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## Background and Review of National Labor Relations Board and Court Decisions in the Area of Managements Prerogatives - The Darlington and General Electric Cases

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BACKGROUND AND REVIEW OF NATIONAL LABOR RELATIONS BOARD AND  
COURT DECISIONS IN THE AREA OF MANAGERIAL  
PREROGATIVES - THE DARLINGTON  
AND GENERAL ELECTRIC CASES

by

Charles W. Bullen, Jr.

A thesis submitted in partial fulfillment  
of the requirements for the degree

of

MASTER OF SCIENCE

in

Economics

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Charles W. Bullen, Jr.

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ABSTRACT

Background and Review of National Labor Relations Board and  
Court Decisions in the Area of Managements  
Prerogatives - The Darlington  
and General Cases

by

Charles W. Bullen, Jr.

Utah State University, 1967

Major Professor: E. B. Murray  
Department: Economics

The effects of the Darlington case on managements prerogatives was that it spelled out what a multi-plant employer must do in the area of plant closure to avoid violating the National Labor Relations Act of 1935. There was also good evidence brought forth to show that management is now bargaining plant closures with union. Thus the conclusion was made that in the area multi-plant employers had lost some power due to the Darlington Case.

The General Case is presently in the Courts and until a final court decision is made it is hard to say what effect it will have on managements prerogatives.

(76 pages)

CHAPTER I  
INTRODUCTION

Statement on Management's Prerogatives

In recent years the National Labor Relations Board and the Federal Courts have made decisions in the area of managements' right to management. These decisions have brought forth some new interpretations of the National Labor Relations Act of 1935, as amended, concerning management's prerogatives in dealing with organized labor.

Nature of Problem

As a result of these decisions, a great deal of public controversy has persisted concerning their intent. One side states that management has misused its power and that the National Labor Relations Board is right in curbing management's misused power. The other side believes that the National Labor Relations Board has made rulings in areas where it has no business, thereby diminishing management's prerogatives to manage.

Purpose of the Study

The purpose of this investigation will be to answer the following questions:

First, what have the National Labor Relations Board and Federal Courts really said in their respective decisions in the areas of plant closure and overall bargaining procedures (Boulwarism)?

Second, have these decisions weakened management's prerogatives in dealing with organized labor, and if so, to what extent?

Third, what is the controversy centered around?

Fourth, to give additional insights into the historical background of management's prerogatives.

#### Method of Investigation

This investigation will first look at the history of the labor movement, and then review the laws that make up the rules by which labor and management must abide. It will also examine the decisions of the Federal Courts and the National Labor Relations Board to see exactly what has been stated in recent controversial decisions. This analysis of the decisions is made to point out the more relevant facts that have led to the contrasting views and will be carried out by library-research study. An analysis will also be made of both sides of the controversies to point out the areas of contention. From these investigations, an attempt will be made to show where the National Labor Relations Board and the courts have placed management's prerogatives.

#### Limitations of the Study

If the above procedures were followed in covering all areas of recent controversy over decisions concerning labor law, the limited time given to write this paper would not be sufficient. Thus, two areas of major controversy have been chosen; they are plant closing, and a company's overall approach to bargaining. In the former area the Darlington case is the key in a series of cases. In the latter the General Electric case has been chosen.

Such important areas of controversy as the subcontracting of work, as set forth in the Fiberboard case; and the ability of labor-management to enforce contracts, as set forth in both the Westinghouse case and the Lincoln Mills case, will not be discussed in this paper even though they are of importance.

It should also be stated that although there is considerable attention given to the basic statutes that concern themselves with labor relations, the statutes are much more involved and no attempt is made to give a complete analysis of them. There are also several statutes that in one way or another pertain to labor, but only those that concern labor-management relations are taken into consideration in the paper.



## CHAPTER II

### HISTORY

A history of managements prerogatives in labor negotiation could start as far back as 1200 B. C. and perhaps farther, but one of the most widely read early labor disputes took place in Egypt in about 1200 B. C. and a written account is in the King James Bible.<sup>1</sup> This dispute arose out of the Pharaoh's command that the Israelites be given no more straw to make brick; that they should go out and get the straw and not have it given to them, but by the same token brick productions were to remain the same. Thus, the Israelites were to take over another step in the production of brick and keep the quantity at the same level. At this the leader of the Israelites went to the Pharaoh's taskmasters and said the work was too much. For this they were beaten and could have been killed. One can easily see that in this labor dispute management had the upper hand. The main prerogative in this case, as in most disagreements between master and slave, was how harsh the punishment should be. Perhaps the reason why more slaves were not killed was that it was hard to get good slaves.

#### Slavery

Slavery is perhaps the crudest form of labor-management relations because, as stated above, the slave had little or no say in the way his life was to be conducted. Slavery started in very early times, and it is

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<sup>1</sup>The Holy Bible: (King James Version) (Salt Lake City, Utah: The Deseret Book Company, 1954), p. 80.

also interesting to note that in ancient civilization slaves were rarely used in the fields. They lived in town and were used for the main part as domestic servants and artisans.<sup>2</sup> Slaves could gain their freedom through hard work and some did. Slavery continued from these early times through to the period of the Roman Empire, at which time it all but died out.

Slavery did not begin again on any great scale until 1441 when the Portuguese began bringing back slaves from Africa to work in the fields of the homeland.<sup>3</sup> This slavery continued in Europe and spread to the American colonies of England in 1619 when twenty Negroes were sold to Jamestown colonists.<sup>4</sup> Slaves did not appear in any great number in this country until the 1680's and the number continued to grow for the next one hundred and forty years. By 1870 the Negroes in this country were estimated at 460,000 or about 20 per cent of the total population.<sup>5</sup> In 1815 the slave trade became illegal in Europe at the Congress of Vienna, and slavery was slowly done away with in European colonies thereafter.

The slavery in this country remained until 1864. Slaves in the United States were the property of the owner and could be bought and sold at will and put to whatever use the master saw fit. This is a far cry from the rights that labor has today.

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<sup>2</sup>Chester G. Starr, Charles E. Nowell, Bryce Lyon, Raymond P. Stearns, and Theodore S. Hamerow, A History of the World (Chicago, Illinois: Rand McNally and Company, 1960), p. 28.

<sup>3</sup>Shepard Bancroft Clough and Charles Wodsey Cole, Economic History of Europe (Boston, Massachusetts: D. C. Heath and Company, 1952), p. 107.

<sup>4</sup>Arthur Cecil Bining and Thomas C. Cochran, The Rise of American Economic Life (New York, New York: Charles Scribner's Sons, 1964), pp. 65-66.

<sup>5</sup>Ibid., p. 29.

### Lords and Serfs

The next form of labor management relations to come along after slavery was the serf-lord relationship. The serf was not much better off than a slave for he was tied to the land. Serfs did have some rights, and many serfs owned land, but the greatest part of the land belonged to the lord of the manor. The serf would do so much work for the lord, and in turn the lord would provide the serf with protection and use of some of his land. This type of relationship between labor and management existed from about 500 A. D. to 1500 A. D. in most of Europe. It lasted until the mid 1800's in parts of Germany. Toward the end of the period, say from 1300 A. D. on, the Feudal System began to break down, and the growth of the towns became more intensive. The break up of the Feudal System was caused by many things, perhaps the most important were:

1. The rise of money economy.
2. An increase in trade and market.
3. The rise of nation and state to provide protection and justice.<sup>6</sup>

Another event that took place later was the enclosure movement that also helped bring an end to feudalism.

With the end of the Feudal System, free labor began to appear. This free labor moved to the cities and went to work many times in the manufacturing of goods. A great deal of the manufacturing at this time was done by the Guilds, which brings up the next form of labor management relations, the Master, Journeyman, and Apprentice.

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<sup>6</sup>Clough and Cole, op. cit., p. 29.

### The Guilds

The Guilds, as they progressed through their history, set up the basis from which the modern arrangements of labor and management have evolved. A guild was set up as early as 1099 in Worms; it was a fishermans guild, and in 1106 the cordwainers (shoemakers) of Wurzburg set up a craft guild.<sup>7</sup>

The craft guilds were set up to control production (both quality and quantity), hours, wages, prices, rules, and apprenticeship regulations. The gradation within the guild were apprentice, journeyman, master; and the elected leaders of the guild were called wardens. For a boy to become an apprentice, his family would sign a written contract indenturing their eight to eleven year old son to a master. Apprenticeship took from two to twelve years, depending on the trade to be learned. The apprentice would live with the master and his family. The master would teach the apprentice the trade, and in turn, the apprentice would work for the master.

When the time of apprenticeship was over, the apprentice became a journeyman and was free to go seek work in any master's shop where he could find a job. The journeyman was free to change his employer any time he pleased, but he was required to give notice of his quitting. The journeyman was free to move about at will and was free to marry if he had saved enough money to support a wife and family.

In the early years of the guilds, it was easy for a journeyman to become a master; but as time went on, it became progressively harder. This occurred because as the guilds got stronger, the masters wanted to

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<sup>7</sup>Ibid., p. 44.

keep the profit of the trade by keeping the wages low. With low wages and high dues, necessary to become a master, the journeyman began to form groups to raise wages and to get better working conditions. These organizations were often under the guise of a religious organization, but at this time (1500) the masters were powerful enough to get laws against strikes and combinations of workers.

This can be said to be the start of what was to become the modern factory system, because as the guild masters became more powerful they took on the role of management and were no longer actual practicing workers of the trade. The guilds slowly changed and many of them became corporations, with what used to be the master now as the employer and owner. The journeyman now became the employee of the company. This break up of the guilds began about 1600 and continued until about 1750. By this time the remaining guilds had little power, and the change from a guild system to capitalism had taken place.

The groups of journeymen that joined together to fight the oppression of the powerful masters were perhaps the first real start of labor unions even though a far cry from what unions are today.

As early as 1400 a change had taken place in the relationship between labor and management in that the masters had to rely on the law to bring about their ends, no longer could a worker be beaten or killed by his master. Thus it can be said that as early as the fourteenth century labor law was being practiced.

As noted above, strikes were illegal as were the organizations themselves. Even though the laws favored the masters, there was still the rule of law, and the law itself became more and more powerful as time went on.

The Rise of Organized Labor

The slave trade and the guilds died out at about the same time and labor moved into its modern era. Labor organizations were still illegal. In 1721 in the case of The King vs. Journeymen-Tailors of Cambridge, the English courts ruled that the journeymen tailors were involved in a criminal conspiracy to raise their wage.<sup>8</sup> In 1809 a similar case took place in the United States, the People of the State of New York vs. James Melvin, or more commonly known as the Cordwainers case. The basic point of this was that a combination of workers was unlawful.<sup>9</sup>

Even with the English case as background, craft unions began to appear in the United States, the more important being the carpenters (1791) and the Cordwainer (1794) in Philadelphia.<sup>10</sup> By 1791 the printers and by 1795 the tailors of Baltimore were organized, and by 1803 the New York Society of Journeymen Shipwrights was formed to mention just a few. These were first considered by the public as dangerous and unpatriotic, finding very little if any public support.

These early unions called several strikes. The most important of which was the last of a series of strikes called by The Society of Master Cordwainers of the city of Philadelphia in 1805. Out of this strike came the above mentioned Cordwainer Case which declared that labor unions were an unlawful conspiracy. This case set a precedent that unions had to work and organize under for years to come. The Unions movement continued in this country even though it was hard for them to exist.

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<sup>8</sup>Stephen J. Mueller and A. Howard Myers, Labor Law and Legislation (Chicago, Illinois: South-Western Publishing Company, 1962), p. 10.

<sup>9</sup>Ibid., p. 29.

<sup>10</sup>Bining and Cochran, op. cit., pp. 249-250.

Management was able to maintain its almost absolute rule of labor unions until 1842 then, in that year, the Supreme Court of the state of Massachusetts ruled in the famous Commonwealth vs. Hunt case that:

(1) trade unions were not a criminal conspiracy and, therefore, lawful; (2) that to strike for a closed shop was not unlawful; and (3) that the union as a whole was not responsible for unlawful acts committed by its members. This decision together with laws passed in several states during the following few years gave the unions a great push forward.

Between 1842 and 1860 labor unions grew, and many national unions were formed, so that by 1860 there were twenty-six national trade union in the United States.<sup>11</sup> A national union is a union made up of several local unions of the same trade. An example would be the shoemakers from several cities (local) banding together to form one nation wide union or national union. This number continued to grow until by 1866 there were thirty-two national trade unions.<sup>12</sup>

During the period from the end of the War Between the States to about 1900, labor made definite gains. During this period an attempt was made to form a single large union to represent all labor regardless of trade. This was first tried by William H. Sylvius in 1866 when he organized The National Labor Union, but it failed. Then in 1869 the Knights of Labor was formed and rose to considerable strength under the leadership of Uriah S. Stevens and T. V. Powerly. The Knights of Labor reached its greatest strength in 1886 and thereafter declined. The Knights did carry out some successful strikes and did organize

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<sup>11</sup>Ibid., p. 253.

<sup>12</sup>Mueller and Myers, op. cit., p. 466.

many workers.

In 1886 The American Federation of Labor was founded by Samuel Gompers. This loosely knit organization of craft-unions was the organization that came to stay. The American Federation of Labor was set under Gompers in such a way that it was an exponent of laissez faire. Gompers and the A. F. of L. opposed government intervention in labor relations. Gompers believed that labor and management should be allowed to fight it out between themselves to see who would win. He believed the government should be used to keep law and order. This "bread and butter" type of unionism caught on and stayed, because it was most compatible with the American way of life.

During this same period, management gave up ground mainly in the areas of hours of work, child labor, and improved safety conditions. Management could no longer make a man or child work long hours (84 hours per week) under unsafe conditions without breaking the law, but it must be noted that poor conditions did still exist in 1900. By 1900 management's God given right to manage as management saw fit was beginning to be questioned. Management's prerogative as to what they paid, who worked, and how long they worked were now no longer solely up to management.

#### Labor 1900-1930

Labor still had a long way to go in 1900 to reach its present status. The period of time from 1900 to the present has been marked by the passage of much labor legislation and many court decisions to interpret these laws.

One of the laws that came for review before the Supreme Court of the United States was a Utah law that limited underground mining to an



eight hour work day.<sup>13</sup> The court upheld this law in a decision in the Holden v. Hardy case. This was one of the few times the court sided with labor around the turn of the century, 1898. Sanford Cohen, a noted labor writer, has called the period from 1880 to 1930 "Judicial Conservatism."<sup>14</sup> The courts handed down decisions both on legislation and various tactics used by unions in labor disputes. This paper will deal primarily with the cases that were used to interpret the laws.

The first law of the period to come under the eye of the courts was the Sherman Anti-Trust Act. The first case to see if labor was to be under the anti-trust law was the Loewe v. Lawlor case better known as the Danbury Hatters case. This case came before the Supreme Court of the United States in 1908.<sup>15</sup> In this case the court ruled that the latter had engaged in a secondary boycott and that this secondary boycott affected interstate commerce. Thus the combination (the Hatters) was in restraint of trade. The union then had to pay the company triple damages. This put labor unions under the control of the anti-trust law.

In 1914 Congress passed the Clayton Act, which contained two sections, 6 and 20, that were designed to remove labor from the anti-trust laws. Section 6 said in part, "the labor of a human being is not a commodity or an article of commerce,"<sup>16</sup> thus, it was not under the anti-trust laws. Section 20 removed labor disputes from the area where a court injunction

<sup>13</sup>Bining and Cochran, op. cit., p. 466.

<sup>14</sup>Sanford Cohen, Labor Law (Columbus, Ohio: Charles E. Merrill Book, Inc., 1964), p. 108.

<sup>15</sup>Herbert G. Heneman, Jr. and Dale Yoder, Labor Economics (Cincinnati, Ohio: South-Western Publishing Company, 1965), pp. 282-283.

<sup>16</sup>U. S., Clayton Act, Sec. 6.

could be issued. At the time this law was passed, it was held by labor leaders as the greatest step forward in labor history. Had this act stood the test of the courts, it would have cut into management's prerogatives in its dealings with the labor to a very great extent, but in 1921 in a 6-3 decision the Supreme Court of the United States handed down the decision in the Duplex v. Deering case.<sup>17</sup> This decision, for all practical purposes, voided sections 6 and 20. The dissent was very sharp in this case with Justices Brandeis, Holmes, and Clarke in the dissent. It is interesting to note that in many of the labor decisions in the early part of this century Holmes and Brandeis dissented, but as time has passed the law has changed, and their dissents are closer to the law today than the majority opinions to which they dissented.

With the fall of sections 6 and 20 of the Clayton Act, management could again obtain injunctions in labor disputes. Management still did not have to recognize unions, and management could discriminate against workers for being members of a labor union.

In 1917, the United States Supreme Court said that the "Yellow Dog" Contract was lawful in the Hitchman Coal and Coke Co. vs. Mitchell. In 1927 the United States Supreme Court backed up the Duplex v. Deering decision with the decision in the Bedford Cut Stone Company v. Journeyman Stone Cutters' Association in which the court still put unions under the Sherman Anti-Trust Act.

With the above decision and three others, Adair v. United States, Coppage v. Kansas, and Truax v. Corrigan, the United States Supreme Court did a good job of cutting down most all state and federal laws that tried to get labor unions either reorganized or out from under the anti-

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<sup>17</sup>Cohen, op. cit., pp. 120-130.

trust laws. Up until the 1930's management had pretty much its own way mainly because of the general laissez-faire attitude of both the general public and the courts, but things began to change in the 1930's.

### 1930 to the Present

This period is when labor grew to prominence. During this period five major federal labor law acts have been passed with which this paper is concerned. They are: The Railway Labor Act of 1926, The Norris-LaGuardia Anti-Injunction Act, The National Relations Labor Act of 1935 (The Wanger Act), Labor Management Relations Act of 1947 (Taft-Hartley Act), and the Labor-Management Reporting and Disclosure Act of 1959 (Landrum-Griffin Act).

The Railway Labor Act of 1926, concerns itself only with those people working on interstate railroads. Even though this act was passed in 1926, it is more in the spirit of the 1930's than of the previous period. That is why it is included in this section. Its main purpose was to encourage bargaining with the government. In 1934 it was amended to include: first, that an employer could not coerce employees to join one union over another, second, that a company could not give funds to help any labor union, third, it outlawed the "Yellow Dog" Contract, fourth, it outlawed as terms of employment that the worker must join a union. This law was the forerunner of the National Labor Relations Act of 1935.

The Norris-LaGuardia Anti-Injunction Act passed congress in 1932. The main purpose of this act was to spell out to the courts what constitutes a labor dispute, under what conditions an injunction could be used, and that "Yellow Dog" Contracts were not enforceable in court. The act

also declared that congress went on record as saying that a worker was free to join or not to join any labor organization of his choosing.

The issuance of injunctions in labor disputes was not made illegal in the act, but a definite set of rules was put forth under which one could be issued. The Act basically stated that injunctions could be issued when:

(1) Unlawful acts are threatened and will be committed unless restrained, or unlawful acts are being committed and will continue unless restrained; (2) Substantial and irreparable damage to the complainant's property will follow; (3) Greater injury will be inflicted upon the complainant by denial or relief than will be inflicted upon the defendant by the granting of relief; (4) The complainant has no other adequate remedy at law; (5) The public officer charged with protecting complainant's property are unable or unwilling to furnish protection.<sup>18</sup>

This act partly destroyed one of management's strongest weapons in fighting strikes for before this time management could get an injunction for just about any reason. This act did not come under the eye of the courts until 1937, and by that time the judicial tide had turned in favor of labor.

The National Labor Relations Act of 1935 is the act around which today's labor relations are centered. The act can be broken into three major areas. First, it gave the employees rights in their relations with management. In section 7 the act states: "Employees shall have the right to self-organizations, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent

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<sup>18</sup>Ibid., p. 143.

that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment."

Section 8 also gives the employee certain rights. These rights are listed as five unfair labor practices. They are that an employer cannot (1) interfere with, restrain or coerce employees in the exercise of the rights guaranteed in section 7, (2) dominate or interfere with the formation or administration of any labor organization or contributes financial or other support to it, (3) discriminate in regard to hire, or tenure of employment, or any term or condition of employment to encourage or discourage membership in any labor organization, (4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act, (5) refuse to bargain collectively with the representatives of his employees.<sup>19</sup>

The National Labor Relations Board is responsible for the administration of the Act and the unfair labor practice come under their adjudication. Certain of these will be looked at more closely later in this paper.

The second part of the NLRA sets up the procedures by which a union becomes a bargaining agent for a certain group of workers. This part of the act also sets up the National Labor Relations Board and charged it with carrying out the procedures for representation. The board originally had three members but now it has five. They are appointed by the President with the advice and consent of the United States Senate.

The third part of the act empowered the National Labor Relations Board (NLRB) to hear unfair labor practice cases and issue cease and desist orders when they found an employer guilty of an unfair labor

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<sup>19</sup>U. S., National Labor Relations Act of 1935, Section 8(A).

practice. The NLRB was given no direct power to enforce their cease and desist orders, but instead they must go to the United States Circuit Courts to get their orders enforced.

One can see that if this act were held to be constitutional, management would lose a great deal of power in dealing with labor. The test in the courts was not long in coming. The case was Jones and Laughlin Steel Corporation v. National Labor Relations Board.

In 1937 in the Jones and Laughlin case, the NLRA was to see if it could stand the test of the Supreme Court. It must be stated that at this time in history the Court was under much pressure from both sides. President Roosevelt was putting pressure on the Court by stating that he wanted a different type of court set-up, and with a large majority of the voters having put him back in the White House in 1936, the Court had reason to think about his request. On the other hand was the fact that nearly sixty of the nation's most prominent attorneys had signed a statement to the effect that they believed that the NLRA was unconstitutional.<sup>20</sup> Because of these reasons, plus the burden of past precedents--many of them very recent--the Court found itself sharply divided.

The case started when the Jones and Laughlin Steel Corporation fired ten members of the Beaver Valley Lodge No. 200 of the Amalgamated Association of Iron, Steel and Tin Workers of America for union activity. Thus, the company engaged in an unfair labor practice.<sup>21</sup> This activity is illegal under Section 8(a)1 which states that it is not legal "to interfere with, restrain, or coerce employees in the exercise of the

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<sup>20</sup>Cohen, op. cit., pp. 151-152.

<sup>21</sup>Mueller and Myers, op. cit., p. 336.

rights guaranteed in Section 7."<sup>22</sup> Section 7 basically states that workers can join a labor organization of their own choosing. This activity of the company is also in violation of Section 8(a)3 which states that "discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization"<sup>23</sup> is an unfair labor practice.

The case came to the Court as a result of the National Labor Relations Board's (NLRB) statement that the above parts of Section 8 had been violated. The Circuit Court denied enforcement of the NLRB's orders, and that there had been subsequent denial of certiorari by the Circuit Court of Appeals, thus the NLRB appealed to the Supreme Court, and the Supreme Court did grant certiorari.

The Jones and Laughlin Steel Corporation argued that the NLRA was an act that was passed under the commerce regulating powers of the Constitution and that regulation of labor relations was not interstate commerce. The Company also stated in its behalf that the ten workers in question were not under the jurisdiction of the NLRA because they were involved in production, and production is not subject to regulation by the federal government. In furthering its argument, the Company went on to state that it believed the NLRA to be unconstitutional under Article III, Section 2, and the Fifth and Seventh Amendments of the Constitution.<sup>24</sup> Article III, Section 2, basically states the areas in which the federal government has power. The Company argued that the federal government had no power to legislate in the area under consideration.

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<sup>22</sup>Ibid., pp. 339-340.

<sup>23</sup>Ibid.

<sup>24</sup>Cohen, op. cit., p. 154.

The Fifth Amendment is the amendment containing the "due process clause." The Company argued that they were deprived of due process of law by the NLRA.

The Company also claimed that they had been deprived of the rights held under the Seventh Amendment, because in the National Labor Relation Board's ruling on the case they told the Company to give the workers in question back pay, and this back-pay order was given without a trial by jury.

At no time did the Company say that they had not discriminated against the workers for union activities. The decision handed down by Chief Justice Charles Evan Hughes was a sweeping victory for the NLRB.

The decision was handed down on April 12, 1937. It was a 5-4 decision written by Chief Justice Hughes. In the decision, Chief Justice Hughes set down four major points:

First, the NLRA was in regulation of commerce. Although the NLRA was not directly in regulation of commerce, the Constitution gives the Congress the power to legislate in areas that are "affecting commerce."<sup>25</sup> This part of the decision gives the Act a very wide scope.

Second, the Court ruled that the Company had committed unfair labor practices against the ten workers and that the Company must comply with the NLRB ruling, including the back-pay regulation.<sup>26</sup>

Third, the Court ruled that the workers were involved in interstate commerce even though they were involved in production because the pro-

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<sup>25</sup>Mueller and Myers, op. cit., p. 339.

<sup>26</sup>Class Notes from Economics 125, November 6, 1964, Utah State University, Logan, Utah (in possession of the writer).



duction process is involved in the "stream of commerce."<sup>27</sup>

Fourth, the NLRA was not unconstitutional under any of the amendments of the Constitution.

It is this decision that set down the constitutionality of the basic labor law that is still in effect today.

With the constitutionality of the National Labor Relations Act proven, plus several other court cases that removed the unions from the jurisdiction of the Sherman Anti-Trust Act, management's power went steadily down hill for twelve years.

Between the National Labor Relations Act and the other court cases, management lost the power to not recognize unions, the power of laying off a union worker for the reason of being in a union, the power to have company supported unions, and the power to not bargain with unions. The court also broadened its power by moving into the area of manufacturing by saying it was interstate commerce. This brought a great number of workers under the provisions of the National Labor Relations Act. They heretofore had not been considered under the provision of the Act.

The reason for this was that World War II had just ended and this was the first year unions could strike. In 1946, public opinion was against organized labor because of the many strikes which had taken place that year.<sup>28</sup> One of the major strikes which took place in 1946 was in the coal mining industry. This strike helped turn the general public against organized labor, because it was called in the middle of the winter and many people went cold. There were also strikes in other

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<sup>27</sup>Mueller and Myers, op. cit., p. 341.

<sup>28</sup>Herbert R. Northrup and Gordon F. Bloom, Government and Labor: The Role of Government in Union-Management Relations (Homewood, Illinois: Richard D. Irwin, Inc., 1963), pp. 67-70.

vital industries the same year, such as a police strike in Boston.

When the people went to the polls in 1946, they made it quite clear that they wanted the power of organized labor decreased. A Republican Congress was sent to Washington in 1947, and on June 23, 1947, it passed the Taft-Hartley Act over the veto of President Truman.

The act was an amendment and an addition to the National Labor Relations Act of 1935. The Taft-Hartley Act as it is best known is formally called the Labor Management Relations Act of 1947. This Act has three important parts. The first part is section 8(b).

Section 8(b) was placed in the Taft-Hartley Act to offset the five unfair labor practices that employers were prevented from perpetrating against unions by provisions of the Wagner Act.

#### Provisions of Section 8(b)

There are seven unfair labor practices in section 8(b). There were only six in the original Taft-Hartley Act. The seventh was added in 1959. Section 8(b)1 makes it an unfair labor practice to restrain or coerce employees in the exercise of the right to bargain collectively through a union of the employees' own choosing.<sup>29</sup> Section 8(b)1 was set up to stop the strong-arm tactics of unions. The union would bring in people to help in their organizational campaigns, and these helpers would intimidate workers into voting for the union. This intimidation is the reason for Section 8(b)1.

Section 8(b)2 makes it illegal to coerce an employer into discriminating against employees to make these employees enter into a union security agreement unless the union has a security contract that is legal

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<sup>29</sup>Ibid., p. 88.

under the Act.<sup>30</sup> Under this section of the Act, a closed shop is an illegal union security contract. If a union can get a union shop agreement with an employer, the new worker does not have to join the union until 30 days after his hiring. This 30 days was decreased to 7 days in the construction industry by the Landrum-Griffin Act. Section 8(b)2 also contains the provisions governing the requirements for union shop agreements which are too lengthy to be covered in this report.

It is an unfair labor practice on the part of a union if the union refuses to bargain collectively with an employer under Section 8(b)3. This section was set up to stop a union from coming to the bargaining table with "take it or leave it" proposals.<sup>31</sup> The words "bargain in good faith" appear in this Section, and the meaning of this phrase has been the key to many court decisions. This also ties in very closely with section 8(d).

Section 8(d) states "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." This point shall come under more consideration later in this paper.<sup>32</sup>

Section 8(b)4 deals with illegal strikes and boycotts. It outlaws secondary boycotts as a means for unions to gain their ends. It also

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<sup>30</sup>Mueller and Myers, op. cit., p. 462.

<sup>31</sup>Northrup and Eloom, op. cit., p. 91.

<sup>32</sup>U. S., Labor Management Relations Act of 1947, Section 8(d).

makes it illegal for a union to force an employer to bargain with that union if it is not the recognized bargaining agent. Another part of Section 8(b) 4 makes the jurisdictional strike illegal. This particular section has been the subject of many National Labor Relation Board decisions because, linked with Section 10(k), which gives the National Labor Relations Board the power to settle jurisdictional disputes, many employers have brought such cases to the National Labor Relations Board. Most jurisdictional disputes take place in the construction industry.

Section 8(b)5 makes it an unfair labor practice for a union to charge excessive dues and initiation fees. This section was placed in the Act to stop unions that have union shop agreements from taking advantage of the position.

Section 8(b)6 makes it an unfair labor practice for a union to "cause or attempt to cause an employer to pay or deliver or agree to pay or deliver any money or other things of value, in the nature of an exaction, for services which are not performed or not to be performed."<sup>33</sup> This section is an attempt to stop the practice called "featherbedding."

Section 8(b)7 was not part of the original Taft-Hartley Act. It was added in 1959 as part of the Landrum-Griffin Act. Section 8(b)7 is a restriction on the use of picketing.<sup>34</sup> It restricts picketing in three specific instances. First, it is illegal for one union to picket an employer who has already agreed to bargain with another union. This ties in with part of Section 8(b)4.

The second part of Section 8(b)7 states that it is an unfair labor

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<sup>33</sup>Northrup and Eloom, op. cit., p. 91.

<sup>34</sup>The Bureau of National Affairs, The Labor Reform Law (Washington, D. C.: Bureau of National Affairs, Inc., 1959), pp. 96-98.

practice to use picketing against an employer who has held a valid election within the preceding 12 months.

The third part of this section makes it illegal for a union to picket an unorganized employer for more than 30 days before filing an election petition with the National Labor Relations Board.

Section 8(b)7 was added to the list of unfair labor practices mainly as a result of practices used by the Teamsters Union.<sup>35</sup> These practices were uncovered by the Senate Select Committee on Improper Activities in the Labor Management Field, under the leadership of Senator John L. McClellan (Democrat, Arkansas).

Section 8(b) gives management back some of the power it lost in 1935, but more than anything it puts the government even more deeply into the area of labor relations. The NLRB was also charged with the administration of this section.

The second part of the Act dealt with strikes that concern national security. In this part of the Act the President is given the power to injoin a strike for up to 80 days if the strike endangers the national security.

This part of the Act gave management some power, for if a company knew a strike might be called and believed it would endanger national security, it would be injoined. The company would not have to bargain quite so carefully.

The third major part of this act is section 14(b). This section gives the states the right to pass right-to-work laws. A right-to-work law can vary a great deal; but basically they are laws that provide for lesser union security under the federal law, that is a state may pass

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<sup>35</sup>Cohen, *op. cit.*, p. 192.

a law that makes one type or all types of union security illegal.

Section 14(b) could have given management many of its lost powers in dealing with unions, but only 19 states have right-to-work laws, and of that number, none are really what might be called industrial states. It must also be noted that in many states that have right-to-work laws the law has not been too effective.

The Taft-Hartley Act also lost some of its possible impact when the United States Supreme Court made rulings in two 1953 cases<sup>36</sup> that, for most purposes, voided section 8(b)6 - the anti-featherbedding section.

As noted above, the Taft-Hartley Act did give management back some powers, but not as many as one might expect.

The last of the labor acts is the Labor Management Reporting and Disclosure Act of 1959, better known as the Landrum-Griffin Act. It was designed to protect the individual union member and small employer from the abuses of unscrupulous union leaders.

Beginning in 1956 the Senate Select Committee on Improper Activities in the Labor or Management Field, under the leadership of John L. McClellan (Democrat, Arkansas), began an investigation into the activities of the leaders of the Teamsters' Union.<sup>37</sup> The Committee found many malpractices had been perpetrated by Teamsters' leaders. The investigation discovered that many of the union leaders were guilty of taking bribes in exchange for "sweetheart contracts," and that these union leaders were also using picketing, secondary boycotts, and extortion on small employers to gain

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<sup>36</sup>American Newspaper Publisher Association v. NLRB 345 U. S. 100 and NLRB v. Gamble Enterprises, 345 U. S. 117.

<sup>37</sup>Northrup and Bloom, op. cit., p. 146.

their ends. More important, the union leaders were misusing union funds and not giving the union members the right to voice opinions against this leadership.

The evidence brought forth by the McCellan committee prompted Robert P. Griffin, Republican Representative of Michigan, and Phillip M. Landrum, Democratic Representative from Georgia, to co-sponsor legislation to correct the problem. The bill they co-sponsored, The Labor-Management Report and Disclosure Act of 1959 or Landrum-Griffin Act, was signed into law by Dwight D. Eisenhower on September 14, 1959. The Landrum-Griffin Act provided for the following: (1) that each member have the right to nominate, vote, and speak in union election, and it set regulations on the terms of office of leader and the way elections are to be carried out; (2) that union report their finances, and employers to report any pay given to union leaders; (3) it requires unions that have trusteeship to report on their affairs; (4) it prohibited Communists and recently convicted criminals from holding office in a union. In 1965 the United States Supreme Court ruled that a Communist could hold office in a labor union; (5) it contains seven amendments to the Taft-Hartley Act. There are three main amendments,<sup>38</sup> The first sets down guide lines as to which sector of government, federal or state, has jurisdiction over certain labor disputes. This amendment gives the states more power in labor cases because in labor disputes where the National Labor Relations Board does not have the time or resources to do the job, the state can be given the power in many of the cases. The vast majority of these cases involve small employers.

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<sup>38</sup>Cohen, op. cit., pp. 474-506.

The second of these major amendments strengthens the rules against secondary boycotts and certain types of picketing.

In the third major amendment, the rules on unionism of construction workers were changed so that a worker in the construction industry must join the union within 7 days of his hire instead of the normal 30 days in other industries.<sup>39</sup> This was done because of the seasonal and short time involved with individual employers in construction work. The major ideas behind this act are to cut the power of union leaders, and give the member his rights.

The employer is put into a slightly better bargaining position by the Act. The small employers are given better protection under the Act by reason of the increased power of the states to have jurisdiction over labor disputes. It also helped management by restricting the picketing by a union that is not the bargaining agent with that company.

This gives management a stronger ability to resist union organizational campaigns. The Act hurts some companies in that "sweetheart contracts", a contract where the company is given privileges that are not in most other contracts, such as no strike clauses or a lower wage. The Act has helped management to some extent.

The past review of the history of labor and labor law will give the insight needed to look at some of the current problems, but first a review of a series of cases to show the way in which the court can change over a relatively short period of time. This is done because it will add to the analysis used later in this paper. For this the case surrounding the so-called Thornhill Doctrine will be used. This doctrine was set down as a result of the United States Supreme Court decision in

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<sup>39</sup>Northrup and Bloom, *op. cit.*, p. 146.



the case of Thornhill v. State of Alabama. The doctrine set forth the idea that picketing is a manifestation of free speech.

In 1921 the Supreme Court handed down decisions in the American Steel Foundries case and the Truax v. Corrigan case, both of which drastically limited the right of organized labor to engage in picketing activities.<sup>40</sup> The decisions in these two cases gave impetus to many states to enact anti-picketing laws. Most of these state laws prohibited one or more of the following types of picketing: outsider, violent, massed, fraudulent, and secondary picketing. Most of these laws were set up to protect the employer from loss of property or to stop general violence.

In 1923 the state of Alabama put a law into effect that prohibited all picketing.<sup>41</sup> This law made it a misdemeanor to engage in any type of picketing. The Thornhill case is the case that tests the constitutionality of this Alabama statute. The decision in this case is considered to be a landmark decision in Labor law.

Section 3448 of the State Code of Alabama reads as follows:

Sec. 3448. Loitering or picketing forbidden.--Any person or persons, who, without a just cause or legal excuse therefore, go near to or loiter about the premises or place of business of any other person, firm, corporation, or an association of people, engaged in a lawful business, for the purpose, or with the intent of influencing, of inducing other persons not to trade with, buy from, sell to, have business dealings with, or be employed by such persons, firm, corporation, or association of persons, for the purpose of hindering, delaying, or interfering with or injuring any lawful business or enterprise or another, shall be guilty of a misdemeanor; but nothing herein shall prevent any person from soliciting trade or business for a competitive business.<sup>42</sup>

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<sup>40</sup>Mueller and Myers, op. cit., p. 198.

<sup>41</sup>Ibid.

<sup>42</sup>Cohen, op. cit., p. 280.

Byron Thornhill was a union leader in the Brown Wood Preserving Company, a pickle-making company. In 1937 the union went on strike. The union comprised all but four of the approximately one hundred employees of the plant. Due to Thornhill's leadership in the strike, he was tried under Section 3448. He was found guilty by the Alabama state courts. Hence, he appealed to the federal courts on the grounds that Section 3448 was unconstitutional under the provisions of the First Amendment and the Fourteenth Amendment. The provision of the First Amendment that the United States cannot abridge the right of freedom of speech, and the Fourteenth Amendment that says that States cannot deny the rights of the Constitution to any person, were the ground on which he based his claim. Both the United States District Court and the United States Circuit Court of Appeals found Mr. Thornhill "guilty of loitering and picketing as charged in the complaint,"<sup>43</sup> and the section was ruled constitutional. Thus, Mr. Thornhill took his case to the United States Supreme Court.

#### The Supreme Court

The Supreme Court in a 8-1 decision voted that Section 3448 was unconstitutional. The main points of testimony brought out by the Supreme Court are: first, that the picketing was done in a peaceful manner and there were only two picket posts manned by six to eight men, 24 hours a day.<sup>44</sup> These picketing posts were at the employees' entrance to the plant and not on any public road. Second, the picketing took place on company property, but the picketers were never asked to leave

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<sup>43</sup>Ibid.

<sup>44</sup>Ibid.

the company property. The third and most important testimony was that of two witnesses, a Clarence Simpson and a J. M. Walden. Simpson was a non-union employee of the Brown Wood Preserving Company. On the day that the company scheduled the plant to resume operations, even though the strike was still on, Simpson went to work. As he approached the employees' entrance, Thornhill came up to him and stated that the union was still on strike, and the union did not want anybody to go to work. Therefore, Simpson went home.

Simpson testified that at no time had Thornhill or any other union member threatened him, either at the time of the strike or as to the testimony given before the courts. Walden testified that he saw the meeting between Simpson and Thornhill and that at no time did it appear to him that Thornhill was unfriendly toward Simpson and that he heard no harsh words between the men.

With this testimony in the background, the court made the following points: First, Section 3448 was unconstitutional under the First and Fourteenth Amendments. Second, the most important, picketing was considered speech and a form of dissemination of information, thus equating free speech and picketing.<sup>45</sup> This idea that picketing and free speech go hand in hand in what is known as the Thornhill Doctrine.

The fall of the Thornhill Doctrine began the year after the decision was handed down.<sup>46</sup> In 1941 the Supreme Court ruled that where violence is involved in the picketing the courts could use injunctions to stop it. Two cases in the late 1940's set down that stranger picketing and off-the-

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<sup>45</sup>Ibid., pp. 199-203.

<sup>46</sup>Cohen, op. cit., pp. 286-306.

job-site picketing were illegal.

In 1947 the enactment of the Taft-Hartley Act, although not aimed at picketing, listed a number of unfair union practices, and it was clearly implied that unions were to be put in check to a certain extent at least. In 1950 three cases came down from the Supreme Court. All were under the unfair labor practice issues of the Taft-Hartley Act, and all involved picketing. In all three cases the court ruled that picketing was unlawful if used to perpetrate an unfair labor practice.

In 1957 the Supreme Court in the Vogt case states that if picketing was in restraint of trade it was illegal.

In 1959 the Landrum-Griffin Act was passed. As part of this act a new section was added to the unfair labor practices that unions can perpetrate against employers. This section places many restrictions upon picketing.

By this time it is easy to see that the Thornhill Doctrine has been largely abandoned, or as Justice William O. Douglas observes: "The Court has come full circle and the state courts and state legislatures are free to permit or suppress a picket line for any reason other than a blanket policy against picketing."<sup>47</sup>

Before going on one thing should be stated. First, that the historical background given in this chapter shows that management has lost a great deal to labor in the past, and that only looking back to what has gone on before can one have some idea of what may yet come. Thus this historical background is very important first, because it gives the background needed to understand the next chapters, and second,

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<sup>47</sup>Ibid., p. 291.

because it will be used to help analyze the present position of the management's rights as discussed in the next chapters.

With this background, this paper will review two recent labor cases and discuss their impact and importance.

### CHAPTER III

This chapter will review two current labor cases that have caused much controversy.

The first case to be reviewed is the Textile Workers Union of America v. Darlington Manufacturing Company. This case was also argued as the National Labor Relations Board v. Darlington Manufacturing Company. When both cases went to the United States Supreme Court, they were settled by the same decision. This, being the former of the above two decisions, is listed as 380US263 in the Court record. This case is one in a series of decisions both by the National Labor Relations Board and the courts dealing with management's prerogatives in the closing of plants. The case was adjudicated by the National Labor Relations Board, the United States Court of Appeals for the Fourth Circuit, and the United States Supreme Court. All three of these groups came up with different points of view of the case.

#### Background

The Darlington Manufacturing Company was a company that operated a single textile mill in the state of South Carolina. Darlington in turn was partly owned by Deering Milliken, Inc. Deering Milliken and Company owned 41 per cent of the stock in Darlington until 1960 when it and Cotwool Manufacturing Corporation merged.<sup>1</sup> Cotwool held 18 per cent of Darlington's stock; thus the merged corporation, Derring Milliken, Inc.,

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<sup>1</sup>Textile Workers v. Darlington Company, 380 U. S. 263 (1965).

owned 59 per cent of Darlington's stock. Deering Milliken, Inc. was controlled by the Milliken family with Roger Milliken as the leader and also as president of Darlington. The Millikens also control Deering Milliken, Inc., and hold 6 per cent of Darlington's stock,<sup>2</sup> thus giving the Milliken family 65 per cent control of Darlington. The Milliken family also owned 16 other textile manufacturers. The other manufacturers had 26 plants and all marketed the goods through Deering Milliken, Inc.

In March 1956 the Textile Workers Union began an organizational campaign at Darlington. During the organizational campaign the management threatened to close down the plant if the union won the election for representation to collective bargaining. The company also used other means to discredit the union. Nevertheless, on September 6, 1956, an election was held and the union won by a very close margin.

On September 12, 1956, Roger Milliken called a meeting of the board of directors of Darlington to consider shutting down the plant.<sup>3</sup> This was only 6 days after the union had won the election. At the meeting, the board of directors decided to close the plant and sell the equipment. The stockholders approved the action of the board on October 17, 1956; as of that date, Darlington quit taking any new orders for goods and began the process of phasing out existing orders. By the end of November, the plant had been entirely shut down, and in December of 1956 the company had an auction and sold the plant's machinery and equipment. Thus, Darlington ceased to exist.

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<sup>2</sup>Ibid.

<sup>3</sup>Ibid.

The Charges

After the plant was closed, the union filed charges with the National Labor Relations Board. These charges claimed that Darlington had committed no less than 3 unfair labor practices. The union charged that Darlington had violated sections 8(a)1 and 8(a)3 of the National Labor Relations Act of 1935 in the closing of the plant. Section 8(a)1 makes it an unfair labor practice "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7."<sup>4</sup> Section 7 gives workers the right to organize and do collective bargaining. Section 8(a)3 states that it is an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment, to encourage or discourage membership in any labor organization."<sup>5</sup> The above two unfair labor practices, according to the union, were perpetuated in the ordering of the plant to be closed. The union also charged that the company had violated section 8(a)5 in not bargaining with the union after it won the election. After the decision to close the plant, union and management did meet, but no bargaining took place.

The National Labor Relations Board gave its decision on the case in 1962. The NLRB was split 4-1 in this case, with board member Rodgers as the dissenter. The NLRB found that the closure of the mill was in violation of section 8(a)3 on the grounds that Darlington President, Roger Milliken, closed the plant because of his anti-union feeling. Milliken stated in testimony before the trial examiner:

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<sup>4</sup>U. S. National Labor Relations Act of 1935, section 8(a)1.

<sup>5</sup>Ibid., section 8(a)3.



"I felt that as a result of the campaign that had been conducted and the promises and statements made in these letters that had been distributed (favoring unionization) that if before we had had some hope, possible hope of achieving competitive (cost) . . . by taking advantage of new machinery that was being put in, that this hope had diminished as a result of the election because a majority of the employees had voted in favor of the union . . ."<sup>6</sup>

The board said that closing the plant without talking to the union to see what their proposals were was a violation of section 8(a)5. Thus, if the shutting down of the plant was an illegal act, the lay-off of the employee was in violation of section 8(a)1. Thus, the National Labor Relations Board had found the company guilty on all the counts brought against them by the union. The board put teeth into its decision by finding that Deering Milliken, controlled by the Milliken family and the owner of the controlling stock in Darlington, was to be held liable for the unfair labor practices that Darlington had committed. This was so, the board ruled, because Darlington was part of a single integrated employer group, the single employer being Deering Milliken. Thus, Deering Milliken had only shut down part of its business and was in violation of the NLRA because this part was shut down for discriminatory reasons.

The board ordered Deering Milliken to place those employees that wanted to work in other Deering Milliken plants on preferential hiring lists for those plants and to give back pay to all Darlington employees that were discharged until they could find equivalent work.

Back pay can amount to a great deal of money. In the Kohler case, it amounted to almost 2 million dollars. The Board cited Fiberboard (379(U. S.)203) as a precedent for its decision. In the Fiberboard case

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<sup>6</sup>Textile Workers v. Darlington Company, 380 U. S. 263 (1965).

the United States Supreme Court ruled that an employer must bargain over decisions that are of a purely business nature if they affect the union. The Fiberboard case involved sub-contracting of maintenance work.

The Fourth Circuit Court of Appeals in a 3-2 decision did not grant the NLRB an enforcement order. The Court of Appeals stated that even though Deering Milliken was a single employer they had the right to close part or all of their plant regardless of motives, anti-union, or otherwise.

The National Labor Relations Board appealed the decision of the Court of Appeals to the United States Supreme Court. The Supreme Court rendered its decision on March 29, 1965. This was a 7-0 decision with Justice Stewart and Justice Goldberg not taking part in the decision. Justice Harlan delivered the opinion of the Court.

Justice Harlan divided the decision into two parts. In the first part he wrote concerning the charge of a violation of section 8(a)3 and the subsequent violation of section 8(a)1 in the closing of the plant. The court ruled that, because of the complete liquidation of the company in such a manner that the business was of no use to the management, there had been no unfair labor practice committed. The court stated:

An employer may not go completely out of business without running afoul of the Labor Relations Act if such action is prompted by a desire to avoid unionization. Given the Board's findings on the issue of motive, acceptance of this contention would carry the day for the Board's conclusion that the closing of this plant was an unfair labor practice, even on the assumption that Darlington is to be regarded as an independent unrelented employer. A proposition that a single businessman cannot choose to go out of business if he wants to would represent such a startling innovation that it should not be entertained without the clearest manifestation of legislative intent or unequivocal judicial precedent so con-

straining the Labor Relation Act. We find neither.<sup>7</sup>

The court also stated that as far as it could see no current labor law had ever meant to stop a business from closing. The court said that the NLRA did not compel a person to become or remain a worker for a particular company; thus, a company was not compelled to come into existence or to remain in existence as an employer.

The union made three contentions. They felt that the closure was only a lockout, or temporary shut down. The court ruled that because of the completeness of the closing and the sale of the entire plant, there was no intent of ever reopening. Thus it could not be a lockout or shut down. The court has ruled that discriminatory lockouts were unlawful in several cases, but complete and lasting closures never had been unlawful. The union also contended that the sale of the plant and the equipment was a resale of plant issue. The court ruled that because of the piece-meal sale of plant and equipment, it was not a resale. It has been held by the courts that in the sale of a complete plant the new owner can be held for the unfair labor practices of the former owner even if the plant was shut down between owners. This was set forth in National Labor Relations Board v. New Madrid Manufacturing Company, but even in this case the actual closure was not held to be an unfair labor practice. The third union charge was that Darlington was a "runaway shop." The court ruled that it was not a "runaway shop" because first, the work done at Darlington was not shifted to another plant; second, no new plant was built to replace the closed one; and third, no benefit was gained by the company by closing.

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<sup>7</sup>Ibid.

In the second part of the decision the court states that Darlington was a single independent employer: "The closing of an entire business, even though discriminatory, ends the employer-employee relationship."<sup>8</sup>

The court then went on to disagree with the Circuit Court on its point concerning "partial closing." The court cited three cases, the first being a case in which it was held that the discharge of the entire work force and the hiring of new personnel to discourage unions was in violation of the NLRA.<sup>9</sup> The others deal with the closing of a part or department of a single business. One was the discriminatory discharge of the personnel in the wholesale department of a laundry.<sup>10</sup> The other involved the discriminatory discontinuation of a shuttle service connecting a military installation and a bus terminal.<sup>11</sup> In both cases the partial shut down discouraged unionization of the rest of the business. To clarify its point the court goes on to state:

While we have spoken in terms of a "partial closing" in the context of the Board's finding that Darlington was part of a larger single enterprise controlled by the Milliken family, we do not mean to suggest that an organizational integration of plants or corporations is a necessary prerequisite to the establishment of such a violation of section 8(a)3. If the persons exercising control over a plant that is being closed for anti-union reasons (1) have an interest in another business, whether or not affiliated with or engaged in the same line of commercial activity as the closed plant, or sufficient substantiality to give promise of their reaping

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<sup>8</sup>Ibid.

<sup>9</sup>Labor Board v. Norma Mining Corp., 206 F. 2d 38.

<sup>10</sup>Labor Board v. Savoy Laundry, 327 F. 2d 370.

<sup>11</sup>Labor Board v. Missouri Transit Co., 250 F. 2d 262.

a benefit from the discouragement of unionization in that business; (2) act to close their plant with the purpose of producing such a result; and (3) occupy a relationship to the other business which makes it realistically foreseeable that its employees will persist in organizational activities, we think an unfair labor practice has been made out.<sup>12</sup>

The court concludes by remanding its decision to the Circuit Court.

It is interesting that the Court did not consider the violation of section 8(a)5 directly, probably because by rule the closure would be illegal on the grounds for which a violation of this section would be founded or destroyed because one cannot bargain at a plant that does not exist.

The decision in this case and the series of which it is the most important part to date help define an area of management prerogatives heretofore left untouched by the NLRB and the Courts. Before the decisions in this area, it was commonly held that management had the prerogatives to close at any time for any reason.

As for Darlington, it won its case in the courts; but the more far-reaching points are yet to be discussed.

The reason for the importance placed on the Darlington case is that it is the decision or point at which the courts ruled in favor of management. The controversy surrounding the NLRB's and the Court's movement into this area of management's prerogatives and the stand of management's prerogatives as to plant closings will be a part of the next chapter of this paper.

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<sup>12</sup>Textile Workers v. Darlington Company, 380 U. S. 263 (1965).

### The General Electric Case

This case deals with management's prerogatives as to choosing the manner in which it will do collective bargaining.

The full name of the case is General Electric Company and International Union of Electrical, Radio, and Machine Workers, AFL-CIO case, a decision that was rendered on December 16, 1964 by the NLRB. This decision is one of the most recent in a series handed down by the National Labor Relations Board which have caused much controversy over the Board's interpretation of certain unfair labor practices and the definition of an unfair labor practice under the provisions of the National Labor Relations Act as amended.

### Background

To understand this decision, a look at the bargaining techniques of the General Electric Company and the Company's general attitude toward labor unions is imperative. The General Electric Company (GE) employed approximately 250,000 employees at the time of the dispute (1960), of whom about 120,000 were in organized bargaining units. The International Union of Electrical, Radio, and Machine Workers, AFL-CIO (IUE) was by far the largest single union with whom General Electric dealt. It represented some 70,000 GE workers.<sup>13</sup> The IUE is an outgrowth of the United Electrical Work Union (UE). This outgrowth came about in 1950 when the UE was ousted from the CIO for alleged Communist domination.

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<sup>13</sup>National Labor Relations Board, Intermediate Report: General Electric and International Union of Electrical, Radio, and Machine Workers, AFL-CIO, prepared by Arthur Leff (Washington, D. C.: National Labor Relations Board, 1963), p. 3.

The IUE was formed from the part of the United Electrical Work Union that wanted to stay in the CIO. Besides the IUE, General Electric had some 10,000 workers still in the UE with whom it bargained. The approximately 40,000 other organized workers were divided among more than 100 other unions.

In 1960 the IUE had 105 bargaining units with General Electric, and almost all of these units were involved in the dispute.<sup>14</sup> The reason for this is that GE and the IUE, by mutual acquiescence, bargained on a national or multi-unit basis. General Electric was the first company to engage in this type of bargaining when the Company and the IUE signed their first contract in September, 1950.<sup>15</sup> These national contracts are for general items of bargaining, and in most cases the individual bargaining units may add any special item in local bargaining that are consistent with the national contract.

The 1950 contract was followed by renewal agreements in 1951, 1952, 1954, and 1955. The 1955 contract was a five-year contract. In the contracts presented during the years from 1950 to 1960, the Company was known for being fair in its approach to the terms of the contracts. The reason for this fairness, as General Electric saw it, was the way in which GE went about its bargaining and how it arrived at its bargaining provisions.

The evaluation of General Electric's bargaining policies dates back to 1946, for it was in 1946 that General Electric was jolted by a very bitter strike.<sup>16</sup> General Electric had gone to the bargaining table with

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<sup>14</sup>Ibid.

<sup>15</sup>Ibid., p. 4.

<sup>16</sup>Ibid., pp. 6-7.

an offer of a 10 cents an hour wage increase, but by the time the strike was over, the Company had to give an  $18\frac{1}{2}$  cents an hour wage increase to its employees. This strike forced GE to take a long look at its approach to employee and union relations.

The development of a new approach to General Electric's labor problems came under the guidance of Lemuel R. Boulware, who served then and for many years after (but not in 1960) as General Electric's Vice-President of Relations Service. The approach that Boulware developed has become known as "boulwareism".<sup>17</sup>

The new approach at General Electric entailed all the principles of personnel relations one learns in the textbooks.<sup>18</sup> One of the main principles is that a company should give employees job satisfaction, and in this way gain the loyalty and support of employees by showing the employees that the goals of the Company and their goals are the same and that the Company is a good employer because it looks out for the best interests of its workers. General Electric's approach was to make the employees feel and understand that it was the Company's aim to do the right thing voluntarily. The idea behind this was to show the worker that he did not need a labor organization to obtain what was his fair share of rights. This approach is one of the points upon which the National Labor Relations Board had to decide as to whether an unfair labor practice had been perpetrated against the Union. The Board's

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<sup>17</sup>Sanford Cohen, Labor Law (Columbus, Ohio: Charles E. Merrill Books, Inc., 1964), p. 203.

<sup>18</sup>Leonard R. Sayles and George Strauss, Personnel: The Human Problems of Management (Englewood Cliffs, New Jersey: 1964), p. 111.



ruling on this approach will be discussed later in this paper.

Under this approach to bargaining, General Electric took upon itself to seek out what was right for its employees. This was done by year-round research into all aspects of labor relations.<sup>19</sup> The research included studies into business conditions, competitive factors, and economic trends in general. General Electric also gathered its own information from meetings with employees, direct discussion between supervisors and employees, and the publishing of statements in both union and company publications to survey the needs and desires of its employees. Also, at the beginning of each contract bargaining, General Electric would listen to and evaluate the union's demands and add the information thus obtained to their total research. Armed with the facts of their research, General Electric would make a determination of what was "right".<sup>20</sup> Then General Electric made an offer to the union, and this offer included everything the company deemed just. This offer was made with the idea that, unless the union could point out where the company research was wrong, this was to be a "take-it-or-leave-it" offer. The Company repeatedly emphasized to its employees and the union the fact that it would not depart from its offer for anything other than facts showing the offer to be wrong, and that threat of strike or a strike itself would not change their position because to the Company any change in their position would be "wrong".<sup>21</sup>

In an attempt to be effective, General Electric based its general

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<sup>19</sup>National Labor Relations Board, Intermediate Report, loc. cit.

<sup>20</sup>Ibid., pp. 6-10.

<sup>21</sup>Ibid.

bargaining philosophy on an elaborate system of management-employee communications which entailed the use of plant newspapers, daily news digests, employee bulletins, letters to employees' homes, television and radio broadcasts, and other mass media communication as well as, perhaps most important, a great deal of personal contacts. As stated previously the Company used almost every type of personnel relations tactics possible.

Two other points of this background are also important. First, in dealing with over 100 different unions, General Electric offered each the same basic programs. This was based on the idea that no union should get more favorable treatment than any other, thus showing the fairness of the Company to all its workers.<sup>22</sup>

Second, about half of General Electric's employees were not in labor organizations, and from time to time either representation or decertification elections were held. At these times, the Company made it quite clear that it did not like unions, and it used its communication system to put this idea across.<sup>23</sup> This system was also used in the 1960 bargaining period as it had been employed in the past. It may be noted that at no time did the National Labor Relations Board consider the use of this communication system as an unfair labor practice until 1960. It is also important to note that the Company gave the non-union workers the same basic programs that the union workers were given. With this background of the bargaining philosophy of the Company, it is easy to

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<sup>22</sup>Ibid., pp. 29-30.

<sup>23</sup>Ibid., p. 14.

see that trouble was bound to occur in 1960.

The Negotiations of 1960

In early 1960 both GE and the IUE were preparing for negotiations.<sup>24</sup> The IUE sent to each of its workers employed by General Electric a ballot listing 19 demands. Each worker was asked to list the demands in order of priority. According to the ballots job security ranked first and economic benefits ranked second. Through research which had been done, the Company also had a good idea that job security and higher wages would be among the Union's major demands. The Company believed that the 1955 contract had been too lenient in respect to the wage issue. The reason for this was that due to the inflation of the late 1950's the cost-of-living escalator clause in the 1955 contract had cost the Company a great deal more than it had expected. Thus, the Company, knowing that the economic improvements to be offered in 1960 would not be too great, embarked upon a campaign designed to build employee support for its positions. This campaign was called "Building Employee Understanding in 1960", and General Electric used its communication system to the utmost.<sup>25</sup>

In early 1960 pre-negotiation meetings were held to exchange information. On June 13, 1960, formal negotiations began.<sup>26</sup> From the very outset of negotiations it was apparent to both sides that it was going to be a long, hard-fought battle before terms of a new contract would be reached. On the first day of negotiations the IUE challenged

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<sup>24</sup>Ibid., pp. 13-17.

<sup>25</sup>Ibid., p. 10.

<sup>26</sup>Ibid., pp. 13-18.

the Company on its stand on personal accident insurance. Without bargaining the point with the Union, GE went out on its own and arranged with an insurance company for an accidental death or dismemberment group insurance policy under which all individual General Electric employees who desired to participate could do so.<sup>27</sup> The Union objected to this insurance plan on four main points:<sup>28</sup> first, the Union was paying the cost of the plan for its members; second, the cost as reported by the Company was too high and could be lowered by obtaining a blanket policy covering the whole Union; third, the plan decreased the Union's ability to negotiate on other phases of the contract; fourth, and most important, in offering the insurance on a take-it-or-leave-it basis General Electric was discrediting the Union and thus undermining good faith collective bargaining. This point was one of the issues brought out by the National Labor Relations Board in its decision in the case.

In the next few meetings following June 13, the IUE set down its demands. These demands were basically as follows:<sup>29</sup> (1) a 3½ percent annual wage increase, (2) a cost-of-living escalation clause, (3) more paid holidays, (4) adjustments due to automation, (5) equal pay for equal work, (6) unemployment benefits, (7) separation pay, (11) improvement in the pension plan, and (12) several other minor non-economical matters.

As soon as the Company obtained the Union demands, it began to

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<sup>27</sup>Ibid., p. 15

<sup>28</sup>Ibid.

<sup>29</sup>Ibid., p. 16.

present its case directly to the workers. General Electric used its communication system to cut nearly every Union demand. On July 1, 1960, a Company newsletter was sent to all employees. In this newsletter the Company stated that if the IUE's demands were met the added cost "could destroy thousands upon thousands of jobs."<sup>30</sup> This type of Company communication continued throughout the entire bargaining period despite heavy Union protest.

From June 13 until the middle of July both sides talked in general terms without getting down to any of the basic issues. By mid-July the bargaining, centered around employment security problems, began in earnest. This bargaining continued until early August. On August 1, 1960, the IUE informed GE that if a contract was not agreed upon by October 1, 1960, it would call a strike.<sup>31</sup> Talks continued through August, and during this time other Union demands were considered. Finally, on August 30, 1960, General Electric set down what is called a "fair but firm offer". This offer was in keeping with General Electric's "Boulwareism" bargaining. Thus, in reality this offer was final unless the IUE could bring up facts which would force the Company to change their position on one point or another. General Electric's offer was considerably less than Union demands. The offer contained:<sup>32</sup> (1) a 3 percent increase at its outset with a 4 percent increase 18 months later, and the contract was to cover a three-year period with no cost-of-living escalator clause; (2) certain benefits if employees were laid off; (3) a loan plan and an

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<sup>30</sup>Ibid., p. 17-18.

<sup>31</sup>Ibid., p. 25.

<sup>32</sup>Ibid., pp. 29-30.

emergency aid plan; and (4) improvements in both pension and insurance plans.

From August 30 to September 8 the bargaining continued without any progress toward a contract. On September 8, 1960, negotiations were suspended until September 20, 1960, because of the IUE national convention. During the convention period, General Electric launched a campaign to induce local officials and individual employees to influence other employees not to strike.

On September 20, 1960, negotiations proceeded with General Electric declaring that its offer was on the table and that the IUE could take it or leave it.<sup>33</sup> The next day the Federal Conciliation and Mediation Service entered into the negotiation at the request of the IUE. Also, on this day the IUE filed charges with the National Labor Relations Board, against General Electric for failure to bargain in good faith.

Two other events occurred in late September that came into play in the later National Labor Relations Board decision.<sup>34</sup> These events were; first, the Company's rejection of the idea that the terms of the 1955-1960 contract be continued until a new contract agreement was signed, and second, General Electric's refusal to give the union information relevant to cost and other bargaining issues. The Union filed its second charge against the Company with the NLRB stating that this withholding of information was an unfair labor practice.

On October 2, 1960, the Union went on strike, but talks still

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<sup>33</sup>Ibid., p. 51.

<sup>34</sup>Ibid., pp. 51-52.

continued. Shortly after the strike began, General Electric began to bargain directly with some of the IUE locals, and in two instances the Company offered the locals better terms than it had offered the national union. General Electric continued local bargaining until October 19, 1960, at which time it declared that the negotiations had reached an impasse and that the IUE should capitulate. The Union capitulated that day. The Union gave up the strike because it had been a total failure. This failure had resulted because many of the Union workers continued to work through the strike. The strike officially ended on October 22, 1960; on November 10, 1960, a new three-year contract was signed between General Electric and the IUE. This new three-year contract followed the Company's offer almost to the letter.

In the post-strike period, the IUE filed additional charges against General Electric. The Union charged that:<sup>35</sup> (1) the Company's overall approach to bargaining was illegal; (2) bargaining with locals during the time of strike was illegal; (3) the strike was an unfair labor practice strike, and 20 workers who had been replaced during the strike should be reinstated and given back pay.

#### The Decision

The charges filed by the IUE stated that the Company had violated Section 8(a) 1, 3, and 5 of the National Labor Relations Act of 1935.<sup>36</sup>

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<sup>35</sup>National Labor Relations Board, Decision: General Electric Company v. International Union of Electrical, Radio, and Machine Workers, AFL-CIO (Washington, D. C.: National Labor Relations Board, 1964), p. 1.

<sup>36</sup>Ibid., 1-18.

Section 8(a)1 basically states that it is illegal for an employer to restrain or coerce employees in their right to bargain collectively.<sup>37</sup>

Section 8(a)3 basically states that it is illegal for an employer to discriminate against an employee because of union membership.<sup>38</sup> Section 8(a)5 basically states that it is illegal for an employer to refuse to bargain collectively.<sup>39</sup>

With these provisions of the law in mind, the National Labor Relations Board began hearings on July 24, 1961, under the direction of trial examiner Arthur Leff. The hearings were closed on January 29, 1963. The basic points of evidence brought out in these hearings were previously stated in the first two parts of this paper. On April 1, 1963, the trial examiner's report was filed with the National Labor Relations Board. This report was strongly in the Union's favor.<sup>40</sup>

On December 16, 1964, the National Labor Relations Board, in a 4-1 decision, that General Electric had not bargained in good faith and had, therefore, violated Sections 8(a)1 and 5.<sup>41</sup> The National Labor Relations Board stated that General Electric had bargained in bad faith in that: (1) it did not furnish the Union with the information it requested, (2) it attempted to bargain with individual union locals while bargaining with the national Union, (3) it presented the insurance plan on a take-or-leave-it basis, and (4) its overall approach to collective

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<sup>37</sup>Cohen, op. cit., pp. 446-447.

<sup>38</sup>Ibid.

<sup>39</sup>Ibid.

<sup>40</sup>National Labor Relations Board, Decision, loc. cit.

<sup>41</sup>Ibid.



bargaining was not consistent with good faith bargaining.

Finding the Company guilty of bad faith bargaining, the National Labor Relations Board ordered General Electric to: (1) supply the IUE with the information requested, (2) reinstate the 20 workers who had been laid off and give them back pay, (3) cease using its present form of bargaining.

This decision is more far-reaching than are the orders against General Electric because for the first time the National Labor Relations Board stated that techniques of bargaining are subject to approval or disapproval by the Board. General Electric, along with others, believe that the Board's decision on the Company's overall technique of bargaining is a violation of an employer's right of free speech. It is also believed by some that this decision takes away the rights of the individual workers in that it requires an employer to deal with the employees through the Union, not the Union through the employee.

The Company has appealed the decision of the National Labor Relations Board to the Second Circuit Court of Appeals.<sup>42</sup> The decision of the Court of Appeals should be rendered by the end of 1967 and both sides have stated that if the ruling goes against them, they will then go to the United States Supreme Court for its decision in the case. Both sides are attempting to get public opinion to support them. At the present time, General Electric seems to have obtained most of the public support, but Frank W. McCulloch, chairman of the National Labor Relations

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<sup>42</sup>"Flood of Comment in Nation's Press Supports Company in NLRB Case," Relations Newsletter (New York, New York: General Electric Company, February 1, 1965), p. 1.

Board, has given several speeches saying, in effect, that the Board is being misinterpreted on this decision.

The next chapter will deal with controversy surrounding this decision, and what it possibly could mean to management's prerogatives.

CHAPTER IV  
THE CONTROVERSY AND MANAGEMENT

Prerogatives Present Position

Darlington Case. From the outset of the Darlington decision, there was a great deal of controversy. One writer even went so far as to say: "that going out of business, under current labor laws, may be even more hazardous than keeping a plant open."<sup>1</sup>

The main point of contention in this case is, does management have the right to close a plant without fear of running the wrath of the NLRB? The Board said that if the closing was for discriminatory reasons then the company has committed an unfair labor practice, but this ruling was based on the idea that Darlington was a part of a larger company; namely, Deering Milliken. It would have been interesting to see what the outcome of the board would have been if Darlington had been, in their opinion, a single business as both courts said it was. This is probably the key to decisions, for as the Supreme Court said, to say that a single business cannot close without committing an unfair labor practice is too great a change from what the congress meant in the framing of the Nation Labor Relations Act.

Prior to the Supreme Court's decision, but after the Circuit Court's decision, Frank W. McCulloch, chairman of the Nation Labor Relations Board, said:

"However in Darlington Mfg. Co. where the employer sold an entire plant to avoid dealing with the union, the Board did not order it

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<sup>1</sup>M. R. Lefkoe, "The NLRB's New, Rough Line," Fortune, November, 1963, p. 164.

to repurchase and reprove the facility, but did direct the employer to offer its laid-off employees positions at other of its nearby plants, to place them on certain preferential hiring lists, and to pay moving expenses and back pay."<sup>2</sup>

The quotation from the chairman of the NLRB is interesting in that the chairman does talk of repurchasing and reopening of the plant. He might have meant that the Board could have gone farther than it did or even that it may have considered making Deering Milliken reopen Darlington. This would have been an even greater departure from the past and shows that the NLRB at least may have thought about completely stripping management of its right to close for discriminatory reasons.

It is interesting to note that in October of 1965 McCulloch gave a speech in which he said, in reference to the Darlington case, that the public had misinterpreted the Board and that the Board was taking cases only one at a time and was not out to set precedence with each case it decided.

The reason for this softer line was probably caused by the court's refusal to uphold the Board's decision and the several articles written in the period just prior to the court decision. Articles with such titles as: Fortune's "The NLRB's, New, Rough Line,"<sup>3</sup> Iron Age's "The Attack on Managements Rights,"<sup>4</sup> Dun's Review's "New Policy for the NLRB,"<sup>5</sup> and

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<sup>2</sup>Frank W. McCulloch, Chairman of NLRB, An Evaluation of the Remedies Available to the National Labor Relations Board-Is there Need for Legislative or Administrative Change?, An address given before the Federal Bar Association, Labor Law Committee, The Ambassador Hotel, Los Angeles, California: June 13, 1964.

<sup>3</sup>Lefkoe, loc. cit.

<sup>4</sup>"The Attack on Management Rights," Iron Age, January 21, 1965, p. 38.

<sup>5</sup>Thomas R. Brook, "New Policy for the NLRB?", Dun's Review and Modern Industry, July, 1965, p. 56.

Nations Businesses, "Lets Stop Labor Board's Unfair Practices."<sup>6</sup> All these attacked the Board for its infringement on management's prerogatives and most made direct reference to the Board's ruling in the Darlington case.

Has the criticism and the Court's decision changed the NLRB's stand on closures? It is felt that the answer to this question could be yes. The reason for this is that in two recent decisions the NLRB has backed off to a certain extent. In the Pierce Governor Co. case,<sup>7</sup> the company moved its plant 32 miles. This company talked with the union and said it would consider for transfer each old employee who applied and would give them there old seniority if they were hired, but the company stated that it would not guarantee jobs for all the old workers. The company also stated that it would not recognize the union at the new plant unless it won representation. The union then charged the company with failure to bargain. The Board said that the company had carried out its obligation to the worker at the old plant, and because a majority of the old plant's employees did not want to be transferred to the new plant, the company did not have to recognize the union.

The other case may be even more important. In the McLoughlin Mfg.<sup>8</sup> case the company closed the plant when no agreement could be reached with the union over a change in a seniority clause that caused excessive cost to the company. Just before the closing, an out-of-state community per-

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<sup>6</sup>Stuart Rothman, "Lets' Stop Labor Board's Unfair Practices," Nations Business, May, 1965, p. 34.

<sup>7</sup>"Two NLRB Rulings on Bargaining in Plant Removal Cases," Bureau of National Affairs: Labor Relations Reporter, May 8, 1967, pp. 1-2.

<sup>8</sup>Ibid.

sueded the company to move their plant there. The company did not tell the union of the relocation. The union filed charges, the NLRB ruled that the company should have told the union of the change in plans, this was a technical refusal to bargain but no remedial order was necessary. The board stated that, because the new plant was being built by the community on the stipulation that local people be hired, and that there was no sign that the old employees would want to transfer, no order was required. Both these cases have been handed down this year.

Thus, in two cases, that are in some respects similar to Darlington, the NLRB has rendered a seemingly less harsh decision from managements point of view. Where does that leave us today with respect to managements prerogatives in closures and the controversy over the Darlington decision? The controversy over the case itself has died down to a great extent since the Supreme Court's decision. The controversy over the Board's ruling, is still carried forth when management wants to make the point that the NLRB is trying to take away management's rights.

All this leads to what management's prerogatives in plant closing are today. As stated earlier in this paper, by use of the Thornhill case and the cases surrounding it, labor law, as it is known today, in most instances is derived from a series of cases. Thus, what is being looked at is the result of a series of cases surrounding the Darlington case.

Before the Darlington case, management could not close a plant and then transfer the work to another plant.<sup>9</sup> It could not close one plant and open a new plant in another town to replace the old one.<sup>10</sup> It could

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<sup>9</sup>NLRB v. New Madrid Mfg. Co., 215 F. 2d 908, 914.

<sup>10</sup>NLRB v. Preston Feed Corp., 309 F. 2d 346, and Labor Board v. Wallick 198 F. 2d 477.

not close part of the plant that was unionized and keep the rest open.<sup>11</sup> It could not close a plant, until the worker renounced the union, and then reopen the plant.<sup>12</sup> After the Darlington decision, what are management's prerogatives? A single owner can have his plant closed by management at any time, for any reason, anti-union or not. If the company is an intergraded multi-plant concern, then management must cope with the following rules. In closing a plant management must be able to show that it has gained no benefit by closing a unionized plant. Nor can management, in a multi-plant company, use closure or threat of closure to discourage unionized plants.

From the stand point of the multi-plant company, the Supreme Court spelled out what it must do to stay out of trouble. Thus, if the Darlington case did anything, it cut the power of the multi-plant company by the setting forth of these rules, of course, both single and multi-plant managers still come under all the pre-Darlington decisions as far as partial closing, lock out, etc. are concerned.

As for single business, its prerogatives have not changed. Then why, one might ask, "Has the NLRB softened?" The answer would be, as stated above, the decision of the Court did not go along with the Board, the criticism of the NLRB was great. Now a third point should be brought out. In the period of time while the Darlington case was in the Courts, management began to bargain with the union over plant closure, the reason for this was that management did not know which way the Courts were going to come out on the case. Thus with the other case in the background and

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<sup>11</sup>NLRB v. Sovoy Laundry, 327 F. 2d 370, and Labor Board v. Missouri Transit Co., 250 F. 2d 261.

<sup>12</sup>NLRB v. Norma Mining Corp., 206 F. 2d 38.

Darlington with its rules, management is bargaining over plant closure, and the NLRB is saying that by doing this management is meeting its obligation under the NLRA.

Management gained back none of the prerogatives it lost before the Darlington decision and probably lost some ground in the Darlington decision, but to a greater or lesser extent management now bargains over plant closure. Thus, it could be said that another area that used to be part of management's right is now gone.

#### The General Electric Case

This case differs from Darlington in that it is the first case to arise in this area, thus there is no series of cases to draw on. Some cases have arisen in the area of general approaches to bargaining; these will be discussed in this section, but before getting to the general effect of the case, a look at the controversy surrounding it should be taken.

The controversy in this case surrounds two main points, one the right of an employer to present his side of a labor issue to his employees and the other the broad interpretation the Board made of section 8(d) of the National Labor Relations Act of 1935.

The General Electric Company is the most upset over, what it calls, the right of "free speech" that it claims the Board has taken away. Virgil B. Day, General Electric's Vice-President of Management Development and Employee Relations services, stated: "This challenge to management's right to communication with employees could be disastrous. The central issue, of course, is the right of free speech and the employees' right to know management's views as well as the union view about business facts



affecting their jobs."<sup>13</sup> On another occasion Day stated: "We believe that employees have the right to know where the Company stands on controversial issues between their management and their union--and that they have the right to hear it from the Company, not someone else."<sup>14</sup>

As noted in the previous chapter, one concept that Boulwarism is based on is the communication between employees and management. This idea finds good foundation in the National Labor Relations Act of 1935 for section 8(c) states:

Free speech. The expressing of any view, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.<sup>15</sup>

Several different law publications have attacked the Board on their interpretation of section 8(c) such as: The Duke Law Journal,<sup>16</sup> Temple Law Quarterly<sup>17</sup> and the Michigan Law Review.<sup>18</sup> The above publications all state that the Board has put itself in a hard to defend position. In the Michigan Law Review it is stated that the Boards know there will

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<sup>13</sup>Virgil B. Day, Vice-President Management Development and Employee Relations Services, General Electric Company, Labor Management Relations in a Newly Competitive World, An address before the 1964 Midwinter Personnel Conference, American Management Association, Chicago, Illinois: February 14, 1964.

<sup>14</sup>Virgil B. Day, Vice-President, Management Development and Employee Relations, General Company, Communications-A Neglected Key to Competitive Progress, An address before the Annual Conference of the International Council of Industrial Editors, Denver, Colorado: June 18, 1963.

<sup>15</sup>U. S., National Labor Relations Act of 1935, Section 8(c).

<sup>16</sup>David L. Benetar, "GE-Unique Situation or Broad Impact," Labor Law Journal, March, 1966, p. 166.

<sup>17</sup>Ibid., p. 166-167.

<sup>18</sup>Ibid.

be a great deal of adverse reaction to the decision, but the Board feels that this reaction will not be enough to get their decision overturned.

One other point the critics of this part of the decision make is that General Electric is being deprived of its rights under the First Amendment of the Constitution.

The defense put up by the Board on the above criticism will be reviewed after a discussion of the criticism that surrounds the decision as to its interpretation of section 8(d). This is done because the Board defends itself on a total stand saying that the total approach is unlawful, not the parts. It almost says that what is lawful in part or by itself is not lawful when put together in a total plan of bargaining.

Section 8(d), as reviewed in chapter II of this paper, basically states that good faith bargaining does not oblige management to meet union proposals with counterproposals or concession.

The trial Examiners report stated that section 8(d) "was not designed as a shield to protect surface bargaining," this report was upheld by the Board. Thus, the Board is saying that an employer cannot bargain with a take-it-or-leave-it attitude even if the employer states that he will change his position if evidence can be brought forth to show where his stand is unrealistic. It is easy to see why the critics state that the Board's decision forces employers to meet proposals with counterproposals or concession. Thus, these critics state the only type of bargaining that can stand the wrath of the NLRB is some type of give-and-take bargaining.

One of the most outspoken critics of this part of the Board's decision is the noted management-relation author, Herbert R. Northrup, also one time General Electric's labor relations consultant. The period of time

he was a consultant for GE could have very easily overlapped Lemuel R. Boulware's period at GE. Northrup says, in effect, that GE's approach to labor relations is, perhaps, one of the best; and the NLRB has dealt GE a great injustice.

Northrup has some court precedence to back his position as far as GE's violation of Section 8(a)5 (good faith bargaining) and its connection with Section 8(d), because the Second Circuit Court of Appeals stated in the Fitzgerald Mills case.<sup>19</sup>

"It is not the proper function of the Board or the courts to determine the proper resolution of differences arising during the course of negotiations. By necessity, a company may begin negotiations with certain firmly set convictions on the matters subject to negotiations, and is not obligated to yield."

The Fifth Circuit Court of Appeals stated in the Herman Sausage case.<sup>20</sup>

"If the insistence is genuinely and sincerely held, it is not mere window dressing, it may be maintained forever even though it produces a stalemate. Deep conviction firmly held from which no withdrawal will be made may be more than the traditional opening gambit of a labor controversy. It may be both the right of the citizen and essential to our economic legal system of free collective bargaining."

It should be noted that it was on this point (section 8(d)) that the Board member Leedon dissented, thus, making the 4-1 decision. With all this well-founded criticism what does the Board say in its own behalf? The Board's most used defense is that General Electric is a special case. The Board states in its 1965 report that General Electric had developed a unique bargaining technique.<sup>21</sup> Frank W. McCulloch, Chairman of the

<sup>19</sup>NLRB v. Fitzgerald Mills, 313 F. 2d 260 (1963).

<sup>20</sup>NLRB v. Herman Sausage Co., 275 F. 2d 229 (1960).

<sup>21</sup>Thirtieth Annual Report of the National Labor Relations Board for the Fiscal Year Ended June 30, 1965 (Washington, D. C.: U. S. Government Printing Office, 1966), p. 69.

NLRB, had applied accepted principles to a unique situation.<sup>22</sup> The principles that McCulloch speaks of are the court rulings in the Truitt Manufacturing case.<sup>23</sup> This ruling found the employer guilty of not bargaining in good faith, but this case did not condemn a total approach to bargaining. Saul J. Jaffe, the associate solicitor of the NLRB, has said that a situation like that at General Electric may perhaps never recur. Thus, the Board is found standing on two main points one that GE is a special case and that only by looking at the total effect of GE labor relations approach can it be condemned.

The unique situation of the Board can come under partial attack in that in 1965 the Board ruled in two cases<sup>24</sup> and in 1966 in one<sup>25</sup> other that a firm stand at the bargaining table is unlawful. In all these cases the Board basically stated that the employers were not bargaining.

The major question now is what will the Courts rule in the case? There are basically three possibilities. First that the Courts will uphold the NLRB on every point in the case. This seems unlikely, but if it did happen management would lose a great deal of its power. It would lose much power in the area of communications with its employees. It would lose the power to depart from the traditional bargaining method. It would also lose regulation over its bargaining techniques.

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<sup>22</sup>Frank W. McCulloch, Chairman NLRB, The Policy, the Purpose, and the Philosophy of the NLRB as Revealed in Decision Trends, A speech given before the Texax Manufacturers Association, 43<sup>rd</sup> Annual Conference, Fort Worth, Texas, October 28, 1965.

<sup>23</sup>NLRB v. Truitt Mfg. Co., 351 U. S. 149, (1956).

<sup>24</sup>Memorial Consultants Inc., 153 NLRB No. 3, 1965, and H. K. Porter Company, Inc., 153 NLRB No. 119, (1965).

<sup>25</sup>Stark Ceramics, Inc., 155 NLRB No. 120, (1966).

On the other hand the second possible court ruling would be to tell the Board it was wrong. This would be a victory for management's prerogatives in that none of the above restrictions would be placed on them.

But the third possible ruling of the court is, perhaps, the most likely to occur. That is the court will rule on some points for General Electric and against others. It seems that a possible ruling would be to rule against the company on the charges of failure to furnish information and the bypassing of the national union, while ruling for the company on firm bargaining and overall attitude or approach to labor management relations. This would be a victory for Boulwarism and management in general because the two latter charges are the most important to management's prerogatives. It should be stated that the above is just a possibility, perhaps a more possible, ruling by the courts but not a prediction of what will happen, for as shown earlier in this paper, in the Thornhill case, what seems most probable for the courts to do one day is not what will happen the next. Thus, until the courts do rule on this case the problems brought forth remain unsolved.

CHAPTER V  
SUMMARY AND CONCLUSIONS

This paper has attempted to show how, throughout history, labor has gained power; and how management has lost prerogatives in its dealing with labor. The historical review and the review of the basic statutes of labor law put forth the background needed to study two areas of current labor controversy. The first was that of plant closure, the Darlington case was used to put forth the ideas of both the National Labor Relations Board and the federal courts in this area. After a review of the case and the controversy, a conclusion was made that management, in general, has come to the point where it believes that it is easier to bargain with the union over the closing of a plant and make whatever concessions are within reason. By bargaining with the union, it greatly lessens the chance of committing an unfair labor practice. Thus, it can be concluded that management lost its prerogatives to close at will, but it must be remembered that this only applies in multi-plant companies. Single plant companies can close at will for any reason because as the Court stated closing a total business ends the employer-employee relationships; thereby, making it impossible to perpetuate an unfair labor practice.

The second area of current controversy was that caused by the NLRB condemning the approach to labor-relations used by the General Electric Company. This approach is commonly called Boulwarism. An attempt was made to show that the decision of the Board is hard to defend in the areas that deal with section 8(c) (free speech) and

section 8(d) (proposals and concessions) and that there is a reasonable probability that the court will not uphold the Board in these areas, but this remains to be seen. If the Courts uphold the Board, then management's prerogatives would suffer a great blow.

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