Milwaukee Spring Division of Illinois Coil Spring Company: Work Relocation as a Means to Obtain Midterm Contract Concessions

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MILWAUKEE SPRING DIVISION OF ILLINOIS COIL SPRING COMPANY: WORK RELOCATION AS A MEANS TO OBTAIN MIDTERM CONTRACT CONCESSIONS

The economic climate of the late 1970's and early 1980's has had, and likely will continue to have, a significant effect on American labor relations.1 Employers, faced with an adverse economic outlook and high labor costs, are seeking wage and benefit concessions from unions to ameliorate their financial troubles.2 Normally, concession bargaining occurs during the negotiation of a new collective bargaining agreement (CBA).3 Recently, however, employers seeking contract concessions have begun to approach the unions in midterm of the CBAs.4 In response to union refusals to make concessions, some employers have attempted to evade their contractual obligations by transferring work to geographic areas having lower labor costs.5

1. See BNA Special Report, Labor Relations in an Economic Recession: Job Losses and Concession Bargaining (July 29, 1982). In 1982 the economy suffered the worst layoff and unemployment figures since the Great Depression. Id. at 23.


3. A collective bargaining agreement is a contract or a mutual understanding between a union and an employer. Generally, the agreement sets forth the terms and conditions of employment including wages, hours, seniority, vacation pay, bargaining unit, grievance procedures, and other working conditions. See H. Roberts, Roberts’ Dictionary of Industrial Relations 15 (2d ed. 1971).


5. In a series of decisions, the National Labor Relations Board (NLRB or Board) held


7. A bargaining unit is a group of employees found by a Labor Board to constitute a unit appropriate for bargaining purposes. The standards commonly used by the Boards include: 1) the desire of the employees; 2) functional coherence; 3) mutuality of interest based on occupation or skill; and 4) the history of collective bargaining. Where no official designation is made, it is the unit accepted by the employer for bargaining purposes. H. Roberts, supra note 3, at 46-47.

8. The Board specifically found that the employer had violated §§ 8(d) and 8(a)(1), (3) and (5) of the Act. Los Angeles Marine Hardware Co., 235 N.L.R.B. at 737. Section 8(d) provides in pertinent part:

For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, 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: Provided, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification . . . (4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration of such contract, whichever occurs later. 29 U.S.C. § 158(d) (1982).

Section 8(a)(1) provides that it is an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section [7]." 29 U.S.C. § 158(a)(1) (1982).

Section 7 provides that "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities, for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157 (1982).

Section 8(a)(3) provides that it is an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to
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National Labor Relations Act (NLRA or Act). The United States Court of Appeals for the Ninth Circuit enforced the Board's Order, despite evidence that the employer's decision to relocate was economically motivated and was not the result of antiunion animus. Further evidence existed that the employer had attempted to bargain with the union regarding relocation and its effect on unit employees.

Until very recently, the Ninth Circuit's decision in Los Angeles Marine had been largely ignored. There has, however, been a surge of work relocation cases premised upon Los Angeles Marine in which the Board has sought to enjoin relocation of bargaining unit work by employers during the pendency of a CBA. The most recent development in this area of the

Section 8(a)(5) provides that it is an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees." 29 U.S.C. § 158(a)(5) (1982).


10. Los Angeles Marine Hardware Co. v. NLRB, 602 F.2d 1302 (9th Cir. 1979).

11. Id at 1306. Conduct motivated by antiunion animus and having the foreseeable effect of either encouraging or discouraging union membership violates § 8(a)(3) of the NLRA. See supra note 8. Where an employer's conduct has only a "comparatively slight" adverse effect on employee § 7 rights, and the employer has come forward with evidence of a legitimate and substantial business justification, antiunion motivation must be proved to sustain a § 8(a)(3) violation. NLRB v. Great Dane Trailers, Inc., 388 U.S. 26, 34 (1967) (quoting NLRB v. Brown, 380 U.S. 278, 287 (1965)). On the other hand, where the conduct is "inherently destructive" of employee rights, no affirmative showing of the employer's unlawful motivation is necessary to establish a § 8(a)(3) violation. See NLRB v. Brown, 380 U.S. at 287; see also infra note 79.

12. Los Angeles Marine, 602 F.2d at 1306.

13. This proliferation of relocation cases prompted one management labor lawyer to remark: "[W]e had all best read rather carefully the Board and the court decision in Los Angeles Marine Hardware Co. . . . I think many of us had been ignoring that case, thinking it was a sport, but we cannot do so any longer." See E. Miller, Remarks at the South Western Legal Foundation, 29th Annual Institute (Oct. 21, 1982). See also infra notes 83-106 and accompanying text.

14. See Quarterly Report of NLRB General Counsel William A. Lubbers, DAILY LAB. REP. No. 3 (BNA), Jan. 5, 1983, at D-1. The NLRB's General Counsel devoted his entire 1983 first quarter report to cases involving unlawful relocation of bargaining-unit work. The report included cases decided by the NLRB Division of Advice upon a request for advice or on appeal from a regional director's dismissal of unfair labor practice charges. It also contained relocation cases in which the Board authorized § 10(j) proceedings as well as a listing of every § 10(j) case authorized by the Board for the first six months of calendar year 1982. Id.

Section 10(j) of the Act empowers the Board, "upon issuance of a complaint . . . charging that any person has engaged in or is engaging in an unfair labor practice, to petition any
law has been the Board's decision in Milwaukee Spring Division of Illinois Coil Spring Co.\textsuperscript{15}

In its initial Milwaukee Spring decision (Milwaukee Spring I),\textsuperscript{16} the Board extensively discussed and unequivocally reaffirmed Los Angeles Marine.\textsuperscript{17} The Board found that the employer's decision to transfer the assembly operation without the union's consent, and consequently, to furlough unit employees during the term of the CBA, constituted a midterm modification within the meaning of section 8(d) of the Act.\textsuperscript{18} The employer filed a petition for review of the Board's Decision and Order with the United States Court of Appeals for the Seventh Circuit, and the Board filed a cross-application for enforcement of its Order.\textsuperscript{19} Prior to review,
the court granted the Board's motion to remand *Milwaukee Spring I* for additional consideration.  

On remand (*Milwaukee Spring II*), the Board reversed *Milwaukee Spring I*, and dismissed the complaint against the employer. It held that, in the absence of a specific work-preservation clause, an employer is free to transfer work out of the bargaining unit during the term of the CBA if the employer first satisfies any contractual obligations to bargain about the re-location decision. In dissent, Member Zimmerman argued that section 8(d) prohibits an employer from relocating bargaining-unit work in order to evade the contract's wage rate during the life of the agreement unless the employer first obtains the union's consent.

This Note will examine the evolution of the law as applied to work relocations to obtain concessions during the term of an existing CBA. It will focus on the two most significant and recent Board decisions, *Los Angeles Marine* and *Milwaukee Spring I*, and will demonstrate that these decisions are consonant with the underlying policies and philosophy of the National Labor Relations Act. Finally, this Note will conclude that *Milwaukee Spring II* is inconsistent with the congressional policy of encouraging the labor stability that results from the negotiation of CBAs of fixed duration.

### I. NLRA: Collective Bargaining as a "Shared Process"

The general purpose of the NLRA is to promote peaceful resolution of industrial disputes by encouraging the practice and procedure of collective bargaining. Through the NLRA, Congress sought to reduce the economic inequality between labor and management by increasing the bargaining power of employees. Congress recognized that refusals by
employers to bargain with employees over wages and benefits had been one of the most prolific causes of industrial strife.\textsuperscript{26}

In 1935, Congress imposed a duty upon employers to bargain in good faith with employee representatives.\textsuperscript{27} Section 8(d) of the Act defines this duty, which includes the mutual obligation of the employer and the union to meet at reasonable times and to confer in good faith.\textsuperscript{28} Hence, collective bargaining is a "shared process" in which each party has the right to participate actively.\textsuperscript{29} The parties, moreover, are required to bargain collectively over "wages, hours, and other terms and conditions of employment."\textsuperscript{30} Either party is obligated, upon request of the other party, to

\textsuperscript{26} See 29 U.S.C. § 151 (1982) ("The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest. . . .").


\textsuperscript{29} General Electric Co., 150 N.L.R.B. 192, 194 (1964).

\textsuperscript{30} 29 U.S.C. § 158(d) (1982). See \textit{supra} note 8. The Supreme Court noted in First Nat'l Maintenance Corp. that "Congress has limited the mandate or duty to bargain to matters of 'wages, hours, and other terms and conditions of employment' . . . [B]oth an employer and union may bargain to impasse over these matters and use the economic weapons at their disposal to attempt to secure their respective aims." 452 U.S. 666, 674-75 (1981) (citing American Nat'l Ins. Co., 343 U.S. 395 (1952)). The original House bill, proposed during the formulation of § 8(d), contained a specific list of mandatory subjects of bargaining. H.R. 3020, 80th Cong., 1st Sess. § 2(11) (1947), \textit{reprinted in} 1 NLRB, \textit{LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947}, at 166-67 (1948) [hereinafter cited as \textit{LEGISLATIVE HISTORY OF 1947 ACT}]; see H.R. REP. No. 245, 80th Cong., 1st Sess. 22-23 (1947), \textit{reprinted in} \textit{LEGISLATIVE HISTORY OF 1947 ACT, supra}, at 313-14. The minority House bill urged rejection of the original bill, arguing that a specific list of mandatory subjects would effectively exclude numerous topics which had traditionally fallen within the scope of collective bargaining. H.R. REP. No. 245, 80th Cong., 1st Sess. 71 (1947) (minority report), \textit{reprinted in} \textit{LEGISLATIVE HISTORY OF 1947 ACT, supra}, at 362. The minority report further contended:

The appropriate scope of collective bargaining cannot be determined by a formula; it will inevitably depend upon the traditions of an industry, the social and political climate at any given time, the needs of employers and employees, and many related factors. What are proper subject matters for collective bargaining should be left in the first instance to employers and trade-unions, and in the second place, to any administrative agency skilled in the field and competent to devote the necessary time to a study of industrial practices and traditions in each industry or area of the country, subject to review by the courts. It cannot and should not be strait-jacketed by legislative enactment.

\textit{Id.} The narrow language of the original House bill was supplanted in conference by the
bargain in good faith over these mandatory subjects. This statutory duty to bargain in good faith, however, does not include a duty to agree on any of the subjects bargained over. Once the parties have reached an impasse over a mandatory subject, the parties may act unilaterally.


32. See 29 U.S.C. § 158(d) (1982), supra note 8. While the Board cannot compel the parties to demonstrate good faith by incorporating any specific contract provisions, see H.K. Porter, Inc. v. NLRB, 397 U.S. 99 (1970), it can evaluate the negotiations between the parties to determine the reasonableness of any position taken and require evidence that the parties are making an effort to reach a common ground. See Reed & Prince Mfg. Co., 205 F.2d 131, 134-35 (1st Cir. 1953); see also NLRB v. Insurance Agents' Int'l Union, 361 U.S. 477, 486 (1980) (“Obviously there is tension between the principle that the parties need not contract on any specific terms and a partial enforcement of the principle that they are bound to deal with each other in a serious attempt to resolve differences and reach a common ground.”).

33. An impasse is reached when there is a clear deadlock and further negotiations would be fruitless. Relevant factors to be considered in deciding whether an impasse in bargaining exists include bargaining history, the good faith of the parties, the length of negotiations, the importance of the remaining issues under discussion, and the understanding of the parties as to the state of negotiations. See Taft Broadcasting Co., 163 N.L.R.B. 475, 478 (1967), enforced sub nom. AFTRA v. NLRB, 395 F.2d 622 (D.C. Cir. 1968).

34. See, e.g., NLRB v. Katz, 369 U.S. 736, 743 (1962). Once the employer and union have bargained to a good faith impasse, an employer is free to unilaterally implement its original decision. Id. If a subject is permissive rather than mandatory, however, the employer may lawfully refuse to bargain and may act unilaterally to implement its decisions. See Borg-Warner, 356 U.S. 342, 349. There are no affirmative obligations on the part of either party concerning bargaining over permissive subjects. “[E]ach party is free to bargain or not to bargain, and to agree or not agree.” Id. at 349. The Board has deemed certain subjects permissive rather than mandatory. See, e.g., Kit Mfg. Co., 150 N.L.R.B. 662 (1964), enforced, 365 F.2d 829 (9th Cir. 1966) (union label); Detroit Resilient Floor Decorators Local 2285, 136 N.L.R.B. 769 (1962), enforced, 317 F.2d 269 (6th Cir. 1963) (industrial promotion funds); Scripto Co., 36 N.L.R.B. 411 (1941) (performance bonds).
In addition to defining the duty to bargain, section 8(d) of the Act imposes a duty upon each party to a CBA to refrain from modifying the CBA without complying with notice and waiting period requirements.\textsuperscript{35} Section 8(d) further provides that neither party to a CBA may be compelled to discuss or to agree to a midterm modification of a term contained in the CBA.\textsuperscript{36} The mandates of section 8(d) apply, however, only to those particular contract terms that are deemed to be mandatory subjects of bargaining.\textsuperscript{37} When an employer unilaterally modifies the terms or conditions of employment during the effective period of a contract without the consent of the union, the employer acts in derogation of his duty to bargain under section 8(d),\textsuperscript{38} thereby violating section 8(a)(5) of the Act.\textsuperscript{39} This violation occurs even if the union has refused to discuss the changes proposed by the

\textsuperscript{35} 29 U.S.C. § 158(d) (1982), \textit{supra} note 8. Section 8(d)(4) states that it will be a violation of the duty to bargain unless a party seeking to terminate or modify the contract “continues in full force and effect, without resorting to strike or lockout, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later.” 29 U.S.C. § 158(d)(4) (1982).


\textsuperscript{37} \textit{See} Allied Chem. & Alkali Workers of Am., Local Union No. 1 v. Pittsburgh Plate Glass Co., Chem. Div., 404 U.S. 157, 183-88 (1971). “Accordingly, just as section 8(d) defines the obligation to bargain with respect to mandatory terms alone, so it prescribes the duty to maintain only mandatory terms without unilateral modification for the duration of the collective-bargaining agreement.” \textit{Id}. at 185-86. Hence, a unilateral modification of a permissive bargaining subject contained in a contract is not an unfair labor practice. \textit{Id.} \textit{See supra} note 34. The remedy available for an injured party in such a case is to institute a breach of contract action under § 301 the Act.

Section 301 provides in pertinent part:

\begin{quote}
Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.
\end{quote}


\textsuperscript{38} 29 U.S.C. § 158(d) (1982), \textit{supra} note 8. Neither good faith nor economic exigencies permit an employer to make unilateral modifications of contractual terms or conditions of employment during the effective period of the contract. \textit{See} Oak Cliff-Golman Baking Co., 207 N.L.R.B. 1063 (1973), \textit{enforced}, 505 F.2d 1302 (5th Cir. 1974) (employer who reduced wages to meet economic crisis unilaterally modified the CBA within the meaning of § 8(d) of the Act).

employer. Moreover, bargaining to impasse concerning proposed contract changes does not excuse a unilateral modification of a mandatory term contained in the CBA.

Through enactment of section 8(d) of the Act in 1947, Congress rejected the then prevailing union philosophy that an employer was obligated, upon the request of the union, to renegotiate terms contained in the existing CBA. It was the clear intent of Congress in 1947 to reject this system of continuous bargaining in favor of a model compelling each party to be bound by the contract for its term absent consent by the other party to voluntarily renegotiate.

one of the employee's § 7 rights—the right to bargain collectively—a violation of § 8(a)(1) occurs. See supra note 8 for a delineation of an employee's rights under § 7 of the Act.

Some employer actions that violate § 8(a)(5) so fundamentally undermine employee § 7 rights that they are "inherently destructive" of these rights, and thus constitute in addition to a § 8(a)(1) violation, a separate § 8(a)(3) violation as well. Section 8(a)(3) prohibits employers from engaging in "discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." 29 U.S.C. § 158(a)(3) (1982). See infra note 79.

40. See Nassau County Health Care Facilities Ass'n, 227 N.L.R.B. 1680, 1683 (1977); C & S Indus. Inc., 158 N.L.R.B. 454, 457 (1966). Parties to an existing CBA are under no duty to discuss changes to the terms of the contract proposed by the other party. See Jacobs Mfg. Co., 94 N.L.R.B. 1214 (1951); Tide Water Assoc. Oil Co., 85 N.L.R.B. 1096 (1949).

41. See NLRB v. Scan Instrument Corp., 394 F.2d 884, 887 (7th Cir. 1968) (terms contained in a CBA are "frozen as . . . term[s] or condition[s] of employment for the contract period involved absent mutual consent of the contracting parties to this alteration or qualification").

42. See supra notes 24-41 and accompanying text. The legislative history of § 8(d) is replete with references to the rights of the parties to refuse to bargain over terms contained in the CBA. The House Report explained that § 8(d) "does not require bargaining on any matter during the term of the collective bargaining agreement, except as the express terms of the agreement permit." H.R. REP. NO. 245, 80th Cong., 1st Sess. 23 (1947), reprinted in Legislative History of 1947 Act, supra note 30, at 361; H.R. REP. NO. 510, 80th Cong., 1st Sess. 35 (1947), reprinted in Legislative History of 1947 Act, supra note 30, at 539. The parties, however, are free to discuss changed circumstances. See, e.g., 93 Cong. Rec. 7002 (1947), reprinted in Legislative History of 1947 Act, supra note 30, at 1624 (statement of Sen. Taft) ("Parties may meet and discuss the meaning of the terms of their contract and may agree to modifications or change of circumstances, but it is not mandatory that they do so.").

Congress' primary concern in enacting § 8(d) was to prohibit the parties from resorting to the use of economic weapons. See 93 Cong. Rec. 6611 (1947), reprinted in Legislative History of 1947 Act, supra note 30, at 1577 (statement of Sen. Morse) ("[T]he union, once it signs a contract has no right to strike during the life of the contract if the strike is to force a change in the terms of the contract."); 93 Cong. Rec. 5146 (1947) reprinted in Legislative History of 1947 Act, supra note 30, at 1496 (statement of Sen. Bael) ("[Section 8(d) is] another provision aimed primarily at protecting the public, as well as the employee, who have been the victims of 'quickie' strikes").
II. Developing the Theory

A. The Early Cases—Unsuccessful Attempts to Prohibit Midcontract Work Relocations

The effect of section 8(d) on employer work relocation during the term of the CBA has been addressed by the NLRB in only a few decisions.\(^4^4\) The Board, with limited approval by the reviewing courts of appeals, has held that relocation of bargaining-unit work during the life of the agreement may constitute an unlawful modification under section 8(d) of the Act.\(^4^5\)

In *University of Chicago*,\(^4^6\) the employer operated several medical-academic complexes on its campus. All functions carried on in these complexes were placed under the administrative direction of the University's Biological Services Division (BSD).\(^4^7\) The BSD janitorial employees were represented by two different local unions and were covered by two separate CBAs.\(^4^8\) During the first year of a two-year CBA, BSD advised one local union\(^4^9\) that BSD desired to institute a uniform higher standard of sanitation throughout the hospital complex, and that the only feasible way to accomplish that goal was to transfer all custodial work to the other local union.\(^5^0\) BSD transferred the bargaining-unit work despite the union's objections. The union responded to BSD's abrogation of the CBA by filing unfair labor practice charges with the NLRB.\(^5^1\) The Board held that BSD's unilateral transfer of custodial work out of the bargaining unit during the term of the CBA was a modification of a jurisdictional guarantee\(^5^2\) implicitly embodied in the contract's recognition clause in violation of sec-

\(^4^4\). See supra note 5; see also infra notes 46-106 and accompanying text.

\(^4^5\). See supra note 44.

\(^4^6\). 210 N.L.R.B. 190 (1974), enforcement denied, 514 F.2d 942 (7th Cir. 1975).

\(^4^7\). University of Chicago, 210 N.L.R.B. at 191.

\(^4^8\). *Id.* Two hundred of the 219 BSD custodians were represented by the American Federation of State, County, and Municipal Employees' Union (AFSCME), with the remaining 19 being represented by the Service Employees International Union (SEIU). *Id.* at 191, 193.

\(^4^9\). *Id.* at 194. In September 1970, a new two-year CBA was entered into between BSD and SEIU. In July 1971, SEIU was advised by BSD of the decision to allocate all custodial work to AFSCME. *Id.*

\(^5^0\). *Id.* BSD received numerous complaints from the medical faculty to the effect that the portion of the medical-academic complexes cleaned by SEIU was being maintained inadequately. Many physicians expressed a desire to raise the overall level of cleanliness to that maintained by AFSCME members. *Id.*

\(^5^1\). *Id.* at 191.

\(^5^2\). A contract's jurisdictional clause states the union's authority to represent certain groups of employees in a specific type of work or occupation. *See H. Roberts, supra note 3*, at 239.
The Board reasoned that BSD's practice of allocating cleaning areas between the two unions was a part of the bargaining history leading to the CBA, and thus a jurisdictional guarantee was necessarily embodied in the CBA's recognition clause.

The United States Court of Appeals for the Seventh Circuit refused to enforce the Board's Decision and Order. The court held, on the basis of existing case precedent, that unless such transfers were specifically prohibited by the CBA, the employer was free to transfer work out of the bargaining unit after bargaining in good faith to impasse. Having found no antiunion animus, the court determined that the sole reason for BSD's decision to transfer the work was its desire to institute a uniform higher standard of sanitation in the medical-academic complexes.

Three years later, in Boeing Co., the NLRB employed essentially the same rationale as it had in University of Chicago in refusing to allow an employer to relocate bargaining-unit work. The dispute involved unionized welders and a manufacturer of military and commercial hydrofoils. Since 1959, when the union first became certified as the bargaining agent of the company's employees, all welding had been performed by the bar-

53. A contract recognition clause identifies the union as the bargaining agent and representative of the employer's employees. See id. at 456.

54. University of Chicago, 210 N.L.R.B. at 190. The Board held that by transferring work out of SEIU's bargaining unit, the employer had repudiated both the contract recognition clause and the terms and conditions of employment contained in the contract and, therefore, had violated §§ 8(d) and 8(a)(1), (2), (5) of the Act. 210 N.L.R.B. at 199.

55. University of Chicago v. NLRB, 514 F.2d 942 (7th Cir. 1975).


57. Id. The Seventh Circuit observed that BSD had a past practice of transferring work from one bargaining unit to the other and also that there never was a definite line of demarcation concerning the division of cleaning responsibilities. Id. at 948. In refusing to enforce the Board's order the court stated:

We can find no support for this novel theory either in the 'bargaining history' of this case or in any legal precedents. In our view, the effort of the Board to thus read a jurisdictional guarantee into a recognition clause seriously impinges upon the fundamental rights of management and requires reversal.

Id. at 944.

58. 230 N.L.R.B. 696 (1977), enforcement denied, 581 F.2d 793 (9th Cir. 1978). The Board distinguished the Seventh Circuit's University of Chicago opinion by noting that in Boeing, the work assigned was not identical to that being performed in each bargaining unit, there was no history of prior work transfers, and the union had always carefully policed its unit's jurisdiction. Id. at 701. Additionally, unlike the situation presented in University of Chicago, there were no health and safety considerations alleged in the transfer. Id.

59. Hydrofoils are produced by cutting sheets of aluminum, folding and fitting the pieces together, and then tack welding them in place, pending the final welding. Id. at 697.
gaining unit employees.\textsuperscript{60} However, in the fall of 1975, the employer decided to train nonunion employees to perform the process of tack welding.\textsuperscript{61} Ostensibly, the employer sought to eliminate inefficiency in the production process. The employer implemented its training program despite the union’s objections that such action constituted an unlawful transfer of work out of the bargaining unit.\textsuperscript{62} The Board, acting on the union’s charge against the employer, held that the employer’s action was a modification of the CBA’s recognition clause and therefore unlawful under section 8(d) of the Act.\textsuperscript{63} It reasoned that since all tack welding had been performed by the bargaining unit employees throughout the history of the union’s bargaining relationship with the employer, tack welding was the province of those employees whom the union represented under the existing CBA.\textsuperscript{64}

The United States Court of Appeals for the Ninth Circuit refused to enforce the Board’s decision, stating that the Board’s interpretation of the recognition clause as an implied jurisdictional clause was unwarranted and without a sound basis in law.\textsuperscript{65} Relying on the Seventh Circuit’s rationale in University of Chicago, the court concluded that the central issue in Boeing Co. was not whether there had been a midterm modification of the CBA, but rather whether the recognition clause could support an implied grant of jurisdiction.\textsuperscript{66} The Ninth Circuit emphasized that the employer’s sole motive for transferring the work was a desire to increase the level of efficiency in production and not a desire to escape the terms of the CBA.\textsuperscript{67}

\section*{B. Work Relocation Undertaken to Evade Contractual Labor Costs—A Legitimate Business Justification?}

The Board adopted the decision of an Administrative Law Judge (ALJ) in Los Angeles Marine,\textsuperscript{68} and held that the employer violated sections 8(d) and 8(a)(1), (3) and (5) of the Act by relocating bargaining unit work with-

\begin{itemize}
  \item \textsuperscript{60} In February 1975, the employer and the union entered into a new two-year CBA. \textit{Id.}
  \item \textsuperscript{61} \textit{Id.}
  \item \textsuperscript{62} \textit{Id.}
  \item \textsuperscript{63} \textit{Id.} at 704. The Board specifically found that the employer violated §§ 8(a)(1), (5), and 8(d) of the Act.
  \item \textsuperscript{64} \textit{Id.} at 698. The Board argued that a jurisdictional guarantee may be “an inextricable, albeit inexplicit” part of a contract’s bargaining history and therefore part of the contract itself. \textit{Id.}
  \item \textsuperscript{65} Boeing Co. v. NLRB, 581 F.2d 793, 798 (1978).
  \item \textsuperscript{66} \textit{Id.} at 797.
  \item \textsuperscript{67} \textit{Id.}
  \item \textsuperscript{68} 235 N.L.R.B. 720 (1978), enforced, 602 F.2d 1302 (9th Cir. 1979).
\end{itemize}
out the union's consent during the term of the existing CBA.\textsuperscript{69} The ruling was upheld despite evidence that the employer had bargained in good faith concerning the relocation and its effects, the lack of antiunion animus, and the existence of legitimate economic justification.\textsuperscript{70}

One of the employer's two divisions, Los Angeles Marine Hardware Co., was a party to a CBA covering its recreational sales employees.\textsuperscript{71} The employer faced a potential operating loss at the Los Angeles Marine facility in part due to high labor costs.\textsuperscript{72} During the 1975 negotiations leading to execution of the CBA, and again in 1976 when the agreement provided for reopening wage negotiations, the employer unsuccessfully sought to obtain wage concessions from the union.\textsuperscript{73} Unable to attain the financial relief it had requested, the employer terminated all of its employees at the Los Angeles Marine facility and relocated its recreational sales operations.\textsuperscript{74} The union filed charges with the NLRB alleging that the employer's actions constituted an unlawful midterm modification of the CBA in violation of sections 8(d), 8(a)(1), (3), and (5) of the Act.\textsuperscript{75}

The ALJ held that section 8(d) of the Act forbids any party to a CBA from making a midterm modification of a term contained in the contract without the other party's consent.\textsuperscript{76} He maintained that even if an employer were motivated by valid economic concerns, it could not, absent union consent, modify wage rates, replace all unit employees, or remove work from the bargaining unit during the term of the CBA.\textsuperscript{77} The ALJ explained that if relocation alone were permitted to vary that result, employers would then be able to accomplish indirectly that which they could not accomplish directly under section 8(d) of the Act.\textsuperscript{78} In addition, the ALJ found that the employer's discharge of unit employees as part of its

\begin{itemize}
  \item \textsuperscript{69} Id. at 737-38.
  \item \textsuperscript{70} Id. at 732-33.
  \item \textsuperscript{71} Id. at 721. The employer's other division, Cal Marine, was an inactive corporate shell prior to the circumstances giving rise to litigation.
  \item \textsuperscript{72} Id. at 722. In 1975, a survey of the employer's competitors disclosed that its labor costs were $1.40 per hour higher than those of its highest paying competitor and almost $2 per hour higher than two other competitors. By 1976, the employer was confronted with a potential $170,000 annual loss and also was experiencing cash flow problems. \textit{Id.}
  \item \textsuperscript{73} Id.
  \item \textsuperscript{74} Id. at 724-25. The recreational sales operations were transferred to the inactive corporate shell, Cal Marine. The employer hired new recreational sales employees at wage and benefits below the level previously required under the existing CBA. \textit{Id.}
  \item \textsuperscript{75} Id.
  \item \textsuperscript{76} Id. at 735.
  \item \textsuperscript{77} Id. (citing Boeing Co., 230 N.L.R.B. 696 (1977); Oak Cliff-Golman Baking Co., 207 N.L.R.B. 1063 (1973); AAA Electric, Inc., and Simms Electric Co., 190 N.L.R.B. 247 (1971)).
  \item \textsuperscript{78} 235 N.L.R.B. at 735.
\end{itemize}
plan to escape the economic obligations of the CBA was conduct that was "inherently destructive" of employee rights, and thus violative of sections 8(a)(1) and (3) of the Act.\textsuperscript{79} The Board adopted the ALJ's decision without comment.

The United States Court of Appeals for the Ninth Circuit enforced the Board's order, although it observed that the employer was motivated solely by economic factors and not by unlawful considerations.\textsuperscript{80} Nevertheless, the court noted that the employer's actions amounted to a midterm repudiation of the CBA and that such action is not excused by either good faith or economic necessity.\textsuperscript{81} Like the ALJ, the court concluded that "[t]o permit such a result would allow an employer to do indirectly what cannot be done directly under the Act."\textsuperscript{82}

In \textit{Brown Company}, the Board reaffirmed the rationale of \textit{Los Angeles Marine}.\textsuperscript{83} The Board majority found that the employer had violated sections 8(a)(1) and (3) of the Act by discontinuing its cement-hauling operations, laying off employees, and transferring trucks to another division in order to avoid wage obligations under the CBA.\textsuperscript{84} It found the section 8(a)(3) violation on the theory that the employer's actions were "inherently destructive of employee interests."\textsuperscript{85} A minority of the Board disagreed

\begin{footnotesize}
\begin{enumerate}
\item[79.] \textit{Id.} at 736 (quoting Rushton \& Mercier Woodworking Co., 203 N.L.R.B. 123, 124 (1973), enforced, 86 L.R.R.M. 2151 (1st Cir. 1974)). Generally, a violation of § 8(a)(3) requires a showing that the employer was motivated by a desire to discourage union membership. \textit{See} American Ship Bldg. Co. v. NLRB, 380 U.S. 300, 311 (1965); Republic Aviation Corp. v. NLRB, 324 U.S. 793, 805 (1945). When an employer's conduct is "inherently destructive" of employee rights, however, a violation of § 8(a)(3) does not require proof of antiunion motivation. \textit{See} NLRB v. Great Dane Trailers, Inc., 388 U.S. 26, 34 (1967) (quoting NLRB v. Brown, 380 U.S. 278, 287 (1965)). The \textit{Great Dane} Court reasoned that such conduct "carries with it 'unavoidable consequences which the employer not only foresees but which he must have intended' and thus bears 'its own indicia of intent.'" \textit{Id.} at 33 (quoting NLRB v. Erie Resistor Corp., 373 U.S. 221, 231 (1963)). For a critical review of the Board's application of the "inherently destructive" doctrine in work relocation cases, see Irving, \textit{Plant Relocations and Transfers of Work: The NLRB's "Inherently Destructive" Approach}, 34 LAB. L.J. 549-62 (1983).
\item[80.] \textit{Los Angeles Marine Hardware Co. v. NLRB}, 602 F.2d 1302, 1306 (9th Cir. 1979).
\item[81.] \textit{Id.} at 1307.
\item[82.] \textit{Id.}
\item[83.] \textit{Brown Co.}, 243 N.L.R.B. 769 (1979). The Board cited \textit{Los Angeles Marine} and stated:

\begin{quote}
[W]e have held that a unilateral removal of bargaining unit work during a contract term is the type of contract modification proscribed by the Act, regardless of economic justification. Further, under § 8(d) of the Act, a party to the contract cannot be compelled to bargain about such a modification and, accordingly, any modification can be implemented only with the consent of the other party.
\end{quote}

\textit{Id.} at 771 (footnote omitted).
\item[84.] \textit{Id.} at 772.
\item[85.] \textit{Id.} at 771 (quoting Rushton \& Mercier Woodworking Co., 203 N.L.R.B. 123, 124)
\end{enumerate}
\end{footnotesize}
with the majority's findings of fact concerning the employer's conduct.\textsuperscript{86} The minority emphasized, however, that it supported the majority's conclusion that a unilateral removal of bargaining-unit work during the term of the CBA without the union's consent was an unlawful modification of the CBA.\textsuperscript{87} The Ninth Circuit refused to enforce the Board's Decision and Order and remanded the case to the Board for a determination of whether a work-relocation clause in the contract permitted the employer to transfer the work.\textsuperscript{88}

Due to the large increase in the number of work relocation cases the Board sought an opportunity to clarify its rationale and holding in \textit{Los Angeles Marine}. It was presented with such an opportunity in \textit{Milwaukee Spring Division of Illinois Coil Spring Co.}

### III. Milwaukee Spring Division of Illinois Coil Spring Company: Staying the Course?

The Illinois Coil Spring Company was comprised of three divisions—Holly Spring, McHenry Spring, and Milwaukee Spring.\textsuperscript{89} The employees at the Milwaukee Spring facility were represented by the International Union, the United Automobile, Aerospace and Agricultural Implement

(1974), enforced, 86 L.R.R.M. 2151 (1st Cir. 1974)). In finding a violation of § 8(a)(3) the Board majority reasoned that:

\textit{It matters not whether Respondent's transfer of its trucks was a result of union animus, nor that it first bargained with the Union and attempted to get it to sign a new agreement. It is obvious that Respondent's actions were 'inherently destructive of employee interests' and that the employees lost the jobs to which they were entitled as a result of Respondent's efforts to escape its economic obligations under the contract.}

\textit{Id} (footnoted omitted). \textit{See supra} note 79. The majority found it unnecessary to consider whether the employer had violated § 8(a)(5).

\textsuperscript{86} Brown Co., 243 N.L.R.B. at 773-75.

\textsuperscript{87} \textit{Id} at 775. In Tocco Div. of Park-Ohio Indus., 257 N.L.R.B. 413 (1981), enforced, 112 L.R.R.M. 3089 (6th Cir. 1983), the Board held that an employer violated §§ 8(a)(1) and (5) by refusing to bargain over the decision to relocate bargaining-unit work. In dicta, the Board cited \textit{Brown Co.} and stated that a “unilateral removal of bargaining unit work during a contract term is the type of contract modification proscribed by the Act.” 257 N.L.R.B. at 414 n.8. The Sixth Circuit did not comment on the Board’s statement concerning unilateral removal of bargaining-unit work. \textit{But see} Walter B. Cooke, Inc., 262 N.L.R.B. 626 (1982) (employer’s removal of bargaining-unit work was not a midterm modification of the contract violative of § 8(d)).

\textsuperscript{88} Brown Co., 243 N.L.R.B. 769 (1979), remanded without opinion, 663 F.2d 1078 (9th Cir. 1981). The Ninth Circuit's analysis is unofficially reported at 109 L.R.R.M. 2663 (9th Cir. 1981).

\textsuperscript{89} \textit{Milwaukee Spring I}, 265 N.L.R.B. 206 (1982). The Board determined that each division was a separate bargaining unit although the company constituted a single employer within the meaning of the Act. The Holly Spring facility was assimilated into the nonunionized McHenry Spring facility, prior to the events giving rise to litigation. \textit{Id} at 206-07.
Workers of America (UAW), and its Local 524. Since 1961, the employer and the union had entered into a series of CBAs, the most recent of which was effective from April 1980 through March 1983.

In January 1982, during the second year of a three-year CBA, the employer approached the union and proposed that the union forego a scheduled wage increase and grant other contract concessions. In March, the employer announced that its financial situation had worsened, both because of the loss of a substantial customer's business and because of deteriorating economic conditions in general. During concession bargaining with the union, the employer proposed relocating its assembly operations to the nonunionized McHenry Spring facility where labor costs were significantly lower than those at the Milwaukee Spring facility. While the employer expressed a willingness to consider alternatives to the proposed relocation, it also informed the union that wage and benefit concessions were necessary to keep Milwaukee Spring's molding operations economically viable. The union presented these concessions to its members, who voted against acceptance but indicated that they were willing to continue discussions. The employer then presented the union with a comprehensive written proposal detailing the terms under which the employer would retain assembly operations in Milwaukee. In response to the union's inquiry whether this constituted a final offer, the employer stated that although the written proposal approached the minimal concessions the employer could accept, further bargaining was not foreclosed. The union membership rejected the employer's specific proposals as well as any

90. Id.
91. Id. at 207.
92. Id.
93. Id. The employer failed to renegotiate a supplier's contract with Fisher Body, resulting in a $200,000 per month decline in revenue. Id. An employer who asserts that poor financial performance necessitates wage and benefits concessions may have a duty under § 8(a)(5) to supply the necessary information to substantiate its claims. See, e.g., NLRB v. Truitt Mfg. Co., 351 U.S. 149 (1956). The Truitt Court reasoned:

Good-faith bargaining necessarily requires that claims made by either bargainer should be honest claims. This is true about an asserted inability to pay an increase in wages. If such an argument is important enough to present in the give and take of bargaining, it is important enough to require some sort of proof of its accuracy. Id. at 152-53.
94. The employer informed the union that its labor costs were $8 per hour in wages and $2 per hour in fringe benefits at its Milwaukee facility, in contrast to wage and fringe benefit costs of $4.50 and $1.35 respectively at its McHenry facility. Id. at 207.
95. The union membership voted against accepting reductions to the hourly wage and fringe benefit rates in effect at the McHenry plant. Id.
96. The employer explicitly conditioned its relocation decision upon the union's granting of labor cost concessions, and presented the union with a document entitled Terms Upon Which Milwaukee Spring Assembly Operations will be Retained in Milwaukee. Id.
further consideration of contract modifications. The employer subsequently announced its decision to relocate the Milwaukee assembly operations to the McHenry facility. 97

The case was submitted to the Board on stipulated facts. 98 The employer stipulated that the relocation of its assembly operations was due solely to the comparatively higher labor costs under the CBA at the Milwaukee facility. 99 It further stipulated that the decision to relocate the assembly operations was not prompted by an inability to pay the contractual labor costs, but rather by a failure to secure an adequate return on investment. 100 In Milwaukee Spring I, the Board ruled that the employer's decision to transfer its Milwaukee Spring assembly operations to the nonunion McHenry Spring facility constituted a midterm modification within the meaning of section 8(d) of the Act. 101 It held that the employer was not privileged to relocate the assembly operations without the consent of the union or a waiver of the union's statutory right to object to such action. 102 The employer argued that both the preamble of the CBA and the management rights clause contained therein waived any right the union had to object to the transfer. 103 The Board dismissed both contentions, and found that the union had not clearly and unequivocally waived its statutory right to object to the employer's actions. 104 It ordered the employer to rescind its decision to transfer the assembly operations and to reestablish the status quo ante by restoring to the Milwaukee facility any work that had been

97. Id.
98. Id. at 206. The parties stipulated to the record and waived any right to a hearing before an Administrative Law Judge. Parties may avoid a formal hearing by stipulating those facts not in dispute on which they desire a decision. See T. KAMMHOLZ & S. TRAUSS, PRACTICE AND PROCEDURE BEFORE THE NATIONAL LABOR RELATIONS BOARD 77 (1980).
100. Id.
101. Id. at 210. The Board specifically found that the employer had violated §§ 8(d) and 8(a)(1), (3), and (5) of the Act. Id.
102. Id. Chairman Van de Water based the findings of violations of the Act upon the parties' stipulation that the employer's transfer of assembly operations was not motivated by an inability to pay the contractual wage rate. Id. at 210 n.7. He indicated that if the employer had faced bankruptcy or if the short-term viability of the corporation had been in jeopardy, the Board's decision might have been different. Id. at 208 n.3. Such a position, however, is inconsistent with prior Board precedent holding that neither subjective good faith nor economic exigencies permit an employer to make unilateral midterm modifications of mandatory terms contained in the CBA. See, e.g., FWD Corp., 257 N.L.R.B. 1300 (1981); Morelli Constr. Co., 240 N.L.R.B. 1190 (1979); Sun Harbor Manor, 228 N.L.R.B. 945 (1977); Oak Cliffs-Golman Baking Co., 207 N.L.R.B. 1063 (1973); C & S Indus., 158 N.L.R.B. 454 (1966).
104. Id.
transferred.105 The Board further ordered the employer to reinstate, with back pay, all employees furloughed as a consequence of the decision to relocate assembly operations.106

On remand from the United States Court of Appeals for the Seventh Circuit, the Board reversed its prior decision and dismissed the complaint against the employer.107 In Milwaukee Spring II, the Board asserted that Milwaukee Spring I represented a substantial departure from well-established Board precedent because by its terms the CBA did not restrict the employer's right to make relocation decisions.108 The Board held that, in the absence of a specific work-preservation clause, an employer may transfer work out of the bargaining unit during the term of the CBA if the employer first satisfies any obligations it may have to bargain about the relocation decision.109 It reasoned that the employer's actions did not violate section 8(d) because there was no specific provision in the CBA that restricted work relocation.

In examining the midterm modification issue, the Board noted that in Milwaukee Spring I, it had never identified the specific contract term modified by the employer's decision to relocate the assembly operations.110 The Board ruled that identification of the specific term contained in the CBA that was modified by the employer's decision to relocate was the sine qua non of a section 8(d) violation.111 Rejecting the union's argument that the employer's relocation decision modified the contract's wage and benefits provisions, the Board stated that those provisions only represented an agreement to compensate unit employees at a given rate. It found that the employer had abandoned all attempts to obtain wage and benefits concessions at Milwaukee Spring prior to making the decision to transfer the

105. Id. at 210.
106. Id. at 210-11.
107. Milwaukee Spring II, 268 N.L.R.B. No. 87, 115 L.R.R.M. 1065, 1069 (1984). The "Motion to Remand to the Board" did not state any reason for the Board's desire to reconsider the Milwaukee Spring I decision. During the interim period between the original decision and the request for remand, however, the composition of the Board changed as a result of the addition of several Reagan appointees. See supra note 20 and accompanying text.
108. Id. at 1067-68. The Board cited Ozark Trailers Inc., 161 N.L.R.B. 561 (1966), for the proposition that the employer's sole obligation to the union was to bargain in good faith to impasse prior to implementing any decision to relocate bargaining-unit work. 268 N.L.R.B. No. 87, 115 L.R.R.M. at 1067-68. The Ozark Board required a manufacturer of refrigerated truck bodies to bargain with the union before deciding to close one of its plants during the term of the CBA. There had been no allegation of a midterm modification of the CBA in Ozark. The Board maintained that this was due to its recognition that the employer's sole duty was to bargain about the decision. Id.
110. Id.
111. Id.
assembly operations. The Board maintained, therefore, that the contractual wage and benefits provisions were not disturbed at the Milwaukee facility.

The Board also rejected any contention that the employer's relocation decision modified the contract's recognition clause. Adopting the reasoning of the reviewing courts of appeals, the Board overruled its prior holdings in University of Chicago and Boeing. In doing so, the Board asserted that it was not within its province to create an implied work-preservation clause based upon either wage and benefits or recognition provisions. The Board concluded that the rationale it had applied in Milwaukee Spring I had the effect of adding terms to the CBA that the parties had not agreed upon.

The Board then examined its holding in Los Angeles Marine that an employer is not free to transfer work out of the bargaining unit during the term of the CBA without the union's consent. It noted that the Board's reliance in Los Angeles Marine on University of Chicago was misplaced. In the Board's view, University of Chicago did not support Los Angeles Marine because University of Chicago differentiated between work relocations and work reassignments. The University of Chicago decision had required the union's consent only with regard to work relocation during the contract's term. The Board found that, even though no logical distinction could be drawn between work relocation and work reassignment, the transfer of work of the type at issue in Milwaukee Spring was not proscribed by section 8(d).

In adopting the Seventh Circuit's rationale in University of Chicago, the Board held that for those cases where antiunion animus cannot be shown and absent a specific contract provision restricting the employer's decisionmaking rights, the full extent of an employer's

113. Id., 115 L.R.R.M. at 1067.
114. Id.; see supra notes 52-54 and accompanying text.
115. Id. See Boeing Co. v. NLRB, 581 F.2d 793 (9th Cir. 1978); University of Chicago v. NLRB, 514 F.2d 942 (7th Cir. 1975); see also supra notes 46-67 and accompanying text.
116. Milwaukee Spring II, 268 N.L.R.B. No. 87, 115 L.R.R.M. at 1067. The Board stated: "[n]o doubt parties could draft such a clause; indeed, work-preservation clauses are commonplace. It is not for the Board, however, to create an implied work-preservation clause in every American labor agreement based on wage and benefits or recognition provisions, and we expressly decline to do so." Id. (footnote omitted). See supra note 32.
118. Id. See supra notes 68-82 and accompanying text.
120. Id.
obligation to the union was to bargain in good faith to impasse.\textsuperscript{121}

The Board then addressed its finding in \textit{Milwaukee Spring I} that the employer violated section 8(a)(3) when it laid off unit employees as a consequence of its decision to transfer work.\textsuperscript{122} It reasoned that the section 8(a)(3) violation had been contingent upon the finding of a section 8(a)(5) violation.\textsuperscript{123} Because it found that the employer's decision to transfer work was not a violation of section 8(a)(5), the Board concluded that there was no basis for finding a violation of section 8(a)(3).\textsuperscript{124}

Finally, the Board stated that both \textit{Los Angeles Marine} and \textit{Milwaukee Spring I} discouraged meaningful midterm bargaining over decisions to relocate bargaining unit work.\textsuperscript{125} It asserted that an employer contemplating a relocation would have an incentive to deny that its decision to relocate work was based upon labor costs. Such a denial would avoid granting to the union the right to veto the relocation decision.\textsuperscript{126} The Board maintained that its holding in \textit{Milwaukee Spring II}, on the other hand, would encourage meaningful and realistic exchanges between the parties on the subject of work relocation and thus foster the process of collective bargaining.\textsuperscript{127}

In dissent, Member Zimmerman asserted that absent the union's consent, section 8(d) of the Act prohibited the employer from transferring work out of the bargaining unit in order to obtain relief from the labor costs under the CBA.\textsuperscript{128} He argued that there are two key issues that must be addressed in every work relocation case. The first issue is whether the employer's decision to relocate bargaining-unit work is a mandatory subject of bargaining.\textsuperscript{129} Zimmerman maintained that because the employer's

\textsuperscript{121} \textit{Id.} (citing Textile Workers v. Darlington Mfg. Co., 380 U.S. 263 (1965); Fibreboard Paper Prod. v. NLRB, 379 U.S. 203 (1964)).

\textsuperscript{122} \textit{Milwaukee Spring II}, 268 N.L.R.B. No. 87, 115 L.R.R.M. at 1069. \textit{See supra} note 79.

\textsuperscript{123} \textit{Milwaukee Spring II}, 268 N.L.R.B. No. 87, 115 L.R.R.M. at 1069.

\textsuperscript{124} \textit{Id.}

\textsuperscript{125} \textit{Id.}

\textsuperscript{126} \textit{Id.} The Board maintained that unless the union is denied the right to veto the relocation decision, the employer would be hesitant to discuss wage concessions with the union out of fear that these discussions "would be used as evidence that labor costs had motivated the relocation decision." \textit{Id.}

\textsuperscript{127} \textit{Id.}

\textsuperscript{128} \textit{Id.} (Zimmerman, dissenting). \textit{See supra} notes 35-36 and accompanying text.

\textsuperscript{129} \textit{Milwaukee Spring II}, 268 N.L.R.B. No. 87, 115 L.R.R.M. at 1069. Member Zimmerman stated that the "threshold issue" of whether the employer's decision to relocate bargaining-unit work was a mandatory subject of bargaining was governed by the Supreme Court's decision in \textit{First Nat'l Maintenance Corp.} v. NLRB, 452 U.S. 666 (1981). \textit{Milwaukee Spring II}, 268 N.L.R.B. No. 87, 115 L.R.R.M. at 1070-71. In \textit{First Nat'l Maintenance}, the Court held that management decisions were mandatory subjects of bargaining only if
decision to relocate work was "amenable to resolution through [collective] bargaining," it constituted a mandatory subject of bargaining. 130 The second key issue is whether section 8(d) prohibits an employer from relocating work out of the bargaining unit after bargaining to impasse during the term of the CBA. 131 Zimmerman emphasized that he would find an employer's decision to relocate work violative of section 8(d) only when the employer's sole or predominant motivation was to evade the terms of the CBA. 132 He asserted that the employer's decision to transfer work from Milwaukee Spring to McHenry Spring was motivated solely by its desire to avoid the contractual wage rates. 133

Member Zimmerman then suggested that the critical inquiry in ascertaining whether the relocation of bargaining-unit work is violative of section 8(d) must focus on the employer's motive to relocate. 134 He maintained that if an employer's decision was motivated by a desire to

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130. Milwaukee Spring II, 268 N.L.R.B. No. 87, 115 L.R.R.M. at 1069. In Otis Elevator Co., 255 N.L.R.B. 235 (1981) [hereinafter cited as Otis Elevator I], the Board found that the employer's decision to transfer bargaining-unit work was a mandatory subject of bargaining, and held that the employer's refusal to bargain with the union over that decision violated §§ 8(a)(1) and (5) of the Act. Id. at 235-36. In Otis Elevator Co., 269 N.L.R.B. No. 162, slip. op. (April 26, 1984) [hereinafter cited as Otis Elevator II], the Board reconsidered its finding in Otis Elevator I in light of the Supreme Court's opinion in First Nat'l Maintenance v. NLRB, 452 U.S. 666 (1981). See supra note 129. The Board, in Otis Elevator II, held that because the employer's decision to relocate bargaining-unit work turned "upon a change in the nature or direction of the business," it was not a mandatory subject of bargaining. 269 N.L.R.B. No. 162, slip. op. at 5-6. The Board found that the employer had not based its decision upon labor costs, but rather upon its determination that its facilities were outdated, its product was not competitive, its research and development operation duplicated other operations, and a newer and larger research and development center was available. Id., slip op. at 5. Member Zimmerman agreed with the majority that the employer's decision was not a mandatory subject of bargaining because the concerns underlying the employer's decision were not amenable to resolution through collective bargaining. Id., slip op. at 14-15 (Zimmerman, concurring in part and dissenting in part). Where, however, "union concessions may substantially mitigate the concerns underlying the employer's decision . . . [and] absent any showing of the employer's urgent need for the kind of speed, flexibility, or secrecy as referred to by the Court in First National Maintenance," Zimmerman would require the employer to bargain over the decision to transfer bargaining-unit work. Id. at 15.

131. Id. See supra notes 34-43 and accompanying text.


133. Id. See supra notes 99-100 and accompanying text.

avoid the terms of the CBA, then the decision would violate sections 8(d) and 8(a)(5), and thus the employer could not lawfully transfer work during the term of the CBA without the union's consent.\footnote{135} He asserted that the obligation of an employer was to bargain with the union in good faith to impasse prior to implementing any decision to relocate.\footnote{136}

The minority criticized the majority's assertion that the contractual wage and benefits provisions at the Milwaukee Spring facility were not disturbed by the employer's decision to relocate the bargaining-unit work.\footnote{137} It stated that it was "disingenuous" to suggest that the provisions were unimpaired when there would be no employees left at the Milwaukee Spring facility to receive the wages and benefits.\footnote{138}

The dissent also criticized the majority's claim that the rationale of \textit{Los Angeles Marine} and \textit{Milwaukee Spring I} created an implied work-preservation clause in virtually every CBA.\footnote{139} It asserted that the rationale of these two decisions does not depend on the existence of a work preservation clause, but rather on the employer's desire to modify the contractual wage rate, a result proscribed by section 8(d).\footnote{140} The dissent also disagreed with the Board's contention that the rationale of \textit{Los Angeles Marine} and \textit{Milwaukee Spring I} encouraged employers to deny that the relocation decision is motivated by labor costs. It suggested that avoidance of the disruption in production is a substantial incentive for an employer to engage in concession bargaining with the union.\footnote{141} Finally, the dissent noted that \textit{Milwaukee Spring II} was inconsistent with the express declaration of Congress that there no longer be a system of continuous bargaining.\footnote{142}

\section*{IV. Implications of the \textit{Milwaukee Spring} Decision}

Section 8(d) of the Act proclaims that neither party to a CBA is required to discuss or agree to any modification of the terms contained in the agreement.\footnote{143} Through section 8(d), Congress sought, \textit{inter alia}, to promote the

\footnotesize
\begin{itemize}
\item Relocations of Work and an Employer's Duties under Section 8(d) of the National Labor Relations Act: A Three Step Analysis, 11 Fordham Urb. L.J. 795, 842-43 (1983).
\item Milwaukee Spring II, 268 N.L.R.B. No. 87, 115 L.R.R.M. at 1074. With regard to the Board's reliance on \textit{Ozark}, Zimmerman noted that \textit{Ozark} was not analyzed under a § 8(d) theory, and thus was inapposite to a discussion of the applicability of § 8(d) of the Act to the facts of \textit{Milwaukee Spring}. \textit{Id.} at 1075 n.19.
\item \textit{Id.} at 1074.
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.}
\item 29 U.S.C. § 158(d) (1982); \textit{supra} note 36.
\end{itemize}
industrial peace that results from CBAs of fixed duration. To effectuate
the congressional goal of labor stability, section 8(d) imposes two separate
duties on the parties to an extant CBA. First, the parties are prohibited
from using economic pressure tactics for the purpose of either securing a
reopening of the agreement or retaliating against the other party for refus-
ing to reopen the agreement. Second, the parties may not unilaterally
modify the terms and conditions of the agreement.

The Board's decision in Milwaukee Spring II can be most strongly criti-
cized for focusing solely on the issue of whether the employer unilaterally
modified a specific term of the agreement by relocating bargaining-unit
work in violation of section 8(d)(4). The Board rejected the argument that
the CBA's wage and benefits provisions were modified indirectly by the
transfer of bargaining-unit work. Unable to find an express provision in
the CBA prohibiting relocation of bargaining-unit work, the Board refused
to hold that the employer's actions violated section 8(d). As the dissent
aptly noted, however, because there would be no employees at the Mil-
waukee Spring facility to receive the wages and benefits, the Board's con-
tention that these provisions were not modified arguably is without logic
and exalts form over substance.

Even assuming arguendo, that the Board correctly found that there was
no section 8(d)(4) unilateral modification, it still failed to evaluate the em-
ployer's actions with respect to the section 8(d) proclamation that neither
party can be forced to discuss or agree to a modification of a term con-
tained in the extant agreement. In so doing, the majority disregarded
the stipulation that the employer's relocation decision was motivated solely
by the employer's desire to avoid the contractual wage rates. The Board
decisions in Los Angeles Marine, Brown Co., and Milwaukee Spring I were
premised on the Board finding that the employer's decision to relocate was

144. See supra notes 24-29 and accompanying text.
145. See supra notes 35-36.
146. Id. See also supra notes 40-41.
147. Milwaukee Spring II, 268 N.L.R.B. No. 87, 115 L.R.R.M. at 1066-67. This position
is inconsistent with prior Board precedent. See C & S Indus., 158 N.L.R.B. 454 (1966). In
C & S Indus., the Board stated:
[Where an employer unilaterally effects a change which has a continuing impact
on a basic term or condition of employment, wages for example, more is involved
than just a simple default in a contractual obligation. Such a change manifestly
constitutes a "modification" within the meaning of Section 8(d). And if not made
in compliance with the requirements of that section, it violates a statutory duty the
redress of which becomes a matter of concern to the Board.
Id. at 458 (emphasis added).
148. See supra note 35.
motivated by a desire to escape the terms of the CBA.\textsuperscript{149} The majority's reasoning in \textit{Milwaukee Spring II}, however, is notable for having taken what \textit{Los Angeles Marine} and its progeny had established as a factual issue and resolving it as a matter of law without regard to the facts of the case. Moreover, in light of the employer's admitted motivation in \textit{Milwaukee Spring}, it was unnecessary for the Board to consider the more conceptionally difficult section 8(d)(4) unilateral modification issue.

The operational effect of \textit{Milwaukee Spring II} is to cast an aura of legitimacy upon an employer's use of work relocation as an economic weapon to obtain midterm contract concessions from a union. This effect must be contrasted with the unquestioned prohibition against union use of economic weapons aimed at obtaining modifications of the extant agreement.\textsuperscript{150} As a practical matter, absent a specific work-preservation clause in the contract, a union now has no choice but to bargain about midterm changes at the request of the employer or risk losing bargaining-unit work.\textsuperscript{151} This use of work relocation or any other economic weapon for the purpose of forcing a reopening of the agreement is clearly inimical to the congressional objective of labor stability. It is hardly conducive to industrial peace to allow an employer to eviscerate the CBA of the employer's freely assumed obligations by the simple expedient of threatening to transfer work out of the bargaining unit. Such a result is clearly inconsistent with the "contained in" language of section 8(d).\textsuperscript{152} Indeed, Congress rejected exactly this type of continuous bargaining system in enacting this statutory provision.\textsuperscript{153} Thus, an employer's relocation of bargaining-unit work motivated by a desire to force the reopening of the CBA is contrary to the express intent of Congress and hence, violative of sections 8(d) and 8(a)(5) of the NLRA.

\textsuperscript{149} In \textit{Los Angeles Marine}, the employer's admitted motivation for relocating the bargaining-unit work was its desire to evade the labor costs of the CBA. 235 N.L.R.B. at 735. In \textit{Brown Co.}, the Board found that the employer relocated work "for the sole purpose of escaping from its wage obligations under the existing collective-bargaining contract." 243 N.L.R.B. at 771. Finally, in \textit{Milwaukee Spring I}, the employer stipulated that the sole reason for its decision to relocate work was its desire to escape the labor costs of the CBA. 265 N.L.R.B. No.28, 111 L.R.R.M. at 1486.

\textsuperscript{150} See, e.g., Brewery Delivery Employees Local Union 46, 236 N.L.R.B. 1160, 1173-74 (1978); Chauffeurs, Salesmen and Helpers Local 572, 223 N.L.R.B. 1003, 1008 (1976); Communications Workers of Am., 204 N.L.R.B. 782, 784-85 (1973); Telephone Workers Union of N.J., Local 827, 189 N.L.R.B. 726, 734 (1971).

\textsuperscript{151} An employer's use of work relocation as an economic weapon to obtain a midterm bargaining demand is the functional equivalent of an offensive lockout. See American Ship Bldg. v. NLRB, 380 U.S. 300 (1965) (initiating offensive lockout).

\textsuperscript{152} See supra note 36.

\textsuperscript{153} See supra notes 42-43 and accompanying text.
Similarly, the Board’s reasoning that *Los Angeles Marine* created an implied work-preservation clause in virtually every CBA appears flawed. *Los Angeles Marine* does not infer a work guarantee from the wage provision of the CBA. Relocation of bargaining-unit work during the life of the CBA is not *per se* unlawful. As the dissent in *Milwaukee Spring II* observed, the employer’s motivation is the determinative factor in ascertaining whether the relocation of bargaining-unit work is lawful. Under this theory, an employer motivated by legitimate business reasons is not prohibited from transferring work out of the bargaining unit. The purposeful evasion of express contract provisions accomplished through the vehicle of work relocation, however, would constitute an unlawful

154. 268 N.L.R.B. No. 87, 115 L.R.R.M. at 1075. The principle that the parties to a contract are under a good faith commitment not to take actions designed to evade their freely assumed obligations is well-established in contract law. See Cox, *The Legal Nature of Collective Bargaining Agreement*, 57 MICH. L. REV. 1, 31 (1958) (“[O]ne might fairly conclude in the absence of other evidence that the provisions of a collective bargaining agreement establishing wages and labor standards imply an obligation not to seek a substitute labor supply at lower wages or inferior standards.”); Restatement (Second) of Contracts § 205 (1981) (“Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.”). The duty of good faith requires that each party refrain from conduct that would prevent or hinder the performance of its own duty, or of the performance of the other party’s obligation, and to take affirmative action to cause the occurrence of the condition. See also J. Murray, *Murray on Contracts, A Revision of Grismore on Contracts* § 187 (2d ed. 1974); E. Farnsworth, *Contracts* § 7.17 (1982).

The party’s duty to exercise good faith when that party has discretionary control over a provision of a contract is exemplified in output and requirements contracts. In contracts of these types, the parties are allowed to manage their businesses in accordance with their best business judgment regardless of the effect on output or requirements. The good faith requirement, however, prohibits business modification when the motivation for that modification is to undermine, circumvent, or avoid the terms of the contract itself. See, e.g., Lambert Corp. v. Evans, 575 F.2d 132 (7th Cir. 1978); Weaver & Assoc. v. Asphalt Constr., 587 F.2d 1315 (D.C. Cir. 1978); HML Corp. v. General Foods Corp., 365 F.2d 77 (3d Cir. 1966); Western Oil & Fuel Co. v. Kemp, 245 F.2d 633 (8th Cir. 1957).

155. See, e.g., Boeing Co., 581 F.2d 793 (9th Cir. 1978) (no violation of § 8(d) found when the sole motivation for the decision to transfer work was the desire to increase the level of efficiency in production); University of Chicago v. NLRB, 514 F.2d 942 (7th Cir. 1975) (no violation of § 8(d) found when the sole motivation for the decision to transfer work was the desire to raise the level of sanitation); see supra notes 46-66 and accompanying text.

The Board’s Division of Advice will recommend that a complaint be dismissed when the employer’s decision to relocate work is not motivated by a desire to evade the terms of the CBA. See, e.g., Chino Mines Co., 112 L.R.R.M. 1419 (1983) (complaint dismissed because the employer’s actions were motivated solely by economic considerations unrelated to the labor costs of the CBA); Greyhound Lines, Inc., 112 L.R.R.M. 1437 (1983) (complaint dismissed because the employer’s actions were motivated by efficiency reasons and not by a desire to escape the terms of the CBA); Stewart Sandwiches, Inc., 112 L.R.R.M. 1422 (1982) (complaint dismissed because the employer’s actions were not motivated by a desire to evade the terms of the CBA).
midterm modification of the contract.\textsuperscript{156} Therefore, \textit{Los Angeles Marine} only prohibits employer use of work relocation as an economic weapon to obtain midterm contract concessions from the union.

Finally, this rationale, in accord with \textit{Los Angeles Marine}, does not fore-close meaningful midterm bargaining between the parties. The desire to avoid disruptions in production is a strong motive for an employer to engage in open and frank negotiations with a union. Likewise, the desire to protect union jobs as well as the union's awareness that the economic problems will have to be addressed at the contract's expiration, provides an incentive for unions to be amenable to compromise. Where employers have legitimately demonstrated their financial difficulties, many unions have responded, and will continue to respond, to an opportunity to save their jobs.\textsuperscript{157}

\section*{V. Conclusion}

In \textit{Milwaukee Spring Division of Illinois Coil Spring Co.}, the National Labor Relations Board ruled that absent a specific work-preservation clause, an employer is free to transfer work out of the bargaining unit during the term of the CBA if the employer first satisfies any obligation he may have to the union to bargain about the relocation decision. The immediate effect of \textit{Milwaukee Spring II} is to allow an employer to use the threat of work removal to force union concessions during the term of the agreement. This result is clearly inconsistent with the explicit intent of Congress, embodied in section 8(d), to promote the labor stability that results from CBAs of fixed duration. Moreover, \textit{Milwaukee Spring II} removes the assurance that a CBA, once executed, will firmly establish the terms and conditions of employment, and thus the Board's decision undermines the process of collective bargaining as a means to settle industrial labor disputes.

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\begin{footnotesize}
\textsuperscript{156} \textit{Milwaukee Spring I}, 265 N.L.R.B. at 208-09; Boeing Co., 230 N.L.R.B. at 700-04; \textit{Los Angeles Marine}, 602 F.2d at 1306-07.

\textsuperscript{157} See supra note 4.
\end{footnotesize}