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Self-Driving Trucks and Labor Law

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Self-Driving Trucks and Labor Law -- A Look Ahead

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Introduction

Welcome to the future: The year is 2020 and an organized—i.e. unionized trucking company—"L2M2" has announced it is acquiring a convoy of autonomously powered—i.e. "self-driving"—transportation vehicles.

Initially, several of the trucks will "platoon" together with the lead vehicle having a safety driver while the others follow without drivers. Using artificial intelligence, the trucks will be in constant communication, capable of immediately responding to changing conditions with greater precision and speed than human drivers.

Initial savings are expected to come from reduced drag on the trailing trucks resulting in fuel efficiencies, lower emissions and nearly continuous operations. L2M2 may need to have back up drivers in the trailing vehicles depending on state and federal law. However, L2M2 expects that as compliance with heightened safety standards is demonstrated, this will become unnecessary.[1]

What labor law advice would you offer L2M2? The question would obviously necessitate an analysis of the collective bargaining agreement ("CBA") between the employer and the union. But say the CBA was silent with respect to the implementation of automation, robotics, and/or artificial intelligence in the workplace: what would happen then?

The purpose of this article is to delve into the labor law[2] ramifications of these proposed changes in the workforce and consider how they may be analogous to current legal precedent concerning the contracting or subcontracting out the work of unionized workers.

Legal Background: Mandatory and Permissive Subjects of Bargaining

Regarding the trucking company example, the beginning of the legal analysis would be to determine whether the implementation of automation, robotics, and/or artificial intelligence in the workplace is a "mandatory" subject of bargaining under the National Labor Relations Act (the "NLRA"). This is because Section 8(d) of the NLRA states that an employer and the union representative of the employees have a mutual obligation to confer

[1] Wilson, *supra*, note 1.

[2] "Labor law," as opposed to "employment law," is defined as laws concerning the relations between unions and management in areas such as collective bargaining and union organizing. *See* BLACK'S LAW DICTIONARY (10th ed. 2014) (defining labor law as "The field of law governing the relationship between employers and employees, esp. law governing the dealings of employers and the unions that represent employees.").

in good faith with respect to *wages, hours, and other terms and conditions of employment*.[3] These matters have been held to be "mandatory subjects of collective bargaining."[4]

Further, as a result of Congress' failure to amend the NLRA to provide a more precisely defined list of mandatory subjects of bargaining, the task of defining what "terms and conditions of employment" are subject to mandatory bargaining has been left to the National Labor Relations Board (the "NLRB")[5] and Courts to decide.[6]

An employer's failure to bargain concerning a mandatory subject is deemed an unfair labor practice in violation of section 8(a)(5) of the NLRA.[7] The Supreme Court has refined the definition of mandatory bargaining subjects to include subjects that "vitally affect" employees,[8] including subjects that relate directly to nonemployees—i.e., subjects that concern individuals or conditions outside the bargaining unit, but have a substantial impact on bargaining unit employees.[9]

Ostensibly, to the extent that the implementation has a substantial impact on bargaining unit employees, this would include the implementation of automation, robotics, and artificial intelligence.

On the other hand, unions and employers need not bargain with respect to "permissive" subjects of bargaining, but they may if both agree to do so.[10] Examples of permissive subjects of bargaining include most managerial prerogatives and matters "at the core of entrepreneurial control,"[11] such as expansion of company facilities and production decisions.[12]

The Current Legal Precedent

Contracting and/or Subcontracting Out Work Covered by a CBA

When an employer decides to "contract out" or to subcontract work currently performed by union employees, the employer is seeking to replace the union employees usually in the hope of reducing labor costs or inefficiencies.[13] The decision to use robotics, for example,

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[3] National Labor Relations Act (, as amended,) § 8(d), 29 U.S.C. §158(d) (2016).
[4] Debra J. Zidich, Comment, *Robotics in the Workplace: The Employer's Duty to Bargain over Its Implementation and Effect on the Worker*, 24 SANTA CLARA L. REV. 917 (1984) (citing R. GORMAN, BASIC TEXT ON LABOR LAW 496 (1976)).
[5] The NLRB is the federal regulatory agency authorized by statute to promulgate decisions and regulations under the NLRA.
[6] THE DEVELOPING LABOR LAW 1325 (John E. Higgins Jr. et al. eds., 6th ed. 2012).
[7] Zidich, *supra*, note 2 at 917.
[8] Allied Chemical & Alkali Workers Local I v. Pittsburgh Glass Co., 404 U.S. 147, 179–80 (1971).
[9] THE DEVELOPING LABOR LAW, *supra* note 7 at 1327.
[10] *Id.*; *see also NLRB v. Borg-Warner Corp., Wooster Division*, 356 U.S. 342, 349 ("As with other matters, however, each party is free to bargain or not to bargain, and to agree or not to agree.")
[11] Also known as exclusive "management rights."
[12] *See* Fibreboard Paper Products v. NLRB, 379 U.S. 203, 233 (Stewart, J., concurring).
[13] Zidich, *supra* note 5, at 923.

may be analogous to the decision to contract or subcontract out work because, in both decisions, the effect is to replace one set of workers with another—whether it be robots or workers from another company—in an effort to reduce the employer's labor costs.[14]

The landmark Supreme Court case of *Fibreboard Paper Products v. NLRB*[15] concerned an employer's decision to save labor costs by contracting out its maintenance facility work formerly done by union employees.[16]

The Supreme Court held that, even in the absence of antiunion motivation, an employer may have a duty to bargain with the union before making economically motivated decisions—such as contracting or subcontracting work formerly done on the premises by union employees—because such decisions deprive employees of their employment and are thus within the phrase "terms and conditions of employment" subject to mandatory bargaining.[17]

Emphasizing the limits of the facts in the case, the majority noted (1) that the company's basic operation did not change as a result of the decision to contract out the work; (2) no capital investment was required or contemplated; and (3) the employees of the independent contractor were to do the work under "similar conditions of employment" as the employees they replaced.[18]

The Court in *Fiberboard* warned that its reasoning and holding were narrow and limited, and that its reasoning should not be used to expand the scope of mandatory bargaining to include all subcontracting cases.[19] This stipulation was also discussed in Justice Stewart's concurring opinion. That stipulation becomes critical when *Fiberboard* is applied to robotics, automation, and artificial intelligence replacing unionized employees.[20]

Indeed, Justice Stewart stated that, while the NLRB and Courts have recognized job security in various circumstances as a "term and condition of employment" subject to mandatory bargaining, he also stated that not every decision which affects job security is one that requires bargaining.[21]

Justice Stewart specifically noted that decisions concerning investment in labor-saving machinery and commitment of investment capital, are strictly entrepreneurial in nature—as opposed to terms and conditions of employment—and therefore are completely outside the scope of mandatory collective bargaining.[22]

The concurring opinion of Justice Stewart concluded, that the proper forum for resolution of disputes concerning technological change and its effect on the worker is the legislature, and not the NLRB or Courts:[23]

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[14] *Id.*
[15] 379 U.S. 203 (1964).
[16] *Id.*
[17] *Id.* at 203–14.
[18] *Id.* at 213–15; Zidich, *supra* note 5, at 925; THE DEVELOPING LABOR LAW, *supra* note 7 at 1414.
[19] *Fibreboard*, 379 U.S. at 215; Zidich, *supra* note 5, at 925; THE DEVELOPING LABOR LAW, *supra* note 7 at 1414.
[20] Zidich, *supra* note 5, at 925.
[21] *Fibreboard*, 379 U.S. at 233 (Stewart, J., concurring).
[22] *Id.*; Zidich, *supra* note 5, at 925.
[23] Zidich, *supra* note 5, at 925.

> [The] subcontracting [in this case] falls short of such larger entrepreneurial questions as what shall be produced, how capital shall be invested in fixed assets, or what the basic scope of the enterprise shall be. In my view, the Court's decision in this case has nothing to do with whether any aspects of those larger issues could under any circumstances be considered subjects of compulsory collective bargaining under the present law.
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> ***I am fully aware that in this era of automation and onrushing technological change, no problems in the domestic economy are of greater concern than those involving job security and employment stability.*** Because of the potentially cruel impact upon the lives and fortunes of the working men and women in the Nation, these problems have understandably engaged the solicitous attention of government, of responsible private business, and particularly of organized labor. It is possible that in meeting these problems Congress may eventually decide to give organized labor or government a far heavier hand in controlling what until now have been considered the prerogatives of private business management. That path would mark a sharp departure from the traditional principles of a free enterprise economy. Whether we should follow it is, within constitutional limitations, for Congress to choose. But it is a path which Congress certainly did not choose when it enacted the [NLRA and its amendments].[24]

Robotics and Automation as Contracting or Subcontracting Out Unionized Work[25]

Robotics and automation are labor-saving devices that involve the commitment of investment capital to obtain.[26]

Analyzing an employer's decision to implement robotics and/or automation measures under the *Fibreboard* legal framework—i.e., unionized work being contracted or subcontracted out to machines, who are not unionized workers—would depend upon the circumstances of the case.

[24] *Fibreboard*, 379 U.S. at 225–26 (Stewart, J., concurring).
[25] Some legal scholars believe robotics and automations could also be considered as analogous to a relocation of work premises, or partial sale of a business. For discussion on these topics *see* Zidich, *supra* note 5, at 929–36.
[26] Zidich, *supra* note 5, at 926.

As stated before, the majority in *Fibreboard* noted that analysis on whether contracting or subcontracting work is a mandatory subject of bargaining depends on (1) whether the company's basic operation changed or whether the basic operation did not change as a result of the decision to contract out work; (2) whether capital investment was required or contemplated; and (3) whether the work contracted/subcontracted out is similar to the work performed, under the "similar conditions of employment," as the employees they replaced.[27]

Under *Fibreboard*, an employer likely satisfies the second criterion since implementation of robotics and automation measures in the workplace contemplates considerable capital investment. However, whether the company's basic operation changed, and whether the work performed is similar and performed under the similar conditions of employment—i.e., *Fibreboard's* first and third elements, respectively, depend upon the circumstances.

If an employer's decision to implement robotics or automation considerably changes the company's basic operation, and if the work performed is significantly different, or performed under significantly different conditions, then it is more likely that the decision falls within the exclusive management's rights prerogatives, and is not a mandatory subject of bargaining.

However, if an employer's decision to implement robotics and/or automation measures does not change the basic operation of the company, or if the work performed is similar and performed under similar conditions, then it is more likely that the decision will be considered a mandatory subject of bargaining. If so, then the employer may not unilaterally implement robotics or automation measures, and, instead, must bargain with union over the measures ***before*** implementation.

Cases Dealing with Robotics and Automation

Although there are no cases dealing with artificial intelligence, there are some—although scant—NLRB and court decisions dealing with the implementation of robotics and automation as mandatory subjects of bargaining. These cases, for the most part, involve an employer's technological changes in the context of newspaper printing.

For example, in *Columbia Tribune Publishing*,[28] the U.S. Court of Appeals for the Eighth Circuit upheld the NLRB's ruling that the employer failed to bargain in good faith regarding a change in the type of machinery used in its business.[29] The employer's change was from the traditional "hot-type" printing press to a new ***automated*** process called "cold-type."[30]

The new process, a technological improvement, resulted in the layoff of half of the unionized employees.[31] The employer contended that the new technology created a unit of employees who were not covered by the CBA or represented by the union. But, the NLRB,

[27] *Fibreboard*, 379 U.S. at 213–15.
[28] NLRB v. Columbia Tribune Publ'g Co., 495 F.2d 1384 (1974), *enforcing* 201 NLRB 538.
[29] *Id.*; THE DEVELOPING LABOR LAW, *supra* note 7 at 1409.
[30] *Id.*
[31] *Id.*

relying on *Fiberboard*, held that because the change affected bargaining unit employees, was a different way to perform the same work, and did not create a "new" unit, it was a mandatory subject of bargaining. As a result, the NLRB concluded the employer violated Section 8(a)(5) of the NLRA by failing to bargain in good faith concerning the change.[32]

In *Renton News Record*,[33] the NLRB described the issue in terms relevant today:

> The change in the method of operations in this case is the result of technological improvements. Obviously, such improvements serve the interests of the economy as a whole and contribute to the wealth of the Nation. Nevertheless, the impact of automation on a specific category of employees is a matter of grave concern to them. It may involve not only their present but their future employment in the skills for which they have been trained. Accordingly, the effect of automation on employment is a joint responsibility of employers and the representatives of the employees involved.

The NLRB noted that the employers in *Renton News* were faced with a "choice of either changing their method of operations to one at least equal to that of their competitors or being forced to go out of business. They selected the former alternative."[34]

The NLRB concluded that, because implementing the technological change was economically necessary, the remedy should only require the employers to bargain with the union over the effects of their implementation decision.[35] Federal courts have upheld NLRB determinations requiring effects-only bargaining in similar cases.[36]

Pan American Grain Co., Inc., 351 NLRB 1412 (2007) is an illustrative example. In *Pan American Grain Co., Inc.*, the Board reaffirmed the importance of an employer's ability to establish "that its decision to lay off any specific individual . . . was based exclusively on its modernization program."[37] Citing *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981), the Board noted that the Court placed automation in a category of management

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[32] *Id.*; *see also* THE DEVELOPING LABOR LAW, *supra* note 7 at 1410, n. 472 ("This decision by the Eighth Circuit may be read as extending the mandatory requirements of the Supreme Court's decision in [Fibreboard], *to encompass both automation and technological change*.") (emphasis added).
[33] 136 NLRB 1294 (1962).
[34] *Id.* at 1297–98; Zidich, *supra* note 5, at 936.
[35] *Id.* at 1298; Zidich, *supra* note 5, at 936, n. 124; *see also* Island Typographers, 252 NLRB 9 (1980) (holding that the employer did not violate NLRA when it introduced new technological process, but violation found when worker layoffs occurred as a result of implementation).
[36] Zidich, *supra* note 5, at 936–37, n. 125 (citing NLRB v. Columbia Tribune Pub. Co., 495 F.2d 1384 (1974); Omaha Typographical Union v. NLRB, 545 F.2d 1138 (1976); Newspaper Printing Corp. v. NLRB, 625 F.2d 956 (1980)).
[37] *Pan American Grain Co., Inc., and Pan American Grain Mfg. Co., Inc., and Congreso de Uniones Industriales de Puerto Rico*, 351 NLRB 1412, 1414 (2007).

decisions "'to be considered on their particular facts' with respect to the duty to bargain."[38] Addressing that point, the Board concluding that the employer failed to bargain as required because the layoffs at issue were caused by reduced sales, not managerial changes in automation, robotics or AI.[39]

Effects Bargaining

Even if there no obligation to bargain over a decision to implement robotics or automation measures as a means of contracting out or transferring unionized work, there is often the duty to bargain over the ***effects*** of such decisions.[40] This is known in labor law as "effects bargaining."

Effects bargaining requires management and labor to attempt in good faith to come to an agreement regarding what will happen to individuals affected by an implemented decision.[41] In the case of workers who were laid off due to the implementation of robotic or automated equipment, bargaining topics may include such items as termination pay, retraining programs, seniority status, etc.[42]

Thus, even if the particular circumstances behind introducing robotics or automation measures at the workplace demonstrate there is no mandatory obligation to bargain ***before*** implementation, the employer, nevertheless, must still bargain with the union regarding the ***effects*** of the decision to robotize or automate features in the workplace.

Conclusion

Employers should take their time in planning these changes, and should consult with their labor counsel before moving forward in order to minimize risk and exposure. The hypothetical at the beginning of this article does not make clear whether drivers will be eliminated by the self-driving trucks or additional employees will be needed to maintain the trucks and software.

If history is a guide, either way, unions will want to be part of the process and the NLRB will be called upon to determine at what point unions are entitled by law to demand a seat at the bargaining table.

As long ago as 1946, Walter Reuther, the famed leader of the UAW, appreciated the dilemma that automation presented. "Reuther and his colleagues shared widespread hopes that the new production processes would relieve the burdens of assembly-line work and increase the working class's access to cultivated leisure. At the same time, however, they

[38] *Id.* at 1413.
[39] *Id.* at 1414.
[40] THE DEVELOPING LABOR LAW, *supra* note 7 at 1424.
[41] Zidich, *supra* note 5, at 936, n. 123.
[42] *Id.*

recognized that unchecked technological change would generate a wave of structural unemployment by displacing experiences workers while denying new, unskilled workers necessary jobs."[43]

[43] David Steigerwald, Walter Reuther, the UAW, and the dilemmas of automation, 51, LABOR HISTORY (Issue 3), 429–453.