United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: September 19, 2000

TO : Philip E. Bloedorn, Regional Director
Region 30

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Tower Automotive Products Company, Inc.
Case 30-CA-15152

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This Section 8(a)(5) case was submitted for advice on whether the Employer, which manufactures truck frames for automobile makers, unlawfully decided unilaterally to manufacture a new model truck frame in another facility.

The Union represents approximately 2100 production and maintenance employees at the Employer's Milwaukee Works facility which consists of around 50 buildings.[1] The Employer is currently manufacturing the P-150 Ford Ranger truck frame at Milwaukee Works. On June 8, 1999, Ford announced that it had awarded the Employer a contract to manufacture the next generation of Ford Ranger truck frame, the P-273, for the model year of 2003. In an internal memorandum dated June 16, 1999, the Employer stated that even though the P-273 had been "quoted for production in Milwaukee", the Employer was continuing to evaluate frame manufacturing locations.

The Employer avers that over the following 11 months, the Union periodically inquired about the status of the Employer's decision of where to manufacture the new P-273 frame. The Employer advised the Union that no final decision had been made and that Milwaukee Works was "one of the options." Finally on May 1, 2000, the Employer informed the Union that the most likely site for manufacture of the P-273 would be a new Employer facility in Minnesota, and not Milwaukee Works. According to the Union, the Employer stated: "P-273 will not be made at Milwaukee Works. The reason is that we are not competitive at Milwaukee Works."

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[1] The Union is one of seven unions which represent the total of around 3500 employees at Milwaukee Works.

The Employer told the Union that there was a possibility that the P-273 could be made at the former Steeltech plant.[2] The Employer cautioned that the parties first would have to reach agreement on what terms and conditions would cover any operation at Steeltech, and second that the Employer would then have to compare manufacturing costs between Steeltech and Minnesota. The Employer initially proposed reopening the entire bargaining agreement in order to discuss Steeltech, but the parties instead bargained over a supplemental agreement applicable exclusively to the Steeltech facility.

The Employer stated that it needed tentative agreement from the Union on Steeltech terms by May 9 with ratification to occur by May 15, if Milwaukee Works were selected.[3] On May 2, the Employer presented an outline of a proposed supplemental agreement, applicable only to Steeltech and premised on the fact that the P-273 would not be produced at Milwaukee Works. The Employer's proposal outlined Union concessions in the areas of Cost Competitiveness, Flexibility, and Stable Business Environment. On May 4, the Union requested information comparing the costs of manufacturing at Steeltech and Minnesota, so that the Union could formulate a realistic counteroffer. The Employer replied that it could not provide such information before May 10, which was the day after the parties were to have reached final tentative agreement. Although the Union protested that it needed such cost information to meaningfully bargain, the Union nevertheless continued daily negotiations through the May 9 deadline. On May 10, the Employer announced its decision to produce the P-273 at a non-Milwaukee facility.

We conclude, in agreement with the Region, that the Employer unlawfully announced that the new Ford Ranger P-273 truck frame would be produced in a facility other than Milwaukee Works because (1) the Employer's decision to produce the P-273 was a privileged entrepreneurial decision, but its subsequent decision concerning where to produce the P-273 encompassed the mandatory subject of fairly claimable unit work; (2) the Employer's decision to relocate this unit work encompassed a mandatory subject under the test set

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[2] The Steeltech plant, not then owned by the Employer, was located downtown and away from Milwaukee Works.

[3] When the Union asked about the need for such a short negotiation schedule, the Employer admitted that this time table was the Employer's and had not been imposed by Ford.

forth in Dubuque[4]; (3) the Employer announced such decision as a "fait accompli" and the subsequent bargaining over possibly producing the P-273 at Steeltech could not and did not entail bargaining over producing the new frame at Milwaukee Works; and finally (4) the Union did not waive its right to bargain over this matter, either by its failure to request bargaining from June 1999 until May 1, or by the "Joint Process" provision in the parties' bargaining agreement cited by the Employer.

First, we conclude that the Employer's decision to manufacture the P-273 was a privileged entrepreneurial decision. In KIRO, Inc.,[5] the employer decided to add a half-hour news program at the 10 p.m. time slot. Because CBS required the employer to run network programs at that time, the employer contracted with another station to broadcast the 10 p.m. news show even though the program was produced at the employer's facility and by its personnel. The complaint alleged, in part, that the employer violated Section 8(a)(5) by failing to bargain with the union over its decision to produce a regular news program for broadcast on the channel of an independent television station.

The Board held that the employer did not have an obligation to bargain over the decision to produce the new show. Id. at 1327. The Board characterized the decision to add the 10 p.m. news program as a choice of product type or a method of product distribution. The Board found these decisions to fall outside the realm of mandatory bargaining because they have only limited, indirect impact on employment. In the instant case, the Employer's decision to manufacture Ford's new P-273 frame is substantially the same as the television station's decision to produce an additional news program. This initial decision, therefore, encompassed an entrepreneurial matter over which the Employer need not have bargained.

On the other hand, the Employer's subsequent decision of where to produce the P-273 trenched upon a mandatory subject, because production of the P-273 was fairly claimable unit work. The Employer argues that the P-273 will be a new product which unit employees have never before manufactured. However, the mere fact that the P-273 is new does not mean that its manufacture is not unit work.

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[4] Dubuque Packing, 303 NLRB 386 (1991).

[5] 317 NLRB 1325 (1995).

In AMCAR Div., ACF Industries,[6] the Board found that an employer had an obligation to bargain over its decision to subcontract the work of installing a guard tower, even though unit employees had not previously performed such work. In reaching this conclusion, the Board noted that unit employees had performed similar work in the past, i.e., the construction of buildings smaller than the watchtower, and that the new work "involved skills and experience which bargaining unit employees possessed." Id. In the instant case, the P-273 frame is slightly wider than the P-150 frame, and will be subject to an e-coat rather than a wax coat. These are insignificant differences, however, which will hardly require employees with substantially different skills and experience.[7] It thus seems clear that production of the P-273 is unit work.

Next we conclude that the Employer's decision to relocate the manufacture of the P-273 encompassed a mandatory subject under Dubuque, which sets forth the Board test for determining whether a work relocation decision is a mandatory subject of bargaining. Under that test, the General Counsel has the initial burden of showing that a unit work relocation decision was "unaccompanied by a basic change in the nature of the employer's operation." The employer then has the burden of either rebutting this prima facie case, or of proving certain affirmative defenses. First, the employer may attempt to show that its decision concerned a change in the "scope and direction of the enterprise" in which case there will be no duty to bargain over the decision.[8] The employer may also avoid bargaining if it can demonstrate that (1) labor costs were not a significant factor in the decision; or (2) even if labor

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[6] 234 NLRB 1063, 1064 (1978), enfd. as modified 596 F.2d 1344 (8th Cir. 1979).

[7] In 1996, the Employer's predecessor, A.O. Smith, began producing the current F-150 frame. The Union asserts, without contradiction by the Employer, that A.O. Smith treated the then new F-150 as unit work even though A.O. Smith had to invest approximately $80.00 million in a new assembly line. Thus, it appears that, in the recent past, manufacture of a new model frame has been treated as unit work.

[8] See, e.g., Noblit Brothers, Inc., 305 NLRB 329, 330 (1992); Holly Farms Corp., 311 NLRB 273, 277-278 (1993), enfd. on other issues 48 F.3d 1360 (4th Cir. 1995), affd. 517 U.S. 392 (1996).

costs were a factor, the union could not have offered labor cost concessions that could have changed the employer's decision.

Applying the Dubuque test here, we have already concluded, supra, that the Employer has relocated unit work. We also conclude that this was unaccompanied by any basic change in the nature or direction of the Employer's business. The Employer continues to manufacture truck frames; the manufacture of the new P-273 frame will not at all change that operation.[9] Having established a prima facie case, we turn next to whether there is evidence to establish either of the Dubuque affirmative defenses.

Regarding the first defense, the Employer asserts that its decision to relocate this work was not significantly based upon labor costs and instead turned on several other factors: the need to e-coat the new frame, which otherwise is wider than the current P-150 frame; the need to continue manufacturing the P-150 while preparing for manufacture of the P-273; the fact that Ford awarded the Employer only one-half of this new production work; and Ford's "preference" that the work be done in proximity to the Ford plant in Minnesota. The Employer therefore characterized its decision to relocate as one based upon "capital expenditures" and "facility unsuitability", and not a decision based significantly upon labor costs.

We conclude to the contrary that labor costs were a significant factor in the Employer's decision. During bargaining with the Union for possibly performing this work at Steeltech, the Employer itself proposed serious labor cost concessions from the Union. The Employer thus made clear that the labor costs at Milwaukee Works were a substantial factor in deciding where the P-273 would be manufactured. The Employer otherwise stated on more than one occasion that the Milwaukee Works was not "competitive", indicating that cost factors were a substantial concern. Finally, the Employer has not demonstrated that the other non-labor cost factors essentially controlled or dictated its relocation decision, without regard to labor costs. Accordingly, the Employer simply has not demonstrated that

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[9] Thus, the Employer's reliance on First National Maintenance, 452 U.S. 666 (1981) is totally misplaced. Cf. Noblit Bros., supra, where the employer fundamentally changed its marketing and customer service operation from a showroom-based system to a telemarketing system. The Board thus found no bargaining obligation with the union which had represented the showroom-based employees.

its decision was not motivated at least in significant part by labor costs.

The Employer cited case, FMC Corp., 290 NLRB 483 (1988), does not require a contrary result. There the employer unilaterally decided to manufacture its new Sea Hawk crane at another facility, rather than at its union facility. The ALJ found no violation on the view that the manufacture of a new product was not unit work, because by definition a new product has never before been manufactured by unit employees. A Board majority did not adopt the ALJ's rationale and instead found no Section 8(a)(5) unilateral change "even if it were bargaining unit work." The Board majority held that the particular employer decision in that case was not amenable for bargaining under Otis Elevator, which was the Board's test prior to Dubuque for whether an employer was obligated to bargain over transferred unit work. In that regard the Board noted that the employer's decision rested in part upon lower wage rates at the other facility, but that its decision also rested upon higher productivity and lower scrap costs at that facility, and the fact that the other location was the employer's principle crane manufacturing site.[10]

FMC Corp. does not stand for the proposition that a decision over where to manufacture a new product line, as opposed to whether to manufacture a new product, is entrepreneurial and nonmandatory. To the contrary, that was the position of Stephens' concurrence rather than the position of the Board majority. We therefore would not dismiss this allegation on the proposition that an employer may unilaterally decide where to manufacture a new product in circumstances where, under traditional unit work jurisprudence, the manufacture of the new product would clearly entail unit work.

With regard to the second Dubuque defense, that the Union could not have offered concessions which could have changed the Employer's decision, the Union during Steeltech bargaining asked the Employer for cost comparison information between Steeltech and Minnesota. The Employer never provided that information. Nor has the Employer provided the Region with specific cost or other financial information comparing Milwaukee Works to Minnesota, which

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[10] Then Chairman Stephens concurred with the result. In essential agreement with the ALJ view concerning the presence of unit work, Chairman Stephens concluded that "there was no work transfer issue in the case . . ." Id. at 485, note 6.

information might support a claim that, even if labor costs were a factor, the Union could not have offered sufficient concessions.[11] Since the Employer has not established this last affirmative defense, its relocation decision was a mandatory subject of bargaining.

Next we conclude that the Employer violated Section 8(a)(5) by failing to bargain in good faith over this decision. First we reject the Employer's contention that the Union waived its right to bargain over this matter by its failure to seek bargaining from June 1999 until the Employer's May 1 announcement. To be sure, the Board has long held that where a union receives timely notice that the employer intends to change a condition of employment, it waives its right to bargain unless it promptly requests negotiations over that matter.[12] An employer's notice is timely if it is given sufficiently in advance of the proposed change to allow a reasonable opportunity to bargain. Id. We conclude, however, that the Employer's communications prior to May 1 were not notice that a decision had been made.

In Melody San Bruno,[13] the union asked the employer in July about rumors that its car dealership was being sold. The employer replied that no sale was then in progress. In response to a similar union inquiry in September, the employer stated that the dealership was up for sale but that regulatory problems would likely delay any sale through November or even into the next year. In mid-October, the employer told the union that the dealership was being sold, but that Toyota hadn't yet approved and that there were EPA problems concerning the sale of the buildings and property. The employer stated that it could not give the union a date or a time of any sale. On October 20, the employer announced the sale to employees advising them that they would be laid off that day or by October 23. The union

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[11] [*FOIA Exemption 5*

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[12] Intersystems Design Corp., 278 NLRB 759 (1986), quoting Ciba-Geigy Pharmaceuticals Div., 264 NLRB 1013, 1017 (1982) enf'd 722 F.2d 1120 (3d Cir. 1983).

[13] Melody San Bruno, Inc., 325 NLRB 846 (1998).

immediately but unsuccessfully tried to contact the employer, who was unavailable through the October 23d date.

The Board adopted the ALJ who found that the employer had failed to provide the union with sufficient notice and an opportunity to bargain over the effects of the sale. The ALJ found that the "scant and indirect oral assertions . . . respecting the possible sale . . . were clearly not sufficient to fulfill the Respondent's obligation to timely notify the Union of the sale . . . and provide the Union with an opportunity to bargain respecting the effects of the sale . . ." Id. at 848. Thus the Board found that the employer violated Section 8(a)(5).

In the instant case, the Employer announced in June 1999 that it was considering where to manufacture the P-273 and that Milwaukee Works was still "an option." Over the ensuing months, the Union repeatedly and diligently asked the Employer for an "update" on this decision. The Employer only iterated that it had not yet made one. We conclude that here, as in Melody San Bruno, the Employer's indirect references to the possibility that the P-273 might not be manufactured at Milwaukee works was insufficient notice of a proposed decision. To the contrary, the Employer assured the Union that no final decision had yet been made. In fact, the Employer itself admits that it wasn't until just before May 2000, when Ford announced design changes in the P-273, that the Employer finally decided at that late date to relocate the P-273 work out of Milwaukee Works. The time delay of over 11 months further undermines the Employer's assertion that the Union had clear notice of this decision much earlier in 1999.[14] Accordingly, we would not find that the Union's failure to insist upon bargaining over this subject from June 1999 until May 2000 constituted a waiver of its bargaining rights.

We also conclude that, when the Employer finally did announce its decision on May 1, 2000, it did so as a "fait

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[14] See Fountain Valley Regional Hospital, 297 NLRB 544 (1990) where five months elapsed between the final implementation of a change and an earlier memorandum which the employer alleged provided notice of that change. The Board found a violation first noting that the memorandum did not constitute clear notice of the change. The Board then held that "even if we were to find that the memorandum gave clear notice that a change was intended, we find that it could have been reasonably concluded that the Respondent had abandoned any intention to implement changes . . ." given the five months delay.

accompli."[15] It made clear to the Union that the P-273 would not be manufactured at Milwaukee Works. It also invited the Union to negotiate labor concessions so that the Employer might possibly manufacture the P-273 at Steeltech. The Employer by that conduct additionally indicated that a firm decision to not produce that frame at Milwaukee Works had already been made. In these circumstances, it would have been futile for the Union to have requested negotiations on this subject, and the Union's failure to do so may not constitute a waiver of its bargaining rights on that subject.

We also conclude that the parties' Steeltech negotiations did not fulfill the Employer's obligation to bargain over manufacturing the P-273 at Milwaukee Works. The Employer entered into negotiations over Union concessions at Steeltech on the explicit premise that any agreement reached between the parties would not apply at Milwaukee Works. It seems clear that these negotiations were not intended to substitute for, and in fact did not result in, negotiations over the manufacture of the P-273 at Milwaukee Works.[16]

We also conclude that the Employer cited provision in the parties' agreement does not constitute a Union waiver of bargaining over this subject. The waiver of a statutory right will not be lightly inferred and can be established only if the waiver is clear and unequivocal.[17] Such a waiver will not be found simply because the contract

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[15] It is well established that a union has not waived bargaining by failing to request it where a change is presented by the employer as a "fait accompli." Intersystems Design Corp., 278 NLRB 759 (1986), citing Gulf States Mfg. v. NLRB, 704 F 2d. 1390, 1397 (5th Cir. 1983).

[16] Assuming, arguendo, that the Steeltech bargaining had in some way encompassed the subject of P-273 frame manufacture at Milwaukee Works, the Employer's self-imposed short time schedule for these negotiations, and its adamant refusal to provide critically relevant Union requested information, clearly would have prevented the reaching of any good faith impasse over this subject.

[17] Metropolitan Edison v. NLRB, 460 U.S. 693, 708 (1983); Ciba-Geigy Pharmaceuticals Div., 264 NLRB 1013, 1017 (1982), enf'd 722 F.2d 1120 (3d Cir. 1983) and cases cited therein; Rockwell International Corp., 260 NLRB 1346, 1347 (1982).

contains a management rights clause.[18] "Accordingly, the Board has repeatedly held that generally worded management rights clauses or 'zipper' clauses will not be construed as waivers of statutory bargaining rights."[19] The Board will also look to the bargaining history of the parties for evidence that the parties had "fully discussed and consciously explored [the allegedly waived subject] . . . and [that] the union consciously yielded or clearly and unmistakably waived its interest in the matter."[20]

In Litton Systems,[21] a work relocation case, the management rights clause reserved for the employer, inter alia, the following rights:

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[18] Ciba-Geigy Pharmaceuticals Div., 264 NLRB at 1017; Kay Fries, Inc., 265 NLRB 1077, 1084 (1982), enf'd 722 F.2d 732 (3d Cir. 1983); Rockwell International Corp., 260 NLRB at 1347.

[19] Johnson-Bateman Co., 295 NLRB 180, 184 (1989) (no waiver of right to bargain over drug testing in management-rights clause that did not mention drug testing); Suffolk Child Development Center, 277 NLRB 1345, 1350 (1985) (management-rights clause not waiver of right to bargain over health care, because no specific mention in clause of medical benefits or other terms of employment); Kansas Education Ass'n, 275 NLRB 638, 639 (1985) (no waiver by union of right to bargain about employee transfer arrangements because management rights clause was too vague). Cf. Rockford Manor Care Facility, 279 NLRB 1170 (1986) (employer's unilateral substitution of new health insurance plan not unlawful; union waived right to bargain about carrier-induced changes in health insurance by virtue of contractual agreement to a "highly detailed 'zipper' clause . . . and an equally comprehensive management rights clause" demonstrating mutual intent to waive bargaining during term of contract with respect to all subjects left unregulated within the four corners of the contract, and constituting an "incisive, direct, and specific . . . assault on the existence of any negotiating responsibility during the term of the contract," thus committing unresolved issues to management prerogative).

[20] Johnson-Bateman, 295 NLRB at 185 (citing Rockwell International Corp., 260 NLRB at 1347); accord, Reece Corp., 294 NLRB 448, 450-451 (1989).

[21] 283 NLRB 973 (1987).

> to direct the working force, to hire, to discipline, to discharge for cause, to schedule work, . . . to transfer, and to determine the size of the work force, layoffs, product and production methods . . .[22]

The Board held that this clause was not a waiver of the union's right to bargain over the relocation of work. Indeed, the quoted language did not give the employer the right unilaterally to "transfer bargaining unit work outside of the unit . . . ." [23] Other relocation cases show the Board's continued adherence to this strict "clear and unequivocal" waiver standard.[24]

The cited provision is not a management rights clause but rather a post-contract "Letter of Understanding" concerning "Joint Process Boundaries." According to the Union, the parties use the "Joint Process" as a predicate to either the filing of any grievance or to formal bargaining. The provision setting forth "Joint Process Boundaries" defines three areas for this process, and lists "site selection" as a management prerogative. The Employer argues that since "site selection" is listed as a management prerogative, its decision to manufacture the P-273 also falls within the exclusive control of the Employer.

We conclude that this ambiguous language falls far short of constituting a clear and unequivocal waiver. First, according to the Union, the Letter of Understanding only delineates subject matters within the "Joint Process"; it does not set forth matters over which parties have exclusive control. Second, the Union asserts that "Joint Process" discussions are premised upon the understanding that neither party waives it right to later grieve the issue if an agreement is not reached. The Employer has not contradicted either of these Union assertions, both of which undermine any finding of Union waiver. Finally, the Union asserts that "site selection" was intended to refer to, and has always and only been applied to, the Employer's selection of a manufacturing site among the 50 buildings within the Milwaukee Works complex. The Employer has neither contradicted that assertion nor pointed to any past use of the "Joint Process" to allow its unilateral relocation of unit work outside Milwaukee Works. We therefore conclude that this language does not amount to a

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[22] Id. at n. 3.

[23] 283 NLRB at 974 (emphasis added).

[24] See, e.g., Geiger Ready-Mix Co., 315 NLRB 1021 n. 8 and 1033 (1994); Owens-Brockway Plastic Products, 311 NLRB 519 (1993) and Reece Corp., 294 NLRB at 450-451.

clear and unequivocal Union waiver of bargaining over this matter.[25]

The Employer also asserts that the employees will not be affected by its decision because the P-273 is an entirely new product and the P-150 will continue to be made at Milwaukee Works. In Westinghouse Electric Corp.,[26] the Board held that unilateral subcontracting may not be violative of the Act if there is no significant detriment to the unit employees. In dismissing the complaint, the Board noted that "the record fails to establish that if the subcontracts had not been awarded, Respondent would have either recalled employees in layoff status or assigned overtime work to employees in the unit." Id. at 447. The Board also noted that the employer and the union had bargained about subcontracting and agreed that the employer could subcontract work in certain circumstances.

Consistent with Westinghouse Electric, the Board in Louisiana-Pacific Corp.,[27] concluded that the employer did not violate Section 8(a)(5) by subcontracting certain work rather than reopening a lawfully closed plant and recalling laid-off employees to perform the work. A customer asked the employer to perform certain work and the employer determined that it would have cost $200,000 to reopen the plant. The employer refused to reopen the plant unless the customer bore the cost, which the customer refused to do. Therefore, instead of reopening the plant, the employer arranged to have a competitor perform the work and, in turn, agreed to perform similar work for the competitor in the future. In dismissing the Section 8(a)(5) allegation, the Board held that "the employees would have had no occasion to perform the work ... [and] the employees did not sustain a

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[25] We also reject the Employer's contention that the Union waived bargaining over the manufacturing location of the P-273 because the Union, on occasion in the past, had not demanded bargaining over the manufacturing location of other new frames. It is well settled that a "union's past acquiescence in previous unilateral conduct does not necessarily operate in futuro as a waiver of its statutory rights under Section 8(a)(5)." United Hospital Medical Center, 317 NLRB 1279 (1995).

[26] 153 NLRB 443 (1965).

[27] 312 NLRB 165 (1993), modified on other grounds 52 F.3d 255 (9th Cir. 1995).

significant detriment as a result of the Respondent's arrangement with [its competitor]."[28]

The instant case is well distinguishable because the decision to relocate the P-273 will have a clear impact on bargaining unit employees in the form of lost work, albeit not until the year 2003. In fact, approximately 400 unit jobs would be lost if the P-273 were not manufactured in Milwaukee Works. Thus, the Employer's decision will have a significant impact, albeit a delayed one, upon the unit.

In sum, the manufacture of the P-273 is unit work; its relocation from Milwaukee Works encompasses a mandatory subject because the Employer will not thereby effect change in the "scope and direction of the enterprise", and the Employer has not demonstrated that labor costs were not a significant factor in the decision, or that the union could not have offered labor cost concessions that could have changed the employer's decision; and finally the Union has not waived its bargaining rights over this decision.

B.J.K.

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[28] Cf. Acme Die Casting, 315 NLRB at 202 (the Board, in affirming the ALJ, stated that Torrington Industries is not limited to cases where employees are laid off or replaced; the ALJ found that even though no employees were laid off or suffered a reduction in their workweek, these employees lost additional overtime work that they might have enjoyed if the employer had left the work in plant); Dorsey Trailers, Inc., 321 NLRB 616, 617-618 (1996), enf. denied in relevant part 134 F.3d 125 (3d Cir. 1998)(same).