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## **Plant Closings: Comparative and American Perspectives\*\***

### I. INTRODUCTION

The subject of this article would probably have been considered somewhat recondite and not very interesting prior to the mid-1970s; it is, unhappily, a sign of our current economic plight that the problem of plant closings, including partial shutdowns and relocations, is now high on the list of national concerns. For example, according to a survey by the Bureau of National Affairs, during the first three months of 1982, 350,000 U. S. workers lost their jobs either permanently or temporarily, and there were 112 permanent shutdowns.<sup>1</sup> The topic embraces economic dislocation as it affects workers, the local economy, local and federal government, and the community<sup>2</sup> The article will discuss laws and public policies relevant to this topic. Some attention also will be given to the ways in which other countries attempt to deal with it.

It should be emphasized at the outset that in the United States union members comprise less than 25 percent of the workforce,<sup>3</sup> and the number of workers covered by collective bargaining agreements is only slightly in excess of 25 percent.<sup>4</sup> Thus, even though the organized portion of the labor force is heavily concentrated in the so-called smokestack industries, where most dislocations have occurred, it remains true that the problem of plant closings, broadly defined, is not one that can be dealt with effectively within the framework of legislation applicable only to collective-bargaining relationships.

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<sup>1</sup> BNA EDITORIAL STAFF, LABOR RELATIONS IN AN ECONOMIC RECESSION: JOB LOSSES AND CONCESSION BARGAINING 3 (1982). A study by the investment firm of Merrill, Lynch, Pierce, Fenner & Smith, Inc., estimated that at least 80,000 steel mill jobs have vanished since 1979. Most are in the "Rust Bowl" region that includes parts of New York, Pennsylvania, Ohio, Michigan, Indiana, and Illinois. "Rust Bowl: Steel Mills Waste Away," Los Angeles Times, April 25, 1983, pp. 1, 8.

<sup>2</sup> See Millspaugh, *The Campaign for Plant Closing Laws in the United States: an Assessment*, 5 CORPORATION L. REV. 291, n. 1 (1982).

<sup>3</sup> DIRECTORY OF U. S. LABOR ORGANIZATIONS, 1982-83 EDITION 44 (C. Gifford ed. 1982).

<sup>4</sup> *Id.* at 46.

## II. PRESENT LEGISLATION

### A) Federal Legislation<sup>5</sup>

#### 1. Regulated Industries

##### a) Railroads.

It is not commonly recognized that in the regulated, or formerly regulated, industries—railroads, trucking, airlines, and urban mass transportation—employees have received considerable protection from the consequences of layoffs or displacement resulting from mergers, acquisitions, and abandonments.<sup>6</sup>

In the railroad industry, since the initial federal intervention in the form of the Emergency Railroad Transportation Act of 1933,<sup>7</sup> a combination of statutory, administrative, and collective bargaining protective provisions has substantially eased the impact on employees of mergers, acquisitions, and abandonments, including job losses resulting from technological changes and corporate reorganizations. Significantly, the most important initial protection was provided, not by legislation, but by a collective bargaining agreement between 20 major railroad unions and 85 percent of the railroad carriers known as the Washington Job Protection Agreement. This agreement, which applied only to mergers and abandonments, provided, among other things, for payment of 60 percent of a displaced worker's pay for up to five years, depending on his length of service; displacement allowances for five years for employees retained at lower pay; relocation moving expenses; and severance pay based on length of service. Collective bargaining agreements incorporating the provisions of the Washington Job Protection Agreement were enforceable through the machinery of the Railway Labor Act.<sup>8</sup>

During the period 1936 to 1940, in the absence of any federal legislation, the Interstate Commerce Commission (ICC), exercising its statutory discretionary power to impose conditions required to render merger proposals „consistent with the public interest”, included labor protective provisions in orders approving railroad mergers.<sup>9</sup> In 1940 the Interstate Commerce Act was amended to provide mandatory statutory protection for employees within its jurisdiction. The ICC was directed, in approving railroad mergers, to "require a fair and equitable arrangement to protect the interests of the railroad employees affected," and to include in its order provisions designed to insure for a four-year term that affected employees would not be placed in a worse position in respect of their employment. The Supreme Court subsequently held that

<sup>5</sup> Additional federal laws not dealt with in this article include those providing assistance to employees adversely affected by foreign competition, e.g., *Trade Expansion Act of 1962*, PUB. L. No. 87-794, 76 Stat. 872; *United States Trade Act of 1974*, 19 U. S. C. §§ 2251-2394 (1978). See MacNeil, *Plant Closings and Workers' Rights*, 14 OTTOWA L. REV. 1, 46-48 (1982).

<sup>6</sup> Blumberg, *Collective Layoffs: Protection of Employees Against Dismissal or Displacement as a Result of Mergers, Closings, or Work Transfers*, 26 A. J. COMP. L. 277-78 (Supp. 1978). Discussion is here confined to railroads and airlines and is based almost entirely on Dean Blumberg's excellent summary. For his treatment of motor carriers, water carriers and freight forwarders, other regulated utilities, urban mass transportation, and pollution control acts, see *id.* at 281, 282-83.

<sup>7</sup> 48 Stat. 211 (1933).

<sup>8</sup> 45 U. S. C. § 3 (1972).

<sup>9</sup> 49 U. S. C. § 5(2)(b)(Supp. 1977).

the statute did not impose a mandatory "job freeze."<sup>10</sup> In his dissenting opinion, Justice Douglas noted that the House had adopted a proviso prohibiting the Commission from approving a merger if it would result in unemployment or displacement of employees or in the impairment of their existing employment rights.<sup>11</sup> This proviso, which had been rejected by the Congress, represented one of the first of many unsuccessful legislative attempts to curb management decisions to terminate employees for bona fide economic reasons.<sup>11/a</sup>

The final sentence of section 5(2)(f) of the Interstate Commerce Act reads: "Notwithstanding any other provisions of this Act, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any [railroad] carrier or carriers . . . and the duly authorized representative or representatives of its or their employees." Nevertheless, in a divided decision, the Supreme Court held that a collective agreement reducing the benefits provided in a prior agreement that met the requirements of section 5(2)(f) was not enforceable.<sup>12</sup>

The Interstate Commerce Act also requires approval by the ICC of any route or station abandonment. The statutory standard in the case of abandonments involves the "public convenience and necessity." The Supreme Court unanimously held that this standard requires the ICC to consider the impact of abandonments on labor,<sup>13</sup> and rejected the Commission's view to the contrary as "not only hostile to the major objective of the Act and inconsistent with decisions of this Court, but irreconcilable with its own interpretations of § 5(4)."<sup>14</sup> Thereafter, commencing in 1944,<sup>15</sup> the ICC has required severance pay in route and station abandonment cases generally. Except in cases of total abandonment by carriers in extreme financial difficulty, the so-called Burlington formula (100 percent of compensation for four years or the employee's length of service, if less) has been uniformly applied.<sup>16</sup>

The Supreme Court, in a narrowly divided decision, held in 1960 that the Railway Labor Act required the carrier to bargain over its decision to eliminate railroad stations and station jobs,<sup>17</sup> thereby strengthening, as one writer put it, the "symbiotic relation between the statutory scheme and collective bargaining in the railroad industry."<sup>18</sup>

The provisions of the Washington Job Protection Agreement were improved upon by the Rail Passenger Service Act of 1970, which required "fair and equitable arrangements" to protect the interests of employees affected by the discontinuance of intercity rail passenger service.<sup>19</sup> The arrangements were

<sup>10</sup> Brotherhood of Maintenance of Way Employees v. United States, 336 U. S. 169, 177-79 (1961).

<sup>11</sup> *Id.* at 192.

<sup>11/a</sup> 47 U.S.C. & 5 (2) (f) (1976).

<sup>12</sup> Norfolk & W. R. R. v. Nemitz, 404 U. S. 37 (1971).

<sup>13</sup> ICC v. Railway Labor Executives Ass'n, 315 U. S. 373 (1942).

<sup>14</sup> *Id.* at 380.

<sup>15</sup> Chicago, B. & Q. R. R. Abandonment, 257 I. C. C. 700 (1944).

<sup>16</sup> See Brown, *Employee, Protection and the Regulation of Public Utilities, Mergers, Consolidations and Abandonment of Facilities in the Transportation Industry*, 63 YALE L. J. 445, 452-53 (1954), cited in Blumberg, *supra* note 6, at 280 n. 17.

<sup>17</sup> Order of Railroad Telegraphers v. Chicago & N. W. Ry., 362 U. S. 330 (1960). See Meltzer, *The Chicago & North Western Case: Judicial Workmanship and Collective Bargaining*, 1960 SUP. CT. REV. 113.

<sup>18</sup> Blumberg, *supra* note 6, at 280.

<sup>19</sup> 45 U. S. C. §§ 541, 565 (1972).

to be approved by the Secretary of Labor. The protective provisions certified by the Secretary for displaced or dismissed employees increased the dismissal allowance to 100 percent of compensation and extended the period of compensation from five to six years; moreover, the period commenced on the later date of actual displacement, rather than on the earlier date of the discontinuance.<sup>20</sup>

Finally, the Regional Rail Reorganization Act of 1973<sup>21</sup> and the Rail Revitalization Reform Act of 1976<sup>22</sup> provided similar job protective provisions for railroad employees on a regional and national basis, respectively.

b) Airlines

Although the Federal Aviation Act, providing for regulation of commercial air carriers, contains no provisions for the protection of employees, section 1378(b) requires that all airline mergers, purchases, leases, control acquisitions, and route changes be approved by the Civil Aeronautics Board (CAB), which must find that the transaction is "consistent with the public interest."<sup>23</sup> The CAB has followed the pattern of protective labor provisions developed for the railroads by the ICC. Its own pattern was established in the *United-Capital Merger Case*,<sup>24</sup> in 1961; it consisted of 13 conditions, including, severance pay (60 percent for a period of five years, depending upon length of service), displacement allowances, and integration of seniority lists for the protection of affected employees.

The CAB has been criticized for "blindly" following the ICC,<sup>25</sup> on the theory that the "declining railroads" were hardly an appropriate model for the "vigorously expanding airline industry";<sup>26</sup> but, of course, all that has changed in recent years, and the airlines, too, face declining revenues, mounting deficits, and in some cases, bankruptcy. Mergers are on the increase, and the need for protective provisions for affected airline employees is greater than ever.

In the foregoing brief review of employee protection in the railroad and airline industries, two facts stand out. The first is that the prime impetus to the development of those protective patterns was not a statute, but a private collective-bargaining agreement—the Washington Job Protection Agreement of 1936. The second, and more important, is that all of the protective provisions, whether fixed by statute or by private agreement, deal with the consequences of the mergers, acquisitions, and abandonments; none offers any opportunity for the employees concerned, or their bargaining representatives, to participate with management in making the initial decisions. The reasons for this significant distinction are articulated more clearly in cases

<sup>20</sup> PUB. L. No. 91-518, App. C-1, C-2, C-3, 83 Stat. 1327 (1970). See *Congress of Railway Unions v. Hodgson*, 326 F. Supp. 68, 76 (D. D. C. 1971).

<sup>21</sup> 45 U. S. C. §§ 701, 771-79 (Supp. 1977).

<sup>22</sup> 45 U. S. C. §§ 801, 836 (Supp. 1977).

<sup>23</sup> 49 U. S. C. §§ 1301, 1378(b)(1970). All functions, powers, and duties of the CAB were terminated or transferred by the Act of Oct. 24, 1978, PUB. L. No. 95-504, § 40(a), 92 Stat. 1744 (1978), effective on or before Jan. 1, 1985. All functions, powers, and duties under § 1378 were transferred to the Department of Justice.

<sup>24</sup> 33 C. A. B. 307, 323-31, 342 (1961).

<sup>25</sup> See Rosenfield, *Airline Mergers: The Public Interest in Labor Protective Provisions*, 61 KY. L. REV. 429, 450-51, 459 (1973), cited in Blumberg, *supra* note 6, at 282, n. 32.

<sup>26</sup> Blumberg, *supra* note 6, at 282.

decided under the National Labor Relations Act (NLRA),<sup>27</sup> which are, discussed in the following section.

## 2. Unregulated Industries

### a) Collective Bargaining

The Act makes it an unfair labor practice for an employer to refuse to bargain collectively with the exclusive bargaining representative of its employees.<sup>28</sup> It also defines collective bargaining as the performance of the mutual obligation of the parties to meet and confer in good faith over wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, but does not compel either party to agree to a proposal or to make a concession.<sup>29</sup>

Most of the decisions of the National Labor Relations Board (NLRB) and the courts bearing on complete or partial plant closings or relocations, or the contracting out of work formerly performed by plant employees, have concentrated on the question whether the employer's conduct constituted a refusal to bargain. The broad outlines of the doctrine developed by those decisions are now fairly well established.<sup>30</sup> Thus, "an employer has the absolute right to terminate his entire business for any reason he pleases," but this right does not include the ability to close part of a business no matter what the reason."<sup>31</sup> Although total liquidation is not an unfair labor practice, even if it is "motivated by vindictiveness toward the union,"<sup>32</sup> the legal consequences of thereafter continuing in business may be different. For example, in *Textile Workers v. Darlington Mfg. Co.* the Supreme Court ruled in part:

If the persons exercising control over a plant that is being closed for antiunion reasons (1) have an interest in another business, whether or not affiliated with or engaged in the same line of commercial activity as the closed plant, of sufficient substantiality to give promise of their reaping a benefit from the discouragement of unionization of the business; (2) act to close their plant with the purpose of producing such a result; and (3) occupy a relationship to the other business which makes it realistically foreseeable that its employees will fear that such business will also be closed down if they persist in organizational activities . . . an unfair labor practice has been made out.<sup>33</sup>

An employer faced with the economic necessity of either moving or consolidating the operations of a failing business has no duty, in the absence of any showing of antiunion animus, to bargain with the union concerning the decision to shut down part of the operation; but it does have a duty to notify

<sup>27</sup> 29 U. S. C. §§ 151-168 (1976).

<sup>28</sup> 29 U. S. C. §§ 158(a)(5), 159(a)(1976).

<sup>29</sup> 29 U. S. C. § 158(d)(1976).

<sup>30</sup> Outside the scope of this article is the phenomenon of the "runaway shop," an actual removal of a plant to a different location to forestall, or to retaliate against, the exercise by employees of their rights to organize and to bargain collectively, as guaranteed by § 7 of the NLRA, 29 U. S. C. § 157 (1976). Such conduct may be a violation not only of § 8(a)(5), but also of § 8(a)(1), 29 U. S. C. § 158(a)(1)(1976) (interference, restraint, or coercion of employees in the exercise of rights guaranteed by § 7), and § 8(a)(3), 29 U. S. C. § 158(a)(3)(1976) (discrimination in regard to hire or tenure of employment, or any term or condition of employment, to encourage or discourage membership in any labor organization).

<sup>31</sup> *Textile Workers v. Darlington Mfg. Co.*, 380 U. S. 263, 268 (1965).

<sup>32</sup> *Id.* at 274.

<sup>33</sup> *Id.* at 275-76.

the union of its intentions in order to give the latter a chance to bargain over the effects of the partial closing on the employees involved.<sup>34</sup> How much notice is required is not clear.<sup>35</sup>

As a general rule, the decision whether to contract out work being performed by employees in a bargaining unit is a mandatory subject of bargaining. Yet the holding to that effect in the leading case of *Fibreboard Paper Products Corp. v. NLRB*<sup>36</sup> has been somewhat circumscribed by Justice Stewart's concurring opinion, which has been relied upon as authority almost equal to that of the opinion of the Court. Troubled by what he considered the "implications of . . . disturbing breadth" radiating from the Court's opinion in *Fibreboard*, Justice Stewart sought to limit its scope in part as follows:

. . . [T]here are . . . areas where decisions by management may quite clearly imperil job security, or indeed terminate employment entirely. An enterprise may decide to invest in labor-saving machinery. Another may resolve to liquidate its assets and go out of business. Nothing the Court holds today should be understood as imposing a duty to bargain collectively regarding such managerial decisions, which lie at the core of entrepreneurial control. Decisions concerning the commitment of investment capital and the basic scope of the enterprise are not in themselves primarily about conditions of employment, though the effect of the decision may be necessarily to terminate employment.<sup>37</sup>

The most recent Supreme Court pronouncement on this general subject came in *First National Maintenance Corp. v. NLRB*,<sup>38</sup> in which an employer terminated a contract with a customer and discharged the employees who had been working under that contract. A majority of the Court, speaking through Justice Blackmun, held that although the employer had a duty to bargain in good faith with the union representing its employees over the effects of the decision, it had no duty to bargain over the decision itself. Justice Blackmun proposed a balancing test that would not, in his words, "serve either party's individual interest, but . . . [would] foster in a neutral manner a system in which the conflict between these interests may be resolved";<sup>39</sup> but it must be conceded that he put his thumb on the scales. He apparently took for granted "the employer's need for unencumbered decision-making,"<sup>40</sup> and starting with that premise, he had no trouble reaching the conclusion that "bargaining over management decisions that have a substantial impact on . . . continued . . . 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."<sup>41</sup> Here, again, Justice Blackmun's assumptions favored the employer. Conceding the union's "legitimate concern over job security," he declared that its practical purpose in participating in a decision

<sup>34</sup> *NLRB v. Royal Plating & Polishing Co.*, 350 F. 2d 191 (3d Cir. 1965).

<sup>35</sup> In *First Nat'l Maint. Corp. v. NLRB*, 452 U. S. 661, 682 (1981), the Court said that bargaining over the effects of a decision "must be conducted in a meaningful manner and at a meaningful time and the Board may impose sanctions to insure its adequacy."

<sup>36</sup> 379 U. S. 203 (1964).

<sup>37</sup> *Id.* at 223.

<sup>38</sup> 452 U. S. 661 (1981).

<sup>39</sup> *Id.* at 680-81.

<sup>40</sup> *Id.* at 679.

<sup>41</sup> *Ibid.*

whether to close a particular facility would be "largely uniform: it will seek to delay or halt the closing."<sup>42</sup> And although the union would doubtless "be impelled, in seeking these ends, to offer concessions, information, and alternatives that might be helpful to management of forestall or prevent the termination of jobs," he thought it unlikely that requiring bargaining over the decision itself, as well as its effects, would "augment this flow of information and suggestions."<sup>43</sup>

Justice Blackmun recognized that if labor costs are an important factor in the decision to close, management has an incentive voluntarily to discuss the matter with the union and to seek concessions that will permit it to continue operations. On the other hand, he observed that

management may have great need for speed, flexibility, and secrecy in meeting business opportunities and exigencies. It may face significant tax or securities consequences that hinge on confidentiality, the timing of plant closing, or a reorganization of the corporate structure. The publicity incident to the normal process of bargaining may injure the possibility of a successful transition or increase the economic damage to the business. The employer may also have no feasible alternative to the closing, and even goodfaith bargaining over it may be both futile and cause the employer additional loss.<sup>44</sup>

Finally, Justice Blackmun concluded that the harm likely to be done to an employer's need to operate freely in deciding whether to shut down part of its business purely for economic reasons outweighs the incremental benefit that might be gained through the union's participation in making the decision, and we hold that the decision itself is *not* part of . . . terms and conditions' . . . over which Congress has mandated bargaining.<sup>45</sup>

In deciding *First National Maintenance* the Court "intimate[d] no view as to other types of management decisions, such as plant relocations, sales, subcontracting, automation, etc., which are to be considered on their particular facts."<sup>46</sup> The NLRB General Counsel subsequently addressed himself to those types of decisions in a memorandum applying the balancing test<sup>47</sup> enunciated by the Court.<sup>48</sup> In this regard, he stated, the focus should be on whether the employer's decision was based on labor costs or other factors that would be amenable to resolution through the collective bargaining process. In respect of managerial decisions similar to that involved in *First National Maintenance*, the General Counsel thought that the decision in that case covered economically-motivated decisions to go wholly out of business, to terminate a distinct line of business, and to sell a business to another and no longer to remain in it. Regarding the latter two situations, the NLRB had come to the same conclusion prior to the Court's decision in *First National Maintenance*.<sup>49</sup>

<sup>42</sup> *Id.* at 681.

<sup>43</sup> *Ibid.*

<sup>44</sup> *Id.* at 682-83.

<sup>45</sup> *Id.* at 686 (italics in original).

<sup>46</sup> *Id.* at 686, n. 22.

<sup>47</sup> See text at note 38 *supra*.

<sup>48</sup> General Counsel Memorandum No. 81-57, Nov. 30, 1981, 4 CCH LAB L. REP 9271.

<sup>49</sup> See, e.g., *Kingwood Mining Co.*, 210 N. L. R. B. 844 (1974), *aff'd sub nom. UMW v. NLRB*, 515 F. 2d 1018 (D. C. Cir. 1975) (employer ceased coal mining operations while continuing to operate its coal tipple); *General Motors Corp.* 191 N. L. R. B. 951 (1971), *aff'd*, 470 F. 2d 422 (D. C. Cir. 1972) (sale of retail outlet to franchise dealer).

Of course, the employer is obligated to bargain over the effects of these transactions on his employees; but unlike the situation in the regulated industries, the law imposes no minimum protections that must be accorded to those employees.

### *B) State Legislation*

Three States, Maine, Wisconsin, and South Carolina have enacted laws dealing with plant closings. The Maine statute<sup>50</sup> provides that any employer proposing to relocate a covered establishment outside the State shall notify employees and the officers of the municipality where the plant is located at least 60 days prior to the relocation. Violations are punishable by a maximum fine of \$500, which may not be imposed if the relocation "is necessitated by a physical calamity, or if the failure to give notice is due to unforeseen circumstances." In addition, any employer who relocates or terminates a covered establishment will be liable to his employees for severance pay at the rate of one week's pay for each year of employment by the employee in that establishment. Again, this provision does not apply if relocation or termination of an establishment is "necessitated by a physical calamity."

The Wisconsin statute<sup>51</sup> provides that every employer employing 100 or more persons in the State who has decided upon a merger, liquidation, disposition or relocation within or without the State shall notify the Department of Industry, Labor, and Human Relations at least 60 days prior to taking such action. The employer is obligated to provide in writing all information concerning its payroll, affected employees, and the wages and other remuneration owed to such employees that the Department may require. The penalty for failure or refusal to provide such information is a maximum fine of \$50 for each terminated employee.

The South Carolina Statute<sup>51a</sup> applies only to employers "requiring" notice from any employee of the time such employee will quit work." Such an employer must notify its employees of its "purpose to quit work or shutdown" by posting notices to that effect "not less than two weeks in advance or the same length of time in advance as is required by it of its employees before they may quit work." The notices must state the date of the beginning of the shutdown or cessation from work and the approximate length of time it will continue. These provisions do not apply to shutdowns or temporary cessation of work caused by accidents to machinery or by some act of God or of the public enemy. Violations of the law are subject to a fine not exceeding \$5,000; in addition, the employer will be liable "to each and every one of his employees for such damages as such employee may suffer by reason of such failure to give such notice."

As can readily be seen, the fines imposed by the Maine and Wisconsin statutes are purely nominal and without any deterrent effect; but the notice requirements provide the opportunity for state authorities and unions, if any are involved, to put pressure on employers to discuss their plans and, possibly, to modify or even abandon them. The fines provided for in the South Carolina

<sup>50</sup> ME. REV.-STAT. ANN. tit. 26, § 625B (1982-83 Supp.).

<sup>51</sup> WIS. STAT. ANN. § 109.07.

<sup>51a</sup> S. C. Code S. C. CODE ANN. § 41-1-40.



statute are somewhat larger, though hardly severe. In any case, employers may take themselves out of the reach of the statute simply by not requiring their employees to give notice of their intention to quit.

It is thus clear that the statutory protection of employees against collective layoffs due to plant closures or removals is both uneven and very limited. To the extent that the problem is dealt with in collective bargaining agreements, provisions are made for severance pay, relocation payments, and preference in job selection at the new localities. Some agreements provide for minimal job retraining and assistance in finding jobs with other employers. The number of employees covered by such provisions, however, in relation to the number of those displaced, is miniscule. Efforts by unions to obtain broader protection of employment security in their collective bargaining agreements have not been very productive.

### III. COMMON-LAW RULES

At least as far back as the sit-down strikes of the 1930s, workers claimed some sort of "property rights" in their jobs, but those assertions were not based upon any carefully developed and articulated theory. That task was undertaken by Professor Frederic Meyers in his seminal work, *Ownership of Jobs: A Comparative Study*,<sup>52</sup> which has prompted others to explore this question. Space does not permit a summary of Meyers' views;<sup>53</sup> but for present purposes it is sufficient to quote one paragraph from his study:

A job, of course, is an abstraction, but like other abstractions such as "good will" and "expectancy of profit," it may become the object of "ownership." Acceptance of the idea of job ownership then raises the issue of the consequences of involuntary deprivation of "title."<sup>54</sup>

Whatever the merits of this notion may be, suits alleging that this "involuntary deprivation of 'title'" as a result of plant closings or removals violates the Fifth and Fourteenth Amendments' prohibition against deprivation of property without due process of law have uniformly been rejected by the courts. A decision that some scholars thought might signal an important new trend in judicial thinking was handed down by the Court of Appeals for the Second Circuit in 1961, in the case of *Zdanok v. Glidden*,<sup>55</sup> which held that employees at a plant that had been moved to another city were entitled to employment at the new plant site with full seniority rights accumulated under the collective agreement at the former site. Characterizing seniority rights as "unemployment insurance," the court majority concluded that the employees involved had "earned" their valuable unemployment insurance, and that their rights in it were "vested" and could not be unilaterally annulled,<sup>56</sup> notwithstanding that the collective agreement creating the seniority had expired.

<sup>52</sup> F. MEYERS, *OWNERSHIP OF JOBS: A COMPARATIVE STUDY* (1964).

<sup>53</sup> See Aaron, *The Ownership of Jobs: Observations on the American Experience*, in *JOB EQUITY AND OTHER STUDIES IN INDUSTRIAL RELATIONS* 50 (W. Fogel ed. 1982).

<sup>54</sup> MEYERS, *supra* note 52, at 3.

<sup>55</sup> 288 F. 2d 99 (2d Cir. 1961), *aff'd on another issue*, 370 U. S. 530 (1962).

<sup>56</sup> *Id.* at 103.

The decision in *Glidden* was criticized<sup>57</sup> and defended,<sup>58</sup> but its reasoning was rejected by other courts,<sup>59</sup> and the coup de grace was delivered by the Second Circuit itself in *Local 1251, UAW v. Robertshaw Controls Co.*,<sup>60</sup> six years later.

In recent years a considerable body of literature has been devoted to attacking the American doctrine of employment at will, which holds that in the absence of some express agreement or statutory provision to the contrary, the employment relation is "at will," and may be severed by either party, at any time, for any reason or no reason.<sup>61</sup> A number of recent court decisions have refused to follow the rule,<sup>62</sup> but these cases have all involved individual discharges, not collective layoffs or dismissals in connection with plant closures or removals.

Accordingly, those wishing to provide greater job protection for employees in cases of plant closures and removals have shifted their emphasis to proposals for additional statutory regulation. Before discussing those legislative proposals, however, I shall review briefly some relevant experiences in a few other countries.

#### IV. EUROPEAN EXPERIENCE<sup>63</sup>

##### A. Sweden

Limitations of space compel me to confine my discussion of foreign experience to selected European countries and the European Economic Community.

Sweden, as usual, seems to have the most advanced, comprehensive, humane, and successful policies dealing with potential and actual employee dislocations resulting from plant closures or removals, or reductions in employment levels. As is the case in so many aspects of formulating and administering social and economic programs in Sweden, a key role in dealing with problems of employment dislocation is played by a tripartite body of government, business, and labor union representatives, known as the National

<sup>57</sup> E.g., Aaron, *Reflections on the Legal Nature and Enforceability of Seniority Rights*, 75 HARV. L. REV. 1532 (1962).

<sup>58</sup> E.g., Blumrosen, *Seniority Rights and Industrial Change*, 47 MINN. L. REV. 505 (1963); Note, *Treatment of Monetary Fringe Benefits and Post Termination Survival of the Right to Job Security*, 72 YALE L. J. 162, 168-81 (1962).

<sup>59</sup> E.g., *Oddie v. Ross Gear & Tool Co.*, 305 F. 2d 143 (6th Cir.), cert. denied, 371 U. S. 941 (1962).

<sup>60</sup> 405 F. 2d 29, 33 (2d Cir. 1968): "It is time that *Glidden* be formally interred. It is therefore expressly overruled."

<sup>61</sup> See, e.g., authorities cited in Aaron, *supra* note 53, at 85-86.

<sup>62</sup> See, e.g., Brown, *Limiting Your Risks in the New Russian Roulette—Discharging Employees*, 8 EMPLOYEE REL. L. J. 380 (1982), and cases cited therein.

<sup>63</sup> Much of the material in this section is drawn from ECONOMIC DISLOCATION: PLANT CLOSINGS, PLANT RELOCATIONS AND PLANT CONVERSION (1979). Subtitled "Policies and Programs in Three Countries [Sweden, West Germany, and Great Britain]; Recommendations for the United States," this work is a joint report submitted by a group of Labor Union Study Tour Participants from the United Auto Workers, United Steel Workers, and the International Association of Machinists and Aerospace Workers. It will be cited hereafter as "JOINT REPORT."

Labor Market Board—AMS for short. Of the 13 voting members, six are selected from blue-collar, white-collar, and professional employee federations; three from the employers' federation, two from government, and one each representing women and agriculture. Despite the unions' voting majority, most decisions of the AMS have been unanimous.<sup>64</sup>

AMS is supported at the national level by a staff of 800; its 24 county labor market boards and over 200 local employment services offices throughout the county employ about 8,000 civil service employees. Its annual budget is about \$2 billion—roughly nine percent of Sweden's total national budget and 2.5 percent of GNP. These funds are used to administer a wide range of programs, including the employment service, labor mobility assistance, training, and vocational guidance and rehabilitation. In addition, there are employment subsidy programs and inventory stockpiling programs to keep people in their jobs, as well as a variety of innovative job-creation programs.<sup>65</sup>

The AMS is aided in coping with economic dislocation by the legal requirement that employers give advance notice of impending dismissals. Before implementing decisions to close a plant or permanently to reduce the level of employment at a facility, employers must give notice to the union, the appropriate county branch of the labor market board, and the employees involved. The union must be notified as soon as management has reached a tentative decision to reduce the level of employment at a facility. Under the 1976 Act on Co-determination at Work,<sup>66</sup> management may not implement its decision until it has negotiated with the union, which has full legal rights of access to company financial and other information. The employer is obligated to negotiate every aspect of its decision with the union, including the number of jobs to be eliminated, the timing of any proposed reductions in employment, and supplementary protection (above minimum statutory requirements) for workers who will be adversely affected.

Under the Employment Security Act of 1974, an employer must warn the union of the intended employment reductions at least one month before a planned layoff for lack of work, whether the layoff is temporary or permanent, and must offer to start negotiations promptly with the union. If the parties disagree about whether the proposed layoff is justified, it cannot be put into effect until the dispute has been resolved by the Labor Court, which is empowered to modify or delay the layoff.

Advance notice of layoffs, ranging from two to six months, depending upon the number of workers involved, must also be given by the employer to the County Labor Market Board, as well as to the union and to individual employees slated for discharge. The order in which individuals must be retained in temporary or permanent reductions in force is determined by law, with workplace seniority being the dominant factor. Special arrangements are made for alternative employment for older workers and the handicapped.

As part of the scheme of early warning of impending dislocations, the government provides 75 percent of a worker's wages for repair or other non-production work at firms in temporary difficulty. This subsidy is in-

<sup>64</sup> JOINT REPORT, *supra* note 63, at 10.

<sup>65</sup> *Ibid.*

<sup>66</sup> Act No. 580, June 10, 1976, International Labor Office (ILO) Legislative Series 1976-Swe. 1.

<sup>67</sup> JOINT REPORT, *supra* note 63, at 11-12.

creased to 90 percent for workers 50 years old and over, and to workers in the so-called exposed industries, that is, those especially hard hit by import competition.

All of these measures are but a part of the larger system of intensive job retraining, promotion of labor mobility, and job creation, developed and administered by the AMS. Such a system is possible because of Sweden's homogeneous and relatively small population (about 8,000,000), its high level of unionization (70 percent overall), the strong national consensus on government social and economic policies, and the Swedish genius for working out even the most intractable problems through tripartite discussions.

#### *B. EEC: collective redundancies; mergers, and takeovers*

Discussion of laws relating to collective dismissals for economic reasons in other West European countries will be most comprehensible within the framework of EEC Directives. In 1975 the Council of the European Communities issued its directive on collective redundancies.<sup>68</sup> It requires employers contemplating collective redundancies to begin consultations with the workers' representatives with a view to reaching an agreement. These consultations must at least cover ways and means of avoiding collective redundancies or reducing their number and mitigating their consequences. Employers must, therefore, supply workers' representatives with all relevant information, and must state in writing the reasons for the redundancies, the number of workers involved, the number normally employed, and the period over which the dismissals are to be effected; this information is intended to enable workers' representatives to make constructive counterproposals. Employers must also forward to the competent public authorities copies of all written communications between themselves and workers' representatives.

Independently of the foregoing procedures for consultation with workers representatives, employers must notify competent public authorities in writing of any projected collective redundancies. This notification must contain all relevant information concerning the plan for collective redundancies and the information given to workers' representatives. Copies must also be sent to workers' representatives, who may send any comments they may have to the public authorities.

Subject to the authority of Member States to reduce or extend the period, at least 30 days must elapse between notification to the public authorities and the commencement of collective redundancies.

In 1977 the Council issued another Directive on the safeguarding of employees' rights and advantages in the case of mergers and takeovers.<sup>69</sup> It applies to transfers of a business or part of a business within the territorial scope of the Treaty establishing the EEC. The transferor's rights and obligations arising from a contract of employment or employment relationship existing on the date of the transfer must be assumed by the transferee; but Member States may require that the transferor shall also continue to be liable for rights arising from the employment contract or relationship. Fol-

<sup>68</sup> 75/129/EEC, Feb. 17, 1975; see EUR. IND. REL. REV. No. 13, 24-25 (Jan. 1975).

<sup>69</sup> 77/187/EEC, Feb. 14, 1977; see EUR. IND. REL. REV. No. 36, 25-26 (Dec. 1976).

lowing the transfer, the transferee must maintain the working conditions provided in a collective agreement, at least until the expiration or termination of that agreement or the execution of another. Member States are permitted, however, to limit the period for which the transferee must retain those working conditions to one year. Member States are also directed to adopt measures necessary to protect the interests of the transferor's employees and former employees at the time of the transfer in respect of immediate or prospective entitlements to old-age and survivors' benefits over and beyond the statutory social security schemes.

Both the transferor and the transferee are required to inform the representatives of their respective employees of the reasons for the transfer; the legal, economic, and social implications of the transfer for the employees; and the measures envisaged in relation to the employees. The transferor must provide this information to the representatives of its employees "in good time," and in any event before the transfer directly affects the conditions of work and employment of his employees. If either the transferor or the transferee envisages taking measures in relation to its respective employees as a result of the transfer, it must consult with his respective employees' representatives "in good time," with a view to seeking an agreement.

Before continuing with an account of the latest proposed Council Directive, it will be useful to note briefly the laws relating to worker displacements in three of the Member States—West Germany, The Netherlands, and France—because they have had some influence on that Directive.

### C. West Germany

West Germany has a similar but not quite so comprehensive a system as Sweden's for dealing with potential and actual employment dislocations caused by closures, removals, or reductions in force. It has no control agency comparable to the AMS, nor are there tripartite bodies to administer policies of the Ministries of Labor and Economics. At the enterprise level, however, pursuant to the provisions of the Works Constitution Act of 1972,<sup>70</sup> the works councils, consisting of representatives elected by all the workers — union and non-union, blue-collar and white-collar — have substantially the same rights in respect of advance notice and full disclosure by the employer concerning proposed employee displacements, negotiations over all details of the proposed dislocation, and adjudication by a labor court of any unresolved details, as those enjoyed by Swedish unions. Agreements reached as a result of these negotiations are known as "social plans." They deal comprehensively with ways of avoiding or easing the economic hardships on workers as a consequence of employment cutbacks, by minimizing the number of outright dismissals and providing broad economic protection for those who are dismissed.<sup>71</sup>

The Protection Against Dismissal Act of 1969<sup>72</sup> bars the "socially unjustified" dismissal of any worker after a probationary period of six months. In the case of mass dismissals the enterprise must notify the Labor Ministry in advance. Reasons for the planned dismissals must be stated, and the employer

<sup>70</sup> ILO Legislative Series 1972—Ger. F. R. 1.

<sup>71</sup> JOINT REPORT, *supra* note 63, at 22.

<sup>72</sup> ILO Legislative Series 1969—Ger. F. R.

must also forward a copy of the works council's opinion as to whether the layoffs are justified. The regional office of the Labor Ministry is empowered to delay any dismissals for up to two months after it receives notification from the employer. In practice, the authorities usually delay dismissals for one month, in order to provide time to arrange retraining and other programs for affected workers.<sup>73</sup>

#### D. The Netherlands

The Dutch Works Councils Act of 1979<sup>74</sup> establishes a system with strong similarities to those of Sweden and West Germany, but one that goes even further in some respects.<sup>75</sup> The law expands the scope of the previous code-termination requirements and states that the employer must "obtain the council's consent" for proposed changes and modifications relating to a broad range of terms and conditions of employment. Should the works council and the employer, in the context of a joint meeting, not be able to resolve their differences over a co-determination issue, it must be referred for final resolution to an external, "trade commission," consisting of representatives from both sides.

Works Councils must now be consulted prior to a decision being taken by management regarding, among other things, establishment of new undertakings, withdrawing or entering into financial co-operation with other firms, and hiring temporary workers. Prior consultations regarding closures and transfers were already required. Before any final decision is taken on any of these matters by management, there must be a discussion with the council, and the employer must give detailed reasons for its plans. The council must also be asked for its opinion "in time for it to be able to influence the final decision." Multinational corporations are excused from the prior consultation requirement only if the plan in question "could not reasonably be expected to have any direct impact on undertakings in the Netherlands." The exception does not apply, however, if a decision to transfer production away from The Netherlands is involved, or if any "substantial investment" is being made.

Whenever a works council opinion on a consultation issue runs counter to the employer's view, the employer is precluded from implementing the decision for at least one month. During this period, the council can appeal against the employer's plan to the Commercial Section of the Amsterdam Court of Justice. The court has the power to revoke the decision after having determined "whether the employer could reasonably have arrived at the decision in question after weighing all the interests involved."

Dutch works councils are also entitled to receive from employers semi-annual reports on the "general activities" of the undertaking; annual "financial accounts" of the undertaking, placing these in context of any larger group of which it is a part; and information on "future prospects" and activities, plus any long-term budget forecasts.

<sup>73</sup> JOINT REPORT, *supra* note 63, at 24.

<sup>74</sup> See EUR. IND. REL. REV., No. 54, 10-12 (June 1978).

<sup>75</sup> This discussion of the Dutch Works Councils Act is based on *Netherlands Works Councils Come of Age*, EUR. IND. REL. REV., No. 82, 7-8 (Nov. 1980).

<sup>76</sup> Act No. 75-5 respecting dismissals for economic reasons, Jan. 3, 1975, ILO Legislative Series 1975-Fr. 1.

## E. France

In 1977 France adopted a new Decree implementing a 1975 Act<sup>76</sup> on procedures to be followed in redundancy situations.<sup>77</sup> The Decree requires all private and public undertakings with at least 50 workers to inform the local labor inspector of "any movements in their level of manpower" within the first eight days of each month. Subject to certain limited exceptions in the public sector, all employers, regardless of workforce size, must gain prior approval from the Labor Inspectorate for any recruitment or dismissal that comes within 12 months following redundancies.

## F. EEC: Multinationals

We may now return to the latest and most controversial EEC draft Directive, establishing new rules on information for and consultation with employee representatives of multinationals.<sup>78</sup> If adopted, the Directive will apply to all multinationals in the EEC (regardless of head office location) and national firms with 100 or more workers operating in a single Common Market country. This document is known as the "Vredeling Directive," because its principal draftsman was Henk Vredeling of The Netherlands, a former EEC Social Affairs Commissioner.

Under the draft Directive, as amended,<sup>79</sup> the obligations to inform and consult are approximately the same for both multinational and national firms covered by the Directive. Each firm is required to draw up an information statement at least every six months, summarizing the activities "of the dominant undertaking and its subsidiaries taken as a whole." The statement must cover structure and manning; the economic and financial situation; the general situation and probable trends in business, production, and sales; the employment situation and likely trends; production and investment programs; rationalization projects; manufacturing and working methods, particularly the introduction of new working methods incorporating new technology; and all procedures and plans that "are liable to have a substantial effect on the employees' interests." Copies of these statements must be sent to employees' representatives.

The draft Directive gives employees' representatives prior consultation rights over certain planned decisions covering all or a main part of a firm or its subsidiaries when these could "substantially" affect employee interests. Detailed information on these issues must be sent by EEC central management to management in each subsidiary with 1,000<sup>80</sup> or more employees at some point prior to the final adoption of a decision.<sup>81</sup> Such information must include an explanation of the reasons of the proposed decision, its legal,

<sup>77</sup> Decree of Dec. 28, 1977; see EUR. IND. REL. REV. No. 50, 5-6 (Feb. 1978).

<sup>78</sup> EUR. IND. REL. REV., No. 82, 22-24 (Nov. 1980).

<sup>79</sup> Some 37 amendments, largely supported by business, were adopted by the European Parliament before the proposal was approved on Dec. 14, 1982. See BNA Daily Lab. Rep. No. 251: A-9 (Dec. 30, 1982).

<sup>80</sup> The number of employees was only 100 or more in the original draft.

<sup>81</sup> The original draft required notification at least 40 days prior to the taking of a decision.

economic, and social consequences for the workers concerned, and measures planned in respect of those workers.

The draft Directive lists the following types of decisions covered by the required prior consultation procedure: closure or transfer of part of or an entire establishment; major cutbacks, expansion plans or changes in company activities; major organizational changes; and any partnerships with other firms or the termination of existing business relationships of that kind. Management has the right, however, to decline to supply data that it regards as "secret"; it also is not required to provide employee representatives with any data not disclosed to shareholders.

Upon receipt of this information, a subsidiary is obligated to disclose it to the employees' representatives without delay. An amendment requires that employee representatives authorized to receive management information under the directive be elected by secret ballot, despite the absence of such a provision from the national laws and practices of a number of the 10 EEC countries. They then have 30 days in which to give an opinion. If they conclude that the planned decision will have direct adverse consequences on employment or working conditions, subsidiary management may then be required to consult with the employees' representatives with a view to seeking agreement on ways of alleviating likely hardship. Employee representatives are also entitled to submit written requests for further information to the parent company, but only when company at the national or local level refuses to provide the requested data.<sup>82</sup>

The draft Directive leaves it to the legislatures of Member States to determine those employee representatives to be given information and consultation rights. It does provide, however, that so far as consultation is concerned, if there exists in a Member State "a body representing employees at a level higher than that of the individual subsidiary" (such as a group or central works council), this body will have the right to participate in consultations.

The draft Directive provides for no penalties for breach of its provisions; it leaves that determination to the individual Member States. It declares however, that national implementing legislation must provide a right of appeal for employees' representatives with regard to disputed company decisions affecting their members.

It was inevitable that the draft Directive would not be adopted by the EEC Council of Ministers in its original form. The Community-level employers association (Union Internationale des Industries de la Communauté Européenne) is totally opposed to it, and the Community's main union organization (European Trade Union Confederation) is also opposed because the draft

<sup>82</sup> As originally drafted, the Directive included a so-called bypass provision that would have entitled unions to call for consultations with a company's international headquarters if they were not satisfied with the responses from the national or local levels. According to Paul Weinberg, a vice-president of American Express Co., "[In this bypass provision] the unions are after more than disclosure. In particular, they would like to see the accounts of multinational corporations; i. e., headquarters. They are not interested in the country ledgers. If, for example, a company operates out of London, they want to see the London accounts and how they will affect them in France or in the underdeveloped countries." BNA Daily Lab. Rep., *supra* note 79, at A-10.



omits specific penalties.<sup>83</sup> Even as amended, however, the Directive will almost certainly go far beyond what employers in the United States, who have reacted with alarm to the Vredeling proposals, would be ready to accept.<sup>84</sup>

## V. PROPOSED FEDERAL AND STATE LEGISLATION

### A. Summary of Legislative Proposals

Despite the fundamental antipathy of American employers to mandatory legislative requirements of disclosure and consultation with employees or unions prior to closing or relocating plants, or consolidating or reducing employment levels, a growing number of bills introduced in the federal and state legislatures has reflected the impact of European experience.<sup>85</sup> At the federal level, the first relatively recent effort to secure comprehensive plant closing legislation began in 1974, with the introduction in the House of the National Employment Priorities Act.<sup>86</sup> The bill was aimed at "arbitrary and unnecessary closing and transfers . . . which cause irreparable social and economic harm to employees, local communities and the nation . . ." It would have established a National Employment Relocation Administration, with the authority, triggered by a request from an affected union, or 10 percent of the employees, to investigate and report on each closing and to determine whether or not the closing was "justifiable." An unjustified closing would result in the loss to the employer of eligibility for various tax benefits. A comprehensive program of federal financial assistance to the worker, the threatened business, local businesses, and the local government was also contemplated. Companion legislation to the House proposal was introduced in the Senate the following year.

A variety of other bills followed, spurred by the growing number of plant closings. They embodied increasingly sophisticated and comprehensive proposals, supported by a broad spectrum of groups, ranging from industrial communities hard hit by the economic recession to a committee of Auto Workers, Machinists, and Steelworkers, following a study tour of Sweden, West Germany, and Great Britain.<sup>87</sup> None of these proposals has been enacted into law. Taken as a whole, the legislative proposals fall into six categories: prenotification, governmental regulatory intervention, employer benefits assistance, local and federal government compensation by employers, employer assistance, and employee boycott assistance.<sup>88</sup>

<sup>83</sup> EUR. IND. REL. REV., No. 82, 5 (Nov. 1980).

<sup>84</sup> For example, David A. Ruth, Director of International Affairs of the U. S. Council for International Business, warned that even the amended Directive "would still internationalize industrial relations and allow, among other things, for the creation of an EEC-wide works council of employees to receive information and engage in consultations with management." And according to Paul Weinberg, "'Consultation' is another dangerous word, because from the union's perspective 'consultation' means 'negotiation.'" BNA Daily Lab. Rep., *supra* note 79, at A-10.

<sup>85</sup> For a review and analysis of the types of bills introduced see, especially, Millspaugh, *supra* note 2. Briefer discussions may be found in B. BLUESTONE & B. HARRISON, CAPITAL AND COMMUNITY: THE CAUSES AND CONSEQUENCES OF PRIVATE DISINVESTMENT 256-60 (1980), and A. Freedman, *Analysis of Plant Closing Legislation*, BNA Daily Lab. Rep. No. 152: E-1 (Aug. 5, 1980).

<sup>86</sup> H. R. 13541, 93d Cong., 1st Sess. (1974).

<sup>87</sup> See JOINT REPORT, *supra* note 63.

<sup>88</sup> Millspaugh, *supra* note 2, at 299.

At the state level there has been a similar increase in the number of proposals to deal with the problem of plant closings and renewals, and a similar lack of success in getting them adopted. These proposals can be grouped generally into three categories: prenotification, severance benefits, and creation of a community assistance fund.<sup>89</sup>

### B. Employer Attitudes Toward Legislative Proposals

It is not my purpose to discuss in this article the merits and weaknesses of the numerous bills relating to plant closings and relocations that have been proposed to federal and state legislatures. It is important, however, to note the almost uniformly hostile stance taken against all such proposals by the American business community, because that is surely a significant dimension of the problem confronting the country.<sup>90</sup>

The following quoted statements are illustrative of many others that might be cited:

Even serious consideration of this bill [on plant closings] would be raising a sign on the borders of this state investment isn't welcome here. A firm with divisions in other states would have one more incentive to expand elsewhere.<sup>91</sup>

Unions are interested in raising wages and fringe benefits for their members. They know, however, that their ability to do this is restricted by the threat of firms moving to new locations. If business can be prevented from moving, the immediate threat of job loss is taken away, and, as a consequence, unions can be expected to increase their demands on employers.<sup>92</sup>

The purpose of those bills is to give politicians and unions property rights in the existing distribution of jobs and business activity. And the exercise of these rights would prevent businesses from moving to more profitable and productive locations. Instead, the firm's assets are kept in place where they can be pillaged by the feather-bedding and antiquated work rules of union shops and forced to pay the bills run up by vote-buying politicians . . .<sup>93</sup>

What can reasonably be inferred from these comments is that American industry opposes legislation that would place any limitation on the freedom of the individual employer to shut down or move its plant for economic reasons, or to grant or withhold advance notice of its decision, as it sees fit. Many businesses have acted in good faith to ease the impact of such decisions on their employees, once the decisions have been taken, but it is questionable how useful those efforts really are. As previously noted, the assistance offered consists largely of severance pay, relocation pay, aid in finding a new job,

<sup>89</sup> *Id.* at 297.

<sup>90</sup> See BLUESTONE & HARRISON, *supra* note 85, at 260-66, from which the examples used here were taken.

<sup>91</sup> Statement by a spokesman for Associated Industries of Massachusetts, quoted by Liz Bass, "Runaway Plants Leave Workers Out in the Cold," *The Citizen Advocate*, March 1979, p. 3.

<sup>92</sup> R. MCKENZIE, *RESTRICTIONS ON BUSINESS MOBILITY* 57 (1979), a book published by the American Enterprise Ass'n.

<sup>93</sup> "Words and Deeds," *The Wall Street Journal*, Nov. 23, 1979, p. 20.

and minimal job retraining; rarely does it comprise all of these elements. Even then, it is inadequate to deal with the tragic byproducts of job losses and plant renewals: income loss and underemployment, loss of family wealth, deterioration of physical and mental health, as well as the creation of "ghost towns," "community anomie," and related private and public ills.<sup>94</sup>

The problems created by plant shutdowns and removals cannot be solved, or even effectively ameliorated, by the discretionary unilateral actions of employers. Nor is it enough to require employers to bargain with unions over the consequences of a plant closure or removal. In the first place, as previously noted, such a requirement applies to only about a quarter of the labor force. Also, at the time bargaining takes place, the union is usually in a position of great weakness relative to the employer, who has, figuratively, packed his bags and is now half-way out the door. Finally, in the usual case, the union is able to obtain for the employees it represents not much more than a band-aid to cover a gaping wound, and the community that is being abandoned gets nothing. Obviously, the NLRA is a useless instrument with which to deal with this problem. The success of efforts to improve the existing situation is dependent, therefore, on a change in the attitude of business generally toward some government regulation of both the procedures to be followed in respect of plant closings or removals and the minimum employee protective provisions to be provided.

## VI. CONCLUDING OBSERVATIONS

Faced with the immediate consequences of various kinds of natural disasters—floods, fires, earthquakes, tornadoes, and the like—private citizens in this country, as well as the federal and state governments, are capable of prodigies of organization and cooperation to provide relief for the victims. Unhappily, no comparable efforts on a similar scale are forthcoming to relieve individuals and communities whose lives are seriously disrupted, even destroyed by sudden plant closings or removals. Although in most instances such events can be predicted well in advance, the idea of advance planning to forestall them or to ameliorate their effects, which involves not only employers and their employees, but also unions, if any, and the government, remains an unpopular one.

Why should this be so? Clearly, the business ethos in our society is extremely hostile to "governmental intervention" in the private economy, even when it takes the form of bailouts of failing corporate giants, such as Lockheed and Chrysler. By the same token, opposition to any government control of the mobility of capital is automatic and powerful. As previously noted, some moderation of these attitudes is essential if there is to be any significant change in present conditions, and it would be naive to suppose that the legislative responses of the European countries that I have touched upon so briefly and superficially will offer any encouragement in that direction. To the contrary, the European "model" is more likely to frighten American employers and to harden their resistance to any governmental legislation affecting plant closing or removals. That is a natural reaction; after

<sup>94</sup> These consequences have been documented in painful detail in BLUESTONE & HARRISON, *supra* note 85, at 62-83.

all, the European legislation is the product of economic, social, and political environments profoundly different in many respects from our own. What works for those countries, if it does work, need not, and probably would not, work for us. Nevertheless, the advantages of carefully studying what those and other countries—*e.g.*, Britain, Canada, Australia, Japan—do in respect of dislocations caused by plant closures and removals are considerable. What we can learn is to view our own problems from a new and different perspective, to ask ourselves what might happen if we were to abandon our basic premise that any social measures that impede the mobility of capital are necessarily bad and must therefore be rejected.

Actually, there is nothing new about such a perspective. The idea of some form of federal or state regulation of plant closings and removals, as we have seen, has been embodied in proposed legislation for over a decade. Indeed, it was discussed in the 1966 Report of the National Commission on Technology, Automation, and Economic Progress.<sup>95</sup> What the Commission had to say in its report has lost none of its relevance in the intervening years. Despite the tendency of some groups to regard the problems incident to plant closings and removals as regrettable but temporary phenomena, associated with the economic recession from which we seem at last to be slowly emerging, the truth is that these problems are occasioned in large part by a rapidly changing technology and will be with us indefinitely. The Commission interpreted its assignment as including an obligation to make recommendations to management and labor and to all levels of government to facilitate occupational adjustment and geographical mobility” and to “share the costs and help prevent and alleviate the adverse impact of change on displaced workers.”<sup>96</sup>

The Commission’s recommendations ranged from relatively cautious and moderate prescriptions to what were then bold and innovative proposals. Among the latter were “a program of public service employment, providing, in effect, that the government be an employer of last resort, providing work for ‘hard-core unemployed’ in useful community enterprises”; and that “economic security be guaranteed by a floor under family income,” including “both improvements in wage related benefits and a broader system of income maintenance for those families unable to provide for themselves.”<sup>97</sup> It considered that the “responsibility of Government is to foster an environment of opportunity in which satisfactory adjustment to change can occur,” but that “the adjustments themselves must occur primarily in the private employment relationship.”<sup>98</sup> Its suggestions for government involvement were confined largely to establish “a national computerized job-man matching system which would provide more adequate information on employment opportunities and available workers on a local, regional, and national scale”;<sup>99</sup> to federalize the public employment service; to create a permanent program of relocation assistance to workers and their families stranded in economically declining

<sup>95</sup> 1 TECHNOLOGY AND THE AMERICAN ECONOMY (1966), hereafter cited as “COMM’N REP.” The Commission was established by Act of Aug 5, 1964, PUB. L. No. 88-444.

<sup>96</sup> 1 COMM’N REP., *supra* note 95, at 33.

<sup>97</sup> *Id.* at 110.

<sup>98</sup> *Id.* at 111.

<sup>99</sup> *Ibid.*

areas; and to adopt the following recommendation relating to economic planning and development:

We recommend that each Federal Reserve bank provide the leadership for economic development activities in its own region. The development program in each Federal Reserve District should include: (1) A regular program of economic analysis; (2) an advisory council for economic growth composed of representatives from each of the major interested groups within the district; (3) a capital bank to provide venture capital and long-term financing for new and growing companies; (4) regional technical institutes to serve as centers for disseminating scientific and technical knowledge relevant to the region's development; and (5) a Federal executive in each district to provide regional coordination of the various Federal programs related to economic development.<sup>100</sup>

In the Commission's view, an adequate adjustment program to deal with technological change, to be achieved through a combination of both government and private policies, must satisfy the following basic requirements: (1) those displaced should be offered either a substantially equivalent or better alternative job or the training or education required to obtain such a job; (2) they should be guaranteed adequate financial security while searching for alternative jobs, or while undertaking training; (3) they should be given sufficient financial assistance to permit them to relocate their families whenever this becomes necessary; and (4) they should be protected against forfeiture of earned security rights, such as vacation, retirement, insurance, and related credits, resulting from job displacements.<sup>101</sup>

The Commission's more specific suggestion of ways for private parties to facilitate adjustments to change are by now familiar. It largely discounted the common fears of employers of formal advance-notice agreements, noting that "the United States is the only industrialized country that permits the closings of large plants without notice."<sup>102</sup> It urged the adoption of "early warning systems" that would alert employees to the possibility or inevitability of future compulsory job changes; it also recommended "the broad dissemination of information about general technological developments throughout an industry or region [which] would alert employers, unions and employees alike to the possibility and timing of changes."<sup>103</sup>

Among the most important of the Commission's findings and recommendations were those relating to education.<sup>104</sup> It emphasized that education must be understood as a process of life-long learning, and that young people should be prepared from an early age to accommodate to changing job requirements in their mature years. Versatility and flexibility, the Commission found, are the indispensable elements to be developed by our educational system. While recognizing that "training for many—perhaps most—specific jobs can and must be done on the job as a responsibility of the employer," the Commission suggested that "there are some pupils whose greatest potential can be realized through occupational-vocational-technical education," which, coupled with a parallel program of general education, "can equip them with both job skills and a solid foundation for the adaptability necessary in a dynamic society."<sup>105</sup>

<sup>100</sup> *Ibid.*

<sup>101</sup> *Id.* at 60.

<sup>102</sup> *Id.* at 67.

<sup>103</sup> *Id.* at 43-49.

<sup>104</sup> *Id.* at 46.

The quality of education at all levels in the United States has been steadily declining in recent years, the most recent judgment by a qualified group of evaluators has pronounced it "mediocre." This problem is by no means unrelated to that of plant closings and removals, some of which might not be necessary if the local labor force were capable of adapting to the production of an entirely different product. Although primary responsibility for the upgrading of our educational system must be assumed by the state and federal governments, even those businesses opposed to governmental regulation of the timing and procedures of plant closings and removals would be acting in their own interests by contributing to the improvement of educational facilities at all levels.

I have dwelt in this closing section on the findings and recommendations of the Commission, not because I believe they provide a panacea for our present ills, but because the same ideas have been repeated quite recently,<sup>105</sup> and because I believe that they offer useful suggestions as to how we may start to combat them within a framework that American industry ought not to perceive as unduly threatening. Many would regard the Commission's recommendations as inadequate to deal with the problems we now face; but if government is to intervene in a substantial way to control and alleviate the worst consequences of unrestricted plant closings and removals—as I believe it must—the process must be accomplished gradually, or it will fail entirely.

Meanwhile, we may be sure that the problems discussed in this article will not go away; they will continue to tear rents in our social fabric unless and until we, as a society, accept the responsibility of planning to prevent, or to ameliorate in an effective way, the human tragedies and economic waste inherent in unregulated plant closings and removals.

<sup>105</sup> A NATION AT RISK, REP. OF NAT'L COMM'N ON EXCELLENCE IN EDUCATION (1983), quoted in Los Angeles Times, 27 April, 1983, p. 1.

<sup>106</sup> See, e.g., Remarks of President Reagan before National Conference on Dislocated Workers, Pittsburgh, Pa., BNA Daily Lab. Rep. No. 67: X-1 (April 6, 1983); "Transition of Displaced Workers to New Jobs Said Eased by Labor, Management Cooperation," *Id.* No. 69: CC-1 (April 8, 1983).