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The sole stockholder of the Garwin Corporation, a New York apparel manufacturer, caused a similar manufacturing company to be incorporated in Florida. The Garwin Corporation then terminated its New York operations, discharged its employees, and resumed operations at the Florida location. The International Ladies' Garment Workers' Union, which represented a majority of the discharged employees, filed a complaint with the National Labor Relations Board, alleging that the Garwin Corporation had violated sections 8(a)(1), (3) and (5) of the National Labor Relations Act because the relocation was motivated by anti-union animus and because the discharged employees were deprived of their rights

* 4 CCH LAB. L. REP. ¶ 9503 (NLRB June 28, 1965), *petition to review and modify docketed*, No. 19478, D.C. Cir., 1965 (hereinafter cited as principal case).

guaranteed by section 7 of the act.[1] In addition, the union charged that the company had independently violated section 8(a)(5) by failing to bargain about the decision to move and about the effects of the relocation on the employees at the New York site. The Board found that the company had committed the alleged unfair labor practices and, as a remedy for the section 8(a)(1) and (3) violations, ordered the employer to cease and desist from the violations and to offer reinstatement with back pay to the New York employees at the old plant, if it were reopened, or at the new one, if the employer elected to remain there. To remedy the section 8(a)(5) violations, the Board ordered the employer to bargain "on request" with the union at the new site whether or not it represented a majority of the employees there.[2] However, the Board stated that any collective bargaining agreement resulting from the order to bargain would bar a certification petition of another union for only one year unless the ILGWU could reestablish its majority within that time in Florida.[3]

In recent years, more and more employers have moved their industrial operations to locales which lack union organization and which have low wage scales.[4] In determining whether any of the employer activities associated with these relocations constitute unfair labor practices, the Board and the courts must weigh the interests of the respective parties—management's right to make economic decisions, the unions' need for self-preservation, and the employees' right to bargain collectively through representatives of their own choice.[5] Thus, it has been held that an employer does not violate the act if the relocation is made primarily for economic reasons,[6]

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1. Sections 8(a)(1), (3), and (5) of the National Labor Relations Act (Wagner Act), 49 Stat. 449, 452, 453 (1935), 29 U.S.C. §§ 158(a)(1), (3), (5) (1964), provide in pertinent part:

It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7. . . .

(3) by discrimination . . . to encourage or discourage membership in any labor organization . . . .

(5) to refuse to bargain collectively with representatives of [the] . . . employees . . . .

Section 7 of the NLRA, 49 Stat. 452 (1935), as amended by the Labor Management Relations Act (Taft-Hartley Act), 61 Stat. 140 (1947), 29 U.S.C. § 157 (1964), provides that "employees shall have the right to self-organization [and] . . . to bargain collectively through representatives of their own choosing."

2. Principal case at 16003.

3. *Ibid.* Normally a collective bargaining agreement negotiated with the elected union representative bars the filing of an election petition for three years. See, *e.g.*, General Cable Corp., 139 N.L.R.B. 1123 (1962); Pacific Coast Ass'n of Pulp & Paper Mfrs., 121 N.L.R.B. 990 (1958).

4. See generally Note, 34 TEMP. L.Q. 136, 137 (1961); Saturday Evening Post, *The Fight for Industries Is Rough in Some Places*, April 9, 1960, p. 10; U.S. News and World Report, *Why Big Business Is Going "Small Town,"* Dec. 21, 1959, p. 89.

5. See generally Comment, 7 VILL. L. REV. 450, 452 (1962).

6. See, *e.g.*, NLRB v. Rapid Bindery, Inc., 293 F.2d 170 (2d Cir. 1961); NLRB v. Lassing, 284 F.2d 781 (6th Cir. 1960), *cert. denied*, 366 U.S. 909 (1961); NLRB v.

but does commit an unfair labor practice whenever, as in the principal case, the plant relocation is motivated in whole or in part by anti-union animus.[7] Nevertheless, even if the employer has valid economic reasons for the relocation, he commits an unfair labor practice if he fails to notify the union of his decision to move and fails to bargain about the effects of the relocation on the employees at the original site.[8]

In fashioning appropriate remedies for these unlawful relocations, which are often referred to as "runaway shops,"[9] the Board's primary objective has been to restore the *status quo ante*.[10] Although it might seem that implementation of this objective would produce a number of diverse remedies, the Board has in fact established a definite remedial pattern. When the operations are moved only a relatively short distance, the Board prescribes the same remedy that it uses in all other cases where an employer directly causes the loss of a union's majority:[11] the employer is ordered to offer the employees reinstatement with back pay and to bargain upon request with the union which has been representing his employees.[12] On the other hand, if the case involves a long-distance move, the Board has, at least prior to the principal case, permitted the employer to choose between two alternative courses of action: (1) resume operations at the abandoned plant, offer reinstatement with back pay to the employees, and bargain with their union representatives; or (2) remain at the new site, offer reinstatement with back pay to the employees, and, *conditioned upon proof of its ma-*

Houston Chronicle Publishing Co., 211 F.2d 848 (5th Cir. 1954); Brown Truck & Trailer Co., 106 N.L.R.B. 999 (1953).

7. See, *e.g.*, Sidele Fashions, Inc., 133 N.L.R.B. 547 (1961), *enforced per curiam*, 305 F.2d 825 (3d Cir. 1962); Industrial Fabricating, Inc., 119 N.L.R.B. 162 (1957), *enforced per curiam*, 272 F.2d 184 (6th Cir. 1959).

8. See NLRB v. Rapid Bindery, Inc., 127 N.L.R.B. 212 (1960), *enforced in part*, 293 F.2d 170, 176 (2d Cir. 1961); NLRB v. Standard Handkerchief Co., 4 CCH LAB. L. REP. ¶ 9101 (NLRB Feb. 15, 1965). In addition, the employer may have to bargain about the actual decision to relocate. See note 25 *infra*.

9. See 2 CCH LAB. L. REP. ¶ 3795. "Runaway shops" must be distinguished from total liquidations of a business, since the United States Supreme Court has held that an employer may close his "entire business," even if the liquidation is motivated by vindictiveness toward the union. Textile Workers v. Darlington Co., 380 U.S. 263, 272-74 (1965). In the principal case the Board adopted the Trial Examiner's finding that the Florida corporation was merely the alter ego of the New York corporation; therefore, the business was not really "liquidated." See principal case at 15998.

10. See, *e.g.*, Jacob H. Klotz, 13 N.L.R.B. 746, 778 (1939), *modified*, 29 N.L.R.B. 14 (1941). See generally Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 188-200 (1941).

11. See, *e.g.*, NLRB v. Warren Co., 350 U.S. 107 (1955); Franks Bros. Co. v. NLRB, 321 U.S. 702 (1944); Delight Bakery, Inc., 145 N.L.R.B. 893 (1964); Joy Silk Mills, Inc., 85 N.L.R.B. 1263 (1949), *modified and enforced*, 185 F.2d 732 (D.C. Cir. 1950).

12. See Rapid Bindery, Inc., 127 N.L.R.B. 212 (1960) (60-mile move); New Madrid Mfg. Co., 104 N.L.R.B. 117 (1953) (31-mile move); Rome Products Co., 77 N.L.R.B. 1217 (1948) (130-mile move). The justification for the use of this remedy is that the employees can accept the offer of reinstatement without substantial inconvenience to themselves.

jority status, bargain with the union.[13] Thus, it is apparent that the compulsory bargaining order in the principal case is a significant departure from the traditional remedial order for a long-distance "runaway shop."

To remedy unfair labor practices, the Board is required to issue a cease-and-desist order and is empowered to take any other affirmative action which will effectuate the policies of the act,[14] so long as it is not punitive.[15] Section 1 of the act specifically states that the statutory policies are to mitigate and eliminate obstructions to the free flow of commerce, to encourage collective bargaining, and to protect the employees' right to freedom of association and self-organization.[16] In addition, the United States Supreme Court has suggested that one purpose of the act is to prohibit discriminatory use of economic weapons which are designed to obtain future benefits for the employer and to discourage future collective action by the employees.[17]

In light of these purposes and policies, the Board's conditional bargaining order, the remedy used prior to the principal case, does not seem to "remedy" a long-distance "runaway shop." In the first place, back-pay awards are usually insufficient to compensate employees who have been discharged as a result of the relocation.[18] Second, former employees are usually unwilling to uproot themselves and their families in order to accept reinstatement at a new location,[19] and employers are not likely to return to their abandoned plants. Thus, collective bargaining between the principal parties is completely destroyed. Third, the conditional bargaining order allows an employer to utilize the economic weapon of plant relocation to establish and retain a non-union plant, which is usually the primary objective of his move.[20] Fourth, the requirement that the employer must give notice of a decision to move and bargain about the effects of the move is in no way enforced by the conditional bargaining order. Finally, the order does not deter other anti-union employers who might want to relocate in the future.

13. See, *e.g.*, Sidele Fashions, Inc., 133 N.L.R.B. 547, 556 (1961), *enforced per curiam*, 305 F.2d 825 (3d Cir. 1962); Industrial Fabricating, Inc., 119 N.L.R.B. 162, 174 (1957), *enforced per curiam*, 272 F.2d 184 (6th Cir. 1959); Mount Hope Finishing Co., 106 N.L.R.B. 480, 501 (1953), *rev'd on other grounds*, 211 F.2d 365 (4th Cir. 1954).

14. See NLRA § 10(c), 49 Stat. 454 (1935), as amended, 61 Stat. 147 (1947), 29 U.S.C. § 160(c) (1964).

15. See Local 60, United Bhd. of Carpenters & Joiners v. NLRB, 365 U.S. 651 (1961); Republic Steel Corp. v. NLRB, 311 U.S. 7 (1940).

16. 49 Stat. 449 (1935), as amended, 61 Stat. 136, 29 U.S.C. § 151 (1964).

17. See Textile Workers v. Darlington Co., 380 U.S. 263, 271 (1965).

18. See Farber, *Reversion to Individualism: The Back-Pay Doctrines of the NLRB*, 7 IND. & LAB. REL. REV. 262 (1954).

19. See MACDONALD, LABOR PROBLEMS AND THE AMERICAN SCENE 271 (1938); Farber, *supra* note 18, at 268.

20. See Note, 77 HARV. L. REV. 1100 (1964); Note, 112 U. PA. L. REV. 69 (1963); Comment, 7 VILL. L. REV. 450 (1962).

The remedy employed in the principal case, which requires recognition of the union at the new site, is obviously better than the conditional bargaining order. It more effectively restores the *status quo ante* because the union is still the certified bargaining agent, the position it occupied prior to the unlawful plant removal. It may also provide a nonpunitive means by which the Board can deter other unlawful relocations. Nevertheless, the remedy in the principal case does not fully effectuate the purposes and policies of the act.[21] Since a compulsory bargaining order in the context of a long-distance relocation compels all of the new employees to be represented by a union which they may not desire, those employees are inhibited in their right of self-organization and in their freedom to choose a majority representative, in direct contravention of the policies of section 7.[22] In addition, the order does not remedy the infringement upon the right of the employees at the old site to bargain about the effects of the move prior to the time of the actual relocation, although the employer may still be subject to a breach-of-contract suit if there is a provision in the old contract prohibiting relocation.[23] Furthermore, it should be noted that the reasoning of the United States Supreme Court in its recent decision in *Fibreboard Paper Products Co. v. NLRB*[24] could be extended so as to require an employer to bargain about the actual decision to relocate.[25] If such an expanded duty to bargain is recognized, then neither the compulsory bargaining order nor the conditional bargaining order would be a realistic remedy for violations of that duty.

There have been a number of other suggested remedies for long-distance "runaway shops," but each seems to be as unsatisfactory as the conditional bargaining order and the compulsory bargaining order. For example, the requirement that the Board's remedies be nonpunitive[26] would appear to preclude severance pay awards[27] and criminal sanctions.[28] An order to move back and reopen the old plant might re-

21. See 40 N.Y.U.L. REV. 997 (1965); 41 NOTRE DAME LAW. 267 (1965).

22. See NLRA § 7, 49 Stat. 452 (1935), as amended, 61 Stat. 140 (1947), 29 U.S.C. § 157 (1964).

23. See United Shoe Workers of America v. Brooks Shoe Mfg. Co., 187 F. Supp. 509 (E.D. Pa. 1960), *modified*, 298 F.2d 277 (3d Cir. 1962).

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

25. In *Fibreboard*, *supra* note 24, the Supreme Court held that an employer must, in some circumstances, bargain about the decision to subcontract. The Court's rationale suggests that other management decisions which may have an effect on employment conditions are mandatory subjects of bargaining. See generally 74 YALE L.J. 1472, 1476-77 (1965). In one case, White Consol. Indus., Inc., 4 CCH LAB. L. REP. ¶ 9704 (NLRB Sept. 24, 1965), the union raised the issue, but the Board dismissed the complaint, stating that "the Union did not object to Respondent's plans or request bargaining with respect to either the *decision* or its impending effect upon unit employees . . . ." *Id.* at 16451 n.1. (Emphasis added.)

26. See text accompanying note 15 *supra*.

27. See Farber, *supra* note 18, at 268.

28. See SUBCOMM. ON NLRB OF THE HOUSE COMM. ON EDUCATION AND LABOR, 87TH

store the exact *status quo ante*,[29] but it too appears punitive because a financial burden would be placed on the employer which is out of proportion to the injury caused to the employees at the old site.[30] In addition, an outright order to return might actually interfere with interstate commerce rather than promote it as the NLRA requires.[31] Although these criticisms might be answered if the Board encouraged relocation of the old employees by requiring the employer to pay higher incentive wages, to pay relocation costs, and to guarantee transfer of earned seniority rights,[32] it is doubtful that enough employees could be persuaded to move to the new site to continue the union's majority representation. In any event, it would appear unjust to place the burden of remedying the employer's unfair labor practice on innocent employees and their families.

Although all of the Board's post-relocation remedies can be criticized for either practical or legal reasons, it appears that the Board can remedy "runaway shops" under existing law by controlling them prior to relocation. Section 10(j) of the act authorizes the Board to seek appropriate temporary relief or a restraining order from a federal district court whenever it issues a complaint charging that any person "has engaged in or is engaging in an unfair labor practice."[33] Therefore, if a complaint is filed with the Board prior to the actual plant relocation, the Board can petition the court for an order requiring bargaining and maintenance of the *status quo*. The advantages of such an order are obvious. First, it would prohibit the employer from moving out machinery or terminating his lease and then claiming economic hardship as a defense to a later attempt by the Board to force him to return to his old plant. Second, it would strengthen the job security of the employees at the old site and ensure collective bargaining about the effects of an economically mo-

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CONG., 1ST SESS., HEARINGS ON ADMINISTRATION OF THE LABOR MANAGEMENT RELATIONS ACT BY THE NLRB pt. 1, at 27-28 (Comm. Print. 1961) [hereinafter cited as PUCINSKI REPORT].

29. In the principal case, the union requested this remedy at the hearing before the Board, see principal case at 16000, and is also seeking this remedy in its petition to review and modify the Board's order.

30. *But see* 40 N.Y.U.L. REV. 997, 1002 (1965).

31. See Jacob H. Klotz, 13 N.L.R.B. 746 (1939), *modified*, 29 N.L.R.B. 14 (1941).

32. See generally Zdanok v. Glidden Co., 288 F.2d 99 (2d Cir. 1961), *aff'd on other grounds*, 370 U.S. 530 (1962), *reversing* 185 F. Supp. 441 (S.D.N.Y. 1960); Aaron, *Reflections on the Legal Nature and Enforceability of Seniority Rights*, 75 HARV. L. REV. 1532 (1962); Note, 77 HARV. L. REV. 1100 (1964).

33. 61 Stat. 149 (1947), 29 U.S.C. § 160(j) (1965). Critics have repeatedly asserted that the injunctive provisions of the act are unfairly weighted against labor unions. See PUCINSKI REPORT, *op. cit. supra* note 28, at 27-52. However, Chairman McCulloch has declared that the Board intends to utilize the injunctive procedures more fully. See Address by Chairman McCulloch, Eighth Annual Joint Industrial Relations Conference, Michigan State University, 49 L.R.R.M. 74 (April 19, 1962); Jay, *What Is New in the Labor Injunction?*, N.Y.U. 15TH ANN. CONF. ON LABOR 266 (1963). See generally *id.* at 261-78.

tivated move. Third, it might eliminate the necessity of a later infringement on the right of the employees at the new site to choose their own bargaining representative. Since legislative history clearly indicates that section 10(j) was enacted to provide a means of obtaining speedy relief and to maintain the *status quo* in any case where the Board would otherwise be unable to correct an unfair labor practice until after substantial injury had been inflicted,[34] it would seem that the "runaway shop" situation is an appropriate place for its use.[35]

Although the Board can seek only temporary relief under section 10(j) if the particular union involved or an employee at the old site files an unfair labor practice charge,[36] it seems doubtful that an employer could act so quickly or so surreptitiously that a union or an employee would be unable to file charges until after the relocation.[37] If it appears that the employer is contemplating a plant relocation, a complaint should be filed alleging that the employer has taken some concrete action, such as building a new plant or incorporating in another state, that the company has failed to give notice of its intention to move, that a demand has been made upon the employer to bargain, that the employer has ignored that demand, and that such behavior constitutes a refusal to give notice and to bargain about the effects of a contemplated relocation, in violation of section 8(a)(5).[38] If the employer believes that he has valid economic reasons for the move and that he has not otherwise committed an unfair labor practice, he should then be allowed to present affidavits and financial statements to the district court to indicate that the granting of an injunction or other temporary relief is not warranted.[39]

34. See NLRB v. Manning, Maxwell & Moore, Inc., 48 CCH LAB. CAS. ¶ 18424 (W.D. La. 1963); Boire v. Tiffany Tile Corp., 47 CCH LAB. CAS. ¶ 18235 (M.D. Fla. 1963); S. REP. No. 104, 80th Cong., 1st Sess. 27 (1947).

35. Only one case has been found in which a district court actually enjoined a company from moving its operations before a determination by the Board of the merits of the complaint. Getreu v. Gas Appliance Supply Corp., Civil No. 5291 (S.D. Ohio 1963), 28 NLRB ANN. REP. 145 (1963). *Cf.* Peerless Woolen Mills, 49 L.R.R.M. 82-83 (10th Cir. 1961); Phillips v. Burlington Indus., Inc., 49 L.R.R.M. 2144 (N.D. Ga. 1961).

36. See NLRA § 10(j), added by 61 Stat. 149 (1947), as amended, 29 U.S.C. § 160(j) (1964).

37. In the principal case, rumors of the move reached union officials in May 1963. Although the employer denied union suggestions that a relocation was pending, he did close down and move in July. Principal case at 15998. For further illustrations, see Standard Handkerchief Co. v. NLRB, 4 CCH LAB. L. REP. ¶ 9101 (Feb. 15, 1965) (union knew employer was moving machinery out of the plant for more than two weeks); Sidele Fashions, Inc., 133 N.L.R.B. 547 (1961), *enforced per curiam*, 305 F.2d 825 (3d Cir. 1962) (employees and union knew of a building being erected in another state even though the employer denied that the company was planning to move); Rome Products Co., 77 N.L.R.B. 1217 (1948) (employees had four days' notice before the move); Schieber Millinery Co., 26 N.L.R.B. 937, *enforced per curiam*, 116 F.2d 281 (8th Cir. 1940) (employees feared an impending move ten days before the move).

38. 49 Stat. 453 (1935), 29 U.S.C. § 158(a)(5) (1964).

39. Phillips v. Burlington Indus., Inc., 49 L.R.R.M. 2144 (N.D. Ga. 1961). In

When a temporary injunction is granted by a district court, the Board's own procedural rules require it to hold hearings on the unfair labor practice charge "expeditiously" and to give the case priority.[40] If the Board determines that the relocation is, in fact, not economically motivated or that the employer has not given notice of its decision to move and has not bargained about the effects of the move, the Board can then issue a permanent cease-and-desist order and require bargaining. Even if the relocation appears economically motivated, the Board may still order the employer to bargain about the effects of the move on the employees at the old site. In addition, if the duty to bargain about the actual decision to relocate is ultimately recognized,[41] section 10(j) will enable the Board to enforce that duty at the appropriate time. Thus, even though an employer may be required to delay temporarily a contemplated relocation, the temporary restraining order assures satisfaction of his bargaining duties—a result which no post-relocation remedy can satisfactorily achieve.

Conceivably, the *Garwin* case could be reversed on appeal solely on the issue of whether there was an unfair labor practice. It is more likely, however, that the determinative issue will concern the validity of the Board's new remedy for a long-distance "runaway shop." Since the compulsory bargaining order more effectively promotes the purposes and policies of the act than does the conditional bargaining order, it should be enforced. On the other hand, it is apparent that no post-relocation remedy can repair the injury that is inflicted upon the union and the employees at the original site and still protect the rights of the employees at the new site. Consequently, the Board should in the future promote greater use of the temporary relief available under section 10(j). While some courts may be reluctant to restrain a relocation until the Board determines whether an employer has fulfilled his duties to his employees, a temporary injunction coupled with a bargaining order seems to effectuate the policies of the act. It promotes collective bargaining; it protects the rights of the employees at both the old and the new site to be represented by bargaining representatives of their own choice; and it allows the Board to act against unfair labor practices at a time when they can be most appropriately remedied.

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that case, the court denied an injunction because the employees could receive no benefit from continued operation of an insolvent concern.

40. 8 NLRB: STATEMENTS OF PROCEDURE, RULES AND REGULATIONS pt. G, in 29 C.F.R. § 102.94 (1965). If the Board refuses to act, the district court may dissolve the injunction. See Getreu v. ITU, 50 L.R.R.M. 2266 (S.D. Ohio 1962).

41. See note 25 *supra* and accompanying text.