Michigan Law Review

Volume 71 | Issue 5

1973

Organized Labor, the Environment, and the Taft-Hartley Act

James C. Oldham
Georgetown University Law Center

Follow this and additional works at: <https://repository.law.umich.edu/mlr>

Part of the [Environmental Law Commons](#), [Labor and Employment Law Commons](#), and the [Legislation Commons](#)

Recommended Citation

James C. Oldham, *Organized Labor, the Environment, and the Taft-Hartley Act*, 71 MICH. L. REV. 935 (1973).

Available at: <https://repository.law.umich.edu/mlr/vol71/iss5/3>

This Article is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

ORGANIZED LABOR, THE ENVIRONMENT, AND THE TAFT-HARTLEY ACT

James C. Oldham

I. INTRODUCTION	936
II. THE IMPACT OF OUT-PLANT POLLUTION AND THE ATTITUDE OF EMPLOYEES ...	939
A. <i>Job Security</i>	941
1. <i>Calculation of Pollution Abatement Costs</i>	942
2. <i>Pollution Abatement Costs and Plant Closings</i>	944
B. <i>The Effect of Out-Plant Pollution on Workers as Members of the Community</i>	946
1. <i>The Company Town</i>	946
2. <i>The Captive Community</i>	947
3. <i>The Urban Industrial Community</i>	949
C. <i>Individual Resistance</i>	953
III. THE UNION RESPONSE TO OUT-PLANT POLLUTION	956
A. <i>Environmental Blackmail</i>	956
B. <i>General Environmental Involvement</i>	962
1. <i>Inactive Unions</i>	962
2. <i>Unions Adopting Environmental Resolutions</i>	963
3. <i>Affirmative-Action Unions</i>	966
a. <i>The United Auto Workers</i>	967
b. <i>The International Brotherhood of Pulp, Sulphite, and Paper Mill Workers</i>	971
c. <i>Other unions</i>	973
C. <i>Union Activity Through State Environmental Protection Agencies</i> ...	977
D. <i>The Present State of Union Concern</i>	980
IV. APPLICATION OF THE TAFT-HARTLEY ACT	981
A. <i>The Duty To Bargain on Environmental Matters</i>	981
1. <i>Supreme Court Vicissitudes</i>	982
2. <i>Legislative History of "Other Conditions of Employment"</i>	990
3. <i>The Response of the NLRB and the Courts of Appeals</i>	996
4. <i>The Industrial Experience</i>	999
5. <i>Summary Reflections on Fibreboard</i>	1001
B. <i>Individual Refusals To Perform Environmentally Injurious Work as Concerted, Protected Activity</i>	1002
1. <i>Concerted, Protected Activity</i>	1003
2. <i>Refusal To Engage in Unlawful or Unconscionable Activities as Concerted, Protected Activity</i>	1007
3. <i>The Effect of a Union on the Scope and Protection of Section 7 Rights</i>	1010
4. <i>Statutory Protection for Individual Refusals To Contribute to Unlawful Employer Activities</i>	1017
V. ILLUSTRATIVE AND RECOMMENDED CONTRACT PROVISIONS	1020
A. <i>The IAM Environmental Shutdown Provision</i>	1020
B. <i>The United Farm Workers Economic Poisons Provision</i>	1021
C. <i>The Steelworkers and Glass Bottle Blowers General Policy Provisions</i> .	1021
D. <i>The Pulp, Sulphite, and Paper Mill Workers Comprehensive Proposal</i> .	1021
E. <i>Suggested Provisions for Individual Employee Protection</i>	1023
F. <i>A Suggested Conglomerate Provision</i>	1024
VI. CONCLUSION	1026

ORGANIZED LABOR, THE ENVIRONMENT, AND THE TAFT-HARTLEY ACT

James C. Oldham*

I. INTRODUCTION

WALTER REUTHER typified much of what is best in organized labor. He was a man of high intensity, with persistent vision and lofty goals. Sometimes his flights into idealistic prose must have seemed flatulent to the rank and file,¹ but he strove to keep union ideals visible and to keep the labor movement on the cutting edge of social change.

In 1970, not long before his death, Walter Reuther reached this judgment:

I think the environmental crisis has reached such catastrophic proportions that I think the labor movement is now obligated to raise this question at the bargaining table in any industry that is in a measurable way contributing to man's deteriorating living environment. And I believe the UAW is obligated to raise this matter at the bargaining table in 1970.²

Mr. Reuther's exhortation was heeded in Atlantic City, New Jersey, at the 1970 United Auto Workers (UAW) Annual Convention. There it was resolved:

Unchecked pollution by the automobile and related industries is of

* Associate Professor of Law and Assistant Dean, Georgetown University Law Center. B.S. 1962, Duke University; LL.B. 1965, Stanford University; M.S.B.A. 1967, University of Denver.—Ed.

I am indebted to many in the development of this Article, but I should like especially to acknowledge two groups whose contributions have been invaluable: the members of my seminar, Public Responsibilities in Private Collective Bargaining, conducted during the spring of 1972, and the many officers and employees of the United Auto Workers who were consistently generous with their time, thoughts, and information. Particularly helpful was John Yolton, Administrative Assistant to Olga Madar—the Vice President of the United Auto Workers whose responsibilities encompass conservation and the environment. It was through Mr. Yolton that I became the temporary custodian of the United Auto Workers questionnaires, which are discussed in some detail herein.

1. A 1952 speech to the CIO Convention, at which Reuther succeeded Philip Murray to the presidency, is illustrative. As free labor, he said,

We have a job . . . of doing much more than just bargaining for our membership. We have to assume ever-increasing social responsibilities . . . We must find a way to realize the tremendous spiritual reservoir that resides within a free people, and translate that power into constructive approaches to the world's problems—if we do that, we can win the battle for peace and freedom.

Quoted in J. FITCH, *SOCIAL RESPONSIBILITY OF ORGANIZED LABOR* 208 (1957).

2. Press Conference, Jan. 8, 1970. Excerpts are printed in *The UAW's Fight Against Pollution* 10 (undated), a booklet collecting articles concerning environmental problems that have appeared in the *UAW Washington Report*.

direct concern to auto workers not only because they are citizens concerned for their environment but because there is a direct threat to their jobs and their job security. The worker's stake in resolving this problem for society and the nation is compounded by the stake in his own job. We shall raise this issue sharply in 1970 negotiations in discussions with the companies . . .³

Mr. Reuther's declaration and the subsequent UAW resolution raise a host of practical and legal questions. Among them:

- Will the companies listen?
- Must the companies listen?
- Can contract provisions with meaningful environmental language be reached that are not trade-offs for bread-and-butter demands?
- Is ratification by membership a realistic expectation?
- Will the environmental provisions be implemented at the local level?

Legally, the overriding issue is the extent to which the duty to bargain under the Taft-Hartley Act⁴ can be said to encompass matters of environmental concern to the employee in his role as a member of the community. A related inquiry is whether employees can, without fear of reprisal, take a stand against adverse ecological effects of their employer's operations, particularly if the employees' jobs contribute to the problem. To phrase the latter question under the Taft-Hartley Act: Is a concerted refusal by employees to perform work which is ecologically destructive an exercise of section 7 rights which is thereby protected by section 8(a)(1) of the Act? This question is complicated by the potential conflict between the union, as a collective representative, and the consciences of individual employees.

Relevant also to those inquiries is the recently enacted Occupational Safety and Health Act of 1970 (OSHA).⁵ This statute, even though almost diluted in its coverage by limitations imposed at the appropriations stage,⁶ has enormous potential. Whether the potential

3. Quoted in 1 BNA ENV. REP. (Current Developments) 19 (1970).

4. 29 U.S.C. §§ 141-87 (1970). The Taft-Hartley Act, officially known as the Labor-Management Relations Act of 1947, amended several provisions of the National Labor Relations Act of 1935 (Wagner Act), ch. 732, 49 Stat. 449, and added several new provisions to the law. Through the remainder of this Article, the current law will be called the Taft-Hartley Act.

5. Pub. L. No. 91-596, 84 Stat. 1590 (codified at 29 U.S.C. §§ 651-78 (1970)).

6. House and Senate conferees on the Labor Department appropriation bill for fiscal 1973 agreed to "exempt" employers with 15 or fewer employees from OSHA. The "exemption" took the form of a ban on expenditures for inspection of any such small

will be realized remains uncertain,⁷ but federal intervention was clearly needed to invigorate both industry and organized labor on in-plant health and safety conditions.⁸ The impact that OSHA will have on out-plant environmental problems is uncertain. Some improvements precipitated by OSHA will benefit the outside environ-

establishment. Thus, with no supportive legislative hearings, the conferees eliminated OSHA protections for some 15 million employees, or one fourth of those previously covered by the Act. *See* 80 LAB. REL. REP. 308 (1972). These limitations did not, however, take effect because President Nixon vetoed the entire appropriations bill, which covered the Departments of Labor and Health, Education, and Welfare. A new appropriations bill (H.R. 16654), which reduced the exemption to three employees or less, was then subjected to a pocket veto by the President. Therefore, the Act is being administered as it was written—with no exemptions. The Occupational Safety and Health Administration is at present operating under a continuing appropriations resolution.

7. That the OSHA administrators, as presently constituted at least, may not be taking the bold, sweeping actions necessary to apply the statute as fully as possible may be indicated by the recently decided "walk-around time" problem. At issue was whether, under OSHA, employees who exercise their statutory right to accompany OSHA inspectors during plant tours of safety conditions have the concomitant right to receive wages for the time spent during the inspection. The matter was raised by the Oil, Chemical, and Atomic Workers Union (OCAW), and the agency determined that walk-around time is not paid time. This decision was reached by the Solicitor's Office of the Department of Labor despite the language of section 8(e), 29 U.S.C. § 657 (e) (1970), that employee representatives "shall" be given an opportunity to accompany the inspector and the provision of section 11(c), 29 U.S.C. § 660(c) (1970), prohibiting discrimination against employees for exercising "any right afforded by this [Act]." The Labor Department was not bothered by the fact that Mobil had originally left the salaries of the "walkers" intact, but changed this policy after the company was cited for three "serious violations" and ninety "other violations." *See* Office of the Solicitor, U.S. Dept. of Labor, Memorandum for Assistant Secretary George C. Guenther (March 1, 1972).

The union is resisting this narrow interpretation. On February 14, 1973, a suit, *Leone v. Mobil Oil Co.*, Civil Action No. 285-73, was filed in the United States District Court for the District of Columbia requesting damages and a declaratory judgment on the "walk-around time" issue. Furthermore, OCAW negotiations concerning 415 agreements with oil companies that expired on December 31, 1972, have included demands that independent consultants survey plants periodically for hazards and that a labor-management committee police health and safety conditions. According to OCAW International President Gropiron, success over this issue would give workers a say in determining whether working conditions are safe. He was careful to add that the public as well as workers might be affected by plant conditions since "if dangerous gases are loose in the plants, they're bound to blow downward to the community." OCAW Press Release, Jan. 4, 1973.

8. *See generally* J. PAGE & M. O'BRIEN, BITTER WAGES: RALPH NADER STUDY GROUP REPORT ON DISEASE AND INJURY ON THE JOB (1973). Also of significance in this regard are the results of the 1970 UAW strike against General Motors (GM), which reflect the importance of in-plant health and safety problems at the bargaining table. According to Irving Bluestone, director of the General Motors Department of the UAW, in 40 out of the 155 plants engaged in local negotiations, management granted 1915 demands related to working conditions which were "onerous, dangerous, uncomfortable." Of these, the largest group by far, 673, dealt with "improvement of the plant environment." This category included such diverse demands as insect and rodent control; ventilation installation and improvement; noise pollution; cleanliness of cafeterias and locker rooms; and removal of all oil, water, and other debris from the floors. News from UAW, Nov. 10, 1971.

ment as well,⁹ but the business expenditures that will be required to comply and to stay in compliance with OSHA may delay constructive attention to community-oriented environmental problems at the bargaining table.

The legal issues inherent in treating out-plant pollution under the Taft-Hartley Act cannot be fully evaluated without a realistic appreciation of practical considerations and industrial experience. For this reason, considerable empirical information has been collected from a variety of sources.¹⁰ The examination and evaluation of this data will precede the legal analysis. The data, it is hoped, will resolve two questions: What is the effect of out-plant pollution on the workers, and what has been the response of labor unions to date?

II. THE IMPACT OF OUT-PLANT POLLUTION AND THE ATTITUDE OF EMPLOYEES

Early in this century, Louis Brandeis reflected on the concept of collective bargaining. He stated:

Two lines of development consistent with industrial democracy seem to me possible. Both preclude the present arrangement of the so-called individual contract between the employer and employee.

The one possibility is a great advance in collective bargaining and trade unionism.

The other possibility is the development of cooperation.

Cooperation to be effective means something very different from mere profit sharing. It means giving to the workman not only a share of the profits, but a share of the responsibilities and management, and a utilization of the latent powers in him. There now exists in

9. A striking example was recently provided by the OCAW concerning asbestos workers and asbestos-contaminated burlap bags. At the plant in question, it was alleged that not only was the workers' health in danger, but also that members of the public were placed in jeopardy because they might inhale asbestos contained in bags that had been used to store asbestos and then sold to nurseries. *Washington Post*, Feb. 15, 1972, at A3, col. 4.

10. In general, the information was collected from national and international unions headquartered in the United States through correspondence, questionnaires, and personal visits by the author. In addition, the environmental protection agencies of every state were contacted. In the fall of 1971, a series of questions was sent to the approximately 135 unions headquartered in the United States with membership exceeding 5000 workers, and at the same time letters were sent to the state environmental protection agencies. Follow-up letters were sent to the unions and agencies during the summer of 1972. These efforts generated responses from approximately 60 unions (44% of those contacted) and 38 state agencies (76%).

Additional information and data were secured through personal visits in Washington and elsewhere. Of special significance in this connection were two valuable sets of documents entrusted to the author by the UAW: (1) the questionnaires referred to in the acknowledgements at the outset of this Article, which the UAW sent during 1970 to 430 local unions and which requested information on occupational health and safety matters, including environmental concerns that extend beyond the confines of the work place, and (2) reports of actual health and safety settlements achieved by about 75 local unions after the termination of the 1970 General Motors strike.

this country among businessmen an undeveloped and—to a considerable extent—unconscious feeling that something in the line of this true cooperation is essential; and there is reason to believe that within a comparatively short time we shall have a marked development of such cooperation.¹¹

Brandeis' prophecy proved wrong; instead of employer-employee "cooperation," collective bargaining was the vehicle which gained widespread acceptance.¹² Fundamental to any concept of collective bargaining is the question of what is to be bargained about. Although considerable law has developed regarding the subjects that must be bargained over,¹³ the first step for the employees and their union representatives is to sort out priorities and to determine what to press for at the bargaining table.

Do the individual workers or their unions care about subjects, such as community environmental problems, that have not traditionally surfaced at the bargaining table? The answer depends on many factors, some of which are immediately apparent. The views of the rank-and-file workers will be different from those of their international representative. The interest of the local union in bargaining over "social" issues will generally be less than that of a progressive international.¹⁴ The views of the individual workers will

11. Letter to Winthrop Talbot, in 2 LETTERS OF LOUIS D. BRANDEIS, 1907-1912, at 587 (M. Urofsky & D. Levy ed. 1971).

12. Brandeis' prophecy may yet be fulfilled. A recent article by a student of workers' management and community control outlines the growing willingness of Europeans to experiment with worker self-management and the increased discussion such strategies are receiving in the United States, particularly in the UAW. Case, *Vision of a New Social Order*, THE NATION, Feb. 14, 1972, at 200. See also Senator Wagner's concept of a labor-management "partnership," discussed in text accompanying notes 254-57 *infra*.

13. In both the Wagner Act and its successor, the Taft-Hartley Act, the duty of employers to bargain pertained to "wages, hours and other conditions of employment." Taft-Hartley Act § 8(d), 29 U.S.C. § 159(a) (1970). See also Taft-Hartley Act § 9, 29 U.S.C. § 160 (1970). What constitutes "wages, hours and other conditions of employment," is not spelled out in the statute, and it is this skeletal phrase which has been fleshed out by Board and court decisions. See text accompanying notes 173-228 *infra*.

14. Recall the remarks of Walter Reuther in note 1 *supra*. Consider also the remarks of Irving Bluestone of the UAW: "But we have never lost sight of the fact that we are just one little piece of the total society. And that our effort must be to move the totality of the society along. We have tried to fashion our collective bargaining proposals so that what helps our people also is in tune with the needs of society." Johnson & Kotz, *The Unions—III, For Young Workers, Old Leaders*, Washington Post, April 11, 1972, at A8, col. 6, col. 7.

At the local level, the idealistic union goals often espoused by international spokesmen may lose some of their allegiance. As authors of one study concluded: "Almost all workers were convinced of [the union's] value as a form of job security; only a minority showed 'emotional identification' with its organized goals." L. SAYLES & G. STRAUSS, *THE LOCAL UNION* 132 (1967).

A graphic illustration of the tension between international goals and local interests

depend on their skills, their age, their dependents, and like determinants. Job security always looms large at the local level, and this remains true notwithstanding increasing alienation of younger workers from both their jobs and the unions to which they belong.¹⁵

To evaluate how these generalizations apply to environmental matters, three inquiries are pertinent. First, to what extent are jobs being jeopardized by pollution cleanup requirements? Second, are individual workers affected to any great extent by the polluting effects of an employer's operations? Third, are there individual workers who are prepared to disregard job security to resist the performance of certain types of work that have injurious environmental consequences? Answers to these questions should facilitate a judgment on the importance of out-plant environmental issues to the laboring public.

A. *Job Security*

As workers in the paper industry, we are aware of the pollutants which result from our productive operations. We are aware of the fact that workers and management must continually search for new means to reduce and eliminate such pollutants.

However, we are also becoming increasingly aware of the real danger of losing many of our jobs because of incessant and strenuous demands that our industry *immediately* eliminate all forms of pollution, regardless of cost and irrespective of the present state of abatement technology in the industry.¹⁶

occurred in the UAW's 1970 GM strike. During that struggle, the GM division of the international union asked if its Local No. 160 would permit 306 of its 5000 hourly workers to cross picket lines in order to work on auto emission and safety developments. According to Irving Bluestone, the UAW did not "want to give GM the opportunity to place the blame on UAW for holding back progress on pollution control." 1 BNA ENV. REP. (Current Developments) 664 (1970). Local No. 160, however, refused to cooperate and voted against letting the 306 workers continue their pollution control efforts. *Id.* See also note 114 *infra*.

15. As Leonard Woodcock, President of the UAW, has written:

Those who sit below the salt, and that still includes most wage-earners and their families, are not in a position to take a bold, intransigent stand against pollution and the employers who are its major perpetrators. Even though they have traditionally been and remain the chief victims of pollution, working people are obliged by the insecurity of their jobs and lives, by their families' needs and by their loyalties to wives and children, to give "the smell of the paycheck" priority over a wholesome working and living environment—when they are offered no other choice.

Woodcock, *Labor and Politics of Environment*, SIERRA CLUB BULL., Dec. 1971, at 11, 14.

16. United Papermakers and Paperworkers, AFL-CIO, CLC, A Position Paper on Air and Water Pollution Control Measures in the Paper and Allied Products Industry I (undated) (emphasis original) [hereinafter UPP Position Paper]. This position paper better operating efficiency and lower water costs, yielding a ten per cent return on the

Soon after the issuance of this paper, the United Papermakers and Paperworkers merged into the Pulp, Sulphite, and Paper Mill Workers to form the United Paperworkers International Union.

The foregoing statement by the United Papermakers and Paperworkers Union has represented and may still represent a relatively common position throughout organized labor.¹⁷ Such a stance is based on the often unarticulated but major premise that "[m]ost pollution abatement expenditures do not increase productivity and do not produce a financial return."¹⁸ Since job security occupies such a prominent position in the hierarchy of employee concerns, the impact of environmental activities on job opportunities must be carefully considered.

1. *Calculation of Pollution Abatement Costs*

The assumption that expenditures for pollution abatement offer no corresponding financial benefits has been used by industry in resisting environmental controls. This argument may be used in union negotiations—without union restraint on wages and benefits the increased costs of pollution control may lead to closing a plant.¹⁹ Alternatively, the argument may be offered to mobilize union opposition to environmentally beneficial legislation or regulation.²⁰ Yet, beneath the surface of such appeals lies a difficult problem: How can cost estimates placed by industry on the pollution abatement requirements applied to any given plant be objectively evaluated? Some researchers have alleged that cleanup estimates prepared by consultants for industry have led in several instances to a dilution of otherwise applicable environmental standards, even though it could be demonstrated that the estimates were based on significant misapprehensions. As a result, the suggestion has been made that environmental agencies must develop the staff capability to make their own cost studies or to analyze the cost studies submitted to them.²¹

One of the difficulties with industry's cost estimates is that the figures tend to be gross projections of capital expenditures required for pollution abatement, which do not take into account offsets that would accrue to the company in the form of federal tax credits, depreciation allowances, savings because of better operating efficiency, and revenues from the sale of products recovered in the abatement process. As noted in a study on pollution costs prepared

17. See, e.g., the reference by Leonard Woodcock to the sentiments of the workers in note 15 *supra*. See also text accompanying notes 98-102 *infra*.

18. UPP Position Paper, *supra* note 16, at 4.

19. See pt. III. A. *infra*.

20. See text accompanying note 162 *infra*.

21. 2 BNA ENV. REP. (Current Developments) 1293 (1972).

for the Council on Environmental Quality (CEQ) and the Environmental Protection Agency (EPA), these offsets are not insignificant.²² In fact, Carl Gerstacker, Chairman of the Board of the Dow Chemical Company, maintains that, by care and ingenuity, pollution control can be profitable. In a speech to the Economic Club of Detroit in early 1972, Gerstacker flatly stated that Dow had made good profits on the capital it had spent for pollution control.²³ He and his

22. The report states:

Although these studies focused on adverse economic impacts, it should be noted that there will be positive economic impacts as well. An example of positive economic impacts, which were not addressed by the microeconomic studies, is increased profits and employment (a) in the industries that produce pollution abatement equipment and services, (b) the industries that produce relatively low-polluting products, and (c) some of the firms in the industries that are impacted by environmental regulations (i.e., firms that absorb the market shares previously held by firms that are not efficient when measured by their use of total resources, including the environment, and thus close when they must incur pollution abatement costs).

Examples of positive economic impacts, which were not addressed by either the microeconomic or macroeconomic studies, are (a) possible productivity increases where environmental regulations stimulate technological developments (e.g., changes in production processes which both increase productivity and reduce pollution), and (b) increases in the average level of productivity in some industries as environmental regulations result in the closing of plants that are inefficient in their use of total resources. Further, no attempt was made to quantify the economic benefits of a cleaner environment (e.g., higher crop yield, increased man-hours of productive work) or to compare these benefits with the costs of pollution abatement. Finally, since the macroeconomic analysis employs the conventional national income accounts framework, it overstates the net costs (or understates the net benefits) to society because such accounting fails to include the benefits of a cleaner environment.

U.S. COUNCIL ON ENVIRONMENTAL QUALITY, DEPT. OF COMMERCE & ENVIRONMENTAL PROTECTION AGENCY, *THE ECONOMIC IMPACT OF POLLUTION CONTROL: A SUMMARY OF RECENT STUDIES 4-5 (1972)* [hereinafter *CEQ STUDY*].

23. Address by Carl A. Gerstacker, Feb. 22, 1972. Some of the examples given by Gerstacker were: a 7.2 million dollar cooling tower investment which would produce better operating efficiency and lower water costs, yielding a ten per cent return on the investment; a 2.7 million dollar investment to recover chlorine and hydrogen previously lost to the atmosphere, yielding 900,000 dollars per year in savings in operating costs; a 750,000 dollar investment to reduce solids discharged into the Mississippi, resulting in 250,000 dollars annual savings in material and water costs; and pollution control projects installed in 14 latex plants at a cost of 2 million dollars, expected to cut operating costs by approximately 2 million dollars a year.

These are dramatic examples; Gerstacker acknowledged that they were selected for that reason and not all experiments by Dow had been so successful. But the point is significant: Pollution abatement processes are capital expenditures with concomitant revenues and savings, arguably to the point of no net cost.

There is further support for this proposition. In a speech before the Town Hall of California on March 14, 1972, Richard Cheney, President of the Glass Container Manufacturers' Institute, stated that reclamation and recycling of bottles alone was approaching one billion bottles per year. Secondary uses of the reclaimed material, including glasphalt paving, bricks, blocks, and terrazo floors, were being developed.

Perhaps the most advanced system for mining the "urban ore" of discarded materials was designed by the Black Clawson Company for the Franklin, Ohio, refuse-processing plant. Using magnets, the plant is capable of processing 150 tons of trash per day, from which 27 tons of paper fiber, 9 tons of ferrous metals, 9 tons of crushed glass, and 1,500 pounds of aluminum are normally recovered. Aside from establishing

fellow officers are convinced that the company can average its entire pollution abatement program at zero *net* cost.

Given this testimony of actual and potential offsetting revenues attending pollution control, environmental agencies should require, at a minimum, that corporations bear a burden of proof that includes not merely a gross analysis but a net cost analysis as well. Unions can often assist in this regard since capital expenditures for pollution abatement will undoubtedly be discussed at the bargaining table in conjunction with the company's ability to accommodate wage and fringe benefit demands.²⁴

2. *Pollution Abatement Costs and Plant Closings*

Even if the premise that pollution abatement expenditures do not produce a financial return is accepted, it does not resolve whether such expenditures actually eliminate jobs, or whether they constitute a make-weight rationale for shutting down plants which were marginal to begin with. Unquestionably, a number of industrial facilities have been and will continue to be closed down, ostensibly because of financial inability to surmount required pollution abatement costs.²⁵

This problem has led the EPA to attempt an "early-warning system" which will permit early identification of industrial plants that may be in jeopardy because of environmental requirements.²⁶ The plan has been structured so that the EPA will alert the Department of Labor to EPA enforcement actions in time for the Department to take "prompt and appropriate action to avoid or minimize unemployment problems."²⁷ Initial attention will be focused on

a pollution-free waste disposal system, the plant can apparently operate profitably. Public Relations Dept., American Iron and Steel Institute, *Steel Facts*, Fall 1971, at 12.

Finally, governmental incentives should not be overlooked. For example, the Internal Revenue Service has indicated that as a consequence of President Nixon's 1972 environmental message to Congress, it will be "clarifying the availability of tax exempt treatment industrial revenue bond financing for the construction of recycling facilities built by private concerns to recycle their own wastes." 2 BNA ENV. REP. (Current Developments) 1486 (1972). There have also been proposals in Congress that would enable the Small Business Administration to make loans to facilitate alterations or changes in plant, equipment, or production methods caused by federal or state pollution regulations. 3 *id.* at 344, 431 (1973).

24. Cf. *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956).

25. Media reports have documented a number of these situations. See, e.g., Calame, *Fearing Loss of Jobs, Union Battle Efforts To Clean Environment*, Wall St. J., Nov. 19, 1971, at 1, col. 6; Scates, *A Choice: Pollution or Poverty*, Washington Post, Jan. 23, 1972, at A3, col. 1; Udall & Stansbury, *Selling Ecology to the Hard Hats*, Washington Post, April 25, 1971, at B1, col. 1.

26. 2 BNA ENV. REP. (Current Developments) 856 (1971).

27. *Id.* at 884 (1971).

economically depressed areas; and, if the cooperative program is successful, plans will be formulated to extend it to the Department of Commerce, the Small Business Administration, and the Economic Development Administration.²⁸

The EPA's early-warning system presupposes that plant closures caused by environmental requirements constitute a serious problem for American industry and for organized labor. However, there are reasons to think that the problem is not as severe as labor or media reports would indicate. For instance, there is evidence that most of the plant closings simply hasten the inevitable. According to the CEQ study previously mentioned:

Most of the firms or plants that will be forced to close are currently marginal operations (e.g., smaller, older, less efficient producers) that were already in economic jeopardy due to other competitive factors. In such cases, the impact of environmental standards is only to accelerate closings that would have occurred anyway. The pollution abatement costs either eliminate already slender profit margins or reduce them to a level at which they fail to justify the required capital expenditures in pollution abatement equipment (in terms of an adequate return on investment).²⁹

The over-all conclusion of the report was that, although not inconsequential, "the impact of those pollution control costs that were estimated and examined would not be severe in that they would not seriously threaten the long-run economic viability of the industrial activities examined."³⁰ And from a macroeconomic stand-

28. *Id.*

29. CEQ STUDY, *supra* note 22, at 10. In terms of numbers, the report states:

There are approximately 12,000 plants currently operating in the industrial activities studied. Of these it is expected that approximately 800 would close in the normal course of business between 1972 and 1976. It would appear from the contractors' evaluations that an additional 200-300 will be forced to close because of pollution abatement requirements. Many of these additional closings would appear to involve plants that were vulnerable for other reasons and, hence, that were likely to have closed anyway a few years later.

Id. See also Udall & Stansbury, *supra* note 25, at B4, col. 1, quoting former environmental official Ben Linsky to the effect that "[a]ny plant so marginal that a small addition to its cost threatens a shutdown is probably being carried on faith credit and has been sick for a long time."

30. CEQ STUDY, *supra* note 22, at 3. That pollution control costs are not inconsequential is highlighted by continuing announcements of plant closings or shutdowns caused by pollution cleanup requirements. Recent examples include a Maryland sulphuric acid plant of Bethlehem Steel Corporation, an Arizona mining and milling facility operated by Duval Corporation, the Weyerhaeuser Company Sulphite Pulp Mill in Everett, Washington, and a California plant that manufactures particle board. 2 BNA ENV. REP. (Current Developments) 920, 1059-60, 1148, 1238, 1293 (1972). Over all, the EPA reports that during the second quarter of 1972, environmental regulations were a factor in the closing of three plants and the curtailing of production in three others. It is projected that nine additional plants might close and one more might curtail production in the near future. There were a total of 21 closings and 13 curtailments be-

point, the study indicated that "the national economy will not be severely impacted by the imposition of pollution abatement standards."³¹

Clearly, there have been and will continue to be valid instances of plant closings precipitated by environmental control requirements imposed on industry. However, insistence upon careful net cost data should keep these instances to a low number, affecting a minimal percentage of the work force. For those employees whose jobs are displaced, new approaches are feasible such as the protective legislation being advanced by the UAW.³² In view of these considerations, it is fair to conclude that the job scare attending pollution abatement efforts has been overdrawn. It should not be the basis for a retraction of environmental requirements except in cases that have received extremely close attention and documentation.

B. *The Effect of Out-Plant Pollution on Workers as Members of the Community*

The extent to which industrial workers are affected by out-plant pollution caused by the industrial facilities in which they work depends on a number of factors, chief among which are the type of industry and its geographic and demographic setting. As to the latter, there are three principal situations in which out-plant pollution is likely to affect workers significantly: the company town, the "captive community," and the urban industrial setting.

1. *The Company Town*

The company town, although rare today, was historically a relatively familiar feature of American business.³³ Because of a plant's

tween January 1971 and June 1972. In the same time period, 44 closings and 13 curtailments were threatened. 3 *id.* at 572 (1973).

31. CEQ Study, *supra* note 22, at 11. The approach used to prepare the CEQ Study was to conduct one macroeconomic analysis and eleven microeconomic analyses, each of which was performed by an independent consulting firm under the guidance of the Council of Economic Advisors. *Id.* at 3, 5. The eleven microeconomic studies addressed the following industries: automobiles, baking, cement, electric power generators, fruit and vegetable canning and freezing, iron foundries, leather tanning, nonferrous metals smelting and refining, petroleum refineries, pulp and paper mills, and steel-making. *Id.* at 6.

32. See text accompanying notes 79-85 *infra*.

33. See, e.g., S. BUDER, PULLMAN—AN EXPERIMENT IN INDUSTRIAL ORDER AND COMMUNITY PLANNING, 1880-1930 (1967); J. ARMSTRONG, FACTORY UNDER THE ELMS: A HISTORY OF HARRISVILLE, NEW HAMPSHIRE, 1774-1969 (1969). Usually the company town was created because of geographic necessity, but sometimes the efforts were altruistically motivated, such as the case of Pullman, Illinois.

remote location, the workers in such a setting generally have no choice about where they live; their lot is company-owned housing. Obviously, the influence of the employer permeates the lives of the employees beyond the eight hours per day when the employees may physically be at the plant. It is for this reason that the National Labor Relations Board and the courts have upheld the position of the workers that such things as rent of the company housing constitute "conditions of employment" that are mandatory subjects for bargaining.³⁴

2. *The Captive Community*

Another situation, which closely parallels that of the company town, might be termed the "captive community." Here, even though independent businesses, housing, and other commercial amenities exist, the community is nevertheless extraordinarily dependent upon a single corporate entity that operates a major industrial plant in the area. Dependence will occur primarily because the corporation is the chief employer in the town, but there will also be indirect connections between the corporation and other community interests and services such as real estate and banking.³⁵ This pattern is not uncommon in rural communities throughout the United States. A good example is the town of St. Mary's, Georgia. In this community of about 1,800 residents, nearly all of the wage earners are employed by the Gilman Paper Company.³⁶ The mill also indirectly supports many of the remaining 3,400 residents of Camden County. Until

34. See, e.g., *American Smelting & Ref. Co. v. NLRB*, 406 F.2d 522 (9th Cir.), cert. denied, 395 U.S. 935 (1969); *NLRB v. Lehigh Portland Cement Co.*, 205 F.2d 821 (4th Cir. 1953); *Weyerhaeuser Timber Co.*, 87 N.L.R.B. 672 (1949).

35. A community can be "captive" to industry in other ways as well. Even though an industrial complex may not employ the bulk of the workers in a community, the industrial activity which does exist may create pollution that captivates the entire area. A case in point is Helena, Montana, as revealed in a 1972 study by the EPA. There, the EPA bluntly concluded:

Atmospheric concentrations of sulphur dioxide in the Helena Valley exceed Montana air quality standards and levels reported in federal criteria to be associated with deleterious effects on human health, vegetation, and materials. Industrial operations of American Smelting and Refining Company and Anaconda Company in East Helena are the responsible sources.

U.S. ENVIRONMENTAL PROTECTION AGENCY, HELENA, MONTANA, AREA ENVIRONMENTAL POLLUTION STUDY 1 (1972) [hereinafter HELENA, MONTANA STUDY].

The American Smelting and Anaconda Plants referred to employed a combined total of 260 workers out of a population of roughly 29,000. *Id.* at 6-7. Since these workers cannot escape the reach of their employer's emissions, their conditions of employment extend beyond the work place in much the same fashion as in the company town.

36. Shuck & Wellford, *Democracy and the Good Life in a Company Town*, HARPER'S, May 1972, at 56, 57.

recently, all workers at the mill were required to live in St. Mary's;³⁷ they reportedly encounter the influence of the mill in virtually all of the commercial enterprises that the community harbors.³⁸

If St. Mary's, Georgia, is typical, these captive communities may have been saved by their industrial captors from economic desuetude.³⁹ Small communities frequently solicit the introduction of industry in order to secure new jobs and other advantages for their residents.⁴⁰ Nevertheless, it is clear that in these communities the lives of the workers are intricately interwoven with the fate of the resident corporation. And, occasionally, the chamber-of-commerce advantages of attracting industry turn sour. The community may become subject to political manipulation,⁴¹ or there may be environ-

37. *Id.* at 58-59.

38. Shuck and Wellford described the situation at St. Mary's in the following manner:

The workers [*sic*] who does move to St. Mary's is drawn into an intricate web of economic and financial relationships, the strands of which all lead back to the mill. He has probably bought his house from the major real estate company in St. Mary's, controlled by the Brumley Family. [Brumley is the mill's manager.] He has probably mortgaged his house and car to St. Mary's State Bank, also controlled by Brumley, and purchased life and home owner insurance from Flem Hall, cashier at this bank. The mortgage funds probably come from First Federal Savings and Loan Association in Brunswick, of which Brumley is a Director

Id. at 59.

39. *Id.* at 63.

40. For a study of labor market behavior in selected small communities, see R. WILCOCK & I. SOBEL, *SMALL CITY JOB MARKETS: THE LABOR MARKET BEHAVIOR OF FIRMS AND WORKERS* (1958). As the authors note:

Within recent years, significant labor market changes have been created by the substantial amount of geographic decentralization of American industry. Factories, in many cases branch plants of large firms, have been moving not only into the suburbs of large urban centers but also into small communities beyond the orbit of large metropolitan labor market areas. For many of these small communities, the new plant represents, if not the only industrial employment, at least a major proportion of such job opportunities. Among the results of small town industrialization are better-balanced populations, with fewer young persons "lost" to the cities, higher living standards for many residents and a higher utilization of labor force potential.

Id. at 5. Occasionally, this desire to attract industry subordinates other goals such as environmental protection. As put by H. S. Houthakker, a member of the President's Council of Economic Advisors, "It is conceivable that a depressed area may want to attract industry at the expense of a less stringent ambient air standard; the citizens of that area should be able to have some influence on the choice involved . . ." *Quoted in* Woodcock, *supra* note 15, at 13. Leonard Woodcock has characterized Mr. Houthakker's statement as the "old and ever-new government-industry partnership against the unorganized, the unemployed, the poor and their communities." *Id.* at 14. Nevertheless, the residents of small communities do frequently agitate for industry at any cost. In Midland, Michigan, citizens staged a mass rally to protest the delays which construction plans on an atomic power plant had suffered because of environmental requirements. *Detroit News*, Oct. 13, 1971, at 2A, col. 1. Another example, ironic in retrospect, is Everett, Washington, currently suffering because of the shutdown of mills due to environmental requirements. That city was once billed by the Chamber of Commerce as "The City of Smokestacks." Scates, *supra* note 25, at A3, col. 1.

41. This was alleged to have occurred in St. Mary's, Georgia. See Shuck & Wellford, *supra* note 36.

mental abuses to which the residents become subject and over which they have very little control. An infamous example of the latter occurred years ago in Donora, Pennsylvania, where several residents were killed and a great many hospitalized because a stagnant cloud of coal dust had lodged in the valley in which the community sits.⁴² More recent examples have occurred in Buffalo Creek Valley, West Virginia, and Providence Valley, Elkton, Maryland. In February 1972, at least 115 persons died in Buffalo Creek Valley and more than 80 per cent of the homes of the Valley's 5,000 residents were destroyed as a result of the collapse of a huge bank of slag and industrial waste built up over the years by the Buffalo Mining Company.⁴³ In Providence Valley, residents who were made ill by fumes exuding from the chemical plant located there were awarded damages by a county court for their "very real, substantial and unreasonable injuries, both physical and in the enjoyment of their properties."⁴⁴ The chemical plant was the only industrial operation in the valley, which has about 200 residents.

For the chemical workers and miners living in Providence Valley and Buffalo Creek Valley, and for workers similarly situated in other captive communities, it is obvious that their lives were and are affected around the clock by the operations of their employers. Their "conditions of employment" encompass much more than the circumstances attending their eight-hour working shifts each day.

3. *The Urban Industrial Community*

The third and most pervasive geographic setting in which workers' lives are affected by the adverse environmental impact of their employers' operations is the familiar urban industrial area within

42. See Roueche, *The Fog*, in B. ROUCHE, *ELEVEN BLUE MEN* 194 (1953) and in *ECOLOGICAL CRISIS—READINGS FOR SURVIVAL* 125 (G. Love & R. Love ed. 1970).

43. Caudill, *Buffalo Creek Aftermath*, *SAT. REV.*, *THE SOCIETY*, Aug. 26, 1972, at 16.

44. *Capurro v. Galaxy Chem. Co.*, Nos. 3313 & 3357, Slip Op. at 5 (Cir. Ct., Caroline County, Md., June 3, 1972). Judge Wise found it particularly significant that the president of the corporation testified under oath when speaking of corrective measures that might be taken "that he considered corporate survival his first priority, above any consideration of the interests of the Plaintiffs and the plant neighborhood." Slip Op. at 4. The damage suit in question proceeded under a nuisance theory, and was the aftermath of an earlier injunction suit that had been successfully maintained by the residents. Slip Op. at 2-3.

Pertinent also is a recent award by a jury to a Sumter, South Carolina, farmer of 135,000 dollars for damage to his land caused by the pollution of a local stream by four Sumter industries. According to the farmer, raw waste dumped into the stream damaged his timber, produced an offensive odor, intensified the mosquito problem, and generally depreciated enjoyment of his property. The jury awarded 10,000 dollars in actual damages and punitive damages of 125,000 dollars. 3 *BNA ENV. REP.* (Current Developments) 95 (1973).

which manufacturing or processing facilities are located. Because of the proximity of the homes of many workers to their place of work, these employees are affected to a significant extent by pollution emanating from their employers' industrial facilities.⁴⁵ According to a 1965 Census Bureau Study, 34 per cent of all blue-collar workers (craftsmen, operatives, and laborers) lived within three miles or less of their place of work, and an additional 15 per cent lived four or five miles away.⁴⁶ While generalized data may not be available or feasible regarding patterns of dispersion of stationary source industrial pollutants, studies indicate that instances of dispersion in excess of several miles are common.⁴⁷

45. As noted by Udall and Stansbury:

Increasingly, younger labor leaders realize that most workers live near their plants in some of the worst urban neighborhoods, and that the very poisons environmentalists hope to remove from the outside community do their greatest damage inside the blue-collar work place. For these reasons, the industrial worker stands to gain more than anyone else from the ecology movement.

Udall & Stansbury, *supra* note 25, at B5, col. 1. See also Woodcock, *supra* note 15, at 15.

46. U.S. BUREAU OF THE CENSUS, DEPT. OF COMMERCE, 1963 CENSUS OF TRANSPORTATION, PASSENGER TRANSPORTATION SURVEY, HOME-TO-WORK TRAVEL, ADVANCE REPORT 12 (1965). Similar geographic distributions in percentage terms were found to exist for clerical or sales workers, and for professional and managerial employees. For "service and private workers," 51% were found to live three miles or less away from their work. *Id.* Two observations on these data should be made, however. First, while the geographic distribution from home to work of white- and blue-collar workers may be similar, the place of work of the blue-collar worker will more often be at a source of industrial pollution than the place of work of the white-collar worker. Second, there are numerically more blue-collar workers than employees in the other categories, and, in that sense, blue-collar workers are the class most affected by pollution from stationary sources. For example, according to the 1965 study, 35% of workers living one mile or less from their place of employment were blue collar (craftsmen, operatives, and laborers) compared with 23% of professional and managerial employees. For workers living two or three miles from work, the comparison was 38% to 23%, respectively. *Id.*

In some heavy industrial areas, the disparity between the number of blue-collar and professional or managerial employees is considerably greater. For example, according to 1970 census data for the Gary-Hammond-East Chicago, Indiana, Standard Metropolitan Statistical Area (SMSA), approximately 45% of the workers who reside in the area are craftsmen, operatives (except transport), and nonfarm laborers, compared with the 17% who are professional and managerial employees. U.S. BUREAU OF THE CENSUS, DEPT. OF COMMERCE, 1970 CENSUS TO POPULATION AND HOUSING, CENSUS TRACTS: GARY-HAMMOND-EAST CHICAGO, IND., STANDARD METROPOLITAN STATISTICAL AREA 17 (1972). The heavily industrial character of the SMSA is reflected in the fact that 44% of all employees living in the area are engaged in manufacturing, and over 82% reported their place of work as being within the SMSA. *Id.* at 9, 17.

47. For example, in the Environmental Protection Agency's study of Helena Valley, Montana, see note 35 *supra*, dispersion of sulphur oxides at levels exceeding acceptable air quality criteria carried from the East Helena Industrial Complex for distances well in excess of five miles. HELENA, MONTANA STUDY, *supra* note 35, at 1, 10, 25-44. For additional studies containing similar data, see U.S. PUBLIC HEALTH SERVICE, DEPT. OF HEALTH, EDUCATION, AND WELFARE, IRONTON, OHIO-ASHLAND, KENTUCKY-HUNTINGTON, WEST VIRGINIA, AIR POLLUTION ABATEMENT ACTIVITY, PRE-CONFERENCE INVESTIGATIONS 62-63 (1968); U.S. PUBLIC HEALTH SERVICE, DEPT. OF HEALTH, EDUCATION, AND WELFARE, PARKERSBURG, WEST VIRGINIA-MARIETTA, OHIO, AIR POLLUTION ABATEMENT ACTIVITY 48-55 (1967).

The extent to which the lives of industrial workers are affected by the polluting activities of their employers may be evaluated further by considering the results of an empirical study undertaken by the UAW during 1970. In February of that year, the UAW International Headquarters sent an "Environmental, Occupational Health and Safety Questionnaire" to over 400 local unions.⁴⁸ Although many of the questions dealt with in-plant safety conditions,⁴⁹

48. The questionnaire, which is reproduced in Appendix A *infra*, was completed by 430 local UAW unions, the bulk of which (152) are located in Michigan. Geographically, the next largest grouping (69 locals) is Canadian. The remainder is distributed throughout the United States, although the number of locals located in New England, the Rocky Mountains, and the Deep South is small.

The questionnaire utilized by the UAW was a successor to a questionnaire fashioned by the OCAW and circulated in 1969 pertaining to occupational health and safety matters. The OCAW circulated its questionnaire to 508 locals, of which 130 provided usable responses. In conjunction with this questionnaire, the OCAW held a series of regional conferences throughout the United States and Canada to discuss hazards in the industrial environment. A representative transcript of one of these conferences, together with the tabulated results of the questionnaires and elaborative testimony, was presented to the House Education and Labor Committee in hearings on OSHA. *Hearings on H.R. 843, H.R. 3809, H.R. 4294, and H.R. 13373 Before the Select Subcomm. on Labor of the House Comm. on Education and Labor*, 91st Cong., 1st Sess., pt. 2, at 1179-217, 1233-307, 1484-86 (1969) [hereinafter *H.R. 843 Hearings*]. The questionnaire in blank was also printed. *Id.* at 1217-18. Comparable testimony on behalf of the OCAW was presented to the Senate Labor and Public Welfare Committee. *Hearings on S. 2193 and S. 2788 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 91st Cong., 1st & 2d Sess., pt. 2, at 1007-72 (1970) [hereinafter *S. 2193 Hearings*].

Subsequent to the distribution of the UAW questionnaire, OSHA was passed, and for this and other reasons the questionnaire was never analyzed by the UAW except in a general way. In 1971, the returned questionnaires were released to the author's custody, facilitating a computer analysis of the results. The original data were refined in two ways: according to (1) the size of the local and (2) the type of production taking place at the plant. With regard to size, the largest two groupings were locals with less than 100 members (81 locals or 19% of those surveyed) and those with more than 1000 members (67 locals or 16%). Surmising that relatively different patterns of answers to the questionnaire might attend these two groups, they were isolated for cross-tabulation purposes. A similar isolation was fashioned around the type of production. Two categories were created: "service and assembly" and "heavy industry," which together encompassed 274 of the 430 locals. These two categories were also selected for cross-tabulation on the assumption that significant differences in questionnaire responses would be revealed. For some purposes, the size of the locals proved irrelevant; for example, the number of bargaining units was not significantly greater with larger locals than with smaller locals. However, as demonstrated in the succeeding text and notes, the assumption that the size of the local was a significant determinant generally proved to be correct, in contrast to the type of production, which did not reveal as many differences as had been expected.

49. See Appendix A *infra*. The in-plant data is relevant to this Article in two ways: first, in-plant problems are often related to out-plant pollution, as when ventilation causes fumes to be discharged into the outside environment; second, the attitude of management to in-plant safety and health issues may be helpful in assessing the responsiveness of companies to the well being of workers as members of the community affected by company operations.

Only about one fifth of the locals reported that the employer measured industrial air contaminants and physical agents, and even fewer employers released data to employees. Only 17% of the locals had asked the companies to monitor standards on a regular basis, with the requests coming predominantly from larger locals.

a number of questions related directly to the out-plant pollution effects of the industrial facilities for which the local unions are certified bargaining representatives.

When asked whether their members knew if their plant was contributing to pollution of the surrounding air, water, and land, 59 per cent of the 430 unions answered that the plants were contributing to pollution. In locals with membership exceeding 1,000, this figure rose to 78 per cent.⁵⁰ Fifty-seven per cent of the locals indicated that their plants did not have devices to purify wastes before discharge into the air or water; however, this condition was more prevalent in the plants associated with small unions than those associated with large ones.⁵¹

Seventy-eight locals, or 18 per cent of those responding, indicated that their plants had been cited for air or water pollution violations by a governmental agency. This figure rose to 26 per cent for local unions affiliated with heavily industrial plants, and to 37 per cent for local unions with membership exceeding 1,000.

These results, while not surprising, represent a disquieting confirmation of the pervasiveness of polluting activities by a broad cross section of industry as recently as 1970. Even more disturbing are the figures that describe the polluting activities which individual employees are required to engage in as part of their employment obli-

The availability of medical care on the work premises and the presence of company-sponsored medical testing correlated with the size of the local unions. Significantly, 36% of all local unions reported that their companies had no safety or health programs, although more of the large locals, 79%, reported such programs.

Responding to a call for suggestions, the most frequent recommendation was the establishment of a safety committee. To remedy the effects of harmful substances in the work place, 31% of the locals called for better ventilation; there was no indication, however, that the employees were concerned with the effect of harmful fumes once they were aired outside the work place.

More than 40% of the locals reported that the poor safety attitude of the companies was their chief difficulty. Undoubtedly, these figures do not represent a fully objective point of view; only 9 of the 430 unions indicated that indifference of the membership to health and safety issues caused any problems. Other figures substantiate this point: 40% of the unions indicated that they did not spot check the safety or health engineering equipment used by their members.

Presumably the foregoing plant conditions will undergo radical changes as the impact of OSHA is felt. The data revealed by the UAW questionnaire can certainly be viewed as a belated corroboration of the need for the Act.

Exact responses for both in-plant and out-plant data may be obtained from the author.

50. The corresponding figure for small unions is 44%.

51. In locals with less than 100 members, 73% reported that there were no waste-purifying devices, whereas the negative responses in large unions amounted to 37%. Among those locals associated with plants that have been labeled "heavy industry" or "service and assembly," a lack of purifying devices was reported in 55% of the cases in both categories—a figure corresponding closely to the over-all percentage given in the text (57%).

gations. When asked if their members are assigned job tasks by plant management that result in air or water pollution, 37 per cent of the locals answered affirmatively. In heavy industrial unions, the figure rose to 43 per cent, and, in unions with membership exceeding 1,000, the figure climbed to 46 per cent. These statistics are highly germane to any discussion of possible protection available under the Taft-Hartly Act for employees who refuse to perform environmentally injurious work.⁵²

A final series of questions and answers of significance to the out-plant pollution issue relates to how employees' lives are affected outside the plant. Seventy-six locals, more than 17 per cent, knew of instances when their members' lives had been directly affected by pollution caused by the plants at which they worked. Such examples were cited by almost one fourth of the large unions responding to the questionnaire, as well as by one fourth of those plants which are heavily industrial. Moreover, other questions and answers reveal that additional members may have been affected by out-plant pollution. When asked if emissions from company smokestacks caused damage to employees' cars parked in the company lot during working hours, 33 per cent of all unions reporting indicated "yes," and in the large unions ill effects were reported in 55 per cent of the cases.⁵³

Thus, particularly in the larger unions, the instances in which the environmental effects of employer operations have an adverse impact on employees' lives are numerous. The problems of out-plant pollution and their relationship to the unions and the individual workers are not merely theoretical. It is not surprising to find that workers are increasingly resistant to participation in the polluting activities of their employers.

C. *Individual Resistance*

Years ago, it might have been thought rare for an employee to exercise social conscience in any fashion that might jeopardize his employment. However, with the coming of an era in American society in which individual and minority protests are frequent such

52. See pt. IV. B. *infra*.

53. The corresponding figures for damage to cars in service and assembly and heavy industry were 38% and 39%, respectively. More unions (40% over-all) reported the presence of emissions in the parking lots than reported damage to cars.

It can be argued that the parking lot situation should be analyzed as an in-plant condition because the effects occur on company property. However, employees frequently park not in company lots but in nearby commercial lots. In both cases, the nature of the damaging factor—emissions from company equipment—is the same. Therefore, the parking lot problem is one with clear out-plant implications.

actions by employees are no longer unusual. More often than not, at issue in these instances has been alleged racial discrimination,⁵⁴ but recently there have been examples directly involving the environment.

Illustrative of the environmental protests is the case of Gilbert Pugliese, a millwright. After having been a steelworker for twenty-eight years, Pugliese one day refused to push a button that would have sent several hundred gallons of oil into the Cuyahoga River at the Cleveland plant of the Jones and Laughlin Steel Corporation.⁵⁵ Although the spillage of oil was a minor feature of the company's polluting activities, Pugliese recognized that the discharge could be avoided if the oil were pumped into drums, and he simply took a stand.⁵⁶ When this first happened in 1969, Pugliese was immediately suspended for five days. He was threatened with permanent suspension, but the company decided not to risk a revolt of the workers and humored him for two years. However, in the summer of 1971, a foreman insisted that Pugliese again punch the oil discharge button. Risking eighteen years of seniority and his entire livelihood, Pugliese refused.⁵⁷ Eventually, due to support from fellow workers and embarrassment caused by adverse publicity, the union had to support Pugliese—reportedly in order to avert a wildcat strike.⁵⁸ Pugliese kept his job, and Jones and Laughlin initiated a procedure to use drums and pumps to dispose of the waste oil;⁵⁹ but it was an involved and tawdry process which would not have ended happily without the power of the press.⁶⁰

There have been other examples of resistance by employees to action by, or job requirements of, their employers that would have

54. See *NLRB v. Tanner Motor, Ltd.*, 349 F.2d 1 (9th Cir. 1965), discussed in note 353 *infra*, in which two employees who campaigned for nondiscriminatory hiring of blacks by their employer were disciplined. Consider, too, the experience of Polaroid Corporation in 1970-1971 when a small group of its black employees formed the Polaroid Revolutionary Workers Movement to force Polaroid to cease doing business in South Africa. This experience, which received considerable coverage in the press, is summarized in Blumberg, *Corporate Responsibility and The Employee's Duty of Loyalty and Obedience: A Preliminary Inquiry*, 24 OKLA. L. REV. 279, 282 (1971).

55. This case is described in Ehrenreich & Ehrenreich, *Conscience of a Steelworker*, THE NATION, Sept. 27, 1971, at 268.

56. *Id.* at 269. Even though a relatively minor act of pollution, the oil discharges were in violation of the Refuse Act of 1899, ch. 425, § 13, 30 Stat. 1152 (codified at 33 U.S.C. § 407 (1970)).

57. Ehrenreich & Ehrenreich, *supra* note 55, at 269.

58. *Id.* at 270.

59. *Id.* at 271.

60. For a discussion of the possibilities Pugliese might have explored under the Taft-Hartley Act, see pt. IV. B. *infra*.

had injurious environmental consequences. In 1970, Captain William Guthrie, a pilot for Eastern Air Lines, was fired because of his refusal to continue to empty the pressurization and drain cans of his aircraft after take-off.⁶¹ Guthrie was reinstated after his conduct generated publicity adverse to Eastern and had been the subject of a resolution by the Air Line Pilots Association calling for an industry-wide practice of drainage prior to take-off.⁶² Refusal to participate in environmentally damaging activities also led a group of employees of the Corps of Engineers to file suit in February 1972 against the General Services Administration (GSA) in opposition to the GSA's plan to build a federal office building in downtown Mobile, Alabama.⁶³ The employees charged that the GSA had not filed an environmental impact statement as required by the National Environmental Policy Act,⁶⁴ and that the planned structure would add to the congestion problems of the downtown area. More recently, three General Motors employees reported to work wearing gas masks to protest the pollution in the plant caused by gasoline-powered fork-lift trucks.⁶⁵ After refusing their foreman's request to remove the masks, the three employees were permitted to file a grievance but were then suspended from work.

Incidents such as these testify to the growing impatience of today's worker with authoritarian behavior by employers who may not have fully explored whether social interests can be accommodated without sacrificing profits.⁶⁶ This growing impatience should be recognized not only by employers, but also by unions. Unions are in an ideal position to back up employees such as Pugliese and Guthrie; it should not take the threat of a wildcat walkout to jar a union into action.⁶⁷

61. Letter from J.J. O'Donnell, President, Air Line Pilots Assn., to James C. Oldham, Nov. 4, 1971 [hereinafter O'Donnell Letter].

62. See note 107 *infra*.

63. 2 BNA ENV. REP. (Current Developments) 1356 (1972).

64. 42 U.S.C. § 4332 (1970).

65. Detroit Free Press, Jan. 21, 1973, § A, at 6, col. 1. The Vice President of the UAW local said that in mid-1971, GM had agreed to replace gas-powered trucks, as they became obsolete, with electric ones. *Id.* See also text accompanying note 124 *infra*.

66. For examples of such accommodation, see note 23 *supra* and accompanying text.

67. At the opposite extreme from the Pugliese case are those instances, generally involving public employees, when union strike activity has harmful environmental effects. The strike of New York City sanitation workers in 1971 is a case in point. In litigation commenced by public officials seeking a preliminary injunction, the New York supreme court held that a common-law action would lie against union leaders who allegedly conspired to engage in an unlawful strike that resulted in the discharge of raw sewage into Long Island Sound, disrupted ecological balances, and endangered beach areas. *Caso v. Gotbaum*, 67 Misc. 2d 205, 323 N.Y.S.2d 742 (Sup. Ct. 1971), *revd.*

III. THE UNION RESPONSE TO OUT-PLANT POLLUTION

The environmental involvement of national and international unions headquartered in the United States has been erratic and relatively inconclusive. Nevertheless, there have been union responses to environmental problems in general and to the operations of their own companies in particular—responses that merit examination. Preliminary consideration will be given to the one issue on which several unions have focused, “environmental blackmail.”

A. *Environmental Blackmail*

In the view of some observers, the plant closure cry raised by industry when faced with environmental controls is often disingenuous and constitutes what has been termed “environmental blackmail.”⁶⁸ A number of unions, particularly the Oil, Chemical, and Atomic Workers (OCAW) and the International Association of Machinists and Aerospace Workers (IAM), are beginning to recognize these smoke screens and call the employers’ bluff primarily through contract negotiations and union policy statements. Other unions, notably the UAW, are concentrating their efforts on legislative protection to cushion the impact of curtailed operations resulting from pollution regulation.

Of union responses to the blackmail issue, perhaps the most widely cited instance of refusal to capitulate was taken by the OCAW when Union Carbide announced that federal environmental requirements would force the closing of its plant at Marietta, Ohio. Faced with steadfastness by the OCAW, Union Carbide backed down and

on other grounds, 38 App. Div. 2d 955, 331 N.Y.S.2d 507 (1972). The basis for the court’s ruling was “a new rule that persons maliciously polluting or contaminating the environment may be enjoined by the chief executive officer of a county or town whose residents are adversely affected by the offensive conduct, or by private citizens reasonably affected.” 67 Misc. 2d at 212, 323 N.Y.S.2d at 750. The court reasoned:

The conscience of our community is saturated with environmental awareness, and those deliberately contaminating the environment as an illegal tactic are conspicuously wrongdoers. For the law to ignore this would be to forfeit all credibility. Just as new torts have emerged with new technology, new torts must emerge with changing population pressures and acknowledged social responsibilities.
67 Misc. 2d at 213, 323 N.Y.S.2d at 751.

68. Calame, *supra* note 25, at 21, col. 4. After referring to an effort by environmentalists for new laws that would help call the bluff of business, the author stated: “This reflects a view that many company threats about layoffs and plant closings amount to ‘environmental blackmail.’” Udall & Stansbury, *supra* note 25, at B1, col. 2, quote Norman Cole, head of the Virginia State Water Pollution Control Board, as stating: “An industry’s first response to environmental orders is often to create a job scare. It tries to bluff its union and its congressmen into calling off the dogs. If companies spent as much time and ingenuity cleaning up as they do stalling, the whole country would be better off.” See also Reid, *Ecological Blackmail: “Jobs vs. Clean Air,”* ENVIRONMENTAL ACTION, Aug. 21, 1971, at 13.

indicated that it would seek ways to avoid any significant layoffs while complying with the environmental order.⁶⁹ Similar experiences have been reported by other unions.⁷⁰

In addition, the OCAW introduced a strong resolution at the 1971 AFL-CIO Constitutional Convention, proposing that "when-ever environmental protection measures force the partial or full closure of a facility with resultant job losses, displaced workers shall be protected in their economic well-being."⁷¹ Suggested protection included early retirement with pension, extended severance pay, and transfer to other facilities. Costs of the protection were to be borne by the employer where feasible, but by the government if necessary.⁷² The resolution also included a provision urging legislation to inhibit employers from using the threat of unemployment as a method of avoiding compliance with pollution control regulations; under this scheme, an employer could be enjoined from "lay[ing] off . . . any worker until the necessity of such layoff or layoffs has been proven, with the burden of proof on the employer and with public hearings and opportunity for cross-examination of employer witnesses provided."⁷³ These provisions constituted two points of a sixteen point resolution urging a strong stand on many aspects of environmental abuse.⁷⁴ However, the OCAW resolution was referred to the AFL-CIO Committee on Resolutions, where it was badly emasculated.⁷⁵

69. Calame, *supra* note 25, at 21, col. 4; Udall & Stansbury, *supra* note 25, at B4, col. 1.

70. In Ticonderoga, New York, an International Paper Company mill threatened to move if it was forced to comply with a state air pollution order. The union initially supported the company's resistance, but then began to realize that the highly skilled pulp and paper workers it represented could not easily be replaced—that, in fact, International Paper could not move without them. Union support of the company ceased and International Paper stayed in Ticonderoga and complied with the order. Udall & Stansbury, *supra* note 25, at B4, col. 2.

The American Smelting and Refining Company (ASARCO) in Tacoma, Washington, was initially supported in its resistance to a pollution order by workers who feared that the company might close the Tacoma plant, as it had the ASARCO plant in Selby, California, rather than comply with cleanup orders. But ASARCO gets its copper ore from the Philippines and obviously must remain near the Pacific Coast. With Oregon and California already on the record as being against dirty smelters, many of the men began to question their role as "pollution pawns." *Id.* at B1, col. 2; B4, col. 4.

71. AFL-CIO, Resolution No. 72, Environmental Protection, Ninth Constitutional Convention, Bal Harbour, Fla. (Nov. 18-24, 1971), reprinted in Appendix B *infra*.

72. *Id.*

73. *Id.*

74. *Id.* Fourteen of the 16 points of the OCAW resolution, which dealt with matters other than environmental blackmail, were supported by a separate resolution introduced by the Colorado Labor Council. (The OCAW is headquartered in Denver.) AFL-CIO, Resolution No. 13, Ecological and Environmental Problems, Ninth Constitutional Convention, Bal Harbour, Fla. (Nov. 18-24, 1971).

75. See AFL-CIO, Resolution No. 124, The Environment, Ninth Constitutional Con-

Other unions have concentrated on contract negotiations in their efforts to blunt any adverse impact of environmental regulation. In at least three contracts, the IAM has secured the following provision in collective bargaining agreements:

Pollution Control—The contracting parties agree that pollution control is a company responsibility—if the shop is closed by a government agency, because of an alleged violation of an established pollution control standard, all employees covered by this Agreement, shall receive full compensation and their regular rate of pay, for all time lost.⁷⁶

The provision is a broad one, and its open-ended nature could generate a number of arbitration cases in the event of a plant shut-down. For example, the phrase “for all time lost” must have some implied limitation, such as the use of due diligence by employees to seek comparable employment elsewhere. It is significant, too, that the bargaining units covered by the foregoing provision are all quite small.⁷⁷

Most unions have not sought to deal with the problem at the bargaining table. The typical pattern of behavior has been either to capitulate when an employer insists that a marginal plant be shut down rather than cleaned up, or to aid the employer in seeking exceptions to the pollution abatement orders that affect the plants in question.⁷⁸

The UAW's campaign against environmental blackmail has been more visible and different in emphasis. In June 1971, Leonard Woodcock, President of the UAW, presented to the Subcommittee on Air and Water Pollution of the Senate Public Works Committee, which at the time was holding hearings on the economic impact of environmental control requirements, a statement about the plight of the working person in environmental blackmail situations and proposed legislation to deal with the problem.⁷⁹ The basic thrust of

vention, Bal Harbour, Fla. (Nov. 18-24, 1971) [hereinafter Resolution No. 124], reprinted in Appendix B *infra*.

76. IAM Contract with Harig Mfg. Corp. at 19 (effective June 1, 1970); IAM Contract with Powers Label Co. Division, Duncan Parking Meter Maintenance Co. at 12 (effective June 1, 1970); IAM Contract with R. Krasberg & Sons Mfg. Co. at 10 (effective June 1, 1970).

77. The units are 106 employees at Harig Mfg. Corp., 5 employees at Duncan Parking Meter Maintenance Co., and 30 employees at R. Krasberg & Sons Mfg. Co. Letters from Albert Epstein, Director of Research, IAM, to James C. Oldham, Nov. 30, 1971; Dec. 13, 1971.

78. See, e.g., text accompanying note 164 *infra*.

79. *Hearings on Economic Dislocation Resulting from Environmental Control Before the Subcomm. on Air and Water Pollution of the Senate Comm. on Public Works*, 92d Cong., 1st Sess. 281 (1971) [hereinafter *Dislocation Hearings*].

the proposed legislation was to give workers who are displaced or otherwise affected by an employer's pollution abuses the right to bring a class action in a state or federal court against the corporation and its officers and directors for damages.⁸⁰ These damages would include, among other things, all lost wages and fringe benefits, compensation for loss of seniority rights, costs of retraining necessary to obtain other employment, and moving expenses; damages would be offset by any unemployment compensation or other benefits collected by the employees.⁸¹ Affected employees would, however, be required to have sought suitable employment elsewhere before they could recover damages.⁸² The proposed legislation further would provide that there would be a conclusive presumption in favor of workers when layoffs, shutdowns of plants, or down-grading of jobs resulted from a governmental order precipitated by environmental pollution, and the Secretary of Labor would be empowered to bring suit if requested by individuals.⁸³ Woodcock pointed out that the basic concept of his proposed legislation was not new—it had recently been implemented by the Congress as part of the AMTRAK legislation.⁸⁴ He further suggested that a cost-sharing program might be set up so that the government would assist employers in meeting the expenses necessitated by the legislation.⁸⁵

Subsequently, under the direction of its Education and Conservation Department, the UAW has actively sought support for the legislation proposed by Woodcock. In addition to disseminating widely the statement Woodcock had made to the Air and Water Pollution Subcommittee,⁸⁶ the UAW succeeded in interesting the Urban Environmental Conference (UEC) in the environmental blackmail issue. The UEC is a group organized by Michigan Senator Philip Hart during late 1971, and the group is actively working with the union on ways to stop environmental blackmail as one of its three national priority projects.⁸⁷

As a result of UAW and UEC activity, a draft of a bill, entitled "Environmental Controls Adjustment Act of 1972," has been pre-

80. *Id.* at 286.

81. *Id.*

82. *Id.* at 288.

83. *Id.* at 288-89.

84. *Id.* at 287-88. The rail passenger legislation is contained in 45 U.S.C. §§ 501-644 (1970).

85. *Dislocation Hearings*, *supra* note 79, at 290.

86. *See, e.g., UAW's Woodcock Blasts Industry's Environmental "Game Plan," ENVIRONMENTAL J.*, Sept. 1971, at 31. *See also* Woodcock, *supra* note 15, at 15-16.

87. *The Sun* (Baltimore), Dec. 9, 1971, at A16, col. 1.

pared by the staff of the Air and Water Pollution Subcommittee. In its present draft status, the bill would provide sweeping economic protection for workers who lose their jobs as a result of plant shut-downs or reorganizations necessitated by pollution regulations.⁸⁸ The approach of the bill is to administer grants through the states by coordinating disbursements with unemployment compensation programs already in operation at the state level. Even though the bill is only in the formative stages, it is worth observing that operating through state unemployment compensation structures could be quite cumbersome, and could be inequitable to employees of the same corporation who happened to reside in different geographic locations.

Union interest in protective legislation is reportedly having an effect on legislative enactments directed primarily to other issues but which collaterally affect worker dislocation. For example, sections of the Federal Water Pollution Control Act Amendments of 1972⁸⁹ also speak to the problem of environmental blackmail. One section requires the Administrator to consider potential economic and social dislocations when deciding whether to establish effluent limitations.⁹⁰ Furthermore, under section 507(e),⁹¹ the Administrator is ordered to evaluate potential loss or shifts of employment resulting from pollution enforcement. Specifically mentioned for investigation are threatened plant closures or job reductions. Employees who lose or are threatened with the loss of their jobs as a result of effluent limitations imposed by the Act can request an investigation in which the employer will explain the actual or potential effect of such a limitation on employment and the justification for any discharges or layoffs. The Administrator is then directed to report on these relationships and include any recommendations he thinks appropriate, all of which are to be available to the public.

This same question was dealt with on a broader scale in title VIII of the Public Works and Economic Development Act of 1972.⁹² The bill, which was eventually vetoed by President Nixon, required the Administration to investigate employment losses actually or allegedly resulting from enforcement of any federal environmental quality law. This investigation was to consider the extent to which the community would be dislocated and any possible alternatives to

88. The bill is presently in discussion draft form only.

89. Pub. L. No. 92-500, 86 Stat. 816.

90. Federal Water Pollution Control Act § 302(b)(1), *added by* Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, § 2, 86 Stat. 846.

91. Federal Water Pollution Control Act § 507(e), *added by* Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, § 2, 86 Stat. 890.

92. H.R. 16071, 92d Cong., 2d Sess., tit. VIII (1972), in 118 CONG. REC. 18357-58 (daily ed. Oct. 14, 1972).

the employment loss. After the employer filed a report showing the employment consequences of compliance with the law, the Secretary of Labor would certify the workers unemployed as a result of pollution standards. Certified employees could then receive unemployment compensation equal to sixty per cent of their former weekly wage for seventy-eight weeks, mortgage and rental payments for up to a year, and re-employment assistance, all to be funded under a 100 million dollar authorization. The employer was forbidden to discharge or discriminate against any employee who aided in the enforcement of this or other pollution laws. When the Secretary found such discrimination, he could order reinstatement of the employee and fine the employer 1,000 dollars for each day the violation continued. The Secretary was also empowered to make low interest loans to aid private industry in developing pollution control facilities when necessary financing was unavailable from private sources. These expenditures were to be covered by a separate 100 million dollar authorization. As explained in debate by its leading sponsor, Senator Williams, the rationale for the bill was that "in protecting future life for our children and grandchildren, we owe an immediate obligation to our current work force. We have no right to force upon them the exclusive costs of redeeming our environment for future generations."⁹³

Foreshadowing the eventual veto, various administration officials made known their objections to the legislation. Secretary of Labor Hodgson was opposed, not only because he viewed the program as "inadequate" and financially uncertain, but also because the "Department of Labor . . . has always favored having only one unemployment program, rather than a series of programs tailored to specific workers 'adversely affected' through a particular circumstance."⁹⁴ Caspar Weinberger, Director of the Office of Management and Budget, objected on budgetary grounds and on the theory that revenue-sharing met the same objectives "in a more effective and responsive manner."⁹⁵

To Senator Muskie's mind, the bill was necessary to assure that the "jobs and livelihoods of workers, their families, and their communities are not used as pawns in industry efforts to undercut pollution control regulations."⁹⁶ However, because of the veto, the

93. 118 CONG. REC. 17718 (daily ed. Oct. 12, 1972) (remarks of Senator Williams).

94. Letter from James D. Hodgson to Senator Randolph, Sept. 14, 1972, in 118 CONG. REC. 17719 (daily ed. Oct. 12, 1972).

95. Letter from Caspar Weinberger to Senator Randolph, Sept. 9, 1972, in 118 CONG. REC. 17720 (daily ed. Oct. 12, 1972).

96. 118 CONG. REC. 17728 (daily ed. Oct. 12, 1972) (remarks of Senator Muskie).

threat and reality of environmental blackmail are still essentially unregulated.

Nevertheless, the water pollution provisions and the draft legislation previously discussed represent a start toward the UAW goal of shielding the workers from environmental blackmail. Undoubtedly, the full protection goal of the UAW has little political feasibility, but if further compromise legislation should be enacted, it could advance the willingness of organized labor to combat environmental pollution at the bargaining table and elsewhere.

B. *General Environmental Involvement*

Unions can be categorized into three groups according to the degree of attention devoted to environmental problems.⁹⁷ Some have expended virtually no energy in considering the problem. Others have passed resolutions at international conventions pertaining to various environmental subjects. Finally, a few unions have engaged in some sort of affirmative action on environmental problems, such as negotiating contract provisions or sponsoring legislative or educational campaigns.

1. *Inactive Unions*

Not surprisingly, the first category is the largest in terms of the number of international unions—although not in terms of the number of members represented. Of the sixty unions responding to a series of questions sent by the author to 135 national and international unions headquartered in the United States, thirty-five fell within the first category.⁹⁸ A number of these unions represent nonindustrial, white-collar workers who do not suffer the primary effect of stationary source industrial pollution.⁹⁹ But some of the

97. This categorization excludes attention to in-plant occupational safety and health problems.

98. See note 10 *supra*.

99. *E.g.*, Actors Equity Assn., American Postal Workers Union, National Assn. of Broadcast Employees & Technicians. However, even among these unions, pollution takes its toll. For example, the Musicians' Guild indicates, "Our members have a great deal of problems with [a]ir pollution as they cannot sing properly and are subject to inflammation of throat and nose due to foul air in densely populated urban centers." Letter from Joan Greenspan, Asst. Executive Secretary, Musicians' Guild, to James C. Oldham, Oct. 28, 1971. Furthermore, noise caused by airplanes, traffic, horns, and sirens disrupts concerts in which Guild members are performing. The Guild has been active in supporting local bills for control of noise and for securing better enforcement of local ordinances in existence.

Other unions associated with nonindustrial employers are also taking affirmative environmental action. See, *e.g.*, the example of the Communication Workers Union in note 160 *infra*.

unions in this category, such as the Teamsters, are quite large and are very much involved with polluting industries.¹⁰⁰ This is not to say that these unions, or the seventy-five unions that did not respond at all, have no concern for the safety and health of their workers. Although the record of organized labor on occupational health may be less than outstanding,¹⁰¹ there are nevertheless many unions that allocate all of their resources available for safety and health to problems occurring in the workplace, thereby excluding problems extending into the community at large.¹⁰²

2. *Unions Adopting Environmental Resolutions*

Unions in the second category—those that have confined their interest in the environment to adopting resolutions—have often been content with resolutions that are merely affirmations or retreads of resolutions adopted at the annual AFL-CIO Convention.¹⁰³ The

100. The Teamsters have sponsored a three-year study on the adverse environmental conditions facing the professional truck driver, but the study is of an occupational health and safety variety, and the Teamsters are keeping the results of this study confidential. Letter from Abraham Weiss, Research Director, Teamsters, to James C. Oldham, July 27, 1972.

101. See generally J. PAGE & M. O'BRIEN, *supra* note 8.

102. For example, Mr. M.B. Wigderson, Staff Vice President of the Air Line Employees Assn., in a letter to the author dated November 2, 1971, stated:

We have not had any ground swell from our membership demanding that we negotiate into the agreements contractual language which would tend to deal with environmental or ecological features concerning the operation of an air line. We do have contractual language which deals directly with safety and health, but in all honesty, anti-pollution theories were not involved.

From the foregoing, I think you would be safe in assuming that the white collar workers who make up the membership of this Union do not feel that the Union in and of itself should be the vehicle to carry on anti-pollution campaigns.

A statement from the Bakery Workers' Union puts it more directly: "I know the unions could do more than they have about the ecology of the country, but we feel there are more pressing matters of immediate concern." Letter from Vaughn Ball, Director of Research and Education, Bakery & Confectionary Workers' Union, to James C. Oldham, Oct. 28, 1971.

These statements are admittedly realistic and perhaps representative of a widely held view within organized labor. But the times are changing, and so, too, may that point of view. As put by Joseph T. Power, General President of the Plasterers' Union, in a letter to the author dated Dec. 2, 1971:

In my opinion, organized labor has every justification to interject themselves [*sic*] into the involvement of anti-pollution and concern over the establishment and functioning of environmental programs.

Organized labor has the same moral responsibility that was evident in spear heading other social legislation and the implementation thereof, such as social security, health, education, safety in the work place, etc.

103. *E.g.*, Amalgamated Clothing Workers, Resolution No. 20, The Environment, 28th Biennial Convention (May 29-June 2, 1972), which reads:

RESOLVED, that the 28th Biennial Convention of the Amalgamated Clothing Workers of America, AFL-CIO, CLC:

1. Joins with the AFL-CIO in the struggle to conserve our environment and stem the tide of pollution;
2. Recommends that because of air pollution and the tremendous drain on energy

AFL-CIO resolutions, in turn, have tended to be quite bland, particularly when compared with those resolutions referred to the Resolutions Committee from which the final product originated.¹⁰⁴

Other unions have independently formulated environmental resolutions. Some of these are so general as to be of limited usefulness.¹⁰⁵ Others make specific suggestions about legislative enactments and appropriations,¹⁰⁶ which could prove useful if the unions en-

fuels by internal combustion engines for automotive vehicles, we urge that the National Air Pollution Control Administration give top priority to developing alternative sources of power for such vehicles;

.....

4. As a means to protect workers from losing their jobs and to discourage companies from relocating to areas having more lenient pollution laws, we urge that the federal air and water pollution acts should be amended to provide national emission standards on all sources of air and water pollution.
5. Urges strengthening the authority of the Environmental Protection Agency and centralization of the administration of federal anti-pollution activity; and
6. The Amalgamated, through its publication, legislative activities and educational activities, will continue to fight for a cleaner environment.

104. Reference was made earlier to the OCAW and Colorado Labor Council resolutions introduced at the Ninth Constitutional Convention of the AFL-CIO. See notes 71 & 74 *supra* and accompanying text. The OCAW resolution (which was identical to the Colorado Labor Council Resolution except for the addition by the OCAW of points one and two) is set out in Appendix B *infra*. The resolution reported out of the Resolutions Committee of the AFL-CIO and adopted by the Convention, however, is considerably watered down compared to that offered by the OCAW, even though the end product is alleged by the AFL-CIO to cover the substance of the OCAW resolution. See Resolution No. 124, *supra* note 75, reprinted in Appendix B *infra*. Most of the features of the adopted resolution were presented to the Democratic and Republican National Conventions as the AFL-CIO 1972 platform proposals. See AFL-CIO, Platform Proposals (1972).

The Industrial Union Department of the AFL-CIO has independently adopted a resolution on the environment. After calling generally for mobilization of resources and organizations to combat environmental pollution and for a national plan to deal with the problems, the statement in conclusion resolved:

7. The Industrial Union Department make every effort to see that the burden of technological change is borne not only by the worker but—in the transition to new means of production—by the whole community on whose behalf the change takes place.
8. The Industrial Union Department condemns and rejects the environmental blackmail of those who would intimidate the worker with economic threats.

Industrial Union Dept., AFL-CIO, A Resolution on the Environment (1971).

105. See, e.g., International Ladies' Garment Workers Union, Resolutions, 34th Annual Convention (May 1971); Office & Professional Employees' Intl. Union, Resolution No. 38, Convention, Miami Beach, Fla. (June 1971), the operative paragraph of which reads as follows:

RESOLVED that the Office & Professional Employees International Union and its membership support those organizations whose objectives are to have all governments in our countries (Canada and the U.S.) introduce and enforce strong and stringent anti-pollution controls and laws so that our children and their children should inherit a world which is not only fit to live in, but a world which retains those natural beauties and other attributes essential not only to the physical but also to the intellectual and spiritual well being of mankind.

106. See, e.g., American Fedn. of State, County & Municipal Employees, Resolution No. 70, Contamination of the Natural Environment, Convention (1970). Consider also the following resolution of the Office & Professional Employees International Union:

WHEREAS, under authority of the National Environmental Policy Act, President Nixon created a Council on Environmental Quality, and

deavor to see that these suggestions are implemented. Still others have fashioned resolutions relating specifically to the type of business in which most of their members work, or around a particular event with which the union was involved.¹⁰⁷

Resolutions may be useful in focusing the attention of union members on particular matters of concern to the international. But

WHEREAS, this three member group was to ride herd on other federal agencies reviewing the environmental impact of their projects before construction began, and

WHEREAS, the Council, which is getting more than one hundred such reports monthly and the volume is threatening to break down the system, was only granted a first year budget of one million dollars which allowed only twenty-one professionals on the staff, and

WHEREAS, the Council needs additional funds to beef up its staff with qualified persons so that what started out as an effort to exercise responsible environmental concern over public works can be continued for another year, now, be it

RESOLVED: that all citizens concerned about the effect of dams, highways and other public work projects on the environment should be speaking up for the fact that the Council on Environmental Quality needs more money, let it be

RESOLVED FURTHER: that this, the 12th Convention of the OPEIU, urge all members to contact their Congressmen to insure that this Council is properly funded so that it can continue its vital work.

Office & Professional Employees Intl. Union, Resolution E.B. No. 10, Council on Environmental Quality, Convention, Miami Beach, Fla. (June 1971).

107. A representative example of resolutions relating to the type of business of the employers with which a union negotiates is the following resolution, adopted by the Newspaper Guild National Convention, June 26-30, 1972:

CLEAN ENVIRONMENT

The Newspaper Guild, as a strong International voice, should provide a good example in newspaper recycling by printing Guild international and local publications on recycled paper. The Guild should, after starting printing on recycled materials, urge the printing industry to adopt a policy of using recycled paper in its operation in order to prevent depletion of our ever-diminishing forest reserves.

The Guild further urges that the printing industry limit its emissions and use every effort to persuade paper processing plants to take measures to reduce the chemical effluents despoiling rivers and polluting the air to the detriment of the health and well-being of the population at large.

An example of a resolution surrounding a particular event is the experience previously referred to of the Air Line Pilots Association in support of Captain William Guthrie's efforts to ensure drainage of pressurization and drain cans of aircraft prior to take-off. *See* text accompanying notes 61-62 *supra*. The Board of Directors of the Air Line Pilots Association adopted the following resolution in 1970:

WHEREAS the dumping of Kerosene from the Pressurization and Drain cans of jet aircraft has become a major concern of the Air Line Pilots Association and the National Air Pollution Control Administration, and

WHEREAS the NAPCA has asked airlines to voluntarily halt dumping millions of pounds of jet fuel each year into the skies near airports,

THEREFORE BE IT RESOLVED that it shall be Association Policy to strongly urge all airlines whenever possible to drain all Pressurization and Drain cans on jet aircraft prior to take-off.

O'Donnell Letter, *supra* note 61.

Perhaps the Association was co-opted; President O'Donnell advises that Captain Guthrie "is now actively working with the company on ecological matters." *Id.* President O'Donnell also indicated that the Association has supported the redesign of jet engine burner cans and studies of the effect of fuel spillage on runways. In Mr. O'Donnell's judgment, "It has not been necessary for our Association to force to the bargaining table these problems. The airline companies have instituted programs with great vigor when technological research has produced a better, cleaner product." *Id.*

in terms of real-world accomplishments, they are significant only to the extent they are ultimately translated into action. This does not often happen.

3. *Affirmative-Action Unions*

There are a few unions that have taken some sort of action on community environmental problems. Occasionally this action is so oriented toward compromise that the union becomes the hostage of the industry. A prime example is the record of the United Mine Workers (UMW), with its long history of environmental involvement—involvement that has been deferential to industry and generally ineffective.¹⁰⁸ This has been particularly unfortunate in the mining industry since its operations are often conducted in the captive-community geographic setting, where the lives of employees

108. An example of the priorities of the UMW is seen by the statement of Joseph P. Brennan, Director of UMW Research and Marketing before the Illinois Pollution Control Board, March 12, 1971. Regarding the dangerous sulfur dioxide (SO₂) emissions resulting from the use of high sulphur coal, he stated:

While we acknowledge the need for air pollution control and the need for regulations to help bring such control about, we want to present to you today the other side of the coin. We are asking that in the rush to enact the strongest possible air pollution abatement regulations you do not destroy the Illinois coal industry and the jobs, wages and other benefits which that industry brings to your State.

While continuing to stress the advantages that coal brought to Illinois, he recognized "the legitimate demands of the citizen of Illinois for air pollution abatement." His problem, however, was that "inevitably these demands will be translated into regulations, regulations which will impose financial and technological burdens on industry."

His solution to this dilemma was to call for more advanced technology, and for greater "pressure" to be applied to the electric utilities who would then voluntarily refrain from polluting. He concluded:

[T]here are those who suggest we can no longer wait, that we must have the maximum reduction of pollution now. I recognize that this is a popular course, I also recognize that those who espouse it can do so without fully recognizing the consequences upon the people who mine and transport Illinois coal. Unfortunately, I do not believe that this is in the interest of the State. Certainly it is not in the interest of its miners, and on their behalf I would ask that you do not impose SO₂ emissions regulations which are pending

Any discussion of the UMW should take into account the new leadership of the union which was voted in as a result of the court-ordered rerun of the 1969 election. To demonstrate the new direction of the leadership, upon taking office on December 22, 1972, President Arnold Miller promptly discharged 20 of the 24 members of the International Board. *Washington Post*, Feb. 22, 1973, at A9, col. 2. Miller announced that henceforth the union would seek stricter enforcement of coal mine safety standards, and that he had warned one of the coal companies against firing a UMW safety committeeman who pulled men out of a mine containing too much methane gas. *Id.*, Jan. 5, 1973, at A2, col. 4.

In terms of a change from the types of policies represented by Mr. Brennan's statement, one of the more dramatic examples came when the UMW asked the Senate Interior Committee to prohibit strip mining of coal unless the land could be properly restored. Miller's position was that "we cannot allow the corporate interests in their zeal for profits to destroy our ecological balance, destroy our land and create panic among those who labor to produce the wealth of our country." *Id.*, March 15, 1973, at A28, col. 8.

are inextricably tied around the clock to the operation of the mines.¹⁰⁹

But there are unions in this third category that are struggling to wrestle community environmental problems into the open and to marshal resources to deal with them. The most active have been the UAW and the Pulp, Sulphite, and Paper Mill Workers.¹¹⁰

a. *The United Auto Workers.* Much has been said already about the UAW. In addition to that union's environmental blackmail campaign, it has made significant efforts to educate the membership about environmental concerns. During the 1970 GM strike, the international union required rank-and-file employees to attend strike education classes for two hours per week; some of these sessions were devoted to environmental matters, utilizing both films and materials specially prepared for the sessions by the UAW Conservation and Resource Development Department.¹¹¹ Additional environmental

109. Consider, for example, the disasters in the mining communities at Donora, Pennsylvania, and Buffalo Creek Valley, West Virginia, described in the text accompanying notes 42-43 *supra*.

110. These unions generally adopt internal environmental resolutions in conjunction with their other activities. The 1972 UAW resolutions on ecology and natural resources covered much ground, including air and water pollution, population, recycling, urban planning, transportation, environmental education, land use, pesticides, and nuclear power. Most pertinent to the present Article was the resolution on environmental blackmail which provided:

Industry has a long and continuing record of resistance and delaying tactics to avoid the costs of eliminating their pollution. One strategy in this attempt is that of playing on the economic fears of workers and communities to create opposition to clean-up efforts. To put an end to such "environmental blackmail," legislation must be enacted to safeguard workers from job-loss fear caused by plants threatening to either close or move to other countries rather than abate their pollution. Plants should be forbidden by law to engage in economic intimidation. Plants claiming "impossible" pollution control costs should first be required to provide their company's financial records to a public show cause hearing and completely substantiate such financial claims before any government permission for plant closure is considered.

Employees should not have to bear the burdens and sacrifices involved in correcting environmental pollution caused by their employers.

UAW supports passage of legislation which guarantees workers restitution whenever they lose wages, fringe benefits, protections or security rights because of plant shutdowns or layoffs resulting from environmental pollution or its correction by their employers. Moreover, such legislation should provide the right for workers to sue for damages for harm done to them under such circumstances. We must continue to urge Congress for legislation allowing the Highway Trust Fund to be properly allocated to all forms of transportation.

UAW, Resolution on Ecology and Natural Resources, 23d Constitutional Convention, Atlantic City, N.J. (April 23, 1972) (emphasis original).

111. Interview with John Yolton, Administrative Assistant to UAW Vice President Olga Madar, Detroit, Oct. 29, 1971. The UAW has typically required two hours of picket line duty per week during a strike as a prerequisite to the collection of strike benefits of forty dollars per week. However, in the 1970 strike there was no need for extensive picket lines, thus facilitating the alternative of education sessions. Previously there had been annual education sessions for local union leaders, but the GM strike education sessions marked the first significant educational series involving the rank and file. Representative of the prepared materials were a four-page pamphlet entitled

education programs have been sponsored by the UAW as a part of ongoing programs held at the union's Family Education Center at Onaway, Michigan.¹¹²

The UAW's environmental efforts have not been uniformly successful. For example, an attempt by UAW Vice-President Olga Madar to secure environmental information from GM during the 1971 Campaign GM experience produced only the most sketchy and superficial results.¹¹³ Also, the UAW's resolve to treat community

What Kind of World Will They Have? (Oct. 1970) and a booklet, complemented by a suggested outline, entitled *Conserving Our Resources—What We Can Do* (1970).

112. For example, the UAW sponsored a 1970 symposium entitled "The Impact of Urbanization on Man's Environment," held at United Nations Headquarters in New York and at the UAW's Family Education Center, Onaway, Michigan, June 13-20, 1970. Portions of this symposium were subsequently published by the UAW for its own education programs and for distribution elsewhere. United Nations & UAW, Symposium on the Impact of Urbanization on Man's Environment, Statement and Conclusions (1970); L. Woodcock, *The Crisis of Our Environment, UAW's Views Presented to a United Nations Conference* (1970).

113. At the annual meeting of shareholders held on May 21, 1971, Olga Madar stated:

People are now aware of the extent, the danger and the causes of pollution. They are committed to the American dream that citizens of this nation can have an impact on organizations, industry and government in bringing about change. Reporting your actions on pollution control and prevention makes General Motors a patriotic ally with the citizens of this nation. And it would increase the salability of the product. Affirmative action also to prevent pollution beyond that required by government regulation is also essential and needed. We now know, after the fact, as we attempt to repair the damages, that prevention is less costly in taxes not only to citizens, but also to stockholders, and in fact what we have learned is that the dividend factor is substantially reduced because of the increase in taxes in terms of cleaning up the damage which has been done in the past.

. . . I would think that, in terms of affirmative action, that General Motors would make public in its annual reports whether or not any toxic materials used in the manufacturing process are coming in contact with our public waterways or are in any way causing air pollution.

General Motors Corp., Annual Meeting of Shareholders, May 21, 1971, Transcript at 190-91.

James Roche, Chairman of the Board of General Motors, did not respond at the meeting to the above points. Later, raising the matter again, Ms. Madar wrote to Mr. Roche. Along with a series of questions concerning employment and training of women, the following questions were put:

Is General Motors involved in affirmative action to prevent pollution beyond that required by government regulation?

Is General Motors making public or registering with government agencies the toxic materials used in the manufacturing process which come in contact with our public waterways or are causing air pollution?

Letter from Olga Madar, Vice President, UAW, to James M. Roche, Chairman, Board of Directors, General Motors Corp., Sept. 18, 1971.

Chairman Roche's answers, conveyed to Olga Madar by Irving Bluestone, who had received them from George Morris, Vice President of the General Motors Industrial Relations Staff, were quite general. They indicated that General Motors had been applying more restrictive pollution control codes than required by law, and, with regard to planned expenditures, the corporation was spending 64 million dollars in 1971 on industrial air and water pollution. Concerning automobile emission controls, the corporation indicated it was not exceeding government standards, but was spending 150 million dollars on its 1971 program. Letter from James M. Roche, Chairman, Board of Directors, General Motors Corp., to Olga Madar, Vice-President, UAW, Nov. 16,

environmental problems at the bargaining table in 1970, admittedly complicated by the prolonged GM strike, does not appear to have been implemented at the local level to any significant degree. This conclusion stems both from the refusal of local union members to cooperate in continuing auto emission control work during the strike¹¹⁴ and from an analysis of the health and safety results achieved by seventy-five GM locals.

Environmental bargaining by the UAW locals during 1970 was not successful, but neither was it inconsequential. Although environmental issues were raised in almost all cases, rarely did they clearly address the environment outside the plant. Of the approximately 750 environmental protection demands put forward by the 75 local unions reporting back to the International,¹¹⁵ 76 per cent dealt with ventilation—basically with requests for new or refashioned air freshening or climate control systems.¹¹⁶ It is dubious whether these issues can properly be categorized as out-plant environmental concerns. Obviously, the reason for any ventilation or exhaust system in an industrial setting is to remove noxious elements from the in-plant atmosphere. The reports to the international did not indicate concern by the locals over any potentially adverse effects outside of the plant caused by the release of these elements. The only references

1971; Memorandum from Irving Bluestone, Director, General Motors Dept., UAW, to Olga Madar, Vice-President, UAW, Nov. 24, 1971.

114. See Kerwin, *Pollution Small Issue to Strikers*, Detroit News, Oct. 19, 1970, at 7A, col. 1, cols. 1-4:

The [UAW]'s image as a pacesetter [in pollution control] was tarnished last week by rebellious rank-and-file members who apparently consider a strike more important than protecting the environment. The UAW's hierarchy was unable to get Local 160 to relax its strike enough to permit 300 of its members to work on a crash program at the General Motors Technical Center in Warren to control auto emissions. . . .

But even more embarrassing is the failure of UAW leadership to persuade its pickets to permit workers from other unions—building tradesmen—to install pollution control equipment at GM factory sites during the strike

At its national union convention last April, delegates—prompted by the late UAW President Walter P. Reuther—vowed to make pollution control a “bargainable issue” at the negotiating table in 1970.

Industry spokesmen scoffed at the idea that such a technical item could be bargained over. They also predicted that the item would get lost since workers were more interested in “bread and butter” issues as [*sic*] higher wages, early retirement and restoration of the cost of living scale.

Their suspicions apparently were confirmed last week by adamant pickets who apparently place pollution control low on their priority list.

115. As mentioned in the acknowledgments at the outset of this Article, the UAW made available to the author both the questionnaires and reports filed by the GM locals that listed the health and safety demands made during the 1970 negotiations and the eventual settlement reached on each issue. All references are to the demands categorized as involving environmental controls. No further citations will be given for figures that summarize these reports.

116. This figure increased to 86% when items related to ventilation, such as exhaust equipment and maintenance, are included.

made to this subject were two requests for larger, more efficient exhaust stacks inside the plants;¹¹⁷ it is possible that these exhausts would be filtered or in some way detoxified before release, but if so it is not apparent from the demands. The conclusion is inescapable that, although clearly affecting the outside environment, ventilation is generally regarded by the locals as only an in-plant concern.¹¹⁸

There were several instances in which local unions demanded that emission controls be placed on all air-polluting equipment.¹¹⁹ Three locals even pressed the demand that existing machinery not be operated until the controls were installed.¹²⁰ In all cases the company pronounced itself dedicated to the eventual elimination of pollution—and thus, studies were proposed and commended. Only twice were promises of specific remedies made.¹²¹

Several other union demands showed a tendency to treat the outside as the refuse area for in-plant emissions. One request was made to vent the exhaust from a hose cutting area directly outside,¹²² while another was that tar be poured away from the workers, preferably outside.¹²³ It apparently did not occur to or interest these locals to press for the elimination or reduction of the offensive wastes—it was easier to request that they be disposed of elsewhere. The Chevrolet plant in Buffalo reversed these positions, however, demanding ab-

117. These were made at the Chevrolet Plant in Tonawanda and the Hydromatic Plant.

118. Whether ventilation issues present a new concern or a long-standing problem to the locals is unclear because of the terminology used. Since the demands and settlements are essentially internal documents, they employ descriptive terms and labels that have little meaning to outsiders. Accordingly, a demand that an additional air make-up unit be placed on the left side of aisle J-15 in Department B-18 does not reveal whether the request originates from a new awareness of the pollution hazards caused by industrial processes employed in the department or merely a more traditional desire to have a cool, comfortable worksite.

119. See notes 120-21 & 127 *infra*. In two instances, the company agreed to repair the damage to employees' cars resulting from briquette plant emissions. (Chevrolet Metal Castings Plant, Saginaw; Chevrolet Plant, Grey Iron.)

120. At one plant, the demand was bluntly put: "The Briquette Plant shall not be permitted to operate at any time until an Emission System is installed and operating." Chevrolet Metal Castings Plant, Saginaw. Similar positions were taken at Chevrolet Plant, Grey Iron, and at Delco Moraine.

121. In both instances, the response came in regard to a demand concerning a briquette plant, see note 119 *supra*. Both provisions involved the same local. Following completion of the strike, management promised to operate the plant "in compliance with applicable local, state and federal emission control regulations which require that such facilities include an emission control system. Management also states that when the emission control system on the briquette plant is shut down for major repairs, productive operations on the facility will be suspended until such repairs are completed." Chevrolet Metal Castings Plant, Saginaw; Chevrolet Plant, Grey Iron.

122. Rochester Products Plant.

123. Chevrolet Plant, Norwood.

solute use of outside areas during nonworking time because the ventilation inside was so poor.

Six UAW locals demanded that gasoline-powered trucks used within the plant be replaced with electric battery-operated vehicles.¹²⁴ Coming from GM employees, this demand has particular irony. In most instances, management agreed that as the present equipment wore out, it would be replaced with electric models if they could be purchased at comparable cost. Also of interest were five complaints about gas fumes. One settlement specified a switch to butane fuel,¹²⁵ and another indicated that in the future only unleaded gas would be used.¹²⁶

There were ten demands that specific machines or production processes be enclosed to retard the spread of fumes, vapors, and particles. The usual target was paint spraying, welding, or grinding operations, although asbestos dust and methylene dichloride were also singled out.¹²⁷ The specificity of these requests reflects an increased sophistication regarding the dangers of particular elements and processes and the increasing evidence linking gases and particulates to respiratory diseases.

b. *The International Brotherhood of Pulp, Sulphite, and Paper Mill Workers.* A second union that has taken steps to come to grips with community environmental problems is the International Brotherhood of Pulp, Sulphite, and Paper Mill Workers.¹²⁸ This union's environmental involvement spans a period of several years. In early 1970, the union successfully negotiated contract language with the Kamloops Pulp and Paper Company, Ltd., in British Columbia, establishing a joint union-management environmental protection committee to educate employees on pollution matters both on and off the job, to receive information, and to make suggestions on environmental problems.¹²⁹ Previously, the International Executive Board of the union had outlined a six-point action plan for a pollution abatement program, which, in part, directed the

124. Chevrolet Metal Castings Plant, Saginaw; Chevrolet Plant, Buffalo; Chevrolet Plant, Grey Iron; Chevrolet Plant, Livonia; Chevrolet Plant, St. Louis. Notably, the same demand at the Delco Moraine Plant was met with a flat company agreement to replace two of the gas trucks with electric vehicles.

125. General Motors Assembly Division, Fremont.

126. Rochester Products Plant.

127. A.C., Flint; Central Foundry, Bedford; Central Foundry, Saginaw; Chevrolet Metal Castings, Saginaw; Chevrolet Mfg. Plant, Warren; Chevrolet Parts, Saginaw; Chevrolet Truck; Delco-Moraine; Fisher Body, Mansfield; Fisher Body, Pittsburgh.

128. This union no longer exists independently. See note 16 *supra*.

129. Intl. Bhd. of Pulp, Sulphite & Paper Mill Workers, News Release, July 1971.

union's Research and Education Department to collect information on the extent of pollution in the mills with which the union bargained and to carry out an intensive public-information program.¹³⁰ Later in 1970, the union sponsored a workshop on "Man and His Environment" for more than 250 local union leaders, at which an official position paper approved by the Executive Board was explained to local representatives. The position paper recommended, among other things, the establishment of pollution control committees in all local unions, collection of factual material, and affiliation with specific antipollution groups.¹³¹

In 1971, the Pulp, Sulphite, and Paper Mill Workers refined its position paper into a detailed environmental program for local unions. This program, which was later adopted by the international union,¹³² contains specific proposals for implementing an environmental plan of action at the local level.¹³³ Suggestions in three areas are of particular interest, relating to (1) in-plant activities of the workers, (2) the joint environmental control committee, and (3) collective bargaining issues. In the plant, the formation of an environmental-concerns committee is recommended, accompanied by the appointment of individuals to provide media assistance and to attract guest speakers. Furthermore, it is suggested that two members of this committee act as an in-plant study group to discover ways by which plant operations could become more ecologically sound.¹³⁴

The joint environmental control committee recommended by the Pulp, Sulphite, and Paper Mill Workers Union is designed to have an equal number of management and union representatives, whose responsibilities shall be "to consider, investigate and make proposals to the company with respect to the environmental problems arising from the operation of the plant."¹³⁵ The committee's

130. *Id.*

131. 1 BNA ENV. REP. (Current Developments) 616 (1970).

132. Letter from Richard A. Estep, Director, Department of Research and Education, Pulp, Sulphite & Paper Mill Workers Union, to James C. Oldham, Nov. 4, 1971.

133. Intl. Bhd. of Pulp, Sulphite & Paper Mill Workers, Project III—An Environmental Program for Local Unions (June 8, 1971) [hereinafter Project III].

134. *Id.* at 1. These members are instructed at some point to "ask other members of the union . . . to describe or write down job actions they perform which might be harmful. A list should be compiled and submitted through the pollution committee or grievance committee for action." *Id.* This suggestion is directly pertinent to the discussion regarding protected, concerted activities of individual employees who resist the performance of environmentally harmful jobs. See pt. IV. B. *infra*.

135. Project III, *supra* note 133, at 1. The committee would also be consulted for its approval concerning the possible ecological consequences of new building plans. These consultations would likely be resisted by management since considerations of design and operation of new buildings may constitute a "management prerogative." See text accompanying note 201 *infra*.

powers, however, include only investigation, record-keeping, and recommendation for action.¹³⁶

In the area of collective bargaining issues, the program suggests that local unions attempt to make the term "unfair environmental practice" as much of a byword as "unfair labor practice" and that they seek a stipulation in all contracts that "no company take economic reprisal against an employee because he reports his company's pollution violations to public authorities."¹³⁷ Also, it is recommended that the unions push for full public disclosure of financial records to support any claim of high pollution abatement costs,¹³⁸ and "bargain to require companies which reduce their work forces as a result of environmental cost pressures to continue to pay the wages of those employees who lose jobs for a specified period of time afterward."¹³⁹ Finally, it is recommended that stipulations be achieved in contracts that "a given percentage of investments and profits be utilized for environmental research."¹⁴⁰ The program acknowledges that "[f]ew collective bargaining sessions to date in any industry have been able to induce management to accept concepts of this nature," but suggests ways to marshal community support, such as taking out newspaper ads, meeting with ecology groups within the community and with the workers themselves, approaching local politicians, and writing letters to the editors of newspapers.¹⁴¹

c. *Other unions.* Negotiated contract provisions which encompass community environmental problems are rare. Occasionally, general provisions have been secured, such as the following language

136. Project III, *supra* note 133, at 1-2.

137. *Id.* at 2.

138. *Id.* at 2.

139. *Id.* at 2. This recommendation states further that after dismissal, employees should be paid before stockholders, and laid-off workers should be given relocation assistance. Giving employees preference over shareholders would require that management carefully consider corporation law. For instance, officers and directors may be placed in a position of risking a breach of their fiduciary duties to shareholders.

140. *Id.* at 2. The suggestion that a percentage of investments and profits be specified in the contract and devoted to environmental research, albeit courageous, faces formidable obstacles under the Taft-Hartley Act and interpretive case authority. For instance, one of the principles most frequently encountered for delineating those areas that are reserved to management for decision is that management retains the prerogative of making decisions on capital expenditures. It should be recognized that if the tactic is attempted by a union, and if the union's insistence threatens to go to impasse or assumes strike proportions, an unfair labor practice charge alleging refusal to bargain can be anticipated. *See, e.g., Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203 (1964). The fiduciary duties of officers and directors under corporation law could also be a problem. Thus, this provision raises more serious, and to some extent different, considerations than the other contract recommendations contained in the union's program for local unions.

141. Project III, *supra* note 133, at 2.

which appears in contracts negotiated by the Glass Bottle Blowers Association: "Environmental Control Program: The Company will continue to cooperate with the Union in all legitimate labor-management activities in this area."¹⁴² A more substantive provision is the health and safety section of the contract recommended by the United Farm Workers Organizing Committee. That provision, among other things, deals specifically with pesticides and establishes a health and safety committee comprised of workers' representatives, the members of which are to be given "free access to all records concerning the use of economic poisons" and are to participate with the company in the formulation of rules and practices relating to the health and safety of the workers.¹⁴³ No worker under the agreement would be required to work when in good faith he believes that to do so would immediately endanger his health or safety.¹⁴⁴ These provisions are preceded by a preamble which recites the danger to the earth's ecology inherent in improper use of "economic poisons," and which concludes that "in hope of taking progressive steps to protect the health of the farm workers and consumers, Company and Union agree that the subject of economic poison is a necessary and desirable subject for this collective bargaining agreement."¹⁴⁵

Many of the activities of the OCAW have previously been mentioned;¹⁴⁶ but even though the OCAW has a progressive attitude on environmental matters, no local union agreements have been negotiated dealing exclusively with the environment beyond the actual confines of the work place. As one union spokesman said, "This should not be interpreted as a lack of concern. Rather, it is an inability to effect controls over an area where we lack jurisdiction."¹⁴⁷

142. Letter from Harry L. Moore, Director of Legislation, Glass Bottle Blowers Assn., to James C. Oldham, Aug. 16, 1972.

143. United Farm Workers Organizing Comm. Contract § 18.

144. *Id.*

145. *Id.*

146. See text accompanying notes 69-75 *supra*.

147. Letter from Frederick A. Linde, Presidential Assistant, Health, OCAW, to James C. Oldham, Nov. 22, 1971. This concern over jurisdiction would appear to conflict with a previous report that the OCAW planned to make pollution problems a subject for contract negotiations. See 1 BNA ENV. REP. (Current Developments) 20 (1970). Perhaps the previous report contemplated pollution problems that have a significant bearing on the in-plant environment. By contrast, Olga Madar of the UAW has stated:

[W]e have said that, for the first time, we will make the problem of general environmental pollution a bargaining issue in our next negotiations. Pollution at the work place has been a subject for discussion for a great number of years but much more needs to be done to protect the health and safety of our membership in the plants.

This year, hopefully, we are going to tackle these two together. That's not going

The jurisdictional question under the Taft-Hartley Act is a serious one.¹⁴⁸ In Canada, where the Taft-Hartley impediments do not apply, contractual bargaining on out-plant environmental problems has occurred with more frequency. In a study performed by the Canadian Labour Congress, it was reported that all five of the unions which were considered¹⁴⁹ had at one time tried unsuccessfully to negotiate clauses relating to the control and elimination of pollution.¹⁵⁰ All of the unions planned "to press this issue in their future negotiations,"¹⁵¹ and in at least one instance, the Steelworkers upheld their promise. Article 22 of the 1970-1972 agreement between the Steelworkers and Cominco, Ltd., provided as follows:

The Company and the Union affirm their joint objective of achieving a work environment in the Company's operations and a general environment in the communities which these operations affect, which is pollution free to the extent practical, recognizing the nature of the Company's industrial operations.¹⁵²

This provision, although basically a statement of good intentions,

to be easy because it's going to be difficult to get the kind of contractual language which will comply with the legal structures in collective bargaining.

Madar, *Ecotactics*, in 11th Farmer Labour Teacher Conference, Report, Solution to Pollution, Matter of Life and Death, at 39, 41 (June 20-21, 1970).

148. See pt. IV. A. *infra*.

149. The five unions were the Pulp, Sulphite & Paper Mill Workers, the UAW, the OCAW, the Glass Workers, and the Steelworkers. Canadian Labour Congress, Draft Report of Survey Results Concerning Environmental Activities of Five Unions 2 (undated).

150. *Id.* at 4.

151. *Id.* The questionnaire was circulated by the Canadian Labour Congress in response to a request from the Swedish Embassy preliminary to Sweden's hosting of the United Nations Conference on the Human Environment in June 1972. Letter from Jim MacDonald, Director, Social & Community Programs Dept., Canadian Labour Congress, to James C. Oldham, July 6, 1972. Mr. MacDonald attended the United Nations Conference, and subsequently observed that the minimal attention given "the working environment" in the "Action Plan" recommendations was "a cause of dissatisfaction to those of us who were 'worker' delegates in our respective national delegations." *Id.* Noting that the United States delegation to Stockholm did not include a trade unionist, Mr. MacDonald observed: "By and large [the United States delegates] brought little credit to your nation." *Id.*

The Canadian Labour Congress has been attentive to pollution problems for several years. In addition to the 1971 questionnaire and resultant report, the Congress has prepared an educational film on pollution problems and devoted the citizenship month campaign of February 1971 to the theme of the environment. Letter from George Home, Director, Political Education Dept., Canadian Labour Congress, to James C. Oldham, Nov. 26, 1971.

152. Agreement, Trail, Kimberly, H.B., Benson Lake, and Bluebell Operations, Between Cominco, Ltd., and Locals 480, 651, 901, 949 & 7293 of the United Steelworkers of America, July 1, 1970-June 30, 1972, at 59. This provision was renewed and now expires on May 30, 1973.

has nevertheless facilitated the creation of a labor-management committee on pollution.¹⁵³ Shortly after the signing of the agreement, a Steelworker official with jurisdiction over Western Canada instructed his locals "that a pollution clause be made one of the major priorities in your next negotiations," and that "it is an issue that should be pressed to a strike issue unless we get verifiable evidence from the Companies that they have done something and are willing to put a clause on pollution in our collective agreements"¹⁵⁴ While it is unlikely that local unions would treat an environmental provision as a strike issue, management consent to that type of provision is feasible without a strike threat, given the provision's generality. The widespread adoption of such a provision would be a useful first step in treating community environmental problems at the bargaining table and would facilitate the treatment of environmental questions through the grievance and arbitration procedure set forth elsewhere in the contract.¹⁵⁵

The preceding examples of union involvement in community environmental problems have been some of the more visible to date. There have been other sporadic instances of union involvement, such as occasional union "discoveries" of pollution with which management is then confronted¹⁵⁶ or which are lodged with the appropriate environmental protection agency.¹⁵⁷ A few unions have been

153. Schreiner, *Steelworkers in Forefront in Anti-Pollution Battle*, *The Western Steelworker*, April-May 1972, at 7, col. 1, col. 3.

154. *Id.* at 7, col. 3.

155. Grievance and arbitration clauses come in various sizes and shapes. The scope of the grievance provision may be broader than that of the arbitration provision. Typically, however, the two provisions will be coextensive and will provide for the treatment of issues involving "the meaning, interpretation or application" of the provisions of the collective bargaining agreement.

156. Compare the experience of a Rochester, New York, UAW local shop chairman who wrote to the International describing chemical discharges from his plant which were polluting nearby streams. After ascertaining that the water was in fact polluted, UAW headquarters took the matter up with GM's Director of Labor Relations. The reply from GM stated that the water sample had been taken from a sewer line, and that, in any event, local industrial waste engineers from the city had tested the plant's effluent and found it "acceptable to their system and within existing codes." Letter from Bill Reece, Shop Chairman, Local 1097, UAW, to Walter P. Reuther, President, UAW, April 27, 1970; Letter from Irving Bluestone, Director, GM Department, UAW, to George Morris, Director, Labor Relations, General Motors Corp., July 5, 1971; Letter from George Morris to Irving Bluestone, July 16, 1971.

157. For example, in 1971, the Safety Committee of Local No. 1974 of the International Brotherhood of Electrical Workers discovered pollution in a creek flowing east of the Western Electric plant where union members were employed. Test samples were sent to the Omaha Testing Laboratories, and later the EPA was contacted. Reportedly, the union's evidence was convincing, notwithstanding the fine reputation of Western Electric on environmental matters. As a result, the company took steps to rectify the problem. Berger, *Western Electric Found Polluting Nearby Stream*, *The Short Circuit*, Dec. 1971, at 3.

vigorous participants in the formulation of environmental trade associations comprised of labor, management, and professional representatives.¹⁵⁸ Others work with their companies or with civic organizations in cooperative efforts to promote conservation and environmental programs.¹⁵⁹ A few imaginative attempts to combat pollution have also been made by nonindustrial unions.¹⁶⁰

C. *Union Activity Through State Environmental Protection Agencies*

In correspondence with the environmental protection agencies of the 50 states, responses were received from 38 agencies, 76 per cent of those contacted. Generally, most agencies responded that, while they were hopeful that significant union activity in support of en-

158. The Association of Western Pulp and Paper Workers, together with several other unions, was instrumental in the organization of the Western Environmental Trade Association (WETA). Letter from Hugh D. Bannister, President, Western Pulp & Paper Workers, to James C. Oldham, July 24, 1972. The Trade Association has a broadly representative board of directors and has been active in major environmental projects on the West Coast. See *WETA, A Prospectus*, 1 WETA Newsletter, July 1972.

159. For example, the Glass Bottle Blowers Association indicates that it has worked extensively with companies to mount recycling campaigns as well as on research projects. Letter from Harry L. Moore, Director of Legislation, Glass Bottle Blowers Assn. to James C. Oldham, Aug. 16, 1972. Similar cooperative efforts have been reported between the Air Line Pilots Association and the air line companies. See note 107 *supra*.

160. For instance, Mr. Joseph Beirne, President of the Communication Workers of America, wrote to the Chairman of the Board of the American Telephone and Telegraph Company in June 1971 to emphasize the union's belief that the Bell System owed more to the community than providing the best telephone service at the lowest possible prices. In addition to recommending that the Bell System evaluate the mining methods of its copper suppliers and the reforestation programs of companies from which it buys timber for telephone poles, President Bierne stated:

Along these lines, the Bell System could help to speed the development of a low emission motor vehicle. As one of the nation's largest purchasers of motor vehicles with a fleet of some 128,000, it would seem reasonable that AT&T should exert some of its vast market power on the automobile manufacturers. The Bell System could provide a real economic incentive for producing low emission motor vehicles if it would adopt a firm policy of making all of its purchases in a given period of time, say five years for example, from the automobile company which is the first to offer a motor vehicle which meets the 1975 standards as provided for by the Act. If such a policy were adopted it would have its most beneficial effect if it were announced as soon as possible and well before the date on which compliance with the Act would be required. This would give the same opportunity and incentive to all of the auto makers and it would firmly place AT&T on the side of cleaner air before other major U.S. corporations. Such a policy would entail little or no cost to the operating companies and it[t] would be wholly consistent with the announced objectives of the Corporation.

Letter from Joseph A. Beirne, President, Communications Workers of America, to H. L. Romnes, Chairman of the Board and President, AT&T, June 30, 1971.

Another example of an effort by a nonindustrial union to combat pollution is provided by the American Federation of Teachers. That union commissioned a classroom teacher from Kansas City, Missouri, to prepare a detailed lesson plan on environmental problems for use in the school systems. Letter from Robert D. Bhaerman, Director, Department of Educational Research, American Fedn. of Teachers, to James C. Oldham, Nov. 18, 1971. See *American Teacher*, April 1970, at 11, for more of the specifics of this

vironmental abatement would be forthcoming, very little activity of this type had yet come to their attention. The agencies were asked if they had encountered any specific instances of union members refusing to perform acts in the course of their employment which would have violated federal or state environmental laws. They were also asked whether unions had taken any affirmative action in an attempt to bring employers into compliance with pollution control legislation or ordinances. Finally, general information and comments regarding labor union activity in the area of environmental protection were solicited.

A few agencies were simply unresponsive.¹⁶¹ However, most responded to the questions even though they could provide very little information. Half of the responding states had nothing tangible or significant to report.

In a number of instances, however, participation by labor in environmental protection agency hearings was reported. In three states, labor union testimony against the imposition of environmental controls was described.¹⁶² Nevertheless, there were five states in which testimony had been given or active support otherwise demonstrated to the environmental protection agencies in favor of the imposition of controls.¹⁶³ In three states, controls were favored by organized

project. Unfortunately, the lesson plan concepts did not materialize to the extent originally intended. Letter from Robert D. Bhaerman to James C. Oldham, June 27, 1972. What was accomplished is summarized in *American Teacher*, April 1972, at 11.

161. For example, Mr. Tommy Gingles, Assistant Executive Director, Air & Water Pollution Control Commn., State of Mississippi, indicated that the author's letter had been referred to the Commission's legal staff, which replied: "We have no comment on this matter and to our knowledge, Mississippi statutory law is silent on this subject." Letter from Tommy Gingles, to James C. Oldham, Jan. 5, 1971.

162. Letter from William A. Munroe, Chief, Bureau of Air Pollution Control, State of New Jersey, to James C. Oldham, Nov. 23, 1971; Letter from Aaron L. Bond, Chief, Health & Air Quality Control Section, New Mexico Environmental Improvement Agency, to James C. Oldham, July 19, 1972; Letter from Gerald R. Severson, Attorney, Texas Air Pollution Control Services, to James C. Oldham, July 3, 1972. Mr. Bond referred to invitations extended to labor unions to participate in a hearing on copper smelter emissions, stating that "the interest of the labor union is in supporting the position of the industry that no further control of emissions is desirable."

163. Letter from John E. Daniel, Attorney, Bureau of Environmental Health, Alabama Dept. of Public Health, to James C. Oldham, Dec. 2, 1971 [hereinafter Daniel Letter]; Letter from Norman E. Schell, Director, Div. of Air Pollution Control, Arizona State Dept. of Health, to James C. Oldham, Feb. 23, 1972 [hereinafter Schell Letter]; Letter from Frank P. Partee, Director, Kentucky Air Pollution Control Comm., to James C. Oldham, Dec. 2, 1971; Letter from Martin A. Ferris, III, Special Assistant Attorney General, Bureau of Air Quality Control, Maryland Environmental Health Administration, to James C. Oldham, Dec. 3, 1971; Letter from Ed Gatzemeier, Industrial Hygiene Engineer, Montana State Dept. of Health, to James C. Oldham, Nov. 15, 1971. Also of interest in this regard are the views of James W. Murry, Executive Secretary of the Montana State AFL-CIO, who urged the EPA "to hold firm on the emission standards it

labor, but additional time was requested before the controls would become applicable, or controls were supported only on the condition that no loss of jobs would result.¹⁶⁴

In at least one instance, a labor union had sought an environmental protection agency's assistance in bringing an action against an employer.¹⁶⁵ Three states indicated that employees or union members had individually reported employers to environmental protection agencies.¹⁶⁶ And in one state, criminal sanctions had been sought by an environmental protection agency against individual employees for polluting activities.¹⁶⁷

One state agency was familiar with a local public information program which had been supported by a labor union,¹⁶⁸ but in several additional states, the role played by labor unions was to impede pollution abatement. In two of these instances, labor pickets precluded or interrupted the installation of pollution abatement equipment or waste disposal efforts,¹⁶⁹ and in three states, it was

set" for various smelters in the state. EPA Hearings on the Montana Air Implementation Plan, held in Helena, Mont., Aug. 30, 1972.

164. Schell Letter, *supra* note 163; Letter from John C. Soet, Chairman, Air Pollution Control Commn., Michigan Dept. of Public Health, to James C. Oldham, Nov. 11, 1971; Letter from Daniel M. Barolo, Sanitary Engineer, Div. of Air Resources, New York State Dept. of Environmental Conservation, to James C. Oldham, July 20, 1972.

165. In New York, an incident was reported in which union representatives approached the Department of Environmental Conservation concerning the etching of automobile windshields of aluminum plant employees caused by fluorides. Ultimately, the matter was settled between the employees and the company, and it was stated that "this was definitely through union action." Letter from Harry H. Hovey, Jr., Associate Director, Div. of Air Resources, New York State Dept. of Environmental Conservation, to James C. Oldham, Nov. 10, 1971. *See also* note 157 *supra*.

166. In Rhode Island, two incidents of disposing plating rinses into state waters were reported by anonymous employees to the applicable environmental agency. Letter from Raymond J. Joubert, Senior Sanitary Engineer, Div. of Water Supply & Pollution Control, Rhode Island Dept. of Health, to James C. Oldham, July 11, 1972. In Missouri, an incident was reported where union members approached the air conservation commission during contract negotiations and requested that certain actions be taken against their company. Once the contract was negotiated, no further complaints were filed. Letter from H.D. Shell, Acting Executive Secretary, Missouri Air Conservation Commn., to James C. Oldham, Nov. 9, 1971. And in Virginia, employees of a railway company complained to the state air pollution control board about choking fumes emanating from diesel engines being operated in the railroad yards. Letter from Hamilton Crockford, Information Officer, Virginia State Air Pollution Control Bd., to James C. Oldham, Nov. 4, 1971.

167. In Arkansas, it was reported that "misdemeanor charges have been brought against individual employees of a corporate employer for open burning in violation of the Air Code." Letter from James M. McHaney, Attorney, Arkansas Dept. of Pollution Control & Ecology, to James C. Oldham, Nov. 9, 1971. *See also* note 67 *supra*.

168. Daniel Letter, *supra* note 163.

169. An incident was reported in New Jersey in which a union's picket line prevented proper disposal of odor-causing wastes at an industrial operation. Letter from Herbert Wortreich, Chief Enforcement Officer, Bureau of Air Pollution Control, New

reported that employees had failed to use already installed pollution control equipment.¹⁷⁰

D. *The Present State of Union Concern*

Did Walter Reuther's call to arms on environmental concerns in February 1970¹⁷¹ do any good? Certainly it was a catalyst for some action, such as the UAW's energetic collection of data, the flurry of resolutions by international unions, and a handful of negotiated contract provisions. In retrospect, 1970 appears to have been labor's ecology year; less attention has been focused on environmental concerns since then. Resolutions have been fewer, and no outpouring of contract negotiation efforts has occurred. Nothing of consequence was done with the data collected by the UAW. Admittedly this is no surprise—out-plant environmental concerns are relatively far down the priority list for the typical union, at least when it comes to real-world negotiations and attendant trade-offs. Exacerbating the situation has been the depressed but inflationary economy and more than customary concern about job security.

Perhaps it is time again to sound the alarm. One thing is clear from the UAW questionnaires: The matter is not solely academic. Untended out-plant environmental pollution by corporate employers is widespread, it frequently demands complicity of the workers, and it very often directly affects the lives of individual employees. With the economy again on an upward incline, and given the continuance of wage guidelines that restrain labor's traditional negotiating room, extraordinary attention might be directed to nonwage demands; perhaps 1973 can be another ecology year for labor.

What is the range of action which organized labor has at its disposal? Resolutions are easy, and legislative action also can be pursued, as the UAW has shown.¹⁷² Safety and health questions can generally be isolated and given a more central role in negotiations

Jersey Dept. of Environmental Protection, to James C. Oldham, July 11, 1972. A labor disagreement that involved a craft union stopped progress on the installation of pollution abatement devices in Louisiana. Letter from John E. Trygg, Technical Secretary, Louisiana Air Control Commn., to James C. Oldham, July 24, 1972. *See also* note 114 *supra*.

170. Letter from William D. Christen, Hearing Commissioner, Indiana State Board of Health, to James C. Oldham, Nov. 22, 1971; Letter from Raymond G. Buerger, Air Quality Engineer, Air Quality & Occupational Health Section, Kansas State Dept. of Health, to James C. Oldham, Nov. 5, 1971; Letter from Carl G. Beard, II, Director, West Virginia Air Pollution Control Commn., to James C. Oldham, Nov. 5, 1971.

171. *See* text accompanying note 2 *supra*.

172. *See* text accompanying notes 79-85 *supra*.

and in daily plant operations, especially with the momentum provided by OSHA. But there are two further possibilities that could be of major significance—if the law supports or protects them. One is to bring out-plant pollution questions to the bargaining table. The other is for unions to encourage their members to balk at performing work that directly results in pollution and to seek contract language to protect any such workers from discipline or discharge. Whether or to what extent these courses of action are permitted by the Taft-Hartley Act is the inquiry to which the remainder of this Article is devoted.

IV. APPLICATION OF THE TAFT-HARTLEY ACT

A. *The Duty To Bargain on Environmental Matters*

The Wagner and Taft-Hartley Acts created no express division of subject matter into mandatory and nonmandatory categories for purposes of the duty to bargain.¹⁷³ The Supreme Court accepted the NLRB's use of this distinction in the *Borg-Warner* case¹⁷⁴—a step

173. A preliminary question should be acknowledged. It is fair to ask whether it is philosophically wise, even if legal, to extend collective bargaining to encompass out-plant pollution. It may be argued that collective bargaining is cluttered enough without the imposition of this additional area and that the NLRB is without the resources to accommodate more unfair labor practice cases. Moreover, the varied interests of local and international unions will detract from the uniform development of national environmental standards.

In response, it is not suggested that environmental problems of unionized employers would be relegated solely to the bargaining table. Were that the case, surely a patchwork pattern would result. However, from an "arsenal of weapons" standpoint, it is not harmful to add the bargaining process to those recourses available to individuals who suffer environmental degradation—especially when workers often suffer the most. Clearly, this conclusion obtains for the company town and the captive community, and it may be appropriate for the urban industrial setting as well.

For the individual workers, no risk of a crazy-quilt pattern attends the possibility that they might resist the performance of environmentally injurious work. It is true that thorny discharge or grievance cases may occur, but policy implications would be minimal. Relevant by analogy are conflicts between work requirements and employees' religious beliefs that have been dealt with in grievance and arbitration procedures. *See, e.g.,* A.O. Smith Corp., 72-1 CCH Lab. Arb. Awards ¶ 8134 (1972) (Volz, Arbitrator); International Shoe Co., 17 L.R.R.M. 2813 (1946) (Klannon, Arbitrator); Goodyear Tire & Rubber Co., 17 L.R.R.M. 2722 (1945) (McCoy, Arbitrator). There admittedly would be widespread plant shutdowns if all employees who perform work contributing to pollution simultaneously refuse to do their jobs. Raeburn W. MacDonald, Chief Engineer for the Maine Environmental Improvement Commission, has said that "should employees refuse to work in factories that have not yet met their pollution control obligations protracted layoffs would result in connection with the type of industry existing in Maine." Letter from Raeburn W. MacDonald to James C. Oldham, Nov. 30, 1971. But realistically this will not happen, and some environmental progress might result from bringing the operations of employers that are presently violating applicable pollution standards into compliance. Perhaps similar progress can occur where operations of employers are not patently illegal but are unconscionable.

174. *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342 (1958).

that was viewed as unfortunate by many observers.¹⁷⁵ Subsequent to *Borg-Warner*, the Supreme Court has continued to refine the contours of the duty to bargain in terms of the mandatory-permissive distinction. The cases are relatively well known, but a review may be helpful, particularly in light of the comments from the Court in the recent *Pittsburgh Plate Glass* decision.¹⁷⁶

1. Supreme Court Vicissitudes

In *Borg-Warner*, the central issue was whether the employer could lawfully insist that its collective bargaining contract with some of its employees include a "ballot" clause calling for a prestrike secret vote of those employees concerning the employer's last offer.¹⁷⁷ In a five-to-four decision, the Court upheld the conclusion of the NLRB that the employer's insistence on this clause was an unfair labor practice.¹⁷⁸ Writing for the majority, Justice Burton determined that the duty to bargain under the Taft-Hartley Act was limited to those subjects falling within the phrase "'wages, hours and other terms and conditions of employment'";¹⁷⁹ other subjects could be discussed voluntarily at the bargaining table but could not be insisted upon.¹⁸⁰ Justice Burton concluded that the ballot clause related "only to the procedure to be followed by the employees among themselves before their representative [might] call a strike or refuse a final offer."¹⁸¹ In his view, it settled no term or condition of employment; the clause merely called for an advisory vote of the employees. In dissent, Justice Harlan persuasively reviewed the

175. Cox, *Labor Decisions of the Supreme Court at the October Term, 1957*, 44 VA. L. REV. 1057, 1074-86 (1958); St. Antoine, *Judicial Caution and the Supreme Court's Labor Decisions, October Term 1971*, 6 U. MICH. J. L. REF. 269, 280 (1973); Comment, *Requirement Under Taft-Hartley Act To Bargain in Good Faith*, 44 MARQ. L. REV. 220 (1960); Note, *The Impact of the Borg-Warner Case on Collective Bargaining*, 43 MINN. L. REV. 1225 (1959); Comment, *Bargaining on Nonmandatory Topics Constitutes Refusal To Bargain*, 11 STAN. L. REV. 188 (1958).

176. *Chemical Workers Local 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971).

177. 356 U.S. at 343. Also under consideration was a "recognition" clause whereby the employer sought to extend recognition to an uncertified local union, rather than to the international certified by the Board. Since such a clause would have directly contravened the Taft-Hartley Act, the Court, with no dissents, found that the employer's insistence on such a clause was an unfair labor practice. 356 U.S. at 350, 362.

178. 356 U.S. at 349-50.

179. 356 U.S. at 349, quoting Taft-Hartley Act § 8(d) (codified at 29 U.S.C. § 158(d) (1970)). Although the company had met the requirements of good faith as to the mandatory subjects of bargaining, the Court concluded that insisting upon permissive subjects "is, in substance, a refusal to bargain about the subjects that are within the scope of mandatory bargaining." 356 U.S. at 349.

180. 356 U.S. at 349.

181. 356 U.S. at 350.

legislative history of both the Wagner and Taft-Hartley Acts to support his conclusion that the decision of the majority sanctioned "an intrusion by the Board into the substantive aspects of the bargaining process which goes beyond anything contemplated by the National Labor Relations Act or suggested in this Court's prior decisions under it."¹⁸² Justice Harlan was unable to agree with the majority regarding the classification of the ballot clause. Noting that the phrase "other terms and conditions of employment" had "been accorded by the Board and courts an expansive rather than a grudging interpretation,"¹⁸³ Justice Harlan could see no distinction between the ballot clause and other developments affecting "the employer-employee relationship in much the same way" such as the timing of strikes or voting by employees to determine their preference before the union's decision to strike.¹⁸⁴

In 1964, the concurring opinion of Justice Stewart in the *Fibreboard* case¹⁸⁵ enhanced the "grudging interpretation" of the statutory phrase. There the Court, in an opinion by Chief Justice Warren, affirmed the conclusion of the Court of Appeals for the District of Columbia Circuit¹⁸⁶ that contracting out work previously performed by members of an existing bargaining unit is a subject for mandatory bargaining. The Chief Justice, in an opinion joined by four other members of the Court,¹⁸⁷ noted that the peaceful resolution of industrial disputes would be furthered by the Board's holding that contracting out is a mandatory subject of bargaining.¹⁸⁸ The Court found substantiation for its conclusion in general industrial practices through which "contracting out in one form or another has been brought, widely and successfully, within the collective bargaining framework."¹⁸⁹ Justice Stewart, joined by Justices Douglas and Harlan, concurred, largely for the purpose of articulating what he viewed as the narrow scope of the majority holding.¹⁹⁰ He stated:

182. 356 U.S. at 351-52.

183. 356 U.S. at 353.

184. 356 U.S. at 353. Justice Harlan further argued that even if the ballot clause was a permissive subject, a good faith insistence upon it should not result in an unfair labor practice: Merely because the one party is not required to negotiate about a subject should not mean that the other is prohibited from insisting upon it. 356 U.S. at 353-54.

185. *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203 (1964).

186. *Local 1304, Steelworkers v. NLRB*, 322 F.2d 411 (D.C. Cir. 1963).

187. Justice Goldberg did not participate in the consideration or decision of the case.

188. 379 U.S. at 210-11.

189. 379 U.S. at 211.

190. 379 U.S. at 217-18.

It is important to note that the words of the statute are words of limitation. The National Labor Relations Act does not say that the employer and employees are bound to confer on any subject which interests either of them; the specification of wages, hours and other terms and conditions of employment defines a limited category of issues subject to compulsory bargaining. The limiting purpose of the statute's language is made clear by the legislative history of the present act.¹⁹¹

Justice Stewart acknowledged that "[t]here was a time when one might have taken the view that the National Labor Relations Act gave the Board and the courts no power to determine the subjects about which the parties must bargain—a view expressed by Senator Walsh when he said that the public concern ends at the bargaining room door,"¹⁹² but he reasoned that "too much law has been built upon a contrary assumption for this view any longer to prevail, and I question neither the power of the Court to decide this issue nor the propriety of its doing so."¹⁹³

Senator Walsh, of course, had been referring to the Wagner Act. That Act, as is later indicated in more detail,¹⁹⁴ picked up the phrase "other conditions of employment" from pre-existing statutes, all of which support an expansive reading of the words. If Justice Stewart was obliquely admitting this fact in *Fibreboard*, he must have justified his narrow reading of the phrase by reliance on the legislative background of the Taft-Hartley amendments to the Wagner Act. Justice Stewart noted the rejection in conference of the House of Representatives' approach of enumerating specific subjects which must be bargained about; however, he concluded that even though less limiting language was ultimately agreed upon, the final version adopted "the same basic approach in seeking to define a limited class of bargainable issues."¹⁹⁵ But, the language enacted in section 8(d)¹⁹⁶ of the Taft-Hartley Act was virtually identical to the language previously utilized in the Wagner Act and other statutes; how these words came in 1947 to acquire a meaning exactly opposite of that which had prevailed before is difficult to understand. As Justice Harlan pointed out in his dissent in *Borg-Warner*,¹⁹⁷ the rejection

191. 379 U.S. at 220.

192. 379 U.S. at 219 n.2. For the text of Senator Walsh's statement, see text accompanying note 253 *infra*.

193. 379 U.S. at 219 n.2.

194. See text accompanying notes 229-40 *infra*.

195. 379 U.S. at 221.

196. 29 U.S.C. § 158(d) (1970).

197. 356 U.S. at 355-56.

in conference of the "laundry list" approach of the House bill logically supports a broad reading of the language which Congress finally adopted.¹⁹⁸ Justice Stewart's treatment of legislative history in the *Fibreboard* case is, at best, cavalier.

Having concluded that the legislative history of the Taft-Hartley Act supported a narrow reading of the phrase "other conditions of employment," Justice Stewart then enumerated illustrative subjects which he visualized as within this limited concept. Easily included are such things as hours of work, quantity of work, periods of relief, safety practices, and aspects of job security.¹⁹⁹ However, not all decisions that affect job security are encompassed. Some such decisions, such as the volume and type of advertising expenditures or product design, are not embraced because their impact on job security is too remote.²⁰⁰ Others, such as investment in labor-saving machinery or liquidation of assets, are excluded because they constitute the prerogative of management. According to Justice Stewart: "Nothing the Court holds today should be understood as imposing a duty to bargain collectively regarding such managerial decisions, which lie at the core of entrepreneurial control."²⁰¹ To extend the duty to bargain in this fashion would, according to Justice Stewart, "mark a sharp departure from the traditional principles of a free enterprise economy"—"a path which Congress certainly did not choose when it enacted the Taft-Hartley Act."²⁰²

This final conclusion by Justice Stewart is highly debatable. Moreover, Justice Stewart was writing for only three of the eight Justices sitting for the *Fibreboard* case; the majority opinion by Chief Justice Warren did not speak of a narrow interpretation of "other conditions of employment." In fact, the potential reach of

198. See also notes 245-52 *infra* and accompanying text.

199. 379 U.S. at 222.

200. 379 U.S. at 223. The trouble with these examples is that they are relative. There surely can be instances in which product design or advertising volume will affect employees sufficiently to merit bargaining. As noted by Chamberlain and Kuhn:

Changes in the bargaining unit and shifts in market control and competition may lead unions to insist upon broadening the scope of bargaining. For example, it may be impractical for a single small firm to undertake an extensive advertising program to expand sales, but numerous small companies, bargaining collectively with the union, may respond to union pressures for a promotional campaign to which all contribute and from which all benefit. This has, in fact, happened in the New York City Women's Clothing Industry. Workers in the individual firms would be likely to feel that company's advertising plans are of no direct interest to them because they seem so meager in size and effect, but pitched on an industry basis they may be of importance because of their greater impact on sales, output, and employment.

N. CHAMBERLAIN & J. KUHN, *COLLECTIVE BARGAINING* 91 (2d ed. 1965).

201. 379 U.S. at 223.

202. 379 U.S. at 226.

the majority's declaration that the words "plainly cover termination of employment"²⁰³ undoubtedly triggered many of Justice Stewart's remarks.

Significant, too, is the language of Judge, now Chief Justice, Warren Burger, in the lower court opinion which the Supreme Court affirmed in *Fibreboard*. Writing for the District of Columbia Circuit, Judge Burger observed that the statutory definition in the Taft-Hartley Act of subjects about which parties were required to bargain was framed in "the broadest terms possible"; in his judgment:

The use of this language was a reflection of the congressional awareness that the act covered a wide variety of industrial and commercial activity and a recognition that collective bargaining must be kept flexible without precise delineation of what subjects were covered so that the Act could be administered to meet changing conditions.²⁰⁴

As is apparent, Judge Burger's interpretation of the phrase "wages, hours, and other conditions of employment" stands in contrast to that developed by Justice Stewart in his concurring opinion.

Until recently, the NLRB has relied upon the majority opinion in *Fibreboard* in giving broad content to the duty to bargain. Not only were other subcontracting cases encompassed, but so were additional bargaining subjects once thought to be reserved to management.²⁰⁵ In 1971, however, the Board acquiesced in *General Motors Corp.*²⁰⁶ Responding to a charge of a *Fibreboard*-type breach of the duty to bargain, three members of the Board accepted the Stewart view that *Fibreboard* is to be limited to its facts. Thus, the transfer of certain business operations was held to be a sale rather than a subcontract, thereby necessitating bargaining over the effects of the sale on employees but not over the basic managerial decision.²⁰⁷

203. 379 U.S. at 210.

204. 322 F.2d at 414.

205. McLoughlin Mfg. Corp., 182 N.L.R.B. 958 (1970), *enforced in part*, 463 F.2d 907 (D.C. Cir. 1972); Metromedia, Inc., 182 N.L.R.B. 202 (1970); Skaggs Drug Centers, Inc., 176 N.L.R.B. 737 (1969); Wittock Supply Co., 171 N.L.R.B. 201 (1968); General Motors Corp., 169 N.L.R.B. 827, *modified*, 171 N.L.R.B. 666 (1968); Winn-Dixie Stores, Inc., 147 N.L.R.B. 788 (1964), *enforced in part*, 361 F.2d 512 (5th Cir.), *cert. denied*, 385 U.S. 935 (1966); Northwestern Publishing Co., 144 N.L.R.B. 1069 (1963), *enforced*, 343 F.2d 521 (7th Cir. 1965); Adams Dairy, Inc., 137 N.L.R.B. 815 (1962), *enforcement denied*, 322 F.2d 553 (8th Cir. 1963), *vacated and remanded*, 379 U.S. 644, *enforcement denied on remand*, 350 F.2d 108 (8th Cir. 1965), *cert. denied*, 382 U.S. 1011 (1966); Renton News Record, 136 N.L.R.B. 1294 (1962).

206. 191 N.L.R.B. No. 149, 77 L.R.R.M. 1537 (1971), *petition for review denied sub nom.* UAW v. NLRB, 470 F.2d 422 (D.C. Cir. 1972). *See also* Summit Tooling Co., 195 N.L.R.B. No. 91, 79 L.R.R.M. 1396 (1972).

207. 191 N.L.R.B. No. 149, at 3-8, 77 L.R.R.M. at 1539-40. The Board relied on

Given the courts of appeals' disagreement with the Board over the scope of *Fibreboard*,²⁰⁸ and in view of the changed composition of the Board, acquiescence was not surprising. Nevertheless, dissenting Members Fanning and Brown argued:

With all respect, we submit that the concurrence in *Fibreboard* and the dicta with respect to managerial decisions are not the law of the case. The fact is that the Supreme Court has not addressed itself directly to the issue here involved, and *Fibreboard*, while it may be considered limited in scope, remains the only Supreme Court pronouncement in this area.²⁰⁹

The courts of appeals have been even less generous, as only the Fifth and District of Columbia Circuits have upheld the Board's early interpretation and application of *Fibreboard*.²¹⁰ The remaining five circuits that have considered the question have tended to limit *Fibreboard* to its particular facts.²¹¹

Given the majority opinion in *Fibreboard*, it might have been expected that the Supreme Court would set the circuits aright by confirming the interpretation of *Fibreboard* employed by the Fifth and District of Columbia Circuits and by the Board until the *General Motors* case. However, the Court's recent decision in the *Pittsburgh Plate Glass* case²¹² casts a strong shadow over Chief Justice

Justice Stewart's language about decisions that "lie at the very core of entrepreneurial control." 191 N.L.R.B. No. 149, at 5, 77 L.R.R.M. at 1539. But the Board considered two other factors: the need for secrecy and swiftness in these decisions, and the importance of operational and financial considerations with which employees and their unions are not likely to be familiar. It remains to be seen to what extent the Board will elaborate these criteria.

208. See N.L.R.B. No. 149, at 4 n.7, 77 L.R.R.M. at 1539 n.7. See also text accompanying notes 266-80 *infra*.

209. 191 N.L.R.B. No. 149, at 10-11, 77 L.R.R.M. at 1541.

210. See *UAW v. NLRB*, 381 F.2d 265 (D.C. Cir.), *cert. denied*, 389 U.S. 857 (1967); *NLRB v. Winn-Dixie Stores, Inc.*, 361 F.2d 512 (5th Cir.), *cert. denied*, 385 U.S. 935 (1966); *NLRB v. American Mfg. Co.*, 351 F.2d 74 (5th Cir. 1965).

211. *NLRB v. Acme Indus. Prod.*, 416 F.2d 40 (6th Cir. 1971); *NLRB v. Thompson Transp. Co.*, 406 F.2d 698 (10th Cir. 1968); *NLRB v. Transmarine Navigation Co.*, 380 F.2d 933 (9th Cir. 1967); *NLRB v. Royal Plating & Polishing Co., Inc.*, 350 F.2d 191 (3d Cir. 1965); *NLRB v. Adams Dairy, Inc.*, 350 F.2d 108 (8th Cir. 1965), *cert. denied*, 382 U.S. 1011 (1966). See generally Rabin, *Fibreboard and the Termination of Bargaining Unit Work: The Search for Standards in Defining the Scope of the Duty To Bargain*, 71 COLUM. L. REV. 803, 810-12 (1971). It should be noted that what is being discussed is bargaining over decisions to subcontract or to automate or the like; the Board has long held that bargaining over the effects of such a decision—so-called "impact bargaining"—is required. See, e.g., *Town & Country Mfg. Co.*, 136 N.L.R.B. 1022 (1962), *enforced*, 316 F.2d 846 (5th Cir. 1963); *Brown-Dunkin Co.*, 125 N.L.R.B. 1379 (1959), *enforced*, 287 F.2d 17 (10th Cir. 1961); *Shamrock Dairy, Inc.*, 124 N.L.R.B. 494 (1959), *enforced*, 280 F.2d 665 (D.C. Cir. 1960); *Brown Truck & Trailer Mfg. Co.*, 106 N.L.R.B. 999 (1953). *Accord*, *Teamsters Union v. NLRB*, 280 F.2d 665 (D.C. Cir.), *cert. denied*, 364 U.S. 892 (1960).

212. *Chemical Workers Local 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971).

Warren's and Judge, now Chief Justice, Burger's interpretation of section 8(d).

In *Pittsburgh Plate Glass*, the Court was asked to decide whether bargaining over benefits for retired employees was mandatory under the Taft-Hartley Act. The Court per Justice Brennan concluded that such bargaining was not required for three independent reasons: (1) retirees are not within the definition of employees utilized in section 2(3) of the Act,²¹³ (2) retired employees could not be legally encompassed within the bargaining unit under the statutory language, and (3) retiree benefits do not so vitally affect active employees as to constitute a mandatory topic of bargaining subject to the restrictions on midterm contract modifications set out in section 8(d) of the Act.

None of these reasons necessarily involved any philosophical damage to the collective bargaining process. As to the first two, Justice Brennan acknowledged the relevance of industrial practice, citing the majority opinion in *Fibreboard*,²¹⁴ but he stated that industrial experience could not change the law regarding which employees could be included in the bargaining unit under the Taft-Hartley language.²¹⁵ As to the third reason, both the court of appeals²¹⁶ and the Supreme Court²¹⁷ acknowledged that future retirement benefits of *active* workers are a mandatory topic for bargaining. Thus, the failure to embrace the benefits of already retired workers did not represent a narrowing of the mandatory subject area.

However, in determining whether the benefits of retired employees so vitally affected the active employees as to present a mandatory subject of bargaining under the doctrine of the *Oliver* case,²¹⁸ the Supreme Court for the first time approvingly cited Justice Stewart's concurring opinion in *Fibreboard*.²¹⁹ Justice Brennan stated

213. 29 U.S.C. § 152(3) (1970).

214. 404 U.S. at 175-76, citing 379 U.S. at 211.

215. 404 U.S. at 176.

216. *Pittsburgh Plate Glass Co. v. NLRB*, 427 F.2d 936, 941 (6th Cir. 1970).

217. 404 U.S. at 180: "To be sure, the future retirement benefits of active workers are part and parcel of their overall compensation and hence a well-established statutory subject of bargaining."

218. *Teamsters Union v. Oliver*, 358 U.S. 283 (1959). A collective bargaining agreement, establishing a minimum rental to be paid by carriers to truck owners who drove their own vehicles, was held to cover a mandatory subject even though the Court did not determine if the truck owners were themselves "employees." This was believed necessary because the rental term was "but a direct frontal attack upon a problem thought to threaten the maintenance of the basic wage structure established by the collective bargaining contract." 358 U.S. at 294.

219. Justice Brennan's initial reference to Justice Stewart's concurring opinion was in support of the statement that subjects for mandatory bargaining are not immutable

that section 8(d) of the Act "does establish a *limitation* against which proposed topics must be measured."²²⁰ Using language from *Borg-Warner*, Justice Brennan indicated that the limitation generally includes only issues which "settle an aspect of the relationship between the employer and employees."²²¹ Nevertheless, the Court recognized that, as in *Oliver*, third-party interests can be relevant to the duty to bargain. In each case, the test is whether the third-party matter "vitally affects" the terms and conditions of employment of bargaining unit employees.²²² On the facts before it, the Court concluded that the Board had misapplied this test; Justice Brennan stated that the Board's view that retiree benefits *vitally* affected conditions of employment of active employees "simply neglected to give the adverb its ordinary meaning."²²³ This holding, apart from the language used to support it and quibbling over the lack of deference to the agency charged with enforcing the Act,²²⁴ is not especially objectionable.

However, in two other respects the opinion may portend a shift to the Stewart position. First, the Court slighted the impact of industrial experience on the mandatory bargaining issue. Acknowledging the Board's reliance on the widespread industrial practice of bargaining over retiree benefits, Justice Brennan summarily dismissed the practice: "[W]e find nowhere a particle of evidence cited showing that the explanation for this lies in the concern of active workers for their own future retirement benefits."²²⁵ Pointedly omitted from this observation was any reference to *Fibreboard*, even though Chief Justice Warren's opinion placed heavy reliance on industrial practice as a logical factor determining whether or not a subject fell within the mandatory category.²²⁶ Second, in a potentially important footnote, the Court seemed to go out of its way to observe that, in determining whether an issue was a mandatory subject of bargaining, the impact on employee interests may not be the sole test: "Other considerations, such as the effect on the employer's freedom to conduct

—a proposition for which the majority opinion would have stood equally well. 404 U.S. at 178.

220. 404 U.S. at 178 (emphasis added).

221. 404 U.S. at 178.

222. 404 U.S. at 179.

223. 404 U.S. at 182.

224. For instance, notwithstanding the Court's conclusions, the expertise of the Board in classifying bargaining subjects as mandatory or nonmandatory was acknowledged by Justice Brennan. 404 U.S. at 182.

225. 404 U.S. at 182.

226. 379 U.S. at 211-12.

his business, may be equally important."²²⁷ As previously indicated, such an argument had been a crucial element of Justice Stewart's position in *Fibreboard*.²²⁸

Justice Brennan's reliance on Justice Stewart's *Fibreboard* opinion, his acceptance of the limited nature of section 8(d), and his disregard of Chief Justice Warren's view of the importance of industrial practice collectively constitute a troublesome harbinger for the future of collective bargaining. This development is particularly disturbing given the legislative history of the phrase "other conditions of employment" and the healthy approach to this phrase adopted by the majority in *Fibreboard* and Judge Burger in the lower court. The duty to bargain existed before the Taft-Hartley Act, as did the key statutory phrase. And, as indicated by both Justice Harlan's dissent in *Borg-Warner* and the discussion to follow, the legislative history tends to refute Justice Stewart's conclusions rather than support them.

2. Legislative History of "Other Conditions of Employment"

The first appearance of the phrase "conditions of employment" in federal statutes affecting labor occurred in the labor exemption to the Clayton Antitrust Act of 1914.²²⁹ However, in labor legislation the phrase more often utilized before 1914 and for nearly two decades to follow was "working conditions."²³⁰ In 1932, the Norris-LaGuardia Act²³¹ was enacted—a statute drafted with a broad brush in order to eradicate widespread judicial abuses in issuing labor injunctions. As defined by the Act, a "labor dispute" included

any controversy concerning *terms or conditions of employment*, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing or seeking to arrange *terms or*

227. 404 U.S. at 179 n.19. The Court indicated that it was not presented with the occasion "to consider what, if any, those considerations may be." It should be noted that whether or not there are pertinent considerations other than the impact on employee interests, there is no basis in the legislative history for the assertion that an employer's freedom to conduct his business is "equally important." See text accompanying notes 229-58 *infra*.

228. 379 U.S. at 223. See text accompanying notes 201-02 *supra*.

229. Section 20 of the Act provided in part that "no restraining order or injunction shall be granted . . . involving, or growing out of, a dispute concerning terms or conditions of employment . . ." 29 U.S.C. § 52 (1970).

230. See, e.g., the law creating the Labor Department in 1913, 29 U.S.C. § 551 (1970); the Women's Bureau Act of 1920, 29 U.S.C. § 13 (1970); the Railway Labor Act of 1926, 45 U.S.C. § 151(a) (1970).

231. 29 U.S.C. §§ 101-15 (1970).

conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.²³²

A year later, Congress passed the National Industrial Recovery Act (NIRA).²³³ When President Roosevelt recommended this legislation to Congress on May 17, 1933, section 7(a) of the administration bill spoke of compliance by employers with "maximum hours of labor, minimum rates of pay, and *other working conditions*, approved or prescribed by the President."²³⁴ The House of Representatives passed a bill containing the "working conditions" language;²³⁵ however, during Senate consideration of the House bill, Senator Walsh of Massachusetts sponsored an amendment striking "other working conditions" from section 7(a) and inserting in its stead "other conditions of employment."²³⁶ Although there was no debate on the Walsh amendment, Senator Walsh's intent is clear because he inserted his views into the *Congressional Record*. He stated:

On page 8 the expression "working conditions" is used four times. "Working conditions" might be construed as limited to physical conditions within a factory. "Conditions of employment" is a much broader phrase and might include the problem of night labor by women and children and other employment restrictions as well as physical conditions of the factory.²³⁷

The Senate agreed to the Walsh Amendment and the House concurred in the Conference Committee's recommendation. Thus, section 7(a) of the NIRA referred to compliance by employers with "maximum hours of labor, minimum rates of pay, and other conditions of employment, approved or prescribed by the President."²³⁸

The NIRA was passed by Congress to empower the President to cut unemployment and increase labor's earning strength. The powers given to the President were extensive, prompting the Democratic Chairman of the House Committee on Rules, Mr. Pou, to state

232. Norris-LaGuardia Act § 13(c), 29 U.S.C. § 113(c) (1970) (emphasis added). See also section 2 of the Act, where the freedom to negotiate "the terms and conditions of his employment" was declared to be one of the rights that the worker should have and which the Norris-LaGuardia Act was enacted to protect. 29 U.S.C. § 102 (1970).

233. Ch. 90, 48 Stat. 195.

234. H.R. 5755, 73d Cong., 1st Sess. § 7(a) (1933) (emphasis added), in H.R. REP. NO. 159, 73d Cong., 1st Sess. 2, 4 (1933).

235. See 77 CONG. REC. 4373 (1933).

236. 77 CONG. REC. 3550 (1933). See also 77 CONG. REC. 4220 (1933) (remarks of Representative Kelly).

237. 77 CONG. REC. 4799 (1933).

238. Ch. 90, § 7(a), 48 Stat. 199.

during floor debate that "the President of the United States is made a dictator over industry for the time being, but it is a benign dictatorship; it is a dictatorship dedicated to the welfare of the American people."²³⁹ Viewed in this context, an expansive application of section 7(a) of the statute, as amended by Senator Walsh, was a congressional objective.

This objective was swiftly carried out. Within four months after passage of the NIRA, the National Recovery Administration promulgated codes of fair competition that contained a wide variety of prohibitions based on the enabling language of "other conditions of employment." These prohibitions included age limits for hazardous occupations, restraints on child labor, provisions for worker safety and health, limitations on reclassification of workers, and even provisions on company stores and houses.²⁴⁰

Against this background, the Wagner Act in 1935 created machinery making it an unfair labor practice for employers to refuse to bargain on "rates of pay, wages, hours of employment, or other conditions of employment."²⁴¹ Relatively early in the legislative process, the predecessor of section 9(a)²⁴² spoke of collective bargaining "in respect to rate of pay, wages, hours of employment, or other *basic* conditions of employment"²⁴³ Significantly, the limiting word "basic" was dropped from the bill before introduction. Furthermore, during all of the hearings and floor discussion on the Wagner Act, there was no question or challenge to the use of the phrase "other conditions of employment."

The sponsors made no express statement of the intended interpretation of the bill. Years later, however, during the debate on the Taft-Hartley amendments, Senator Wagner offered a retrospective interpretation. He stated:

By substituting the narrower term "working conditions" for the present broader term "conditions of employment," the bill would

239. 77 CONG. REC. 4188 (1933).

240. NATIONAL RECOVERY ADMINISTRATION, REPORT ON THE OPERATION OF THE NATIONAL INDUSTRIAL RECOVERY ACT 9 (1935).

241. National Labor Relations Act (Wagner Act), ch. 372, §§ 8(a)(5), 9(a), 49 Stat. 452, *as amended*, 29 U.S.C. §§ 158(a)(5), 159(a) (1970).

242. National Labor Relations Act (Wagner Act), ch. 372, § 9(a), 49 Stat. 453, *as amended*, 29 U.S.C. § 159(a) (1970).

243. S. 2934 (1934) (emphasis added). This version of the Senate bill, while not reflected in the *Congressional Record*, is found in the collected papers of Senator Wagner (*see note 254 infra*). The original bill introduced by Senator Wagner on February 28, 1934, S. 2926, did not include the word "basic." S. 2926, 73d Cong., 2d Sess. § 5(2) (1934), in 1 NATIONAL LABOR RELATIONS BOARD, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935, at 1, 3 (1949).

narrow the scope of collective bargaining to exclude many subjects, such as, perhaps pension plans, insurance funds, which properly belong in the employer-employee relationship and in regard to which the employer should not have the power of industrial absolutism.²⁴⁴

During the early 1940's there was considerable debate about what constituted "management rights" under the Wagner Act. In 1945, the President's National Labor-Management Conference, after a long series of meetings, was unable to agree on a system which would categorize those items properly encompassed by collective bargaining and those items that should be excluded.²⁴⁵ An additional attempt to enumerate the collective bargaining subjects to be covered by the statute was rejected during the legislative process leading to the Taft-Hartley Act. The House bill had deleted all reference in section 9(a) to "wages, hours, and other conditions of employment," substituting instead a definition of collective bargaining in section 2(11) that restricted the area of compulsory bargaining to specified subjects, such as wages, hours, seniority provisions, or safety conditions.²⁴⁶ The minority report on the House bill noted that "[t]his section attempts to limit narrowly the subject matters appropriate for collective bargaining."²⁴⁷

The Senate left section 9(a) as it was in the Wagner Act, referring to collective bargaining "in respect to rates of pay, wages, hours of employment, or other conditions of employment."²⁴⁸ Instead of

244. 93 CONG. REC. 3323 (1947).

245. U.S. DIVISION OF LABOR STANDARDS, DEPT. OF LABOR, BULL. NO. 77, THE PRESIDENT'S NATIONAL LABOR-MANAGEMENT CONFERENCE, NOVEMBER 5-30, 1945, at 7, 56-62 (1946).

246. H.R. 3020, 80th Cong., 1st Sess. (1947). The text of section 2(11) of the bill was: Such terms shall not be construed as requiring that either party reach an agreement with the other, accept any proposal or counterproposal either in whole or in part, submit counterproposals, discuss modifications of an agreement during its term except pursuant to the express provisions thereof, or discuss any subject matter other than the following: (i) wage rates, hours of employment, and work requirements; (ii) procedures and practices relating to discharge, suspension, lay-off, recall, seniority, and discipline, or to promotion, demotion, transfer, and assignment within the bargaining unit; (iii) conditions, procedures, and practices governing safety, sanitation, and protection of health at the place of employment; (iv) vacation and leaves of absence; and (v) administrative and procedural provisions relating to the foregoing subjects.

It is noteworthy, also, that an attempt to add pension plans, group insurance benefits, and hospitalization benefits to the list failed. 93 CONG. REC. 3712 (1947). This illustrates the importance of flexible statutory language. Group insurance and hospitalization benefits have been bargained about for years; they are matters of vital concern to employees and are both part of the effective wages of employees and the employees' "conditions of employment." See, e.g., *W. W. Cross & Co. v. NLRB*, 174 F.2d 875 (1st Cir. 1949) (group insurance); *Inland Steel Co. v. NLRB*, 170 F.2d 247 (7th Cir. 1948), cert. denied, 336 U.S. 960 (1949) (pensions).

247. H.R. REP. NO. 245, 80th Cong., 1st Sess. 71 (1947).

248. S. 1126, 80th Cong., 1st Sess. § 9 (1947).

fashioning a limiting definition of collective bargaining, the Senate bill added section 8(d). That section picked up the language from section 9(a) and states, among other things, that collective bargaining "is the performance of the mutual obligation of the employer and the representatives of the employees to meet at reasonable times and confer in good faith in respect to wages, hours, and other terms and conditions of employment" ²⁴⁹ In the Conference Committee, the Senate bill was accepted, and the flexible approach toward bargaining subjects was maintained. ²⁵⁰ As evaluated by Judge Major of the Seventh Circuit in the *Inland Steel Co.* case: ²⁵¹

We do not believe that it was contemplated that the language of Sec. 9(a) was to remain static. Congress in the original as well as in the amended Act used general language, evidently designed to meet the increasing problems arising from the employer-employee relationship. As was said in *Weems vs. United States* . . . : "Legislation, both statutory and constitutional, is enacted, it is true, from an experience of evils, but its general language should not, therefore, be necessarily, confined to the form that evil had theretofore taken. Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth." ²⁵²

To some, the vital principle of the Wagner Act was a *laissez-faire* bargaining philosophy. This view of the duty to bargain is captured by the widely quoted remarks of Senator Walsh:

When employees have chosen their organization, when they have selected their representatives, all the bill proposes to do is to escort them to the door of the employer and say, "Here they are, the legal representatives of your employees." What happens behind those doors is not inquired into, and the bill does not seek to inquire into it. ²⁵³

Senator Wagner undoubtedly concurred in his colleague's appraisal of the intended effect of the statute, but his aspirations for

²⁴⁹ *Id.* § 8(d).

²⁵⁰ H.R. REP. NO. 510, 80th Cong., 1st Sess. 34 (1947).

²⁵¹ *Inland Steel Co. v. NLRB*, 170 F.2d 247 (7th Cir. 1948), *cert. denied*, 336 U.S. 960 (1949).

²⁵² 170 F.2d at 254, *quoting* *Weems v. United States*, 217 U.S. 349, 373 (1910). At issue in *Inland Steel* was whether an employer could make unilateral changes in pension and welfare policies of unit employees. It was held that unilateral changes were not permitted, since the policies constituted a mandatory subject for bargaining. The court rejected the company's argument that since the pension plan did not take effect until retirement, the plan did not affect the employees during the term of their employment.

²⁵³ 79 CONG. REC. 7660 (1935). These remarks were referred to by Justice Harlan in his dissent in *Borg-Wagner*, 356 U.S. at 354.

the legislation ran deeper. Wagner's objective was more than to escort the parties to the bargaining table; he wanted to change their status into something which approached a bargaining partnership. This hope is reflected in his papers and speeches.²⁵⁴ For example, in 1926, Wagner stated: "In place of the old relation of master and servant the new day demands a partnership between corporate industry and organized labor."²⁵⁵ Wagner also prophesied the increasing importance of organized labor in the United States, concluding that "necessarily the whole present relationship of organized labor to industry must change."²⁵⁶ In 1937, Senator Wagner summarized his feelings in this way:

I believe that Labor and Industry can and should be left entirely to solve their own problems, upon a basis of partnership, and that the function of the federal government is to protect only the basic industrial liberties upon which such a partnership must be founded.²⁵⁷

254. The Lauinger Library of Georgetown University is the receptacle of the collected papers of Senator Wagner (1877-1953). The papers were given to Georgetown University in 1952 after sitting in disarray in the basement of the Old Senate Office Building since June 28, 1949, when Senator Wagner resigned from the Senate due to ill health. From 1952 until the early 1960's, the papers were stored in the basement of the Riggs Library of Georgetown University, disturbed only by an occasional scholar. It has been only since the beginning of 1972 that any effort has been made to catalogue the papers, and these efforts remain far from complete.

In 1968, J. Joseph Huthmacher, a professor of history at Georgetown University, published an "unofficial" biography entitled: *SENATOR ROBERT F. WAGNER AND THE RISE OF URBAN LIBERALISM*. The primary source of the book was the collected papers, a source which Professor Huthmacher stated in his preface was poor because "[Wagner] left behind little in the way of personal reflection." *Id.* at vii. Since the completion of this book, the papers have been generally undisturbed by researchers.

An examination of the Wagner papers by two of the author's labor seminar students confirmed Professor Huthmacher's appraisal of the documents as a research source. There were few position papers or draft bills on the development of the initial Wagner Act, although there was some very general correspondence pertaining to certain sections of the Act with key people of the day (such as Secretary of Labor Perkins, National Recovery Administration Administrator Johnson and General Counsel Donald Richberg, union leaders, and civil rights leaders); none of these letters contains specific formulations of basic sections of the Act. Strikingly, there is no correspondence relevant to the Act between the Senator and President Roosevelt or Mayor LaGuardia, two of Wagner's closest political allies. Professor Huthmacher suggests in his preface that the reason for this is "that in the age of telephone and rapid transportation, politicians simply do not communicate very much with each other on paper—to history's loss." *Id.* at x. There are also very few handwritten notes of the Senator on any subject in the papers and none that pertains to the Act.

Nevertheless, the papers do yield a "feel" for the labor attitudes of the era and for the philosophical objectives of Senator Wagner as he strove to enfranchise the labor movement. Possibly other attributes of the papers will surface as the cataloguing is completed and the documents become amenable to more systematic scrutiny.

255. Address by Senator Wagner, *New Responsibilities Of Organized Labor*, New York State Fedn. of Labor Convention, Rochester, N.Y., Aug. 28, 1926.

256. *Id.*

257. Address by Senator Wagner, Yale Law School, April 16, 1937.

Surely one of the industrial liberties underlying such a partnership is the freedom to insist upon bargaining over a broad range of conditions of employment, according to the relative impact of those conditions on the parties and their degree of interest in dealing with them. To prevent this from happening is clearly out of keeping with the spirit of Senator Wagner's legislation and its subsequent amendments.²⁵⁸

3. *The Response of the NLRB and the Courts of Appeals*

The NLRB has not pursued the "hands off" policy articulated by Senators Wagner and Walsh. But neither was the Board skimpy in its pre-1971 approach to the subjects over which there must be bargaining.²⁵⁹ The general attitude of the Board was to construe the duty to bargain broadly and to expand the bargaining territory to encompass new concerns of significance to the workers. As Justice Harlan observed:

The most cursory view of decisions of the Board and the circuit courts under the National Labor Relations Act reveals the unsettled and evolving character of collective bargaining agreements. Provisions which two decades ago might have been thought to be the exclusive concern of labor or management are today commonplace in such agreements. The bargaining process should be left fluid, free from intervention of the Board leading to premature crystallization of labor agreements into any one pattern of contract provisions, so that these agreements can be adapted through collective bargaining to the changing needs of our society and to the changing concepts of the responsibilities of labor and management.²⁶⁰

The NLRB decision in the *Fibreboard* case²⁶¹ illustrates Justice Harlan's point. Theretofore, subcontracting had been viewed as the exclusive preserve of management. The Board further held in *Adams Dairy, Inc.*²⁶² that a dairy's decision to change its delivery system in order to sell its trucks and replace its drivers with independent contractors should have been bargained with the union. In *Winn-*

258. In fact, Wagner stated in 1937 that it was wrong to expect the government to do the job of bargaining: "[I]t is a mistake to treat industry and labor as the immature children of a parental state." Address on CBS Radio, June 4, 1937.

259. It may not be irrelevant to observe that since the enactment of the Wagner Act, the Board has operated under a Democratic administration for 25 of 38 years.

260. *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342, 358-59 (1958) (concurring and dissenting opinion).

261. 138 N.L.R.B. 550 (1962).

262. 137 N.L.R.B. 815 (1962), *enforcement denied*, 322 F.2d 553 (8th Cir. 1963), *vacated and remanded*, 379 U.S. 644, *enforcement denied on remand*, 350 F.2d 108 (8th Cir. 1965), *cert. denied*, 382 U.S. 1011 (1966).

*Dixie Stores, Inc.*²⁶³ the Board concluded that bargaining should be held concerning an employer's decision to close its cheese processing plant in favor of an independently operated packaging process, and, in *Ozark Trailers, Inc.*,²⁶⁴ a decision to close a facility was held to be bargainable due to the attendant loss of jobs and the importance of job security to the Warren opinion in *Fibreboard*.²⁶⁵

Nevertheless, as previously indicated, the Board has yielded in recent cases to the views of the courts of appeals.²⁶⁶ The tension between the Board and the courts of appeals over *Fibreboard* had become pronounced. The estrangement extended not only to major "entrepreneurial" issues, but also to minor disputes about what are "conditions of employment." Illustrative of the latter disputes is a series of cases dealing with food prices at employers' cafeteria or vending machine facilities. In *Westinghouse Electric Corp.*,²⁶⁷ the trial examiner ruled that the company had violated sections 8(a)(1) and 8(a)(5) of the Taft-Hartley Act²⁶⁸ by refusing to bargain with the union about changes in cafeteria food prices.²⁶⁹ On review, the Board concluded that bargaining over every food price change was impracticable, but bargaining was required in response to a "specific union request for bargaining about changes made or to be made."²⁷⁰ Before the Fourth Circuit, a three-judge panel upheld the Board's order by a vote of two to one.²⁷¹ However, on review en banc, the three-judge panel's decision was reversed, and enforcement of the Board's order was denied.²⁷²

The incident which precipitated the dispute in *Westinghouse Electric* was an increase by the caterer of five cents in the price of hot food entrees and an increase of one cent in the price of carry-out coffee.²⁷³ In the view of the full Fourth Circuit, this decision did not *substantially* affect conditions of employment and, therefore, was not a mandatory subject of bargaining. The court stated that the NLRB was

263. 147 N.L.R.B. 788 (1964), *enforced in part*, 361 F.2d 512 (5th Cir.), *cert. denied*, 385 U.S. 935 (1966).

264. 161 N.L.R.B. 561 (1966).

265. *See* 379 U.S. at 210-11.

266. *See* text accompanying notes 206-11 *supra*.

267. 156 N.L.R.B. 1080, *enforced*, 369 F.2d 891 (4th Cir. 1966), *enforcement denied on rehearing en banc*, 387 F.2d 542 (4th Cir. 1967).

268. 29 U.S.C. §§ 158(a)(1), (5) (1970).

269. 156 N.L.R.B. at 1083-93.

270. 156 N.L.R.B. at 1081. Members Jenkins and Zagoria dissented.

271. *Westinghouse Elec. Corp. v. NLRB*, 369 F.2d 891 (1966).

272. *Westinghouse Elec. Corp. v. NLRB*, 387 F.2d 542 (1967).

273. 387 F.2d at 545.

apparently unwilling to acknowledge that in determining whether a given matter should be deemed a mandatory bargaining subject, the courts, as well as the Board itself, have recognized a legal distinction between those subjects which have a material or significant impact on wages, hours, or other conditions of employment, and those which are only indirectly, incidentally, or remotely related to those subjects.²⁷⁴

This distinction was pivotal in the court's view, because "practically every managerial decision has some impact on wages, hours, or other conditions of employment"²⁷⁵ In reaching its conclusion, the Fourth Circuit rejected the Board's view that Congress had used the phrase "terms and conditions of employment" in its "broadest sense." Instead, the court relied on Justice Stewart's concurring opinion in *Fibreboard* to the effect that the phrase is restricted to a limited category of issues subject to compulsory bargaining.²⁷⁶

In light of the legislative history of the phrase "other conditions of employment," continued reliance on Justice Stewart's *Fibreboard* analysis is unfortunate and, in many cases, unnecessary. For instance, it would not offend the legislative history of the statutory phrase to engraft upon it a materiality or substantiality test. Simply in order to have a manageable bargaining process, mandatory bargaining should be limited to those subjects that are of real significance to the workers. From this point of view, the result reached in *Westinghouse Electric* may be acceptable.

If a materiality standard is to be applied, however, it is important that the test be qualitative, not quantitative. This point was noted by Judge Sobeloff of the Fourth Circuit in his dissenting opinion in *McCall Corp.*²⁷⁷—another cafeteria price decision in which the Board's bargaining order was not enforced. Judge Sobeloff thought that the availability or nonavailability of reasonably priced food on an employee's working premises was "an important 'physical dimension' of any employee's working environment" and a mandatory bargaining subject.²⁷⁸ "The monetary amount in a given case is irrelevant; the test of 'materiality' . . . is a qualitative, not quantitative, test."²⁷⁹ His suspicion that *McCall* or *Westinghouse Electric* might have been decided differently if there had been sharp food price increases rather than modest ones seems instinctively sound.

274. 387 F.2d at 547.

275. 387 F.2d at 548.

276. 387 F.2d at 545-46, citing 379 U.S. at 220-24.

277. *McCall Corp. v. NLRB*, 432 F.2d 187 (4th Cir. 1970).

278. 432 F.2d at 189.

279. 432 F.2d at 189.

And surely Judge Sobeloff is correct in suggesting that the nature of the bargaining issue should control, not the monetary amount involved.²⁸⁰

4. *The Industrial Experience*

In evaluating a "qualitative materiality" standard, it is useful to consider industrial bargaining experience. In the large industrial unions, basic wage and fringe benefit packages may be negotiated at the national level and national attention may focus on these issues. At the local level, however, bargaining proceeds on a remarkably diverse collection of topics, many of which may seem utterly trivial to outsiders even though they can significantly affect the quality of life for the industrial worker. Examples may be drawn from the local bargaining results achieved by the UAW at various GM plants in the 1970 negotiations. The local bargaining demands and settlements reached between the UAW and GM during this period included the following:²⁸¹

- Demand: Parking lots be cleaned once per week.
- Settlement: Agreed, on a scheduled basis.²⁸²
- Demand: Plastic trash barrels be used.
- Settlement: Agreed to experiment with plastic trash can liners.²⁸³
- Demand: Booster batteries and cables and wrecker service be provided for employees during winter.
- Settlement: Agreed to provide battery boosters and cables.²⁸⁴
- Demand: Transportation be provided to and from main cafeteria for lunch for employees assigned to work outside.
- Settlement: Rejected.²⁸⁵
- Demand: Ice cream machine be provided in tool rooms.
- Settlement: Agreed.²⁸⁶
- Demand: Waterless hand soap be supplied for garage mechanics and oilers.
- Settlement: Agreed.²⁸⁷

280. The NLRB did not acquiesce in the Fourth Circuit's views, but continued to apply the principles enunciated in its own opinions in *Westinghouse Electric and McCall Corp.* See, e.g., *Package Mach. Co.*, 191 N.L.R.B. No. 60, 77 L.R.R.M. 1456 (1971), *enforcement denied*, 457 F.2d 936 (1st Cir. 1972).

281. These excerpts were obtained from the materials referred to in note 115 *supra*. The demands were categorized as pertaining to "working conditions" or as "miscellaneous."

282. Cadillac Motors Plant.

283. *Id.*

284. Chevrolet Mfg. Plant, Flint.

285. Chevrolet Metal Castings Plant, Saginaw.

286. A.C. Plant, Flint.

287. Chevrolet Metal Castings Plant, Saginaw.

- Demand: Weekly cafeteria menus be posted by all time clocks and bulletin boards.
- Settlement: Management will request cafeteria to comply.²⁸⁸
- Demand: Picnic tables be placed throughout the plant.
- Settlement: Fifteen picnic tables purchased.²⁸⁹
- Demand: All vending machine items be time- and date-stamped.
- Settlement: Sandwiches will be date-stamped.²⁹⁰
- Demand: Chewing tobacco be made available in vending machines.
- Settlement: Agreed.²⁹¹
- Demand: Electric hand dryers be installed at all wash-up locations and toilets.
- Settlement: Rejected.²⁹²

Almost all of the above examples might be considered nonmandatory subjects for bargaining if a quantitative substantiality test is used along the lines suggested by the en banc opinion in *Westinghouse Electric*. For instance, posting cafeteria menus on a weekly basis is surely no more significant than a slight increase in cafeteria prices. Yet, management listened to all of the above demands—and more—because all of them were of real significance to the quality of the working environment of the employees and affected their attitudes toward their jobs. Admittedly, some of the demands which might have proved costly, such as electric hand dryers in washrooms, were rejected by management. Since they were probably regarded as luxuries by the employees, no major issue was made of them, but at least bargaining took place.

It may be said that these examples merely reflect voluntary bargaining in which any enlightened management will engage for employee relations purposes. But this observation begs the question. The point is that industrial practice—an important element of Chief Justice Warren's opinion in *Fibreboard*—supports these demands as mandatory bargaining subjects, as do the legislative history of the Wagner Act and the Taft-Hartley amendments, and the interpretation of that history as reflected in the NLRB decisions in *Westinghouse* and *McCall*.

Local bargaining may soon encompass some aspects of the out-plant environment. Already there have been instances of bargaining

288. Chevrolet Plant, Norwood.

289. Chevrolet Truck Plant.

290. Chevrolet Mfg. Plant, Warren.

291. Fisher Body Plant, Mansfield.

292. General Motors Assembly Div. Plant, Wilmington.

over the impact of fallout from the employer's plant on employee's cars in outside parking lots.²⁹³ Bargaining may develop with regard to the impact of employer pollution on nearby recreational facilities and similar matters.²⁹⁴ If so, this bargaining, as well as the local examples described above, can and should be accommodated by the Taft-Hartley Act.

5. *Summary Reflections on Fibreboard*

As a bargaining relationship becomes more stable and longstanding, the spectrum of subject matter dealt with at the bargaining table tends to broaden.²⁹⁵ Occasionally these experiences approach the partnership concept contemplated by Senator Wagner.²⁹⁶ In other situations, even though there is no partnership, management nevertheless engages in bargaining on subjects which might not, in many courts, be regarded as mandatory. Bargaining occurs because it is politically expedient in terms of public and employee relations. This is particularly true at the local level, as has been documented by the experience between GM and the UAW.

In the company town or captive community, an employer is relatively more powerful than in the urban industrial setting and may resist the partnership concept since it would mean relinquishing a significant bargaining advantage without clear legal or economic compulsion to do so. Thus, in geographic settings where employees' lives are most affected by their employers, voluntary bargaining on a cooperative basis over whatever subjects are of real concern to the workers will rarely occur. This is exactly why employers operating remote lumber camps are obliged under the Taft-Hartley Act to bargain over matters that have not been construed as mandatory in less remote communities;²⁹⁷ and the analogy between the urban industrial setting in today's economy and the captive community suggests that distinctions heretofore applied may not remain appropriate.

293. See note 119 *supra*.

294. Cf. the picnic table demand in text accompanying note 289 *supra*.

295. See C. RANDLE, *COLLECTIVE BARGAINING PRINCIPLES AND PRACTICES* 132 (1951).

296. For instance, in the ladies' garment industry, collective bargaining contracts "specify the conditions under which an employer may reorganize his business, or enter into another partnership, or send material to other firms for fabrication . . ." *Id.* at 131. As early as 1926, the Amalgamated Clothing Workers and Hart, Shaffner, and Marx reportedly worked together to arrange for "a more minute subdivision of labor than formerly, the substitution of machine work for many hand operations, a reduction in the number of styles and increased efficiency in routing material through the plant." *Id.*

297. See *NLRB v. Lehigh Portland Cement Co.*, 205 F.2d 821 (4th Cir. 1953); *Weyerhaeuser Timber Co.*, 87 N.L.R.B. 672 (1949).

The proper question is one of the relative qualitative impact on the workers. Whenever geography, technology, or other factors yield new circumstances that significantly affect the workers, bargaining should follow.²⁹⁸ This may require an adjustment of the traditional prerogatives of management and labor, but as a UAW representative noted: "The whole history of bargaining is one of workers taking away management rights They would not have made any progress if they hadn't."²⁹⁹

The majority opinion's interpretation in *Fibreboard* of "other conditions of employment" is sound. To the extent that the majority opinion has been overshadowed by the Stewart concurring opinion, the majority views should be resuscitated. It is hoped that the *Pittsburgh Plate Glass* opinion will not do permanent damage to the limber approach to the duty to bargain employed in *Fibreboard* by Judge Burger and Chief Justice Warren.

Collective bargaining must be maintained as a malleable vehicle that can adapt to changing conditions. One such changing condition is the impact of out-plant environmental pollution on the workers. In company towns and in captive communities, where bargaining over a broad range of issues is mandatory, bargaining on out-plant pollution should also be mandatory. In urban industrial settings, where the impact of an employer's out-plant pollution on employees is great,³⁰⁰ the statutory language and legislative history of the Taft-Hartley Act dictate the same result.

B. *Individual Refusals To Perform Environmentally Injurious Work as Concerted, Protected Activity*

Gilbert Pugliese's environmental encounter with his employer has already been summarized.³⁰¹ Pugliese refused to continue to perform what had previously been part of his job—punching a button which released thousands of gallons of oil into the Cuyahoga River.

Pugliese settled his case out of court and was reinstated. But had he not succeeded, would he have had recourse under the Taft-Hartley Act? A strong case under existing authorities can be made for the proposition that any discipline or discharge of Pugliese by

298. For a discussion of changes occasioned by technology, see D. BOK & J. DUNLOP, *LABOR AND THE AMERICAN COMMUNITY* (1970), particularly ch. 12, entitled: *Frontiers of Substantive Bargaining*. Layoffs due to environmental requirements are as attributable to technology as layoffs due to automation.

299. Detroit Free Press, Jan. 25, 1970, § A, at 6, col. 1.

300. See notes 45-53 *supra* and accompanying text.

301. See text accompanying notes 55-60 *supra*.

Jones and Laughlin would have constituted a violation of section 8(a)(1) of the Act.³⁰² However, the results in a particular case may differ depending on whether a union is involved. If there is no union, recourse to the NLRB and successful prosecution of a section 8(a)(1) charge are entirely feasible. If there is a union, under present law employees may have to turn exclusively to the union for help. This might result in the successful processing of grievances, to the point of arbitration if necessary, but if the union is unsympathetic and can devise a nonarbitrary reason for declining to press the grievance, the employees could be left without a remedy. While this result is by no means certain under existing law, it is a sufficient possibility to prompt a suggestion for ameliorative legislation.³⁰³

However, it is useful to explore first the scope of concerted activities protected by section 7 of the Act³⁰⁴ in those cases uncomplicated by the presence of or resistance by a union. The effect of a union on the scope and protection of those rights can then be more meaningfully considered.

1. *Concerted, Protected Activity*

Jill Severn was employed by the Washington State Service Employees Council and the Service Employees Union (SEU) Local No. 6, in May 1969 as an organizer of nursing home and hospital employees in the Seattle area.³⁰⁵ She was competent at her job, and at the same time she was personally active in social causes not directly related to her employment. As president of an organization known as Radical Women, she participated in a picket line sponsored by another labor organization on strike against a photo-finisher in Seattle.³⁰⁶ This picketing activity, which occurred early one morning prior to her normal working hours, was covered by the local press. President Hare of Local 6 of the SEU, after reading the news story, told Severn that this type of activity reflected badly upon the union and she should either choose to work for the union or for Radical Women, but not for both. Severn did not make this election, but no

302. 29 U.S.C. § 158(a)(1) (1970).

303. See text accompanying notes 386-400 *infra*.

304. Taft-Hartley Act § 7, 29 U.S.C. § 157 (1970): "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . ."

305. Washington State Serv. Employees State Council No. 18, 188 N.L.R.B. No. 141, at 3, 76 L.R.R.M. 1467, 1467 (1971).

306. 188 N.L.R.B. No. 141, at 3, 76 L.R.R.M. at 1467.

discipline was imposed.³⁰⁷ Later, Severn participated in a demonstration at the Seattle-Tacoma Airport under the auspices of the Central Contractors' Association, an organization active in promoting job opportunities for blacks. Many of the demonstrators, including Severn, were arrested for criminal trespass, and on November 7, 1969, Severn's arrest was reported prominently in the morning newspaper.³⁰⁸ President Hare told Severn that he was much disturbed, contending that "her participation in the outside organization would make her ineffective as an organizer because the employers whose employees she was organizing would point to her as someone who would likely be sent to jail."³⁰⁹ Severn responded that the employees she was organizing were about fifty per cent black, so that her outside activity in support of minority employment would not be harmful. Hare and Severn were unable to resolve their differences, and Severn was discharged.³¹⁰

The NLRB, adopting the findings, conclusions, and recommendations of the trial examiner, ordered reinstatement of Jill Severn on the grounds that her discharge constituted an interference with protected, concerted activities under the Taft-Hartley Act.³¹¹ Citing the *Phelps Dodge* decision of the Supreme Court,³¹² the trial examiner concluded that the necessary element of "concert" under the Act was present, even though Severn was the only employee of Local No. 6 at the demonstration: The employees acting in concert need not all work for the same employer.³¹³ In addition, citing the Second Circuit's decision in *NLRB v. Peter Cailler Kohler Swiss Chocolates Co.*,³¹⁴ the trial examiner concluded that Severn was protected even though the demonstration at the Seattle-Tacoma Airport was not aimed at the hiring practices of her own employer.³¹⁵

Thus, according to the NLRB, an individual's exercise of conscience can be protected under the Taft-Hartley Act when these acts are supported by other employees, whether or not of the same em-

307. 188 N.L.R.B. No. 141, at 3, 76 L.R.R.M. at 1467.

308. 188 N.L.R.B. No. 141, at 3, 76 L.R.R.M. at 1467.

309. 188 N.L.R.B. No. 141, at 4, 76 L.R.R.M. at 1468.

310. 188 N.L.R.B. No. 141, at 4, 76 L.R.R.M. at 1468.

311. 188 N.L.R.B. No. 141, at 1-2, 76 L.R.R.M. at 1469.

312. 188 N.L.R.B. No. 141, at 4, 76 L.R.R.M. at 1468, citing *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941).

313. 188 N.L.R.B. No. 141, at 4-5, 76 L.R.R.M. at 1468.

314. 188 N.L.R.B. No. 141, at 5, 76 L.R.R.M. at 1468, citing 130 F.2d 503 (1942).

315. 188 N.L.R.B. No. 141, at 5, 76 L.R.R.M. at 1468-69. The trial examiner also noted that there was no substantial evidence that Severn's activity "was truly inimical to Respondents' business activities as a labor organization." 188 N.L.R.B. No. 141, at 5, 76 L.R.R.M. at 1468, citing *NLRB v. Local 1229, IBEW*, 346 U.S. 464 (1953).

ployer, assuming that no substantial interference with the business interests of the employer taking disciplinary action transpires. Furthermore, the exercise of conscience need not be related to the employment practices of the employee's own company.

When the circumstances of the worker's own employment are at issue, protection under the Act is even more secure. For instance, in *KPRS Broadcasting Corp.*,³¹⁶ a secretary named Carole Wise was held by the Board to have been protected under section 8(a)(1) of the Act when she spoke up at a shareholder meeting in defense of another employee, disputing claims by the corporate owners that the employee was a "militant." This action, in the view of the Board, allied Ms. Wise with the other employee's efforts to secure improved working conditions, for which retaliation by the company was not permitted.³¹⁷

Even though, as noted by the Ninth Circuit, "concerted activities for the purpose of mutual aid or protection are not limited to union activities,"³¹⁸ there must be some element of concert. Often, as in the case of Gilbert Pugliese, an exercise of conscience may be initiated by the individual action of an employee, although it may be accompanied or quickly followed by sympathetic action by other employees. These initial individual actions are not necessarily unprotected; protection will depend on the factual circumstances. Individual complaining does not constitute protected activity.³¹⁹ However, when individual complaining coalesces with some expression inclined to produce group or representative action, the activity becomes protected.³²⁰

The thinness of the dividing line between the two types of cases is illustrated by decisions holding that a single employee's encouragement of individual fellow workers to present grievances is unprotected,³²¹ but a single employee attempting to induce his coworkers

316. 181 N.L.R.B. 535 (1970).

317. 181 N.L.R.B. at 536. Consider, too, the first NLRB decision in *Tanner*, which did not focus on the impact of the union, but which held that protests by a small group of employees in the unit to induce their employer to hire more blacks were protected under section 8(a)(1). *Tanner Motor Livery, Ltd.*, 148 N.L.R.B. 1402, *vacated and remanded*, NLRB v. *Tanner Motor Livery, Ltd.*, 349 F.2d 1 (9th Cir. 1967). See also note 353 *infra*.

318. *Salt River Valley Water Users Assn. v. NLRB*, 206 F.2d 325, 328 (1953).

319. *Indiana Gear Works v. NLRB*, 371 F.2d 273 (7th Cir. 1967); *Mushroom Transp. Co. v. NLRB*, 330 F.2d 683 (3d Cir. 1964); *Office Towel Supply Co.*, 201 F.2d 838 (2d Cir. 1951); *Southwest Latex Corp.*, 175 N.L.R.B. 358 (1969); *Gulf Container Corp.*, 161 N.L.R.B. 734 (1966).

320. *Hugh H. Wilson Corp. v. NLRB*, 414 F.2d 1345, 1348 (3d Cir. 1969), *cert. denied*, 397 U.S. 935 (1970).

321. *NLRB v. Northern Metal Co.*, 440 F.2d 881 (3d Cir. 1971); *Mushroom Transp.*

to join in a petition regarding a common grievance is protected.³²² Protection is also accorded if the individual is presenting grievances on behalf of others.³²³

In the Ninth Circuit's *Signal Oil* decision,³²⁴ an employee's remark, expressing sympathy with a threatened strike, was held to be concerted since, even though aimed at only one nonunion listener, it was related to group action. The employer had argued that in order to be protected, comments had to be made pursuant to a "plan," "joint scheme," or "pre-existing group understanding," with the specific design of urging those to whom it was addressed to engage in "group action." This argument was rejected by the court.³²⁵

The various attitudes of the courts of appeals toward what constitutes "concerted" activity were surveyed recently by the Third Circuit in *NLRB v. Northern Metal Co.*³²⁶ A nonunion employee's attempt to secure holiday pay, which he believed to be due him under the collective bargaining agreement, was held unprotected. The "constructive" concerted activity theory, utilized by one court to sanction any individual action to enforce a collective agreement,³²⁷ was rejected.³²⁸ The court relied in part upon language from the Seventh Circuit that "'it is necessary to demonstrate [at least] that the activity was for the purpose of inducing or preparing for group action to correct a grievance or a complaint.'"³²⁹ Seven years earlier, in the *Mushroom Transportation* case,³³⁰ the Third Circuit had extended this concept to include not only group action but also "talk looking toward group action."³³¹

Co. v. NLRB, 330 F.2d 683 (3d Cir. 1964); *Joanna Cotton Mills v. NLRB*, 176 F.2d 749 (4th Cir. 1949); *Union Carbide Corp.*, 171 NLRB 1651 (1968).

322. *Salt River Valley Water Users Assn. v. NLRB*, 206 F.2d 325 (9th Cir. 1953).

323. *Owens-Corning Fiberglass Corp. v. NLRB*, 407 F.2d 1357 (4th Cir. 1969); *Signal Oil & Gas Co. v. NLRB*, 390 F.2d 338 (9th Cir. 1968); *NLRB v. Guernsey-Muskingum Elec. Co-op*, 285 F.2d 8 (6th Cir. 1960).

324. *Signal Oil & Gas Co. v. NLRB*, 390 F.2d 338 (1968).

325. 390 F.2d at 342. The employer relied on *Mushroom Transp. Co. v. NLRB*, 330 F.2d 683 (3d Cir. 1964); *NLRB v. Texas Natural Gasoline Corp.*, 253 F.2d 322 (5th Cir. 1958); *Continental Mfg. Corp.*, 155 N.L.R.B. 255 (1965); *General Elec. Corp.*, 155 N.L.R.B. 208 (1965). Instead, the court, 390 F.2d at 342, relied upon *NLRB v. J.G. Boswell Co.*, 136 F.2d 585, 595 (9th Cir. 1943), where it was held that "[a] discharge of a non-union employee because of a . . . belief that he was sympathetic to, or active in, a union, violates sections [8(a)(1) and (3)] The fact that the alleged union activity extends 'outside his own employment' is immaterial."

326. 440 F.2d 881 (1971).

327. *NLRB v. Interboro Contractors, Inc.*, 388 F.2d 495 (2d Cir. 1967).

328. 440 F.2d at 884-85.

329. 440 F.2d at 884, quoting *Indiana Gear Works v. NLRB*, 371 F.2d 273, 276 (1967).

330. *Mushroom Transp. Co. v. NLRB*, 330 F.2d 683 (1964).

331. 330 F.2d at 685. The Third Circuit in *Northern Metal* indicated that *Mush-*

These comments by the Seventh and Third Circuits highlight the fact that the group objective need not pertain to the entire collective bargaining unit; a group effort to vindicate an individual employee's grievance may suffice. Thus, leaving aside the implications of the presence of a union, Gilbert Pugliese might qualify for reinstatement under section 8(a)(1) of the Act in view of the sympathetic reaction of some of his fellow workers who made a group effort to see his individual grievance satisfied. Moreover, what Pugliese was asked to do as a part of his job was not merely unconscionable by his own measure; it was unlawful under the Refuse Act of 1899.³³²

2. *Refusal To Engage in Unlawful or Unconscionable Activities as Concerted, Protected Activity*

It is hardly a radical notion that employees should be protected from discipline or discharge for refusing to perform unlawful acts. This proposition has been applied by the Board in a variety of situations.

The Board has ruled that an employer violated the Act by attempting to induce an employee to give false testimony to a Board agent.³³³ Similarly, the Board has held that an employee's refusal to sign a false statement, regarding overtime payment found to be due her after a Labor Department investigation, is protected, concerted activity.³³⁴ And in another situation, the Board found that an employer had violated the Act by requiring employees to sign a petition exonerating the company of any wrongdoing.³³⁵

Related decisions hold that it is protected, concerted activity for employees to take steps to see that statutes are complied with by reporting alleged violations to appropriate authorities. Reporting possible violations goes beyond mere "griping" or complaining about working conditions, which may be unprotected. Thus, in *Gibbs Die Casting Aluminum Corp.*,³³⁶ an employer was found to have vio-

room Transportation represented the extent of its willingness to stretch the concerted, protected activity concept of section 7. 440 F.2d at 884.

332. Ch. 425, § 13, 30 Stat. 1152 (codified at 53 U.S.C. § 407 (1970)).

333. *Dubois Fence & Garden Co.*, 156 N.L.R.B. 1003 (1966). This same result had been reached in *Oregon Teamster Security Plan Office*, 119 N.L.R.B. 207 (1957), with the Teamsters as the employer asking the employee to give false testimony or to avoid testifying at all. In *National Springs Corp.*, 160 N.L.R.B. 148 (1966), the Board held it a violation for the employer to threaten reprisal against the author of an affidavit to the Board.

334. *Gem Knits, Inc.*, 174 N.L.R.B. 449 (1969).

335. *Fennel's Auto & Body Works, Inc.*, 171 N.L.R.B. 35 (1968).

336. 174 N.L.R.B. 75 (1969).

lated section 8(a)(1) by laying off three employees who had complained to local health department officials about excessive methylene chloride fumes in the plant. It was held that the employees were engaged in protected, concerted activity even though the employee making the actual complaint did not inform the department that she was acting on behalf of other employees or advise any coworkers that she had filed a complaint.³³⁷

In *Illinois Ruan Transport Co.*,³³⁸ the Board held that an employee could not be discharged for taking his truck to an ICC inspection station for a safety check. This case, together with other decisions on which the Board relied,³³⁹ establishes the proposition that an employee may not be denied the right to speak with public authorities regarding conduct of his employer that violates public regulations, and any discharge or discipline based on an employee's effort to present such a grievance would constitute an interference with concerted activity, protected under section 7. This position has judicial support.³⁴⁰

More often, however, the courts have examined the problem of unlawful acts from the perspective of employees who engage in unlawful behavior, rather than from the point of view of those who refuse to do so. The courts have been consistent in concluding that illegal activities by employees are not protected by the Taft-Hartley Act. An early, firm statement on this point was made by the Supreme Court in *NLRB v. Fansteel Metallurgical Corp.*,³⁴¹ and there are numerous subsequent authorities to the same effect.³⁴² In these decisions, the unprotected, illegal employee activity has involved violence or other demonstrative antisocial conduct.

337. 174 N.L.R.B. at 78-79. See also *Kansas Refined Helium Co.*, 176 N.L.R.B. 1037 (1969), where an employee's attempt to have the trial examiner's recommended order posted on the bulletin board was precluded from being the basis for disciplinary action.

338. 165 N.L.R.B. 227 (1967), *enforcement denied*, 404 F.2d 274 (8th Cir. 1969). The court of appeals denied enforcement because the employer had other, valid reasons for the discharge. Although the court found it unnecessary to reach the point, it was assumed, *arguendo*, that such a visit to the ICC would by itself be a protected, concerted activity.

339. 165 N.L.R.B. at 231-32, *citing* *Thurston Motor Lines, Inc.*, 159 N.L.R.B. 1265 (1966); *Socony Mobil Oil, Inc.*, 153 N.L.R.B. 1244 (1965), *enforced in part*, 357 F.2d 662 (2d Cir. 1966).

340. In *Walls Mfg. Co. v. NLRB*, 321 F.2d 753 (D.C. Cir. 1963), the court upheld the Board's finding that an employer had illegally fired an employee for writing a letter to the state health department concerning unsanitary conditions in the plant restroom.

341. 306 U.S. 240, 254-55 (1939).

342. See, e.g., *Trailmobile Div., Pullman, Inc. v. NLRB*, 407 F.2d 1006 (5th Cir. 1969); *Oneita Knitting Mills, Inc. v. NLRB*, 375 F.2d 385 (4th Cir. 1967); *Titan Metal Mfg. Co.*, 135 N.L.R.B. 196 (1962).

If these physical elements are absent, but the employee behavior remains unlawful, protection under the Act will still be denied. For instance, in *American News Co.*,³⁴³ the Magazine Mailers' and Deliverers' Union of North Jersey bargained for and won a wage increase from the American News Company but struck when the increase was suspended because of wartime wage restraints. The Board concluded that "a strike prosecuted in order to compel an employer to violate the [Stabilization] Act of October 2, 1942, is not within the concerted activities protected by section 7."³⁴⁴

Based on logic, policy, and the foregoing authorities, the conclusion in *American News* can be fairly adapted to Gilbert Pugliese's situation. Thus, refusing an employer's order to violate the Refuse Act of 1899 is within the concerted activities protected by section 7.

Had the dumping of oil by Jones and Laughlin into the Cuyahoga River not been unlawful, would Pugliese's refusal nevertheless have been protected? The issue becomes one of differing mores and a question of whose conscience is entitled to prevail.³⁴⁵ The principal issue in this context is the precise duty of loyalty, if any, owed by an employee to his employer.³⁴⁶ When the Supreme Court dealt with this issue in the *Jefferson Standard* case,³⁴⁷ it disapproved of concerted activities by television technicians who sponsored and distributed "second-class city" handbills designed to impugn the technical quality of their employer's product. The Court noted that the employees' attack related to no labor practice of the company, made no reference to wages, hours, or working conditions, but instead attacked policies "of finance and public relations for which management, not technicians, must be responsible."³⁴⁸ In the Court's judgment, "nothing could be further from the purpose of the Act than to require an employer to finance such activities."³⁴⁹

343. 55 N.L.R.B. 1302 (1944).

344. 55 N.L.R.B. at 1312.

345. This dilemma recurs throughout society in a wide array of situations. A recent illustration taken from the military is the problem in Viet Nam concerning the personal responsibility of soldiers carrying out superior orders which, while not clearly a violation of military law, are to the individual soldier morally indefensible. Consider, too, the defense extended by the courts to conscientious objectors who otherwise would be forced against their consciences to participate in immoral conduct. See, e.g., *Gillette v. United States*, 401 U.S. 437 (1971). Granted, the Constitution is operative in these cases, but the analogy to forcing employees to do acts which are by their personal moral codes unconscionable is clear. See also note 353 *infra*.

346. See generally Blumberg, *supra* note 54. See also Blades, *Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404 (1967).

347. *NLRB v. Local 1229, IBEW*, 346 U.S. 464 (1953).

348. 346 U.S. at 476.

349. 346 U.S. at 476. Even under these circumstances, Justice Frankfurter, joined by

However, in the *Jefferson Standard* case, the employees' acts verged on misrepresentations to the public. The employees were left unprotected because of the caustic and aggressive appeal to the public, which made no reference to a labor dispute and resulted in undue business damage to their employer.³⁵⁰ Operating on what the Court perceived as fair play, the behavior was left unprotected. It is quite another matter for an employee to refuse to perform work he views as unconscionable. There may be no interference with the employer's legitimate business interests in this situation. Surely there is none if the employee can be assigned to other work and the dispute thereby ended. Even if the dispute reaches the point where the employer is requested to remedy the unconscionable conditions, the employee should be protected so long as no substantial business of the employer is disrupted. This test was applied to Jill Severn's case, and it is a reasonable minimum standard.³⁵¹

3. *The Effect of a Union on the Scope and Protection of Section 7 Rights*

The broad mandate of section 7, giving employees the right to engage in or refrain from organization, collective bargaining, or other concerted activities for mutual aid or protection, has been the central source of individual rights created by the Taft-Hartley Act. However, in particular situations these section 7 rights are tempered by the majority-rule principle of section 9(a),³⁵² which states that the selected employee representative is the exclusive collective representative for all employees in an organized bargaining unit. Tension between these two sections arises when a minority of union members or nonunion employees in the organized unit engages in concerted activities without union approval. To what extent does the vesting of exclusive bargaining power in the union limit minority employee rights? Or, putting the question another way, are individual members of an organized bargaining unit, such as Gilbert

Justices Douglas and Black, filed a strong dissent, concluding that the majority had misconstrued "legislation designed to put labor on a fair footing with management." 346 U.S. at 480.

350. 346 U.S. at 476.

351. See text following note 315 *supra*. Cf. Civil Rights Act of 1964, tit. VII, § 701(j), added by Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 2(7), 86 Stat. 103: "The term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business."

352. 29 U.S.C. § 159(a) (1970).

Pugliese, required to channel their concerted activity exclusively through their bargaining representative, with no concurrent or subsequent recourse if the bargaining representative proves unhelpful?

In *NLRB v. Tanner Motor Livery, Ltd.*,³⁵³ the Ninth Circuit denied protection to activity which was admittedly concerted, because the picketing employees had failed to discuss their grievance with the union before initiating action designed to increase the hiring of blacks by their employer. A review of the choices open to the *Tanner* court and the few pertinent cases subsequently decided suggests that the principle enunciated in *Tanner* may be given wide application.

When a union is operating in a collective bargaining unit, section 9(a) advances industrial stability by assuring the employer that his only bargaining adversary will be the authorized representative and that he need not deal with factions whose demands might conflict with those of the majority. This concept was central to the Supreme Court's decision in the *Allis-Chalmers* case³⁵⁴ in which fines by a union against its members who had violated the union's constitution and bylaws by crossing picket lines during a strike were upheld. Relying on fair representation cases,³⁵⁵ the Court spoke of the importance of majority rule and the concomitant loss of some individual rights in the bargaining process that employees in the unit must suffer.³⁵⁶

The Court in *Allis-Chalmers* invoked the majority-rule principle to dispose of a problem between individual employees and their union. Usually, however, the problem of majority rule and minority protests has arisen in the context of bargaining demands. Probably

353. The *Tanner* case originally came before the Board in 1964, which held that the employer had violated section 8(a)(1) by discharging two employees who had engaged in the protected, concerted activity of protesting their employer's alleged racially discriminatory hiring practices. 148 N.L.R.B. 1402 (1964). The Ninth Circuit affirmed the Board's finding that the concerted activities of the employees were protected under section 7 of the Act. However, the court remanded the case for the Board to consider whether any such activities should be channeled through the established collective bargaining representative pursuant to the requirements of section 9(a). 349 F.2d 1 (1965). On remand, the Board reaffirmed its original finding, reasoning that section 9(a) was irrelevant since the employees were not "acting in derogation of their established bargaining agent" by seeking to end "morally unconscionable" behavior. 166 N.L.R.B. 551 (1967). The Ninth Circuit finally held that by failing in their "obligation" to speak first with the union representative, the employees were deprived by section 9(a) of the protection otherwise provided for concerted activity. 419 F.2d 216 (1969).

354. *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175 (1967).

355. 388 U.S. at 180, citing *Steele v. Louisville & N.R.R.*, 323 U.S. 192 (1944); *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1959).

356. 388 U.S. at 180-82.

the most well-known decision of this type is *NLRB v. Draper Corp.*,³⁵⁷ decided nearly thirty years ago by the Fourth Circuit. A group of employees struck to protest alleged delaying tactics by their employer in contract negotiations with the certified union. The union did not call, authorize, or sanction the strike, which the court characterized as "wildcat" and refused to protect under section 7. The court stated that "employees must act through the voice of the majority or the bargaining agent chosen by the majority" in order to promote effective bargaining.³⁵⁸ Clearly, the court feared that extending protection to minority action would lead to a breakdown of the collective bargaining process, and, no matter what its goals, a protected but unauthorized strike would erode the representative status of the certified union. This viewpoint prevailed in a number of subsequent decisions.³⁵⁹

Despite the general disapproval of minority strikes, the Fifth Circuit introduced a more flexible approach in 1964 in *NLRB v. R.C. Can Co.*³⁶⁰ The court held that minority action could be protected when taken in support of union objectives. The court recognized the importance of bargaining with an exclusive agent, but laid greater stress on the competing interest of allowing union members to "speak effectively in behalf of their own organization and the aims and objectives which it collectively seeks to assert in their behalf."³⁶¹ The court fashioned the following test: If the minority's action was "in criticism of, or opposition to, the policies and actions" previously adopted by the majority, such "diverse, dissident action is not protected. . . . If, on the other hand, it seeks to generate support for an acceptance of the demands put forth by the union, it is protected"³⁶²

In the *Tanner* case, the Ninth Circuit had its choice, but rejected *R. C. Can* in favor of *Draper*, which it viewed as "more in accord with the concept of orderly bargaining premised upon democratic union processes."³⁶³ The court in *Tanner* limited somewhat the plenary sweep of *Draper* by reserving as premature the question of what action the minority group might take if the majority (the

357. 145 F.2d 199 (1944).

358. 145 F.2d at 203.

359. *NLRB v. Sunbeam Lighting Co.*, 318 F.2d 661 (7th Cir. 1963); *Plasti-Line, Inc. v. NLRB*, 278 F.2d 482 (6th Cir. 1960); *Harnischfeger Corp. v. NLRB*, 207 F.2d 575 (7th Cir. 1953); *NLRB v. Warner Bros. Pictures, Inc.*, 191 F.2d 217 (9th Cir. 1951).

360. 328 F.2d at 974.

361. 328 F.2d at 979.

362. 328 F.2d at 979.

363. 419 F.2d at 221.

union) refused to press for the requested objective.³⁶⁴ If this were to happen, the focus would shift to the duty of fair representation and the principles enunciated in *Vaca v. Sipes*.³⁶⁵ In *Vaca*, the Supreme Court articulated and applied the test that "[a] breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of a collective bargaining unit is arbitrary, discriminatory, or in bad faith."³⁶⁶

The treatment of the concerted minority action question in *Tanner* has recently been reinforced by the decision of the Fifth Circuit in *NLRB v. Shop-Rite Foods, Inc.*³⁶⁷ The case involved a minority walk-out without consultation with union officials, who later disapproved of the strike. The Fifth Circuit, which had previously constructed the *R.C. Can* approach, now dismissed it as "of doubtful viability" since it had not been referred to in subsequent Fifth Circuit cases and because it had been rejected in *Tanner*.³⁶⁸ The court was concerned about the breadth of the *R.C. Can* test:

If union objectives are characterized in general terms—such as wages, job security, conditions of employment and the like—one can assume that in a great majority of instances minority action will be consistent with one or more of those objectives. If *R.C. Can* is not applied with great care it would allow minority action in a broad range of situations and permit unrestrained undercutting of collective bargaining.³⁶⁹

The court in *Shop-Rite* did not completely discard the *R.C. Can* test, but limited it to minority action toward a "specific, previously considered and articulated objective."³⁷⁰ Realistically, this narrower proposition substantially eviscerates *R.C. Can*.³⁷¹

364. 419 F.2d at 221. The court later noted:

We think it arguable that in cases where employees, not acting through the union, initiate in a peaceful and non-disruptive manner an activity which would otherwise be protected under section 7, but is not by reason of section 9(a), the employer has a duty to tell them that the matter must be taken up through the union, and, if the employer does not do so, he has waived his right to object on that ground, so that section 7 becomes fully operative. We do not decide this question; we think it is for the Board to decide in the first instance.

419 F.2d at 222.

365. 386 U.S. 171 (1967).

366. 386 U.S. at 190.

367. 430 F.2d 786 (1970).

368. 430 F.2d at 790-91.

369. 430 F.2d at 790.

370. 430 F.2d at 790.

371. The court in *Shop-Rite* did offer a final disclaimer: "We do not hold that there cannot be circumstances in which an employee or minority group of employees, may engage, without reference of the matter to union processes, an action which is protected under section 7" 430 F.2d at 791.

In a case now working its way through appeal, it appears that the NLRB has accepted the *Tanner-Shop-Rite* rationale. *The Emporium*³⁷² involves the discharge of two employees for picketing their employer's store because of alleged racial discrimination against employees. Although it was the "official" union position that employer discrimination existed, the union's approach was to process the charges through traditional grievance and arbitration channels. The employees were seeking more rapid results, and they embarked on a public education and boycott campaign. The trial examiner's report, adopted by the Board, found:

It would be absurd to say that because they [the pickets] and the Union had a common ultimate objective, these four employees were somehow implementing or strengthening the Union in its position. They were acting outside the agreement and contrary to the Union's advice and urging.³⁷³

The *Tanner-Shop-Rite* doctrine has important implications for employees such as Pugliese who resist the polluting activities of their employer in circumstances where a certified bargaining representative is present. If the objective of the resistance is to effectuate a change in conditions of employment which would pertain to the entire bargaining unit, these employees must turn to their union for help. If the union is amenable, a contract provision could be sought to give employees the desired protection.³⁷⁴ If the union declines to pursue this objective, there would likely be no recourse under *Vaca v. Sipes* since the union's refusal would almost certainly be free from arbitrariness, bad faith, and discrimination. Thus, assuming that the protection sought does not constitute a "specific, previously considered and articulated objective" of the union, the employee may be left without recourse, unless the employer has waived his right in the manner discussed in *Tanner*.³⁷⁵

Faced with this dilemma, an employee in Pugliese's position could take a stand resulting in discharge or discipline and then request the union to process a grievance upon his behalf seeking reinstatement. Since almost all union contracts have a "just cause" provision limiting discharges, a grievance of this type would generally be appropriate.³⁷⁶ There is considerably less likelihood that

372. 192 N.L.R.B. No. 19, 77 L.R.R.M. 1669 (1971), *appeal pending*, No. 71-1656 (D.C. Cir.).

373. 192 N.L.R.B. No. 19, at —, 77 L.R.R.M. at 1670.

374. See text accompanying notes 414-19 *infra*.

375. See note 364 *supra*.

376. Even so, the economic burden on any worker in this situation highlights the

the union would refuse to process this grievance in good faith on nonarbitrary and nondiscriminatory grounds; in fact, this might well be a type of grievance the union would be actively interested in supporting.

Two further distinctions must be recognized. First, it may be that an employee such as Pugliese will be chiefly interested in ending his *personal* involvement in continued pollution by his employer; his objective is to be relieved of the task of pressing the "pollution button," even though he realizes that others in the unit will continue to be required to do it.³⁷⁷ Second, it is possible that the objective sought, whether personal to a single employee or a broader goal with ramifications for the entire bargaining unit, concerns a matter outside the scope of what has traditionally been mandatory bargaining subject matter.

The Ninth Circuit in *Tanner* dealt with both of these points by concluding, in both opinions, that picketing by employees in support of a policy of nondiscriminatory hiring did "relate to terms and conditions of employment."³⁷⁸ Instead of referring to nondiscriminatory hiring as a mandatory subject for bargaining, the court simply called it a "proper subject" of collective bargaining.³⁷⁹ The court may have been choosing its words very carefully since the Board and the courts have been ambiguous about whether "conditions of employment" must be involved for activities to be protected by section 7 to the same extent as in determining mandatory subjects for bargaining. This ambiguity stems from section 7 cases in which no organized bargaining units exist and the duty to bargain is not pertinent. For example, Jill Severn's activity on behalf of Radical Women and minority hiring in the construction trades was protected under section 7. Yet her activity could not have been characterized as involving "conditions of employment" in a bargaining sense. Applying the tests of *Pittsburgh Plate Glass* and *Borg-Warner*, nothing vitally affecting her fellow employees was at issue and no aspect of the employer-employee relationship was settled.

Surely the scope of section 7 is not reduced by the existence of a union, notwithstanding the implications of *Allis-Chalmers*. Em-

importance of seeking, in contract negotiations, provisions of the type discussed at text accompanying note 420 *infra*.

377. This was in fact Pugliese's situation during his first round with the company. He was content for a considerable period of time not to be personally required to dump the oil, although others in the unit continued to perform this task. See text following note 56 *supra*.

378. 349 F.2d at 4; 419 F.2d at 218.

379. 419 F.2d at 218.

ployees do become subject to majority rule when a union is certified; but if employees have majority support in the unit, they should be able to engage in activity for mutual aid or protection to the same extent as if no union were present since they theoretically will be able to direct union policy in pursuit of their objectives (except for matters waived by a collective bargaining agreement). When there is no union, often there is no inquiry of any kind as to whether the activity relates to "terms and conditions of employment." No inquiry was made as to *Jill Severn*, indeed, it could not have been since the Board noted in *Severn's* case that activity for mutual aid or protection need not even relate to one's own employer.

The Ninth Circuit's finding of unprotected activity was based on the language of section 9(a) of the statute. That section designates certified unions as "exclusive representatives . . . in respect to rates of pay, wages, hours of employment, or other conditions of employment," with the proviso that individual employees or groups of employees have the right to present individual grievances to their employers without the intervention of the union as long as the union has the opportunity to be present.³⁸⁰ The court in *Tanner* observed: "There appears to be a difference between collective bargaining and presenting grievances, else why did the Congress limit the provision in section 9(a) to grievances?"³⁸¹ One effect of this difference, in the court's opinion, was to restrain employees from bargaining indirectly through the grievance procedure over subject matter which should be left to the negotiation and administration of the collective bargaining contract. "Thus, the desire of employees for non-discriminatory hiring, while a proper subject for collective bargaining, may not be a proper basis for a grievance."³⁸² However, this proposition should operate in the other direction as well. To paraphrase the court's language: Employer discipline over a refusal to do work which yields unconscionable pollution, while possibly not a proper subject for collective bargaining, may still be a proper basis for a grievance.

In fact, the *Tanner* court was conscious of this distinction. In its second opinion, the court noted that the desire of the employees for nondiscriminatory hiring related to a condition of employment "affecting the entire bargaining unit"—a condition which was not "personal" to the two employees who were picketing.³⁸³ The court

380. 29 U.S.C. § 159(a) (1970).

381. 349 F.2d at 5.

382. 349 F.2d at 5.

383. 419 F.2d at 218.

also explained some of its previous decisions upholding individual employee action notwithstanding the presence of a union on the basis that the activity involved the presentation of grievances under section 9(a).³⁸⁴ In one of these earlier decisions, the court had expressly rejected an employer's argument that under section 7 activities for "other mutual aid or protection" must be related to "the purpose of collective bargaining."³⁸⁵

The conclusion that emerges from the language of sections 7 and 9(a), as they have been construed by the Board and courts, is that activity for mutual aid and protection by a minority of employees which is not aimed at all employees in the unit—which is not bargaining-oriented but "personal"—remains protected, notwithstanding the presence of a union and the application of the *Tanner* and *Shop-Rite* decisions. Otherwise, employees should be advised that the presence of a union means not only the loss of individuality which attends majority rule, but also a diminution of the substantive scope of their protection under section 7.

4. *Statutory Protection for Individual Refusals To Contribute to Unlawful Employer Activities*

The case law clearly establishes that unlawful employee conduct is unprotected.³⁸⁶ Conversely, it follows that a concerted refusal to obey an employer's order to violate the law is protected. But, where there is a union, any such refusal by employees may have to be sent under *Tanner* and *Shop-Rite* through union channels from which a satisfactory resolution may never emerge. This problem would be circumvented by statutory protection which would provide that a refusal by an employee to perform work that directly contributes to a violation of the law would not be deemed a strike and would be protected under section 7.

There is direct precedent for such an approach in section 502 of the Taft-Hartley Act.³⁸⁷ That section provides, in part, that work stoppages by employees "in good faith because of abnormally dangerous conditions for work at the place of employment" shall not be deemed a strike under the Taft-Hartley Act. Illustrative of the application of this section is the decision of the Third Circuit in *Phil-*

384. 419 F.2d at 219 n.1, discussing *Salt River Valley Water Users Assn. v. NLRB*, 206 F.2d 325 (9th Cir. 1953); *Morrison-Knudsen Co. v. NLRB*, 358 F.2d 411 (9th Cir. 1966).

385. *NLRB v. Morrison-Knudsen Co.*, 358 F.2d 411, 413 (9th Cir. 1966).

386. See text accompanying notes 341-44 *supra*.

387. 29 U.S.C. § 143 (1970).

adelphia Marine Trade Association v. NLRB.³⁸⁸ In that case, a group of longshoremen refused to unload one ship by a method that they thought was abnormally dangerous. The Trade Association did not contest the NLRB's finding of abnormally dangerous conditions, but argued that its subsequent lockout of all longshoremen "was justified because its purpose was to compel the union to abandon a 'quickie strike,' and to compel the submission of the dispute to arbitration."³⁸⁹ The court stated: "The short answer to this is because the union's activity was found to come within the ambit of section 502, it was not a strike in violation of the contract, but, on the contrary, was protected activity."³⁹⁰

In order for protection designed along the lines of section 502 to be meaningful, however, the subjective good faith belief of the employees as to the existence of abnormally dangerous or unlawful conditions should be sufficient to invoke the statute. It is this issue—whether an objective or subjective test is to be applied—that has dominated the litigation under section 502. In *NLRB v. Knight Morley Corp.*,³⁹¹ a subjective test was applied: all that need be shown is that the workers could reasonably consider the working conditions to be abnormally dangerous.³⁹² In later decisions, however, the NLRB and the Eighth Circuit have concluded that an objective test for abnormally dangerous working conditions is appropriate.³⁹³ Furthermore, as the Board has recently stated,

Absent the emergence of new factors or circumstances which change the character of the danger, work which is recognized and accepted by employees as inherently dangerous does not become "abnormally dangerous" merely because employee patience with prevailing conditions wears thin or their forbearance ceases.³⁹⁴

Even under the Board's approach, employees should be protected

388. 330 F.2d 492, *cert. denied*, 379 U.S. 833 (1964).

389. 330 F.2d at 495.

390. 330 F.2d at 495.

391. 251 F.2d 753 (6th Cir. 1957), *cert. denied*, 357 U.S. 927 (1958).

392. 251 F.2d at 759. The condition in question was an unusually unpleasant combination of dust, grit, heat, and humidity inside the plant, due in large part to malfunctions in the blower providing the ventilation required by Michigan's statute. 251 F.2d at 756.

393. See, e.g., *NLRB v. Fruin-Colnon Constr. Co.*, 330 F.2d 885 (8th Cir. 1964); *Curtis Mathes Mfg. Co.*, 145 N.L.R.B. 473 (1963). In *Fruin-Colnon*, the construction of section 502 by the Sixth Circuit in *Knight Morley* was expressly rejected. 330 F.2d at 892. In the *Curtis Mathes* case, decided before *Knight Morley*, an opposite result was reached on virtually identical facts.

394. *Anaconda Aluminum Co.*, 197 N.L.R.B. No. 51, at 20, 80 L.R.R.M. 1780, 1782 (1972), *citing* *NLRB v. Fruin-Colnon Constr. Co.*, 330 F.2d 885 (8th Cir. 1964).

from extraordinary danger that exists above and beyond the normal hazards of their work. Yet, such protection will have little significance unless activated by the good faith belief of the employees as to the nature of the extraordinary danger. These points were recognized recently by the Third Circuit in *Gateway Coal Co. v. United Mine Workers*.³⁹⁵ In conjunction with a dispute between the union and the employer over a reduced air flow in a mine shaft, it was discovered that certain foremen had been making false entries on the log book recording the air flow.³⁹⁶ When these foremen were reinstated, the employees, led by the union, walked off the job. The employer sought to deal with the situation under those sections of the contract providing for final and binding arbitration of "any local trouble of any kind" at the mine.³⁹⁷ Acknowledging the strong federal policy in favor of arbitration, the court nevertheless reached the following conclusions:

Considerations of economic peace that favor arbitration of ordinary disputes have little weight here. Men are not wont to submit matters of life or death to arbitration and no enlightened society encourages, much less requires, them to do so. If employees believe that correctible circumstances are unnecessarily adding to the normal dangers of their hazardous employment, there is no sound reason for requiring them to subordinate their judgment to that of an arbitrator, however impartial he may be.³⁹⁸

The suit in *Gateway Coal* was not brought under section 502, but the court supported its conclusion by referring to section 502 and by citing its earlier decision in *Philadelphia Marine Trade Association* and the Sixth Circuit's *Knight Morley* decision.³⁹⁹ Nevertheless, the opinion, although salutary in outcome, may not persuade the Supreme Court, which has taken the case on certiorari.⁴⁰⁰

A revival of the subjective test utilized in *Knight Morley* could ameliorate the problem of the *Tanner* doctrine. If a minority of employees protest what they in good faith believe to be abnormally dangerous working conditions, their activity cannot be deemed a

395. 466 F.2d 1157 (1972), *cert. granted*, 41 U.S.L.W. 3462 (U.S., Feb. 26, 1973).

396. 466 F.2d at 1158.

397. 466 F.2d at 1159.

398. 466 F.2d at 1160.

399. 466 F.2d at 1160. The Eighth Circuit's opinion in *Fruin-Colnon Constr. Co. v. NLRB*, 330 F.2d 885 (1964), was not cited. However, the dissenting judge observed that, as he read the statute, section 502 "requires a third party, a court, to determine the reasonableness of the union's belief in the abnormally dangerous condition." 466 F.2d at 1162.

400. 41 U.S.L.W. 3462 (Feb. 26, 1973).

strike and would be protected even if the employees did not elect to go to the union first. Applying a subjective standard to section 502 or granting statutory protection for an employee's refusal to obey an employer's order to contribute to unlawful activity is not contrary to the *Tanner* rationale. *Tanner* rests on the necessity of preserving the exclusivity of the union's role as the bargaining representative—a role undercut by activities of a minority of employees seeking to secure additional benefits or to apply pressure on the employer. The union, however, has no power to countenance violations of the law by its employees. Nothing the union could negotiate or arbitrate with the employer would solve this problem, short of agreement to accept the employee's refusal to perform the illegal act. Also, as *Gateway Coal* recognizes, "no enlightened society" should encourage, much less require, employees to arbitrate a matter of life or death. The same should be true of violations of the law. Forced negotiation or arbitration of these problems is materially different from requiring employees to subordinate their economic demands to those articulated by the chosen collective bargaining representative.

Perhaps section 502 suits will be exempted by the courts from the *Tanner-Shop-Rite* doctrine. But, absent this development, statutory protection of an employee's refusal to contribute to a violation of the law, either by amendment to section 502 or by independent legislation, would be helpful. Any such legislation would probably circumvent *Tanner* and *Shop-Rite* by inference, although express language to this effect could easily be incorporated.

V. ILLUSTRATIVE AND RECOMMENDED CONTRACT PROVISIONS

The extent to which out-plant environmental matters can be brought to the bargaining table will vary according to the type of contract language sought. Some of the attempts which have been made by labor have been previously discussed. Those provisions, and other ideas, need now to be considered against the legal backdrop of legislative history and case authority giving content to the duty to bargain.

A. *The IAM Environmental Shutdown Provision*

Under the established holdings of the NLRB, the provision negotiated by the IAM concerning environmental shutdowns⁴⁰¹ clearly covers a mandatory subject of bargaining. It is unnecessary to apply *Fibreboard* in analyzing this provision since the object of

401. See text accompanying note 76 *supra*.

the provision is not the decision to shut down, but the impact of the shutdown on the workers. Although the shutdown or layoff would be caused by economic problems precipitated by governmental requirements, this should be treated the same as shutdowns for other economic reasons. Bargaining is required over the impact of partial plant closings and complete plant shutdowns.⁴⁰²

B. *The United Farm Workers Economic Poisons Provision*

As earlier indicated,⁴⁰³ the United Farm Workers' contract has a provision that combines general ecological recitations with provisions concerning the use of pesticides that directly affect the worker's health as well as the welfare of the public. There should be no question that this provision represents a mandatory bargaining subject, even under the views of the courts of appeals. Justice Stewart in *Fibreboard* acknowledged that safety issues concerning the lives of the workers during their working experience were encompassed by the duty to bargain.⁴⁰⁴

C. *The Steelworkers and Glass Bottle Blowers General Policy Provisions*

It is not realistic to consider the provisions concerning general environmental policy negotiated by the Steelworkers or Glass Bottle Blowers⁴⁰⁵ as involving a strike issue; whether either is construed as a mandatory bargaining issue is academic. It is likely, nevertheless, that management would cooperate in fashioning such a provision, and the presence of this type of provision in a collective bargaining agreement would be a first step that might in succeeding contracts lead to more substantive arrangements. Moreover, it is possible that the contract provision would generate meaningful grievance and arbitration cases.

D. *The Pulp, Sulphite, and Paper Mill Workers Comprehensive Proposal*

Some parts of the proposal of the Pulp, Sulphite, and Paper Mill Workers⁴⁰⁶ should be regarded as mandatory subjects of bargaining

402. See *General Motors Corp.*, 191 N.L.R.B. No. 149, 77 L.R.R.M. 1537 (1971), petition for review denied sub nom. *UAW v. NLRB*, 470 F.2d 422 (D.C. Cir. 1972); note 211 *supra*.

403. See text accompanying notes 143-45 *supra*.

404. 379 U.S. at 222.

405. See text accompanying notes 142 & 152 *supra*.

406. See text accompanying notes 132-41 *supra*.

under existing law, such as the environmental layoff protection. Other parts, such as the contract provision for disclosure of financial records to support an employer's claim of high pollution abatement costs (other than as a part of required bargaining over threatened layoffs or suspensions), would be met with claims of managerial prerogatives. It can be argued that all such information is relevant to job security as information to be used by a union to avert layoffs. But this is what Justice Stewart's opinion in *Fibreboard* was all about—the fact that an issue affects job security is not enough in all cases.⁴⁰⁷

The same problem occurs with regard to the provision of the Pulp, Sulphite, and Paper Mill Workers' proposal earmarking a percentage of investment and profits for environmental research.⁴⁰⁸ This type of provision not only raises a management prerogative question, but also requires an allocation by management of capital funds—exactly the sort of thing that Justice Stewart was talking about in *Fibreboard*⁴⁰⁹ and that was picked up subsequently in the *Darlington* case.⁴¹⁰ Yet, this is an example of a provision where Justice Stewart's narrow interpretation is harmful. If employees wish to press for these demands and if their lives are significantly affected,⁴¹¹ the law and times should adjust. Employer prerogatives are not written in stone, and this provision would settle an aspect of the employer-employee relationship.⁴¹² It is a condition of employment on which

407. 379 U.S. at 222-23.

408. Compare the one-half cent per hour industry contribution for environmental research won by the United Rubber Workers in 1970. Pearlstine, *Labor's Pollution Campaign Goes Up in Smoke*, Wall St. J., April 19, 1971, at 14, col. 3.

409. 379 U.S. at 223.

410. *Textile Union Workers v. Darlington Mfg. Co.*, 380 U.S. 263 (1963), involved the decision by a board of directors to close down a plant rather than recognize the newly elected union. Faced with the question whether this action constituted violations of sections 8(a)(1) and 8(a)(3), Justice Harlan, speaking for the Court, asserted:

Whatever may be the limits of § 8(a)(1), some employer decisions are so peculiarly matters of management prerogative that they would never constitute violations of § 8(a)(1), whether or not they involved sound business judgment, unless they also violated § 8(a)(3). Thus it is not questioned in this case that an employer has the right to terminate his business, whatever the impact of such action on concerted activities, if the decision to close is motivated by other than discriminatory reasons.

380 U.S. at 269.

411. Whether or not employees are *vital* affected, to use Justice Brennan's *Pittsburgh Plate Glass* term, is an inquiry in all cases as a practical matter. The substantiality of the impact of the subject on the employees necessarily is a factor in evaluating the subject as a potential strike issue.

412. As previously discussed, the Court in *Borg-Warner* apparently used this test as a means for determining what would or would not be a mandatory subject of bargaining. The ballot clause being proposed by the company was excluded because "[i]t settles no terms or condition of employment—it merely calls for an advisory vote of the employees. It is not a partial 'no-strike' clause. A 'no-strike' clause prohibits the employees from striking during the life of the contract. It regulates the relations between the employer and the employees." 356 U.S. at 350.

bargaining should be required to the extent pressed by either party at the bargaining table.

The Pulp, Sulphite, and Paper Mill Workers' approach has one strategic advantage. By intermingling clearly mandatory provisions with arguably nonmandatory ones, the burden is shifted to the employer to winnow out the nonmandatory features. This may prove a delicate process, both from a legal and political standpoint. Management might choose to resolve such a problem by bargaining on the entire proposal until a resolution is reached, instead of picking the proposal apart on jurisdictional grounds.⁴¹³

E. *Suggested Provisions for Individual Employee Protection*

Three general types of provisions can be negotiated to protect the individual employee.⁴¹⁴ One would provide that no discipline or discharge of employees could be imposed for reporting an employer's pollution violation. This provision should clearly be mandatory under the Taft-Hartley Act. It is akin to the "just cause" provisions that have been around for years. There should not be particularly strong employer opposition to this type of provision.

Another possible provision would prohibit discipline or discharge for a refusal to perform work that directly contributes to unlawful pollution. This provision should also be mandatory under existing law. Employees can refuse to perform unlawful acts.⁴¹⁵ Conversely, employees are not protected if they are engaged in unlawful behavior or seek unlawful goals.⁴¹⁶ This provision can also be construed as an aspect of familiar "just cause" contractual language. Here, as in all of the contract provisions discussed, the grievance and arbitration process could play a significant role.

Finally, a third section could provide that no employee could be disciplined or discharged for refusing to perform work that directly contributes to improper pollution. Once again, this could be a part of the "just cause" provision, and the term "just cause" might be defined in the contract to exclude this type of behavior. The employees' interest in being able to refuse this type of work is clearly a condition of employment—not only would it be a "bone of contention"⁴¹⁷ between the employer and the employees, but also it would

413. As later indicated, this strategic feature also attends the conglomerate proposal suggested at text accompanying note 420 *infra*.

414. These provisions are hypothetical; to the author's knowledge they have not been negotiated in practice.

415. See text accompanying notes 333-40 *supra*.

416. See text accompanying notes 341-44 *supra*.

417. Weyerhaeuser Timber Co., 87 N.L.R.B. 672, 676 (1949).

be related to job security. Moreover, this type of provision directly involves the employer-employee relationship, and, in the language of *Borg-Warner*,⁴¹⁸ echoed in *Pittsburgh Plate Glass*,⁴¹⁹ it would settle an aspect of the employer-employee relationship. Admittedly, this is a subject to be negotiated and would call for a rule of reason. If the essence of an employee's job unavoidably involves environmentally harmful acts that the employee views as unconscionable (though not unlawful), and if no transfer is feasible, the employee might be lawfully fired. But in any case, construction of the contract provision would be required, and useful advantage might be taken of the grievance and arbitration procedures. Moreover, in the process the employer may be sensitized to environmental considerations not previously considered—a salutary by-product of including this type of provision in the bargaining mainstream.

F. *A Suggested Conglomerate Provision*

The following provision is suggested as a model for handling environmental problems through collective bargaining.⁴²⁰

(a) An employee shall in no way be penalized for refusing to perform a job or task, if his refusal is based on a good faith claim that the job or task will contribute to an unlawful or unduly hazardous pollution condition. Upon any such refusal, the employee shall be given suitable work elsewhere in the plant, if such work is available. If no suitable work is available, the employee shall be sent home, and the time lost by the employee shall not be paid for by the company.

(b) If the plant is closed partially or completely by any government agency for an alleged violation of a pollution control standard, all employees affected by the closing shall receive full compensation at their regular rate of pay for any time lost for a period of ____ days or until such time as the employees secure suitable employment else-

418. 356 U.S. at 350.

419. 404 U.S. at 178.

420. Although hypothetical, the various parts of this conglomerate provision have been adapted from a number of sources, such as Leonard Woodcock's environmental blackmail legislative proposal (see text accompanying notes 79-85 *supra*), the Pulp, Sulphite, and Paper Mill Workers' outline for an environmental protection committee (see text accompanying notes 135-36 *supra*), and various contract provisions designed to deal with health and safety problems. The health and safety provision after which paragraph "(a)" in the text is fashioned was negotiated by the UAW in Philadelphia in a contract between Local No. 1069 and the Vertol Division of Boeing Aircraft Company. That provision included the following language:

An employee shall not be discharged for refusing to work on a job if his refusal is based on a claim that said job is not safe or might unduly damage health Pending such determination, the employee will be given suitable work elsewhere in the plant, if such work is available. If no suitable work is available, he will be sent home. The time lost by the employee shall not be paid for by the company.

where, whichever is shorter. The company shall provide assistance in relocating employees and, wherever possible, shall retain the employees on the payroll by transferring them to other company operations. Employees shall not be paid for any time lost after having been offered suitable alternative employment, if such employees decline to accept such employment.

(c) There shall be established a joint union-management committee, consisting of three union and three company representatives to be known as the Environmental Committee. The committee shall establish minimum pollution standards which shall be within ten per cent of then existing federal standards. The committee shall hold meetings at least once each month, for the purpose of jointly inspecting, investigating, and reviewing pollution conditions, and for the purpose of making joint recommendations to eliminate unhealthy or undesirable conditions. A written record shall be kept of all matters handled by the committee. In the event of a tie vote, the issue may be submitted to the decision of a representative from [a local environmental protection group]. Time spent on work of the committee shall be paid time.

(1) Any committee representative may arrange for an inspection of facilities or a review or analysis of information by appropriate officials of government or independent agencies, provided that any such inspections shall be made in the presence of union and company representatives and that all reports, advice, recommendations, opinions, or findings, whether verbal or documentary, shall provide equal opportunity for comment and be equally available to the union and company.

(2) The committee shall serve as a Community Dispute Settlement Center, applying the techniques of mediation, fact-finding, and if feasible, arbitration to complaints from the community. The committee shall have authority to advertise its existence by means of local media outlets, such advertising to be conducted not less than once each month.

(d) There shall be established an Environmental Fund for purposes of pollution control and environmental protection, to be administered and disbursed by the committee, and to be funded by either the union or the company at their discretion, or by the terms set forth in this contract. A treasurer, appointed by the committee, shall submit a financial report once every three months. The fund shall be audited by a certified public accountant once each calendar year, and the audit shall be prominently displayed in the plant and offices of the company.

(e) Upon determination by the committee that, for a consecutive period of not less than three days, normal and continuing production operations have caused pollution levels to exist in excess of committee standards in either customary work areas or in areas of company-provided leisure or convenience facilities such as lunch areas or park-

ing lots, the company agrees to contribute \$_____ to the Environmental Fund, and an additional \$_____ for each successive day in which the standards are exceeded. In making such determinations, the committee shall have access to the company's monitoring equipment or shall be authorized to secure and operate its own monitoring equipment.

(f) The union agrees that all production operations necessary for the continuing operation or installation of antipollution devices or procedures will be permitted throughout the period of any and all strikes. The category of jobs covered by this provision will be designated by the committee. The designations to apply throughout a given strike will be those established at a time six months prior to strike action.

(g) The union agrees to enforce a fine of not less than \$_____ to be paid to the Environmental Fund by any employee found by the committee to have violated, without authorization, company pollution regulations or regulations and procedures established by the committee, including reasonable standards limiting personal actions such as discarding personal refuse.

(h) The company and the union agree that there shall be no reprisal against anyone who volunteers information concerning company or employee actions related to pollution to any third party.

As indicated by the preceding discussion, some parts of this conglomerate provision clearly fall within the mandatory bargaining range, while others cannot be so clearly categorized. This contract proposal, like that of the Pulp, Sulphite, and Paper Mill Workers discussed above, has a tactical advantage. Just as riders on congressional bills often succeed as compromise means of securing passage of the basic legislation, some of the "riders" in the conglomerate provision might be successfully bargained over in the process of hammering out a final provision to deal with environmental problems.

VI. CONCLUSION

In the aggregate, organized labor's involvement in environmental problems has not been momentous. The reasons for this limited activity are varied, including the persistent fear, at the local level in particular, of job losses; the need to apply limited union resources to priorities that seem more immediate to the worker in the work place; the existence of other organizations and agencies designed to spend all of their energies on environmental problems; and presumed limitations on the legal possibilities within labor's jurisdiction.

However, recent developments have weakened some of these excuses, and others appear insubstantial upon close analysis. The job

scare is usually exaggerated; it may be nonexistent at the national level, and legislative or contractual protection can be achieved and should be sought for workers at the local level. The emergence of OSHA should boost considerably the health and safety protections for the workers in the plant, thereby facilitating a diversion of some resources to health and safety conditions outside the plant. Certainly it is now recognized that the environmental protection agencies cannot do the entire job, and for political reasons many of them will operate in circumscribed ways.

Some of the legal alternatives open to organized labor under the Taft-Hartley Act are clear. Contract provisions to protect against job losses in cases of environmentally required shutdowns can be sought. Provisions can be negotiated to protect workers against reprisal when they report unlawful polluting activities of their employer to an environmental protection agency. Contract protection can also be negotiated to provide that a refusal by a worker to perform work which contributes to unlawful pollution by his employer shall not constitute just cause for discipline or discharge.

Other Taft-Hartley Act alternatives are not as clear but deserve to be tested. At the bargaining table, a general provision dealing with community environmental problems such as the one achieved by the Steelworkers in a Canadian agreement⁴²¹ should be sought. Because of the provision's generality, management may not raise the *Borg-Warner* issue to test whether the provision must be bargained about. Even if this issue is raised, there is the chance that the provision will be classified as mandatory, particularly if it arises in the setting of the company town or the captive community. At the same time, environmental language can be inserted in provisions that have long been accepted as mandatory bargaining issues. The United Farm Workers Organizing Committee provision on pesticides is illustrative, even though that organization operates outside the jurisdiction of the Taft-Hartley Act.⁴²² Any number of variations in contractual language can and should be experimented with. As noted by Chamberlain and Kuhn:

If any conclusions can be reached as to the "appropriate" subject matter of collective bargaining, then, it is that one cannot label certain matters as bargainable and exclude others as beyond the union's interest. Such labels do not often stick. With changing economic, social, and political relationships, issues which were once of no concern to the workers, presumably because they were beyond their

421. See text accompanying note 152 *supra*.

422. Taft-Hartley Act § 2(3), 29 U.S.C. § 152(3) (1970).

control, or those not immediately affecting their welfare become of direct interest, with the possibility of control discovered or created. One may question whether the impact of the union on any given sphere of business operation is desirable or undesirable, just as one may wonder whether the influence of a trade association is beneficial or not, but this is a question to which the answer cannot be readily found simply by dividing all business matters into the classifications of those which are bargainable and those which are not bargainable.⁴²³

If there is no union, employees who are disciplined or discharged because of refusals to perform work which is environmentally injurious should file section 8(a)(1) charges, alleging interference with protected, concerted activities. If there is a union, and if there is no "just cause" provision of the type previously mentioned, these employees should file the same charge, arguing that the *Tanner* case is inapplicable. Alternatively, if there is a "just cause" provision—either a generic one or one particularized to environmental concerns—these employees should file a grievance and seek the active backing of their unions. If the unions will not cooperate, employees should call in the press, seek the support of fellow employees, contact the federal and state environmental protection agencies, and perhaps call in an OSHA inspector.⁴²⁴

For those few unions that have the resources and have demonstrated a willingness to press for legislation on environmental problems, there are several possibilities. The UAW's campaign to secure legislative protection for workers laid off, discharged, or otherwise adversely affected by environmental shutdowns should be supported. Also, new statutory protection, analogous to section 502 of the Act, could be sought so that a refusal to perform unlawful activities will not be deemed a strike. This protection would be especially meaningful in those states where employees may be individually liable for performing acts which contribute to unlawful pollution.⁴²⁵ Such employees are in a thoroughly untenable position when the regular performance of their jobs could lead to individual criminal sanctions.

Finally, unions can be influential through empirical activities. Fact gathering of the type engaged in by the OCAW as a prelude to OSHA, and by the UAW on occupational health and safety and

423. N. CHAMBERLAIN & J. KUHN, *supra* note 200, at 106-07.

424. An unfair labor practice charge based on an alleged breach of the duty of fair representation could be filed as well, but success under the *Vaca* case would be unlikely unless the union has been completely irresponsible. See text accompanying notes 365-66 *supra*.

425. See text accompanying note 167 *supra*.

environmental matters, can yield powerful data with which to confront employers, environmental protection agencies, or the press. But the collective data should not be allowed to gather dust; it must be analyzed, utilized, and periodically updated.

It is worth reiterating that the various suggestions put forth in this Article are intended to supplement, and not to substitute for, independent energies directed at environmental problems. Moreover, there are a great many employers who are responding voluntarily to eliminate adverse environmental consequences of their commercial and industrial operations. But in those lamentably numerous instances where substantial pollution remains, it is time to realize that the workers are genuinely, often predominantly, affected by their employers' pollution outside the plant as well as inside, and that there is a high degree of interconnection between the internal and external environments. A handful of unions and employers have recognized these facts, and others will as well as time passes and environmental conditions worsen. It is hoped that the unions will recognize one thing more—that attention by organized labor to community environmental problems represents, in the long run, an exercise in enlightened self-interest.

APPENDIX A

February 23, 1970

To All UAW Local Union Presidents and Chairmen of Bargaining Committees in the United States and Canada

Greetings:

As you know the UAW Executive Board has suggested for consideration by the delegates to the forthcoming Constitutional Convention in April that the problem of pollution become a matter for collective bargaining in 1970 negotiations. Moreover, the UAW has already been hard at work developing and promoting protective legislation on this problem. It will be one of the priority objectives of the UAW, both at the bargaining table and in the legislative branches of government in the United States and Canada, to seek to protect UAW members and the millions of other workers against environmental, occupational safety and health hazards which each year become increasingly a danger to life and limb.

In order to better prepare ourselves for 1970 negotiations on this subject and to promote strong protective legislation, we will need

information which, within the Union, can be supplied only by you and your fellow Local Union officers.

There are three basic types of in-plant pollution: noise pollution, particulate matter or dust pollution, and pollution from toxic fumes or gases.

There are about 6,000 potentially dangerous chemical substances used in modern industry today which can adversely affect the health of workers. There are only the weakest forms of protective standards concerning 450 of these chemicals. It is extremely important that we know what kinds of toxic materials are being used today in plants under UAW contract. Your Local Union Safety Committee or the stewards and committeemen should be helpful to you in obtaining the information required for response to questions #2 through #39.

Industry is one of the worst polluters of the air, the water and the land. The harmful effects upon the environment, upon the public welfare and the health of the nation is [*sic*] already receiving wide publicity. The health of thousands of our members is day by day adversely affected by the industrial pollution inside the plants. Industry has not taken sufficient protective action to eliminate pollution and its harmful effects. This is why it is necessary for the Union to make this a matter of collective bargaining and for this purpose it is essential that we have maximum information concerning industrial pollution in each of the plants under UAW contract. Your Local Union Conservation-Recreation Committee should be involved in compiling the requested data for response to questions #40-#54. Your stewards and committeemen could be most helpful as well in collecting information for you.

By helping us assemble this inventory about the environmental, occupational safety and health problems in your plant, you will be making an important contribution to the UAW effort to improve working conditions and to formulate strong federal legislation which will protect workers everywhere on their jobs and where they live.

The need for collecting this information is urgent. Please return the questionnaire, properly filled out, to Solidarity House, attention of the *President's Office*, promptly.

Fraternally,
Walter P. Reuther, *President*
Olga M. Madar, *Director*
Department of Conservation and
Resource Development

U.A.W.
ENVIRONMENTAL, OCCUPATIONAL HEALTH AND
SAFETY QUESTIONNAIRE

Local No. _____ Address: _____

No. of bargaining units _____

Names of Companies—Type of production and number of members

1. Are the companies that you hold contracts with covered by the Walsh Healey Act? (The Walsh Healey Act covers all companies which do work for the Government in excess of \$10,000 per year. Please indicate if you know or believe your plant is in that category.)
2. The standards for chemicals, sound and particulate matter are known as Threshold [*sic*] Limit Values. Are these values posted for your members to see?
3. Do the companies measure them with monitoring equipment to see that they are not exceeded?
4. How often? Daily _____ Weekly _____ Monthly _____ Yearly _____ Never _____
5. Do the companies allow the Union to see the results of their tests?
6. Does the Union ask that monitoring be done on a regular basis?
7. Does your Local Union do monitoring?
7. [*sic*] Are special medical tests given to UAW workers on a regular basis?
8. How often?
9. Are these tests required by your contract?
10. Are the results given to the individual?
11. Are the results given to the Local Union?
12. What kind of medical tests are performed? (For example: urine for lead, etc.)
13. What type of safety or health programs does the company have?
14. What suggestions do you have for improvements?
15. Do they have Doctors on duty?
16. How many?
17. All shifts?
18. Do they have nurses on duty?
19. How many?
20. All shifts?
21. To the best of your knowledge, list the harmful substances used by your members in the manufacturing process.

22. What substances seem to be giving your members the most trouble in the workplace? (For example: gases, particulate matter, noise, chemicals, etc.)
23. What needs to be done?
24. Should the employer provide more information about the nature of these dangers to health or safety?
25. How often are your plants visited by a safety inspector—state or federal?
26. Does your local ever spot check the safety or health engineering equipment used by members?
27. What is the result?
28. If an inspector has visited your plant, has he discussed his findings with the union?
29. If not, why not?
30. Have you been able to get copies of his reports?
31. Please state your views on the problems your local union has faced regarding safety.
32. Have there been accidents in the plants where the employees were unable to protect themselves from harm?
33. Also list diseases developed by your members and other facts bearing on the question of health damage.
34. How has management responded to union requests for better safety or health conditions?
35. Does your plant employ personnel solely for safety or health protection purposes?
36. Do you have a joint union-management safety committee in your plant?
37. If yes, list names and addresses of local union members who serve on this committee.
38. List names and addresses of any members who serve as safety people for your local union. (If same as above, indicate "same".)
39. Are they recognized by the company?
40. Do your members know if their plant is contributing to pollution of the surrounding air, water and land?
41. Please describe how this occurs and about how much pollution results. (Waste products flushed into rivers, gases or dust released into the air.)
42. Do any of your members know of examples where their lives have been directly affected by pollution caused by your plant? (Recreation facilities such as water or land destroyed, impaired or otherwise diminished in value for others.)

43. Please list examples.
44. Does your plant have devices that purify wastes before they are discharged into the air or water?
45. Are they maintained in working order?
46. Has your plant been "Cited" for air or water pollution violations by any Governmental enforcement agency?
47. Describe violation or violations.
48. Are your members assigned job tasks by plant management and/or supervision which results in air or water pollution?
49. If so, specify:
50. Are emissions from your company's smokestacks present in plant parking lots where your members park their cars during their work hours?
51. If emissions are present, are there ill effects to your members' cars?
52. List examples:
53. Does your local union have a Conservation-Recreation Committee?
54. If yes, please list names and addresses of Committee members.

NOTE: PLEASE RETURN TO UAW, SOLIDARITY HOUSE,
ATTENTION OF THE PRESIDENT'S OFFICE.
THANK YOU FOR YOUR COOPERATION.

Name of Local Union Officer returning Questionnaire
Local Union office held:

APPENDIX B

Ecological and Environmental Resolutions Considered at the Ninth Constitutional Convention of the AFL-CIO, Bal Harbour, Florida, November 18-24, 1971.

I. RESOLUTION PROPOSED BY OCAW

Environmental Protection

RESOLUTION NO. 72—By Delegates A. F. Grospiron, B. J. Schafer, Eldwood D. Swisher, Anthony C. Sabatine, Angelo Augustino; Oil, Chemical & Atomic Workers International Union.

WHEREAS, It is not necessary in this statement to reiterate the many ways by which modern man is polluting his environment. These have been well publicized and discussed in recent years. It is clear to all that pollution is making life less pleasant, is causing sickness, and indeed is threatening the very survival of the human race, and

WHEREAS, On many occasions labor unions have contributed significantly to the current efforts to stop pollution. Union members are well informed on the subject because they work in the industrial plants which contribute to pollution. They are the first to be exposed to the toxic and noxious fumes, vapors, liquids and solids which escape from the factories into the general environment, and

WHEREAS, On some occasions organized labor faces a conflict of interest between environmental clean-up on the one hand and economic security and prosperity on the other hand. This conflict is particularly poignant when employers assert that certain facilities must be closed, causing unemployment, when anti-pollution measures are deemed to be too expensive, and

WHEREAS, We believe that these conflicts can be resolved and must be resolved. The position of organized labor must be that environmental protection must have the highest priority, that pollution must be stopped at all costs, and

WHEREAS, In most cases existing industrial facilities can be so modified and improved as to eliminate polluting emissions. In most cases the owners can accomplish this through the expenditure of reasonable amounts of money. In most cases this will mean more, not less, employment because labor is required in the building, installation and day-to-day operation and maintenance of pollution control devices, and

WHEREAS, In some few cases it may be economically unsound to continue operations of obsolete, economically marginal facilities. There is no doubt that pollution control laws and regulations will force the shutdown of some places of employment. Of course the number of plants which actually must be closed will be far fewer than the number threatened by owners and managers who seek to escape compliance with environmental protection orders, and

WHEREAS, Whenever the closing of a facility does prove necessary, the workers displaced must be given economic protection and assistance. This must be considered one of the necessary costs of ending pollution, to be absorbed by the economy, private and public, as all other costs are absorbed; therefore, be it

RESOLVED: By the AFL-CIO Convention that it does support a full and effective elimination of environmental pollution at whatever cost is necessary, and be it further

RESOLVED:

1. That whenever environmental protection measures force the partial or full closure of a facility with resultant job losses, displaced

workers shall be protected in their economic well-being. Such protection can take the form of early retirement with adequate pension, extended severance pay, transfer to jobs in other facilities of the company involved, job retraining and job placement, and others. The costs should be borne by the employer where feasible. Whenever an employer demonstrates conclusively that it is not feasible for him to bear the costs, government must assume the responsibility.

2. That employers be inhibited from using the threat of unemployment as a method, avoiding compliance with pollution control standards by the passage of legislation providing that any employer making such a threat be subject to injunction forbidding the layoff of any worker until the necessity of such layoff or layoffs has been proven, with burden of proof on the employer and with public hearings and opportunity for cross-examination of employer witnesses provided.

3. That emissions standards be established without delay, based in principle on zero pollution; that such standards be uniform for all 50 States, Puerto Rico, and Canada; and that the standards be given the force of law.

4. That all federal, state and local government jurisdictions provide penalties of sufficient severity and that these penalties be enforced for violations of emission standards by individuals and corporations.

5. That victims of pollution, public and private, be entitled to sue polluters for triple damages plus replacement in kind.

6. That all waste waters be freed of such metallic toxicants as mercury, copper and chrome, and that all burdens of salts, organics and biologically active impurities be reduced to a level no higher than that of the receiving waters; that thermal pollution be regulated and that such other safeguards be established so that the waters receiving wastes be unaltered ecologically.

7. That the industrial practice of dispersing waste gases by such devices as overly tall stacks, be discouraged and that emphasis be placed upon process and apparatus improvements.

8. That the practice of injecting fluid wastes into subterranean disposal wells be immediately disallowed and that all such practices now authorized by state permits be revoked.

9. That city and county control boards be restricted in granting variances from lawful control orders.

10. That statewide zoning be applied to the location of factories, plants and industries.

11. That all states mandate class actions to replace the common-law principle of nuisance and to permit suits against polluters by persons otherwise unable to demonstrate direct injury.

12. That states provide penalties equivalent to a minimum of ten years' taxes against industries which "run away" from a state to avoid compliance with pollution standards and that such a penalty be a lien against the treasurer of the offending firm; that the United States Departments of Labor and of Health, Education and Welfare immediately establish guidelines by which it may reasonably be determined when an industry "runs away" rather than comply with environmental standards.

13. That no tax concessions of any manner be granted to any plant required to install devices, change processes or alter raw materials for the purpose of complying with an order to abate pollution and comply with control standards.

14. That any business activity using municipal facilities for the treatment of wastes or disposal, including sewerage and sewage treatment, be assessed weighted and equitable charges.

15. That no plant or business shall permit noise, light or radiation, in addition to gases, solid wastes and fluids, to escape into surrounding neighborhood.

16. That the affiliates, staff and officers of the AFL-CIO encourage constructive legislation for environmental control, support and aid politicians concerned with environmental protection, and exert their families' influence in the market place by purchasing and using products, materials, packaging and devices which are proven not to contribute to pollution or to the degradation of our environment, and to assist and encourage all organizations involved in the fight to maintain a viable ecology.

Referred to Committee on Resolutions.

II. RESOLUTIONS PASSED

Resolution No. 124: The Environment

The challenge of pollution is far from met, although there has been some improvement over the past two years.

In the administration of federal anti-pollution legislation, we urge that the National Oceanic and Atmospheric Administration be transferred from the Department of Commerce to the Environmental Protection Agency. The administration of the Refuse [Act?] should also be transferred from the Corps of Army Engineers to the Environmental Protection Agency, with responsibilities extended to cover

intra-state as well as inter-state navigable waters, underground waters, lakes, estuaries [*sic*], the contiguous coastal areas, and appurtenant land.

Changes in industrial processes, to abate air and water pollution, may cost jobs in one area and gain them in another sector. Workers, however, are badly in need of protection against environmental blackmail by management and possible misrepresentations of job loss resulting from the cost of complying with a government abatement order and where companies threaten to leave and relocate in another state or locality, whose laws and enforcement programs are softer on polluters.

Therefore, the federal air and water pollution acts should be amended to provide national emission standards on all existing stationary sources of both air and water pollution. The amendment should provide that any employer, alleging that an abatement order will cause layoffs, dismissals, or cessation of operations, must prove its case before an administrative hearing called by the federal agency involved. Any company, in those circumstances, which fails to demonstrate such relationship, would be subject to civil penalties. Any worker or workers' representative, using the protections and rights of the act, must be protected from management sanctions by non-discrimination provisions in the federal air and water pollution control acts.

If an actual job-loss is demonstrated, federal manpower training and other special programs should assist the workers.

Because of air pollution and the tremendous drain on energy fuels by internal combustion engines for automotive vehicles, we once again urge that the National Air Pollution Control Administration give top priority on developing alternative sources of power for such vehicles, particularly in the field of steam power.

Although the 1970 Clean Air Act Amendments streamlined the enforcement process, the federal, regional and state enforcement efforts have not been adequate. There should be a concerted crack-down on all violators of emission standards.

The AFL-CIO supports amendments to the federal Water Pollution Control Act which would:

Cover all navigable waters, underground waters, lakes, coastal areas, contiguous coast areas, soil wash from all sources, feed lots, sanitary landfills, and associated land problems affecting water quality.

Empower the federal government to establish national emission

standards. All industrial concerns releasing effluents into water would be required to measure and report the kinds and quality of such effluents to the federal government.

Provide for issuance of immediate abatement orders enforced by federal court orders. Civil and criminal penalties for violators should be stiffened. The 1899 Refuse Act should be made an important enforcement tool.

At least \$3 billion each year for the next five years, should be appropriated by Congress for federal grants to assist municipalities in construction or modification of sewage treatment plants.

Such a program could create more than 250,000 new jobs, many in areas of high unemployment, with a multiplier effect, adding as many as 300,000 additional new jobs. To assist needy communities, the present 66 percent federal matching ceiling should be increased to 80 percent.

Each state plan should require river basin planning as the foundation of its abatement program as a condition of receiving federal approval and financial assistance.

The nation is in need of a national land-use policy as an important and logical next step to improve and enhance the quality of our environment, and at the same time, provide for sound use and development, consistent with the economic and social needs of the American people.

Such a national land use policy should include the following: a federal grant-in-aid program to assist state and local governments in establishing or improving their land-use programs and managements, and adopting broad land-use laws and programs; a federal program to improve land-use planning and operations on federally owned lands; developing data on major land-use and planning trends; strengthening federal, state and local soil conservation programs.

We continue to support the family farm ownership, the break-up of huge land monopolies, and strict enforcement of the excess acreage provisions of federal reclamation laws.

We urge an expansion of the federal role and increased emphasis in solid wastes technology, in particular those dealing with separation, recycling and re-use of solid wastes. A broad and systematic program should give full consideration to human values, including the jobs of workers in the private sector as well as those employed in the disposal field.

Resolution No. 125: Energy

The AFL-CIO has time and again, over the past decade, called for a comprehensive natural resources and energy policy, integrated

with a full-employment economic policy which would protect and preserve the environment, protect the interests of the consuming public, and eliminate duplication of functions and waste among the scattered federal resources departments and agencies.

A long-range national energy policy is needed that will influence the percent of America's future energy requirements supplied by oil, natural gas, coal and uranium. Such a policy should develop a rational pattern of research, development and conservation of energy resources, resolution of problems of costs, supply, monopolization, pollution, and the necessary restructuring of the federal agencies engaged in these fields.

Just as the President is now advised by a statutory Council of Environmental Advisers, a similarly constituted Council on National Energy Policy should be created by Congress. The council's functions should include a close consultative relationship with the Environmental Protection Agency, annual reports to Congress on the state of the nation's energy posture, projections of energy resources and needs, and recommend research and development programs to help solve present and future problems of competition, new and improved technologies, consumer protection and foreign supply.

We urge the establishment by Congress of long-range programs to develop our enormous oil shale resource, and utilizing domestic coal reserves by converting them into supplies of low-pollution natural gas.

The creation of TVA-type development agencies are needed in order to most effectively achieve the national objectives of abundant low-cost supply of such new energy fuels, guard against monopoly, provide a federal cost yardstick to protect consumers, conserve the resources and prevent environmental damage.

We have long urged high priority to development of a feasible breeder reactor technology. We support congressional authorization of a demonstration breeder reactor to be constructed and operated by the Atomic Energy Commission, with the most meticulous protection against the terrible hazards of plutonium, one of the most dangerous materials. This should be done with full participation by the nation's scientific community, and protection against breeder reactors close to population centers.

While we endorse the recent strengthening by the Atomic Energy Commission of its standards, governing release of airborne radioactive materials to the general environment, we insist that such reductions be made to apply to all radiation workers as well.

We cannot emphasize too strongly the need for more resources

to be placed into the effort to achieve sustained energy from the fusion of the heavy hydrogen atom. The difficult problems that still lie ahead must be more rapidly resolved. Fusion power would make it possible to achieve an almost limitless supply of energy from the oceans.

The continuation of major and minor power brownouts and blackouts, in the past six years, underlies the need for legislation of the kind that the AFL-CIO has urged since 1959. Such a program would create a low-cost, reliable bulk power supply system for the United States, open to participation by all electric systems. The federal government should regulate the creation and operation of regional power supply systems. If such agencies fail to carry out the aims of the program, the federal government should build and operate them.

Once again, we urge Congress to investigate the increasing control over major energy sources by giant integrated corporations, the accompanying decline in competition, and the failure of the Federal Power Commission and the Department of the Interior to provide adequate protection of the public against energy monopolies.