Labor Law: Duty to Bargain Over Decision to Mechanize Operations

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RECENT DECISIONS

Labor Law: Duty to Bargain Over Decision to Mechanize Operations—In the recent case of Libby, McNeill and Libby v. Wisconsin Employment Relations Commission and Obreros Unidos,¹ the Supreme Court of Wisconsin held that the unilateral economically motivated decision of respondent employer to harvest its 1968 cucumber crop by mechanical means was not a mandatory subject of collective bargaining within the meaning of the Wisconsin Employment Peace Act. However, the supreme court additionally held that the respondent had committed an unfair labor practice under Wisconsin Statutes sections 111.06(1)(d)² and 111.02(5)³ by refusing to bargain concerning the effects of that decision. The court sustained that portion of the order of the Wisconsin Employment Relations Commission (WERC) which required the respondent to bargain collectively with respect to the effects of the decision to mechanize its operations, but the matter was remanded for the purpose of deleting all reference in the order requiring collective bargaining concerning the mechanization decision itself.

The test applied to distinguish between economically motivated management decisions which require bargaining and those which do not was whether the decision would change the basic direction of the company’s activities. It was concluded that most management decisions which change the direction of the corporate enterprise, involving a change in capital investment, are not bargainable. Additionally, the court cited with approval the proposition that there is no duty imposed upon employers to bargain collectively regarding managerial decisions which lie at the core of entrepreneurial control.⁴

In adopting the above test, the court rejected the WERC test which would have required bargaining whenever the decision would

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¹ 48 Wis. 2d 272, 179 N.W.2d 805 (1970).
² Wis. Stat. § 111.06(1)(d) (1969) makes it an unfair labor practice for an employer “[t]o refuse to bargain collectively with the representative of a majority of his employees in any collective bargaining unit.”
³ Wis. Stat. § 111.02(5) (1969) defines “collective bargaining” as the negotiating by an employer and a majority of his employees in a collective bargaining unit (or their representatives) concerning representation or terms and conditions of employment of such employees in a mutually genuine effort to reach an agreement with reference to the subject under negotiation.
⁴ 48 Wis. 2d at 283, 179 N.W.2d at 811.
affect terms and conditions of employment. In so doing, it attempted to delineate those decisions which lie at the core of entrepreneurial control and also affect conditions of employment, but are not subjects of a duty to bargain because they are uniquely management rights. In the instant case, the decision to mechanize cucumber operations, to the total exclusion of the bargaining unit members, was considered to be a decision which was not a mandatory subject of bargaining because of its concern with the commitment of capital and the basic direction of the enterprise. Such a decision, the court felt, was a management decision within the purview of Wisconsin Statutes section 180.30 which requires that the business and affairs of the corporation be managed by the board of directors. In so holding the court stated: “Any management decision may affect terms and conditions of employment. Not all decisions are bargainable.”

The court recognized the apparent lack of cases on the point in issue in spite of the fact that “as technology has marched unyieldingly forward, there have been numerous clashes over the idea of replacing men with machines.” The test adopted by the court was based upon recognized cases in the parallel areas of work subcontracting, plant relocation, partial and total liquidation of plant facilities, and other changes in the basic enterprise wherein the primary motivation is economic in nature.

The counsel for the WERC had contended that the facts within *Fibreboard Paper Products v. NLRB*, a leading case on subcontracting bargaining unit work, were analogous to those at bar. In *Fibreboard*, the United States Supreme Court had held that the decision to subcontract out janitorial work previously performed by members of an existing bargaining unit was a required subject of bargaining under the National Labor Relations Act. The Su-

5. *Id.* at 284, 179 N.W.2d at 811.
6. *Id.* at 281, 179 N.W.2d at 810.
7. *Id.* at 280, 179 N.W.2d at 809.
8. While Wisconsin has enacted its own “little” Labor Relations Act (Wis. Stat. ch. 111), it is generally conceded that federal cases are interpretive, if not binding, concerning legislative intent, particularly in matters of first impression. Such federal cases “are generally followed so far as applicable by the WERC and . . . [the Wisconsin] Supreme Court.” Libby, McNeill & Libby v. Wisconsin Employment Relations Commission, 72 L.R.R.M. 2190, 2191 (Wisconsin Circuit Court, Waushara County, 1969). The parallel between the National Labor Relations Act and the Wisconsin Statutes is readily apparent when § 8(a)(5), 29 U.S.C. § 158(a)(5) (1970), and § 8(d), 29 U.S.C. § 158(d) (1970), are compared with Wis. Stat. § 111.06(1)(d) (1969) and § 111.02(5) (1969) respectively.
10. *Id.* at 209.
preme Court of Wisconsin rejected this contention by citing with approval the concurring opinions of Justices Stewart, Douglas, and Harlan, in *Fibreboard*, which carefully limited the interpretation to the facts of that case.\(^\text{11}\) The Wisconsin Supreme Court noted with emphasis this statement of the concurring Justices: "Nothing the Court holds today should be understood as imposing a duty to bargain collectively regarding such managerial decisions, which lie at the core of entrepreneurial control."\(^\text{12}\) The concurring Justices had further stated that the purpose of section 8(d) of the National Labor Relations Act was clearly to exclude from mandatory bargaining "those management decisions which are fundamental to the basic direction of a corporate enterprise or which impinge only indirectly upon employment security."\(^\text{13}\)

The Wisconsin Supreme Court stated that the WERC contention ignored the basic change in capital investment which distinguished the decision at bar from the restricted facts of *Fibreboard*. The court recognized the constraining effect of later interpretations as more narrowly defining the permissible application of the rule enunciated in *Fibreboard* requiring bargaining with respect to the business decision itself.\(^\text{14}\)

In an attempt to resolve the issue of whether an economically motivated decision to mechanize a portion of a company's operations is a mandatory subject of collective bargaining, the court relied upon *NLRB v. Adams Dairy, Inc.*,\(^\text{15}\) *NLRB v. Transmarine Navigation Corp.*,\(^\text{16}\) and *NLRB v. Royal Plating and Polishing Company*\(^\text{17}\) which involved similar "decision" issues. In *Adams Dairy*, the Eighth Circuit Court of Appeals held that a dairy's decision to liquidate a part of its business involving the distribution of milk products through the bargaining unit's driver salesmen and to distribute its products through independent contractors was not a required subject of bargaining. In so holding the court recognized that a basic operational change had taken place which involved more than just the substitution of one employee for another, and that, unlike the situation in *Fibreboard*, there was a change in the capital structure of Adams Dairy which resulted in a partial liqui-

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11. 48 Wis. 2d at 281, 179 N.W.2d at 810.
12. 379 U.S. at 223; quoted in 48 Wis. 2d at 281, 179 N.W.2d at 810.
13. *Id*.
14. 48 Wis. 2d at 282-84, 179 N.W.2d at 810.
15. 350 F.2d 108 (8th Cir. 1965).
16. 380 F.2d 933 (9th Cir. 1967).
17. 350 F.2d 191 (3d Cir. 1965).
dation and a recoupment of capital investment. To require otherwise was considered to be an abridgement of the company’s freedom to manage its own affairs. Similarly, the Ninth Circuit Court of Appeals, in *Transmarine Navigation*, held that a decision to terminate a business and reinvest as part of a joint enterprise was a fundamental change in the direction and operation of the corporate enterprise which greatly affected its capital, assets and personnel, and, therefore, was not bargainable. Both the Eighth Circuit and the Ninth Circuit Courts of Appeal carefully noted that the decisions were unstimulated by union animus but were motivated solely by economics of operation. In *Royal Plating and Polishing*, the Third Circuit Court of Appeals held that an employer faced with the economic necessity of either moving or consolidating operations of a failing business would have no duty to bargain with the union respecting its decision to shut down a portion of its operations, in the absence of a discriminatory motive.

While recognizing Libby’s management right, in the absence of anti-union considerations, to make an economically motivated decision considered to lie at the core of its “entrepreneurial control” and involving a change in the capital structure of the organization, the court followed a well established rule when it ordered the respondent to bargain with the union concerning the “effects” of that decision. That rule states that when an employment relationship is threatened by a unilateral economic move by the employer, the federal courts and the National Labor Relations Board have found an enforceable duty to bargain over the impact of that decision on the employees.

Supporting cases and decisions are numerous. Quoting *Transmarine Navigation*, the Wisconsin Supreme Court stated:

> Once such a decision is made the employer is still under an obligation to notify the union of its decision so that the union may be given the opportunity to bargain over the rights of the employ-

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18. 350 F.2d at 111.
19. 380 F.2d at 937.
20. 350 F.2d at 196.
21. 48 Wis. 2d at 285, 179 N.W.2d at 812.
ees whose employment status will be altered by the managerial decision. 23

Thus the court recognized that certain actions may be unique management prerogatives because they involve economically motivated decisions which change the capital structure of the organization or which lie at the core of entrepreneurial control of that organization. In this case the right of the company to make the decision to mechanize its cucumber picking operations was held to be such a management prerogative. The court recognized the conflicting policies inherent in situations involving the replacement of men with machines. The policy of the Wisconsin Employment Peace Act to promote industrial peace and secure regular and adequate income for employees was recognized as being in conflict with the right of private enterprise to manage its own affairs, under the facts of this case. 24 The test adopted was not whether the decision was one which affects "terms and conditions" of employment, but whether the decision could be said to be one which changed the basic direction of the company's activities. In adopting this test the Wisconsin Supreme Court relied heavily upon the concurring opinion of Fibreboard, which clearly excluded from mandatory bargaining "those management decisions which are fundamental to the basic direction of a corporate enterprise or which impinge only indirectly upon employment security." 25 Use of the "impinge only indirectly upon employment security" portion of the test would clearly have required bargaining as to the decision to mechanize in this instance, for the bargaining unit jobs were completely eliminated. Such a test is similar to that advocated by the WERC. However, the tests given above are disjunctive, for the interests to be served are often conflicting. An extreme recognition of "employment security" may lead to a restriction in the ability of private enterprise to manage its own affairs. Such is not the purpose of the Wisconsin Employment Peace Act. 26 Recognition of managerial decision rights when either part of the test is satisfied, there-

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23. 380 F.2d at 939; quoted in 48 Wis. 2d at 285, 179 N.W.2d at 812.
24. 48 Wis. 2d at 280, 179 N.W.2d at 810.
25. 379 U.S. at 223.
26. See 48 Wis. 2d at 280, 179 N.W.2d at 810, which states that the purpose of the Employment Peace Act, as enacted in Wis. STAT. § 111.01(2) (1969), is to promote "industrial peace, regular and adequate income for employees and uninterrupted production of goods and services."
fore, is not inconsistent with the fundamental purpose of the Act, promotion of industrial peace.

The Libby case establishes a threshold test for determining whether a particular decision is a unique management prerogative because of its bearing upon the ability of private enterprise to manage and be responsible for its own affairs. Only when this threshold issue of whether the decision is one which affects the direction of the corporate enterprise, involving the commitment of invested capital, is resolved in the negative can consideration be given to the question of whether the decision itself is bargainable because of its effects upon terms and conditions of employment. When the threshold issue is answered affirmatively, the interests of the bargaining unit are considered sufficiently protected under the Wisconsin Employment Peace Act by requiring bargaining solely with regard to the decisions's "effects."

ROBERT J. BOVIN

Constitutional Law: Testimonial Privilege of Newsmen—It has long been recognized that there is incumbent upon each citizen a duty to testify when summoned by a court exercising its lawful jurisdiction. The imposition of such a testimonial duty is thought to be a natural and elementary obligation which must be met if our judicial system is to function in the fair and orderly manner demanded by both individual litigants and society.¹ Although the parties to a very small and select group of relationships have been granted testimonial privileges protecting confidential communications, the courts have been very reluctant to elevate the relationship of a newsmen with his confidential sources to a similar status.² Unlike doctors, lawyers, and other professionals who enjoy such a privilege,³ newsmen are often forced to choose between incurring a

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1. As the United States Supreme Court has stated: "[P]ersons summoned as witnesses by competent authority have certain minimum duties and obligations which are necessary concessions to the public interest in the orderly operation of legislative and judicial machinery." United States v. Bryan, 339 U.S. 323, 331 (1950). See also Blackmur v. United States, 284 U.S. 421 (1931); and Blair v. United States, 250 U.S. 273, 281 (1918).

2. The case most often cited for the common law rule that no privilege exists in favor of communications made to newsmen is People ex rel. Mooney v. Sheriff of New York County, 269 N.Y. 291, 199 N.E. 415 (1936). See also 58 AM. JUR. Witnesses § 546 (1948); 97 C.J.S. Witnesses § 259 (1957); Annot., 7 A.L.R.3d 591 (1966).