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Management prerogatives, plant closings, and the NLRA: A response

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I will speak briefly, and I hope that my focus will complement the points made by the other speakers earlier this morning. I would like to advance just one main point, and that is my belief that the labor movement should think of the problem of democratic control of investment decisions and resource allocation choices as being inextricably linked to the problem of democratic organization of the day-to-day work process. Our aspirations must be broad enough to encompass both the goal of enterprise responsibility to the community and the ideal of worker control of the workplace.

The two concerns, democratic control of investment decisions and worker control of the work process, are fused together by discussion of the management prerogatives doctrine.¹ Discussions of management prerogatives typically focus on the first problem, private versus social control of investment. But the doctrine is also a fundamental barrier to democratic participation by workers in the organization of work. A basic purpose of the doctrine is to induce us to believe in the undesirability and/or the impossibility of democratic decision making in the workplace, both with respect to the content, location, and scale of enterprises and with respect to governance of the work process itself. By the same token, the arguments in support of worker control complement and reinforce the case that we must make for community control of investment decisions. It therefore seems prudent to link the struggle for socially responsible investment to a struggle for worker self-governance in the production process.

Alongside the central issue discussed by this panel, *viz.*, whether society's resources will be dedicated first and foremost to the pursuit of profit or to meeting people's needs, is another issue confronting the nation. Seen from one perspective it is the question of productivity. From another, it is the question of democracy in daily life, including working life.

The advanced technological systems increasingly deployed in our economy potentially call for a labor force characterized by general capabilities to investigate and learn about the unexpected, to think flexibly about new problems, and to participate effectively in complex teamwork. The produc-

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1. The "management prerogatives doctrine" is a fundamental premise of collective bargaining law. It holds that the management of an enterprise is presumptively entitled to legal freedom of action with respect to certain actions and decisions in the workplace. One of the most important implications of the doctrine is the rule that management is not under a duty to bargain collectively regarding certain types of investment and shut-down decisions because these decisions lie at the "core" of entrepreneurial prerogative. *See Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 223 (1964) (Stewart, J., concurring). The most recent formulation of the doctrine by the Supreme Court will be found in *First Nat'l Maintenance Corp. v. NLRB*, 101 S. Ct. 2573 (1981) (Court undermines workers' statutory right to collective bargaining by balancing it against employers' need for "unencumbered decision-making").

tivity of our industrial and service systems would be enormously enhanced if jobs were designed to draw upon workers' abilities to learn, to accumulate knowledge, and to develop flexible conceptual and interpersonal capabilities. However, designing jobs this way conflicts with the mental habits and instincts of American management. Management inclines toward more traditional modes of workplace organization, less fraught with the danger of loss of control over workers. The impulse to maintain control appears even in some of the recent "quality of working life" experiments through which management hopes to boost productivity by mobilizing the desire of workers to participate in enterprise governance. Fred Block and Larry Hirschhorn have summarized the most basic and enduring managerial attitude: "[a] work force stripped of conceptual skills is easily replaceable, hence cheaper, and is unable to use its knowledge as a lever against management."² Therefore, the job-design potentials of advanced technology often go unrealized. Instead, we witness an awesome and systematic degradation of workers and jobs, which has been commented on by other speakers this morning.³

Traditional, antiparticipatory modes of workplace organization are not entirely "rational," that is to say profit-maximizing, from the long-run management standpoint. Hierarchy and deskilling deny management the opportunity to capture and cash in on the productive power of workers' learning and problem solving capabilities. For this reason, and also perhaps because of the general democratic norms of our political culture, authoritarian forms of workplace organization are in constant need of ideological justification. The industrial community constantly needs to be persuaded that we ought to have management (in the sense of a distinct, privileged group within workplace organization charged with the responsibility of command). The industrial community needs constantly to be persuaded that command, planning, and choice ought to be separated from execution. Management prerogatives doctrine functions as part of this process of persuasion and legitimation.

Professor Atleson's presentation, and the longer work on which it is based,⁴ carefully identify and examine the values and assumptions that are nourished and continuously revitalized by the management prerogatives doctrine. Included in these underlying assumptions are the premises that denial of employee input and control over basic or even routine enterprise decisions is justified because workers lack knowledge about financial and operational matters,⁵ because they lack interest in investment and resource

2. Block & Hirschhorn, *New Productive Forces & The Contradictions of Contemporary Capitalism: A Post-Industrial Perspective*, 7 THEORY AND SOCIETY 363, 375 (1979).

3. See generally H. BRAVERMAN, *LABOR & MONOPOLY CAPITAL* (1974).

4. J. ATLESON, *VALUES & ASSUMPTIONS IN LABOR LAW* (forthcoming 1983).

5. Typical of administrative and judicial attitudes on this point is *General Motors Corp.*, 191 N.L.R.B. 951 (1971) (decision to withdraw from business not subject to duty to bargain), *enforced sub nom. UAW v. N.L.R.B.*, 470 F.2d 422 (D.C. Cir. 1972) ("decisions

allocation choices, and because business growth supposedly requires free capital mobility regardless of the human consequences. Perhaps most important is the ancient non sequitur that management has a right to control the workplace because it owns the workplace.

The crucial point of Jim Atleson's paper and other recent work in the new "critical labor jurisprudence,"⁶ is that the ideological content of the management prerogatives doctrine is important. The vision of the world of work that the doctrine underwrites and advances provides significant symbolic and emotional underpinnings that tend to legitimate an historically obsolete form of workplace organization. The social function of significant legal ideas like the management prerogatives doctrine is to induce us to accept a certain view of the possibilities of and constraints upon human freedom, to induce us to believe in the justice, or at the least the inevitability of existing institutional forms. In particular, management prerogatives doctrine is designed to get us to believe the simplistic if not plainly inaccurate claim that management has always had the power to govern the work-process (unless it conceded part of that power by agreement); and the plausible but nonetheless wholly undemonstrated claim that operational efficiency in work requires hierarchy and command. In sum, the purpose of the management prerogatives doctrine is to deny us access to knowledge about our past and political imagination about our future.

Moreover, the doctrine shifts the "burden of proof" regarding justification of democratic accountability. In a democratic culture, those who exercise power should, presumptively be subject to the norms of popular participation and communal responsibility. By making it appear that private, non-accountable command is somehow "natural" or appropriate in the workplace, the management prerogatives doctrine places the uphill burden of justification upon those who would apply basic democratic ideals to so-called private holders of economic power.⁷ This is an imposing obstacle to the moral progress of an industrial society. It tends to inhibit all of us from seeing the workplace as a potential setting for workers to experience and develop their capacities for self-realization and collective self-governance.

To be successful, the overall attack on the management prerogatives doctrine must include the objectives of worker self-management on a day-

such as this, in which a significant investment or withdrawal of capital will affect the scope and ultimate direction of an enterprise, are matters essentially financial and managerial in nature. . . . They . . . involve subject areas as to which the determinative financial and operational considerations are likely to be unfamiliar to the employees and their representatives").

6. See generally Klare, *Labor Law as Ideology: Toward a New Historiography of Collective Bargaining Law*, 4 INDUS. REL. L.J. 450 (1981), particularly sources cited at *id.* at 450 n.1.

7. These themes are developed at greater length in Klare, *supra* note 6, and Klare, *The Public-Private Distinction in Labor Law*, U. PA. L. REV. (forthcoming 1982).

to-day level as well as socially responsible investment decisions. Therefore, it seems appropriate and prudent that we fight for both workers' control and democratic resource allocation as alternatives to the existing and accepted forms of workplace organization. The fight for jobs is an urgent and commanding priority. But we should also be fighting for better jobs, for jobs with meaningful content, jobs offering workers self-developmental possibilities, jobs offering the possibility of a satisfying balance between work time and personal life.

It will not be easy to wage both struggles simultaneously. We live in desperate times. Yet I agree with Staughton Lynd that while we fight for our immediate priorities, we must keep our eyes on the horizon. By placing the question of workers' control high on our agenda, we contribute to the great task of mobilizing this generation to carry on the historic work of the labor movement. As a subpoint by way of conclusion, I would urge continuing theoretical work on the legal system as part of the broader effort of formulating our aspirations for democratic participation in viable political, organizational, and doctrinal terms. A part of our task must be to decode, understand, and transcend the cultural obstacles to democratic progress represented by powerful and pervasive legal ideas such as the management prerogatives doctrine.