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## Labor Relations--Employer's Duty to Bargain Over Subcontracting-- Waiver

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union cannot then demand this additional information. Its right has been waived.

Many developments are occurring in labor law concerning the duty to bargain in good faith. In the instant case, there is further extension of the duty to bargain in post contractual relations where there is a grievance-arbitration clause. Furthermore, there is an expansion of the employer's duty to provide information to the union so that it now includes the granting of access to company property for union conducted time studies. Consequently, the trend toward a wider duty to bargain continues apace, with this case marking its latest step.

*Edward Perry Johnson*

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**Labor Relations—Employer's Duty to Bargain  
Over Subcontracting—Waiver**

One type of maintenance work at Allied Chemical involved scheduled repairs, such as machine improvement and minor construction. In the past this work had been performed both by company employees and outside contractors. During negotiations leading to the collective bargaining agreement, the union attempted to secure a commitment from the employer which would have restricted the company's right to unilaterally subcontract this type of work. After full discussion of the issue, the union consented to a contract which did not include the restriction. Two months after the collective bargaining agreement was signed by the parties, the union requested the employer to notify and bargain with it respecting the company's decisions to subcontract this type of maintenance work. The company refused to notify the union before the work was subcontracted. No employees in the maintenance department were laid off or discharged as a result of the employer's unilateral subcontracting. The union filed a section 8(a)(5)' charge with the National Labor Relations Board.

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<sup>1</sup> "It shall be an unfair labor practice for an employer to refuse to bargain collectively with the representatives of his employees . . ." Labor Management Relations Act (Taft-Hartley Act), § (8)(a)(5), 61 Stat. 136 (1947), 29 U.S.C. 158(a)(5) (1964).

The Board concluded that there was no evidence of a significant impact on the employees from which it could find that the employer, by unilaterally deciding to subcontract, violated its duty to bargain. The charges were dismissed. *Held*, affirmed. In determining whether the employer has violated his statutory duty to bargain about "wages, hours and other terms and conditions of employment," the Board and the courts must examine the impact on the employees resulting from the unilateral decision to subcontract. Here the Board was entitled to conclude that there was no substantial adverse impact on the employees caused by the employer's unilateral decisions to subcontract. *District 50, UMW, Local 13942 v. NLRB*, 358 F.2d 234 (4th Cir. 1966).

The issue of subcontracting is becoming increasingly important to both management and labor. To the employer subcontracting represents a feasible method of operation to reduce expenses and increase profits. However, from the employee's point of view, subcontracting is to be feared. It threatens a loss of jobs and the destruction of the bargaining unit itself. In considering this subject the initial issue is to determine whether subcontracting is a statutory subject to collective bargaining under Section 8(d)<sup>2</sup> of the Labor Management Relations Act.

A current discussion of the problems involved in subcontracting need only begin with the recent Supreme Court decision in *Fibreboard Paper Products Corp. v. NLRB*,<sup>3</sup> since all previous subcontracting cases must be considered in the light of this decision. In *Fibreboard* the existing collective bargaining contract with the union was about to expire. The union sought to negotiate a new contract. The company unilaterally decided to contract out its maintenance work and refused to negotiate with the union on this subject thereby eliminating the maintenance employees. The

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<sup>2</sup> 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 . . . but such obligation does not compel either party to agree to a proposal or require the making of a concession . . . Labor Management Relations Act (Taft-Hartley Act) § 8(d), 61 Stat. 136 (1947), 29 U.S.C. § 158(d) (1964).

<sup>3</sup> 379 U.S. 203 (1964).

Supreme Court affirmed the Board's decision<sup>4</sup> that the company's failure to negotiate with the union concerning its decision to subcontract was a refusal to bargain although the company's motive was economic rather than anti-union.<sup>5</sup> In reaching this conclusion, the major concern was to determine the meaning of the words "other terms and conditions of employment" in Section 8(d). Both the Board and the Court relied on *Order of R.R. Telegraphers v. Chicago & No. W. Ry.*<sup>6</sup> and *Teamsters v. Oliver*<sup>7</sup> in reaching their conclusion that the subcontracting in question was covered by this phrase. The Supreme Court in *Fibreboard* stated:

that the type of "contracting out" involved in this case—the replacement of employees in the existing bargaining unit with those of an independent contractor to do the same work under similar conditions of employment—is a statutory subject of collective bargaining under § 8(d). Our decision need not and does not encompass other forms of "contracting out" or "subcontracting" which arise daily in our complex economy.<sup>8</sup>

The true significance of this decision depends on the Board's application of this doctrine to other cases. The Board soon recognized that the principles of *Fibreboard* were not hard and fast rules and that the permissibility of unilateral subcontracting would have to be approached on a case-by-case basis.<sup>9</sup>

In one of the Board's first decisions after *Fibreboard* the employer unilaterally subcontracted the rebuilding of a mining machine formerly done by unit employees. However, all unit employees continued to work full time and the Board found no section 8(a)(5)

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<sup>4</sup> *Fibreboard Paper Products Corp.*, 138 N.L.R.B. 550 (1962).

<sup>5</sup> In *Town & Country Mfg. Co.*, 136 N.L.R.B. 1022 (1962), the Board established a duty to bargain over economically motivated decisions to subcontract, but in that case anti-union motives were also involved.

<sup>6</sup> 362 U.S. 330 (1960).

<sup>7</sup> 358 U.S. 283 (1959).

<sup>8</sup> *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 215 (1964).

<sup>9</sup> See, e.g., *Allied Chemical Corp.*, 151 N.L.R.B. 718 (1965); *Superior Coach Corp.*, 151 N.L.R.B. 188 (1965); *Westinghouse Elec. Corp. (Mansfield Plant)*, 150 N.L.R.B. 1574 (1965); *Shell Oil Co.*, 149 N.L.R.B. 305 (1964).

violation since the employer's action resulted in no "significant detriment" to the employees in the unit.<sup>10</sup>

Thus the Board hit upon the concept of "significant detriment" which has been consistently followed by it<sup>11</sup> although sometimes expressed as "significant impact"<sup>12</sup> or other similar phrases apparently having the same basic meaning. This threshold concept of detriment requires that the unilateral decision must have caused substantial harm to the members of the bargaining unit.<sup>13</sup> With this concept in mind, the next step is to determine what the Board considers as substantial harm to the bargaining unit. This is an illusive idea and it is regrettable that the Board has not offered a more definite criterion. In any event, the Board suggested in *Westinghouse Electric (Mansfield)*<sup>14</sup> that where there had been a section 8(a)(5) violation it appeared that the subcontracting either (1) effected a change in the conditions of employment, or (2) resulted in a significant impairment of job tenure, employment security or reasonably anticipated work opportunities in the bargaining unit.<sup>15</sup>

A good example of the difference in the two tests is demonstrated by a decision in which the majority of the Board found no significant detriment to the employees in the bargaining unit as there were no layoffs and consequently no change in the terms and conditions of employment. The majority held the possibility that employees, who had been laid off two years earlier, would have been recalled except for the subcontracting was too remote. The dissent, relying on the "significant impairment of . . . reasonably anticipated work opportunities . . ." concluded that the laid off employees did suffer a "significant detriment."<sup>16</sup>

Of the two standards suggested, the change in condition of employment test, seems preferable since the Board does not have to analyze the employee's expectations, but can make its deliberations on more easily ascertainable criteria such as whether the managerial decision itself caused a change in the working arrangements of

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<sup>10</sup> *Kennecott Copper Corp.*, (Chino Mines Division), 148 N.L.R.B. 1653 (1964).

<sup>11</sup> See, e.g., *American Oil Co.*, 151 N.L.R.B. 421 (1965); *Westinghouse Elec. Corp. (Bettis)*, 153 N.L.R.B. No. 33 (1965).

<sup>12</sup> See, e.g., *Superior Coach Corp.*, 151 N.L.R.B. 188 (1965).

<sup>13</sup> 33 U. CHI. L. REV. 315, 318 (1966).

<sup>14</sup> 150 N.L.R.B. 1574 (1965).

<sup>15</sup> *Supra* note 13.

<sup>16</sup> *Westinghouse Elec. Corp. (Bettis)*, 153 N.L.R.B. No. 33 (1965).

the firm, such as layoffs.<sup>17</sup> It would also give the employer a better guide line for future decisions.<sup>18</sup>

It appears that the "reasonable anticipation" test has not been followed and even when it was suggested in *Westinghouse (Mansfield)*<sup>19</sup> the Board stated that the employer's duty to give a union prior notice and an opportunity to bargain normally arises where the employer proposes to take action which will effect some change in existing employment terms or conditions within the range of mandatory bargaining. To determine if a change occurred the Board looked to past practice to determine what was the norm or status quo and found that subcontracting was a recurrent event in accord with the employer's usual method of doing business. It concluded that the employer's unilateral action did not change the terms and conditions of employment. The Board stated that there was no demonstrable adverse impact on the employees in the unit as there was no loss of jobs. If there has been a history of subcontracting the Board has generally not found a refusal to bargain, but this is often linked to the key factor that no "significant detriment" occurred to the employees.<sup>20</sup> The employer should continue to argue that past history of subcontracting is a defense when subcontracting is the normal method of operation, but whether the Board would take the same approach if there were a loss of jobs or layoffs is questionable.<sup>21</sup> For example, suppose the employer had unilaterally subcontracted 100,000 dollars worth of work for five years and yet because of good business conditions, no employees were laid off. Then in the sixth year the employer subcontracts 100,000 dollars worth of work, but due to less work in the unit 20 per cent of the employees are laid off. While the subcontracting is the status quo, the Board would probably find a violation since the subcontracting the sixth year caused a significant detriment to the bargaining unit.

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<sup>17</sup> *Supra* note 13, at 320.

<sup>18</sup> *Ibid.*

<sup>19</sup> 150 N.L.R.B. 1574 (1965).

<sup>20</sup> Mermin, *The Impact of Darlington-Fibreboard*, N.Y.U. 18th CONT. ON LABOR 235, 247 (1966).

<sup>21</sup> In Puerto Rico Telephone Co., 149 N.L.R.B. 950 (1964), the employer had subcontracted for two years, but since there were layoffs the Board found an unfair labor practice.

While the Board has maintained that the *Fibreboard* doctrine is not limited to employer subcontracting actions which result in the permanent elimination of an entire department, unit or individual jobs,<sup>22</sup> the Board has consistently limited the doctrine to those situations in which a significant detriment has occurred resulting in an actual change in the employee's terms and conditions of employment. For example, the Board stated that even if it be assumed that some loss of overtime did result from the subcontracting, it does not appear that such loss had a substantial impact upon the unit employee's terms and conditions of employment as no unit employee was laid off or lost his regular wage.<sup>23</sup>

The principal case emphasizes the fact that there was no substantial impact on the bargaining unit since none of the employees were laid off or discharged. Therefore, it would appear from the Board's decisions and the principal case that the employer's unilateral subcontracting actions will not result in a section 8(a)(5) violation as long as there is no actual change in employee conditions such as layoffs or loss of jobs. It would also appear that if the Board becomes involved in the "reasonable anticipation of work opportunities" area, it will have gone beyond the Supreme Court's decision in *Fibreboard*.

There is a major distinction between *Fibreboard* and the subsequent Board decisions concerning subcontracting which may give the employer a defense to unilateral subcontracting even when there is a significant impact on the employees thereby creating a statutory duty to bargain. This defense is waiver. In *Fibreboard* the collective bargaining agreement had expired while in the principal case, and the majority of the other Board decisions since *Fibreboard*, there was an existing collective bargaining agreement in existence at the time of the unilateral action by the employer.

In the principal case the union attempted during negotiations to secure a ban against subcontracting, however, the union failed and agreed to a collective bargaining contract which did not mention subcontracting. This prompted the employer to argue that the union had waived its right to bargain over subcontracting during the term of the agreement. The trial examiner did not agree with this

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<sup>22</sup> American Oil Co., 151 N.L.R.B. 421 (1965).

<sup>23</sup> General Tube Co., 151 N.L.R.B. 850 (1965).

contention, but the Board did not adopt the trial examiner's conclusions in this area because it was unnecessary for the Board's decision.

It is important to realize why this was unnecessary for the Board's decision. The trial examiner found that the employer did have a statutory duty to bargain over subcontracting and that the union had a statutory right to bargain over subcontracting. With this finding it then became necessary for the trial examiner to consider the employer's defense of waiver to determine if the union did waive its rights. However, when the Board reversed the trial examiner and found no significant detriment to the employees and therefore no statutory duty to bargain, it became unnecessary to consider waiver.

To fully understand the concept behind waiver it is necessary to consider the period immediately preceding the Taft-Hartley Act.<sup>24</sup> The Wagner Act<sup>25</sup> had been judicially construed to mean that the employer's duty to bargain continued throughout the term of the agreement even with respect to those matters which were agreed upon by the parties.<sup>26</sup> However, this judicially established requirement was supposed to have been set aside by section 8(d)<sup>27</sup> of the present act. The interpretation of this section was presented to the Board in *Jacobs Mfg. Co.*<sup>28</sup> where the union, during the existence of the contract, requested bargaining over pensions and group insurance. During pre-contract negotiations the matter of group insurance had been discussed. The board split over this question and finally found the employer guilty of a refusal to bargain only on the issue of pensions which had not been discussed in pre-contract negotiations. Thus a majority seemed to hold that

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<sup>24</sup> Labor Management Relations Act (Taft-Hartley Act), 61 Stat. 136 (1947), 29 U.S.C. § 141 (1964).

<sup>25</sup> The National Labor Relations Act (popularly known as the Wagner Act) 49 Stat. 449, 29 U.S.C. § 151 was approved on July 5, 1935. Twelve years later this statute was amended and supplemented by the Labor Management Relations Act (popularly known as the Taft-Hartley Act) passed on June 23, 1947, over President Truman's veto.

<sup>26</sup> Seagle, *The Duty of an Employer to Bargain in Postcontract Negotiations*, 51 CORNELL L.Q. 523, 524 (1966).

<sup>27</sup> The duties so imposed shall not be construed as requiring either party to discuss or agree to any modifications 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. 61 Stat. 136 (1947), 29 U.S.C. § 158(d) (1964).

<sup>28</sup> 94 N.L.R.B. 1214 (1951).

discussion of a bargainable issue in contract negotiations excused subsequent bargaining on the issue during the term of the contract.<sup>29</sup> In *NLRB v. Jacobs Mfg. Co.*<sup>30</sup> the court enforced the Board's decision. In commenting on the Taft-Hartley exception to the duty to bargain under section 8(d), the court said that the "purpose of this provision is, apparently, to give stability to agreement governing industrial relations. . . ."<sup>31</sup> But, section 8(d) does not relieve "an employer of the duty to bargain as to subjects which were *neither discussed nor embodied* in any of the terms and conditions of the contract."<sup>32</sup> The court pointed out that it did not intend to pass upon the effect on the duty to bargain that mere previous discussion of a subject would have without putting it into the contract.<sup>33</sup>

Regardless of what the majority of the Board seemed to hold in *Jacobs*, the Board is now taking the view that to have a waiver it must be shown that the union consciously yielded or clearly and

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<sup>29</sup> *Supra* note 26, at 526. In *Jacobs Mfg. Co.*, 94 N.L.R.B. 1214, 1231 (1951), member Reynolds, basing his dissent on a study of the legislative history of § 8(d), contended that:

Section 8(d) imposes no obligation on either party to a contract to bargain on any matter during the term of the contract except as the express provisions of the contract may demand. This is a result reasonably compatible with the particular section 8(d) language involved, as well as with section 8(d) as a whole. Moreover, not only does the result accord stability and dignity to collective bargaining agreements, but it also gives substance to the practice and procedure of collective bargaining.

Chairman Herzog, concurring in part:

True, that agreement is silent on the subject, so it cannot literally be said that there is a term "contained in" the 1948 contract relating to the group insurance program. The fact remains that during the negotiations which preceded its execution, the issue was consciously explored . . . . In my opinion, it is only reasonable to assume that rejection of the Union's basic proposal, coupled in this particular instance with enhancement of the substantive benefits, constituted a part of the contemporaneous "bargain" which the parties made when they negotiated the entire 1948 contract. In the face of this record as to what the parties discussed and did, I believe that it would be an abuse of this Board's mandate to throw the weight of Government sanction behind the Union's attempt to disturb, in midterm, a bargain sealed when the original agreement was reached.

To hold otherwise would encourage a labor organization — or, in a section 8(b)(3) case, an employer — to come back, time without number, during the term of a contract, to demand resumed discussion of issues which, although perhaps not always incorporated in the written agreement, the other party had every good reason to believe were put at rest for a definite period. I do not think that the doctrine of the *Tide Water* case was ever intended to go as far as to extend to facts like these, or that it should be so extended. . . .

<sup>30</sup> 196 F.2d 680 (2d Cir. 1952).

<sup>31</sup> *Id.* at 684.

<sup>32</sup> *Ibid.* (emphasis added.)

<sup>33</sup> *Id.* at 683, note 1.

unmistakably waived its right.<sup>34</sup> The Board also stated that to adopt another view would be equating a collective bargaining agreement to an ordinary contract and disregard the familiar concept of collective bargaining as a continuing and developing process. It would seem obvious that the amendment of section 8(d) by the Taft-Hartley Act was to put some limit on the scope of collective bargaining and the solution is not advanced by continuing to speak of a "continuing and developing process" since it was this language which produced the Taft-Hartley amendment.<sup>35</sup>

The Board, however, has continued to maintain the position that while a statutory right may be waived by collective bargaining, a waiver, if it is to be found, must be clearly and unmistakably established and it is not lightly to be inferred.<sup>36</sup> In one subcontracting case the Board held that the fact the union tried to have provisions written into the agreement which would have prevented the employer from subcontracting did not constitute a waiver when the union failed in its attempt to include such provisions.<sup>37</sup>

While the present position of the Board is open to criticism, the employer, if he is now going to argue waiver, is faced with the difficulty of showing a "clear and unmistakable waiver." In trying to show this the transcript of the pre-contract negotiations could become extremely important. With the transcript the employer should be able to show a clear waiver in a case where the union gives up its ban on subcontracting as a quid pro quo for another concession, such as a union security clause.<sup>38</sup> To hold that this would

<sup>34</sup> Press Co., 121 N.L.R.B. 976, 979 (1958):

It is well established Board precedent that, although a subject has been discussed in pre-contract negotiations and has not been specifically covered in the resulting contract, the employer violates section 8(a)(5) of the Act if during the contract term he refuses to bargain, or takes unilateral action with respect to the particular subject unless it can be said from an evaluation of the prior negotiations that the matter was "fully discussed" or "consciously explored" and the union "consciously yielded" or clearly and unmistakably waived its interest in the matter.

<sup>35</sup> *Supra* note 26.

<sup>36</sup> Timken Roller Bearing Co. v. N.L.R.B., 325 F.2d 746 (6th Cir. 1963).

<sup>37</sup> Cloverleaf Div. of Adams Dairy Co., 147 N.L.R.B. 1410 (1964).

<sup>38</sup> New York Mirror, 151 N.L.R.B. 834, 840 (1965). The Board stated that, "if it were to appear that after full explanation of the subject during prior negotiations the Union had consciously yielded their interest . . . in return for the severance and termination provisions, a finding of clear and unmistakable waiver might well be justified," citing Shell Oil Co., 149 N.L.R.B. 283 (1964); Shell Chemical Co., 149 N.L.R.B. 298 (1964); Proctor Mfg. Corp., 131 N.L.R.B. 1166, 1169 (1961).

not be a waiver would place the employer at an unfair disadvantage in that he conceded to one demand in exchange for the dropping of another and during the term of the contract the union could again demand bargaining concerning the "waived" demand.<sup>39</sup>

The position taken by the Board concerning waiver since the Taft-Hartly Act can be summarized into three interpretations: (1) Member Reynolds' opinion in *Jacobs Mfg. Co.* that the employer is not obligated to bargain over any matter during the contract unless specifically provided for in the contract;<sup>40</sup> (2) the majority holding in *Jacobs* which indicated that mere discussion during contract negotiations would constitute a waiver;<sup>41</sup> (3) the view expressed in *Press Co.*<sup>42</sup> and also in part by Chairman Herzog's opinion in *Jacobs Mfg. Co.*<sup>43</sup> that the union must have consciously explored the matter and clearly waived it. While the third view has been criticized, the Board in a recent subcontracting case has indicated that it might move into a fourth position of express contractual waiver.<sup>44</sup>

The Board, apparently ignoring the purpose of the Taft-Hartley Act, stated that —

in the absence of a specific contract clause covering the matter an employer is under a continuing duty to bargain on request with respect to subcontracting affecting unit work, and therefore, must bargain with the union in good faith upon demands as to such subcontracting even during the terms of an existing agreement.<sup>45</sup>

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<sup>39</sup> In *Beacon Piece Dying & Finishing Co., Inc.*, 121 N.L.R.B. 953 (1958), the Board seemed to take the position that waiver will not be found in the common "give and take" bargaining situation. This case could be distinguished on its facts since the employer completely refused to discuss the matter in question.

<sup>40</sup> 94 N.L.R.B. 1214, 1231 (1951).

<sup>41</sup> 94 N.L.R.B. 1214 (1951).

<sup>42</sup> See note 34.

<sup>43</sup> 94 N.L.R.B. 1214, 1227 (1951).

<sup>44</sup> *American Oil Co.*, 151 N.L.R.B. 421 (1965).

<sup>45</sup> *Id.* at 422. It is interesting to note that the Board cites *Westinghouse Elec. (Mansfield)*, *supra* note 14, for this proposition while in *Mansfield* the Board actually stated at page 1576: "Thus, it is wrong to assume that, in the absence of an existing contractual waiver, it is a per se unfair labor practice. . . ." The Board further stated that the fact that the union on three separate occasions sought contract language limiting subcontracting but each time signed a contract without such limitation was a contributing factor to their decision, especially since the union did win agreement for improved benefits in employment security.

This case is diametrically opposed to Member Reynolds' dissenting opinion in *Jacobs* and it is also an extension of the previous board positions.

Even with this extreme position, the employer should be able to protect himself by the use of a coverage clause (or a termination and modification clause). This type of clause should satisfy both the clear and unmistakable waiver test and also the express contractual requirement. In *Jacobs*<sup>46</sup> the Board stated that the employer could protect himself with a coverage clause to the effect that both parties waive bargaining over any issue not included in the contract.

It would appear that a clause to this effect would be a "clear and unmistakable waiver", however, the trial examiner in *Westinghouse (Mansfield)*<sup>47</sup> held that a similar clause was not such a "clear and unmistakable waiver" of a statutory right. The clause was even stricter than the coverage clause approved by the Board in *Jacobs* since the parties waived only matters discussed during negotiations but not embodied in the contract.<sup>48</sup> The Board in *Mansfield* did not have to consider the trial examiner's conclusion since it found no statutory duty to bargain. Even though the trial examiner said it was not a waiver, it is difficult to see how the Board could reach a conclusion that such a clause in the contract would not be a "clear and unmistakable waiver." This type of clause should also be distinguished from a wrap-up clause such as was

<sup>46</sup> *Jacobs Mfg. Co.*, 94 N.L.R.B. 1214, 1220 (1951):

The parties acknowledge that during negotiations which resulted in this agreement, each had the unlimited right and opportunity to make demands and proposals with respect to any subject or matter not removed by law from the area of collective bargaining, and that the understandings and agreements arrived at by the parties after the exercise of that right and opportunity are set forth in this agreement. Therefore, the Corporation and the Union, for the life of this agreement, each voluntarily and unqualifiedly waives the right, and each agrees that the other shall not be obligated, to bargain collectively with respect to any subject or matter not specifically referred to or covered in this agreement, even though such subjects or matters may not have been within the knowledge or contemplation of either or both the parties at the time that they negotiated or signed this agreement.

<sup>47</sup> *Westinghouse Elec. Corp.*, (Bettis), 153 N.L.R.B. No. 33 (1965).

<sup>48</sup> *Id.* at 1585:

The company and union each voluntarily and unqualifiedly waives the right, and each agrees that the other shall not be obligated, to bargain collectively with respect to any subjects or matters not specifically referred to or covered in [the contract] which were discussed during the negotiations of [the contract].

involved in *New York Mirror*<sup>49</sup> which the Board found did not constitute a waiver. This clause merely provided that the entire contract was embodied in the written contract.

While a coverage clause could aid the employer in arguing waiver, the waiver argument without this clause is certainly not dead, although the Board has dealt it a grievous blow.<sup>50</sup> The Eighth Circuit Court of Appeals<sup>51</sup> recently stated that even if the subcontracting in question had been held to be a subject of collective bargaining, it was certainly arguable that the parties had already bargained over the subject during contract negotiations. For three previous contracts the union had tried to include a clause which would have prevented subcontracting, but the final agreement was always silent on the matter. The court by dicta indicated that the waiver argument is still valid. However, in light of the recent Board decisions, the management lawyer is going to have to be extremely cautious in this area. In many situations it may well be advisable to bargain over such matters.

It has also been argued that the union waived its right to bargain over subcontracting by agreeing to a broad management prerogative clause. It is argued by some that it is drawing too much meaning from a management prerogative clause standing alone to say that the union waived or bargained away its statutory right to collective bargaining.<sup>52</sup>

On the other hand, while the Board is reluctant to find waiver, it has found such a waiver in some recent cases<sup>53</sup> where along with other factors there was a management rights clause.<sup>54</sup> Thus, a properly drawn management prerogative clause is still important although in a recent case the Board did not adopt the trial examiner's conclusion that the management rights clause constituted a waiver.<sup>55</sup> In any event, since it is not per se an unfair labor practice

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<sup>49</sup> *New York Mirror*, 151 N.L.R.B. 834 (1965).

<sup>50</sup> *Supra* note 26, at 536.

<sup>51</sup> *NLRB v. Adams Dairy Inc.*, 350 F.2d 108 (8th Cir. 1965).

<sup>52</sup> *Dunau, Subcontracting and Unilateral Employer Action*, N.Y.U. 18th Conf. on Labor 219, 232 (1966).

<sup>53</sup> *International Shoe Corp.*, 151 N.L.R.B. 673 (1965); *Ador Corp.*, 150 N.L.R.B. 1658 (1965); *General Motors Corp.*, 149 N.L.R.B. 396 (1964).

<sup>54</sup> *Supra* note 20, at 246.

<sup>55</sup> *Fafnir Bearing Co.*, 151 N.L.R.B. 332 (1965).

to insist on such a clause,<sup>56</sup> the management lawyer should bargain for as broad a prerogative clause as possible.

*Louis Sweetland Southworth, II*

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**Products Liability—Delegation of Duties by Manufacturers of  
Inherently Dangerous Products**

*P*, the purchaser and user of a hot water heater, manufactured by *D<sub>1</sub>*, instituted an action against *D<sub>1</sub>* and *D<sub>2</sub>*, the contractor who installed the hot water heater, for the damages arising from its explosion. When sold, the water heater was accompanied by installation instructions which specified that a combination temperature and pressure valve must be used on the hot water line. These instructions were not followed. The contractor instead followed the common practice of the plumbing industry and installed only pressure valves, resulting in the explosion. The lower court dismissed the suit as to *D<sub>2</sub>* and found against *D<sub>1</sub>* and then both *P* and *D<sub>1</sub>* appealed. *Held*, judgment against *D<sub>1</sub>* reversed. The water heater was not in a defective condition or unreasonably dangerous to the user when it left the manufacturer, and, in addition, the water heater was substantially changed when used by *P* from the condition in which it was sold. Because *D<sub>2</sub>* failed to install the correct temperature relief valve he was negligent and this negligence became the sole proximate cause of the explosion. *State Stove Mfg. Co. v. Hodges*, 189 So. 2d 113 (Miss. 1966).

This case raises a vital problem existing today in the field of product liability, i.e., to what extent can a manufacturer delegate his duty to preserve the safety of the consuming public through (1) inspecting his product, (2) warning as to the safe use of his product or (3) installing additional and necessary safety devices, and by delegating this responsibility be relieved of liability, when the product itself is inherently or imminently dangerous?<sup>1</sup>

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<sup>56</sup> *NLRB v. American Nat'l Ins. Co.*, 343 U.S. 395 (1952).

<sup>1</sup> For the purposes of this article it is assumed that privity of contract is not a requirement for the manufacturer to be held liable. However, West Virginia would still recognize the manufacturer's liability since it supports the exception of imminently dangerous products to the privity rule. *General Motors Corp. v. Johnson*, 137 F.2d 320 (4th Cir. 1943) and *Peters v. Johnson, Jackson & Co.*, 50 W. Va. 644, 41 S.E. 190 (1901).