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COLLECTIVE BARGAINING
IN THE 1980’S —
COMMENTS AND OBSERVATIONS*

Harry Huge and Layne Carlough McCarthy**

INTRODUCTION

A nationwide shift in the bargaining objectives of American unions is apparently occurring. A pattern of union concessions and management demands is commonplace as 1982’s collective bargaining calendar proceeds. This change in fundamental priorities and relationships has been blamed on the deep recession, inflation, foreign competition, political climate,¹ and the advent of automation.² However, as this paper will discuss, this change may be essential to the survival of certain industries of this country, and may set precedents beneficial in the future to both sides of the bargaining table.

Whether collective bargaining is entering a “major new era,” as most predict, awaits the passage of time.³ This majority view contends that an immediate positive aspect emerging from our nation’s deteriorating economic condition has been an “increasing awareness by labor and management of the need to cooperate in countering mutual problems, such as foreign competition, energy shortages, and plant and product obsolescence.”⁴ Nevertheless,

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¹. For example, the breaking of PATCO during the air traffic controllers strike by the Reagan Administration signaled a far different political atmosphere from labor relations with previous administrations.


³. However, as Business Week reports, at least one scholar believes otherwise: “Those who speculate that wage concessions will spread through the economy and create basic changes are ‘creating unrealistic expectations and bargaining problems, which somebody will have to settle,’ [says John Dunlop, a Harvard University professor.] It is not a major new era, and that I’m willing to sign my name to.” Moderations Chance to Survive, Bus. Wk., Apr. 19, 1982, at 123.

whatever the future, both unions and management face the hard realities of the moment; and the choices that each side is forced to make not only are heated by policy concerns but by legal consequences as well. Both unions and management are venturing into new ground, from mid-contract concessions to a more dominant role for unions in the management of corporations. Some of these issues will be explored in this paper.

**MID-CONTRACT CONCESSIONS**

*Duty to Renegotiate Generally*

An array of new questions has been thrust upon the unions as they ponder the consequences of the next visit to the bargaining table. One of the more recent dilemmas confronting a union is whether to make “concessions” while a contract is still in effect — the mid-contract concession. The question that arises is whether the parties to a collective bargaining agreement have a duty to renegotiate that agreement during its term. Section 8(d)(4) of the National Labor Relations Act (the “NLRA”) resolves this question, as follows:

[T]he duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. . . .

The recent distress associated with mid-contract concessions, though, has not been brought about by either party instituting an action to force the reopening of a contract, as in previously mentioned cases. Rather, the premature gravitation to the bargaining table has been effectuated, in most cases, by an awareness on both sides of a rapidly deteriorating economy and a need for a reassessment of the positions on both sides. In the case of the United Auto Workers (the “UAW”), Ford and General Motors, not to mention a long list of other industries, the economic crisis has resulted in threatened and actual plant closings. The UAW came to the table with plans to thwart this devastating source of unemployment. They proposed wage concessions in return for job security, and a greater union voice in

management decisions about when and whether to close a plant, and in sub-contracting. What can the union do when the employer is deciding to close a plant? Can the union force an employer to bargain about his decision to shut down a plant? Should he grant wage concessions to avert a plant shutdown? What are the competing interests and how should they be dealt with at the bargaining table?

**Duty to Bargain Over Decisions to Partially Terminate Business**

The Supreme Court recently dealt with the issue of whether an employer has a duty to bargain over the partial termination of his business in *First National Maintenance Corp. v. NLRB.* Is a partial closing decision to be considered a mandatory subject of collective bargaining? The Supreme Court found it was *not,* and the Court concluded that employers’ decisions to terminate portions of their businesses are not mandatory subjects under Section 8(d) of the NLRA. Employers however, must give notice of and engage in meaningful bargaining about the effects of partial terminations. The Court’s decision rests on a close analysis of Sections 8(a)(5) and 8(d) of the NLRA.

First National Maintenance Corporation (“FNM”) was a business that provided housekeeping, cleaning and maintenance services for commercial customers. In the Spring of 1977, FNM began providing services for Greenpark Nursing Home, but it soon realized that it was losing money, and it requested an increase in its weekly fee. In early July, FNM told Greenpark that it would discontinue its services unless Greenpark provided the fee increase. On July 28, FNM informed its workers at Greenpark that they would be terminated in three days. The union immediately asked FNM to delay the termination pending collective bargaining but the company refused the offer to bargain. Unfair labor practice charges were filed against the company which alleged that FNM had breached its duty under the Act by failing to bargain over the termination and its effects. The NLRB sustained the union’s charges and ordered the company to bargain in good faith with the union about both subjects.

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7. Id. at 686.
8. Id. at 681-82.
9. 29 U.S.C. § 158(a)(5)(d) (1976). Section 8(a)(5) provides in pertinent part: “It shall be an unfair labor practice for an employer . . . (5) to refuse to bargain collectively with the representative of his employees. . . .” Section 8(d) provides in pertinent part: “For 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 to confer in good faith with respect to wages, hours and other terms and conditions of employment. . . .”
Second Circuit, although differing over the appropriate rationale, affirmed the Board’s order. The Supreme Court reversed. The Supreme Court held the employer had no duty to bargain about its economically based decision to terminate a part of its business. Concentrating on the concept of mandatory bargaining, the Court quoted from *Fibreboard Paper Products Corp. v. NLRB*, and explained the origin of mandatory bargaining:

> The aim of labeling a matter a mandatory subject of bargaining . . . is to “promote the fundamental purpose of the Act by bringing a problem of vital concern to labor and management within the framework established by Congress as most conducive to industrial peace.”

The Court, in determining whether bargaining would further the purposes of the NLRA, balanced the possible harm to the employer’s freedom of operation against the benefit to be gained through the union’s participation in the decisionmaking process. The Court set out its balancing test by stating that “in view of an employer’s need for unencumbered decisionmaking,” such freedom to make decisions should be abridged “only if the benefit, for labor-management relations and collective bargaining process outweighs the burden placed on the conduct of the business.” The Court concluded that the likelihood of harm to an employer’s freedom to operate outweighed any benefit that might be gained by union participation in decisionmaking. The Court, therefore, held that “the decision itself is not part of Section 8(d)’s ‘terms and conditions’ over which Congress has mandated bargaining.”

The majority opinion in *First National Maintenance* has been berated for its vagueness, lack of guidance, and overall disingenuousness. Justice Blackmun enunciated a balancing test but he failed to provide guidance for its application. The Court left unanswered questions concerning the determination of what is “beneficial” for labor relations and the collective bargaining process, and what is not.

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11. 627 F.2d 596 (2nd Cir. 1980).
12. 452 U.S. at 686.
14. 452 U.S. at 677–78.
15. Id. at 679.
16. Id. at 686.
18. Id. at 713.
19. Id. at 712.
Justice Brennan, in his dissent, also criticized Blackmun’s balancing test for its speculative premises and one-sided approach to resolving two-sided controversies. Justice Brennan concluded that the majority’s balancing test takes into account “only the interests of management; it fails to consider the legitimate interests of the workers and their union.”

An additional unresolved question flows from Justice Blackmun’s balancing test. “When does the benefit of bargaining outweigh the employer’s interest in having complete and unencumbered control over the fate of his employees?” The majority opinion acknowledged the concerns of both labor and management over a partial closing decision. The Court emphasized the need management may have for “speed, flexibility and secrecy in meeting business opportunities and exigencies.” The Court continued its communication of the employer’s view by stating that:

The publicity incident to the normal process of bargaining may injure the possibility of successful transition or increase the economic damage to the business. The employer also may have no feasible alternative to the closing and even good-faith bargaining over it may be both futile and cause the employer additional loss.

In a vacuum, Justice Blackmun’s emphasis on management’s need for speed, flexibility and secrecy seems plausible. However, as Justice Brennan stated, “in view of management’s admitted duty to bargain over the effects of a closing, it is difficult to understand why additional bargaining over the closing itself would necessarily unduly delay or publicize the decision.”

Justice Blackmun articulated assumptions about the interest of the union; however, support for his conclusions are absent from the text. Justice Brennan’s response to this argument in his dissenting opinion is more persuasive. He cited the UAW and Chrysler

20. 452 U.S. 666, 689–90 (Brennan, J., dissenting).
21. Id. at 699.
23. 452 U.S. at 682–83.
24. Id. at 683.
25. Id. at 691 (Brennan, J., dissenting).
26. A union’s interest in participating in the decision to close ... part of an employer’s operations springs from its legitimate concern over job security, ... No doubt it will be impelled, in seeking these ends, to offer concessions, information, and alternatives that might be helpful to management or forestall or prevent the termination of jobs. It is unlikely, however, that requiring bargaining over the decision itself, as well as its effects, will augment this flow of information and suggestions. Id. at 681.
Corporation negotiations as an example of decision-bargaining "which led to significant adjustments in compensation and benefits contributing to Chrysler's ability to remain afloat." The positive effects of decision-bargaining are apparent in the recent negotiations between UAW, Ford and GM. In both situations, table talks brought concessions from both sides which resulted in stays of several imminent plant closures. Although the majority opinion in First National Maintenance emphasized and protected the concerns of the employer, it failed to consider adequately the legitimate interests of the workers. The NLRB, on the other hand, perfectly expressed the nature of the employees' interest in a partial closing determination in Ozark Trailers, Inc.

For, just as the employer has invested capital in the business, so the employee has invested years of his working life, accumulating seniority, accruing pension rights, and developing skills, that may or may not be salable to another employer. And, just as the employer's interest in the protection of his capital investment is entitled to consideration in our interpretation of the Act, so too is the employee's interest in the protection of his livelihood.

Since the decision in First National Maintenance, several decisions have come down addressing the issue of an employer's duty to bargain over the partial termination of a business. In U.S. Contractors, Inc., the union alleged that U.S. Contractors, Inc. ("USC") had refused to bargain over both its decision to cease operating its janitorial division and the impact of this decision upon the employees. The Board, in reversing the ruling of the Administrative Law Judge, relied on First National Maintenance and found that there had not been a violation of Sections 8(a)(5) or 8(a)(3) of the Act. The Board stated the balancing test enunciated in First National Maintenance in the following manner:

[W]hen economic reasons compel an employer to decide whether or not to shut down a part of its business, the employer's need to operate freely outweighs any incremental benefit that might be gained through a union's participation in the decisionmaking.

The Board found the employer's motivations for terminating the janitorial division to be economic in nature and dismissed all related charges against the employer.
Another recent case, *Brockway Motor Trucks v. NLRB*,\(^\text{34}\) involved the failure of an employer to bargain over the closing of a facility. The NLRB concluded that the employer had breached its duty to bargain with the union over a mandatory subject and thereafter filed an application for enforcement of its bargaining order. The Third Circuit Court of Appeals reasoned that the Board had not set forth sufficient information regarding the conditions leading to the employer’s decision to close its facility. The Court noted that the Board should hold further proceedings to produce a more thorough record. The Board complied with this suggestion but, while the petitions for enforcement and review were pending, the Supreme Court decided *First National Maintenance*. After consideration of the Supreme Court opinion, the Third Circuit, in its second opinion, directed the Board to dismiss the unfair labor practice charges against the employer.\(^\text{35}\)

**Duty to Bargain over Complete Terminations and Sales of Businesses**

The analysis used in partial termination cases also has been applied in cases concerning a decision to completely close and to sell a portion of a business. In *Merryweather Optical*,\(^\text{36}\) the NLRB held that although there was no duty to bargain about the decision regarding a complete cessation of business, the employer was still obligated to discuss the impact and effect of closing upon the bargaining unit employees.\(^\text{37}\) *General Motors Corp.*\(^\text{38}\) addressed the application of the NLRA to the decision to sell a business. Again, the Board found that a decision affecting the direction of the business through significant investments or withdrawal of capital is a matter which is essentially managerial in nature.\(^\text{39}\) Therefore, there is no duty to bargain over the decision to sell a business; but, bargaining over the effect of the decision is required.

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34. 230 NLRB 1002, 95 L.R.R.M. 1462 (1977), enforcement denied, 582 F.2d 720 (3rd Cir. 1978).
35. 251 NLRB 29, 104 L.R.R.M. 1515 (1980), enforcement denied, 656 F.2d 32 (3rd Cir. 1981). The Supreme Court's decision in First National Maintenance, has thwarted any attempts to force an employer to bargain over his economically motivated decision to close part of his business. Nevertheless, there appear to be some indirect ways of dealing with this problem. One of these methods has appeared on the state level where legislative remedies are being developed to help alleviate the impact of plant closings on workers and communities. Some of the common features of the proposals, as reported in the January 1982 edition of Monthly Labor Review, are advance notice, severance pay entitlement to retirement benefits, creation of a community assistance fund and employee option to purchase the plant.
37. *Id.* at 1215, 100 L.R.R.M. at 1414.
39. *Id.* at 952, 77 L.R.R.M. at 1539.
Impact of Multi-Employer Pension Plan Amendments Act of 1980 on Plant and Business Closings

The collective bargaining relationship has adapted to changes in the economy as the players have shifted their priorities in bargaining talks. Legislative enactments also have been a force behind alterations in both management and labor decisionmaking. The Multi-Employer Pension Plan Amendments Act of 1980 (the "Act") is one such example.

The Act has caused confusion and consternation since its passage in 1980. MPPA is a complex and tortuous attempt to deal with the problem of securing financial stability in private pension plans in order to pay pensions some time in the future. The Act tried to come to grips with the issue of liability and responsibility when an employer leaves a plan, either by terminating the plan for covered employees or by simply withdrawing from the plan. The Act concentrates its efforts on improving the financial integrity and ability of multi-employer pension plans to assure plan continuation while limiting individual employer costs. Whether the Act is accomplishing these goals is a subject of intense debate.

On February 4, 1982, the American Trucking Association ("ATA") filed a complaint for declaratory and injunctive relief in the United States District Court for the Southern District of Mississippi — Jackson Division. The ATA's lawsuit challenges the constitutionality of the Act on behalf of all ATA member companies. The ATA contends that the Act violates the Constitution on the grounds of contract impairment, a public taking without just compensation, a lack of procedural and substantive process, and the removal of the right to a jury trial. The Act, says the ATA, impairs such normal commercial activity as going out of business, changing business

41. See, e.g., The Wall St. J., Mar. 12, 1982, at 30, col. 2:
Executives from four industries charged that a 1980 pension law unfairly burdens their companies, weakens unions' organizing efforts and hurts the retirement funds it sought to protect.
The federal law sought to shore up shaky multiemployer pension plans, which are negotiated by unions and employers, by imposing stiffer penalties for companies that quit them. But the law also has saddled employers with millions of dollars in sometimes unexpected pension liabilities when they buy, sell, move or close operations. About 78 lawsuits have been filed, mostly against pension funds, attacking the complex law as unconstitutional.
Collective Bargaining in the 80's

locations, borrowing money, and expanding operations. The ATA's broadside attack on the Act is just one of the more than seventy-eight cases filed since the Act's passage on September 26, 1980.\textsuperscript{43}

The Act forces managers who make decisions concerning plant closings, and other events which may be a complete or partial termination, to consider another often dominant element in the equation of labor-management relations. Since the Act does not apply to single employer plans, the drive for multi-employer nationwide pension plans may founder on another good intention—guaranteed financial security for the existing plans. Employers in the coal, construction and trucking industries will seek ways to withdraw from multi-employer plans and their potential massive liabilities. This possibility could lead to acrimonious collective bargaining in these industries in the years ahead. It also may cause employers to keep a plant open with a skeleton crew—after laying off the bulk of the employees—to avoid triggering the Act's partial termination provisions, which may result in added financial requirements.

One thing seems certain. Either Congress is going to have to write a yearly or bi-yearly series of amendments in order to deal with the changing economic conditions of pension plans, or the courts will do it for them. One must remember that The Employee Retirement Income Security Act of 1974, ("ERISA")\textsuperscript{44} was passed in response to individual employees losing their pensions, and the massive fraud and mismanagement of several large and highly visible pension and health plans.\textsuperscript{45} Congress is being forced to respond to a massive flight away from multi-employer plans caused by the real or perceived financial straight jacket that many employers, and union leaders, believe has been placed on these fine, flexible, and absolutely necessary institutions — the multi-employer plans.\textsuperscript{46}


Three days after Kaiser Steel, the Supreme Court denied certiorari on January 18, 1982 in National Stabilization Agreement of the Sheet Metal Industry Trust Fund v. Commerical Roofing & Sheet Metal, 655 F.2d 1218 (D.C. Cir. 1981), cert. denied 102 S.Ct. 1256 (1982), in which a similar issue was disposed of both by U.S. District Court Judge Green, and a three judge panel of the D.C. Circuit Court of Appeals. One case—Kaiser v. Mullins—arose in the coal industry, while the other—SASMI—arose in the construction industry.


\textsuperscript{46} This article borrowed ideas and analysis from a superb unpublished paper on the Multi-Employer Pension Plan Amendments Act, written by Robert Bach, Associate General Counsel for The Amalgamated Clothing and Textile Workers Union.
INTERNAL PROBLEMS OF UNIONS WHEN FACED WITH DEMANDS FOR
MID-CONTRACT CONCESSIONS

Collective Interest versus Individual Interest

The institution of American labor unions involves a continuing
accommodation between the interests of the individual member and
those of the group.47 A recent conflict in the town of Kellogg, Idaho
provides a vivid illustration of this group/individual dichotomy.
Kellogg was the site of the Bunker Hill Company, a mining and
smelting business, whose employees were represented by the United
Steel Workers Union. By August of 1981, the effect of the deepening
recession had reached the Bunker Hill plant. The plant’s excessive
losses would force it to close unless the owners could find a buyer. A
few months later, the employees thought that their problem had been
remedied when a group of local investors expressed an interest in
buying the plant. However, their purchase was contingent upon the
imposition of a substantial cut in labor costs. The plan which was
presented to the workers required substantial cuts across the board
by the union, including a waiver of employee pension and insurance
rights, without requiring any guarantees by the potential buyers.48

The leaders of the United Steel Workers local union
recommended a vote against acceptance. Thereafter, during a local
union meeting, a motion was made to conduct an advisory vote on the
issue. The members were informed that the vote was to be advisory
and not binding. On January 17, 1982, members of the nine plant
craft unions, including the Steelworkers, voted 695 to 506 to accept
the local investors’ proposal.49 However, the workers’ celebration
over the retention of their jobs was short-lived. The International
refused to sign the agreement, and the deal collapsed. The national
union leaderships’ position was that they had been presented with a
“take it or leave it” offer, there had been no chance for negotiations,
and the plan contained “take aways” which raised serious legal
questions. Moreover, the International felt that the spectre of Bunker
Hill might spread to other areas of the country.

The Bunker Hill situation raises a number of issues. First, does a
union breach its duty of fair representation to its members by refusing
to accept a deal that would save jobs? Second, may a union negotiate a
contract without the ratification of its membership? Third, what are

47. Comment, Smith v. Hussman Refrigerator Co.: Fair Representation and the Erosion
49. Id.
the concerns of a union when it grants concessions at the bargaining table?

The events of January 1982 in Kellogg brought two interests into conflict: the interest of individual employees in saving their jobs versus the union's interest in negotiating. As previously stated, the opportunity to "negotiate" would not have afforded the union an agreement that best served the interests of all union members nationwide. The union was aware that the outcome of an agreement in one area of the country might set the tone for negotiations in other parts of the country.

The union serves as the exclusive representative in negotiating a collective bargaining agreement. As such, it must attempt to represent a broad range of interests. The doctrine of exclusive representation permits the chosen labor organization to bind the membership to the choices of the representative, subject, of course, to the duty of fair representation.

**The Duty of Fair Representation**

The establishment of a national labor policy was a response to the inequities in bargaining power between organized employers and their individual employees. A recognition of the effectiveness of collective strength fostered the development of union and labor organization. Due to this emphasis on united strength, however, the "interests of individual employees were necessarily subjugated to the larger collective interest." The duty of fair representation was the result of a need to protect individual employees while maintaining effective collective bargaining.

In *Steele v. Louisville & Nashville Railroad* the Supreme Court first attempted to reconcile the sometimes divergent interests of the individual employee and the union. The Court held that the union, as the exclusive representative, has a duty to "protect equally the interests of the members of the craft as the Constitution imposes upon the legislature to give equal protection to the interests of those for whom it legislates."

In *Steele*, the Brotherhood of Locomotive Firemen and Enginemen negotiated a contract which would have ultimately excluded all black firemen from service. The Court found it unlawful for a union to negotiate such a contract, and concluded that it was the

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52. Id. at 202.
express aim of Congress to impose upon the representative of a craft "the duty to exercise fairly the power conferred upon it in behalf of all those for whom it acts, without hostile discrimination against them."  

In Ford Motor Co. v. Huffman, a provision in the collective bargaining agreement which gave seniority credit for pre-employment military service was attacked as exceeding the authority granted to a union representative under the NLRA. The Supreme Court emphasized the need for the delegation of discretion to union negotiators. The negotiators derive strength from the ability to exercise discretion by making concessions and accepting advantages which are believed to be in the best interest of all parties represented.

In support of allocating discretion to the bargaining representative the Court stated:

Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not make them invalid. The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion.

The Court further stated that prospects for the future are often based on compromises made in the present and that such compromises are "natural incidents of negotiation."

The language used by the Court in Ford Motor Co. would be an appropriate response to charges by the Bunker Hill employees that the Steelworkers Union had breached its duty of fair representation. But this is a legal answer, and not necessarily a wise one for a union leader faced with an anxious membership seeing their jobs vanish. Yet, the American labor movement has been built upon decisions between short-term considerations and long-term concerns. It is imperative that union representatives have the flexibility in negotiations to make presently unpopular decisions for the preservation of future goals, so long as these decisions are not made discriminatorily, arbitrarily or in bad faith.

53. Id. at 203.
54. 345 U.S. 330 (1953).
55. Id. at 338.
56. Id.
57. Id.
Recently, the Supreme Court reiterated its justification for the subordination of some individual interests to the collective interests of the whole in *Barrentine v. Arkansas-Best Freight System.* The Court stated that:

Since a union’s objective is to maximize overall compensation of its members, not to ensure that each employee receives the best compensation deal available, cf. *Gardner-Denver, ...* 415 U.S., at 58 n.19, ... a union balancing individual and collective interests might validly permit some employees’ statutorily granted wage and hour benefits to be sacrificed if an alternative expenditure of resources would result in increased benefits for workers in the bargaining unit as a whole.

Although the union has been given broad latitude in fulfilling its duty of fair representation, the scope and substantive content of this duty have been expanded by the Board and the courts. The expansion of the duty of fair representation requires the union to disclose facts which are essential for informed employee decisionmaking. A failure to reveal information which leads members to make uninformed or unfavorable judgments may constitute a breach of the union’s duty of fair representation.

In *Warehouse Union, Local 860 v. NLRB,* the Board found that the union violated section 8(b)(1)(A) of the NLRA when it failed to advise the membership of prior threats of job loss by the employer. The District of Columbia Court of Appeals affirmed the Board’s decision and found that “the union had a duty to inform its membership of management’s position so that they, in turn, could make an informed reassessment of their wage demand.” Such failure to communicate the employer’s position is an “arbitrary action” and, therefore, a breach of the union’s duty of fair representation.

**Ratification of the Collective Bargaining Agreement**

The principle of exclusive representation allows a union to negotiate a contract without the ratification of its members. The NLRA does not require a union to afford its membership the right to ratify a collective bargaining agreement which the union has negotiated. However, where the constitution, by-laws, or articles of...
a union provide for membership vote on collective bargaining agreements, the union must comply. In *Christopher*, the Court concluded that the "Bill of Rights of Members of Labor Organizations" protects the right of members to ratify agreements when it is so provided. The Court did not decide whether members have a right, under Section 411(a)(1), to vote on substantive changes in collective bargaining agreements when no provision expressly providing such vote is contained in the constitution, by-laws or articles of a union.

A recent complaint filed with the NLRB raised the issue of a membership’s right to vote on concessions to an employer. The Regional Director concluded that there was no obligation on the part of the labor organization to negotiate a modification of an existing collective bargaining agreement. In the end, the President of the International invoked his authority under the International Constitution and disallowed the submission of employer proposals to the membership.

A close review of the Union’s Constitution, By-laws and Articles seems necessary to determine the duty owed to the membership regarding the ratification of any labor-management agreements.

**Bargaining Tactics During Periods of Economic Re-adjustment:**

"Bankrupt Companies Are Not Good Employers"

— John L. Lewis

The combination of many factors form the basis of one party’s bargaining power. Legislative enactments often reflect the

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> Every member of a labor organization shall have equal rights and privileges within such organization to nominate candidates, to vote in elections or referendums of the labor organization, to attend membership meetings, and to participate in the deliberations and voting upon the business of such meetings, subject to reasonable rules and regulations in such organization’s constitution and bylaws.

68. 644 F.2d at 470 n. 2.
69. UFCW Int’l Union and RSEU Local 40, UFCW (Kroger Co.) NLRB No. 7-LC-5211 (1981).
70. This case is discussed in a superb paper by Theodore Sachs, Mid Contract Changes and The Duty of Fair Representation (unpublished) (available from the firm of Marston, Sachs, Nunn, Kates, Kadushin and O’Hare of Michigan).
71. The negotiator assesses his strengths and weaknesses prior to taking his place at the bargaining table. He evaluates his position in relation to the power possessed by the opposition. This evaluation process has been divided into three steps: "First, the bargainers evaluate their own power capability and that of their opponents. Second, given these perceptions of power, the bargainers consider the likelihood that the power capability will be actually used. Third, in the context of their power situation, bargainers evaluate their own tactical options and attempt to anticipate their opponent’s tactics.” S. Bacharach & E. Lawler, *Power and Tactics in Bargaining*, 34 INDUS. & LAB. REL. REV. 220 (1981).
economic status of the country and its ideological preferences. These two factors are instrumental in the assessment of one’s bargaining power.

Today’s economic climate has forced many unions to alter their battle plans. The “offensive game” strategy of the past two decades has been put on hold, and a “defensive game plan” has been called upon. Concerns over “job security” have replaced demands for increased wages. The priorities have changed. Employees, fearful of becoming another statistic on the long list of the unemployed, have softened what were once tough positions on increased wages and other benefits. Examples of this change in bargaining strategy during the past year are numerous. The agreement between the UAW and GM was highlighted both by a moratorium on plant closings and by other steps to save jobs.

In the preceding months, the UAW had come to the table several times; each effort ended in failure. Douglas Fraser, the President of the UAW, realized the importance of coming to an agreement quickly and he recognized the UAW’s bargaining strength would come from their ability to make concessions reducing the company’s $19.80 average hourly labor cost. Such concessions came in the form of wage freezes, reductions in personal holidays, and other compromises. Labor’s chief weapon, the strike, may have seemed like an advisable means to a desired end at a time when the economy was stronger. However, Fraser acknowledged such a strike would be a long and bitter battle, largely fought from a position of weakness.

The continuing decline in labor productivity is one factor having an adverse effect on a company’s financial health and the strength of the union’s bargaining power. In the face of declining productivity, energy is poured into the fight against plant closings, and the once persuasive wage increase argument falls by the wayside. “Sooner or later even the most tenacious and effective union will learn the wisdom of John L. Lewis’s remark that ‘bankrupt companies aren’t good employers.’”

While high wages have been blamed for productivity decline and the country’s inability to compete in foreign markets, management must take an even larger share of the blame. Management, not labor leaders, made the decisions at GM, Ford, Chrysler and American

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73. Id.
75. Id.
Motors during the past twenty years. Management's argument that union successes are the cause of their problems, in effect, concedes union leaders out-bargained management.

The recent trend in management-labor relations has seen a retreat from these adversarial attacks to a realization that the survival of both sides may depend upon mutual cooperation. The press has depicted the union as the one making concessions, but an important feature in recent negotiations has been "a recognition by management that concessions, including more participation for workers in management decisions, are called for on their side of the table as well."\(^{76}\)

The values of the work force are changing, resulting in a demand for increased participation in management planning and decision-making.

**Union's Role in Managing a Company**

When the President of the UAW, Douglas Fraser, joined the Board of Directors of Chrysler Corporation in 1980, it was a unique and bold step in American labor-management relations. In Western Europe, the idea of labor and union representatives sitting on the Board of Directors of corporations is routine.\(^{77}\) U.S. management questions whether labor representatives' role as board members is impeded by their wearing "two hats." Fraser's entrance into the board room cut across what historically has been separate roles of management and labor.

Fraser's election to the Chrysler Board is not, however, the first time in American history where unions have attempted to exert influence over management. The stormy history of the United Mine Workers ("UMW") contains a chapter where John L. Lewis and world industrialist Cyrus Eaton, combined forces to seek control of, or at least a voice in, the boards of coal companies, electric utility companies, and certain financial institutions, including San Diego Power & Light, Western Kentucky Coal Company, and Duquesne Power & Light.\(^{78}\) Unions are also becoming aware of the tremendous power of the largest growing pool of capital in the United States economy, multi-employer pension plans.

The election of Douglas Fraser to the Board of Directors of a major, though perhaps failing, United States corporation has not initiated, at

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least in these past two years, a parade of other labor leaders sitting on the boards of industrial or manufacturing companies. This experiment in corporate and union leadership is being watched closely by both labor and management. First, it is probably not an accident that the first major corporation to invite a major union leader to sit on its board was one that was in deep financial and political trouble. Second, over the past fifteen years, the UAW has participated in one form or another of shareholder democracy through its ownership of common shares of stock of Ford, GM, Chrysler, and American Motors. In 1968, during GM’s campaign to influence the make-up of the Board of GM, Leonard Woodcock, then President of the UAW, attended the GM shareholder meeting to urge the election of minority representatives to the Board. He did not ask, in his role as shareholder, that a union leader be elected. It took Fraser’s extension of the principle of corporate ownership to achieve representation on the Board.

There are possible conflict of interest problems with Fraser, acting as labor leader, and Fraser, acting as director. The question arises as to where his loyalties lie, i.e., with the members of his union who are employees of Chrysler, for whom he is supposed to bargain in a fiduciary capacity as union leader, or with the shareholders of the corporation who have elected him to their Board, and to whom he also owes a fiduciary responsibility as director. There are more subtle conflict of interest problems also at work, such as the disclosure of inside information. If management shows the Board of Directors a highly confidential series of financial projections on the future of Chrysler, can Fraser use that information in his bargaining with Chrysler? Would that cause Fraser to be in violation of the insider and disclosure provisions of the federal securities laws? On the other hand, would his failure to utilize that information for the benefit of his union subject him to duty of fair representation charges? Indeed, if Chrysler does fail, will those who write the future history of labor and management relations point to Fraser’s role on the Board as an example of why union leaders should never be corporate directors?

From management’s view, the danger of having a labor leader on the Board is the possibility that he might become too dominant a figure. Someone as talented, articulate and persuasive as Douglas Fraser may, if he wishes, wield an influence in the corporate board room far beyond what he should. Labor union leader Fraser may become the force on the Board that determines the future of Chrysler Corporation. This is not to say that this would be a bad idea, but

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rather that someone who is sitting as a fellow corporate director might be fearful of sharing power traditionally entrusted to management. Fraser clearly has more insight into one of the major elements of making a corporation successful—its labor force—than anyone else sitting on the Board. Fraser can influence that element of corporate profitability, i.e., labor costs, more surely and directly than any combination of people sitting on the Board of Directors.

To exemplify the relationship between union leader and director, consider a situation where the executive committee of the Board, which does not include Fraser as a member, proposes to the Board of Directors the closing of a plant that is represented by Fraser’s union. The purpose of the plant closing is to eliminate a highly unprofitable and costly operation. The activities of the plant would either be subcontracted abroad or to another part of the United States which is not so hospitable to unions. What is Fraser to do? What is the executive committee to do? What is Fraser’s union to do if it learns that Fraser knew of a plant closing months before it was announced publicly, and did not do anything about it? This conceptualization reflects the complexities involved in such an interrelationship and the heightened likelihood of conflict. It is apparent that only if union leaders and corporate leaders are willing to lay down adversary roles, and begin to assume roles that are complementary and supplementary to each other, such as having a member of the union sit on the board of directors, will United States corporations again be able to compete on a worldwide basis and create new jobs for America’s unionized work force.

Unions have another source of power for influencing corporate management; it is the pension fund.

**INVESTMENT OF PENSION FUND AND UNION ASSETS: ITS IMPLICATIONS**

*Posing the Issues — “Social” and “Economic”*

On December 10–11, 1979, the President’s Commission on Pension Policy held hearings in Washington on “The Use of Pension Fund Capital: Its Social and Economic Implications.” The two days’ of hearings concentrated on the issue of who owns Trust Fund\(^8\) assets (the “trustees” or the “beneficiaries”); who controls their investment (trustees, contributors or investment advisors); and what “social” considerations should be taken into account when those assets are invested.

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80. *Trust Fund* means pension, health and welfare, and other similar type jointly-trusted benefit trusts.
The issue of the “social” implications of investments is not a new one. It was basically the concern of who controls corporations which led to the passage of the federal securities laws in 1933 and 1934. Those laws provided the basis, nearly a decade ago, for the widely-publicized proxy fight between a coalition of union and public interest groups and the GM Corporation. The coalition sought to elect more socially conscious members to the Board of Directors and to change GM’s hiring and promotion policies. “Campaign GM” was supported by the UAW and its then President, Leonard Woodcock. The issue again is being hotly debated due to recent economic developments, i.e., the need for capital in this country; the forced closings due to the persistent recession; and the shift of companies and jobs out of the northeast to the “sunbelt,” among others.

For unions and union companies, the issue is a simple one: should union and Trust Fund assets, created pursuant to a collective bargaining agreement, be invested in non-union or anti-union companies? Put another way: should the assets of unions and Trust Funds be used actively in order to have an impact beyond their primary purpose, which is to provide sufficient monies to pay for pension, health and other benefits?

The following quotes pose the question. The first is a report by the International Union of Operating Engineers Local 675 Pension Fund urging the use of assets for social and pro union purposes as follows:

We in the labor movement can no longer permit professional money managers to invest our pension fund assets in anti-union companies or multi-nationals which export work overseas disregarding the interests of the American workers. We believe the bottom line of profit should not control our investment policy.

I would remind these huge corporations and multi-nationals that they do in fact have an obligation to the American system and its citizens for it is society that gives them their riches and has caused them to be the profitable institutions which they now are. I say to you that we will be exploited no longer with our own funds,

83. Unions have assets in their treasury, and these are of course different from Trust Fund assets. Different standards of investment may be applicable, but the issue of whether different standards apply to union assets versus trust assets really has not been tested. Throughout this article, therefore, we will assume that the same investment standards are applicable to both union and Trust Fund assets.
84. The report was presented to the President’s Pension Commission by Dennis J. Walton, Business Manager for the International Union of Operating Engineers Local 675, 6–7.
nor will we stay baffled and apathetic due to nebulous interpretations of ambiguous regulations. 85

The second, a report of the National Association of Manufacturers ("NAM"), 86 states:

Despite the still relatively low level of public exchange over the issue, business is concerned over the possible consequences of the Commission prematurely embracing the concept of 'social' investing.

The NAM believes that the current guidelines of maximum return for minimum risk [that] must continue to be followed, in both traditional and non-traditional investing; that investment managers must continue to be 'prudent' under the most stringent definition of the term; and that balance and flexibility have proven to be essential components of any pension policy and therefore, should not be altered. 87

The above quotes represent the two schools of thought on how union assets should be invested. Each must be considered with respect to the duty of the trustee in achieving the proposed goals.

The State of the Law – What Can Trustees Do

The traditional view and the current state of the law is that a trustee’s principal responsibility is preservation of the Trust Fund's assets, and their growth through sound investment for the sole and exclusive benefit of the beneficiaries. This is the standard of fiduciary duty that is correctly written into ERISA. 88

The Labor-Management Relations Act of 1947 has a similar standard in that trustees have a duty to administer the Trust Fund for the “sole and exclusive benefit” of the beneficiaries. 89

85. Id.
86. The report to the President's Commission on Pension Policy was presented by Hal Sebastian, Manager of Benefits for Standard Oil of Ohio, 5.
87. Id.
88. Subject to sections 1103(c) and (d), 1342, and 1344, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—
(A) for the exclusive purpose of:
   (i) providing benefits to participants and their beneficiaries; and
   (ii) defraying reasonable expenses of administering the plan;
(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;
(C) by diversifying the investment of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and
(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter.
Courts have held this to mean that a trustee should look principally to the safest investments, the most secure, and those which will produce the highest rate of return consistent with the need for security of principal. This has meant that in the search for the growth of assets and a steady rate of return, Trust Fund assets are heavily invested in companies like IBM, a non-union multi-national company which has had one of the greatest advances in the value of its stock over the past fifteen years. The social policies or anti-union biases of managements or companies have been considered less important than the "bottom line."

But, within these standards of fiduciary responsibility, there are two strategies which unions and trustees can follow. One is the safer "passive" strategy; the other, the riskier "active" strategy—but not illegal if applied carefully.

The "Passive Strategy" for Use of Trust Assets

The passive strategy is to withhold investments from companies which are non-union or anti-union. For example, Trust Fund assets were not used to purchase stock in J.P. Stevens before Stevens became unionized; to loan money to J.P. Stevens; or to open accounts in banks which provided working capital to J.P. Stevens. This passive strategy of withholding assets has limited results. The strategy's purpose was to ostracize J.P. Stevens from the "community of right thinking businesses." But, most "right thinking" and "wrong thinking" businesses can survive only if they make a profit. The leverage of being ostracized in the business community has limited impact, as long as the company and its management remain profitable.90

For trustees to withhold investments, they probably would not need any additional direction of a Trust Agreement or Collective Bargaining Agreement and their actions would not violate ERISA. ERISA would not be violated because there would be ample other investments of comparable nature, e.g., a unionized Levi Strauss Company instead of J.P. Stevens. A trustee also could argue that J.P. Stevens is a poor investment because of the financial costs of its anti-union policies. Examples of this kind of passive strategy by the following funds and companies over the past several years include

90. It was the long term implications of profitability caused by the "corporate campaign" and series of legal attacks on Stevens by Amalgamated Clothing and Textile Workers Union ("ACTWU") that led to a change in management at Stevens and a contract with ACTWU.
International Longshoremen's and Warehousemen's Union (South Africa); Retail Whole and Department Store Union (South Africa); United Auto Workers (South Africa); AFL-CIO (resolution to "better serve working people"); United Mine Workers (J.P. Stevens); Hospital and Health Care Workers (South Africa); International Ladies Garment Workers Union (labor relations policies); and Control Data Corporation (socially responsible).

The safer course is to spell out the "passive investment" policies for trustees. The UAW followed this route in its recent Chrysler contract, specifically providing guidelines for pro-union and social investments.91

Specific direction to the trustees regarding the kind of investments the settlors of the trust wish to consider will protect trustees from potential suits initiated by a beneficiary whose portfolio suffered because of those investments.

91. [The UAW's] recent agreement with the Chrysler Corporation provides that up to ten percent of the net annual income to the UAW-Chrysler Pension Fund will be invested in residential mortgages and debt obligations of non-profit nursing homes, nursery schools, federally qualified health maintenance organizations, hospitals or similar non-profit institutions in a few targeted communities where there are high concentrations of UAW members. The communities to be targeted will be selected by a Joint Committee annually.

The residential mortgage component of the new agreement will be focused primarily on single and multiple family dwellings, including cooperatives and condominiums, the purchase price of which is equal to or below the average purchase price of similar housing in the communities involved. Mortgages will not be limited to UAW members, but will be offered to the general public in selected areas.

Investment opportunities in residential mortgages as well as those in socially useful, non-profit enterprises will be recommended to the trustees of the Pension Fund by a newly established Investment Advisory committee composed of six members—three appointed by the Corporation and three appointed by the Union. In the event the members of the Committee are unable to reach agreement on the recommendations to the trustee, the Impartial Chairman of the UAW-Chrysler Appeal Board will cast the deciding vote.

It should be noted that the actual independence of the trustees has not been radically altered; the trustees continue to have full investment discretion and are bound by law to exercise the discretion in a prudent manner. The concept of the Investment Advisory Committee does, however, provide the Union the opportunity to influence investment decisions made by the trustees.

Both the recommendations of Union and the Investment Advisory Committee must be considered by the trustees, but the trustees are not bound by these recommendations and they may reject them if they conclude that the recommended actions are inconsistent with their fiduciary responsibilities under ERISA.

The UAW-Chrysler Agreement in no way jeopardizes the integrity of the Pension Fund. Further, it is the hope of the UAW that exposing the trustees to investment opportunities in socially desirable projects will expand their investment criteria of risk, return and diversification to include social utility.

The agreement negotiated with Chrysler will not dramatically change the investment policy of institutional fund managers. [The UAW] believes that it is an important first step in assuring that the funds which provide benefits for our members are invested in a manner which recognizes social utility.

Report presented by UAW to President's Commission on Pension Policy 5–6 (1979).
The "Active Strategy" for the Use of Trust Assets

The active and aggressive strategy has several facets but the underlying theme is that the Trust assets should be actively used to bring about a specific objective with a particular corporation or group of corporations.

One example is through collective bargaining. A union bargains to have a representative placed on the company's Board of Directors. Another example is through legislation. This is the European model. A third way is through the ownership of stock. Trust Fund assets are used to purchase stock so the Trust Fund becomes a stockholder in the very company whose policies it wishes to change. This permits the shareholder to place union members or union designated people on the Board of Directors. Several examples are pertinent here. The United Mine Workers of American ("UMW") owns seventy-five percent of the third largest bank in Washington, and its top three officers sit on the bank's Board of Directors. The Amalgamated Bank in New York, as well as the Amalgamated Insurance Company, have union officers sitting on their boards.

Purchasing shares in non-union or target companies, and exercising rights of large-yet-minority shareholders provides still another active strategy. A sufficiently large block of stock can petition for a seat on the board, as is traditionally done by large investors. Most managements of public corporations would be hard pressed to deny one board seat to a representative of a large block of stock. Individual Trust Funds and large groups of Trust Funds, as well as all unions and funds of the Building Trades, if their portfolios were searched, may show that they already own a five to ten percent interest in a corporation. If that stock then were used to petition for a seat on the Board of Directors, the director would have a voice in the shaping of corporate policies. In this way, certain policies could be reviewed, challenged, and/or vetoed.

Minority shareholders also can influence a company by threatening or bringing a shareholder's suit. This was done by ACTWU against J.P. Stevens in order to challenge the company in a non-labor forum.

Union objectives also may be voiced by buying stock of other companies which provide services or withholding deposits from banks which provide working capital to the target company. For example, the "Corporate Campaign" of J.P. Stevens prevented certain

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92. For example, in West Germany and Sweden, under the law a certain percentage of workers and representatives of organized labor are placed on the board of directors of corporations.
directors from serving on the Board of J.P. Stevens, such as a bank in New York and an insurance company. This was achieved through the implied threat of withdrawal of several large accounts by union-related Trust Funds from major New York banks.

Purchasing interests in institutions which are very influential and profitable in their own right provides another method to utilize affirmatively Trust Fund assets. Using an earlier example, the UMW owns a seventy-five percent interest in the third largest bank in Washington. From that bank, the UMW receives between two and three million dollars in dividends per year. Large deposits in banks by unions and related Trust Funds may lead to easier credit arrangements for beneficiaries. Guaranteeing housing mortgages also can be considered.

**Antitrust Implications of Union-Only Investments**

An affirmative investment strategy which targets union-built construction for pension fund investments has caused some to suggest that such a scheme raises antitrust problems. The positive act of investing in union only construction has the negative result of denying those same monies to others. Opponents allege that this result implicates the antitrust laws. It is argued that an investment in union built construction, to the exclusion of non-union investment, is a "significant and continuing restraint of trade."93 The antitrust theory of liability most likely to be raised by a potential contractor plaintiff is a "concerted refusal to deal." The charge would allege that the fund agreed (combined, conspired) with the owner, developer or other involved party to exclude all non-union contractors from the bidding.

The specific question of whether the antitrust laws should be applied to a union-only investment strategy has not been addressed by the courts. However, where the investment decisions comply with the fiduciary requirements of ERISA, the reasonableness of such a decision is highlighted and the potential plaintiff's antitrust theories become unpersuasive.

**The Future Developments in the Law of Trust Fund Interest**

The antitrust theories also lose potential as the courts show an interest in the social impact of investments.

[The most recent addition to Scott's *Law of Trusts*, a leading authority in this area, sanctions trustees taking social factors into

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consideration in making investment decisions. In doing so they may 'refrain from allowing the use of the funds in a manner detrimental to society.' We believe that Scott represents the cutting edge of the law and is reflective of the path in which judicial thinking may well develop in this area. 94

But it hasn’t yet. That is the key point to remember. The law has not yet moved to a standard of “social” investing. Yet, within the existing fiduciary standard of prudent man investing, there are opportunities for the imaginative and effective use of union and Trust Fund assets to advance pro-union and social causes. With careful examination and planning, such use of fund assets can be highly effective.

CONCLUSION

There appears to be a fundamental change in labor-management relations. Whether this is truly a “new era” 95 in industrial relations, or merely a surface change brought about by an unstable economy, continues to be debated by labor economists and scholars. John Dunlop, the Harvard professor and former Secretary of Labor, contends that unions are making concessions merely to keep their unions in business. “When there is prosperity, the unions will push for a share of it, and when there is adversity, management will push the other way.” 96 Others argue that economic conditions, together with the rival forces of foreign competition and automation, have caused changes in attitudes, between the two long time adversaries, that are here to stay. Perhaps changes in the economic climate have forced the two sides into a “new era” in industrial relations. However, tomorrow may find that labor and management have gone “back to business as usual.”

95. See supra note 3.
96. Id.