Work Preservation

Language that Helps; Language that Hurts

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A Strikeable Issue?

- Unions strike over an employer discontinuing health care coverage.
- Unions strike over an employer discontinuing pension contributions.
- Unions *SHOULD* be striking over language allowing employers to remove union jobs entirely.

Model Language

Notwithstanding any other provision in this Agreement to the contrary, for purposes of preserving work and job opportunities for the employees covered by this Agreement, the Employer agrees that no operation, work or services of the kind, nature or type covered by, or presently performed by, or hereafter assigned to, the collective bargaining unit by the Employer will be subcontracted, transferred, leased, diverted, assigned or conveyed in full or in part (hereafter referred to as "divert" or "subcontract") by the Employer to any other plant, business, person, or non-unit employees, or to any other mode of operation. In addition, the Employer agrees that it will not subcontract or divert the work presently performed by, or hereafter assigned to, its bargaining unit employees to non-employee owner-operators, independent, distributors or other business entities owned and/or controlled by the Employer, or its parent, subsidiaries or affiliates.

Applicable Federal Precedent

Bargaining *Without* a Work Preservation Clause

Defending Against Subcontracting *WITHOUT* a Work Preservation Clause

Fibreboard Paper Products Corp.: The U.S. Supreme Court considered the question of whether a decision to contract employment to workers outside the bargaining unit, while union members were available and capable of working fell within the bargaining duty imposed by the NLRA.

The Court held that the language in §8(d)- "terms and conditions of employment"- covered this instance of subcontracting since the decision dealt with termination of employment, and did not fundamentally alter the company's basic operation.

SCOTUS Narrows Its Reasoning

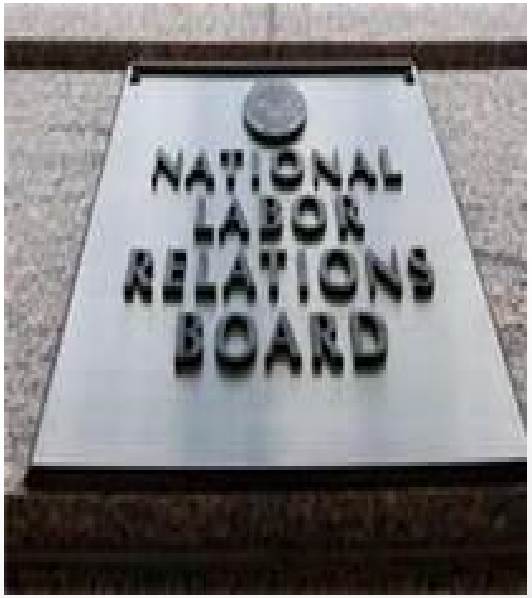
First National Maintenance Corp.: The Court addressed the question of whether an employer must negotiate with the certified representative of its employees over its decision to close a part of its business.

The Court held that bargaining was not required in this situation because the decision involved was akin to the decision of "whether to be in business at all" and was not "primarily" about conditions of employment.

In a footnote, the Court stated that other types of management decisions, "such as plant relocations" should be considered on their particular facts.

OTIS II NLRB Treatment of Management Decisions

- The Board in *Otis II* announced the standard that is most often cited for determining whether a management decision would be subject to a duty of mandatory bargaining.
- The Board held it would impose such a duty on "all decisions which *turn upon a reduction of labor costs…* whether the decision may be characterized as subcontracting, reorganization, consolidation, or relocation…"



Applicable Federal Precedent

Bargaining WITH a Work Preservation Clause

Allowable Work Preservation Clauses

The U.S. Supreme Court on work preservation clauses:

"Whether an agreement is a lawful work preservation agreement depends on 'whether, under all the surrounding circumstances, the Union's objective was preservation of work for [bargaining unit] employees, or whether the [agreement was] tactically calculated to satisfy union objectives elsewhere… The touchstone is whether the agreement or its maintenance is addressed to the labor relations of the contracting employer *vis-à-vis* his own employees." *National Woodwork Manufacturers Assn. v. NLRB,* 386 U.S. 612 (1967)

TEST for Determining if a Work Preservation Clause is Proper

In *NLRB v. International Longshoremen's Association (ILA)*, the Supreme Court announced the following test to determine whether a work preservation clause is proper:

1. The clause must have as its objective the preservation of work traditionally performed by employees represented by the union.
2. The contracting employer must have the power to give the employees the work in question- the so-called "right of control" test.

What Type of Work is "Traditionally Performed"?

Under the first prong of the *ILA Test,* work must be "traditionally performed" in order to be properly protected by a work preservation clause. The objective of the agreement must be work-preservation, rather than satisfaction of the union's goals beyond the unit.

Work is "traditionally performed" if it is work that has been in the traditional scope of the bargaining unit's work as evidenced by the contractual recognition clause and the history of the parties' conduct under it. *GHR Energy Corp. (NLRB).* This includes:

- Work the bargaining- unit employees formerly performed, but was later lost; and
- Work the bargaining unit employees had performed and are still performing at the time of the work-preservation agreement.

Notable Arbitration Cases

Sara Lee Bakery Group (Local No. 289)

Facts: Sara Lee allowed non-union third party drivers to pick-up goods from the production facility instead of using Sara Lee union drivers.

Relevant Contract Language:

(Competitive Distribution) If the Employer has proof that a retail grocer… is offered any bakery products and/or a distribution system by a baker not covered by this specific Agreement, the Employer… may adopt such products or distribution immediately to prevent loss of business to competitor.

(Management Rights Clause) The Management of the business in all its phases and details shall remain solely vested in the Employer except as specifically modified by this agreement.

Decision: Arbitrator relied almost exclusively on the language above to conclude there was no support for the Union position that Employer was violating the CBA by allowing third party drivers to transfer goods.

Cintas Corp. (Local No. 414)

Facts: Cintas acquired a new facility and merged/ re-routed the existing sales territories, which were allocated geographically according to delivery address. After the merger, non-union and union territories overlapped. The Company began assigning business developed in a geographic area covered by the unionized facilities to non-union drivers.

Relevant Contract Language: (Re-Routing) In any market served by both Union-represented Company route-driving employees and by Company route-driving employees not represented by the Union, new business developed or acquired in that market will be allocated according to the geographical location of the customers, with those customers in the established geographical areas served by the Union-represented Company route-driving employees being assigned to bargaining unit personnel.

Decision: The Arbitrator found that the above contract language was clear that new business developed or acquired by the Company in a market covered by bargaining-unit employees, must be assigned to bargaining unit personnel. He was unwilling to look past the clear language of the contract.

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Kraft Foods Global, Inc. (Local No. 51)

Facts: Kraft moved a portion of work from its Farmington, Michigan union facility to its Grand Rapids non-union facility. The Farmington employment levels were not adversely impacted.

Relevant Contract Language:

(Jurisdictional Clause) The Employer agrees to respect the jurisdictional rules of the Union and shall not direct, or allow its employees or persons other than employees in bargaining unit classifications… to perform work that has been recognized as work of the bargaining unit employees.

(Management Rights) The rights to determine the products to be distributed and its means and methods of operation as well as to plan, direct and control operations, schedule hours and to make and enforce reasonable rules are rights retained by management…"

kraft foods

Kraft Foods Global, Inc. (Local No. 51) Cont'd

Decision: The Arbitrator found the language in the CBA to be the most persuasive factor in this dispute. Though he recognized the CBA's jurisdiction clause preserves the Union's jurisdiction to the work being performed at the Farmington facility, the jurisdiction clause does not prohibit the Employer from moving the services areas in question to a different facility. The Arbitrator noted that the exercise of management rights can be restricted under the CBA's provisions, but there were no such restrictions in this case.

Language in Current IBT Collective Bargaining Agreements

Risky Language

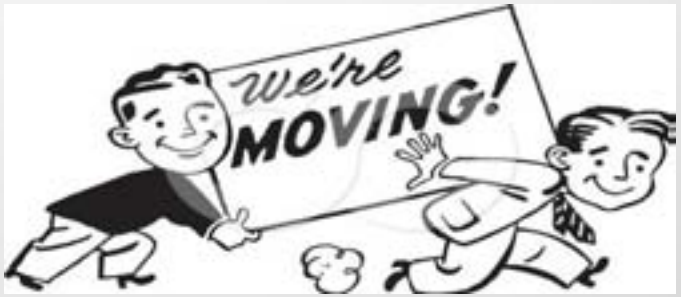
Dangerous Management Rights Clauses

- Local Union 952: The management of the business of the Employer, the direction of its working forces, including the right to hire, suspend or discharge for just cause, or to transfer or layoff employees because of lack of work or other economic reasons, the schedules and systems of operations, are prerogatives of the management…
- Local Union 560: The management of the Company's business and the direction of the working forces, including the right to transfer work, the right to plan and control distribution center operations, to hire, suspend or discharge for proper cause, the right to study or introduce new or improved methods or facilities, and the right to establish and maintain rules and regulations covering the operations of the distribution center, a violation of which shall be among the causes for discharge, are vested in the Company…
- Local Union 120 & 245: All rights not specifically limited by the expressed provisions of this Agreement shall be retained by the Company.

Protecting What's Right

Change of Location/ Termination

- Local Unions 89, 120, 245, 688, 886: Should operational and/or economical conditions arise that affect non-DSD operation, the Company maintains the right without penalty to discontinue this operation and move it to a location where the operational and/or *economical conditions are in the best interest of the Company*. It is understood that prior to the Company discontinuing the operation, it will meet with the Union to discuss the economic and/or operational concerns.
- Local Union 952: Should a unit of operation, or a part of such unit, close, be merged or move from its present location, the Employer and the Union shall meet for the purpose of determining the relative seniority standing of the employees affected.

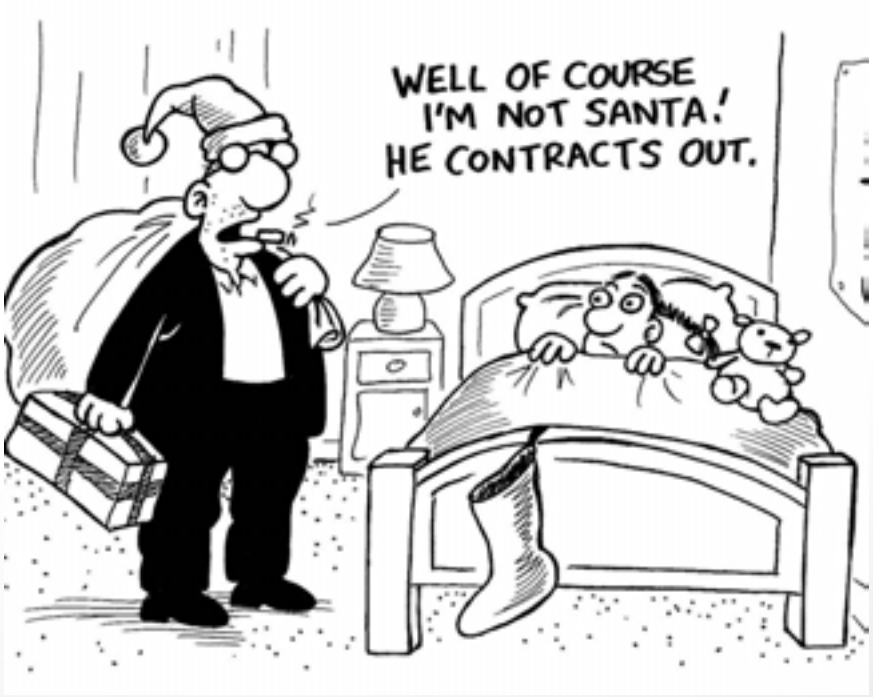


Discontinued Operation/ Sale of Company

- Local Union 344, 455, 926: Should the operational conditions arise that affect DSD operation, the Company maintains the right, without penalty, to discontinue this operation. It is understood that prior to the Company discontinuing the operation, the Company will discuss with the Union the economic impact of the Company's decision.
- Local 783: In the event of change of management or geographical location of plants, or sale of the Company, the present management shall use its best efforts to insure continuation of the provisions of this Agreement thereto during its prescribed period, it being agreed and understood that this article shall not be used as a device to change union representation or cause employees to lose seniority and representation by its present bargaining agent.

Subcontracting Clauses

Local 783: The Company shall notify the Union concerning the transfer or subcontracting of bargaining unit work affecting the status of employees presently performing the work. The Union shall have the opportunity of negotiating the effects of the change on the employees affected. If no agreement is reached, it shall be subject to the grievance procedure as set forth in Article 6 of this Agreement.



Case Study #1: Kellogg

Workplace Closure and Consolidation

Kellogg Background

- July 1, 2009: Local 926 entered into a collective bargaining agreement ("CBA") with Kellogg, effective through June 30, 2014.
- Local 926 represents approximately 14 truck drivers at Kellogg's Pittsburgh, PA distribution center.
- June 27, 2011: Local 52 and Kellogg entered into a CBA, effective through June 23, 2014.
- Local 52 represents approximately 30 stockhandlers and truck drivers at Kellogg's Akron, OH distribution center.

The Problem

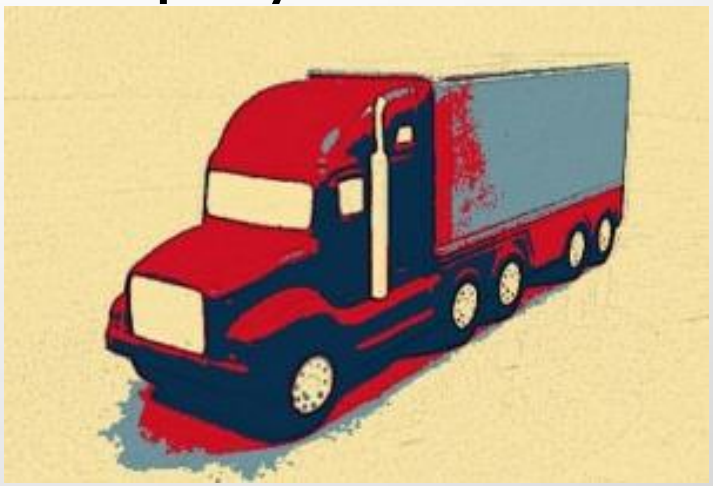
- Kellogg announced it intended to close its Akron and Pittsburgh distribution centers and relocate all of the work to a new distribution center in Warren, Ohio.
- Kellogg said it would layoff all Local 52 and Local 926 union employees, and relocate their work to the new Warren, Ohio facility.
- All delivery work in the new facility would be performed by *non-union* workers.

Relevant Contract Provisions

- Both CBAs were mid-term and contained the following provisions:
  - Prohibiting relocation except after bargaining
  - Prohibiting any performance of unit work by nonunion workers
  - Both CBAs specifically prohibited the assignment of bargaining work outside of the unit

Local 52's Article 24- Work Assignments

The Employer agrees to respect the jurisdictional rules of the Union and shall not direct or require employees or other persons other than the employees in the bargaining unit here involved, to perform work which is recognized as the work of the employees in the collective bargaining unit.

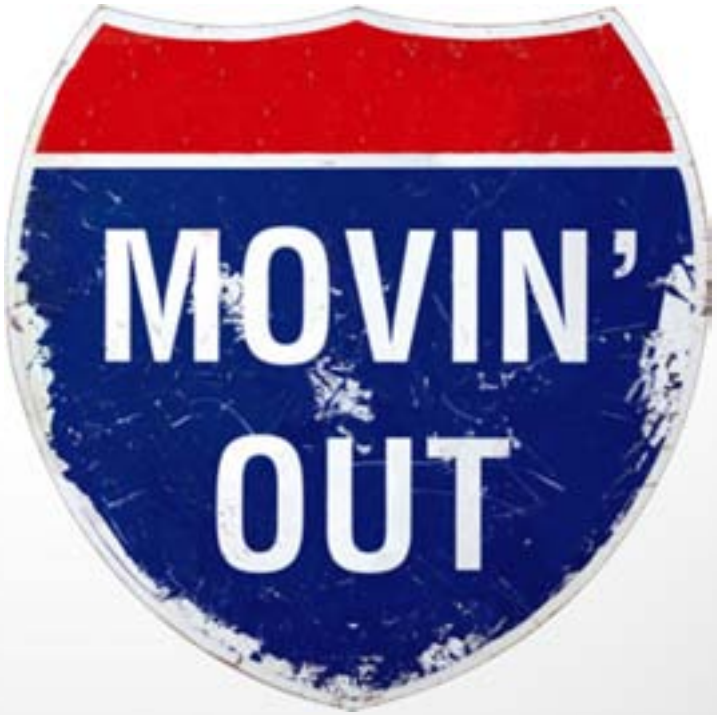


Local 52 Management Rights Clause

The management of the Company's business and the direction of the working forces, including the right to transfer work, the right to plan, direct and control distribution center operations, to hire, suspend or discharge for just cause, the right to study or introduce new or improved methods or facilities, and the right to establish and maintain rules and regulations covering the operations of the distribution center, a violation of which shall be among the causes for discipline, are vested in the Company, and provided, however, that this right shall be exercised with due regard for the reasonable rights of the employees and provided further that it will not be used for the purpose of discrimination against any Union Steward or any other member of the Union. It is understood, however, that any employee affected by this provision shall have the right to take up his or her complaint as provided in the Grievance Clause of this Agreement.

Local 926 Memorandum of Agreement

Should operational and/or economical conditions arise that affect DSD operation, the Company maintains the right without penalty to discontinue this operation and move it to a location where the operational and/or economic conditions are in the best interest of the Company. It is understood that prior to the Company discontinuing the operation, it will meet with the Union to discuss the economic and operations concerns…



Local 926 Management Rights Clause

All inherent and common law management functions and prerogatives which the Employer has not expressly modified or restricted by a specific provision of this Agreement are retained and vested exclusively in the Employer and the Employer shall continue to have exclusive right to take any action it deems appropriate in the management of the Distribution Center and direction of the work forces in accordance with its judgment. The Company shall abide by all federal, state, and local laws.

Union Actions to Remedy

- Kellogg refused to bargain with either Union about the decision to relocate their members' work and outsource it to nonunion workers.
- Both Unions filed class action grievances and concurrently requested to bargain with the Company.
- Kellogg denied the class action grievances.
- Both Unions appealed the grievances to arbitration but Kellogg refused to delay closure and outsourcing of work until after the arbitrator(s)' decisions.

Binding Memorandum of Understanding

The parties agree to neutrality/recognition and preferential hiring of Local 52 and Local 926 members (Akron and Pittsburgh Keebler facilities) into the new Warren, OH location (if the members chose this option).

Keebler will recognize Teamsters Local 52 at the new Warren, Ohio location subject to proof of majority status through "card checks" in accordance with applicable laws, if necessary. Keebler will remain neutral during this "card check" process, if necessary, through December 31, 2012.

The Company agrees to strongly review the recommendation of the union to consider a TSA location in the Pittsburgh area and provide an answer to this request no later than April 27, 2012. The company will provide the union with the business rationale if this cannot be done. If this is considered not to be a viable option by the Company, the parties agree to enter into "Effects" bargaining. If there are other options the union desires the company to consider, it will provide them no later than April 27, 2012…

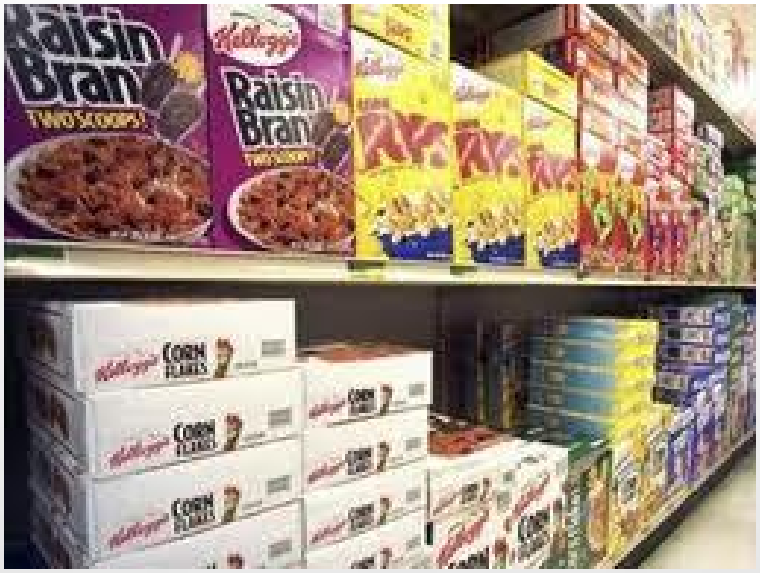
Further Company Action Against the Unions

After the Binding Memorandum of Understanding was signed, Kellogg:

- Hired a nonunion workforce for the Warren, Ohio Facility;
- Refused to transfer or hire any union workers from either Local 52 or Local 926;
- Withdrew recognition from Local 52;
- Failed to honor the provisions of the memorandum with respect to both Unions.

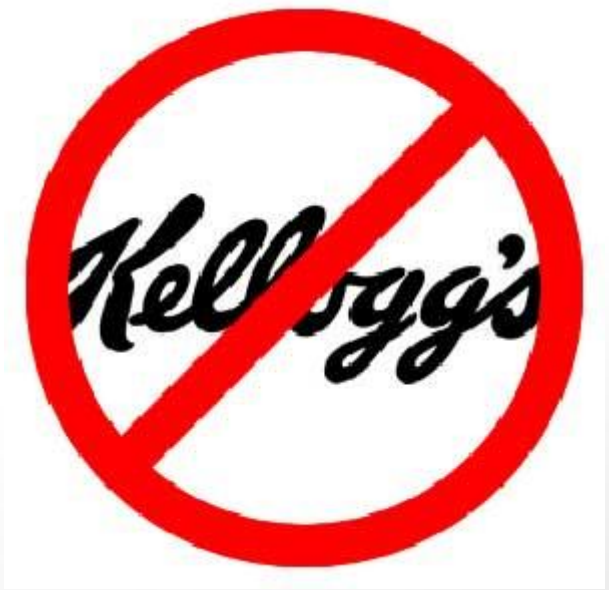
Current Status of Events

- Local 52 filed another class action grievance with Kellogg claiming the Company breached the Memorandum of Understanding.
- Kellogg never answered said grievance and continues to move forward with the relocation.



Union Actions Taken to Protect Union Work

- The Unions collectively filed a Complaint in United States Federal District Court against Kellogg alleging breach of contract and asking for a Status Quo Injunction. [The case was recently dismissed for lack of jurisdiction, but the Union intends to file a motion for reconsideration and notice of appeal.]
- The Unions filed unfair practices charges with the National Labor Relations Board.



Sample Contract Language that the Would Have Been Helpful to the Union

- (Simple Prohibition on Subcontracting) The Employer and the Union agree that stabilized employment is an important objective to be attained. Therefore, the Employer agrees that during the life of this Agreement, no work or services performed or thereafter assigned to the collective bargaining unit shall be subcontracted, transferred, leased or assigned in whole or in part to any other plant, person, or nonunit employees unless the express permission of the Union is obtained in writing.
- (In the Event of Transfer) In the event the Employer elects to permanently transfer operation(s) or jobs from one plant covered by this Agreement to another plant, an employee affected by such change shall have the right to transfer with the job(s)… Any transfer of employees resulting from this provision shall be on the basis that such employees are transferred with full service, seniority rights and the existing collective bargaining agreement.

Questions?

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