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LABOR COSTS AND MIDTERM WORK RELOCATION:
UNFAIR LABOR PRACTICE OR BREACH OF CONTRACT?—
International Union, United Automobile Workers v. National Labor
Relations Board, 765 F.2d 175 (D.C. Cir. 1985).

In International Union, United Automobile Workers v. National Labor
Relations Board (UAW v. NLRB),1 the United States Court of Appeals for
the District of Columbia Circuit held that it was not an unfair labor practice
under the National Labor Relations Act (NLRA)2 when an employer
threatened to relocate certain operations3 from a union plant to a nonunion
plant in order to coerce the union into making midterm wage concessions.4

Nor was it an unfair labor practice when the employer then carried out the
threat to relocate after the union refused to make the wage concessions.5

The D.C. Circuit decision affirmed on appeal the Supplemental Decision
and Order of the National Labor Relations Board (Board) in Milwaukee
Spring II,6 but on a different legal basis. The Board decision in Milwaukee
Spring II was an attempt to establish a broad per se rule permitting midterm
relocations unless prohibited by an express provision in the collective
bargaining agreement.7 This was a direct reversal of the previous Board
rule, applied in Milwaukee Spring I,8 which restricted midterm relocations
if motivated by a desire to avoid the terms of an existing collective
bargaining agreement, unless a specific provision in the agreement author-
ized the employer to make midterm relocation decisions.9

This Note analyzes the union’s legal theory and the court’s response, and
considers additional arguments not presented by the union or discussed
by the court. This Note then analyzes the effect of the D.C. Circuit decision on

1. 765 F.2d 175 (D.C. Cir. 1985).
3. In this Note, a work “relocation” is moving work and equipment from one plant to another
   within the control of a single employer. A work “transfer” is moving work, but not equipment, from
   one plant to another. A work “reassignment” is moving work from one group of employees to another
   within the same plant. “Subcontracting” or “contracting” is moving work from the company’s
   employees to an independent entity with employees not employed by the original company. Some
   decisions use the terms “transfer” and “reassignment” interchangeably.
4. UAW v. NLRB, 765 F.2d at 184.
5. Id.
   aff’d, 765 F.2d 175 (D.C. Cir. 1985). The D.C. Circuit decision was written by Judge Harry T.
   Edwards.
7. Id. at 602.
8. Milwaukee Spring Div. of Ill. Coil Spring Co. (Milwaukee Spring I), 265 N.L.R.B. 206 (1982),
   remanded without opinion, 718 F.2d 1102 (7th Cir. 1983).
9. Id. at 208.
the Board's new rule, and predicts the result in varying factual circumstances. This Note concludes that when an employer's predominant motivation is to avoid the terms of a collective bargaining agreement in order to realize a greater return in an enterprise, the threat of a midterm relocation is not only a prohibited interference with employee rights, but also a breach of contract under the implied covenant of good faith and fair dealing. This Note predicts that unions may utilize the breach of contract action in the future to circumvent the current Board's political stance favoring nonintervention. 10

I. PRIOR LEGAL FRAMEWORK GOVERNING MIDTERM RELOCATIONS

A. The Recognition Clause and Jurisdictional Guarantees

Before the decisions in Milwaukee Spring I, Milwaukee Spring II, and UAW v. NLRB, the Board and the federal appellate courts had developed a framework for evaluating midterm relocation decisions.11 In University of Chicago,12 the Board found that the University of Chicago violated section 8(d), (a)(5), (a)(2),13 and (a)(1) of the NLRA when it transferred custodial work from one bargaining unit to another,14 after bargaining to impasse.15

10. From the union perspective, the Reagan Board has undermined employee rights by restructuring established principles of labor law. Edwards, Deferral to Arbitration and Waiver of the Duty to Bargain: A Possible Way Out of Everlasting Confusion at the NLRB, 46 OHIO ST. L.J. 23, 23 (1985). From the management perspective, the Reagan Board has rejected radical experiments undertaken by the Board during the 1970's, and has returned to normalcy. Id.

11. This legal framework was based primarily on §§ 7, 8(a)(1), 8(a)(3), 8(a)(5), and 8(d) of the NLRA. Section 7 defines the rights guaranteed to employees, which includes the right to bargain collectively and the right to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection. NLRA § 7; 29 U.S.C. § 157.

Section 8(a)(1) contains a broad prohibition on the interference, restraint, or coercion of employees in the exercise of rights guaranteed in § 7. Section 8(a)(3) makes discrimination in order to discourage union membership an unfair labor practice, if in regard to tenure or any term or condition of employment. Section 8(a)(5) makes a refusal to bargain collectively, as defined in § 8(d), an unfair labor practice. NLRA § 8(a)(1), (a)(3), (a)(5); 29 U.S.C. § 158(a)(1), (a)(3), (a)(5).

Section 8(d) defines the duty to bargain collectively. Included in this definition is: the duty to bargain in good faith over wages, hours, and other terms and conditions of employment (mandatory subjects); the duty to follow a specified procedure, without strike or lockout, in order to modify an existing collective bargaining agreement upon expiration (§ 8(d)(1)–(4)) and; the right to refuse to discuss or agree to a midterm modification. NLRA § 8(d); 29 U.S.C. § 158(d).

12. 210 N.L.R.B. 190 (1974), enforcement denied, 514 F.2d 942 (7th Cir. 1975). The Board's decision adopted the recommended Order of the administrative law judge. 210 N.L.R.B. at 190. The panel that decided University of Chicago was composed of Chairman Miller and Members Jenkins and Kennedy. Id.

13. Section 8(a)(2) makes employer domination of a labor union an unfair labor practice.


15. University of Chicago v. NLRB, 514 F.2d 942, 944 (7th Cir. 1975). Although the Board did not indicate whether the parties had bargained to impasse, the Seventh Circuit indicated that they had. Id.
The basis of the Board’s decision was that the recognition clause\(^{16}\) in the collective bargaining agreement embodied the prior bargaining history between the union and the employer, creating a jurisdictional guarantee that the work would remain with the union.\(^{17}\)

The Seventh Circuit in *University of Chicago v. NLRB*\(^{18}\) rejected the Board’s decision and denied enforcement.\(^{19}\) The court held that unless work transfers are specifically prohibited by the collective bargaining agreement, the employer is free to transfer work out of a bargaining unit if it bargains to impasse over the decision\(^{20}\) and is not motivated by antiunion animus\(^{21}\) in making its decision.\(^{22}\) The court concluded by noting that the University of Chicago had based its decision to transfer work from one unit to another on the need to raise the level of sanitation to the standards required by the professional staff.\(^{23}\) The employer was not trying to avoid the terms of the collective bargaining agreement.

Three years later in *Boeing Co.*,\(^{24}\) the Board again extended the recognition clause of a collective bargaining agreement to confer a jurisdictional guarantee that all of Boeing’s tack welding work would be given to union welders.\(^{25}\) The Board found that it was a violation of section 8(a)(5) and (a)(1) of the NLRA for Boeing to reassign some tack welding operations to members of a different union\(^{26}\) engaged in cutting and fitting work.\(^{27}\)

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16. A recognition clause describes the parties to the collective bargaining agreement, including the employer, the divisions involved, the employees covered, and the employees’ bargaining representative. See 1 THE DEVELOPING LABOR LAW 852–53 (C. Morris 2d ed. 1983).

17. *University of Chicago*, 210 N.L.R.B. at 198. Because some of the employees within the first union transferred to lower paying positions in the second union, the Board also found that the employer had modified the wage provision of the collective bargaining agreement. *Id.*

18. 514 F.2d 942 (7th Cir. 1975).

19. *University of Chicago* v. NLRB, 514 F.2d at 949.

20. The court cited *Fibreboard Paper Prod. Corp. v. NLRB*, 379 U.S. 203 (1964). According to *Fibreboard*, an employer must bargain in good faith with the union over “wages, hours, and other terms and conditions of employment.” *Id.* at 210 (citing NLRA § 8(d)). This duty is limited to subjects not expressly covered by the collective bargaining agreement. *Id.*


22. *University of Chicago* v. NLRB, 514 F.2d at 949.

23. *Id.*

24. 230 N.L.R.B. 696 (1977), enforcement denied, 581 F.2d 793 (9th Cir. 1978). As in *University of Chicago*, the Board adopted the recommended Order of the administrative law judge. 230 N.L.R.B. at 696.


26. *Id.*

27. *Id.* at 697. Between the decisions in *University of Chicago* and *Boeing*, the membership of the Board changed. The panel that decided *Boeing*, Chairman Fanning and Members Penello and Murphy, distinguished the recognition clause in the University of Chicago collective bargaining agreement from the recognition clause in the Boeing agreement. 230 N.L.R.B. at 698. In *University of Chicago*, the clause merely described the custodial employees as “Janitors in the Biological Sciences Division,” a
Once again, the Board’s extension of the recognition clause was rejected, this time by the Ninth Circuit in Boeing Co. v. NLRB. The court distinguished between the effect of a recognition clause, which describes people, and a jurisdictional clause, which describes functions, and held that the recognition clause did not guarantee that all welding work, including tack welding, would be given to the welder’s union. Citing University of Chicago v. NLRB, the court held that unless transfers are specifically prohibited by the collective bargaining agreement, an employer is free to transfer work out of a bargaining unit if it bargains to impasse and is not motivated by antiunion animus. Like the Seventh Circuit in University of Chicago v. NLRB, the Ninth Circuit in Boeing v. NLRB found that the employer’s motivation was not to avoid the terms of the collective bargaining agreement, but to increase efficiency in production.

B. Indirect Midterm Modification

Prior to the Ninth Circuit’s decision in Boeing v. NLRB, the Board held in Los Angeles Marine Hardware Co. that the employer had violated section 8(d), (a)(5), (a)(3), and (a)(1) of the NLRA by relocating its recreational sales operation during the term of the collective bargaining agreement from its union facility at the Los Angeles Marine division to a nonunion facility at the California Marine division. The basis of the Board’s finding was not that the recognition clause conferred jurisdictional guarantees, as the Board had found in University of Chicago and Boeing, but that the relocation was an unlawful midterm repudiation of the collective bargaining agreement as a whole. The Board held that to allow the employer to avoid the terms of the collective bargaining agreement by relocating the operations from the facility named in the recognition clause would be to allow the employer to do indirectly what it could not do directly.

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28. 581 F.2d 793, 798 (9th Cir. 1978).
29. Boeing Co. v. NLRB, 581 F.2d at 796.
30. Id. at 797. See supra notes 18–22 and accompanying text.
31. Boeing Co. v. NLRB, 581 F.2d at 797.
32. 235 N.L.R.B. 720 (1978), enforced, 602 F.2d 1302 (9th Cir. 1979). As in University of Chicago and Boeing, the Board adopted the Decision and Order of the administrative law judge. 235 N.L.R.B. at 720.
34. Id. at 737.
35. Id. at 735. The Board also found that the termination of union employees incident to the relocation was inherently destructive of employee interests in violation of § 8(a)(1) and (a)(3) of the NLRA. Id. at 736.
This time, the Ninth Circuit in *Los Angeles Marine Hardware Co. v. NLRB*36 enforced the Board's decision.37 The court, in agreement with the Board's reasoning, held that because an employer cannot alter the terms of an existing collective bargaining agreement before its expiration, Los Angeles Marine had repudiated the agreement by relocating the operations to avoid the union labor rates, economic necessity notwithstanding.38

The employer's motivation emerged as the deciding factor in analyzing relocation cases from the dicta in *University of Chicago v. NLRB* and *Boeing Co. v. NLRB* and from the holding in *Los Angeles Marine Hardware Co. v. NLRB*. If the reason for relocating was to avoid the terms of the collective bargaining agreement, then the relocation, transfer, or reassignment was a midterm repudiation of the collective bargaining agreement. On the other hand, if the employer's motive was to increase efficiency or to raise quality standards rather than to avoid the terms of the collective bargaining agreement, the employer was free to relocate after bargaining to impasse. This rule could only be modified by an express provision in the collective bargaining agreement.39

II. FACTUAL AND PROCEDURAL BACKGROUND OF UAW v. NLRB

A. The Events Preceding the Charge

Illinois Coil Spring Company, an automobile parts manufacturer, operated three divisions. The employees at the Holly Spring and Milwaukee Spring divisions were organized by two separate locals under the United Auto Workers (UAW).40 The employees at the McHenry Spring division were not represented.41

The company first approached the union on January 26, 1982, and requested that the union forego a wage increase scheduled for April 1.42 On March 12, after losing a major contract, the company proposed relocating

36. 602 F.2d 1302 (9th Cir. 1979).
37. *Los Angeles Marine Hardware Co. v. NLRB*, 602 F.2d at 1309.
38. *Id.* at 1307.
39. *See, e.g.*, *University of Chicago v. NLRB*, 514 F.2d at 949 ("unless transfers are specifically prohibited by the bargaining agreement," the general rule applies).
40. *International Union, United Automobile, Aerospace & Agricultural Implement Workers of America (UAW or union).*
42. *Id.* The collective bargaining agreement between Milwaukee Spring, the respondent, and the UAW, the charging party, was effective from April 1, 1980 to March 31, 1983, and applied to 99 bargaining unit employees, 35 of whom worked in the assembly operations. *Id.* The agreement was not unusual. Along with other typical provisions, the collective bargaining agreement contained a management rights clause, *see infra* note 80, and a "zipper" or integration clause. *See infra* note 77.
the assembly operations to the nonunion McHenry Spring division because of significantly lower wage rates paid to the employees there. On March 22, the company informed the union that it was willing to bargain over alternatives to relocating the assembly operations, expressly noting that its labor costs were $10.00 per hour at Milwaukee Spring and only $5.85 per hour at McHenry Spring. The next day, the union informed the company that the employees had voted against accepting the McHenry Spring labor rates, but that the union was still willing to negotiate further. On March 29, the company presented a proposal to the union in a document entitled “Terms Upon Which Milwaukee Assembly Operations Will Be Retained in Milwaukee,” which the union members rejected on April 4. On April 8, 1982, after Milwaukee Spring announced its decision to relocate the assembly operations to McHenry Spring, the UAW filed an unfair labor practice charge.

B. Milwaukee Spring I

In Milwaukee Spring I, the first Decision and Order issued in this case, the Board relied on Los Angeles Marine Hardware Co., 235 N.L.R.B. 720, 720 n.1 (1978) (an employer’s repudiation of a collective bargaining agreement is an inappropriate issue for arbitration), enforced, 602 F.2d 1302 (9th Cir. 1979). In a footnote in the later D.C. Circuit decision, Judge Edwards questioned why this issue was not submitted to arbitration as a contract grievance, UAW v. NLRB, 765 F.2d 175, 182 n.26 (D.C. Cir. 1985). Apparently both the Board and the union viewed repudiation of collective bargaining agreements as an inappropriate issue for arbitration. See Los Angeles Marine Hardware Co., 235 N.L.R.B. 720. 720 n.1 (1978) (an employer’s repudiation of a collective bargaining agreement is an inappropriate issue for arbitration), enforced, 602 F.2d 1302 (9th Cir. 1979).

43. Milwaukee Spring I, 265 N.L.R.B. at 207.
44. Id. This labor cost differential between Milwaukee Spring and McHenry Spring was $4.15 per hour for each of the 35 employees working in the assembly operations at the Milwaukee Spring division. Given that there was approximately one year remaining on the Milwaukee Spring collective bargaining agreement, the total differential was $302,120 (assuming 2080 annual labor-hours per employee).
45. Id.
46. Id. Milwaukee Spring requested a total wage reduction of $1.62 per hour for all employee classifications. This included deletion of a scheduled wage increase, a reduction in the base rate, and the elimination of an incentive pay program. Brief for UAW and its Local 547 at 9, UAW v. NLRB, 765 F.2d 175 (D.C. Cir. 1985). Over the year remaining on the collective bargaining agreement, this would amount to a savings for Milwaukee Spring of $333,590 for the 99 employees represented by the union. See supra note 44.
47. Milwaukee Spring I, 265 N.L.R.B. at 206. The union charged a violation of § 8(a)(1), (a)(3), and (a)(5) of the NLRA. Id. After filing the preliminary pleadings, the parties filed a stipulation of facts and requested that the proceeding be transferred to the Board, waiving a hearing before an administrative law judge. Id. Because the facts were stipulated by the parties, there were no questions of fact to be decided by an administrative law judge. See 2 THE DEVELOPING LABOR LAW, supra note 16, at 1603.
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violation of section 8(d), (a)(5), and (a)(1) of the NLRA. The Board emphasized that in both *Milwaukee Spring I* and *Los Angeles Marine* the employer sought to avoid the terms of the collective bargaining agreement, and that this was prohibited even though the situation was created by external economic conditions.

The Board also found that neither the preamble of the collective bargaining agreement, containing a description of the parties' physical location, nor the management rights clause provided a clear and unmistakable waiver of the union's statutory right to object to a midterm relocation. The effect of *Milwaukee Spring I* was to reaffirm the rule established by the Board and affirmed by the Ninth Circuit in *Los Angeles Marine*: an employer may not remove union work during the term of a collective bargaining agreement, if done to avoid the terms of the collective bargaining agreement, unless specifically authorized by the agreement.

C. *Milwaukee Spring II*

After the Decision and Order in *Milwaukee Spring I*, Milwaukee Spring appealed to the Seventh Circuit and the Board cross-appealed for enforcement. Meanwhile, the composition of the Board changed with the appointment of new members by President Reagan, and the new Board filed
a motion with the Seventh Circuit to remand the case to the Board for reconsideration. On August 4, 1983, the court granted the motion.56

In its Supplemental Decision and Order in Milwaukee Spring II,57 the Board reversed its earlier Decision and Order in Milwaukee Spring I.58 The Board held that in order to find a midterm modification within the meaning of section 8(d), a specific term in the collective bargaining agreement must have been modified.59 The Board noted that the decision in Milwaukee Spring I did not indicate any specific term that was modified by the decision to relocate.60 The Board found that the wage and benefits provisions were left intact at the Milwaukee Spring facility and that the collective bargaining agreement’s recognition clause did not confer jurisdictional rights on the union.61 Finding that the relocation was not a matter that was contained in the collective bargaining agreement, the Board held that the company had fulfilled its obligation to bargain by bargaining to impasse with the union.62 Finally, the Board in Milwaukee Spring II expressly overruled prior Board decisions that had held that the decision to relocate union work to nonunion facilities was a midterm modification of the collective bargaining agreement.63 The Board held that unless relocations are specifically prohibited by the collective bargaining agreement, an employer is free to

59. Id. at 602.
60. Id.
61. Id.
62. Id. at 603. The Board found the decision in Milwaukee Spring I to be a radical departure from previous Board rulings, citing Ozark Trailers, Inc, 161 N.L.R.B. 561 (1966), to emphasize the value of rational midterm economic discussion. 268 N.L.R.B. at 603. In Ozark, the Board noted the numerous occasions in which unions had made midterm concessions in order to save jobs that were threatened by proposed plant relocations. 161 N.L.R.B. at 570. The employer in Ozark, however, had not bargained over the decision to shut down the plant and subcontract the work, and the Board found this to be a refusal to bargain over a mandatory subject and an unfair labor practice. Id. at 562. The Board in Milwaukee Spring II relied on this decision to suggest not that Milwaukee Spring was obligated to discuss the issue of relocation with the union, but that Milwaukee Spring was therefore free to discuss the issue at any time. Milwaukee Spring II, 268 N.L.R.B. at 603.
63. Milwaukee Spring II, 268 N.L.R.B. at 604. In overruling University of Chicago, Boeing, and Los Angeles Marine, the Board cited dicta in University of Chicago that stated that it was well established that an employer could transfer work during the midterm of a collective bargaining agreement, as opposed to reassigning it, after bargaining to impasse. University of Chicago, 210 N.L.R.B. at 190. The Board reasoned that this statement undermined the reliance in Los Angeles Marine (1978) on the decision in Boeing (1977), which in turn had relied on University of Chicago (1974). Milwaukee Spring II, 268 N.L.R.B. at 604.
relocate work out of the bargaining unit after bargaining in good faith to impasse.\textsuperscript{64}

Board Member Zimmerman dissented, proposing a two-stage analysis to be used in relocation cases.\textsuperscript{65} In this proposed analysis, the Board would first determine whether the relocation decision is a mandatory subject of bargaining under the NLRA.\textsuperscript{66} If the decision to relocate is a mandatory subject, the Board next would determine whether the relocation decision was predominantly motivated by a desire to avoid the terms of the collective bargaining agreement.\textsuperscript{67}

After finding that the decision to relocate the assembly operations was a mandatory subject of bargaining, Member Zimmerman moved to the second stage of the proposed analysis. Because the parties had stipulated that the relocation was motivated solely by Milwaukee Spring’s desire to avoid the higher labor rates under the collective bargaining agreement, Member Zimmerman would find a midterm repudiation of the collective bargaining agreement under section 8(d) of the NLRA.\textsuperscript{68}

\textsuperscript{64} Milwaukee Spring II, 268 N.L.R.B. at 604 (citing University of Chicago v. N.L.R.B., 514 F.2d 942 (7th Cir. 1975)). See supra text accompanying notes 18–22. The Board also found that before the employer’s actions could be found to be inherently destructive of employees’ rights under § 8(a)(3), a refusal to bargain over a mandatory subject not contained in the contract must first be found. Because the company had bargained in good faith to impasse before relocating, the company had fulfilled its obligation to bargain and therefore did not violate § 8(a)(5) or (a)(3). 268 N.L.R.B. at 604.

\textsuperscript{65} Milwaukee Spring II, 268 N.L.R.B. at 605 (Zimmerman, Member, dissenting).

\textsuperscript{66} Id. Mandatory subjects of bargaining include wages, hours, and other terms and conditions of employment. First Nat’l Maintenance Corp. v. NLRB, 452 U.S. 666, 674 (1981). “Terms or conditions of employment” is not defined in the NLRA, but this determination is governed by the Supreme Court decisions in Fibreboard Paper Prod. Corp. v. NLRB, 379 U.S. 203 (1964), and First Nat’l Maintenance, 452 U.S. 666, and by the Board decision in Otis Elevator Co. (Otis II), 269 N.L.R.B. 891 (1984). If the value to labor relations and collective bargaining outweighs the burden on the employer’s freedom to manage its business, the subject is a mandatory subject of bargaining. First Nat’l Maintenance, 452 U.S. at 679. In First Nat’l Maintenance, the Court expressly reserved finding whether a plant relocation is a mandatory subject of bargaining, id. at 686 n.22, but the Board in Otis II applied the balancing test to a relocation decision. 269 N.L.R.B. at 891. If the decision to relocate turns on labor costs, it is a mandatory subject of bargaining. Id.

\textsuperscript{67} Milwaukee Spring II, 268 N.L.R.B. at 605 (Zimmerman, Member, dissenting).

\textsuperscript{68} Id. The Board decisions in Milwaukee Spring I and Milwaukee Spring II are the subject of various commentaries. For casenotes questioning the Board’s decision in Milwaukee Spring II, see, e.g., Note, Milwaukee Spring Division of Illinois Coll Spring Company: Work Relocation as a Means to Obtain Midterm Contract Concessions, 33 Cath. U.L. Rev. 1001 (1984); Note, Labor Law—Unfair Labor Practices—Trade Unions—Collective Bargaining—An Employer’s Relocation of Work During the Term of a Collective Bargaining Agreement for the Sole Purpose of Reducing Labor Costs Is Not a Midterm Modification of a Term or Condition of Employment and Does Not Violate the National Labor Relations Act if the Employer Has Bargained to Impasse with the Union Over the Decision, 53 U. Cin. L. Rev. 837 (1984).

For journal articles that view Milwaukee Spring II as a necessary correction, see, e.g., Klaper, Return to Normalcy: NLRB Affirms Right of Employer to Relocate Work from Union to Nonunion Facility, 27 Res Gestae 484 (1984); Millspaugh, Midterm Plant Relocations: The NLRB Puts Humpty Dumpty

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III. UAW v. NLRB

The union appealed the decision in Milwaukee Spring II to the United States Court of Appeals for the D.C. Circuit, primarily because the Board failed to address the union's argument.69 The union had argued that Milwaukee Spring's use of economic pressure—the threat to relocate union work—to force midterm wage concessions, and then carrying out the threat by effectively locking out the employees, was a violation of section 8(d), (a)(5), (a)(3), and (a)(1) of the NLRA.70 Milwaukee Spring argued several alternate positions, but primarily that the management rights clause granted the employer the right to make relocation decisions.71

The court discussed the general legal principles regarding the duty to bargain during the term of a collective bargaining agreement.72 If a mandatory subject is not "contained in" the collective bargaining agreement, the employer must bargain to impasse with the union over the proposed subject.73 Once impasse is reached, the employer may unilaterally implement its proposal without the union's consent.74 If the subject of the proposal is "contained in" the collective bargaining agreement, neither party may unilaterally modify the collective bargaining agreement without the other's consent.75

A mandatory subject may be "contained in" a collective bargaining agreement either by express reference or by waiver of the duty to bargain by the operation of a "zipper" or integration clause.76 The court noted that the collective bargaining agreement in this case contained a zipper clause,77 a


70. Id. at 4. See also UAW v. NLRB, 765 F.2d at 183.
71. UAW v. NLRB, 765 F.2d at 181. See infra note 140.
72. UAW v. NLRB, 765 F.2d at 179-80.
73. Id. at 179.
74. Id.
75. Id. at 179-80.
76. Id. at 180. A zipper clause has the effect of bringing all mandatory subjects of bargaining within the "contained in" category for the purpose of determining the duty to bargain during the term of a collective bargaining agreement. Id. A zipper clause purports to close out bargaining over subjects not included in the collective bargaining agreement. R. Gorman, BASIC TEXT ON LABOR LAW 471 (1976). See also I THE DEVELOPING LABOR LAW, supra note 16, at 642. Mandatory subjects can also be brought within this category by bargaining during negotiations. Jacobs Mfg. Co., 94 N.L.R.B. 1214, 1228 (1951), enforced, 196 F.2d 680 (2d Cir. 1952). See also R. Gorman, supra, at 458-62.
77. UAW v. NLRB, 765 F.2d at 181. The zipper clause read as follows:

Entire Agreement Clause

It is acknowledged that during the negotiations which resulted in this Agreement, that each party had the unlimited right and opportunity to make demands and proposals with respect to any subject or matter not removed by law from the area of collective bargaining, and that the understandings and agreements arrived at by the parties after the exercise of that right and opportunity are set forth in the Agreement. Therefore, the Company and the Union, for the life of the Agreement, each waives the right, and each agrees that the other shall not be obligated, to
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fact that the parties, the General Counsel, and the Board had previously failed to address. The court reasoned that the union must have conceded, and the Board must have found, that the right to relocate the assembly operations was explicit in the management rights clause, which granted to Milwaukee Spring the right to manage the plant and business. Otherwise, the zipper clause would have closed out the issue until the term of the collective bargaining agreement had expired.

After building this analytical framework, the court then addressed the union’s argument. Because the right to relocate the assembly operations was expressly granted by the management rights clause, the court could not see “how two rights can make a wrong.” In other words, if Milwaukee Spring had the right under the NLRA to propose a midterm wage reduction to the union, and the right under the management rights clause to relocate any operation, then it could not be wrong to couple these two rights together in a single proposal to the union.

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78. See infra note 136.
79. The court noted that the Board’s analysis in Milwaukee Spring I was blurred. 765 F.2d at 183 n.30. The Board held that Milwaukee Spring had not violated § 8(a)(5) because it bargained to impasse with the union. Id. If Milwaukee Spring did in fact have the right to relocate under the management rights clause, it had no obligation to bargain over the decision at all. Id. The Board did more than “blur” its analysis. It is evident from Milwaukee Spring I that the Board overlooked the zipper clause, ignored the management rights clause, and treated the issue as if it were not “contained in” the collective bargaining agreement. Milwaukee Spring II, 268 N.L.R.B. at 603.
80. UAW v. NLRB, 765 F.2d at 181–82. The management rights clause read as follows:

FUNCTIONS OF MANAGEMENT

Except as expressly limited by the other Articles of this Agreement, the Company shall have the exclusive right to manage the plant and business and direct the working forces.

These rights include, but are not limited to, the right to plan, direct and control operations, to determine the operations or services to be performed in or at the plant or by the employees of the Company, to establish and maintain production and quality standards, to schedule the working hours, to hire, promote, demote, and transfer, to suspend, discipline or discharge for just cause or to relieve employees because of lack of work or for other legitimate reasons, to introduce new and improved methods, materials or facilities, or to change existing methods, materials or facilities.

Joint Appendix at 24.
81. UAW v. NLRB, 765 F.2d at 182. In fact, both the Board and the union failed to address the application of the management rights clause, leaving the court to assume that the right to relocate was conceded to fall within the clause. Id.
82. Id. at 183.
83. Id. The court observed that the flexibility that exists by allowing the parties to bargain midterm over rights conferred by the collective bargaining agreement is crucial in order to address effectively the unanticipated events and changed circumstances that continually occur in labor relations. Id. at 184.
IV. MIDTERM ECONOMIC PRESSURE

A. The Economic Pressure Theory and the Court's Response

The union argued that Milwaukee Spring's actions were contrary to the requirements in section 8(d) governing the duty to bargain and therefore were a violation of section 8(a)(1) and (a)(5). The argument was not that the relocation itself was a midterm repudiation of the collective bargaining agreement, but rather that the threat to relocate unless the union agreed to wage concessions was illegal economic pressure, and that carrying out the threat was an illegal lockout. For this argument, the union relied on section 8(d).

Section 8(d) describes the duties imposed on both the employer and the union during negotiations for new collective bargaining agreements. In addition, section 8(d) imposes special duties on a party who proposes a midterm modification of an existing agreement, which include notification, negotiation, and a prohibition on strikes and lockouts until the existing agreement expires. Section 8(d) also grants to the other party a right to refuse to discuss or agree to any midterm modifications. A failure to meet these requirements constitutes a violation of section 8(a)(5), which makes a refusal to bargain collectively an unfair labor practice.

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84. Brief for UAW at 12.
85. Id. at 12-14.
86. Id. at 12-13.
87. The text of § 8(d) reads in relevant part as follows:

8(d) For the purposes of . . . section [8], 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: Provided, That where there is in effect a collective-bargaining contract . . . the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification . . . ;
(2) offers to meet and confer with the other party . . . ;
(3) notifies the Federal Mediation and Conciliation Service . . . ; and
(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract . . . until the expiration date . . . ;

The duties imposed . . . by paragraphs (2), (3), and (4) . . . shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before [expiration] of the contract.

NLRA § 8(d); 29 U.S.C. § 158(d).

88. Brief for UAW at 12. See NLRB v. Lion Oil Co., 352 U.S. 282, 285 (1957) (since § 8(d) defines the duty to bargain collectively, a violation of § 8(d) constitutes a refusal to bargain collectively and an unfair labor practice under § 8(a)(5)).

89. See supra note 11.
The union relied on interpreting the explicit restriction on strikes and lockouts in section 8(d)(4) to imply a blanket restriction on the use of any economic pressure to force midterm concessions, and on a broad reading of the term "lockout."90 The court rejected this argument for three reasons. First, the court did not accept the generalization from the express statutory language prohibiting strikes and lockouts to the implied prohibition of any economic pressure, or the union's broad definition of "lockout."91 Second, the court noted the lack of any legal precedent to support the argument that the use of "generic" economic pressure during midterm negotiations was illegal, or that the term "lockout" should be given such a broad reading.92 Finally, given that the union had conceded that the employer had the express right to relocate under the management rights clause of the collective bargaining agreement, the court would not find that it was unlawful for Milwaukee Spring to offer to give up this right if the union voluntarily agreed to a modification of the agreement.93

B. Criticism of the Court's Response

The court's response to the union's argument is weakened by three major considerations. First, in addition to the express prohibition on lockouts in section 8(d)(4), section 8(d) superimposes upon the specific restrictions in section 8(d)(1) through (d)(4) a right in either party to be free from generic economic pressure aimed at a midterm modification of an existing collective bargaining agreement.94 Second, general legal authority for the union's argument exists in the congressional intent underlying the national labor policy.95 Finally, because the union has a statutory right to be free from midterm economic pressure, the management rights clause must provide a clear and unmistakable waiver of this statutory right, rather than blanket coverage, before it can be found to grant the employer the right to make relocation decisions.96

1. Generic Economic Pressure

The court interpreted the explicit reference in section 8(d)(4) to strikes and lockouts as the sole forms of economic pressure prohibited by the

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90. Brief for UAW at 14.
91. UAW v. NLRB, 765 F.2d at 183–84.
92. Id. at 184.
93. Id.
94. See infra text accompanying notes 97–110.
95. See infra text accompanying notes 111–23.
96. See infra text accompanying notes 124–33.
The union argued that these were merely express examples of an implicit prohibition against any midterm economic pressure. The union also defined "lockout" broadly to include a refusal by an employer to furnish available work to its regular employees for the purpose of gaining concessions from them. By trying to extend the prohibition on strikes and lockouts to prohibit any midterm economic pressure, and extending the prohibition against lockouts to cover closures or terminations in connection with a threatened relocation, the union extended the statutory language beyond what the court considered its intended coverage. The court was correct, under rules of statutory construction, to construe the limits on economic pressure in section 8(d)(4) to be as expressly stated. However, the court should have recognized and the union should have argued that section 8(d)(4) need not control recognition of the statutory right to be free from midterm economic pressure.

Section 8(d)(1) through (d)(4) outlines the procedures for modifying collective bargaining agreements. The text following superimposes upon these procedures the broader right to refuse to discuss or accept midterm modifications during the term of an existing collective bargaining agreement. This right to refuse to discuss or agree to a midterm modification is guaranteed by section 7; to interfere or coerce the employees in the

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97. UAW v. NLRB, 765 F.2d at 183–84.
98. Brief for UAW at 14.
99. Id. (citing American Shipbuilding Co. v. NLRB, 380 U.S. 300, 321 (1965); 2 THE DEVELOPING LABOR LAW, supra note 16, at 1034). At Milwaukee Spring, the employer did in fact withhold available work from its regular employees by moving the assembly operations, but at that point it was no longer seeking concessions. At most the threat to relocate was a threatened lockout, but not an actual lockout. Furthermore, the relocation appears not to have been undertaken merely to pressure the union, because the company resumed the same work at the McHenry Spring plant. On the other hand, if the union had been able to show that the employer had offered to return the assembly operations to the Milwaukee Spring plant if concessions were made, the continued withholding of available work should have been construed as a lockout.
100. UAW v. NLRB, 765 F.2d at 183–84.
101. Expressio unius est exclusio alterius. 2A SANDS, SUTHERLAND STATUTORY CONSTRUCTION § 47.23 (4th ed. 1984). The literal meaning of this maxim is that the expression of one is the exclusion of others, or that all omissions should be understood as exclusions. Id. However, it is a rule of statutory construction and not a rule of law, and it can be overcome by a strong indication of contrary legislative intent or policy. Id.
102. Section 8(d)(1) requires that the party requesting a modification serve written notice on the other party 60 days prior to expiration of the existing collective bargaining agreement. Section 8(d)(2) requires that the requesting party offer to meet with the other party to negotiate a new contract with the proposed modifications. Section 8(d)(3) requires that the requesting party serve notice on appropriate mediation agencies within 30 days after a dispute arises. Section 8(d)(4) spells out the duty to continue "in full force and effect, without resorting to strike or lockout, all the terms and conditions of the existing contract." NLRA § 8(d)(1)–(4); 29 U.S.C. § 158(d)(1)–(4).
103. Activities described in § 7 are considered "protected," and include collective bargaining activities by employees in general. Activities described in § 8(a) and (b) are considered "prohibited," but specific collective bargaining activities by unions that are excepted from the prohibitions in § 8.

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exercise of this right should be a violation of section 8(a)(1) and (a)(5). 104

Moreover, if the general right in section 8(d) to refuse to discuss or agree to midterm modifications were construed as being limited by section 8(d)(4) to the specific right to be free only from strikes and lockouts within the notice period at the end of an existing contract, the inclusion of this general right would be superfluous because it would provide no additional protection beyond the prohibition in section 8(d)(4). Also, if this general right to be free from economic pressure were not construed to be superimposed upon the notice procedures, there would be no prohibition on strikes and lockouts before the notice and waiting period defined in section 8(d)(1) through (d)(4). 105 Section 8(d), read as a whole, includes the general right to be free from any economic pressure aimed at modification of the collective bargaining agreement before its expiration. 106

Once the union's statutory right to be free from midterm economic pressure is established, it must meet a balancing test before it is fully recognized. The interference with this statutory right must outweigh the business justification, unrelated to labor costs, 107 for the employer's
The section 7 right protected here is the union’s right to refuse to discuss or agree to midterm wage concessions. The only business justification offered by Milwaukee Spring was a desire to realize a greater return on its investment by reducing labor costs. This justification is not sufficient to tip the balance against the employee rights guaranteed in section 7.

2. Legal Authority and Underlying Policy

The court pointed out the lack of supporting precedent in rejecting the union’s economic pressure argument, noting that the legal authorities cited by the union refer to strikes, and not general economic pressure.

108. Textile Workers Union v. Darlington Mfg. Co., 380 U.S. 263, 268–69 (1965). The Court in Textile Workers acknowledged that many management decisions interfere with employee concerted activities, but held that § 8(a)(1) is only violated when the interference with § 7 rights outweighs the business justification for the employer’s actions. Id. In Textile Workers, the employer closed down an entire plant to avoid paying higher labor rates to a union that had just won a representation election. Id. at 266. The Court’s balancing test was used to weigh the employer’s freedom to run its business against the employees’ freedom to engage in concerted activities. Id. at 268–69. The Court held that the employer was free to terminate an entire plant for any reason, unless the purpose of the closure was to derive some benefit by chilling unionization in the future or at another plant. Id. at 272–74.

109. The parties stipulated that Milwaukee Spring’s sole motive for the relocation was to reduce labor costs in order to realize a higher return on its investment. Milwaukee Spring I, 265 N.L.R.B. 206, 206.

110. In a direct violation of § 8(a)(1), the interference with the employees’ § 7 rights need not be intentional. It is enough that the effect of the employer’s action tends to interfere with § 7 rights. NLRB v. Burnup & Sims, Inc., 379 U.S. 21, 23 (1964); Textile Workers, 380 U.S. at 269; R. Gorman, supra note 76, at 132–33. However, because the § 8(a)(1) violation in this case was derivative by way of § 8(a)(5), Milwaukee Spring’s subjective intent, rather than the objective effect, is determinative of a § 8(a)(1) violation. See The Developing Labor Law, supra note 16, at 75–78. Milwaukee Spring’s subjective intent was to interfere with the employees’ § 7 rights by coercing the union into accepting a midterm modification of the collective bargaining agreement. See Milwaukee Spring I, 265 N.L.R.B. at 206. This should make Milwaukee Spring’s business justification invalid and preclude its consideration as a legitimate factor to weigh against guaranteed employee rights.

Although it is primarily the Board’s role to apply its judgment, discretion, and expertise to this balancing function, the circuit courts have a limited judicial review of Board findings. R. Gorman, supra note 76, at 133–34. The standard of review to be applied to the Board’s determination of questions of fact is one of deference if supported by substantial evidence on the record considered as a whole. NLRA § 10(f); 29 U.S.C. § 160(f). This is an enlarged standard of review that was broadened by the Taft-Hartley amendments. H.R. Rep. No. 510, 80th Cong., 1st Sess. 56 (1947), reprinted in Legislative History of the Labor Management Relations Act, 1947 at 560 (1974) [hereinafter cited as Legislative History]. See also Universal Camera Corp. v. NLRB, 340 U.S. 474, 484–87 (1951). In this case, there is no evidence that the Board applied the Textile Workers balancing test at all.

111. UAW v. NLRB, 765 F.2d at 184.

112. Id. at 184 n.32. The cases cited by the union, United Elec. Workers Local 1113 v. NLRB, 223 F.2d 338 (D.C. Cir. 1955), and Boeing Airplane Co. v. NLRB, 174 F.2d 988 (D.C. Cir. 1949), both involved midterm strikes by the unions and not generic economic pressure. UAW v. NLRB, 765 F.2d at 184 n.32. In United Elec. Workers, a dispute arose concerning the provision in the collective bargaining agreement for a general wage increase. In response, the union held a full membership meeting, accompanied by a walk stoppage and walk out. United Elec. Workers, 223 F.2d at 340. The court found this to be a strike in support of a demand for a midterm modification of the collective bargaining agreement, in breach of a no-strike provision in the collective bargaining agreement and without notice.

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The case authority is admittedly sparse, but except for the *UAW v. NLRB* decision itself, there is also no specific legal precedent to oppose the union's argument. The union relied on the general legal authority in the legislative history of the Taft-Hartley Act\(^{113}\) and in the policy of midterm stability that Congress intended to promote;\(^ {114}\) the court did not acknowledge this general legal authority.

The Taft-Hartley Act changed the law concerning the duty to bargain during the midterm of a collective bargaining agreement.\(^ {115}\) This change included the provision in section 8(d) that rejects the duty to bargain over a modification to a collective bargaining agreement before it expires.\(^ {116}\) This amendment did not outlaw midterm bargaining but made it clear that any bargaining must be voluntary.\(^ {117}\) The underlying policy is to allow the use of economic weapons during the negotiation periods for new collective bargaining agreements, because of the belief that this encourages agreement,\(^ {118}\) but to discourage the use of economic weapons once agreement is reached.\(^ {119}\) The policy focuses on the sanctity of the written collective bargaining agreement. Given the uneven balance of power in favor of the employer in this type of relocation case and the policy favoring stability during the term of a collective bargaining agreement, the court should have neutralized the use of economic pressure during the term of the agreement by finding that Milwaukee Spring had engaged in an unfair labor practice.\(^ {120}\)
Although there is little authority regarding the use of economic weapons during the term of a collective bargaining agreement, in *NLRB v. Insurance Agents’ International Union* the Supreme Court discussed the Board’s regulation of economic weapons during negotiations for new agreements. The Court recognized that the presence of economic weapons in reserve, and their actual use on occasion, was a prime factor in compelling agreement between the parties. The Court stated that Board intervention in an attempt to balance these economic weapons during negotiations amounted to an entrance into the substantive aspects of the collective bargaining agreement, in conflict with congressional intent.

This reasoning by the Supreme Court is consistent with the underlying congressional intent, the national labor policy, and the restriction on midterm economic pressure. The Board’s role is to allow labor and management to utilize their legal economic weapons during negotiation, in order to compel agreement. But once agreement is reached, the Board’s role is to preserve the sanctity of the written collective bargaining agreement. The Board must do this not by enforcing the agreement, but by neutralizing the illegal use of midterm economic weapons aimed at compelling modification of the agreement.

The general legal authority exists in the legislative history of the Taft-Hartley Act, but has yet to be applied in a consistent and specific manner to contemporary relocation problems. The D.C. Circuit in *UAW v. NLRB* had the opportunity to develop relocation law in a manner consistent with the sanctity of the collective bargaining agreement. Instead, the decision becomes fuel for the perpetuation of coercive activities aimed at destroying the stability of collective bargaining agreements.

### 3. The Management Rights Clause and Contractual Waiver

The union did not expressly concede that Milwaukee Spring had the right to relocate under the management rights clause. The court assumed that the union conceded this right because the union failed to argue that the zipper clause eliminated the duty to bargain over the relocation. It is not more workable.

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124. The court relied on the union’s "tacit concession" of Milwaukee Spring’s right to relocate under the management rights clause. *UAW v. NLRB*, 765 F.2d at 182. The court did not scrutinize the management rights clause under the strict standards required of a contractual waiver because it did not find a statutory right to waive. *Id.* at 183–84.
125. *Id.* at 182.
clear why the D.C. Circuit was the first to raise the zipper clause issue, but it is likely that the union did not view the zipper clause as determinative. The effect of the zipper clause was undoubtedly weakened by the broad management rights clause, perhaps to the extent of making the existence of the zipper clause irrelevant to the subject of relocation.

Furthermore, the court erred in extinguishing the union’s statutory right to be free from midterm economic pressure with the employer's vague and broad contractual right to manage operations at Milwaukee Spring. The Supreme Court and the federal appellate courts have consistently held that before a contract clause can operate as a waiver of a statutory right, the language in the contractual provision must be “clear and unmistakable.”

126. See infra note 136.
127. A management rights clause can undoubtedly be worded in terms so broad as to cover any decision regarding the content and distribution of operations at any plant. A zipper clause is only a factor on the issue of work relocation if the management rights clause is narrow enough to leave some plant operations outside its coverage. A zipper clause probably has much more applicability to nonoperational activities that would never fall within a management rights clause, such as pension plans and sick leave allotments.

128. Some of the functions reserved to management were “the right to plan, direct and control operations, to determine the operations or services to be performed in or at the plant or by the employees of the Company...or to change existing methods, materials or facilities.” See Joint Appendix at 24. If the language were loosely interpreted, the right to “control operations...at the plant” or the right “to change existing...facilities” could be read to allow control of these operations and facilities relative to the other plants. But if this point had been argued and closely analyzed in the D.C. Circuit decision, the court should have found that this clause failed to provide the specificity required to waive a statutory right, because the right to relocate was not explicit.

129. Milwaukee Spring I, 265 N.L.R.B. at 209 (citing Timken Roller Bearing Co. v. NLRB, 325 F.2d 746, 751 (6th Cir. 1963), cert. denied, 376 U.S. 971 (1964)). A general contractual provision will not be read as a waiver of a statutorily protected right, unless the provision is “clear and unmistakable.” Metropolitan Edision Co. v. NLRB, 460 U.S. 693, 708 (1983). This fundamental principle is consistently followed throughout the federal circuit courts. See, e.g., NLRB v. South Cent. Bell Tel. Co., 688 F.2d 345, 355 (5th Cir. 1982); Chesapeake & Potomac Tel. Co. v. NLRB, 687 F.2d 633, 636 (2d Cir. 1982); George Banta Co., Inc., Banta Div. v. NLRB, 686 F.2d 10, 20 (D.C. Cir. 1982); NLRB v. Southern Cal. Edison Co., 646 F.2d 1352, 1364 (9th Cir. 1981); NLRB v. Keller-Crescent Co., 538 F.2d 1291, 1299 (7th Cir. 1976). Furthermore, even express language will not be read expansively. Delaware Coca-Cola Bottling Co. v. General Teamster Local 326, 624 F.2d 1182, 1187–88 (3d Cir. 1980); accord George Banta, 686 F.2d at 20.

In International Union, United Automobile Workers v. NLRB, 381 F.2d 265 (D.C. Cir. 1967), a clause in the collective bargaining agreement between General Motors and the union provided that “the methods, processes and means of manufacturing are solely and exclusively the responsibility of the Corporation.” Id. at 266. The court held that this was not a “clear and unmistakable” waiver of the union’s right to bargain where a change in “methods” amounts to contracting out work previously performed within the bargaining unit. Id. at 267. See also Road Sprinkler Fitters Local 669 v. NLRB, 600 F.2d 918, 921–23 (D.C. Cir. 1979), where the court rejected the Board’s failure to apply the “clear and unmistakable” waiver standard. The Board argued that the rights should be determined by contract interpretation rather than by traditional waiver concepts. Id. at 921. The court refused to accept the Board’s “recalcitrance” in not explaining why the standard for waiver should change in light of the Board’s “statutory mandate.” Id. at 923; R. Gorman, supra note 76, at 470–71 (a blanket management rights clause without specificity is not a valid waiver of protected rights); 1 THE DEVELOPING LABOR

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In *Milwaukee Spring I*, the Board found the management rights clause in this collective bargaining agreement\(^{130}\) did not contain an express right to relocate operations from one plant to another.\(^{131}\) Therefore, the clause did not waive the union's right to refuse to agree to a midterm modification.\(^{132}\) Although the decision to relocate arguably falls within the broad coverage of the management rights clause, when used as a contractual waiver of a statutory right, the right to relocate must be explicit. Regardless of the effect of the zipper clause and the breadth of the management rights clause, the union did not concede that it had contractually waived its statutory right.\(^{133}\)

C. The Effect of UAW v. NLRB on the Rule in Milwaukee Spring II

Although the decision in *UAW v. NLRB* affirmed the Board’s decision in *Milwaukee Spring II*, it did so on different grounds. The effect is that the rule formulated in *Milwaukee Spring II* remains undecided at the federal appellate court level. *Milwaukee Spring II* formulated the rule that during the term of an existing collective bargaining agreement, the employer is free to relocate union work to nonunion facilities after bargaining to impasse, regardless of motivation, unless an express provision in the collective bargaining agreement preserves union work.\(^{134}\) This is in sharp contrast with the rule in *Milwaukee Spring I*, which held that an employer

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\(^{130}\) See supra note 80.

\(^{131}\) *Milwaukee Spring I*, 265 N.L.R.B. at 210.

\(^{132}\) Id. Although the decision in *Milwaukee Spring I* was reversed by *Milwaukee Spring II*, the Board in *Milwaukee Spring II* as well as the court in *UAW v. NLRB* did not address the contractual waiver issue. The Board in *Milwaukee Spring II* did not find a statutory right at all, and therefore found nothing to waive. 268 N.L.R.B. at 602. The court in *UAW v. NLRB* also did not acknowledge the existence of the statutory right. 765 F.2d at 183–84. Therefore, the analysis in *Milwaukee Spring I* concerning the requirements for a contractual waiver of a statutory right, and the application of these requirements to the Milwaukee Spring collective bargaining agreement, is unaffected by the later decisions in *Milwaukee Spring II* and *UAW v. NLRB*.

\(^{133}\) See supra notes 124–27 and accompanying text. The requirement that a waiver be clear and unmistakable applies to a waiver of a statutory right. Here, the statutory right was a distinct manifestation of the underlying policy Congress sought to promote by the Taft-Hartley amendments. See supra notes 115–19 and accompanying text. The underlying policy, as well as the statutory right, should not be discarded by a loose application of a broad and vague management rights clause.

The existence of a zipper clause in a collective bargaining agreement should not make the requirements for a contractual waiver of a statutory right any less stringent. The zipper clause does not make the management rights clause any more or any less explicit concerning the right to relocate. It is apparent that the court in *UAW v. NLRB* used the zipper clause to avoid deferring to the Board’s announcement of current relocation policy: that the right to relocate exists regardless of the provisions in the management rights clause, as an inherent management prerogative. Compare *UAW v. NLRB*, 765 F.2d at 181, with *Milwaukee Spring II*, 268 N.L.R.B. at 603.

\(^{134}\) *Milwaukee Spring II*, 268 N.L.R.B. at 604. See supra text accompanying notes 54–64.
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could not relocate union work if motivated by a desire to reduce labor costs, unless the collective bargaining agreement contained an express provision authorizing the employer to make relocation decisions.135

In UAW v. NLRB, the D.C. Circuit did not explicitly choose between the rules from Milwaukee Spring I and Milwaukee Spring II. Instead, the court introduced an element that the parties previously had not considered: the effect of a “zipper” clause in the collective bargaining agreement.136 The court reasoned that because the union did not argue that the zipper clause closed the issue of relocation during the term of the collective bargaining agreement, the union must have conceded that the right to relocate was granted to the employer in the broad management rights clause.137 More importantly, the court reasoned that the Board also must have believed the right to relocate was expressly granted to the employer in the collective bargaining agreement, because of the zipper clause.138 As interpreted at the appellate court level, the new Board rule regarding relocations seems remarkably similar to the rule set out by the Board in Milwaukee Spring I, which also required an express grant of the right to relocate.139 However, by not being explicit on this point, the decision adds a great deal of uncertainty in predicting the current state of relocation law.

The zipper clause in the Milwaukee Spring collective bargaining agreement shifted the focus to the management rights clause. Although Milwaukee Spring argued that the right to relocate fell within the management rights clause,140 this argument was not challenged by the union.141 The court therefore did not need to decide whether the management rights clause did in fact cover relocation. Although the court suggested that the

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136. UAW v. NLRB, 765 F.2d at 181–82. There are many possible explanations for the parties’ and the Board’s failure to acknowledge the existence of the zipper clause in the Milwaukee Spring collective bargaining agreement, but the most likely explanation is inadvertence. The existence of the zipper clause precluded any obligation to bargain and therefore undermined Milwaukee Spring’s argument and the Board’s finding that the employer’s duty is merely to bargain to impasse. The existence of the zipper clause confused the union’s argument because it was not clear what the union’s position was in regard to the management rights clause.
137. UAW v. NLRB, 765 F.2d at 182.
138. Id.
140. UAW v. NLRB, 765 F.2d at 181. Milwaukee Spring argued three alternative positions. First, Milwaukee Spring contended that the relocation was not a mandatory subject of bargaining, under guidelines from Fibreboard and First Nat’l Maintenance. Oral Argument by Counsel for Milwaukee Spring at 71, Milwaukee Spring II, 268 N.L.R.B. 601, reprinted in Joint Appendix at 134. In the alternative, Milwaukee Spring argued that even if the relocation was a mandatory subject of bargaining, the management rights clause covered relocation. Id. Finally, Milwaukee Spring argued that even if the relocation was a mandatory subject of bargaining and even if the management rights clause did not cover the subject of relocation, the company had fulfilled its obligation by bargaining to impasse over the relocation. Id. at 85, Joint Appendix at 145.
141. UAW v. NLRB, 765 F.2d at 181.
breadth of the management rights clause was sufficient to cover relocation, the court relied on the union's "tacit concession" on this issue, and did not rely on a finding that the management rights clause provided a clear and unmistakable waiver of the union's rights. The court did not scrutinize closely the coverage of the management rights clause primarily because the court refused to acknowledge the union's statutory right to be free from midterm economic pressure aimed at a contractual modification. Accordingly, the union must first carry the burden of showing a statutory right exists before the court will apply the strict "clear and unmistakable" waiver requirement to a management rights clause.

If the management rights clause had been narrower than it was in the Milwaukee Spring collective bargaining agreement, the court might not have found that the clause covered relocation, even without acknowledging the union's statutory right. In that event, the zipper clause would have precluded a relocation before the collective bargaining agreement expired. If the collective bargaining agreement had not had a zipper clause, and if the management rights clause had not covered relocation, the court would have found that the company was free to relocate after bargaining to impasse.

142. *Id.* at 182.

143. Milwaukee Spring had argued that the management rights clause not only granted the company the right to make relocation decisions, but also provided an "unequivocal waiver" of any rights the union may have on the issue. *Id.*

144. See *supra* text accompanying notes 82–83.

145. UAW v. NLRB, 765 F.2d at 179. The theory that a party can unilaterally carry out a midterm proposal after bargaining to impasse evolved from Jacobs Mfg. Co., 94 N.L.R.B. 1214 (1951), enforced, 196 F.2d 680 (2d Cir. 1952). The value of this theory to collective bargaining in a relocation case is questionable because the bargaining is virtually meaningless. The employer need only hurry to impasse and then proceed with the relocation. The employer need not conform to the notice requirements in § 8(d)(1)–(4) because the relocation is not a modification of the existing collective bargaining agreement or a lockout under § 8(d)(4). The union's only response is a strike, which is not only meaningless after the employer has already left, but arguably illegal because the existing collective bargaining agreement has not yet expired. *But see* NLRB v. Lion Oil Co., 352 U.S. 282, 292–93 (1957) (the use of economic weapons during contract reopening is not an unfair labor practice). *See also* Local 9735, Mine Workers v. NLRB, 258 F.2d 146, 149 (D.C. Cir. 1958) (a midterm strike not for the purpose of modifying the collective bargaining agreement is not an unfair labor practice); Cheney Cal. Lumber Co., 319 F.2d 375, 380 (9th Cir. 1963) (a strike in breach of no-strike provision in the collective bargaining agreement is not per se a refusal to bargain and an unfair labor practice). Because of the above inconsistencies, some commentators have suggested that an "addition" to a contract should be treated as a "modification" under § 8(d). Cox & Dunlop, *The Duty to Bargain Collectively During the Term of an Existing Agreement*, 63 Harv. L. Rev. 1097, 1125–32 (1950); Peck, *A Proposal to End NLRB Deferral to the Arbitration Process*, 60 Wash. L. Rev. 355, 365–68 (1985). If all mandatory subjects were treated as "frozen" during the term of a collective bargaining agreement, this would create a more stable period between negotiations, and perhaps the policy behind the Taft-Hartley amendments would be better served. *See supra* text accompanying notes 115–20. Of course, the parties would at all times be free to discuss voluntarily any unforeseen issue, or to utilize the grievance procedure provided in the collective bargaining agreement concerning the interpretation or application of that agreement.

The court suggested that the right to relocate may be found under a theory of implied management
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The result from *UAW v. NLRB* is unsatisfactory to both management and labor. The Board's new rule from *Milwaukee Spring II* remains untested at the appellate level because in *UAW v. NLRB* the court did not decide the case on the same basis as the Board. An affirmance of the rule in *Milwaukee Spring II* by an appellate court is questionable because of the Ninth Circuit's affirmance of the opposite rule in *Los Angeles Marine*,\(^\text{146}\) which prohibited relocations if motivated by a desire to avoid the terms of the collective bargaining agreement. An employer who follows Milwaukee Spring's course risks an eventual rejection of *Milwaukee Spring II* by the appellate courts. In any event, an appellate decision in conflict with the Ninth Circuit's decision in *Los Angeles Marine* would need to be resolved in the Supreme Court.\(^\text{147}\)

Labor remains dissatisfied because the Board has been free to apply the new rule from *Milwaukee Spring II* to other relocation cases.\(^\text{148}\) A challenge to the rule from *Milwaukee Spring II* must work its way through the Board before presentation to an appellate court. The challenge may be too costly for such an unpredictable result. The D.C. Circuit's abrupt rejection of the union's economic pressure argument will delay the full development of this argument in the appellate courts, if not completely destroy it.

The D.C. Circuit's manipulation of the Board's decision in *Milwaukee Spring II* was perhaps a signal to unions that the economic pressure argument should be abandoned, and that the rule from *Los Angeles Marine* should be revived. By not affirming the employer's inherent right to make relocation decisions, the court has maintained a glimmer of the rule developed by the Ninth Circuit in *Los Angeles Marine*; and by writing an opinion that can be easily limited to its facts,\(^\text{149}\) the court has avoided issuing a decision that unions must struggle hopelessly to distinguish in the future.

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\(^{146}\) See supra text accompanying notes 36-38.

\(^{147}\) Although the Board often reverses a previous Board rule, see supra note 55, court decisions tend to be more stable, especially when the basis of the decision lies in law and not policy. A decision by the Supreme Court would stabilize both the federal appellate courts and the Board on this issue.


\(^{149}\) The narrow facts were the existence of a zipper clause, a broad management rights clause, and no challenge by the union to the assumed coverage of the management rights clause. Also, the union did not ask the court to uphold the rule from *Los Angeles Marine*. 

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V. BREACH OF CONTRACT AS AN ALTERNATE REMEDY

A. Good Faith and Fair Dealing

Under the collective bargaining agreement, a condition precedent to being paid the union wages is the performance of union work. Although the employer is not expressly obligated to provide union work, implicit in every contract is a concept of good faith and fair dealing, or more specifically, a duty of cooperation. Because a collective bargaining agreement is a contract between the union and the employer, this concept applies to collective bargaining agreements under the NLRA, imposing on the employer a duty to cooperate by not relocating union work to avoid the terms of the agreement.

Although substantial overlap exists between conduct that is an unfair labor practice and conduct that is a breach of contract, the NLRA provides distinct remedies. Unfair labor practice complaints are within the jurisdiction of the Board and are prosecuted by the General Counsel. The Board’s role is to regulate the application of national labor policy.

150. J. CALAMARI & J. PERILLO, THE LAW OF CONTRACTS § 11-32, at 443 & n.78 (2d ed. 1977). “Good faith performance . . . of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party.” RESTATEMENT (SECOND) OF CONTRACTS § 205, at 100 (1981). “Subterfuges and evasions violate the obligation of good faith in performance even though the actor believes his conduct to be justified.” Id. “Interference with or failure to cooperate in the other party’s performance” are examples of bad faith. Id. at 100-01.


A party can enforce a collective bargaining agreement in federal district court under § 301. Section 301(a) reads as follows:

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

152. See, e.g., Hines v. Anchor Motor Freight, 424 U.S. 554, 562 (1976) (the strong policy favoring judicial enforcement of collective bargaining agreements is sufficient to sustain jurisdiction over conduct that is also an unfair labor practice).

153. Textile Workers v. Lincoln Mills, 335 U.S. 448, 452 (1957). The version of § 8 of the Taft-Hartley Act originally included breach of the collective bargaining agreement as an unfair labor practice, but was deleted because of the available remedy under § 301. H.R. 3020, 80th Cong., 1st Sess. 81 (1947) (as passed Senate), reprinted in LEGISLATIVE HISTORY, supra note 110, at 239; 93 CONG. REC. 6600 (1947), reprinted in LEGISLATIVE HISTORY, supra note 110, at 1539.

154. NLRA § 3(d); 29 U.S.C. § 153(d).
Midterm Work Relocation

Breach of contract complaints, on the other hand, are not within the Board’s jurisdiction, and may be brought by the union in any federal district court with jurisdiction over the parties.155

In United Steelworkers Local 4264 v. New Park Mining Co.,156 the union alleged, among other things, that the employer discharged all employees and then entered into leasing agreements with some of the former employees in order to avoid the terms of the collective bargaining agreement and continue its mining operations.157 The district court dismissed the case, holding that the discharge was within the employer’s management prerogative, and at most an unfair labor practice and within the Board’s jurisdiction.158 The Tenth Circuit reversed, finding that the federal district court had jurisdiction under section 301(a) of the NLRA.159 The court held that every contract contains an implied covenant that neither party will do anything that would destroy the other party’s right to receive the fruits of the contract.160 The court acknowledged the employer’s right to run its business and its right to subcontract work unless the collective bargaining agreement expressly prohibits subcontracting, but held that this action cannot be a subterfuge for evading the obligations of the collective bargaining agreement.161

The underlying facts in UAW v. NLRB were very similar to the facts in New Park Mining. All parties conceded that Milwaukee Spring’s motivation throughout was to avoid the wage provisions of the collective bargaining agreement.162 First, Milwaukee Spring attempted to persuade the union to make wage concessions, later making threats to relocate in an attempt to coerce the concessions.163 Second, when the union refused to make the wage concessions, the employer relocated the facilities to the McHenry Spring site, where the labor rates were substantially lower.164 As in New Park Mining, the employer in UAW v. NLRB sought to avoid the labor wage rates in the Milwaukee Spring collective bargaining agreement. The decision to relocate was a “subterfuge” for evading these obligations, and was therefore a breach of the covenant of good faith and fair dealing. Regardless of whether the midterm repudiation of the collective bargaining agreement

155. NLRA § 301(a); 29 U.S.C. § 185(a). See also United Steelworkers, Local 4264 v. New Park Mining Co., 273 F.2d 352, 358 (10th Cir. 1959).
156. 273 F.2d 352 (10th Cir. 1959).
158. Id. at 355.
159. Id. at 357–58.
160. Id. at 357.
161. Id.
162. Milwaukee Spring I, 265 N.L.R.B. at 206.
163. Id. at 207.
164. Id. See supra note 44.
was a midterm modification and an unfair labor practice, it was nevertheless a breach of contract.

B. Unfair Labor Practice or Breach of Contract?

The Board’s decision in Milwaukee Spring II demonstrates the difficulty in applying section 8(d) to midterm relocation problems.\(^{165}\) To find a violation of section 8(d) when an employer relocates operations, as the Board did in Los Angeles Marine\(^ {166}\) and Milwaukee Spring I,\(^ {167}\) the Board must find an indirect modification of the collective bargaining agreement\(^ {168}\) or a repudiation of the agreement as a whole,\(^ {169}\) because no specific term in the collective bargaining agreement is modified by the relocation.\(^ {170}\) Because this interpretation goes beyond the express language of section 8(d), the Board was able to alter this application of national labor policy in Milwaukee Spring II. Furthermore, the “midterm repudiation” rule from Los Angeles Marine and Milwaukee Spring I required a finding that the employer’s subjective intent in relocating was to avoid the terms of the collective bargaining agreement before the Board would find a midterm modification. Because section 8(d) does not expressly address subjective intent, the Board in Milwaukee Spring II easily replaced this requirement with an objective, per se rule.\(^ {171}\)

In Milwaukee Spring II and UAW v. NLRB, the union apparently was aware that the midterm repudiation rule was soon to be overruled by the Board, and chose a different theory on which to base its unfair labor practice charge. This theory was the economic pressure argument, focusing not on the relocation itself, but rather on the employer’s threat to relocate unless the union made midterm wage concessions.\(^ {172}\) This economic pressure argument was ignored by the Board\(^ {173}\) and rejected by the D.C. Circuit.\(^ {174}\) The economic pressure argument was easily rejected and the midterm repudiation rule was easily replaced because these theories did not have support in specific language in the NLRA, or a clear interpretation by the Supreme Court.

Congress or the Supreme Court may eventually clarify the language of section 8(d) to remove any doubt as to whether a relocation is an illegal

\(^ {165}\) See supra text accompanying notes 54–64.
\(^ {166}\) See supra text accompanying notes 32–35.
\(^ {167}\) See supra text accompanying notes 48–53.
\(^ {168}\) See supra text accompanying note 35.
\(^ {169}\) See supra text accompanying note 34.
\(^ {170}\) See supra text accompanying notes 59–60.
\(^ {171}\) See supra text accompanying notes 63–64.
\(^ {172}\) See supra text accompanying notes 84–90.
\(^ {173}\) See supra text accompanying note 69.
\(^ {174}\) See supra text accompanying notes 82–83.
midterm modification of a collective bargaining agreement, or whether the NLRA prohibits the use of economic pressure aimed at forcing midterm concessions. But until Congress or the Supreme Court takes such action, and as long as the Board maintains its current posture, unions should also pursue a common law breach of contract action on the collective bargaining agreement under section 301. The common law unquestionably imposes a duty of good faith and fair dealing in every contractual relationship without reliance on explicit statutory language. Under the breach of contract action, the parties’ subjective motivation is the deciding factor and a proper subject of inquiry. Under the unfair labor practice action, subjective motivation is a proper subject of inquiry only when the current Board so holds.

VI. CONCLUSION

When an employer seeks to avoid the terms of a collective bargaining agreement, either by direct action or by indirect pressure, the Board should find that the employer has committed an unfair labor practice. This finding should be limited to cases similar to the situation at Milwaukee Spring, where the employer’s predominant motive was to avoid the express terms of the collective bargaining agreement, such as labor rates, and where the only business justification is a desire to realize a higher return in the enterprise.

If the relocation is not a mandatory subject of bargaining because it is motivated by factors unrelated to labor costs, then the employer should be free to unilaterally relocate the business, after bargaining with the union over the effects of the relocation. Likewise, if the business justification in seeking to avoid the terms of the collective bargaining agreement lies in substantial financial risk to the employer, this may outweigh the adverse effect on employee rights. Also, if the management rights clause grants the employer the clear and unmistakable right to make relocation decisions, the employer should be free to relocate.

Alternatively, given the current Board’s reluctance to protect employee rights, the federal district courts should find a breach of contract upon a showing of similar facts. The basis for the breach is the employer’s attempt to avoid the collective bargaining agreement, in violation of the implied covenant of good faith, fair dealing, and cooperation inherent in every contract. Legitimate business necessity, or good faith, will excuse the breach.

175. See supra note 10.
176. See supra text accompanying notes 150–51.
The policy underlying the provisions in the NLRA governing unfair labor practices under section 8 and breach of contract under section 301 is stability of contract and industrial peace. The guidelines above provide a workable framework for the resolution of midterm relocation cases while protecting the legitimate interests of both labor and management. The desire to create an easy per se rule is not sufficient reason to sacrifice national labor policy and the interests of individual employees who have invested much of their lives in a continuing employment relationship.

Bryan E. Lee