

**An Inquiry into the Application of  
the *Dubuque Packing* Standards:  
NLRB Decisions Regarding the  
Duty to Bargain over Work Relocation**

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## **An Inquiry into the Application of the *Dubuque Packing* Standards: NLRB Decisions Regarding the Duty to Bargain over Work Relocation**

Cappell and Schmall

### **Abstract**

As global economic forces are used to justify the relocation of work to areas with lower labor and production costs, the U.S. National Labor Relations Board (NLRB) has responded over the last two decades with rationales for determining the conditions under which collective bargaining is required over decisions to subcontract work and to close operations, either completely or partially.

The regulation of the collective bargaining rights over the relocation of work lies at the core of the dialectical tension over worker participation and managerial discretion. In the context of two Supreme court cases, *Fibreboard* and *First National Maintenance*, the NLRB created in the *Dubuque Packing Co.* strategy combining substantive and formal legal rationality to decide the limits of mandatory bargaining over relocation decisions based on three criteria: basic change, labor costs, and futility.

From an analysis of 119 NLRB cases since *Dubuque Packing*, this paper shows that the criteria are interpreted and applied to the advantage of labor. The basic change defense is not upheld frequently, but this criterion does reduce the odds of a remedy being ordered by the Board. In very few instances are jobs prevented from being relocated.

The paper conjectures that there are severe limits to how formally-rational the decision structure of the NLRB can become given the need to assess substantive interests and motives, the increasing complexity and fluidity of economic reality, the changing character of labor/management bonds, and the relative inability of collective bargaining to stem the tide of worker dislocation in the face of contemporary economic conditions.

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## 1. Introduction

From 1981 through 1996, an average of 3.1% manufacturing or production workers who held a job for 3 years or more were displaced.<sup>1</sup> Generally, about half of these displacements were due to plant closures or relocations. In 1997-1999, roughly 3,275,000 workers with 3 or more years of tenure, and an additional 4,300,000 with less tenure, were displaced; and 49.4% of these were due to closures or relocations.<sup>2</sup> Mollie James was one of these displaced workers; she lost her job in June, 1989, as an assembly line worker at Universal Manufacturing Company in Patterson, NJ when the newly acquired business relocated first to Mississippi and then to Mexico.<sup>3</sup> Two years later, the National Labor Relations Board (NLRB) issued a decision, *Dubuque Packing*<sup>4</sup>, outlining a new strategy detailing the conditions under which workplace relocation decisions are subject to mandatory bargaining.

This paper reviews over 100 cases involving union complaints about the bargaining environment and aspects surrounding management relocation decisions. It is safe to say that the application of the strategy announced in *Dubuque Packing* would not have kept Mollie's job in Patterson, but the new strategy has had some benefits for labor. We examine the fundamental aspects of the *Dubuque Packing* bargaining rules and analyze how they were applied in subsequent complaints over relocation bargaining. The strategy announced in *Dubuque Packing* is discussed initially by referring to the modes of legal rationality reflected in administrative law, and law in general.

Before we consider the role labor law and the NLRB play in giving workers a chance to bargain over the decision to relocate their jobs, it is worth reflecting on the environment in which this legal mechanism operates. The tumultuous nature of capitalist economies was emphasized in Schumpeter's classic work:

"Capitalism, then, is by nature a form or method of economic change and not only never is but never can be stationary."<sup>5</sup> "The fundamental impulse that sets and keeps the capitalist engine in motion comes from the new consumers' goods, the new methods of production or transportation, the new markets, the new forms of industrial organization that capitalist enterprise creates." ... "This process of Creative Destruction is the essential fact about capitalism."<sup>6</sup>

Politicians, planners, academics, and lawyers often mistakenly analyze events in this competitive environment; when analyzing a struggling business or industry, even an oligopoly, "...the problem that is usually being visualized is how capitalism administers existing structures, whereas the relevant problem is how it creates and destroys them."<sup>7</sup> Since 1950, the process of "Creative Destruction" has accelerated, and there are areas of administrative law that have expanded to meliorate the human cost of transformative capitalism without altering its fundamental system. While the origin of the National Labor Relations Board was a response to the asymmetric power

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<sup>1</sup>Hipple, Steven. 1999. "Worker Displacement in the mid-1990." Monthly Labor Review (July, 1999): 15-32.

<sup>2</sup>Bureau of Labor Statistics. "Displaced Workers Summary News Release." (<http://www.bls.gov/news.release/disp.nr0.htm> accessed on May, 9, 2002).

<sup>3</sup>Adler, William M. 2000. *Mollie's Job: A Story of Life and Work on the Global Assembly Line*. New York: Touchstone. This journalistic account of the movement of a single job integrates the individual level consequences that result from the complex interplay of structural features shaped by entrepreneurs, financiers, and unions.

<sup>4</sup>*Dubuque Packing Co. Inc. and United Food and Commercial Workers International Union AFL-CIO Local No. 150A* 303 NLRB No. 66 (1991)

<sup>5</sup>Schumpeter, Joseph A. (1950) *Capitalism, Socialism, and Democracy*, 3<sup>rd</sup> Ed. New York: Harper and Row at 82.

<sup>6</sup>Id. at 83.

<sup>7</sup>Id. at 84.

employers held over workers and the crisis of the 1930s, it is a reasonable conjecture that demands have been made on it to expand its domain to include principles whereby the costs of “creative destruction”, borne disproportionately by workers, can be subjected to mandatory bargaining so that these costs can be more equitably distributed. Before we turn to the detailed analysis of the cases illustrating this development, we want to place the recent history of NLRB based decisions in the context of the development of administrative law.

## 2. Research Questions and Relevant Theoretical Background

At the empirical level, this paper describes how the NLRB is processing complaints regarding plant relocations. At the theoretical level, we want to interpret the development of this area of regulatory law through a sociology of law perspective focusing on the modes of legal rationality evident in the analysis currently being applied by the NLRB to decide these complaints.

The process of regulating labor/management relations fits well within what we will call the “structural-dialectical” model of law mobilization.<sup>8</sup> Economic and political conflicts emerge; the primary conflict over economic interests between labor and management being at the core of the NLRB’s function. These conflicts appear as contradictions or dilemmas in law; resolutions are offered to provide an organizational solution to the conflict, which in turn generate more conflict. Contradictions can emerge from the legal domain as well; there are different modes of legal rationality that can be applied to the working out of interim resolutions to explicit conflicts: for example there is a structural-dialectical relationship between judicial and administrative law in the area of labor management law.

At a deeper level, the formal - substantive dialectical structure in law finding and making has been one of the main conceptual categorizations used in comparative law analysis and studies of legal evolution.<sup>9</sup> The tension between the extent to which the law can be made more efficient by relying on external characteristics of the cases, a simple classificatory system, and the extent to which particularities of the cases, including the motives behind bargaining tactics or managerial decisions, is pervasively evident in labor/management law and decisions. Modern labor management regulation is an area, informed as it is by customary information about what is involved in the struggles between labor and capital particular industries, that is, perhaps, unamenable to the “technocratization” found in other areas of regulatory law.<sup>10</sup> The complaints often reviewed by ALJs and the NLRB are “fact intensive”, requiring the searching out of the relevant and determinate facts from extensive details.<sup>11</sup> The need to attribute the motive behind the relocation decision is another example of the inherently substantive, or subjective, legal analysis called for in assessing the legality of labor/management relations and practices. On the other hand, the lack of a systematic approach to categorizing the situations under which a mandatory duty to bargain over relocation decisions exists in the collective mind of the NLRB causes uncertainty, hidden costs, and ultimately inefficiencies in the reallocation of capital. Thus, to appreciate the developments of the rationale used to adjudicate complaints over work and job relocations, one needs to appreciate these perpetual dilemmas created by the need and desire to regulate the balance of power between labor and management: the search for substantive justice regarding the rights and duties of labor and management amid a myriad of different fact-based situations and the need for a degree of formal systematization of governing principles identifying those duties and rights that can be understood and implemented prior to the relocation decision.

Conflicting substantive interests in these relocation issues are manifested in determining the boundaries of “managerial, or entrepreneurial discretion”. This is the heart of the matter in establishing a workable mode of legal rationale to analyze relocation cases, along with many

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<sup>8</sup>Chambliss, William. 1998. “On Lawmaking.” Ch. 1 in W. Chambliss and M. Zatz, *Making Law: the Law State and Structural Contradictions*. Bloomington, IN: Indiana University Press.

<sup>9</sup>Weber, Max. Ch. 8 “Economy and Law” in Max Weber (1978) *Economy and Society*, edited by Guenther Roth and Claus Wittich. Berkeley CA: University of California Press. Atiyah, P.S., and Summers, Robert S. (1987) *Form and Substance in Anglo-American Law: A Comparative Study of Legal Reasoning, Legal Theory, and Legal Institutions*. Oxford: Clarendon Press.

<sup>10</sup>Stryker, Robin (1989) “Limits on technocratization of the law: The elimination of the NLRB’s Division of Economic Research.” *Amer. Soc. Rev.* 54:341-58.

<sup>11</sup>Liebman, Wilma, and Hurtgen, Peter. (2000) “The Clinton Board(s) – A partial look from within.” 16 *The Labor Lawyer* at 52.

other labor relation issues.<sup>12</sup> It is an area of regulatory law that needs a certain level of formal rationalization so that entrepreneurial planning can occur while protecting worker rights. A degree of formal rationalization will also help to reinforce the legal solution to the fundamental conflicts between labor and management. Prior to the development of the *Dubuque Packing* analysis which now governs the adjudication of these complaints, which we have described in two previous articles, this area of law lacked both formal and substantive rationality.<sup>13</sup> "In order that collective bargaining operate effectively, the law defining the scope of mandatory bargaining must be rationalized, so that it might be respected, and it must be stable, so that it might be predictable."<sup>14</sup> We next turn to a brief sketch of the main aspects of this emerging rationale before we describe the results of our analysis of several NLRB decisions.

### 3. Application of Administrative Law regarding the Duty to Bargain over Work Relocation: The *Dubuque Packing* Analysis Standards

In *Dubuque Packing Co.*, while resolving the case at hand, the Board explicated a decision-making rationale intended to clarify the confusion resulting from different standards being used to resolve labor management disputes over the duty to bargain prior to the decision to relocate an operation.<sup>15</sup> The Board's rationale, hereafter referred to as the *Dubuque Analysis*, integrated aspects of the three major prior cases governing the duty to bargain over subcontracting, moving work, or partially closing an operation: *Fibreboard*, *First National* and *Otis II*.<sup>16</sup> The *Dubuque Analysis* can be seen as an attempt to increase the formal rationality in this area of law, but it still leaves ample space for the application of substantively rational modes of legal decision making, given the extreme complexity and uniqueness of the underlying economic and labor/management relations and conditions surrounding the relocation cases. In the face of this complex reality, the NLRB identified three operational concepts regarding the conditions of the work relocation that have a bearing on the duty to bargain: basic change, labor costs and futility of bargaining.

At the first step, the NLRB General Counsel addresses whether the employer's decision to relocate is not "accompanied by a basic change in the nature of the employer's operation."<sup>17</sup> Once a *prima facie* case of "no basic change" is established, the employer has a duty to bargain over the relocation of work. Where the decision to relocate involves a basic change in the "scope or direction" of the enterprise, no mandatory duty to bargain arises. Where the move is unaccompanied by a basic change, a second phase of analysis is activated. Under two conditions, the employer is exempt from a duty to bargain over relocation:

"[T]he employer may produce evidence rebutting the *prima facie* case by establishing that the work performed at the new location varies significantly from the work performed at the former plant, establishing that the work performed at the former plant is to be discontinued entirely and not moved to the new location,

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<sup>12</sup>Miscimarra, Philip A. (1983) *The NLRB and Managerial Discretion: Plant Closings, Relocations, Subcontracting, and Automation*. (No. 24 in the Labor Relations and Public Policy Series). Philadelphia: Industrial Research Unit, The Wharton School, University of Pennsylvania.

<sup>13</sup>This point is elaborated in our analysis of a survey of practicing labor management lawyers. See Cappell, Charles, and Schmall, Lorraine. 1995. "Decisions to Relocate Work: Context and Consequences of Recent NLRB Decisions." Paper presented at the Law and Society Association meetings. Toronto, May, 1995; and Schmall, Lorraine, and Cappell, Charles. 1994. "The Impact of *Dubuque Packing Co.* Upon the Collective Bargaining Practices of Attorneys and Their Clients." 24 *Stetson Law Review* 111.

<sup>14</sup>Harper, Michael C. (1988) "The Scope of the Duty to Bargain Concerning Business Transformations." Ch. 2 in Samuel Estreicher and Daniel Collins (eds.). (1988) *Labor Law and Business Change: Theoretical and Transactional Perspectives*. NY: Quorum Books at 28.

<sup>15</sup>*Dubuque Packing Co. Inc.*, *supra* note 4.

<sup>16</sup>*Fibreboard Paper Prods. Corp. v. NLRB* 379 U.S. 203 (1964). *Otis Elevator Co.*, 255 N.L.R.B. 235 (1981), revised in part, 269 N.L.R.B. 891; modified 116 L.R.R.M. 1075(1984). *First National Maintenance v. NLRB* 452 U.S. 666 (1984).

<sup>17</sup>*Dubuque Packing Co. Inc.*, *supra* note 4 at 391.

or establishing that the employer's decision involves a change in the scope and direction of the enterprise. Secondly, the employer can prove that the move was either not motivated by labor costs, or that even if labor costs were a factor in the decision, bargaining is futile because the union was powerless to make conclusions that would affect the result."<sup>18</sup>

This logical analysis can be diagrammed in a decisional flowchart (see Figure 1 at the end of this paper).

Figure 1 about here

We can see that the *Dubuque Analysis* is hierarchical, beginning with the original regional field office assessment of whether the relocation of jobs involves a basic change, the first logical category in the analysis. If we think of the concepts as a Venn type diagram, the larger this category becomes, encompassing more and more variations in the work performed, the greater the exemptions to bargain spread across different types of transformed work. Simply stated, one needs to know What qualifies as a 'basic change'? How broad is the category? Clearly, when the same work is performed using the same equipment, it is hard to persuade the decision makers that any basic change has occurred. Inversely, as the category grows to encompass different types of change, the range of moves mandating bargaining grows smaller. Thus, subsequent decisions can fill in the substantive content of this formal category.

Employers can challenge the *prima facie* finding of basic change by arguing that the work at the new site varies significantly from that at old site; that the work at old site is to be discontinued entirely; or that the relocation decision involves a change in the fundamental "scope and direction of the enterprise." These criteria then enter the analysis to determine the boundaries of the category of basic change. As the case law evolves, the boundaries should become clearer, leading to more formally rational, administrative law, at least with respect to this category. But as the dimensions of real jobs increase and grow more complex, the categorization of basic change may become unwieldy and difficult to analyze.

If the employer challenge to the *prima facie* finding of basic change fails, labor costs are the next category used to establish the duty to bargain. If the employer can successfully argue and show with evidence that direct or indirect labor costs played no decisive role in the relocation, they are exempted from a duty to bargain. Here, formal rational decision making would require a valid demonstration of costs using accurate data. The NLRB is less likely to accept testimony that labor costs played no role without empirical evidence demonstrating it plays no role, for example, even superficial evidence that the labor costs were actually higher at the new site than the old may not suffice. Here, the Board, to move in the formally rational direction, needs to establish the type of evidence required.

The last step in the determination of a duty to bargain over relocation addresses the claim of the futility of bargaining over labor costs when they were are part of the decision. This again, at the superficial level, would seem amenable to formal rational criteria: an empirical assessment of the comparisons of operational costs at the two sites to what the union could be expected to concede in wages and benefits.

We note, even before we present some of the detailed descriptions of how these major concepts are defined and the boundaries are established, that the *Dubuque Analysis* still requires a mostly case-by-case analysis, a particularistic, substantive mode of legal rationality. Lurking behind these formal categories, articulated in the *Dubuque Analysis*, is the more substantively rational issue of assessing motive, to learn especially if the move constitutes a "run away shop", violating the provisions of the National Labor Relations Act.

The Circuit Court of Appeals for the District of Columbia, as it approved the *Dubuque Analysis*, noted that the analysis tries to discern a purely economic motive and to protect the managerial discretion doctrine articulated in *First National Maintenance*, by distinguishing "... relocations motivated by labor costs from those motivated by other perceived advantages of the new location."<sup>19</sup> The emphasis placed on making inferences about motive, central to the

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<sup>18</sup>Id.

<sup>19</sup>Id., citing the Board in *Dubuque*. Cf. 303 NLRB at 390 n.9 (collecting cases in which the relocation was

protection of labor's rights as articulated in the National Labor Relations Act, adds a permanent, substantive aspect to the legal decision strategies that can be applied to this area of regulatory law.

The analysis established in *Dubuque Packing* is still being applied by Administrative Law Judges and the NLRB. A quick search conducted in May, 2002, for NLRB cases involving a "basic change" issue revealed at least three cases using the *Dubuque Packing* analysis to decide the complaint, *AlliedSignal Aerospace*, *Vico Products*, and *Titan Tire Corporation*.<sup>20</sup>

### 3. Cases and Methodology

A total of 119 cases adjudicated either by the NLRB or the Federal Courts were identified by a search in Lexus using the search code: "Dubuque W/2 Packing w/25 relocation and 'date'". Selected cases were initially scanned to screen cases that were relevant to the research questions we were addressing. As a result of this initial screening, a total of 119 cases up to December, 2000 were briefed using a standard coding form developed by the authors. Information was abstracted regarding:

- The main case characteristics (the deciding body, alleged charges, participation NLRB members where appropriate, type of work, industry, and union involved);
- The facts of the case;
- The aspects of the case relevant to the relocation issue (description of relocation, type or relocation, reason for the relocation, holding and rationale regarding the relocation issue);
- The aspects of the case relevant to the basic change issue (description of the change that took place, classification of change, reason, holding and rationale regarding the basic change issue);
- The aspects of the case relevant to the labor cost issue (description of labor costs at issue, type of labor costs, holding and rationale regarding the labor cost issue);
- The aspects of the case relevant to the futility of bargaining issue (description of the conditions creating futility, classification of conditions, holding and rationale regarding the futility of bargaining defense);
- The aspects of the case relevant to the collective bargaining agreement language (description of the collective bargaining agreement at issue, type of issue, holding and rationale regarding the language of the collective bargaining agreement at issue);
- The aspects of the case relevant to the bargaining relationship or process as it occurred (description of bargaining problem, decision regarding antiunion animus, type of problem, holding and rationale regarding the bargaining process issue), and finally;
- The remedy (were remedies ordered and if so, the type of remedies).

In this report, we focus on the primary conceptual framework articulated in *Dubuque Packing* by tracking the treatment of how the NLRB and courts interpret basic change, labor costs, and futility and the role the concepts play in determining remedies.

### 4. Results

We analyzed the 119 cases that met the targeted search criteria to learn more about how *Dubuque Packing* standards are implemented and with what results. The first part of the analysis reported in this paper is descriptive and interpretive. In the last part of this section we present a predictive logistic regression equation to see to what extent the type of issue raised has on the outcome of the complaint: whether a remedy benefiting workers in some way was ordered. We will see that the categories established by *Dubuque Packing* are frequently used in these

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motivated by labor costs) with id. at 390 n.10 (collecting cases in which the decision was motivated by other factors).

<sup>20</sup> *AlliedSignal Aerospace, a Division of Allied Signal, Inc. and International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, UAW, Local 376 and International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, UAW, Local 1010*. 330 NLRB 175; *Vico Products Company & International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, UAW, AFL-CIO*. 336 NLRB 45 ; *Titan Tire Corporation and United Steelworkers of America, AFL-CIO, CLC and its Local 164L*. 333 NLRB 140.

complaints and the *Dubuque Packing Analysis* is used to resolve the issue. And at the adjudicated level, these complaints are overwhelmingly resolved in favor of the workers. We note that most of these complaints were adjudicated during the 1990's, during the tenure of the Clinton NLRB Boards, in fact, 8 Boards with distinct membership.<sup>21</sup>

#### Frequencies of Issues Raised

In Table 1 we summarize the frequencies with which the three major category issues of *Dubuque Packing*, along with the explicit issue of relocation, were raised in adjudicated complaints. We note that 91 of the 119 cases did have a relocation issue amenable to a *Dubuque Packing* analysis. Thirty six percent (43 cases) of the 119 cases raised basic change claims; forty-five percent (54 cases) raised labor costs as an issue; and only sixteen percent (19 cases) raised futility of bargaining over labor costs as an issue.

Table 1: Distribution of Fundamental Dubuque Issues Raised in NLRB Bargaining Cases (n=119)

	Frequency	Percent	Disposition of Issue	
			Affirmed	Denied
Basic Change	43	36%	6 (14%)	37 (86%)
Labor Costs	54	45%	36 (67%)	18 (33%)
Futility	19	16%	3 (16%)	16 (84%)
Relocation	91	76%	61 (67%)	30 (33%)

We can also see in Table 1 that the overwhelming majority (86%) of the claims of a basic change, raised as a defense to mandatory bargaining, were rejected by the courts or Board. These frequencies indicate, perhaps, that the category of basic change is not being enlarged, but rather interpreted narrowly by the Board during the period studied. Similarly, eighty-four percent of the cases were denied where futility of bargaining was raised as an exempting claim for mandatory bargaining. Labor cost issues, a claim that engenders a duty to bargain over relocation decisions, were affirmed in two-thirds of the complaints. In this domain, the Board's category of what constitutes a labor cost may be expanding.

Of course, these issues are often raised collaterally, and in Table 2 we summarize the frequencies with which each of the three main conceptual categories articulated in *Dubuque Packing* are coincident in the same complaint. We only pause here to note that in 42% of the complaints reviewed, none of the *Dubuque* issues were raised. We speculate that this occurs because in the early period of this inquiry, contemporaneous with the *Dubuque* decision or shortly thereafter, the law was perceived as still unsettled and knowledge of it had not diffused throughout the labor management bar.<sup>22</sup>

Table 2: Joint Frequencies of Issues Raised

Basic Change	Labor Costs	Futility	Frequency	Percent
yes	yes	yes	12	10.1
yes	yes	no	17	14.3
yes	no	yes	2	1.7
yes	no	no	12	10.1
no	yes	yes	4	3.4
no	yes	no	21	17.6
no	no	yes	1	0.8
no	no	no	50	42.0

#### Description of the Types of Relocations

We classified the types of relocations, movement of work, equipment, jobs, into nine broad categories to discern the nature of what types of relocations the Board considered in these

<sup>21</sup>Supra note 11.

<sup>22</sup>Supra note 13.

complaints. The most common image, of a plant picking up and moving, as was the case in *Dubuque Packing* and *Mollie's Job*, constitutes only 12% of the relocations. The most common type of relocation, found in 57% of the complaints, involved moving some work to another site. This type of move, combined with subcontracting work (described in 32% of the complaints) accounts for the vast majority of the relocation of work.

Also note that when work is moved, it is more often to a non-unionized work unit. Forty-one percent of the complaints described situations where the work moved to non-union units, whereas in only 13% of the complaints was the work moved to unionized units.

Table 3: Distribution of Relocation Categories in Decisions involving Relocation Issue

Issue Involved (n=91)	Frequency	Percent
Plant moved	11	12.1
Work moved	52	57.1
Equipment moved	33	36.3
Work out-sourced / subcontracted	29	31.9
Work moved to non-union unit	37	40.7
Work moved to union unit	12	13.2
Laid-off non-union workers	9	9.9
Work moved to corporate subsidiary	20	22.0
Other	27	29.7

Note: Multiple responses across categories possible.

#### Description of the Types of Basic Change Defenses Raised

We now turn to the types of basic changes described in the cases, most of which were raised as defenses to mandatory bargaining over the relocation of work. One descriptive hypotheses we had going into this project involved the rapid changes in the technology of production and distribution. We thought that given the accelerating rate of change due to technology, perhaps the major engine of "creative destruction" in the U.S. capitalist system, the Board would have its hands full of cases involving technology based basic changes. This appears not to be the case; only 9.3% of the cases described explicitly new technology that accompanied a relocation, and an additional 14% of the cases described new processes. New technologies may well be an accepted form of basic change, resolved at the regional field offices and not challenged in union complaints.

Table 4: Distribution of Basic Change Categories in Decisions involving Basic Change Issue

Issue Involved (n=43)	Frequency	Percent
Eliminated product or service	4	9.3
Downsized workforce	16	37.2
Corporate reorganization	9	20.9
Merger or acquisition with 2nd company	6	14.0
Corporate liquidation	1	2.3
New technology – same product/service	4	9.3
New process – same product/service	6	14.0
New product	2	4.6
New market, locations, distribution means	3	7.0
Subcontract for previous in house work	13	30.2
Business expansion, increased production	2	4.6
Change in method/source of capitalization	1	2.3
Facility remodeled/redesigned	3	7.0
Other	13	30.2

Note: Multiple responses across categories possible.

It appears that the most common type of basic change confronted in these complaints

involves organizational change more than changes in the engineering of production and distribution of goods and services: downsizing (37.2%), corporate reorganization (20.9%), and mergers (14%).

With a broader study design, one may learn that the cases before the Board represent a secondary effect in the marketplace; namely a response to cut costs in a competitive market being driven by the leading firms that do use technology to drive up productivity. The firms included in the cases we analyzed may have to resort to reducing costs and raising productivity using simpler techniques, reorganizing for greater efficiency, where most frequently, workers absorb the burden. There would be much to learn about these dynamics from inquiries adopting an industry wide frame of reference.

The wide range of changes that potentially could be classified as basic makes the formalization of this domain of administrative law vulnerable. Perhaps this is why adjudicators have been reluctant to widen the boundaries of this category. Note that while a large number and range of changes are described in the cases, the overall affirmation of the basic change defense is relatively low (14%, see Table 1). There may be a recognition of the slippery slope one generates by expanding these boundaries in the face of increasing economic change.

#### Distribution of Types of Remedies Ordered

We next give a brief statistical overview of the success of the union's complaints. Since these cases usually involve several aspects, the decision of the Board, Administrative Law Judge, or Federal Courts of Appeal are difficult to code overall. We focused on summarizing the disposition of each of the issues (presented in earlier tables) and on whether remedies were ordered that benefited the complainant (the unions). In the vast majority of cases, 85.7% or 102 of 119, a remedy was ordered. By the time a complaint has passed the hurdles of the preliminary investigation, and has remained unsettled so that it reaches adjudication, apparently enough evidence exists of infractions of the National Labor Relations Act to order some type of remedy. These findings are very consistent with another analysis which found that the NLRB upheld the complaint in 88% of the cases it reviewed regarding plant closures.<sup>23</sup>

Table 5 describes in broad categories the types of remedies ordered. The presumptive remedies, without any mediating factors, ordered for violating Sections 8(a)1 and 8(a) 3 of the Act are to "make whole" the union workers and to restore the *status quo ante*. Table 5 breaks down the aspects of such remedies into eleven, categories, which are not mutually exclusive.

Table 5: Distribution of Remedies Ordered (n=102)

Remedy Ordered	Frequency	Percent
Total overall pro-labor remedies ordered	102	85.7%
Temporary Injunction Section 10(j)	4	3.9%
Relocation Enjoined Permanently	10	9.8%
Relocation Enjoined Pending bargaining	9	8.8%
Affirmative Injunction to Bargain	58	56.9%
Return Work	28	27.4%
Return Equipment	11	10.8
Reinstate Workers	43	42.2%
Back Pay	68	66.7%
Relocation Allowed/Back or Severance Pay	15	14.7%
Injunction Against Behaviors Violating 8(a)1	63	61.8%
Other	66	64.7%

Note: Multiple responses across categories possible.

The Administrative Law Judges and Board decisions show a high level of particularistic

<sup>23</sup>McKennirey, John, Compa, Lance, Lara, Leoncio, and Griego, Eric. (1997) *Plant Closings and Labor Rights: A Report to the Council of Ministers by the Secretariat of the Commission for Labor Cooperation on The Effects of Sudden Plant Closings on Freedom of Association and the Right to Organize in Canada, Mexico, and the United States*. Lanham, MD: Bernan Press and the Commission for Labor Cooperation at 117.

remedies, fashioning orders that are tailor-made. This pattern is a clear example of the particularistic dimension of Weber’s “substantive law finding” legal decision making. But there are also formulaic remedies: injunctions against the behaviors violating 8(a)1 (61.8%), aspects of the “make whole” remedy: back pay (66.7%), and aspects of returning to *status quo ante*: return work (27.4%), return equipment (10.8%), and reinstate workers (42.2%). Seldom is the relocation enjoined, either permanently (9.8%) or temporarily (8.8%). The remedies are more likely to provide compensation to displaced workers than they are to alter the fundamental business decision that led to the relocation of work.

A balance between what the business can bear and what is due to the affected workers is evident in the fashioning of remedies. While not explicitly analyzed in this paper, our reading of cases to date support the interpretation that where clear anti-union animus is evident, where the “run-away shop” has been categorized, the remedies will be more burdensome to business. The adjudicated cases applying the *Dubuque Analysis* standards convey a message that labor should be involved in relocation decisions.

#### Effect of Raising *Dubuque Packing* Issues on the Probability of a Remedy Being Ordered

The last step in this preliminary analysis of the 119 labor/management disputes modeled the probability of a pro-labor remedy being ordered as a function of the issues raised. The working hypotheses regarding the effect of the issues central to the *Dubuque Analysis* predict that raising “basic change” and “futility” of bargaining defenses will lower the probability of the pro-labor remedy, while the classification of the relocation as involving “labor costs” will increase the probability of a pro-labor remedy.

We note first, as one glances again at Table 5, that the odds of a pro-labor remedy are very high overall, 6 to 1 (102/17). At this near final stage of adjudication of relocated work disputes, the scales of justice are highly tipped in labors’ favor.

The results of a logistic regression model are presented in Table 6. We first note that none of the coefficients, or effects, are particularly strong. But since our sample of relocation cases come close to constituting the population of relocation cases adjudicated, the effects are worth discussing. We note first that the intercept coefficient, which can be interpreted as the base odds of a pro-labor remedy, rises slightly to 6.11. Thus, controlling for the *Dubuque Packing* issues, the scales tilt slightly more to labor.

Table 6: Results of Logistic Regression Predicting Ordering of a Remedy as a Function of Raising of Fundamental *Dubuque* Issues (n=119)

	Logistic Coef.	S.E.	Odds Ratio	Chi-Sq	P-value
Intercept	1.81	0.37	6.11	24.47	.00
Basic Change Raised	-0.46	0.34	0.63	1.84	.18
Labor Costs Raised	0.12	0.29	1.13	0.17	.68
Futility Raised	0.22	0.39	1.24	0.31	.58

The largest effect is found for the “basic change” defense. When this defense is raised, its impact reduces the odds of a pro-labor remedy by a factor of .63, not quite by half. This effect is in the predicted direction. However the effect for the futility defense is opposite that predicted by applying a *Dubuque Analysis*, 1.24; it actually raises the odds of a pro-labor remedy by nearly a quarter. Raising the labor cost issue also increases the odds of a pro-labor remedy being issued by a factor of 1.13, in the expected direction. Of course these effects are mediated by the holdings regarding each of the claims, and we saw that the futility and basic change defenses were not often upheld, whereas the labor cost claim was (refer again to Table 1).

We also ran a three-way interaction hierarchical model and none of the effects were significant. Subsequently, we inspected a model that deleted the three-way effect and none of the two-way effects are significant. Futility and Change are the two most important factors, and when a model is estimated using just these two factors, the significance level does not change very much; neither p-value is below .10.

## 5. Interpretations and Conclusions

The *Dubuque Analysis* rationale is a hybrid of formal and substantive rationality, as is most of the administrative law enmeshed in the political, economic, and social environment of labor/management regulation. The standards integrate the fundamental protection of entrepreneurial control and management discretion with the perceived need to expand the range of bargaining to give workers some footing to preserve jobs and benefits in a climate of “creative destruction” accelerated by competitive environments extending to the global level. The standards have failed to preserve work by stopping relocations, but have in the egregious cases that reach the final levels of adjudication provided remedies to workers when relocation decisions were made outside of the bargaining environment. The category used in the standards that would exempt more situations from bargaining, the “basic change” defense, by placing them under the umbra of managerial discretion, has not been expanded much. However, the use of the “basic change” defense does slightly alter the odds of a labor oriented remedy being ordered by the Board. Neither has the defense of “bargaining futility” been successfully used by businesses to escape a duty to negotiate over relocations.

It appears as if the *Dubuque Packing* standards have brought an improved level of coherence to the area of relocation bargaining. The rationale is still complex and layered and includes an inevitable substantive, subjective component that forces a “fact intensive” inspection of the particulars of each case. It is doubtful if this area of law will ever be amenable to a more formally rational, efficient, analysis structure driven by superficial facts external to the motives behind the actions because the social realities it attempts to regulate are part of an ever recurring, dialectical relationship involving the substantive based conflicts of fundamental economic philosophies and interests as well as legal principles.

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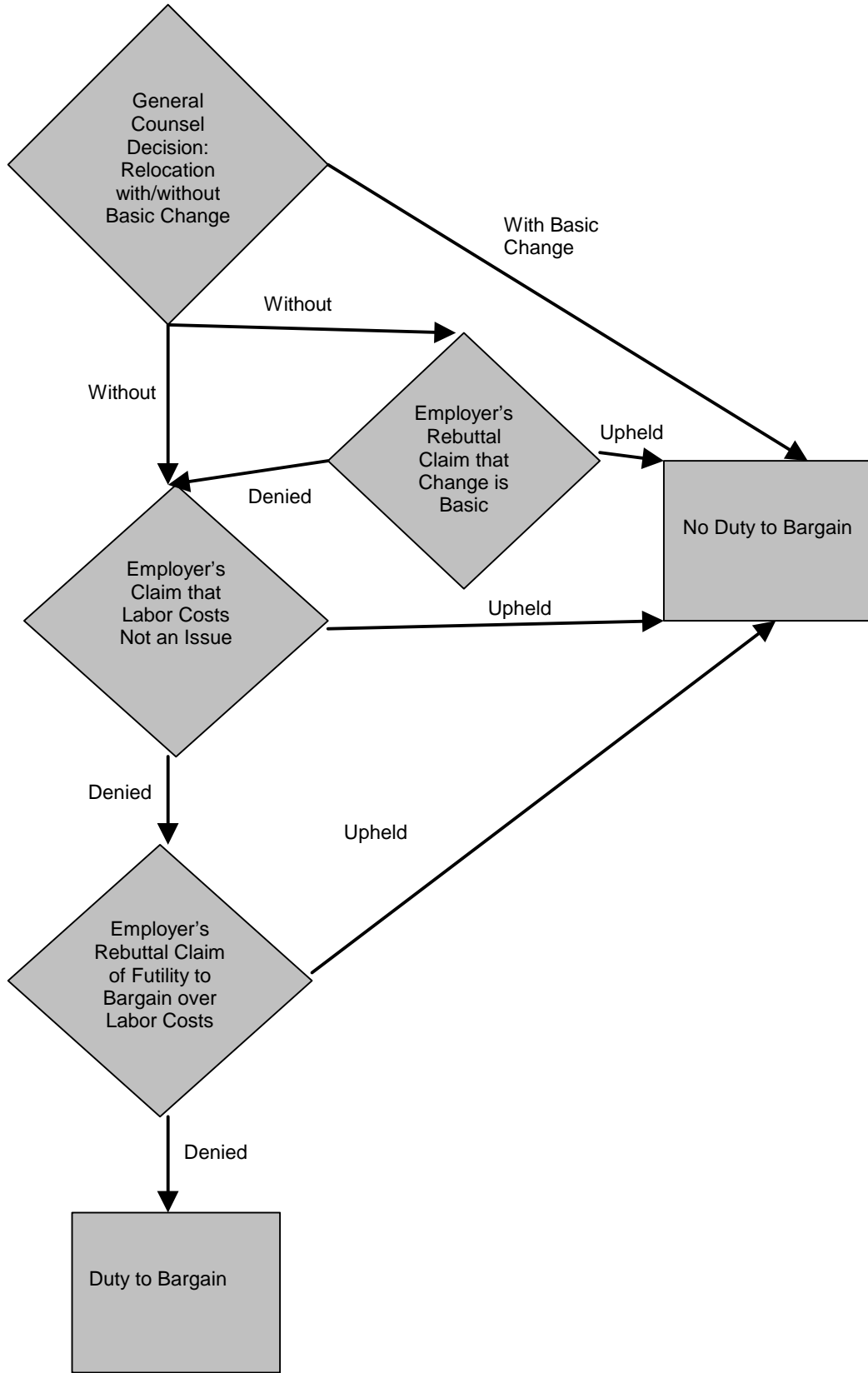


Figure 1: Logical Decision Structure of *Dubuque Packing* Analysis