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## APPLICATION OF THE MANDATORY-PERMISSIVE DICHOTOMY TO THE DUTY TO BARGAIN AND UNI- LATERAL ACTION: A REVIEW AND REEVALUATION

Although it was determined at an early stage in the development of modern labor legislation that labor and management should be required to meet and engage in collective bargaining,<sup>1</sup> Congress has not indicated the specific subjects the parties are required to consider in their negotiations.<sup>2</sup> Section 8(a)(5) of the National Labor Relations Act,<sup>3</sup> part of the original 1935 enactment, enunciates the employer's duty to bargain only in general terms, stating: "It shall be an unfair labor practice for an employer to refuse to bargain collectively with the representatives of his employees, subject to the provisions of [section 9(a)]."<sup>4</sup> In addition to retaining this provision,<sup>5</sup> the 1947 amendments to the Act included a new provision, section 8(b)(3), which imposes a corresponding duty to bargain upon labor organizations.<sup>6</sup> To clarify the extent of the obligation established in these two sections, Congress in 1947 also enacted section 8(d), which defines collective bargaining as good faith negotiations over "wages, hours, and other terms and conditions of employment."<sup>7</sup> Nevertheless, interpretational difficulties have remained with respect to the scope of the statutory phrase.

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1. The theory behind this policy is that "free opportunity for negotiation with accredited representatives of employees is likely to promote industrial peace and may bring about the adjustments and agreements which the Act in itself does not attempt to compel." *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45 (1937).

2. The National Labor Relations Board (NLRB) was unable to afford much assistance on this issue, since its authority to regulate such matters was not clearly established. *See Consumer's Research, Inc.*, 2 N.L.R.B. 57 (1936).

3. 29 U.S.C. §§ 151-68 (1970).

4. *Id.* § 158(a)(5). Section 9(a) refers to the election of, and exclusive representation by, the representatives chosen by a majority of the employees. *Id.* § 159(a).

5. For a discussion of the history of section 8(a)(5), see Feinsinger, *The National Labor Relations Act and Collective Bargaining*, 57 MICH. L. REV. 807 (1959); Comment, *Employer's Statutory Duty to Bargain*, 32 FORDHAM L. REV. 557 (1964); Comment, *Employer's Duty to Bargain Under the National Labor Relations Act*, 30 TENN. L. REV. 543 (1963).

6. 29 U.S.C. § 158(b)(3) (1970) provides: "It shall be an unfair labor practice for a labor organization or its agents to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of Section 9(a)."

7. Section 8(d) provides, in pertinent part:

[T]o bargain collectively is the performance of the mutual obligation of

It is the purpose of this Note to review the efforts of the National Labor Relations Board (NLRB) and the federal courts to apply the statutory duty to bargain to contract negotiations and to actions taken unilaterally by one party without consulting the other. After an examination of the uncertainty and inequities engendered by the current approach, a more practical alternative will be proposed.

### MANDATORY AND PERMISSIVE BARGAINING SUBJECTS

Three approaches have been taken by the NLRB in its attempts to regulate collective bargaining. The first has been the establishment of collective bargaining procedures, with particular emphasis on the concept of bargaining in "good faith."<sup>8</sup> The second has been to prescribe the subjects upon which an employer must bargain at the request of a union.<sup>9</sup> Under this approach management's refusal to bargain upon any single subject covered by the statutory phrase "wages, hours, and other terms and conditions of employment" (a mandatory subject) has been treated as an unfair labor practice, even where the negotiations have encompassed a wide range of topics.<sup>10</sup> The third approach has been to interpret one party's insistence upon a contract clause outside

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the employer and the representative of the employees to meet at reasonable times and *confer in good faith with respect to wages, hours, and other terms and conditions of employment*, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession . . . .

*Id.* § 158(d) (emphasis supplied).

8. "Good faith" bargaining generally involves a test of the employer's subjective state of mind. In recent years, however, the Board has applied the doctrine without regard to the state of mind test. *See, e.g.,* *Truitt Mfg. Co.*, 110 N.L.R.B. 856 (1954), *enforcement denied*, 224 F.2d 869 (4th Cir. 1955), *rev'd*, 351 U.S. 149 (1956) (refusal to furnish financial information while claiming inability to raise wages); *Textile Workers Union (Personal Products)*, 108 N.L.R.B. 743 (1954), *enforced in part*, 227 F.2d 409 (D.C. Cir. 1955), *cert. denied*, 352 U.S. 864 (1956) (engaging in short work stoppages during negotiations); *UMW Union*, 117 N.L.R.B. 1095 (1957), *set aside*, 257 F.2d 211 (D.C. Cir. 1958) (implementing a strike to resolve a grievance in violation of an arbitration clause). *See also* *Cox, The Duty to Bargain in Good Faith*, 71 HARV. L. REV. 1401 (1958).

9. This doctrine came into prominence through decisions dealing with health and welfare, and pension funds. *See, e.g.,* *Inland Steel Co. v. NLRB*, 170 F.2d 247 (7th Cir. 1948), *cert. denied*, 336 U.S. 960 (1949).

10. For a discussion of this approach, see *Cox & Dunlop, Regulation of Collective Bargaining by the National Labor Relations Board*, 63 HARV. L. REV. 389 (1950).

the statutory phrase (a permissive subject) as a violation of section 8(a)(5) or section 8(b)(3).<sup>11</sup>

In 1958 the Supreme Court adopted the Board's distinction between mandatory and permissive bargaining subjects in *NLRB v. Wooster Division of Borg-Warner Corp.*<sup>12</sup> The employer had insisted throughout negotiations upon the inclusion of two clauses: a limitation specifying that the contract was between the company and the UAW local, rather than the international union; and a prohibition against all strikes unless a majority of all bargaining unit employees voted by secret ballot to reject the employer's last offer. Rejecting the company's good faith defense, the Board found that insistence upon either clause constituted a per se violation of section 8(a)(5).<sup>13</sup>

The Supreme Court adopted the Board's approach, holding that insistence upon a nonmandatory clause constitutes a refusal to bargain regardless of either party's good faith. Reading together sections 8(a)(5)<sup>14</sup> and 8(d), the Court observed:

These provisions establish the obligation of the employer and the representative of its employees to bargain with each other in good faith with respect to "wages, hours, and other terms and conditions of employment. . . ." The duty is limited to those subjects, and within that area neither party is legally obligated to yield . . . . As to other matters, however, each party is free to bargain or not to bargain, and to agree or not to agree.<sup>15</sup>

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11. *Dalton Tel. Co.*, 82 N.L.R.B. 1001 (1949), *aff'd*, 187 F.2d 811 (5th Cir. 1951). See also *Allis-Chalmers Mfg. Co. v. NLRB*, 213 F.2d 374 (7th Cir. 1954); *International Bhd. of Teamsters (Conway's Express)*, 87 N.L.R.B. 972 (1949), *enforced*, 195 F.2d 906 (2d Cir. 1952).

12. 356 U.S. 342 (1958).

13. *Wooster Div. of Borg-Warner Corp.*, 113 N.L.R.B. 1288 (1955).

14. The same reasoning is applicable to section 8(b)(3).

15. 356 U.S. at 349. The only subjects to which the parties are not free to agree are those classified as "illegal." It is well settled that an illegal, as distinguished from permissive, subject cannot be included in a collective bargaining agreement notwithstanding mutual approval of the parties. *Honolulu Star Bulletin, Ltd.*, 123 N.L.R.B. 395, *enforcement denied on other grounds*, 274 F.2d 567 (D.C. Cir. 1959). Illegal subjects are those which specifically violate the National Labor Relations Act. Among the most prominent are closed shop clauses, which violate sections 8(a)(3) and 8(b)(2), 29 U.S.C. §§ 158(a)(3), (b)(2) (1970). *American Newspaper Publishers Ass'n v. NLRB*, 193 F.2d 782 (7th Cir. 1951), *enforcing in part* 86 N.L.R.B. 951 (1949). *But see Teamsters Local 357 v. NLRB*, 365 U.S. 667 (1961) (a nondiscriminatory hiring hall is not illegal as a closed shop). Also illegal are hot cargo clauses prohibited by section 8(e), 29 U.S.C. § 158(e) (1970). *Lithographers Local 17*, 130 N.L.R.B. 985 (1961). See also *Lithographers Local 78*, 130 N.L.R.B. 968 (1961). It should be noted, however, that a pro-

The Court reasoned that, since the union was not required to bargain over permissive subjects, the company should not be permitted to condition an agreement with respect to mandatory subjects upon the inclusion of clauses covering permissive subjects. Thus, insistence by one party upon a permissive subject was held to constitute a *refusal to bargain* over all mandatory subjects,<sup>16</sup> and a violation of section 8(a)(5) or section 8(b)(3).<sup>17</sup>

The "secret ballot" clause in *Borg-Warner* was held to be non-

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visio to section 8(e) specifically excludes the construction and apparel and clothing industries from the section's prohibition. The Act also specifically prohibits "featherbedding" clauses. 29 U.S.C. § 158(b)(6) (1970). The courts have interpreted this section strictly, however, holding it to be applicable only in cases where work is not actually performed. Therefore, if the clause requires actual work, regardless of the value of that work to the employer, it is not an illegal subject. *American Newspaper Publishers Ass'n v. NLRB*, 345 U.S. 100 (1953), *affirming in part* 193 F.2d 782 (7th Cir. 1951). Finally, the parties may not agree to limit the exclusive bargaining authority of the union. *Bethlehem Steel Co.*, 89 N.L.R.B. 341 (1950).

Subjects may also be illegal as violative of federal antitrust statutes. See *United Mine Workers v. Pennington*, 381 U.S. 657 (1965); *Meat Cutters Local 189 v. Jewel Tea Co.*, 381 U.S. 676 (1965). Although the applicability of other federal statutes has not been finally determined by the Board or the courts, the Board has required parties to bargain over practices which were arguably in violation of the federal income tax laws (*Evening News Publishing Co.*, 196 N.L.R.B. 530 (1972)) and the government's economic stabilization regulations for wage-price controls (*Servis Equip. Co.*, 198 N.L.R.B. No. 47 (1972); see *Washington Employers, Inc.*, 200 N.L.R.B. No. 117 (1973) (failure to implement wage increase in violation of 5.5 percent Phase II guidelines was a violation of section 8(a)(5))).

The applicability of state law in determining the legality of bargaining subjects remains unsettled due to federal preemption in questions of labor law. See generally *Teamsters Local 24 v. Oliver*, 358 U.S. 283 (1959); *Steelworkers Local 1402 (Midland Ross Corp., Capitol Foundry Div.)*, 199 N.L.R.B. No. 20 (1972) (Board found no violation of section 8(b)(3) where the union insisted upon the inclusion of an "agency shop" clause, which was illegal under the applicable Arizona law).

16. The Supreme Court stated:

[G]ood faith does not license the employer to refuse to enter into agreements on the ground that they do not include some proposal which is not a mandatory subject of bargaining. . . . [S]uch conduct is, in substance, a refusal to bargain about the subjects that are within the scope of mandatory bargaining. This does not mean that bargaining is to be confined to the statutory subjects. Each of the two controversial clauses is lawful in itself. Each would be enforceable if agreed to by the unions. But it does not follow that, because the company may propose these clauses, it can lawfully insist upon them as a condition to any agreement.

356 U.S. at 349.

17. For a detailed discussion of *Borg-Warner*, see Note, *The Impact of the Borg-Warner Case on Collective Bargaining*, 43 MINN. L. REV. 1225 (1959); 11 STAN. L. REV. 188 (1958).

mandatory on the ground that, unlike the normal no-strike clause which "regulates the relations between the employer and the employees," this provision dealt "only with relations between the employees and their unions . . . ." <sup>18</sup> The Court suggested that the proposed clause would result in the weakening of "the independence of the 'representative' chosen by the employees," <sup>19</sup> in effect permitting the employer to deal directly with its employees instead of their statutory representative, and therefore did not deal with "wages, hours, and other terms and conditions of employment." The "recognition" clause was also denominated a permissive subject, the Court viewing the employer's insistence that the certified representative not be a party to the contract as an evasion of the duty to bargain.

In summary, several principles may be extracted with respect to the *Borg-Warner* dichotomy. A party is compelled by statute to bargain only over wages, hours, and other terms and conditions of employment; these are mandatory subjects and a refusal to negotiate as to them, even absent a showing of bad faith, is violative of the Act. Since neither party is required by section 8(d) to make concessions, however, there is no proscription against good faith insistence<sup>20</sup> to the point of impasse on mandatory subjects. Conversely, although the parties may bargain over a permissive clause if they so desire, adamant insistence upon such a clause constitutes a per se violation of the Act.<sup>21</sup> Finally, it should be noted that an agreement by one party to bargain over a permissive subject does not constitute a waiver of its right to insist that the subject not be included in the final agreement.<sup>22</sup> Regardless of the length of the bargaining, a permissive subject never becomes a mandatory subject.<sup>23</sup>

The following discussion will explore the difficulties encountered in applying these general principles to specific collective bargaining subjects in two distinct contexts—the duty to bargain during contract nego-

18. 356 U.S. at 350.

19. *Id.*

20. "Insistence" in the context of collective bargaining means positing the subject matter as a precondition to the negotiation of an agreement or as an ultimatum. See *Philip Carey Mfg. Co. v. NLRB*, 331 F.2d 720 (6th Cir.), *cert. denied*, 379 U.S. 888 (1964) (proposed superseniority provision); cf. *NLRB v. Erie Resistor Corp.*, 373 U.S. 221 (1963).

21. 356 U.S. at 349.

22. *Kit Mfg. Co.*, 150 N.L.R.B. 662 (1964), *enforced*, 365 F.2d 829 (9th Cir. 1966).

23. It has been observed:

A determination that a subject which is non-mandatory at the outset may

tiations and the right of an employer to act unilaterally to implement management decisions. Although separate consideration will be given to those subjects classified as wages, as hours, and as other terms and conditions of employment, it should be noted that the statutory categories are not mutually exclusive; certain subjects, such as paid sick leave, paid holidays, and paid vacation, may fall within any of the three classifications.

### *Duty to Bargain During Contract Negotiations*

The wage category has been afforded a broad construction by the Board and the courts. There is apparently little doubt that basic hourly rates of pay,<sup>24</sup> piece rates and incentive plans,<sup>25</sup> overtime pay,<sup>26</sup> shift differentials,<sup>27</sup> paid holidays,<sup>28</sup> paid vacations,<sup>29</sup> and severance pay<sup>30</sup> are mandatory subjects of bargaining. In addition, profit-sharing plans,<sup>31</sup> stock purchase plans,<sup>32</sup> and merit wage increases<sup>33</sup> have been held to

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become mandatory merely because a party had exercised this freedom [to bargain or refuse to bargain] by not rejecting the proposal at once, or sufficiently early, might unduly discourage free bargaining on non-mandatory matters. Parties might feel compelled to reject non-mandatory proposals out of hand to avoid risking waiver of the right to reject it.

NLRB v. Davison, 318 F.2d 550, 558 (4th Cir. 1963).

24. Beacon Piece Dyeing & Finishing Co., 121 N.L.R.B. 953 (1958); Phelps Dodge Copper Prods. Corp., 101 N.L.R.B. 360 (1952); Betty Brooks Co., 99 N.L.R.B. 1237 (1952).

25. NLRB v. East Texas Steel Casting Co., 211 F.2d 813 (5th Cir. 1954); Moore of Bedford, Inc., 187 N.L.R.B. 721 (1971); Tex-Tan Welhausen Co., 172 N.L.R.B. 851 (1968); C&S Indus., Inc., 158 N.L.R.B. 454 (1966); Honolulu Star Bulletin, Inc., 153 N.L.R.B. 763 (1965); Staub Cleaners Inc., 148 N.L.R.B. 278 (1964); Skyway Luggage Co., 117 N.L.R.B. 681 (1957); Central Metallic Casket Co., 91 N.L.R.B. 572 (1950).

26. NLRB v. Moench Tanning Co., 121 F.2d 951 (2d Cir. 1941); Braswell Motor Freight Lines, Inc., 141 N.L.R.B. 1154 (1963).

27. Smith Cabinet Mfg. Co., 147 N.L.R.B. 1506 (1964).

28. Singer Mfg. Co., 24 N.L.R.B. 444 (1940), *enforced*, 119 F.2d 131 (7th Cir.), *cert. denied*, 313 U.S. 595 (1941).

29. *Id.*

30. NLRB v. Adams Dairy, Inc., 322 F.2d 553 (8th Cir. 1963), *vacated*, 379 U.S. 644 (1965), *on remand*, 350 F.2d 108 (8th Cir. 1965), *cert. denied*, 382 U.S. 1011 (1966).

31. Kroger Co. v. NLRB, 399 F.2d 455 (6th Cir. 1968); NLRB v. Black-Clawson Co., 210 F.2d 523 (6th Cir. 1954); Dickten & Masch Mfg. Co., 129 N.L.R.B. 112 (1960).

32. B.F. Goodrich Co., 195 N.L.R.B. 914 (1972); Richfield Oil Corp., 110 N.L.R.B. 356 (1954), *enforced*, 231 F.2d 717 (D.C. Cir.), *cert. denied*, 351 U.S. 909 (1956). *See also* 43 GEO. L.J. 309 (1955); 69 HARV. L. REV. 1511 (1956).

33. The rationale for holding merit increases to be a mandatory subject has been explained as follows:

Merit pay where there are a number of employees means more than a

constitute a form of compensation and hence to be within the statutory phrase.

The question of Christmas bonuses presents a more difficult classification problem, since these may be considered either gifts or wages. In *NLRB v. Niles-Bement-Pond Co.*,<sup>34</sup> the first case to confront this issue, the Court of Appeals for the Second Circuit viewed a bonus as compensation and ordered the employer to bargain.<sup>35</sup> The Court of Appeals for the Eighth Circuit, however, has held on the basis of three criteria that a bonus was a gift.<sup>36</sup> The factors considered by the court—consistency of the practice, uniformity of the amount, and dependency of payment upon the employer's financial condition—have received general acceptance as the test for classifying a bonus as wage or gift.<sup>37</sup> If the bonus is a wage, it is a mandatory bargaining

gratuity or bonus paid to an occasional employee whom the company wishes to favor on account of his loyalty or efficiency. It means necessarily the formulation and application of standards; and such standards are proper subjects of collective bargaining. Collective bargaining with respect to wages might well be disrupted or become a mere empty form if the control over the wages of individual employees were thus removed from the bargaining area.

*NLRB v. Berkley Mach. Works & Foundry Co.*, 189 F.2d 904, 907 (4th Cir. 1951). See *NLRB v. Katz*, 369 U.S. 736 (1962); *White v. NLRB*, 255 F.2d 564 (5th Cir. 1958); *Armstrong Cork Co. v. NLRB*, 211 F.2d 843 (5th Cir. 1954); *Weston & Brooker Co.*, 154 N.L.R.B. 747 (1965); *Midwestern Instruments, Inc.*, 131 N.L.R.B. 1026 (1961); *J.H. Allison & Co.*, 70 N.L.R.B. 377 (1946), *enforced*, 165 F.2d 766 (6th Cir.), *cert. denied*, 355 U.S. 814 (1948).

34. 199 F.2d 713 (2d Cir. 1952).

35. The court reasoned:

It does, of course, merely beg the question to call . . . [the bonuses] "gifts" and to argue, however persuasively, that gifts *per se* are not a required subject for collective bargaining. But if these gifts were so tied to the remuneration which employees received for their work that they were in fact a part of it, they were in reality wages and so within the statute. . . . Where, as here, the so-called gifts have been made over a substantial period of time and in amount have been based on the respective wages earned by the recipients, the Board was free to treat them as bonuses not economically different from other special kinds of remuneration like pensions, retirement plans or group insurance, to name but a few, which have been held within the scope of the statutory bargaining requirement.

*Id.* at 714.

36. *NLRB v. Wonder State Mfg. Co.*, 344 F.2d 210 (8th Cir. 1965).

37. See, e.g., *John Zink Co.*, 196 N.L.R.B. 942 (1972); *NLRB v. United States Air Conditioning Corp.*, 336 F.2d 275 (6th Cir. 1964); *NLRB v. Citizens Hotel Co.*, 326 F.2d 501 (5th Cir. 1964); *NLRB v. Electric Steam Radiator Corp.*, 321 F.2d 733 (6th Cir. 1963); *NLRB v. Toffenetti Restaurant Co.*, 311 F.2d 219 (2d Cir. 1962); *NLRB v.*



subject; if it is a gift, negotiations regarding it are permissive.<sup>38</sup>

In *Inland Steel Co.*<sup>39</sup> the Board first held that pension benefits for present employees are wages and hence mandatory bargaining subjects.<sup>40</sup> Subsequently, the Board and courts have consistently maintained that retirement income plans<sup>41</sup> and group health insurance plans<sup>42</sup> are within the statutory phrase. In *Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co.*,<sup>43</sup> however, the Supreme Court, reversing a Board ruling,<sup>44</sup> held that bargaining over a pension plan for retired employees is permissive since retirees are not "employees" within the meaning of the Act.<sup>45</sup> As a result of the *Pittsburgh Plate Glass* decision, it is likely that

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Wheeling Pipe Line, Inc., 229 F.2d 391 (8th Cir. 1956); cf. K-D Mfg. Co., 169 N.L.R.B. 51 (1968).

38. There is a question whether a union may be estopped from demanding bargaining over Christmas bonuses as a result of its inaction over a number of years. See *General Tel. Co. v. NLRB*, 337 F.2d 452 (5th Cir. 1964) (no estoppel after 35 years); Comment, *Unilateral Discontinuance of Christmas Gifts by Management*, 6 SANTA CLARA LAW. 79 (1965).

39. 77 N.L.R.B. 1, enforced, 170 F.2d 247 (7th Cir. 1948), cert. denied, 336 U.S. 960 (1949). See also Note, *Proper Subjects for Collective Bargaining: Ad Hoc v. Predictive Definition*, 58 YALE L.J. 803 (1949); Note, *Pension and Retirement Matters—A Subject of Compulsory Collective Bargaining*, 43 ILL. L. REV. 713 (1948).

40. The Board rejected the company's argument that pension benefits are not wages, stating:

With due regard for the aims and purposes of the Act and the evils which it sought to correct, we are convinced and find that the term "wages" as used in Section 9 (a) must be construed to include emoluments of value, like pension and insurance benefits, which may accrue to employees out of their employment relationship. There is indeed an inseparable nexus between an employee's current compensation and his future pension benefits. . . . In substance, therefore, the respondent's monetary contribution to the pension plan constitutes an economic enhancement of the employee's money wages. . . .

Realistically viewed, this type of wage enhancement or increase, no less than any other, becomes an integral part of the entire wage structure, and the character of the employee representative's interest in it, and the terms of its grant, is no different than in any other case where a change in the wage structure is effected.

77 N.L.R.B. at 4-5.

41. T.I.P. Corp., 190 N.L.R.B. 240 (1971).

42. *W.W. Cross & Co. v. NLRB*, 174 F.2d 875 (1st Cir. 1949); *General Motors Corp.*, 81 N.L.R.B. 779 (1949).

43. 404 U.S. 157 (1971), noted in 1971-72 *Annual Survey of Labor Law* 13 B.C. IND. & COM. L. REV. 1347, 1405-08 (1972); Comment, *Collective Bargaining: Insistence, But Only to a Point*, 22 DRAKE L. REV. 365 (1973); 20 KAN. L. REV. 801 (1972); 39 U. CIN. L. REV. 573 (1970); 24 U. FLA. L. REV. 807 (1972).

44. *Pittsburgh Plate Glass Co.*, 177 N.L.R.B. 911 (1969).

45. Section 2(3) of the Act provides, in pertinent part: "The term 'employee' shall

*all* subjects dealing with postemployment remuneration will be considered mandatory as to present employees only.

The status of company housing and company-provided meals has been the subject of continuing litigation. The general rule applied by the Board is that living accommodations provided by an employer are both "wages" and "conditions of employment" if they form an integral part of the employment relationship.<sup>46</sup> In addition, the Board has found the issue of whether a company should provide meals for employees to be within the statutory phrase.<sup>47</sup> Although the Board has viewed the price of food served by the company as a mandatory subject, this position has been repudiated by the Court of Appeals for the Fourth Circuit.<sup>48</sup> There also appears to be a distinction between food served by the company and that provided by vending machines owned by an independent contractor.<sup>49</sup>

The statutory obligation to bargain over "hours of employment" has caused little interpretational difficulty. In the few cases involving this issue, the Board has maintained its position that any addition, subtraction, or rearrangement of working hours by the employer constitutes a mandatory bargaining subject.<sup>50</sup>

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include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment . . ." 29 U.S.C. § 152(3) (1970).

46. See *Hart Cotton Mills, Inc.*, 91 N.L.R.B. 728 (1950), *enforced*, 190 F.2d 964 (4th Cir. 1951); *Elgin Standard Brick Mfg. Co.*, 90 N.L.R.B. 1467 (1950). *But see* *NLRB v. Bemis Bros. Bag Co.*, 206 F.2d 33 (5th Cir. 1953) (company housing *not* a mandatory subject due to lack of advantage to employees in rent arrangement). The Board has also held that discrimination in providing company housing may violate section 8(a)(3), 29 U.S.C. § 158(a)(3) (1970). See, e.g., *W.T. Carter & Bros.*, 90 N.L.R.B. 2020 (1950); *Abbott Worsted Mills, Inc.*, 36 N.L.R.B. 545 (1941), *enforced*, 127 F.2d 438 (1st Cir. 1942).

47. *Weyerhaeuser Timber Co.*, 87 N.L.R.B. 672 (1949). See also *Herman Sausage Co.*, 122 N.L.R.B. 168 (1958), *enforced*, 275 F.2d 229 (5th Cir. 1960) (section 8(a)(5) violated where the employer unilaterally discontinued a meal allowance).

48. *Westinghouse Elec. Corp.*, 156 N.L.R.B. 1080 (1966), *enforcement denied*, 387 F.2d 542 (4th Cir. 1967).

49. In *McCall Corp. v. NLRB*, 432 F.2d 187 (4th Cir. 1970), the court, reversing a decision of the Board, held that the price of food served by an independent contractor from vending machines was not a mandatory subject, especially where other sources of food were available. See also *1970-71 Annual Survey of Labor Relations Law*, 12 B.C. IND. & COM. L. REV. 1026 (1971).

50. *Timken Roller Bearing Co.*, 70 N.L.R.B. 500 (1946), *enforcement denied on other grounds*, 161 F.2d 949 (6th Cir. 1947). *But see* *Massey Gin & Mach. Works, Inc.*,

The category "other terms and conditions of employment," on the other hand, has presented great difficulty, both in its interpretation and in its application. Nevertheless, a number of bargaining subjects obviously fall within the statutory phrase, including vacations,<sup>51</sup> holidays,<sup>52</sup> sick leave,<sup>53</sup> work rules,<sup>54</sup> union use of bulletin boards<sup>55</sup> changes in method of payment,<sup>56</sup> bargaining unit work by supervisors,<sup>57</sup> physical examinations of employees,<sup>58</sup> duration of the collective agreement,<sup>59</sup> grievance procedures,<sup>60</sup> arbitration,<sup>61</sup> layoffs,<sup>62</sup> discharge,<sup>63</sup> and work-

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78 N.L.R.B. 189 (1948), *enforcement denied per curiam*, 173 F.2d 758 (5th Cir. 1949) (employer's failure to notify union of changes in hours mitigated by subsequent negotiation with union and by ambiguous contract provision).

51. *Great S. Trucking Co. v. NLRB*, 127 F.2d 180 (4th Cir. 1942).

52. *NLRB v. Sharon Hats, Inc.*, 289 F.2d 628 (5th Cir. 1961); *Instrument Div., Rockwell Register Corp.*, 142 N.L.R.B. 634 (1963); *Leiter Mfg. Co.*, 112 N.L.R.B. 843 (1955).

53. *NLRB v. Katz*, 369 U.S. 736 (1962).

54. *Murphy Diesel Co. v. NLRB*, 454 F.2d 303 (7th Cir. 1971) (employer violated section 8(a)(5) by unilateral implementation of rules on absenteeism and tardiness); *NLRB v. Southern Transp., Inc.*, 343 F.2d 558 (8th Cir. 1965); *Tower Hosiery Mills, Inc.*, 81 N.L.R.B. 658 (1949). In *NLRB v. Communications Workers Local 1170 (Rochester Tel. Corp.)*, 474 F.2d 778 (2d Cir. 1972), the union was held to have violated section 8(b)(3) by refusing to accept temporary supervisory assignments in derogation of a "letter agreement."

55. *NLRB v. Proof Co.*, 242 F.2d 560 (7th Cir.), *cert. denied*, 355 U.S. 831 (1957).

56. *General Motors Corp.*, 59 N.L.R.B. 1143 (1944) (change of payment from salary base to hourly base).

57. *Crown Coach Corp.*, 155 N.L.R.B. 625 (1965).

58. *LeRoy Mach. Co.*, 147 N.L.R.B. 1431 (1964); *cf. Wilburn v. Missouri-Kansas-Texas R.R.*, 268 S.W.2d 726 (Tex. Civ. App. 1954) (physical examinations a subject of bargaining under the Railway Labor Act).

59. *NLRB v. Yutana Barge Lines, Inc.*, 315 F.2d 524, 528 (9th Cir. 1963); *United States Pipe & Foundry Co. v. NLRB*, 298 F.2d 873 (5th Cir. 1962). Although the question of contract retroactivity is also a mandatory subject of bargaining (*Bergen Point Iron Works*, 79 N.L.R.B. 1073 (1948)), a requirement of employee ratification of a contract is not. *NLRB v. Darlington Veneer Co.*, 236 F.2d 85 (4th Cir. 1956) (company insistence upon secret ratification vote of employees held an unfair labor practice); *cf. NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342 (1958); *North Country Motors, Ltd.*, 146 N.L.R.B. 671 (1964).

60. *Crown Coach Corp.*, 155 N.L.R.B. 625 (1965); *Bethlehem Steel Co.*, 136 N.L.R.B. 1500 (1962), *enforcement denied on other grounds*, 320 F.2d 615 (3d Cir. 1963); *Cranston Print Works Co.*, 115 N.L.R.B. 537 (1956).

61. *NLRB v. Montgomery Ward & Co.*, 133 F.2d 676 (9th Cir. 1943); *United States Gypsum Co.*, 94 N.L.R.B. 112 (1951), *enforced in part*, 206 F.2d 410 (5th Cir. 1953).

62. *Hilton Mobile Homes*, 155 N.L.R.B. 873 (1965), *enforced in part*, 387 F.2d 7 (8th Cir. 1967). *See also Lasko Metal Prods., Inc.*, 148 N.L.R.B. 976 (1964), *enforced*, 363 F.2d 529 (6th Cir. 1966).

63. *See National Licorice Co. v. NLRB*, 309 U.S. 350 (1940); *NLRB v. Bachelder*, 120 F.2d 574 (7th Cir. 1941).

loads.<sup>64</sup> Among those subjects held to be clearly outside the statutory phrase, and thus permissive subjects, are the definition of the bargaining unit where the Board has not yet defined the unit<sup>65</sup> or where the parties wish to negotiate a unit different from that certified by the Board,<sup>66</sup> the participation in negotiations either of persons excluded from the coverage of the Act<sup>67</sup> or of additional parties other than the employer and the employees' certified representative,<sup>68</sup> and the posting of a performance bond to ensure fulfillment of the terms of the agreement.<sup>69</sup>

Controversy has developed recently over union demands that negotiation of collective bargaining agreements be conducted on a company-wide basis, rather than according to established bargaining units. In *AFL-CIO Joint Negotiating Committee for Phelps Dodge*<sup>70</sup> the Board held such a demand, and a resulting strike, to be in violation of section 8(b)(3). Upon appeal, however, the Court of Appeals for the Third Circuit held that, although the various unions had never abandoned their overall objective of negotiating a company-wide labor agreement, all their demands at the different company locations were mandatory subjects over which they were free to bargain to impasse.<sup>71</sup>

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64. *Irvington Motors, Inc.*, 147 N.L.R.B. 565 (1964), *enforced*, 343 F.2d 759 (3d Cir. 1965) (fixing of sales quotas a mandatory subject of bargaining); *Little Rock Downtowner, Inc.*, 145 N.L.R.B. 1286 (1964), *aff'd as modified*, 341 F.2d 1020 (8th Cir. 1965); *Beacon Piece Dyeing & Finishing Co.*, 121 N.L.R.B. 953 (1958).

65. *Radio Corp. of America*, 135 N.L.R.B. 980 (1962); *General Motors Corp.*, 120 N.L.R.B. 1215 (1958).

66. *Douds v. International Longshoremen's Ass'n*, 241 F.2d 278 (2d Cir. 1957).

67. *See, e.g.*, *NLRB v. Retail Clerks Local 648 (Safeway Co.)*, 203 F.2d 165 (9th Cir. 1953) (supervisors); *Southern Cal. Pipe Trades Dist. Council 16*, 167 N.L.R.B. 1004 (1967) (supervisors); *District 50, UMW (Central Soya Co.)*, 142 N.L.R.B. 930 (1963) (agricultural employees).

68. *NLRB v. Taormina Co.*, 207 F.2d 251 (5th Cir. 1953), *enforcing* 94 N.L.R.B. 884 (1951); *Standard Generator Serv. Co.*, 90 N.L.R.B. 790 (1950), *enforced*, 186 F.2d 606 (8th Cir. 1951). Examples of such additional parties include the international where only the local union is certified, the local where only the international is certified, and the employer where the unit is an employer association.

69. *NLRB v. F.M. Reeves Sons, Inc.*, 47 L.R.R.M. 2480 (10th Cir. 1960), *cert. denied*, 365 U.S. 914 (1961); *Rabouin v. NLRB*, 195 F.2d 906 (2d Cir. 1952); *Newberry Equip. Co.*, 135 N.L.R.B. 747 (1962); *Teamsters Local 294 (Conway's Express)*, 87 N.L.R.B. 972 (1949), *enforced*, 195 F.2d 906 (2d Cir. 1952).

A number of additional subjects have been classified as permissive. *See, e.g.*, *NLRB v. Carpenters Local 964*, 447 F.2d 643 (2d Cir. 1971) (demand to withdraw unfair labor practice charges and other pending litigation); *Kit Mfg. Co.*, 150 N.L.R.B. 662 (1964), *enforced*, 365 F.2d 829 (9th Cir. 1966) (union label); *Carpenters Local 2265*, 136 N.L.R.B. 769 (1962), *enforced*, 317 F.2d 269 (6th Cir. 1963) (industry promotion fund).

70. 184 N.L.R.B. No. 106 (1970), *enforcement denied*, 459 F.2d 374 (3d Cir. 1972).

71. *AFL-CIO Joint Negotiating Comm. for Phelps Dodge v. NLRB*, 459 F.2d 374 (3d Cir. 1972).

The various forms of union security agreements have generally been viewed as mandatory subjects within the meaning of "other terms and conditions of employment." As early as 1949 the Court of Appeals for the Ninth Circuit ruled that union security was a subject of required bargaining.<sup>72</sup> It has also been held that proposals for agency shop agreements<sup>73</sup> and nondiscriminatory union hiring halls<sup>74</sup> are mandatory bargaining subjects.

Perhaps the best examples of those subjects which are not "terms or conditions of employment" are internal union matters. The Supreme Court established in *Borg-Warner* that bargaining subjects dealing with the employer-employee relationship are mandatory subjects, while those affecting the relationship between employees and their union are permissive.<sup>75</sup> Thus, an employer may not insist upon a clause requiring a prestrike vote or employee ratification as a condition precedent to the execution of a final agreement.<sup>76</sup> Similarly, the courts have refused to

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72. *NLRB v. Andrew Jergens Co.*, 175 F.2d 130 (9th Cir.), *cert. denied*, 338 U.S. 827 (1949); *cf. Vanderbilt Prods., Inc. v. NLRB*, 297 F.2d 833 (2d Cir. 1961) (insistence upon an open shop held to constitute bad faith bargaining).

In *Steelworkers Union v. NLRB*, 363 F.2d 272 (D.C. Cir.), *cert. denied*, 385 U.S. 581 (1966), *on remand sub nom. H.K. Porter Co. v. NLRB*, 414 F.2d 1123 (D.C. Cir. 1969), *rev'd on other grounds*, 397 U.S. 99 (1970), a section 8(a)(5) violation was found in the employer's consistent refusal of the union's demand for checkoff of dues. *See also NLRB v. Herman Sausage Co.*, 275 F.2d 229 (5th Cir. 1960); *NLRB v. Reed & Prince Mfg. Co.*, 205 F.2d 131 (1st Cir.), *cert. denied*, 346 U.S. 887 (1953). Since union shop and dues checkoff are creatures of contract, however, there is no violation of the Act where the employer unilaterally ceases to effectuate such measures upon the expiration of the collective bargaining agreement. *Marine & Shipbuilding Workers Union v. NLRB*, 320 F.2d 615 (3d Cir. 1963).

73. *General Motors Corp. v. NLRB*, 303 F.2d 428 (6th Cir. 1962), *rev'd*, 373 U.S. 734 (1963). An "agency shop" clause requires an employee to pay the union an amount equivalent to union dues, even though he is not required to join the union.

74. *Houston Chapter, Associated Gen. Contractors*, 143 N.L.R.B. 409 (1963), *enforced*, 349 F.2d 449 (5th Cir. 1965), *cert. denied*, 382 U.S. 1026 (1966); *accord, NLRB v. Tom Joyce Floors, Inc.*, 353 F.2d 768 (9th Cir. 1965); *Teamsters Local 357 v. NLRB*, 365 U.S. 667 (1961) (establishing the legality of union hiring halls); *cf. Marine Cooks Union*, 90 N.L.R.B. 1099 (1950) (dismissing section 8(b)(3) charges against a union for striking to obtain a hiring hall agreement).

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

76. *Id.* *See also Houchens Mkt., Inc. v. NLRB*, 375 F.2d 208 (6th Cir. 1967), *enforcing* 155 N.L.R.B. 729 (1965). For pre-*Borg-Warner* cases, see *Allis-Chalmers Mfg. Co. v. NLRB*, 213 F.2d 374 (7th Cir. 1954); *United States Gypsum Co.*, 109 N.L.R.B. 1402 (1954). *See also Note, Strike Vote Clauses: Bargainable Matter?*, 44 *Geo. L.J.* 120 (1955).

impose upon unions a duty to bargain over internal discipline practices<sup>77</sup> or the makeup of union negotiating teams.<sup>78</sup>

Somewhat different treatment has been afforded matters traditionally within the control of management. The question usually arises when an employer insists upon the inclusion in the collective bargaining agreement of a broad management-rights clause, specifying the areas of control and decision reserved to management.<sup>79</sup> The greater the number of subjects stated to be within the unilateral control of management, the broader the clause is said to be.

In *NLRB v. American National Insurance Co.*<sup>80</sup> the Supreme Court stated the general rule that a management-rights clause covering mandatory subjects is itself a "condition of employment." Hence, insistence upon inclusion of such a clause is not a per se violation of the Act. In *American National* it was held that the Board, rather than passing upon the desirability of the agreement's substantive terms, must base its decision upon the good faith requirements of section 8(d). Thus, although there is no per se violation, an employer may make such extreme demands with respect to the breadth of coverage of the clause that a finding of bad faith is justified.<sup>81</sup>

77. *U.O.P. Norplex Div. of Universal Oil Prods. Co. v. NLRB*, 445 F.2d 155 (7th Cir. 1971) (overruling *Allen Bradley Co. v. NLRB*, 286 F.2d 442 (7th Cir. 1961)). In *Universal Oil* the court found the employer in violation of section 8(b)(5) when it insisted to the point of impasse that the union withdraw fines previously imposed for violation of the union rule prohibiting the crossing of picket lines during a strike. The court relied upon the Supreme Court decision in *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175 (1967).

78. *Racine Die Casting Co.*, 192 N.L.R.B. 529 (1971).

79. A typical management-rights clause is as follows:

The Management of the Company and direction of its working forces including, but not limited to the right to hire, suspend, or discharge for proper cause, and the right to relieve employees from duty because of lack of work or for other legitimate reasons, and the products to be manufactured, the location of plants, the schedules of production, the methods, processes and means of manufacturing, are solely and exclusively the rights and prerogative of the Company provided, however, that this will not be used for the purpose of discrimination against any member of the Union and excepting as these rights and prerogatives may be affected by any of the provisions of this Agreement.

R. KNEE & R. KNEE, *COLLECTIVE BARGAINING CLAUSES* 69 (1967).

80. 343 U.S. 395 (1952). See *Long Lake Lumber Co.*, 182 N.L.R.B. 435 (1970); *Old Line Life Ins. Co.*, 96 N.L.R.B. 499 (1951); *Standard Generator Serv. Co.*, 90 N.L.R.B. 790 (1950), *aff'd*, 186 F.2d 606 (8th Cir. 1951); *Franklin Hosiery Mills, Inc.*, 83 N.L.R.B. 276 (1949).

81. *Stuart Radiator Core Mfg. Co.*, 173 N.L.R.B. 125 (1968); *Vanderbilt Prods. Inc.*,

Most disputes between management and labor are resolved during the process of negotiating the collective agreement. Even disputes which arise during the term of the contract may be dealt with prospectively by including within the agreement a provision either reserving control over an issue to management or requiring arbitration. Nevertheless, where the parties fail to include a management-rights clause or an arbitration provision, or where a dispute arises over an issue which is not covered by such provisions, a determination must be made concerning management's right to take action without first consulting the union.

### *Unilateral Action*<sup>82</sup>

The unilateral action sphere is, in many ways, not far removed from the foregoing discussion of bargaining subjects. The phrase "unilateral act" connotes an action taken by an employer without consultation with the representative of its employees and outside the context of contract negotiations. Thus, the issue presented here is whether an employer's section 8(a)(5) duty to bargain extends to matters other than the content of the collective agreement.<sup>83</sup>

The landmark case in the application of the mandatory-permissive dichotomy to unilateral actions of employers is *NLRB v. Katz*,<sup>84</sup> in which the Supreme Court held that, as a general rule, an employer's unilateral change in terms or conditions of employment, which are mandatory bargaining subjects,<sup>85</sup> constitutes a refusal to bargain in violation of

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129 N.L.R.B. 1323, *enforced*, 297 F.2d 833 (2d Cir. 1961) (employer demands for control were so extreme that no "self-respecting" union could accept them). *See also* Chevron Oil Co., 182 N.L.R.B. 445 (1970); Dixie Corp., 105 N.L.R.B. 390 (1953).

82. For a more detailed discussion of this subject, see Collins, *Unilateral Change in Terms and Conditions of Employment at Contract Termination*, 17 N.Y.U. CONF. LAB. 149 (1964); Cox, *The Duty to Bargain in Good Faith*, 71 HARV. L. REV. 1401, 1423-24 (1958); Feinsinger, *The National Labor Relations Act and Collective Bargaining*, 57 MICH. L. REV. 807, 813-14 (1959); Schatzki, *The Employer's Unilateral Act—A Per Se Violation—Sometimes*, 44 TEXAS L. REV. 470 (1966); 57 VA. L. REV. 706 (1971).

83. Commentators reviewing this area frequently have taken one of two extreme positions. Compare Cox & Dunlop, *Regulation of Collective Bargaining by the National Labor Relations Board*, 63 HARV. L. REV. 389, 404 (1950), and Weyand, *Majority Rule in Collective Bargaining*, 45 COLUM. L. REV. 556, 579-80 (1945) (all unilateral changes constitute refusals to bargain), with Note, *Unilateral Action as a Legitimate Economic Weapon*, 37 N.Y.U.L. REV. 666 (1962) (unilateral actions are consistent with the Act and thus are never refusals to bargain).

84. 369 U.S. 736 (1962).

85. *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342 (1958). *See* notes 12-23 *supra* & accompanying text.

section 8(a)(5) of the Act.<sup>86</sup> There are, however, three generally recognized exceptions to the per se rule of *Katz*. Thus, where the employer and union have bargained to impasse over a change,<sup>87</sup> where the union has waived its right to insist on bargaining over a change,<sup>88</sup> or where the change is required by law to be made upon the termination of the contract,<sup>89</sup> the employer commits no violation by acting without first reaching agreement with the union. All three exceptions are premised upon the assumption that, since the rule prohibiting unilateral action is designed to assist collective bargaining, it ceases to be applicable where bargaining fails, despite good faith efforts, or where the employer has relied in good faith upon the conduct of the union or upon statutory requirements.

Under the rule of *Katz* unless one of the exceptions is specifically applicable, unilateral action with respect to a subject within the scope of the statutory phrase "wages, hours, and other terms and conditions of employment" is a per se violation of section 8(a)(5) because it "directly obstructs or inhibits the actual process of discussion . . ." <sup>90</sup> It is clear that the decisions of the Board and courts regarding which

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86. *Katz* involved an employer's unilateral implementation of a new sick leave plan for its employees, an increase in wages substantially higher than had been offered the union at the collective bargaining table, and a grant of merit increases.

87. Impasse is probably the most common exception to the per se rule. See, e.g., *NLRB v. Tex-Tan, Inc.*, 318 F.2d 472 (5th Cir. 1963) (the question of impasse relates to the totality of the bargaining situation rather than to the specific item upon which the employer took action); *Marine & Shipbuilding Workers Union v. NLRB*, 320 F.2d 615 (3d Cir. 1963), cert. denied, 375 U.S. 984 (1964) (impasse held not to be an exception when it resulted from the employer's insistence upon a nonmandatory subject); *R.C. Can Co.*, 144 N.L.R.B. 210 (1963); *Comfort Springs Corp.*, 143 N.L.R.B. 906 (1963); *Stackhouse Oldsmobile, Inc.*, 140 N.L.R.B. 1239 (1963). See generally Collins, *Unilateral Changes in Terms and Conditions of Employment at Contract Termination*, 17 N.Y.U. CONF. LAB. 149 (1964).

88. The waiver may take the form of either an express assent to the change in question or agreement to the inclusion in the contract of a management-rights clause covering the change. Such a waiver, however, will be strictly construed by the Board and courts and will not be effectuated absent a clear showing of the union's intent to waive its bargaining rights. See, e.g., *Lloyd F. Richardson, Sr.*, 109 N.L.R.B. 136 (1954); *Frohman Mfg. Co.*, 107 N.L.R.B. 1308 (1954).

89. The primary changes which may be made under this exception are the termination of union security or checkoff of union dues under an irrevocable wage assignment. Unless a dues checkoff is terminated upon expiration of the contract, there would be a violation of section 302 of the Labor-Management Relations Act, 29 U.S.C. § 186 (1970). See *Marine & Shipbuilding Workers Union v. NLRB*, 320 F.2d 615, 620 n.4 (3d Cir. 1963).

90. *NLRB v. Katz*, 369 U.S. 736, 747 (1962).



subjects are mandatory in the context of contract negotiations<sup>91</sup> have the corollary effect of imposing restraints upon management's freedom to initiate unilateral changes for the benefit of its business. Consequently, the most fertile source of litigation in this area has been the issue of management's right to act unilaterally with respect to subjects which go to the heart of the operation of the company—subjects such as subcontracting, partial closings, and the sale of a portion of the business.<sup>92</sup>

The rule originally applied by the Board to employer decisions to subcontract work was that, absent a showing of anti-union animus, the employer was free to make economically motivated decisions unilaterally.<sup>93</sup> A change in the Board's attitude toward unilateral action was signaled, however, in *Fibreboard Paper Products Corp.*,<sup>94</sup> in which the Board found a violation of section 8(a)(5) in the employer's decision to subcontract work normally performed by members of the bargaining unit, notwithstanding that the decision was prompted by economic reasons. The Supreme Court affirmed the Board's decision,<sup>95</sup> even though there had been no showing of an anti-union motive for the

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91. See notes 24-81 *supra* & accompanying text.

92. For a more detailed examination of this question, see Goetz, *The Duty to Bargain About Changes in Operations*, 1964 DUKE L.J. 1; Platt, *The Duty to Bargain as Applied to Management Decisions*, 19 LAB. L.J. 143 (1968); Wortman, *Management Rights and the Collective Bargaining Agreement*, 16 LAB. L.J. 195 (1965); Comment, *Employer's Duty to Bargain About Subcontracting and Other "Management" Decisions*, 64 COLUM. L. REV. 294 (1964); Note, *Labor Law Problems in Plant Relocation*, 77 HARV. L. REV. 1100 (1964).

93. See Comment, *Employer's Duty to Bargain About Subcontracting and Other "Management" Decisions*, 64 COLUM. L. REV. 294 (1964).

94. 138 N.L.R.B. 550 (1962), enforced, 322 F.2d 411 (D.C. Cir. 1963), *aff'd*, 379 U.S. 203 (1964). See Farmer, *Good Faith Bargaining Over Subcontracting*, 51 GEO. L.J. 558 (1963); Nelson, *Through a Looking Glass Darkly: Fibreboard Five Years Later*, 21 LAB. L.J. 755 (1970); Rabin, *The Decline and Fall of Fibreboard*, 24 N.Y.U. CONF. LAB. 237 (1971); 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 (1971); Smith, *Subcontracting and Union-Management Legal and Contractual Relations*, 17 W. RES. L. REV. 1272 (1966); Comment, *Employer's Duty to Bargain About Subcontracting and Other "Management" Decisions*, 64 COLUM. L. REV. 294 (1964); Comment, *Subcontracting, Mandatory Collective Bargaining, and the 1965 NLRB Decisions*, 18 STAN. L. REV. 256 (1965); Comment, *The Development of the Fibreboard Doctrine: The Duty to Bargain Over Economically Motivated Subcontracting Decisions*, 33 U. CHI. L. REV. 315 (1966); Comment, *The Scope of Collective Bargaining*, 74 YALE L.J. 1472 (1965).

95. *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203 (1964). For an earlier case involving the application of the Railway Labor Act, see *Order of R.R. Telegraphers v. Chicago & N.W.R.R.*, 362 U.S. 330 (1960) (elimination of bargaining unit jobs was mandatory bargaining subject). In *Elgin, Joliet & E. Ry. v. Brotherhood of R.R. Train-*

employer's decision. While the Court limited its holding to the facts of the case,<sup>96</sup> the Board has continued to apply the "rule" of *Fibreboard* to numerous subcontracting cases,<sup>97</sup> requiring bargaining over the basic decision as well as the "effects" of the action.<sup>98</sup>

Moreover, the Board has extended the *Fibreboard* doctrine to require bargaining in virtually all cases in which management decisions have brought about the discharge of bargaining unit employees.<sup>99</sup> Accordingly, decisions to change or discontinue shifts,<sup>100</sup> to transfer an operation to a different location,<sup>101</sup> to close part of a business,<sup>102</sup> to transfer work to another plant,<sup>103</sup> and to automate<sup>104</sup> have been denominated mandatory

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men, 302 F.2d 540 (7th Cir. 1962), the meaning of the statutory phrase "terms and conditions of employment" was held to be identical under the Railway Labor Act and the National Labor Relations Act.

96. The Court stated:

We are thus not expanding the scope of mandatory bargaining to hold, as we do now, that the type of "contracting out" involved in this case—the replacement of employees in the existing bargaining unit with those of an independent contractor to do the same work under similar conditions of employment—is a statutory subject of collective bargaining under § 8(d). Our decision need not and does not encompass other forms of "contracting out" or "subcontracting" which arise daily in our complex economy.

379 U.S. at 215.

97. For some recent Board decisions on the subcontracting issue, see *Howmet Corp.*, 197 N.L.R.B. No. 91 (1972); *Don Mendenhall, Inc.*, 194 N.L.R.B. 1109 (1972). For decisions involving the Board's remedial power when an employer illegally subcontracts work, see *NLRB v. Jackson Farmers, Inc.*, 457 F.2d 615 (10th Cir. 1972); *Hijos de Ricardo Vela, Inc.*, 200 N.L.R.B. No. 43 (1972); *Hospice of Alverne*, 195 N.L.R.B. 313 (1972); *Tellepsen Petro-Chem. Constructors*, 190 N.L.R.B. 433 (1971).

98. It is well settled that the effects of management decisions upon employees are mandatory subjects of bargaining. See *NLRB v. Winn-Dixie Stores, Inc.*, 361 F.2d 512 (5th Cir.), *cert. denied*, 385 U.S. 935 (1966); *NLRB v. Royal Plating & Polishing Co.*, 350 F.2d 191 (3d Cir. 1965); *Red Cross Drug Co.*, 174 N.L.R.B. 85 (1969); *Ozark Trailers, Inc.*, 161 N.L.R.B. 561 (1966).

99. *New York Mirror*, 151 N.L.R.B. 834 (1965).

100. *Skaggs Drug Centers, Inc.*, 176 N.L.R.B. 737 (1969); *Dixie Ohio Express Co.*, 167 N.L.R.B. 573 (1967), *rev'd*, 409 F.2d 10 (6th Cir. 1969); *Assonet Trucking Co.*, 156 N.L.R.B. 350 (1965).

101. *Thompson Transp. Co.*, 165 N.L.R.B. 746 (1967), *rev'd*, 406 F.2d 698 (10th Cir. 1969); *Transmarine Navigation Corp.*, 152 N.L.R.B. 998 (1965), *rev'd*, 380 F.2d 933 (9th Cir. 1967).

102. *Red Cross Drug Co.*, 174 N.L.R.B. 85 (1969); *Drapery Mfg. Co.*, 170 N.L.R.B. 1706 (1968), *rev'd*, 425 F.2d 1026 (8th Cir. 1970); *Schnell Tool & Die Corp.*, 162 N.L.R.B. 313 (1967), *aff'd*, 403 F.2d 1021 (6th Cir. 1968).

103. *Senco, Inc.*, 177 N.L.R.B. 882 (1969); *Weltronic Co.*, 173 N.L.R.B. 235 (1968), *enforced*, 419 F.2d 1120 (6th Cir. 1969).

104. *Northwestern Publishing Co.*, 144 N.L.R.B. 1069 (1963), *aff'd*, 343 F.2d 521 (7th Cir. 1965); *Renton News Record*, 136 N.L.R.B. 1294 (1962).

bargaining subjects. A division of authority between the Board and the courts of appeals, however, has resulted from the application of two irreconcilable tests to determine an employer's obligation to bargain over an economic decision to terminate or to relocate its operations. Although the Board has employed a "loss of bargaining unit jobs" test in holding that any management decision which may result in the loss of employment is a mandatory bargaining subject,<sup>105</sup> the courts have applied a "basic change test," maintaining that an employer's decision involving a basic change in operations is a permissive subject, over which there is no duty to bargain.<sup>106</sup> In two recent decisions, however, the Board appears to have moved toward acceptance of the courts' position.<sup>107</sup>

In *General Motors Corp.*<sup>108</sup> the Board was confronted with an employer's decision to sell one of its plants. For the first time the Board turned to the courts for authority, rather than to its own *Fibreboard* progeny, in holding that the employer's decision to sell part of its enterprise was a permissive bargaining subject. Indeed, the Board appears to have taken an even more restrictive position than that of the courts, since in *General Motors* there was neither a showing of economic necessity in the decision to sell the franchise<sup>109</sup> nor consideration of whether

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105. *Dixie Ohio Express Co.*, 167 N.L.R.B. 573 (1967); *Ozark Trailers, Inc.*, 161 N.L.R.B. 561 (1966); *Transmarine Navigation Corp.*, 152 N.L.R.B. 998 (1965); *Royal Plating & Polishing Co.*, 152 N.L.R.B. 619 (1965); *Burns Int'l Detective Agency*, 148 N.L.R.B. 1267 (1964); *Adams Dairy, Inc.*, 137 N.L.R.B. 815 (1962); *Town & Country Mfg. Co.*, 136 N.L.R.B. 1022 (1962).

106. *NLRB v. Dixie Ohio Express Co.*, 409 F.2d 10 (6th Cir. 1969); *NLRB v. Royal Plating & Polishing Co.*, 350 F.2d 191 (3d Cir. 1965); *NLRB v. Adams Dairy, Inc.*, 350 F.2d 108 (8th Cir. 1965); *NLRB v. Burns Int'l Detective Agency*, 346 F.2d 897 (8th Cir. 1965); *NLRB v. Rapid Bindery, Inc.*, 293 F.2d 170 (2d Cir. 1961); *Jay Foods, Inc. v. NLRB*, 292 F.2d 317 (7th Cir. 1961). See also Comment, *Duty to Bargain on a Decision to Terminate or Relocate Operations*, 25 WASH. & LEE L. REV. 96 (1968).

107. The change in the Board's position may reflect its change in composition, a majority of the members now having been appointed by President Nixon. It should be noted that the major expansion of the mandatory bargaining subject category occurred primarily during the period of the Kennedy-Johnson Board. See K. McGUINNESS, *THE NEW FRONTIER NLRB* 127 (1963).

108. 191 N.L.R.B. 951 (1971). See generally *1971-72 Annual Survey of Labor Relations Law*, 13 B.C. IND. & COM. L. REV. 1347, 1408-13 (1972); 23 SYRACUSE L. REV. 170 (1972); 1972 WISC. L. REV. 291.

109. See Platt, *The Duty to Bargain as Applied to Management Decisions*, 19 LAB. L.J. 143 (1968) (emphasizing that *Fibreboard* deals only with decisions which are economically motivated).

the sale constituted a "partial closing" of the employer's multi-dealer operation.<sup>110</sup>

*Summit Tooling Co.*<sup>111</sup> represents a still more drastic departure from the Board's former position. Although the case involved a partial closing of the business clearly motivated by anti-union animus, the Board held that the employer had no duty to bargain over the decision with the union representing Summit's employees.<sup>112</sup> This ruling is directly contrary to the Board's position in *Ozark Trailers, Inc.*,<sup>113</sup> in which it was held that a decision partially to close an operation was a mandatory bargaining subject, even when the decision was motivated by economic considerations.

It is submitted that the decisions of the Board in *General Motors Corp.* and *Summit Tooling*, together with the Supreme Court decision in *Pittsburgh Plate Glass*,<sup>114</sup> may well represent a retreat from the trend toward the reclassification of most bargaining subjects as mandatory. Although many complex and difficult topics remain for evaluation by the Board and courts,<sup>115</sup> the indications of a shift away from the Board's previous policy of intervention in the area of collective bargaining subjects is indeed most welcome.

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110. One commentator has viewed the *General Motors* decision as "a situation where mandatory bargaining would have imposed no burden on the employer and where agreement may have been possible." The commentary continues:

[T]he Board appears to have adopted the analysis of the circuit courts, at least with respect to those cases involving a capital commitment. This could exclude any critical evaluation of individual factual situations. If the Board continues to follow the reasoning of the circuit courts, it is conceivable that mandatory bargaining of managerial decisions will only be required in certain subcontracting situations and situations not involving capital commitment. Thus, decisions to close, to transfer to another location, to sell, and possibly even to automate, would no longer be subjects for mandatory bargaining.

1972 Wisc. L. Rev. 291, 299.

111. 195 N.L.R.B. 479 (1972). See generally 1971-72 *Annual Survey of Labor Relations Law*, 13 B.C. IND. & COM. L. REV. 1347, 1408 (1972).

112. Although the decision in *Summit Tooling* retained the obligation of management to bargain about the effects of a unilateral change, Member Fanning, in his dissent in *General Motors Corp.*, argued that bargaining prior to the time a decision becomes finalized may be necessary to prevent the foreclosure of bargaining over a number of valid effects. 191 N.L.R.B. at 954. Such a foreclosure, it was claimed, would result from the employer presenting the union with a *fait accompli*.

113. 161 N.L.R.B. 561 (1966).

114. 404 U.S. 157 (1971). See notes 43-45 *supra* & accompanying text.

115. In *International Ass'n of Machinists v. Northeast Airlines, Inc.*, 473 F.2d 549 (1st Cir. 1972), a decision which could have far-reaching implications, it was held that

## DEFICIENCIES IN THE BORG-WARNER DICHOTOMY

When Congress added section 8(d) to the NLRA to mandate collective bargaining over "wages, hours and other terms and conditions of employment," it was in an attempt to clarify the extent of the duty to bargain.<sup>116</sup> The result, however, of the case-by-case, issue-by-issue approach of the Board and courts to interpretation of the statutory phrase has been a tremendous volume of litigation with an absence of any real certainty. The apparent recent change in the Board's attitude toward expanding the mandatory classification provides an excellent opportunity for a reevaluation of the direction it and the courts have taken for so many years. Before a more advantageous alternative may be suggested, however, it is necessary to isolate the most troublesome shortcomings of the mandatory-permissive dichotomy as it is currently applied.

*The dichotomy discourages the introduction of new bargaining subjects.*

Presently, a party attempting to introduce a subject not previously classified as mandatory or permissive, and not clearly within the statutory phrase "wages, hours, and other terms and conditions of employment," will most assuredly be met by a refusal of the other party to negotiate. The *Borg-Warner* treatment of permissive subjects, precluding one party from insisting upon their inclusion in the contract while permitting the other to refuse adamantly to bargain over them, serves effectively to preserve the status quo by postponing the fruition of new subjects, regardless of their timeliness or importance.<sup>117</sup>

Obvious examples of potential bargaining subjects may be found in the area of environmental concern.<sup>118</sup> Because air and water quality are matters of universal concern, the judicial response to questions of environmental quality is being subjected to scrutiny.<sup>119</sup> While the

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there was no requirement that the employer bargain about either the decision to merge the company with another or the effects of the contemplated merger on the conditions of employment. Although the case arose under the Railway Labor Act, the court employed an analysis of cases decided under the National Labor Relations Act.

116. See note 7 *supra* & accompanying text.

117. NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342, 358-59 (1958) (Harlan, Clark & Whittaker, JJ., dissenting in part).

118. See generally Oldham, *Organized Labor, The Environment, and the Taft-Hartley Act*, 71 MICH. L. REV. 935 (1973).

119. See generally Oakes, *Developments in Environmental Law*, 3 E.L.R. 50001 (1973); Kiechel, *Environmental Court Vel Non*, 3 E.L.R. 50013 (1973); Whitney, *The Case for Creating a Special Environmental Court System*, 14 WM. & MARY L. REV. 473 (1973);

population at large is becoming increasingly involved in this issue, the individuals perhaps most directly affected are denied an efficient mechanism for obtaining redress of their grievances. Since the employee working for a corporation which is the source of pollution has a vital interest in the abatement of this condition, it is submitted that such issues as the willingness and ability of the employer to provide efficient environmental protection and the extent to which the union should share in the cost of that protection should not be excluded from the bargaining table<sup>120</sup> as a result of an arbitrary and basically inflexible rule regarding "approved" subjects.

Nevertheless, environmental issues do not appear to fall within the statutory phrase "wages, hours, and other terms and conditions of employment." Although it might be argued that environmental quality is a "condition of employment," absent a Board or court determination to that effect the party which introduces these subjects into negotiation runs a substantial risk of violating the *Borg-Warner* rule and committing a section 8(a)(5) or section 8(b)(3) unfair labor practice, a risk which few negotiators would be willing to assume. There have been numerous cases in which a party, in complete good faith, introduced a subject into collective bargaining negotiations, pursued it with all available tactics, insisted upon it to the point of impasse, and then was held to have committed an unfair labor practice because the Board viewed the subject as permissive.<sup>121</sup> Obviously, at this last stage it is too late to modify the position and correct the good faith error in judgment. That most parties will refrain entirely from introducing new subjects at the bargaining table in order to avoid incurring unfair labor practice charges results in freezing the subjects available for negotiations and a maintenance of the status quo.

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Whitney, *The Case for Creating a Special Environmental Court System—A Further Comment*, 15 WM. & MARY L. REV. 33 (1973).

120. See Oldham, *supra* note 118, at 981 n.173, where the author suggests that environmental problems should not be limited to the bargaining table, but rather that negotiations should constitute only one element in the "arsenal of weapons" available to employees. The author analogizes refusals to perform environmentally injurious work to cases involving refusals to work based upon a conflict between job requirements and the employee's religious belief. See, e.g., *International Shoe Co.*, 17 L.R.R.M. 2813 (1946) (Klamon, Arbitrator); *Goodyear Tire & Rubber Co.*, 17 L.R.R.M. 2722 (1945) (McCloy, Arbitrator); *A.O. Smith Corp.*, 72-1 CCH Lab. Arb. Awards ¶ 8134 (Volz, Arbitrator).

121. E.g., *NLRB v. Niles-Bement-Pond Co.*, 199 F.2d 713 (2d Cir. 1952); *NLRB v. Andrew Jergens Co.*, 175 F.2d 130 (9th Cir.), *cert. denied*, 338 U.S. 827 (1949); *Inland Steel Co.*, 77 N.L.R.B. 1, *enforced*, 170 F.2d 247 (7th Cir. 1948), *cert. denied*, 336 U.S. 960 (1949).

The *Borg-Warner* dichotomy may also be used affirmatively as a bargaining weapon. A party wishing to avoid bargaining about a subject may merely assert the permissive nature of the issue and refuse even to discuss it. This position is extremely effective in view of the difficulties it presents to the party attempting to introduce the subject. If the subject is indeed permissive, insistence may result in a violation of the Act; if the subject is mandatory and its proponent hesitates to pursue it, the opportunity may be lost to implement a new contract clause of potential benefit. The party employing the dichotomy as a bargaining weapon, however, may equivocate about a subject to which he is opposed, while avoiding the burden of justifying his position on the subject. Thus, even if the position that the subject is permissive is eventually proven incorrect, the party opposing its introduction has accomplished a substantial and profitable delay which could only vitiate the other party's bargaining power.<sup>122</sup>

Employment of the sharp division between mandatory and permissive subjects has the natural effect of preventing the introduction into negotiations of previously unclassified subjects, not only in the area of labor relations but also with respect to important questions of economics, sociology, and related fields. To remedy this situation, it is imperative that a general rule be developed which is sufficiently definite to enable the parties to anticipate the status of potential bargaining subjects *prior* to the commencement of negotiations.

*The application of the dichotomy to unilateral action has resulted in an imbalance of bargaining power.*

It has already been indicated that, by applying the *Borg-Warner* dichotomy to basic changes in company operations unilaterally instituted by management, the Board and courts have placed restrictions upon the employer's right to manage which the union was unable to

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122. Of course, if the subject is eventually determined to be mandatory, the party resisting its introduction into negotiations will be guilty of a refusal to bargain under section 8(a)(5) or 8(b)(3). Nevertheless, the advantages of delay may be sufficient to outweigh the disadvantages of an unfair labor practice penalty. A delay is important in its effect, not only upon the negotiators, but especially upon the organization which they represent. For example, a delay of several months in the determination whether a subject is proper for bargaining will, in most cases, vitiate rank-and-file support for it. This is especially true if the economic climate is altered during the period of delay. The recent negotiations between Chrysler and the United Automobile Workers illustrate this point. The major topic of bargaining in 1973 was the issue of voluntary overtime. Immediately after the union secured major concessions in this

obtain at the bargaining table.<sup>123</sup> It should also be noted that the employer's duty to bargain over changes in existing operations extends beyond the term of the contract and into the period of negotiations for a new contract. The application of the dichotomy to unilateral action thus has the secondary effect of limiting the employer's options with respect to the actions it may take in support of its bargaining position during negotiation of a new contract.

The unreasonableness of this result may be demonstrated by an examination of the cases dealing with the unilateral withdrawal of fringe benefits. In *Molders Union Local 155 v. NLRB*,<sup>124</sup> the Court of Appeals for the District of Columbia Circuit found a section 8(a)(5) violation in an employer's unilateral withdrawal of fringe benefits during contract negotiations. The court reasoned that since the employer's conduct was calculated to produce a strike, it interfered with the union's right to decide whether to strike and thus was inherently destructive of union interests.<sup>125</sup> This result is difficult to reconcile with the Supreme Court's determination in *American Ship Building Co. v. NLRB*<sup>126</sup> that an employer's action in "locking-out"<sup>127</sup> its employees may be justified as a legitimate method of exerting bargaining pressure and is not inherently destructive of union interests.

It seems unreasonable to assert that conduct such as that in *Molders Union*, which deprives employees only of certain fringe benefits, is more harmful to employee and union interests than a lockout, which deprives employees of all salary and benefits. From the union's perspective, the

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area, the Arab oil embargo was imposed, causing the layoff of tens of thousands of autoworkers. Clearly, if a delay had been secured on the voluntary overtime issue until the embargo was imposed, the results of the negotiations would have been markedly altered. It is inconceivable that the rank and file would have supported a demand for voluntary overtime during a period when they were in danger of losing their jobs.

123. See notes 82-115 *supra* & accompanying text.

124. 442 F.2d 742 (D.C. Cir. 1971).

125. For a discussion of the implications of employer actions held to be "inherently destructive" of union interests, see *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26 (1967).

126. 380 U.S. 300 (1965).

127. A "lockout" to an employer is the equivalent of a strike to a union; it occurs when the company closes its doors and refuses to allow its employees to work. Although the result of either strike or lockout is the same (the company is denied production and the employees are denied employment and wages), the advantage of a lockout to an employer is that he is able to determine the timing of the shutdown and will normally choose a time when the economic injury to his business may be minimized. For a more detailed discussion of the lockout as a bargaining weapon, see 76 HARV. L. REV. 1494 (1963); 111 U. PA. L. REV. 128 (1962).



employer's unilateral withdrawal of certain fringe benefits would lead only to a possible "loss of face" with its members and a slight weakening of its bargaining position, while a complete lockout would result in the closing of the employer's business at a time most convenient for it. Moreover, in a lockout union members are completely out of work, receiving no income, and contributing no dues to support the union. Concededly, both actions are designed to enable the employer to improve its position at the bargaining table; nevertheless, to contend that the employer's most severe weapon is less inherently dangerous to union and employee interests is illogical in the extreme.

Moreover, such a position makes the parties' relative bargaining strengths dependent not upon economic power or bargaining tactics but rather upon the options the Board and courts have seen fit to leave in the hands of the adverse parties. Unable to take any partial measures to improve its bargaining position, the employer must choose between complete inaction or a total halt to all forms of production. The union, however, is not confronted with a similar "all or nothing" dilemma. In *NLRB v. Insurance Agents' Union*<sup>128</sup> the Supreme Court held that a slowdown employed as an economic weapon to aid the accomplishment of the union's demands at the collective-bargaining table was not in violation of the duty to bargain. Observing that "the use of economic pressure . . . is of itself not at all inconsistent with the duty of bargaining in good faith,"<sup>129</sup> the Court distinguished the unilateral alteration of employment conditions by the union from unilateral action by an employer on the ground that the changes instituted by the union were not designed to be permanent.<sup>130</sup> Such an argument, it is submitted, is tenuous at best, since there is no basis for assuming that changes in employment conditions unilaterally imposed by an employer are any more permanent than those imposed by a union.

That the current state of the law regarding unilateral action is inconsistent is even more evident in light of the court's reasoning in *Molders Union* that the employer's conduct was "inherently destructive" because it was intended to induce a strike.<sup>131</sup> From this position it would follow that all employer conduct which induces a strike is

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128. 361 U.S. 477 (1960).

129. *Id.* at 490-91.

130. The Court stated: "There was no indication that the practices that the union was engaging in were designed to be permanent conditions of work. They were rather means to another end." *Id.* at 496-97 n.28. See also *NLRB v. Katz*, 369 U.S. 736, 747 (1962).

131. 442 F.2d at 746.

inherently destructive of union interests. But such a conclusion is untenable, for an employer could conceivably induce a strike by adhering to a particular bargaining position or by indicating that it is stockpiling supplies in anticipation of a work stoppage. Although both of these are legitimate employer tactics, their effects would be indistinguishable from those of a unilateral withdrawal of fringe benefits.

By limiting the options available to an employer acting in support of its bargaining position, the application of the *Borg-Warner* dichotomy to unilateral action appears to be inconsistent with the national policy of resting the results of collective bargaining upon the economic strength of the parties.<sup>132</sup> It is submitted that the Board should, if not eliminate the restrictions on unilateral action, at least review the application of the "inherently destructive" theory. Some attempt must be made to distinguish between employer actions which are merely tactics designed to improve its bargaining position and those which constitute direct attacks upon the basis of employee representation and which threaten the very existence of the union.

*The dichotomy is too inflexible to adapt to variations among industries.*

By requiring a general classification of bargaining subjects as either mandatory or permissive, the *Borg-Warner* dichotomy fails to take into account the often substantial differences among industries in the American economy.<sup>133</sup> These differences are particularly relevant to a determination of a subject's classification, for what may well be a mandatory subject in one industrial setting should be viewed as permissive in another. For example, a management decision to purchase prefabricated materials may be expected to engender a markedly different response in the construction industry than it would in the trucking industry,<sup>134</sup> while a decision involving company housing would have a much different effect in a small southern textile town or an Appalachian coal-mining area than it would in the aerospace industry. Similarly,

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132. It is generally recognized that the National Labor Relations Act was not intended to give one party a bargaining advantage over another. Senator Wagner, the sponsor of the original NLRA, stated that the "primary requirement for cooperation is that employers and employees should possess *equality* of bargaining power." 78 CONG. REC. 3678, 3679 (1934) (emphasis supplied).

133. St. Antoine, *Judicial Caution and the Supreme Court's Labor Decisions*, October Term, 1971, ABA SECTION OF LABOR RELATIONS LAW—1972 PROCEEDINGS 4, 14 (1973).

134. See Smith, *Boycotts of Prefabricated Building Products and the Regulation of Technological Change on Construction Jobsites*, 25 IND. & LAB. REL. REV. 186 (1972); U.S. Dept. of Labor, *Exploring Restrictive Building Practices*, 92 MONTHLY LAB. REV. 31 (1969).

the use of a union label<sup>135</sup> could be viewed as a mandatory subject in the garment and printing industries but merely a permissive matter in the automobile industry.

Thus, although the trend of the dichotomy is toward a uniform rule of law concerning each bargaining subject, the practices of different industries clearly suggest that markedly different treatment is required. Any attempt to apply a classification of mandatory and permissive subjects therefore should contain a built-in flexibility to accommodate the various characteristics of substantially different industries. The current dichotomy does not.

*The dichotomy has no sound basis in the reality of collective bargaining.*

The process of collective bargaining is an extremely complex procedure requiring a great deal of knowledge, patience, and skill on the part of the participants.<sup>136</sup> In many instances, the subjects which are not raised at the bargaining table, the manner in which others are raised, and the contexts outside the bargaining room in which discussion occurs are more important than events at the table.<sup>137</sup> Numerous tactics are available to a party who wishes to advance a permissive subject, to impasse if necessary, without providing sufficient evidence to warrant a finding of a section 8(a)(5) or 8(b)(3) unfair labor practice. A few examples should serve to illuminate this point.<sup>138</sup>

A party desiring to include a permissive subject in negotiations could,

135. See generally Bird and Robinson, *The Effectiveness of the Union Label and "Buy Union" Campaigns*, 25 IND. & LAB. REL. REV. 512 (1972).

136. The complexity of collective bargaining negotiations can perhaps be best illustrated by consideration of various types of negotiations often being conducted simultaneously. Professors Walton and McKensie employ the following divisions: (1) *distributive bargaining*—the type of negotiations familiar to the public, where the parties "haggle" over who is to receive how much, and where one party's gain is the other party's loss; (2) *integrative bargaining*—the negotiation of an issue on which both parties may gain or both parties may lose (examples are a job-evaluation system or a retraining program); (3) *attitudinal structuring*—the shaping of such attitudes as trust or distrust, friendliness or hostility, between the parties (this is especially important since the parties will often have to deal with each other over an extended period of time); and (4) *intraorganizational bargaining*—the maneuvering to achieve consensus within (rather than between) the labor and management organizations. A BEHAVIORAL THEORY OF LABOR NEGOTIATIONS (R. Walton & R. McKensie eds. 1965) [hereinafter cited as Walton & McKensie]. See also W. MIERNYK, THE ECONOMICS OF LABOR AND COLLECTIVE BARGAINING 392-407 (2d ed. 1973).

137. See Walton & McKensie, *supra* note 136, at 103-11.

138. For other examples of methods for raising nonmandatory subjects, see Cox, *Labor Decisions of the Supreme Court at the October Term, 1957*, 44 VA. L. REV. 1057, 1076-77 (1958).

for instance, refrain entirely from raising the topic at the bargaining table, while making various comments to "outside" sources through press conferences, union meetings, and internal newsletters and publications regarding the importance that party attaches to the satisfactory settlement of the permissive issue. In this manner the opposing party will be informed of the position and be aware of the probability that no final agreement is possible without some concessions on its part regarding that issue.<sup>139</sup> Similarly, a negotiator could raise a permissive subject at the bargaining table, proceed to admit that it is not a mandatory subject and that bargaining is not required, but in the process subtly convey the impression that the union members (or higher management officials) attach a great deal of importance to the issue.<sup>140</sup> Furthermore, the negotiator could bargain "tough" on one or more of the many important mandatory issues while clearly indicating that if the permissive subject were conceded he would be more flexible or make corresponding concessions in other areas. Finally, it would be possible to create an artificial deadlock and impasse involving a mandatory subject in order to gain a desired concession with respect to a permissive topic. A prime example would be a strike by a union for the ostensible purpose of securing a larger wage increase, while in reality the union is prepared to accept the employer's final wage offer in exchange for a clause dealing with a permissive subject.<sup>141</sup>

It is of great importance to note that implementation of any of these techniques could have a deleterious effect on negotiations. Such tactics place a premium upon subterfuge. Since the exact words employed may have a major impact upon a subsequent unfair labor practice proceeding, the negotiators may be distracted from concentrating on the business of reaching an agreement. Moreover, there eventually arises

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139. An example of this strategy is the procedure employed by Walter Reuther, President of the United Auto Workers, in the early 1950's. To impress the auto manufacturers with his determination to secure a guaranteed annual wage, Mr. Reuther employed the press to demonstrate to the companies, the rank and file workers, the other AFL-CIO unions, and the public at large that he was staking his reputation and probably his career on securing an agreement on this issue. Walton & McKensie, *supra* note 136, at 104. Thus, when a labor negotiator publicly discusses bargaining subjects it generally is with the intent to have a major impact on the conduct of negotiations.

140. Walton & McKensie, *supra* note 136, at 99.

141. Professor Cox employs the following example: "During the years in which the Massachusetts court held it unlawful to strike for a union shop, there were not many strikes upon that issue but a very considerable number of strikes for higher wages were settled as soon as the employer decided to grant a union shop agreement." Cox, *supra* note 138, at 1077 n.64.

an occasion during negotiations when each party must know exactly the other party's strengths and attitudes on the major unresolved issues, or a strike may well result.<sup>142</sup> Nevertheless, the present use of the dichotomy requires a party that is prepared to insist upon a permissive subject to employ all available tactics to conceal its true position.

Thus, the mandatory-permissive dichotomy ignores the reality of the collective bargaining process, since efficient negotiators can succeed in forcing an adversary to bargain over permissive subjects, albeit illegally. Clearly, there should be available a method by which new and important subjects may be openly introduced, without the necessity for concealing the parties' true positions and incurring the risk of unwanted and undesirable strikes.

#### PROPOSED CHANGES IN THE DICHOTOMY

From the foregoing analysis of the current application of the mandatory-permissive dichotomy, it is apparent that a revised standard is required to eliminate the uncertainty and inequities of the present system. Such a standard not only is a prerequisite for proper determinations by the Board and the courts but is necessary as a guide for the parties themselves. Without such guidance neither labor nor management is in a position to evaluate effectively the legal status of a proposed bargaining subject and, therefore, to frame a response which is both appropriate to the actions of the other party and consistent with law. It is submitted that if such a standard were available to the parties prior to the commencement of negotiations, the amount of litigation involving sections 8(a)(5) and 8(b)(3) would be substantially reduced.

This Note has suggested that the trend toward classifying an increasing number of bargaining subjects as mandatory must be reevaluated and, if possible, reversed. At least one commentator has proposed, however, that if the trend is to continue it would be preferable immediately to classify all subjects as mandatory,<sup>143</sup> so that neither party could refuse to bargain about any subject which is introduced into collective bargaining negotiations and either party could insist upon any subject to the point of impasse. This position is premised upon the assumption that a trend toward reclassifying an increasing number of subjects as mandatory eventually would result in all subjects not illegal

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142. See generally Walton & McKensie, *supra* note 136, at 61-67.

143. St. Antoine, *Judicial Caution and the Supreme Court's Labor Decisions*, October Term, 1971, ABA SECTION OF LABOR RELATIONS LAW—1972 PROCEEDINGS, 4, 11-15 (1973).

being so categorized. If this is indeed to be the case, it is argued, then it would be preferable to reach that point as quickly as possible to avoid the long period of confusion which would precede it.<sup>144</sup>

Concededly, this proposal would have the advantage of removing all controversy over the status of a proposed bargaining subject and would serve to clarify the area of unilateral action. It is submitted, however, that the suggested approach is highly understandable for several reasons. In light of recent decisions involving the current dichotomy,<sup>145</sup> the basic assumption that the trend will continue unabated appears to be unwarranted. Moreover, if all bargaining subjects were mandatory, the parties would have to discuss every topic raised, since a failure to negotiate in good faith concerning any conceivable topic, regardless of how trivial, would constitute an unfair labor practice under section 8(a)(5) or 8(b)(3). Finally, the application of this proposal to the area of unilateral action would result in the total destruction of any management flexibility, for conceivably every change a company desired to implement unilaterally would be prohibited. Thus, although preferable to a gradual reclassification of all subjects as mandatory, the proposal to accelerate the reclassification process poses a real threat to free collective bargaining. Were all subjects classified as mandatory, any benefits derived in terms of certainty would be offset by a loss of the flexibility which is so vital to both parties in labor-management relations.

It is submitted that a far more desirable approach would be to retain the mandatory-permissive dichotomy while altering the *Borg-Warner* rule so that only refusals to bargain over mandatory subjects would violate sections 8(a)(5) and 8(b)(3). This proposal would continue to impose upon the parties a duty to bargain over those matters which are most basic to labor relations, while permitting the introduction of, and insistence upon, permissive subjects. Since a party could continue to refuse to bargain about a permissive topic, the determinative factor as to which party is successful would be the relative economic power of each. Such an approach would also have the secondary effect of checking expansion of the category of mandatory subjects, since it would no longer be necessary for a party to resort to extensive litigation to have a new subject classified as mandatory before it could be introduced into bargaining negotiations.

In addition, the contract should constitute the sole limitation upon a party's freedom to act. Such an approach would remove the uncer-

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144. *Id.*

145. See notes 107-15 *supra* & accompanying text.

tainty that currently exists in the area of unilateral action and serve to bring the parties back into a more equitable balance of power. Since the employer would be limited in its right to take unilateral action only to the extent that it has made concessions to the union at the bargaining table, the union would not possess substantial economic power which it was unable to obtain through its negotiating skill. There would also exist a greater degree of certainty concerning the legality of any unilateral action either of the parties might be contemplating. Although this approach may engender new problems of contract interpretation, it is submitted that this disadvantage would be less troublesome than the confusion over the meaning of section 8(d), the unjust limitations imposed upon the employer, and the imbalance of power which currently exist.<sup>146</sup>

### CONCLUSION

Although the mandatory-permissive dichotomy established in *Borg-Warner* has, since its inception, been subjected to heavy criticism,<sup>147</sup> recent decisions of the Board<sup>148</sup> and the Supreme Court<sup>149</sup> apparently slowing expansion of the category of mandatory subjects present an excellent opportunity for serious consideration of alternatives to the *Borg-Warner* rule. The traditional dichotomy has hindered the introduction of unclassified subjects into negotiations, failed to distinguish the treatment of two basically different areas of labor relations, and resulted in a loss of touch with the reality of collective bargaining. Perhaps the most serious defect of the dichotomy is the opportunity it presents for judicial intervention into the collective bargaining process. Although the public interest in labor relations is undeniably vital, it clearly was not the intention of the authors of the federal labor legis-

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146. During the period between the commencement of a union campaign to gain recognition as the bargaining representative of the employees and the completion of the first collective bargaining agreement between the parties, the Board could prohibit unilateral action by either party. For a discussion of unilateral action during union election campaigns, see R. WILLIAMS, P. JANUS & K. HUNN, *NLRB REGULATION OF ELECTION CONDUCT* 104-36 (1974).

147. See, e.g., Christensen, *New Subjects and New Concepts in Collective Bargaining*, ABA SECTION OF LABOR RELATIONS LAW—1970 PROCEEDINGS 245-252 (1971); Cox, *The Labor Decisions of the Supreme Court at the October Term, 1957*, ABA SECTION OF LABOR RELATIONS LAW—1958 PROCEEDINGS, 12, 30-40 (1959).

148. *Summit Tooling Co.*, 195 N.L.R.B. 479 (1972); *General Motors Corp.*, 191 N.L.R.B. 951 (1971). See notes 107-13 *supra* & accompanying text.

149. *Allied Chem. & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971). See notes 43-45 *supra* & accompanying text.

lation to permit the Board and courts to dictate the terms of collective agreements. In his remarks to the Senate in support of the Wagner Act, Senator Walsh stated: "The bill indicates the method and manner in which employees may organize, the method and manner of selecting their representatives or spokesmen, and leads them to the office door of their employer with the legal authority to negotiate for their fellow employees. *The bill does not go beyond the office door.*"<sup>150</sup> Senator Walsh's famous door was breached long ago by the NLRB and the federal judiciary, who now occupy a space next to the table looking over the negotiator's shoulder. The issue which remains to be determined is whether the Board and courts should be permitted to sit at the table and negotiate agreements for the parties. It is submitted that the time has arrived, if not to remove them from the room, at least to point them in the direction of the door.

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150. 79 CONG. REC. 7659 (1935) (emphasis supplied).