CHAPTER 4

DOWNSIZING AND OTHER RESTRUCTURING PROBLEMS

MANAGEMENT PERSPECTIVE

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The New Competitive Era

Once last year's election campaign had ended, the media suddenly awoke to the fact that the touted recession was largely over. But what was not over, and apparently will not be over for some time, is the phenomenon of intensified foreign and domestic competition. This has had many ramifications for U.S. business. It has resulted, for example, in increased research and technological change because in some industries the foreign competition—particularly in the Far East—had surpassed U.S. industries in innovative concepts, not only in product design but also in manufacturing methods and the design of manufacturing equipment. The competition has stimulated new and intensified promotional and sales efforts by U.S. companies. Many had rested too long on past laurels and allowed their sales personnel to become little more than order takers.

Improved manufacturing equipment, new production methods, and more effective marketing techniques have enabled many U.S. businesses to make real progress toward restoring their market share. But these newly awakened companies, and even companies whose market share had not been seriously threatened, have taken harder and harder looks at reducing costs. They must do so to meet intensified price competition and to strengthen profitability, in order to attract new capital and enhance the availability of credit.

The result of this close attention to costs has led business enterprises throughout the nation to take strong steps to reduce

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labor costs. Almost every week we read in the newspapers of major cutbacks in employment, even by companies whose bottom line has continued to look good, but particularly at companies whose earnings have been trending downward. Many of these cuts have hit hardest on middle management and white collar employees. Many companies realized that they had too many layers of supervision, too much unnecessary paperwork, more administrative personnel than were really necessary, and in some instances staffs which had grown because of a stronger desire by managers to build empires, not to make really significant contributions to the success of the business.

Reductions in the blue collar work force, however, have also been substantial. In some instances companies have decided to survive with fewer manufacturing plants, consolidating or discontinuing less profitable or less modern facilities. Virtually all companies have been streamlining production methodology through technologically advanced, labor-saving equipment. Jobs have been eliminated or consolidated where work formerly had expanded to fill the available time, or at least where it had not contracted although old crew sizes were no longer needed. In some instances, after a realistic reappraisal of each individual job classification, it was found that spending full time doing certain jobs was unnecessary.

New methodology changes have resulted from the team concept, or what is sometimes called cellular production. In this relatively new methodology, the concept of each individual blue collar worker with one little niche and one set of rigid and specialized job classification duties—once the typical situation in most of U.S. industry, at least in plants with substantial employment—is rapidly becoming passe. Instead, teams, production cells, or work groups function as a unit, sharing job duties and expertise, and developing new work habits, often by consensus of employees rather than by direction of supervisors. Employee involvement is becoming an everyday subject in meetings of managerial personnel. Employers are discovering that, once employees are given real responsibility for shop-floor operations, they are more innovative and more enthusiastic than old-line supervisors in improving productivity.

Some people say this new manufacturing methodology can be successful only in nonunion facilities, where old patterns of work are less frozen by contract or by past practice than in the typical union setting. However, the General Motors Saturn operation suggests that it is possible to utilize these new concepts in union settings—although with some difficulty and with considerable training for both rank-and-file employees and supervisors. I am not aware of the total cost, but General Motors spent an extraordinary sum of money in lengthy training of union and management personnel, sending many of them to Japan and to other work sites for the purpose of demonstrating how this new shop-floor involvement can work for the benefit of both employees and employers. Not all employees or supervisors or plant managers are flexible enough to change old habits, but it can be done and is being done in union shops as well as nonunion shops.

The Impact of the Changed Economic Climate on Arbitration

Speaking as a management advocate, I would like to suggest that arbitrators need to understand these concepts and to recognize that major restructuring, major changes in manufacturing methodology, and a resulting change in many employment practices are vital U.S. manufacturing needs. We have lost too many manufacturing jobs to foreign manufacturers. We have seen too many bastions of manufacturing disappear. Plants have moved to new locations, either foreign or domestic, where new manufacturing methodology is better accepted by a new corps of managers and shop employees. In many instances unions have been slow to recognize the necessity of these changes. So, I fear, have some arbitrators. Arbitrators have been and will continue to be called upon to resolve contract interpretation disputes growing out of union and employee opposition to such changes.

Some of the old labels are still there, and you will recognize them—for example, past practice, job security, job content, subcontracting, work standards, work schedules, and the alleged inherent right of unions to exercise a veto power over changes.

Job Content

Most arbitrators hold that, in the absence of specific contractual restrictions, management has the right to eliminate, combine, and restructure jobs. Examples of such decisions are *Container Corp. of America*,[1] holding that a wage provision requiring union consent to a change in hourly rates and job classifications did not restrict management's right to eliminate job classifications, and *Hennepin*

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[1]91 LA 329 (Rains, 1988).

Paper Co.,[2] holding that the contractual specification of wage rates and classifications placed no restriction on the employer's right to combine jobs. Management rights have been held to include reallocation of remaining jobs if there was no longer a full-time need for a job classification—a frequent result of technological change. Note, for example, the decision in *Courier Journal*,[3] where new high-tech video display terminals were established in the advertising department, and management was found justified in transferring these restructured duties from the traditional composing room to the advertising department.

Similarly, combining job classifications has been recognized as a legitimate management function when methods of operation were changing.[4] This right has been sustained even when the change in technology resulted in the transfer from bargaining unit employees to more highly skilled nonunion salaried technicians.[5] An employer has also been held entitled to transfer work from one seniority unit to another when the change was made as a result of a need for increasing productivity.[6]

Yet some decisions hold that the mere fact that a job classification is included in the contract means that classification must be retained and must remain unchanged unless there has been union consent.[7] Some decisions have restricted the right to combine jobs or to change job content in the absence of union agreement.[8] Some arbitrators have implied that, while minor changes may be made unilaterally in job duties, any major change requires union consent.[9] Arbitrators have ruled that an employer does not have the right to assign work not previously included in the employee's classification.[10] Unless required by a specific contract clause, this seems totally unrealistic in this time of rapid change. The newer methodology of employee work groups, cellular production, and employee teams necessitates a wide range of new or different job duties; this cannot occur under a rigid job classification system.

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[2]83 LA 214 (Gallagher, 1984).
[3]93 LA 227 (Tharp, 1989).
[4]*United States Steel Corp.*, 85 LA 1026 (Petersen, 1985).
[5]*Otis Elevator Co.*, 95 LA 20 (Dworkin, 1990); *Iowa-Illinois Gas & Elec. Co.*, 91 LA 1181 (Volz, 1988); *Century Plaza Hotel*, 83 LA 1314 (Kaufman, 1984).
[6]*Bethlehem Steel Corp.*, 82 LA 758 (Henle, 1984).
[7]*Transportation Mgmt. of Tenn.*, 93 LA 73 (Holley, 1989); *Southern Extract Co.*, 63 LA 796 (Butler, 1974).
[8]*Allied Plant Maintenance Co.*, 88 LA 963 (Bankston, 1987).
[9]*Nashville Gas Co.*, 88 LA 580 (Kilroy, 1986); *Bethlehem Steel Corp.*, 85 LA 1079 (Henle, 1985).
[10]*Amax Coal Co.*, 82 LA 846 (Witney, 1984).

Arbitrators frequently hold that a change in job duties necessitates a fresh look at or renegotiation of wage rates. For example, it has long been held that assemblers assigned to operate different machines are entitled to a wage rate comparable to the machine operator rate rather than the assembler rate.[11] Under many agreements temporary assignments have called for a changed wage rate, particularly when the transfer is to the work normally performed at a higher rated job classification.[12] But these have become outmoded concepts when work groups freely interchange duties and no one keeps records of when employees move from one machine or task to another. These arrangements were not contemplated when temporary transfer clauses were first negotiated.

Employers have long insisted on the right unilaterally to establish, change, and even eliminate, if necessary, job content. In a union setting changes in employee duties may require negotiation or arbitration of appropriate wage rates reflecting the changes in job duties. Some unions and some arbitrators have not understood this concept but have insisted that job content is a negotiable subject. That was always wrong because it struck at the root of a free, entrepreneurial economy. For the private enterprise system to work, the entrepreneur must decide what is needed to make the product and how that must be done. The union has the right to bargain about what its constituency—the employees—will accept as payment for what the entrepreneur wants done. An arbitrator who holds that job content is *not* the function of the entrepreneur is undercutting the fundamental structure of a free economy.

The arbitrator who takes that approach today is cutting into the roots of the new methodology which the business community has developed in adjusting to the age of Aquarius. Today's entrepreneurs must still decide what needs to be done, but in some settings they have learned a new way to get that accomplished. By giving the individual work groups the responsibility for devising how they can best contribute to getting the job done and thus fulfill the business plan most successfully, an employer can unleash a new supply of creative energy.

While that system is in the experimental stage, an arbitrator who allows the voice of collectivism to impede the growth of new workplace individuality is striking at a changing means of production in

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[11] *Brass Prods. Co.*, 85 LA 465 (Lipson, 1985).

[12] *Florida Power Corp.*, 85 LA 619 (Flannagan, 1985); *Engelhard Indus.*, 82 LA 680 (Nicholas, 1985).

a free economy. Free collective bargaining sanctions the collective determination of the wages to be paid to those who are implementing and devising the methodology. But to collectivize the methodology and to place it in the hands of an institution doom the system to economic failure, as happened under Communism. Arbitrators need to understand that. If that concept is still alive in union and/or arbitral quarters, it must be recognized as obsolete, no longer fitting the kind of restructuring changes required in today's economy.

Wage Rates

Arbitrators face difficult tasks in the wage rate area. An employee who used to operate a lathe full time may now be called upon to operate a milling machine, to do assembly and occasional setups on equipment with which he was only barely familiar before, and to work with other employees to accomplish minor maintenance and repair tasks which used to be handled by the maintenance department. What wage rate is that employee now entitled to?

The easy answer is that management and the union must negotiate wage rates under those circumstances. But contracts are normally renegotiated only every three years, and in the fast-changing manufacturing methodology picture neither management nor the union will want to wait that long to resolve these matters. Furthermore, neither wants to risk interruptions in work caused by strikes during a contract. Hence, if the parties do not agree, arbitrators will have to face up to these kinds of determinations—which they often ducked in the older traditional labor-management picture.

This requires more arbitrators who are familiar with job evaluation techniques, and possibly more permanent arbitrators or permanent arbitration panels, because of an increasing need for arbitrators who understand fully the complex manufacturing methodology in a particular plant or industry. Arbitration, like most professional jobs these days, is becoming more complex, specialized, and difficult.

Manning

Essentially the same considerations are involved when new methodology, not always related to technological developments, results in a managerial decision to reduce crew sizes or to lay off surplus employees. Here, too, arbitrators have recognized the necessity of decreasing crew sizes due to technological change. For example, in *Union Carbide*[13] introduction of a digital electronic weighing system resulted in a decrease in the number of stores' clerks because through this new equipment their work load was at a minimal level.

Modification of methodology can bring new business success and in the long run more and better jobs. But in the short run it may result in a net decrease in jobs and resulting layoffs. While seniority must be recognized, management's basic right to determine the size of the work force has generally been upheld by arbitrators. This must continue as the governing precedent while U.S. industry adjusts to an increasingly competitive environment. Arbitration decisions which reject the employer's right to reduce crew sizes[14] are anachronistic. Ultimately this rigidity means the elimination not only of a few jobs but, more likely, of all jobs because an employer who lumbers along with a bloated work force cannot compete with more efficient competitors.

Work Schedules

Another developing feature of our changing industrial climate is a departure from rigid work schedules, including flex time and part-time work. Arbitrators have traditionally been less willing to approve schedule changes without union consent. For example, some arbitrators have held that reference in the contract to a "regularly scheduled work week" prevents an employer from scheduling different starting times on different days of the week.[15] Others, however, have recognized that even a maintenance-of-standards clause referring to hours of work does not establish a guarantee of hours.[16] Still others have found that the reference in a contract to a "normal" work day and a "normal" work week does not establish guarantees and permits management flexibility in scheduling hours.[17]

Of course, arbitrators may not rewrite contracts, especially those which specifically set forth shift hours and require negotiation to agreement for any change. However, I predict that we will see fewer examples of that type of contract. Highly restrictive, specific

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[13]84 LA 788 (Seinsheimer, 1985).

[14]*Bethlehem Steel Corp.*, 92 LA 553 (Witt, 1988); *United States Steel Corp.*, 62 LA 125 (Witt, 1973).

[15]*Ft. Dodge Laboratories Div.*, 87 LA 1290, 1293 (Smith, 1986).

[16]*Broekhuizen Produce Co* , 82 LA 221, 224 (Roumell, 1984).

[17]*Coca Cola Foods Div.*, 88 LA 129 (Naehring, 1986); *FMC Corp.*, 85 LA 18 (Karlins, 1985).

contract limitations on scheduling are not the norm, and they are fast becoming obsolete. Contracts will continue to specify when overtime and shift differentials must be paid and how differing work schedules are to be compensated. But flexibility in schedule changes is essential so that employers can meet production needs and adapt to the changing work habits of an increasingly diverse work force. In this time of change, arbitrators should not be too eager to impose rigid restrictions on such changes. Today's and tomorrow's schedules are far different from the traditional five-day week, eight hours a day, which was previously the norm in manufacturing. As more women enter the work force part time to spend time caring for their children, and as more employees with disabilities enter the work force under the Americans with Disabilities Act, arbitrators must recognize how drastically and how quickly old modes of operations must change. If these new life patterns, as well as the new intensively competitive economy, continue, as I think they will, arbitrators' thought patterns in this area are going to have to change.

Subcontracting

Another look into my crystal ball shows that arbitrators will face many more decisions relating to subcontracting either by that name or by new labels such as outsourcing and leased employees. As manufacturing employers review the need for technological change and develop new production methodology, they must take a harder look at whether their manufacturing facilities will provide the most sophisticated manufacturing methods. In some instances they are unable to obtain or to justify infusion of new capital necessary to purchase the most modern, efficient, high-quality, high-tech manufacturing equipment. Thus, they must find a supplier with the necessary modern equipment who can provide the product or its vital components at a cost enabling the manufacturer to produce at the market price. In that situation it is essential to subcontract part of the work which used to be done in-house. The supplier may be able to finance the high-tech, sophisticated equipment because it produces the same component for several manufacturers, thus justifying the capital investment. A single manufacturer without major volume may not be able economically to justify the capital necessary to buy that equipment. This requires subcontracting or outsourcing if the end-product manufacturer is to stay competitive, quality-wise and price-wise.

Even where sophisticated equipment is not involved, it may still be necessary to rely on outside sources. For example, a trucking company with a number of terminals around the country may decide to open a new terminal in a new location. Let us assume that this company has a nationwide union contract requiring (at least upon a showing of interest among a representative work force) the extension of the contract to the new terminal. The company undoubtedly has surveyed the area and has reasonable expectations that it will develop a substantial business in the new geographic area. However, rarely will an employer be able to estimate the time frame within which expansion will occur and the duration and stability of new business. New customers may well give this new facility an opportunity for but no guarantee of continuing business.

Those who know the trucking industry recognize that very substantial fluctuations, month by month, and even week by week or day by day, may result in the need for additional drivers and dock workers. In those circumstances, most trucking companies are likely to resort to "leased employees." Leasing companies have drivers and/or dock workers who are supplied to a dozen or even hundreds of different trucking companies on very short notice. In most cases, leasing companies can provide additional drivers in the early morning merely with notice of the need given on the previous afternoon. Similarly, when the trucking company needs fewer employees it simply notifies the leasing company to take the drivers and/or dock workers back. Thus, the trucking company has the flexibility to adapt to a highly uncertain situation.

This results in what has traditionally been called "contracting out." Unions dislike contracting out and want to preserve or build jobs for a regular group of employees to give them that elusive thing called "job security." Increasingly in both manufacturing and service industries, there is less and less job security. In many instances that insecurity is caused by the employer's lack of "customer security" or "price security" or "capital availability security." Thus, service industries and manufacturing industries must resort to outside sources for both products and labor on short notice. Today's business climate makes outsourcing or subcontracting or leased employees an absolute necessity for many businesses.

Arbitration decisions vary, some limiting an employer's right to subcontract and others upholding that right. As the Elkouris have observed, "Arbitrators are more likely to uphold the contracting out of work where it is justified by sound business reasons."[18] The National Labor Relations Board (NLRB) and the Supreme Court have had difficulty coming to grips with these issues. You are undoubtedly familiar with the Supreme Court decisions in *Fibreboard Paper Products Corp. v. NLRB*[19] and in *First National Maintenance Corp.*[20] The NLRB had to revisit this issue recently in *Dubuque Packing Co.*[21] The Board and the courts make a distinction between whether an employer must bargain about a subcontracting decision and whether it must bargain over that decision's impact or effects on the bargaining unit. Some arbitrators have made the same distinction.[22]

The courts, the Board, and arbitrators have fumbled for a formula to resolve these disputes. If arbitrators look at "sound business decisions" as the criteria, as the Elkouris suggest, and if they, the courts, and the NLRB look at those subjects "amenable to collective bargaining" and the influence of "labor costs," it becomes essential for them to understand and evaluate the facts underlying a decision to subcontract, or to close or relocate a plant. That decisionmaking is an increasingly complex job, requiring a more sophisticated understanding of the business world than is needed for discharge or call-in-pay cases.

The Role of Arbitrators

When arbitrators examine whether there is a "sound business reason" for plant closures, relocations, subcontracting, restructuring of jobs or schedules, they need to exercise considerable care. They are not as expert as the business executive in analyzing the factors involved in these decisions. More than lip service must be paid to the old cliche that arbitrators must not substitute their own judgment for that of the employer. In determining whether an employer has made a sound business decision, arbitrators must resist the temptation to second-guess the business executive's judgment.

My management clients and I urge that arbitrators, the NLRB, and the courts do not confuse whether the business decision was rational with whether it was the best one. Those of you who have

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[18]Elkouri & Elkouri, How Arbitration Works, 4th ed., Cum. Supp. (BNA Books, 1989), at 143.
[19]379 U.S. 203, 57 LRRM 2609 (1964).
[20]452 U.S. 666, 107 LRRM 2705 (1981).
[21]303 NLRB 386, 137 LRRM 1185 (1991).
[22]*Witco Chem. Corp.*, 89 LA 349 (Rothstein, 1987).

had experience in the business world (either through operating your own business or managing one for someone else or serving on a board of directors) know that business decisions are often hard to make. One rational person may decide something quite different from another person who is equally rational. I have acquired some humility in this area through serving on boards of directors where I disagreed with managerial decisions which proved over time to be absolutely correct. My own views were rational (at least I thought so and even my colleagues on the board who disagreed with me so conceded). Nevertheless, I was wrong, as subsequent facts demonstrated. The risk taker must make those difficult decisions, bearing in mind that, if the decision proves wrong, it may mean the destruction of the business. Arbitrators should not be too eager to make such a decision for the risk taker since they do not share in the risk or its consequences.

I am not suggesting that contracts do not mean what they say or that arbitrators should ignore clear but severely limiting restrictions in an agreement. Those provisions must be followed, but those are the easy cases for arbitrators. The harder cases occur where the contract is silent or where subcontracting, job content changes, restructuring of departmental or seniority lines, or work schedule changes may be initiated in only the most general terms. These are the cases in which arbitrators should recognize the difficulties of business decisionmaking in today's complex, highly competitive, and ever-changing world and not be too eager to step into the shoes of the managers with responsibility for those decisions.

I hope that you will find this a useful exposition of the concerns of management and the kind of arbitral issues arising in an era of rapid change and major restructuring in an intensively competitive world economy.

LABOR PERSPECTIVE

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On the surface our topic today would appear to be academic—even antiseptic—in nature. Downsizing. Restructuring. Or, as they call it in the steel industry, rationalizing. These are cold, unfeeling, impersonal words. To fully appreciate the scope of our discussion, we must first put some faces to these words—the faces of at least

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250,000 steelworkers once employed in the basic steel industry, the faces of their families, the faces of three-quarters of a million other workers whose livelihoods were tied to those steelworker jobs, and the faces of *their* families. Then add other industries like autos, coal, textiles, heavy equipment, clothing, electronics, computers, and construction, and throw in the forsaken communities that these workers call home. Now you get some idea of the devastating repercussions the United States has endured from downsizing, restructuring, and rationalizing. That is hardly academic—hardly antiseptic—as we have learned painfully in the Steelworkers over the past dozen years.

We have sought to minimize this impact on our members in a number of ways. For those whose jobs have been lost permanently, we have negotiated early retirements, pension supplements, severance pay, retraining, interplant job opportunities, and whatever other physical or moral support we could offer. For those still on the job, we have tough new language in our agreements governing the contracting-out of work, protections for senior employees, and employee involvement and empowerment programs in the broad spectrum of corporate decisionmaking—issues such as technological development, training, and business planning—from the shop floor to the board room. And we have what we consider unequivocally essential for effective problem resolution in this area—guaranteed employment security.

One needs only to pick up a newspaper to know that instances of downsizing, restructuring, and rationalizing are not short term or temporary but are continuing apace—some fueled by the persistent failure of the U.S. economy to function effectively and to grow, some caused by the technological revolution, some by unfair trade, and some resulting from corporate flight to maintain authoritarian and exploitative structures somewhere else in America or in Third World countries with their bare-bones wages and vast profit potential.

Disputes arising from this phenomenon are relatively new in industries like steel, which once had high levels of employment. How do we deal with them? The best solution for today's problems—from a purely industrial relations perspective, as distinct from the much broader societal issues—is the same as yesterday's—employers ought to honor the contracts they have signed. Of course, that would create unemployment elsewhere—specifically, I suppose, among you and your peers. But I'm not simply being facetious. I know of employers who have willfully violated their agreements, saying that they would rather take their chances in arbitration. For some it has been an ill-conceived and expensive gamble, requiring payment of back wages amounting to millions of dollars, capital expenditures, and either callback of laid-off workers or hiring of new employees. Others, unfortunately, have prevailed before arbitrators wary of imposing these penalties, justified though they may be.

On the other hand, we have an excellent situation in this regard in our contract and relationship with National Steel. Since 1986 we have had in place what we call a cooperative partnership agreement that, among other things, guarantees employment security and involves our members in decisions from the shop floor to the executive suite. A plus to this agreement is that, whereas we once had hundreds of grievances and arbitrations pending, we now have a mere handful. And I apologize for that to you practitioners who may be from Michigan or Indiana. I suppose additional apologies may be in order, because we have just negotiated a similar agreement with Inland Steel, which we expect will provide the basis for similar settlements across the industry.

Many of the problems we have been attempting to surmount in this workplace revolution have their roots in the discredited Taylorism theory of management, whereby managers manage, workers work, and, if your job is to turn a screw, you turn the screw, no questions asked.

In order to protect themselves as best they could against this dehumanizing, workers-as-a-cost scheme which pursued layoffs at every opportunity, workers and their unions rightly insisted on and won strict job classifications and work rules, along with strict adherence to the principles of seniority. These became among the most fundamental elements and achievements of trade unionism in collective bargaining, and these are areas which are seriously under review, and in some cases seriously under attack, in today's changing workplace.

What we see in the most egregious cases are employers attempting to drastically reduce the number of employees, to unilaterally impose added duties and/or responsibilities to work assignments, to make layoffs or provide employment opportunities in violation of seniority rules, to contract-out work that properly should be performed by our members, and to transfer work to other locations or close units permanently. When these improper and destructive actions are attempted, they are, obviously, absolutely unacceptable. These attitudes are disappointing, particularly in light of the progress we had made in our relationships with many employers over the past decade. This progress resulted from the industry's financial difficulties as well as an increasing awareness that the contribution of workers and their organizations is a critical component in the enterprise's success. For confirmation of this statement, I refer you once more to the National Steel relationship. In a recent *Wall Street Journal*[1] ad, the company credited our worker involvement program with saving it $100 million in 1991 alone.

We have numerous examples of this throughout the union. Workers at Republic Engineered Steel, an employee-owned facility, implemented savings of $60 million. At Wheeling-Pittsburgh Steel our members have saved the company millions and retrieved previously contracted-out work in the process. One of these tasks was the modernization of a galvanizing line, which resulted in improved yield, productivity gains, and lower raw material costs. The conceptualization, design, construction, and installation were all done by company personnel at a savings of 60 percent on a job that in times past would have gone to an outside contractor. At another company, a group of union members and—heaven forbid—a supervisor developed a new system for processing steel that is saving $3 million a year in energy costs in their plant. A team of pipefitters at another mill put together a manual for repairing steam leaks, which has saved the company a million dollars a year and, there too, returned to our members work that previously had been assigned to an outside contractor. In a more radical departure from the norm, the union and an LTV subsidiary have an agreement that provides for flexible work assignments with a weekly salary—instead of hourly wages—based on the highest skill attained, not the specific job worked, along with profit-sharing and gain-sharing plans.

As you can see from these few illustrations, we have not been unaware of the industry's problems or unsympathetic to them. Indeed, we have negotiated—and the key word is negotiated—work-rule changes and work force reductions. Our members have made huge financial sacrifices, which have combined to make the U.S. steel industry the most efficient in the world in terms of man-hours required to produce a ton of steel—even though it is not the most technologically advanced.

[1]October 22, 1992.

Now that circumstances are improving and future prospects appear much brighter, our purpose is to continue to use the collective bargaining instrument to build the "union environment" workplace of the future—a workplace that combines the best in the basic values of the past with the best that the learning experiences of the massive restructuring and globalization of the economy of the 1980s require and make possible. We call our bargaining program this year "New Directions." Our bargaining committees have informally dubbed it the "twelve points of light." Its focus is on building the workplace and enterprise of the future in ways that meet the needs both of the enterprise and of the people who invest their lives in it. In plain words, we're saying, "Let's put restructuring and rebuilding in a positive context. Let's develop a satisfying, creative, productive, secure, opportunity-creating, learning-oriented work culture in the steel industry."

We view the New Directions approach not as a defensive response to our circumstances, but as a creative and positive solution developed logically from initiatives we undertook to confront the challenges of the 1980s. Consider the following:

1. We entered the 1980s with Labor-Management Participation Teams. We move into the 1990s with a fully developed approach of union/worker involvement and empowerment from the shop floor to the board room, including representation on boards of directors.

2. We entered the 1980s with layoffs, shutdowns, and devastation. We move into the 1990s with a well-developed approach to employment security as the essential foundation for workplace restructuring.

3. We entered the 1980s with a desperate need for new technologies at almost any price. We move into the 1990s with a technology program that involves the workers not from the day the new technology arrives but from the day of its conception.

4. We entered the 1980s with worker training a haphazard, on-again off-again process depending much more on last year's profits than on next year's needs. We move into the 1990s with the assessment of training needs and the development of appropriate apprenticeship and other training programs a matter of joint union and management participation and decisionmaking.

A critical building block for the New Directions program, in which arbitrators have been most important participants, has been the issue of contracting out. We decided early on, during the crisis of the 1980s, that if we were going to save the companies and the industry (and we had little other option), we did not intend to save them for outside contractors. Instead we would save as many companies as possible for the steelworkers who had built them and invested their lives in them. We therefore negotiated strong contracting-out language in our 1986 agreements. With some minor exceptions the language required that our members perform all work they were capable of performing. Cost or lack of personnel would not justify contracting out. Lack of equipment would not in most cases justify contracting out. All the major companies agreed, with the exception of USX, which locked out our members for six months, during which it lost more than $2 billion, before coming to its senses.

This arrangement has worked well for both our members and the companies. It has, of course, preserved employment, but it also has forced the companies to think wisely and to make better management decisions. Now when they have a logistical problem, they are more prone to develop a workable plan, encouraging one of the most important needs in American manufacturing, namely, a serious, in-depth focus on an enterprise's human resources not as a liability but as an asset to be worked with in the most effective possible way. The unspoken message to the workers when they see their work going out the door, or somebody else coming in to do it, could hardly be more negative. Moreover, no outside contractor can possibly bring to the enterprise a commitment equal to that of the employees themselves, nor does our arbitration experience suggest that contractors are for the most part cheaper. In many cases, although the hourly rate contractors pay their employees may be lower than that of our members, the rate they are charging may be considerably higher than our total employment costs.

The contracting-out language was strengthened in 1989, and we intend to strengthen it even further in the current round of bargaining. Despite the language and despite the mutual benefits, we continue to see some violations, as many of you may know. We had a case recently where a company closed a shipping terminal, moved the operation nine miles away, and hired an outside firm to handle the work. We brought the matter to arbitration, and the company was ordered to reopen the old terminal, reinstate our members, and pay them back wages. This type of corporate conduct is just plain silly. It does nothing except harm the corporation and its employees. It is expensive and wasteful, and lends itself to corrupt possibilities with outside vendors.

A continuing commitment to the principles of seniority ranks alongside the elimination of contracting out in the union's development of the workplace of the 1990s. As advancing technology increases the need for a more highly trained work force, we must ensure that present employees are not forgotten and pushed aside and that they have every opportunity to improve their skills to the levels required by the new processes and new procedures. For example, when job assignment decisions are made in restructuring situations, relative ability clauses should not be used to deny senior workers assignments when all they need is some basic familiarization with the work. And the merging of trades must be accomplished with a judicious mix, which encourages workers to pursue the new arrangements while protecting the rights of senior employees to maintain their original craft status. In those situations where downsizing is necessary, it should be achieved through attrition, early retirement, and reduced overtime.

The union's overarching role in this process is to take every step possible to encourage a successful U.S. steel industry to provide good, productive employment. For arbitrators, the challenges will be as new and as varied as the evolving issues, and as traditional as the reasonable and proper application of seniority. In all cases, there will be questions:

1. Are we cognizant of the significant break with the past that many of these changes represent, and sensitive to the need to proceed with care and by agreement, so as not to build hostilities and resentments with the potential to create counterproductive results?
2. Has the elimination of jobs, the combination of jobs, or the adjustment of job content been carried out in a manner consistent with the agreement?
3. Is the pay for jobs to which content has been added commensurate with the added responsibility?

In arriving at answers, one must remember as a central premise that the re-creation of sweat-shop conditions, which labor struggled for generations to eliminate, is not the purpose of today's changes.

While it is clearly inappropriate that outmoded arrangements prevent the achievement of quality and productivity in our workplaces, it is equally inappropriate, particularly given today's level of technological and scientific advancement, to develop (as seems to be happening in some nonunion settings) a new sophisticated level of sweat-shop exploitation. It may be an exaggeration to say that operators who perform minor maintenance are subjected to sweat-shop conditions, but in this area, too, there undoubtedly will be opportunities for creative problem solving and adjudication.

Without question the agreements between the parties will determine how these changes are to be managed. There will also be concerns, from the perspective both of the operators and of the maintenance forces, as to the appropriateness of specific tasks and supervisory decisions. In extreme cases there will be questions as to whether discipline is an appropriate means for achieving the benefits of change. The union's predisposition is that successful workplace change can best be brought about within an employment security structure, by processes of full union and worker involvement in developing the changes and in preparing for their implementation. These changes must be accomplished with full compliance with the principles of seniority in terms of security and opportunity, and with total respect for the safety and occupational health requirements of the workplace.

The union's key message in dealing with restructuring and rebuilding the steel industry—and the attendant issues of workplace change, training and technology, seniority, and the quality of work life—emphasizes union/worker voice, involvement, participation, collective agreement, shared responsibility, and shared decisionmaking. It is the union's view that its members are principal stockholders and investors in their enterprises—literally investors in those situations in which concessions were given in the mid-1980s or in those which have been partially or totally ESOPed—real investors in all of them. More than any other investors, they are interested in and committed to the long term.

No worker I have ever known has taken delight in the rapid demise of the company or its constant teetering on the edge of collapse. The message of the 1990s is that workers and their unions not only must be, but are, part of the solution, not part of the problem. Their accepted, recognized, and empowered participation is an unconditionally essential ingredient for success. We would like to achieve these agreements and administer them in ways that largely reduce, if not eliminate, the possibility of disputes, but we all realize that result is almost unknown. There remains, therefore, a need for skilled, wise arbitrators and effective arbitration procedures to decide a range of issues and concerns much wider in scope and with potentially more significant consequences than ever before.

Comment

EDWARD E. HALES*

The effects of worldwide competitive forces and a slow domestic and international economy have resulted in limited growth for many U.S. companies. As a result, employers have been forced to downsize and restructure, to improve production techniques, to design new and better production equipment, and to concentrate as never before on cutting cost. However, it appears that downsizing and restructuring for competitive purposes have greatly affected employees as a result of reducing the work force and closing and consolidating plants. While this phenomenon continues to develop, it does not appear that the arbitration process is responsible to any significant degree for the problems that exist.

Concern has been expressed about how arbitrators may react to downsizing, restructuring, and the new methodology and technology that employers must undertake to become competitive in the global economic environment. From both a management and a labor perspective, Ed Miller and Lynn Williams have raised some important issues confronting their specific interests in dealing with downsizing in today's global marketplace. Now I will make a few observations from an arbitrator's perspective.

In dealing with the issues of elimination, combination, and changes in job content, resulting from restructuring and downsizing, I am reminded of the early arbitration awards issued shortly after World War II, when many employers had to convert from wartime production to the production of domestic goods. Many of those awards recognized that it was unreasonable to require employers to function as they did in the past. Therefore, with the end of World War II, changes were permitted on the factory floor. Today, many companies, especially those who had been heavily involved in defense production, are faced with the same restructuring. I see no reason why arbitrators will not grant the same flexibility to employers that they granted following World War II. I think arbitrators will follow those well-reasoned awards issued after World War II.

We frequently see transfer of work from one seniority unit to another when skilled trades are involved. Many awards recognize

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that management may have the best information and judgment as to the employees who can best perform the disputed work. However, arbitrators tend to frown upon the changes involving arbitrary and capricious actions.

In dealing with the employer's right to unilaterally change or eliminate *job content,* the key words appear to be "if necessary" and if no specific prohibition on these changes is clearly apparent in the labor agreement.

As to *wage rate* issues, where an employee is required to perform higher and lower wage rate jobs during the same day or the same pay period, the question arises as to what rate of pay should apply. This appears to be an area where the parties are better suited to resolve their differences, and they should be encouraged to negotiate a wage structure that is equitable to both employee and employer. I recommend that such cases be remanded to the parties with suggestions for settlement, but retaining jurisdiction if an agreement cannot be reached.

In connection with an arbitrator's review of management business decisions, management people know that arbitrators never substitute their judgment for management's. Seriously, it seems that those individuals with experience in a particular business are in a better position to make the best business judgments. Further, it is generally the employer who has the necessary data and other information to make a more reasonable business decision. Many arbitrators recognize that the adoption of new methodology and technology—which represents genuine progress toward efficiency and better production methods to become more competitive—is a positive development in the workplace. Further, arbitrators take quite seriously the limitation on their authority imposed by the language in most labor agreements (which advocates like to read to us at hearings), generally stating: "The arbitrator shall have no power or authority to add to, subtract from, or modify any of the terms of this agreement." Thus, it is clear that arbitrators deal with disputes that the parties present to them within the context of the limitations that the parties have placed on that authority in the labor agreement.

The problems created by downsizing and other restructuring measures have caused a great deal of stress on the traditional labor-management relationship, especially by the dislocation of thousands of workers. The notion that an individual will stay with the same employer for decades, remain a loyal worker, and receive job security and ample benefits in return appears to be a dying phenomenon. In the current economic environment, where more employers are trying to operate as lean and efficient entities, to outsource or subcontract work, and permanently to layoff workers and close plants, the traditional model of labor-management relations that existed in the past is rapidly changing.

I would be remiss if I did not take a few moments to touch upon congressional reaction to downsizing and restructuring. The most serious problem created by this action is the dislocation of workers. To address this problem, Congress passed the Worker Adjustment and Retraining Notification Act (WARN) on August 4, 1988, effective February 4, 1989. The Act is complex in its implementation, but its principal thrust is that employers are required to provide a minimum of 60 days advance notice to affected employees, unions, and units of local government when a mass layoff or plant closing is contemplated. WARN was passed over the strong objection of employer groups, who argued that the legislation would deprive them of the management flexibility needed to make quick, sound business judgments. On the other hand, unions and local government units argued that they as well as employees need the advance notice protection of the Act to lessen the economic hardship caused by plant closings and mass layoffs. The General Accounting Office (GAO), whose research staff has been studying the impact of plant closings and economic dislocations, indicates that workers who learn of a layoff or plant closing far enough in advance can find new jobs and maintain their standard of living better than without such notice.

The WARN Act does not appear to alter the traditional labor-management bargaining obligations established under the National Labor Relations Act (NLRA) or the Railway Labor Act, but some labor leaders take issue with that assertion because of WARN's exceptions to employers and the number of employers exempt from coverage. However, the Act does not alter the normal bargaining obligations that are required under the NLRA or other statutes.

As an example, under the NLRA employers are generally obligated to give notice to employees' collective bargaining representatives and to bargain upon request about the effects of plant-closing decisions. Additionally, employers may be obligated to bargain about the plant-closure decision itself. An employer's NLRA obligation may exist even though the number of affected employees may not reach the level necessary to qualify the action as a "plant closing" or "mass layoff" within WARN's definitions.

As indicated earlier, there are exceptions in the Act, and the exception that appears to be generating the most controversy and litigation is the one termed "Unforeseeable Business Circumstances." Under this exception, an employer may order a "plant closing" or a "mass layoff" with less than 60 days notice if such action is necessitated by business circumstances that were not reasonably foreseen at the time the 60-day notice would have been required.

Last week (May 1993), in a case involving General Dynamics and the Machinists Union, a federal district court ruled that the company did not violate WARN when it furloughed 3,000 workers in 1991, after the Navy cancelled the $57 billion A-12 Avenger warplane program. The company apparently advanced "unforeseeable business circumstances" as a defense to former employees' claims, seeking an estimated $12 million in back pay. Of interest is the fact that the A-12 warplane was the largest weapons program ever terminated by the Pentagon, ultimately costing General Dynamics and McDonnell-Douglas Corporation approximately 9,000 jobs.

Union advocates, who deal with WARN litigation regularly, maintain that the St. Louis case reduces the protection afforded workers and expands a large legal loophole for employers, particularly military contractors, to avoid the 60-day notice required by the Act. In defending the court's ruling, military contractors assert that it clarifies the conditions under which employees must be notified of a probable layoff, whereas previously they had to issue a warning notice each time the Pentagon barked.

Although WARN has been in effect only about four years, an attempt is already being made to have Congress reform it. In the eyes of reform proponents, the two most pressing problems are: (1) that too many employers are exempt from the Act's coverage, and (2) that Congress failed to establish an enforcement mechanism. At the time the Act was passed, Congress declined to grant oversight responsibility to any governmental agency; instead, it left enforcement to the federal courts.

Another problem Congress did not anticipate at the time the Act was passed is the ripple effect or secondary impact that plant closings or mass layoffs have on the workers of companies doing business with the original company involved. For example, when Sears announced that it would close its catalog division, its printer, R.R. Donnelly & Sons Co., announced that it would close its southside Chicago plant, which employs about 660 people. Further, John Skorburg, chief economist and director of governmental affairs at Chicagoland Chamber of Commerce, estimated that the Sears decision would cause the layoff of another 6,000 employees at other Illinois companies doing business with Sears.

What does the future portend for labor and management in this era of downsizing and restructuring? And what can and must labor and management do so that employers can remain viable in the sea of global competition?

The recent course of action taken by AT&T and its two main unions, the Communication Workers of America and the International Brotherhood of Electrical Workers, may prove to be the answer. As you know, the telecommunications industry lost its monopoly protection back in the early 1980s. AT&T and its unions, after a few years of spirited collective bargaining, have embarked on a new partnership arrangement in order to return AT&T to dominance in the telecommunications industry. Last year AT&T and its unions signed a labor agreement that calls for an unusual degree of labor-management cooperation. The unions contend that the new contract guarantees them the right to receive information used in the company's decisionmaking process and calls for labor's participation in business strategy decisions. In return for flexibility granted to management in a variety of areas, the unions get a voice in decisionmaking and a company commitment, among other things, to employment security, education, and training or retraining. A recent by-product of this new cooperative venture in the 1992 contract was a recent conference in New Jersey, where approximately 1,000 members of the AT&T work force, divided equally between management and union members, met to discuss, plan, and prepare for the "Workplace of the Future."

More of these initiatives between labor and management will be needed in the future. The arrangement between AT&T and its unions bears watching to see whether they have discovered a new method to become more competitive in the new global market. Will these new cooperative ventures between labor and management make arbitration and arbitrators obsolete? I think not. As long as there is a difference of opinion on labor matters, the arbitration process and arbitrators will be needed.