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Technology, Robotics, and the Work Preservation Doctrine: Future Considerations For Labor and Management

I. INTRODUCTION

Legal and industrial analysts have viewed technological innovation in the workplace as fundamental to successful competition in the international business market.¹ As other countries rapidly develop technologically advanced production methods, the United States is forced to follow suit.² Because of the competitive international market, robots have been developed which can perform a wide variety of highly technical and specialized tasks³ — everything from painting cars to performing human brain surgery.⁴

As robotics and other forms of automation become more prevalent in the workplace, analysts are examining the impact of technology on the human workforce.⁵ This is due to the fact that “[r]ealistically, most technological changes are designed to reduce the number of workers needed to complete a job.”⁶ While the reduction of labor costs and increases in profits through automation are legitimate management objectives, automation has caused unemployment and dis-

1. Comment, *Automation and the Work Preservation Doctrine: Accommodating Productivity and Job Security Interests*, 32 UCLA L. REV. 135, 135 n.1 (1984).

2. Japan is the most explicit example of economic success through automation and robotics. Once a nation with a reputation for “flimsy products,” Japan is now a leader in automated industry due to efficiency, high-quality robotics, and technology. *Technology's Impact on the Workforce*, HIGH TECH., June 1985, at 4; *Competition in the Japanese Robot Industry*, ROBOTICS TODAY, Oct. 1984, at 12. See generally R. PASCALE & A. ATHOS, *THE ART OF JAPANESE MANAGEMENT* (1981).

3. Although this comment generally examines recent automation in the form of robotics and related technology, issues raised and proposals examined are applicable to all forms of automation.

4. See, e.g., *Robots Man The Paint Booth at GM-Orion*, ROBOTICS TODAY, Apr. 1985, at 52 (robots used in automobile manufacturing plant); *Technology Update: Brain-Surgeon Robot Passes Test*, ROBOTICS TODAY, Apr. 1985, at 16 (robot arm used to assist in brain surgery).

5. See, e.g., Levitan & Johnson, *The Future of Work: Does It Belong to Us or to the Robots?*, MONTHLY LAB. REV., Sept. 1982, at 10, 11 (discussions and opinions on the impact of automation and related improvements on human workers).

6. Petrock & Grummon, *The Adoption of Technological Change Management Issues and Practices*, in 2 ROBOTS 8: CONFERENCE PROCEEDINGS — FUTURE CONSIDERATIONS 15-34, 15-41 (1984) (publication of Robotics International of SME).

placement of workers.⁷ This situation necessarily creates two conflicting interests.

The conflict between management's need to automate and remain economically competitive, and labor's need to preserve work for employees forms the basis of this comment. This comment examines each side's arguments and perspectives, analyzes the current law surrounding this issue, and concludes with some suggestions for the resolution or abrogation of future problems in this area.

II. THE COMPETING INTERESTS

A. *Management Perspectives*

Employers favor the implementation of robotics and other technology for various reasons. Among the many benefits cited are a proven quick return on a company's investment, productivity improvement ranging from twenty to sixty percent, and improved quality of product or process output.⁸ Many United States corporations have recognized the need to automate⁹ in order to remain competitive with offshore producers after the recession years.¹⁰ It appears that those businesses which have automated will be among the most successful in America.¹¹ While this may appear to paint a rosy picture for failing industries and a sagging economy, the road to success has been undermined by controversy and complexity.¹² Nevertheless, management appears dedicated to making the technological advances re-

7. Tucker, *GM: Shifting to Automatic*, HIGH TECH., May 1985, at 26.

The average robot in a GM assembly plant displaces at least two workers — even taking into account the additional employees required to install and maintain the robots — according to Harly Shaiken, a technology analyst at MIT. 'Since Hamtramck [GM's newest automated factory] is a new plant, they won't have many problems with laying people off,' he says. 'But layoffs will occur in the older Buick, Olds, and Cadillac assembly plants as work is transferred over to Hamtramck.' In total, Shaiken estimates that at least 40,000 GM jobs will be displaced by automation by the mid-1990's.

Id. at 28.

8. V. Estes, *Robot Justification — A Lot More Than Dollars and Cents*, 1 ROBOTS 8: CONFERENCE PROCEEDINGS — APPLICATIONS FOR TODAY 2-1, 2-4 (1984).

9. Davis, *Renaissance on the Factory Floor*, HIGH TECH., May 1985, at 24.

10. Recession years are generally considered to have taken place between 1979 and 1982. During that time the stockmarket was depressed and inflation was rampant. Companies staggered under the impact of plunging sales levels, low or absent profit performance, and the loss of hundreds of thousand of jobs. Mittelstadt, *Robotics — Thoughts about the Future*, 1 ROBOTS 8: CONFERENCE PROCEEDINGS — APPLICATIONS FOR TODAY 2-12, 2-14 (1984).

11. See generally *Automation U.S.A.*, Special Report, HIGH TECH., May 1985, at 24-47 (articles discuss automation activities of five major U.S. companies and address related issues).

12. Brody, *Overcoming Barriers to Automation*, HIGH TECH., May 1985, at 41. This article cites institutional adversity to change, high cost, complicated and unsuccessful ventures, and communication problems as examples of barriers to automation. However, it appears to greatly underestimate the concern shared by most labor organizations and many workers that automation will eliminate jobs.

quired to maintain America's international economic success in both production and process industries, especially in industries where labor costs are high. For example, General Motors expects to invest over one billion dollars to install approximately 20,000 robots in its facilities by 1990.¹³

In unionized manufacturing industries, where wages are inordinately high, robots are even more economically intriguing to employers. In the automobile industry, for example, a human employee generally costs an employer between twenty-three and twenty-four dollars an hour, including benefits, while an industrial robot which can perform the same job costs approximately six dollars an hour, including maintenance costs.¹⁴ The economic reorganization of industry in America caused by foreign competition and automation, such as that taking place at General Motors, has resulted in plant closures,¹⁵ displacement, and unemployment.¹⁶ This is the point at which the economic rights and interests of management most seriously conflict with the economic rights and interests of labor.

B. Labor Perspectives

"It is beyond question that the United States has always been a 'labor society.'"¹⁷ Automation is perceived by many unions and laborers as a serious threat to the status of the worker in society. Consequently, automation-related issues are rarely favored by unions.¹⁸ Technological advancement eliminates work in various ways. While some workers are retrained to perform new work which has been created by technology, such as maintenance and programming, authorities contend that the number of new jobs created by technology is significantly less than the number of those displaced.¹⁹ "Thus,

13. Foulkes & Hirsch, *People Make Robots Work*, HARV. BUS. REV., Jan.-Feb. 1984, at 94, 95.

14. *Id.*

15. See generally *First Nat'l Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981). The Court held that an employer has no duty to discuss or bargain about a decision to close all or part of a business. The employer's right to make such management decisions was held to outweigh labor's right to bargain about such events. *Id.* at 686. See *infra* notes 93-97 and accompanying text for an examination of the effect of this case on automation-related decisions.

16. See Foulkes & Hirsch, *supra* note 13, at 94; Technology's Impact, *supra* note 2, at 4.

17. Miller, *Were the Luddites Necessarily Wrong?: A Note on the Constitutionality of the "New Technology Bill of Rights,"* 8 NOVA L.J. 515, 516 (1984).

18. Note, *Automation and Collective Bargaining*, 84 HARV. L. REV. 1822, 1822-23 (1971).

19. Comment, *supra* note 1, at 136 n.4.

the long-term effect of robotics [and related automation] would be the unemployment of a large number of unskilled or semi-skilled workers who literally could not be absorbed into the existing employment environment primarily because of their lack of technical training."²⁰ This situation has elicited not just labor union concern, but the serious concern of both legal scholars and economists.²¹ This concern is justified. "Some researchers estimate that the new generation of 'smart' robots, equipped with rudimentary vision or tactile sense, could displace as many as 3.8 million workers."²² Short of displacement, fears have been expressed that automation will result in highly trained employees being reclassified into lower skilled positions with a corresponding reduction in wages.²³

A case in point involves the members of the International Association of Machinists (IAM). Machinists have been displaced by a number of low-skilled machine operators supported by only a few highly skilled service employees.²⁴ Unemployment and a lower level of skills possessed by the average worker have necessarily resulted. Additionally, the machinists charge the government with compounding this problem by promoting low level vocational training and encouraging automation without labor's input or representation.²⁵

In response to this problem, the IAM has developed a proposed Bill of Rights that would force management to address technology-related issues which the IAM claims are being ignored.²⁶ Additionally, un-

20. Comment, *Robotics in the Workplace: The Employer's Duty to Bargain Over its Implementation and Effect on the Worker*, 24 SANTA CLARA L. REV. 917, 920-21 (1984). "It is conceivable that blue collar workers in manufacturing could eventually become as rare as farmworkers." *Bargaining for Jobs in the Automated Factory — Must Managers Consult Labor When Robots Go Marching In?*, 4 CAL. LAW. Jan. 1984, at 28, 31 (quoting AFL-CIO official Dennis Charnot).

21. See generally *Symposium: Workers' Rights and the New Technologies*, 8 NOVA L.J. 481 (1984).

22. Foulkes & Hirsch, *supra* note 13, at 94 (footnote omitted).

23. Note, *supra* note 18, at 1822-23.

24. See *Symposium*, *supra* note 21, at 482-83.

25. *Id.*

26. Proposed Bill of Rights

Congress hereby amends the National Labor Relations Act, Railway Labor Act, and other appropriate Acts to declare a national labor policy through a New Technology Bill of Rights:

I

New Technology shall be used in a way that creates jobs and promotes community-wide and national full employment.

II

Unit labor cost savings and labor productivity gains resulting from the use of new technology shall be shared with workers at the local enterprise level and shall not be permitted to accrue excessively or exclusively for the gain of capital, management, and shareholders.

Reduced work hours and increased leisure time made possible by new technology shall result in no loss of real income or decline in living standards for workers affected at the local enterprise level.

ions in general promote automation-related issues as subjects of collective bargaining agreements²⁷ and have sought to designate them as a mandatory subject²⁸ in order to insure that labor's interests and

III

Local communities, the states, and the nation have a right to require employers to pay a replacement tax on all machinery, equipment, robots, and production systems that displace workers, cause unemployment and thereby decrease local, state, and federal revenues.

IV

New Technology shall improve the conditions of work and shall enhance and expand the opportunities for knowledge, skills and compensation of workers. Displaced workers shall be entitled to training, retraining, and subsequent placement or reemployment.

V

New Technology shall be used to develop and strengthen the U.S. industrial base, consistent with the Full Employment goal and national security requirements, before it is licensed or otherwise exported abroad.

VI

New Technology shall be evaluated in terms of worker safety and health and shall not be destructive of the workplace environment, nor shall it be used at the expense of the community's natural environment.

VII

Workers, through their trade unions and bargaining units, shall have an absolute right to participate in all phases of management deliberations and decisions that lead or could lead to the introduction of new technology or the changing of the workplace system design, work processes, and procedures for doing work, including the shutdown or transfer of work, capital, plant, and equipment.

VII[sic]

Workers shall have the right to monitor control room centers and control stations and the new technology shall not be used to monitor, measure or otherwise control the work practices and work standards of individual workers, at the point of work.

IX

Storage of an individual worker's personal data and information file by the employer shall be tightly controlled and the collection and/or release and dissemination of information with respect to race, religious, or political activities and beliefs, records of physical and mental health disorders and treatments, records of arrests and felony charges or convictions, information concerning sexual preferences and conduct, information concerning internal and private family matters, and information regarding an individual's financial condition or credit worthiness shall not be permitted, except in rare circumstances related to health, and then only after consultation with a family or union-appointed physician, psychiatrist, or member of the clergy. The right of an individual worker to inspect his or her personal data file shall at all times be absolute and open.

X

When the New Technology is employed in the production of military goods and services, workers, through their trade union and bargaining agent, have a right to bargain with management over the establishment of Alternative Production Committees, which shall design ways to adopt that technology to socially useful production and products in the civilian sector of the economy.

Symposium, *supra* note 21, at 483-85.

27. Note, *supra* note 18, at 1823.

28. Mandatory subjects of bargaining directly or indirectly address wages, hours of

needs are addressed when management is confronted with the decision to automate.

Union efforts to negotiate automation-related issues with management have been stultified by current legal standards regarding subjects of mandatory collective bargaining.²⁹ Courts and the National Labor Relations Board (NLRB) have to date been unable to provide operative guidelines for explaining the extent of the duty to address automation issues in collective bargaining. Generally, however, management has not been required to negotiate with unions over such decisions. The rationale for judicial restraint in this area is largely due to the fact that automation requires major structural changes and extensive costs which generally fall into the classification of capital improvement, an area which management traditionally has the right to control. The fact that courts recognize management's right to make such major structural and financial changes without being required to consult labor, necessarily reduces labor's ability to force input into automation-related decisions.³⁰

Consequently, where automation threatens to displace workers, labor has turned to negotiating work preservation provisions into collective bargaining agreements. These provisions are called work preservation clauses³¹ and have become a major element in many collective bargaining agreements.³² Most work preservation clauses contain provisions similar to those found in the IAM's proposed New Technology Bill of Rights³³ such as worker participation rights, wage saving provisions, and retraining for displaced workers.

III. WORK PRESERVATION AND THE LAW

A. NLRA

Under section 7 of the National Labor Relations Act (NLRA), certain types of employee concerted activities are protected. Employees may engage in concerted activities for purposes of collective bargain-

work or working conditions. It is an unfair labor practice for either side to refuse to negotiate over a topic that is classified as a mandatory subject, and it may also be considered a violation of the duty to bargain in good faith. THE DEVELOPING LABOR LAW (C. Morris 2d ed. 1983); see also R. ESTES, LABOR RELATIONS HANDBOOK, in INDUS. REL. GUIDE (P-H) ¶ 50,001, ¶ 50,455 (1983).

29. Management is not required to bargain over all subjects proposed by the union. Subjects which are not mandatory are permissive. Parties have complete discretion to determine whether they wish to address the subjects classified as permissive during bargaining. See NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342, 349 (1958). See *infra* notes 86-99 for a discussion of the duty to bargain.

30. Comment, *supra* note 1, at 136-38. See also Leap & Barrilleaux Pizzolaho, *Robotics Technology: the Implications for Collective Bargaining and Labor Law*, 34 LAB. L.J. 697, 697-703 (1983).

31. Comment, *supra* note 1, at 139.

32. *Id.* at 139 n.17.

33. See *supra* note 26.

ing or other mutual aid or protection.³⁴ This provision includes lawful activities calculated to improve or protect wages, hours, and working conditions. Work preservation activity has been held to be an activity relating to working conditions and, as such, has been considered a concerted activity.³⁵

While concerted activity to preserve work is arguably protected, a problem arises when such activities interfere with the rights of a neutral third party. This is because section 8 of the NLRA prohibits secondary activity,³⁶ which is activity that attempts to reach out and affect the rights of a third party and is "calculated to satisfy union objectives elsewhere."³⁷ Most work preservation efforts include both primary and secondary activity.³⁸ This is due to the fact that although the activity primarily concerns preserving the work of a particular unit, the employer may be required, under a work preservation or work allocation clause, to return previously subcontracted or transferred work to the original bargaining unit.³⁹

It has been argued that work preservation activities involve different goals than those Congress intended to prohibit by the enactment of section 8's prohibition against secondary activity.⁴⁰ Regardless of the union's work preservation legitimacy, courts and the NLRB originally applied a "cease doing business" analysis⁴¹ to work preservation clauses based on an as-applied factual examination.⁴² This resulted in confusion among the courts and the NLRB and the lack of a per se

34. 29 U.S.C. § 157 (1982). Concerted activity consists of employees acting in a group to protect collectively bargained or statutory rights. *See also*, INDUS. REL. GUIDE (P-H) *supra* note 28, at ¶ 50,661.

35. *See Fibreboard Paper Prod. Corp. v. NLRB*, 379 U.S. 203, 209-10 (1964) (citing Pub. L. Ch. 120 § 8(d), 61 stat. 142 (1947)) (held that subcontracting work previously performed by unit members was a condition of employment).

36. While primary activity affects employer-employee relationships directly within the bargaining unit, secondary activity, in the form of sympathy strikes, coercive bargaining, and walk-outs may extend well beyond the unit. Because of the obvious problems such activities have the potential to cause, secondary activities are prohibited by the NLRA. *See* 29 U.S.C. § 158(b)(4)(B) (1982).

37. *National Woodwork Mfrs. Ass'n v. NLRB*, 386 U.S. 612, 644 (1967).

38. Comment, *supra* note 1, at 142.

39. *See, e.g., Teamsters Local 710 (Wilson & Co.)*, 335 F.2d 709, 713 (D.C. Cir. 1964).

40. Comment, *supra* note 1, at 143-44. *See also* Cassman, *Deconsolidating the Work Preservation Doctrine: Dolphin-Associated Transport*, 3 INDUS. REL. L.J. 604, 607 (1981) (application of secondary boycott analysis to work preservation cases was arguably not what Congress contemplated or intended).

41. The "cease doing business" analysis evolved from the terminology used in section 8(e) of the NLRA. Section 8(e) expressly prohibits agreements to "cease doing business" with third parties caused by union pressure.

42. *See, e.g., Meat and Highway Drivers, Local No. 710 (Wilson & Co.)*, 143 N.L.R.B. 1221, 1229-30 (1963), *modified*, 335 F.2d 709 (D.C. Cir. 1964) (union could not

rule applicable to work preservation cases. As work preservation issues became more prevalent in labor management litigation, the courts and the NLRB began to develop case law which expressly addressed work preservation issues.

B. Work Preservation Case Law

The Supreme Court first addressed the work preservation issue in *National Woodwork Manufacturers Association v. NLRB*.⁴³ The union had negotiated a work preservation clause which precluded the employer from using new products that would displace jobs.⁴⁴ The Court was concerned with the protection and preservation of work customarily performed by employees within the bargaining unit. This form of preservation was considered to be primary and therefore lawful under section 8(e) of the NLRA.⁴⁵ Consequently, the Court formulated the work preservation doctrine.⁴⁶ The work preservation doctrine allows unions to negotiate clauses which preserve work even though the rights of the third party are affected, as long as the primary purpose of the clause is to preserve work for employees within the bargaining unit.⁴⁷ The purpose of this doctrine was to clarify the legality of work preservation clauses by distinguishing between primary activity attempting to protect unit jobs and secondary activity which sought to achieve objectives relating to the boycotted third party employer.⁴⁸

The Court held that a union could negotiate a work preservation clause without violating section 8(b)(4)(B) or 8(e)'s prohibitions against secondary boycott activities as long as the objective of the clause was to address "labor relations of the contracting employer vis-a-vis his own employees."⁴⁹ The Court then adopted the "traditional work" standard similar to that which had previously been used

reclaim work because it had already been transferred to a third-party business and this would require the employer to cease doing business with the third party).

43. 386 U.S. 612 (1967).

44. *Id.* at 616. This clause contained a provision which union members used as authorization for refusing to handle prefabricated doors. The door manufacturer, whose contract had been cancelled as a result of the work preservation clause, sued, arguing that the clause was in violation of section 8(e). *Id.* Section 8(e) is the counterpart to section 8(b)(4)(B)'s secondary boycott provisions. A "hot cargo" clause, which consists of an agreement between the union and a third party-employer to cause directly or indirectly a secondary boycott, is prohibited by section 8(e). See 29 U.S.C. § 158(e) (1982).

45. *National Woodwork Mfrs. Ass'n v. NLRB*, 386 U.S. 612, 637-38 (1967).

46. Note that although the Supreme Court did not expressly formulate the work preservation doctrine until it decided *NLRB v. International Longshoremen's Ass'n*, 447 U.S. 490 (1980), the Court intimated that such a standard was available by the primary-secondary analysis espoused in *National Woodwork*. See generally *National Woodwork*, 386 U.S. at 620-39.

47. THE DEVELOPING LABOR LAW 1214 (C. Morris 2d ed. 1983).

48. *Id.* at 1215 (quoting *National Woodwork*, 386 U.S. at 644-45).

49. *National Woodwork*, 386 U.S. at 645 (footnote omitted).

by the NLRB.⁵⁰ The "traditional tasks" analysis was adopted because the Court found that the Union's efforts to preserve work were "related solely to preservation of the traditional tasks of the jobsite carpenters."⁵¹

Although the Court noted that under the secondary-primary analysis these standards would "not always be a simple test to apply,"⁵² it declined to elaborate on how courts could consistently determine when clauses were sufficiently primary to withstand the section 8 prohibitions.⁵³ Nonetheless, the primary-secondary traditional work standard espoused in *National Woodwork* became the basis upon which subsequent courts attempted to differentiate between lawful work preservation activity and illegal work acquisition.⁵⁴

The Court in *National Woodwork* acknowledged that "[i]n this era of automation and onrushing technological change no problems in the domestic economy are of greater concern than those involving job security and employment stability."⁵⁵ In view of this, the Court chastized Congress for failing to adequately assess the consequences of precluding labor-management collective negotiations in the area of technology related work preservation.⁵⁶

The Court in *National Woodwork* did, however, limit its holding to union responses designed to protect that particular union's *future* job displacement by limiting or controlling the implementation of technological improvements or expansions.⁵⁷ As technology advances in

50. *Id.* at 646. See, e.g., *Milk Drivers and Dairy Employees Union No. 546*, 133 N.L.R.B. 1314, 1316 (1961), *enforced sub nom.*, *Minnesota Milk Co. v. NLRB*, 314 F.2d 761 (8th Cir. 1963) (NLRB examination of traditional work in the area of sub-contracting).

51. *National Woodwork*, 386 U.S. at 644-46.

52. *Id.* at 645. The Court did, however, put forward a comparison of the *National Woodwork* facts, found to be primary, and the facts in a previous case, *Allen Bradley Co. v. Local Union No. 3*, 325 U.S. 797 (1945), held to be secondary and unlawful. The Court in *National Woodwork* found that while the Carpenters and Joiners Union in the *National Woodwork* case had confined their activities to preserving work within their own bargaining unit, "the boycott in *Allen Bradley* was carried on, not as a shield to protect or preserve the jobs of Local 3 members, traditionally a primary labor activity, but as a sword to reach out and monopolize all the manufacturing job tasks for Local 3 members." *National Woodwork*, 386 U.S. at 630.

53. *National Woodwork*, 386 U.S. at 644 (the existence of a violation cannot be determined without an inquiry into the surrounding circumstances).

54. See LABOR LAW DEVELOPMENTS § 1.02[2] (J. Moss ed. 1986); Comment, *supra* note 1, at 152-53.

55. *National Woodwork*, 386 U.S. at 640 (quoting *Fibreboard Paper Prod. Corp. v. NLRB*, 379 U.S. 203, 225 (1964) (Stewart, J., concurring)).

56. *Id.* at 640-42.

57. See *id.* at 631-32.

a variety of work displacing methods, unions are forced to take different types of work preservation action than that addressed in *National Woodwork*. Consequently, the work preservation doctrine, as established by *National Woodwork*, has been criticized as being inapplicable to recent forms of labor work preservation action.⁵⁸ This is because technology has significantly reformed production and processing systems and the new work created by technology is no longer sufficiently analogous to the work displaced by such technology. These new forms of work cannot easily be applied to the vague traditional-primary analysis espoused in *National Woodwork*.

Containerization of the shipping industry presents an example of the legal conflict created by the decreasing feasibility of the traditional work preservation doctrine.⁵⁹ The use of containers to transport and move cargo directly from trucks to ships, and vice versa, drastically reduced the amount of traditional work available to longshoremen at every major port in the country.⁶⁰ The problem was further complicated when shipping lines began contracting directly with freight consolidators.⁶¹ This caused the loading and unloading of containers to be done away from the piers.⁶²

Faced with significant potential for displacement, even possible extinction, the International Longshoremen's Association (ILA) responded to containerization by collectively negotiating its Rules on Containers into the labor-management agreement.⁶³ As a result of enforcement of these Rules, the off-pier companies which had replaced the longshoremen in the task of loading and unloading the containers, filed an unfair labor practice grievance with the NLRB alleging that the Rules on Containers violated sections 8(b)(4)(B) and 8(e) of the National Labor Relations Act.⁶⁴

58. See generally Cassman, *supra* note 40.

59. See Ross, *Waterfront Labor Response to Technological Change: A Tale of Two Unions*, 21 LAB. L.J. 397 (1970).

60. See *id.*

61. Freight Consolidators usually have their own off-pier terminals at which they combine the goods received from various shippers. Goods are then transported by truckers or shipping lines to their ultimate destination. NLRB v. Longshoremen, 447 U.S. 490, 496 n.8 (1980). See also Comment, *Intermodal Transportation and the Freight Forwarder*, 76 YALE L.J. 1360, 1362 (1967).

62. See, e.g., NLRB v. Longshoremen, 447 U.S. 490, 495-96 (1980).

63. The Rules on Containers gave longshoremen the exclusive right to load and unload containers which had been consolidated locally, within a fifty mile radius of the pier. Additionally, the shippers who violated the Rules were required to pay the union liquidated damages. The off-pier warehouse and trucking consolidators who lost work as a result of the enforcement of the Rules filed an unfair labor practice charge with the NLRB claiming that the Rules contained illegal secondary objectives. See *id.* at 500-02. For a more detailed explanation of the facts from which the container controversy arose, see Cassman, *supra* note 40, at 621-31.

64. See International Longshoremen's Ass'n, 221 N.L.R.B. 956 (1975), *enforced*, 537 F.2d 706 (2d Cir. 1976), *cert. denied*, 429 U.S. 1041 (1977).

In *International Longshoremen's Association (Consolidated Express, Inc.)*,⁶⁵ the NLRB declined to expand its interpretation of the work preservation doctrine to include the container situation. In making this decision, the Board applied a very limited reading of the *National Woodwork* work preservation doctrine. The Board held that the Rules on Containers included provisions for acquiring work which had not been within the longshoremen's traditional work jurisdiction.⁶⁶ Therefore, the Board found that the Rules were in violation of the secondary boycott provisions contained in the NLRA.

This issue ultimately reached the Supreme Court in *International Longshoremen's Association v. NLRB (ILA I)*,⁶⁷ where the Court held that the Rules on Containers constituted lawful, primary work preservation activity.⁶⁸ The Court explicitly expanded its work preservation analysis to include a "functional equivalent" element.⁶⁹ This element takes into account the necessary relationship between traditional unit work and the related work that emerges as technological advances are made. The Court stated that the legality of these new work preservation agreements "turns, as an initial matter, on whether the historical and functional relationship between this retained work and traditional longshore work can support the conclusion that the objective of the agreement was work preservation rather than the satisfaction of union goals elsewhere."⁷⁰

After expanding the work preservation doctrine and noting that the NLRB had erred as a matter of law, the Court remanded *ILA I* to the NLRB to determine "whether the Rules represent[ed] a lawful attempt to preserve traditional longshore work, or whether, instead, they [were] 'tactically calculated to satisfy union objectives elsewhere[.]'"⁷¹ Although the new "functionally related work" standard increased the flexibility of the NLRB and the courts to accommodate work alterations in jobs caused by new technology, the Court failed to provide adequate guidelines for determining what types of work were in fact functionally related.⁷²

65. *Id.*

66. *Id.* at 712.

67. 447 U.S. 490 (1980). This case was a consolidation of two NLRB containerization cases. See *International Longshoremen's Ass'n (Dolphin Forwarding, Inc.)*, 236 N.L.R.B. 525 (1978); *International Longshoremen's Ass'n (Associated Transp. Inc.)*, 231 N.L.R.B. 351 (1977).

68. *ILA I*, 447 U.S. at 506-10.

69. *Id.* at 510.

70. *Id.* (footnote omitted).

71. *Id.* at 511 (quoting *National Woodwork*, 386 U.S. at 644).

72. *ILA I*, 447 U.S. at 511-12; see also Comment, *supra* note 1, at 157-58.

Despite the implications by the Court, in dictum, that the Rules on Containers were lawful under its expanded version of the work preservation doctrine, the NLRB went on to hold that the Rules contained an unlawful secondary work acquisition objective.⁷³ The Board found that the employer had not diverted work from longshoremen to third parties, but that containerization had simply eliminated their jobs.⁷⁴

The Board's decision was reversed, in part, on appeal⁷⁵ and the work preservation issue appeared again on the Supreme Court's docket in *International Longshoremen's Association v. NLRB (ILA II)*.⁷⁶ This time the Court found that the Board's partial invalidation of the rules was inconsistent with the Court's decisions in *National Woodwork* and *ILA I*.⁷⁷

In affirming the appellate court's reversal of the Board's decision, the Court noted that the Board had committed two fundamental errors in its attempt to analyze the Rules on Containers.⁷⁸ First, the Court stated that by focusing on the effect the Rules may have had on truckers and warehousemen, the Board contravened the Court's direction that such "extra-unit effects" were irrelevant.⁷⁹ Second, the Court said the Board "misconstrued" previous Supreme Court cases by "suggesting that eliminated work can never be the object of a work preservation agreement."⁸⁰

The Court then returned to the broad primary-secondary test established in *National Woodwork*.⁸¹ It held that this test was still the relevant inquiry for examining whether a union's work preservation efforts violate sections 8(b)(4)(B) or 8(e) of the NLRA. Although the Court admitted that this "inquiry is often an inferential and fact-based one, at times requiring the drawing of lines 'more nice than ob-

73. *International Longshoremen's Ass'n*, 266 N.L.R.B. 230 (1983) (this case was a consolidation of nine ILA Container Rules Cases which were before the Board). See *NLRB v. International Longshoremen's Ass'n*, 105 S. Ct. 3045, 3050 n.6 (1985) [hereinafter cited as *ILA II*].

74. *International Longshoremen's Ass'n*, 266 N.L.R.B. at 237.

75. *American Trucking Ass'n v. NLRB*, 116 L.R.R.M. (BNA) 2311 (4th Cir. 1984).

76. 105 S. Ct. 3045 (1985) (the Court limited its inquiry to the alleged unlawfulness of the Rules with regard to the truckers and warehousemen classes of jobs which the Rules were alleged to have illegally acquired for ILA members).

77. *Id.* at 3047.

78. *Id.* at 3056.

79. *Id.* See also *ILA I*, 447 U.S. at 507 n.22; *NLRB v. Pipefitters*, 429 U.S. 507, 526 n.13 (1977) (listing cases in which the *National Woodwork* rule had been consistently applied).

80. *ILA II*, 105 S. Ct. at 3056. "Elimination of work in the sense that is made unnecessary by innovation is not of itself a reason to condemn work-preservation agreements under 8(b)(4)(B) and 8(e); to the contrary, such elimination provides the very premise for such agreements." *Id.* at 3057.

81. See *supra* notes 42-47 and accompanying text.

vious,'⁸² it declined to provide more specific guidelines. While it recognized that arguments against work preservation may have some validity, the Court stated that Congress was the proper branch of government to address those arguments.⁸³ Thus, though the Court's decision in *ILA II* expressed genuine concern for labor's right to collectively bargain effective work preservation clauses and for management's right to prevent secondary boycotts, the Court once again left the NLRB and lower courts in the dark concerning how work preservation and secondary boycott rights are to be effectively co-analyzed.

Although the container automation issues first surfaced in the late 1950's, the Court's ultimate resolution occurred over twenty years later. As technology related displacement becomes more prevalent, work preservation-automation related issues in a variety of factual formats will again haunt the Court. Each time a worker is displaced by automation or an unlawful secondary provision is negotiated into a collective bargaining agreement under the guise of work preservation, the parties to this conflict will recognize the need for more precise guidelines from either Congress or the Court. Until such guidelines are provided, labor-automation law, like automation itself, will continue to be devoid of a reasonably predictable future. Nevertheless, the issue will continue to be a "hotly disputed topic of collective bargaining."⁸⁴

C. Duty to Bargain Over Automation

Subject to the provisions of section 9(a), section 8(a)(5)⁸⁵ of the National Labor Relations Act requires employers to bargain collectively "in respect to rates of pay, wages, hours of employment, or other conditions of employment."⁸⁶ Additionally, section 158(d) requires that bargaining be in "good faith" and goes on to define required bargaining areas as those concerning "wages, hours, and other terms and conditions of employment."⁸⁷

82. *ILA II*, 105 S. Ct. at 3057 (quoting *Electrical Workers v. NLRB*, 366 U.S. 667, 674 (1961)).

83. *ILA II*, 105 S. Ct. at 3057-58.

84. *Id.* at 3048 (quoting *ILA I*, 447 U.S. at 496).

85. 29 U.S.C. § 158(1), (5) (1983).

86. Section 159(a) provides, in pertinent part, that "[r]epresentatives designated or selected for the purposes of collective bargaining . . . shall be the exclusive representatives . . . for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment" 29 U.S.C. § 159(a)(1983).

87. 29 U.S.C. § 158(d) (1983).

From these statutory provisions the NLRB has established two distinct classes of bargaining areas. One class includes mandatory topics over which the parties are required to bargain, the other class contains subjects which, although lawful subjects, are not required to be discussed.⁸⁸ Consequently, the ability of management to legally exclude union influence from automation-related decisions is dependent upon whether such decisions are mandatory bargaining subjects.

The NLRB decisions and case law in this area are somewhat vague. The NLRB has generally held that an employer has a mandatory duty to bargain over the decision to automate.⁸⁹ However, the courts, while recognizing that the decision to automate is a mandatory subject,⁹⁰ have generally exempted decisions concerning fundamental business operations from the mandatory classification. The rationale for this position is that these decisions are economically motivated, and, as such, should remain under management control.⁹¹ These exemptions, however, have not been adequately defined, and this has resulted in ad hoc balancing of management and labor interests. Such balancing produces decisions which reflect subjective views about the legitimacy of labor objectives⁹² and, in turn, provide no unilaterally applicable standard.

In *First National Maintenance Corp. v. NLRB*,⁹³ the Supreme Court addressed the scope of management's duty to bargain over partial business closures. The Court held that because partial closings were within the category of managerial decisions which are economically motivated, an employer has no duty to bargain about its decision to close part of its business.⁹⁴ The rationale for this holding was that while both parties possess significant interests in the decision to

88. See *supra* notes 27 and 28 for more detailed mandatory-permissive explanation. Note also that there is a third, but significantly less controversial, category which contains illegal subjects. Neither side is allowed to discuss illegal subjects. See generally THE DEVELOPING LABOR LAW 863-69 (C. Morris 2d ed. 1983).

89. See, e.g., *Plymouth Locomotive Works, Inc.*, 261 N.L.R.B. 595, 602 (1982); *John Hutton Corp.*, 213 N.L.R.B. 85 (1974); *Renton News Record*, 136 N.L.R.B. 1294, 1297 (1962).

90. See, e.g., *Newspaper Printing Corp. v. NLRB*, 625 F.2d 956, 964 (10th Cir. 1980) (automation of newspaper industry held a mandatory bargaining subject).

91. See, e.g., *NLRB v. Drapery Mfg. Co.*, 425 F.2d 1026 (8th Cir. 1970) (decision to close subsidiary for economic reasons was not an unfair labor practice); *NLRB v. Royal Plating & Polishing Co.*, 350 F.2d 191 (3rd Cir. 1965) (decision to close smaller plant due to unprofitability not an unfair labor practice).

92. Comment, *supra* note 1, at 171 (citing *First Nat'l Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981) and *NLRB v. Island Typographers*, 705 F.2d 44, 50 n.8 (2d Cir. 1983)).

93. 452 U.S. 666 (1981).

94. *Id.* at 686. The Court did, however, expressly decline to address the application of *First National Maintenance* "to other types of management decisions, such as plant relocations, sales, other kinds of subcontracting, automation, etc., which are to be considered on their particular facts." *Id.* at 686 n.22. See *infra* notes 97-99 and accompanying text.

close, the employer's need to manage business interests outweighs any potential benefit to the union through collective bargaining.⁹⁵

"The *First National Maintenance* opinion created a presumption in favor of an employer's right to operate its enterprise freely, which could be rebutted only by an offsetting benefit to harmonious labor relations."⁹⁶ However, the Court explicitly declined to determine whether this balance was applicable to automation-related decisions.⁹⁷ In a subsequent decision by the Second Circuit, this issue was decided in the affirmative, and an automation-related decision was held to be subject to the criterion espoused in *First National Maintenance*.⁹⁸

The holding in *First National Maintenance* will enable management to claim that the decision to automate is analogous to a partial closing and, as such, is not a mandatory bargaining item. Because the Court in *First National Maintenance* has placed a higher value on managerial rights and a free enterprise economy, the rights of employers may be afforded greater weight than the rights of labor.⁹⁹

Technology-related business literature emphatically disagrees with the presumption that labor's interests do not equal management's in this area. The literature consistently cites the need for labor-management cooperation to insure the success of major automation undertakings. The future of a successful step into the automation age largely depends upon the successful integration of labor's input into automation-related projects.¹⁰⁰

IV. FUTURE CONSIDERATIONS

Different studies on the effects of automation and robotics have

95. *First National Maintenance*, 452 U.S. at 678-79. The Court found that such a decision would be mandatory only where management and labor would benefit equally. The Court then formulated a test for weighing the interests:

[I]n view of an employer's need for unencumbered decision-making, bargaining over management decisions that have a substantial impact on the continued availability of employment should be required only if the benefit, for labor-management relations and the collective-bargaining process, outweighs the burden placed on the conduct of the business.

Id. at 679.

96. Comment, *supra* note 1, at 172.

97. *First National Maintenance*, 452 U.S. at 686 n.22.

98. *NLRB v. Island Typographers*, 705 F.2d 44, 50 n.8 (2d Cir. 1983) (automation-related decision to replace type forming in newspaper business would ordinarily be subject to the test of *First National Maintenance*).

99. Comment, *supra* note 1, at 172-73.

100. See, e.g., Daily Labor Report, Sept. 15, 1986 D-1 full text section.

reached varying results. One thing that can be agreed upon, however, is that a substantial number of American workers will be displaced by robots and other forms of automation as the country steps into what is being called an era of automation. This era has been regarded as "one which would rival or surpass the Industrial Revolution of the 19th century in importance."¹⁰¹

Technical advances in agriculture, printing, and mining, for example, have displaced thousands of workers.¹⁰² From 1949 to 1981, the proportion of production workers to the total employed population declined from 82% to 71% and continues to decline.¹⁰³ This is leading to a long term shift in employment from the industrial blue-collar sector to the service sector. The problem, however, is the inability of the services sector to adequately absorb sufficient amounts of displaced workers. As automation research analyst Harley Shaiken has stated: "This technology affects offices as well as factories. It creates a potential economic vise. One jaw shoves people from the plant, and the other limits their shift to white-collar jobs."¹⁰⁴

This situation leaves management in a practical dilemma. While management appears to have the right to integrate automation into their manufacturing systems without mandatory and potentially costly labor input, many successful companies cite labor's input as a prerequisite for significant technological achievements.¹⁰⁵

The agreements made by the auto industries in America are demonstrative of the benefits to be derived from management communicating with labor during automation integration.¹⁰⁶ In the auto industry such worker participation and communication, although complicated by long standing obstacles such as labor-management antagonism, has been considered a significant element leading to overall plant efficiency and success.¹⁰⁷

101. Levitan & Johnson, *supra* note 5, at 10.

102. Katzman, *When Robots Dominate the U.S. Workplace*, SUPERVISORY MGMT., June 1983, at 39.

103. *Id.*

104. *Id.* at 40.

105. Katz, *SMR Forum: Assessing the New Auto Labor Agreements*, SLOAN MGMT. REV., Summer 1982, at 60 [hereinafter cited as Katz]. See also, Foulkes & Hirsch, *supra* note 13, at 94; Altmuro, *How to Achieve Employee Support, Safety and Success in Your First Robot Installation*, in 2 ROBOTS 8: CONFERENCE PROCEEDINGS — FUTURE CONSIDERATIONS, 15-1 to 15-8 (1984); Anderson & Gartner, *When Robots and People Work Together*, in 2 ROBOTS 8: CONFERENCE PROCEEDINGS — FUTURE CONSIDERATIONS, 15-22 to 15-33 (1984).

106. See, e.g., Guest, *Quality of Worklife — Learning From Tarrytown*, HARV. BUS. REV., July-Aug. 1979, at 76. (unsuccessful plant with a very poor labor management relations record was turned around by a Quality of Work Life (QWL) program installation which included, among other things, labor's input into operations management); see generally Comment, *supra* note 1, at 174-76 (citing Guest, *supra* note 106, and other authority to support this general communications-related proposition).

107. Guest, *supra* note 106, at 85-87.

Before introducing robots into a production system, management should carefully analyze the effects they will have on the workplace, principally on employee displacement. Management should try to avoid displacement by retraining as many workers as possible for other jobs within the company. This promotes trust and confidence in automation rather than an antagonistic, negative attitude toward management.¹⁰⁸ For those who are unavoidably displaced, management can help make the adjustment easier by communicating the displacement factor to the workers well in advance of the actual event. This allows employees more time to find alternative employment.

This discussion of workers' problems and management solutions is by no means exhaustive. It is merely an attempt to illustrate the dilemma facing U.S. industry. Robots, which can be advantageous for business, have the potential to be disastrous for workers. It is necessary for business to take advantage of the new technologies and remain competitive overseas but it is equally necessary for them to responsibly consider the potentially adverse effects of this transition.

While some legal commentators see the expansion of the work preservation doctrine as the answer to this problem,¹⁰⁹ others view rejection of the doctrine as the proper method¹¹⁰ of starting down the long, complex road to successful resolution of this conflict.

Regardless of the approach taken, this issue will not go away and it "merits serious discussion."¹¹¹ As manufacturing companies continue to undertake major technological advances in the form of robotics and other automation, the legal community must become more responsive to both sides of this conflict. No longer will ambiguous or "nice" distinctions suffice.

V. CONCLUSION

To date, the courts and the NLRB have provided only vague standards for the application of the work preservation doctrine. As such, more definitive guidelines are needed in order to avoid unnecessary litigation and frustration. Once legal parameters are established, labor and management must work together to seek a mutually accepta-

108. See *supra* note 95 for this and other successful integration suggestions. See also *Daily Labor Report*, *supra* note 100.

109. See, e.g., Comment, *supra* note 1, at 162-76 (author advocating expansion of the work preservation doctrine).

110. See, e.g., Cassman, *supra* note 40, at 631-35 (author advocates rejection of doctrine because, he argues, it is based upon erroneous distinctions).

111. *Id.* at 635.

ble solution to this problem before technological advances complicate the situation to the point where no amicable resolution is possible. This, like most other labor-management negotiations, will necessarily involve concessions by both sides. These suggestions serve to promote a less controversial, more successful transition into the oncoming automation era.

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