LABOR LAW ISSUES IN DECIDING TO AUTOMATE MASS TRANSIT OPERATIONS

For transit employers, the advent of autonomous vehicle technology means that certain technologies are market-ready or readily adaptable to their operations and further automation technologies are in development. Ready now are high–priority advanced driver assistance use and automated shuttles. Transit employers can use lane-assist technologies to run vehicles on highway shoulders or bus lanes adjacent to rush hour traffic. They can use automation to park and recall vehicles and precision movement for fueling, servicing and washing. Circulator and first-to-last mile services are available. Automated maintenance yard applications, automated mobility on demand, and automated bus rapid transit are in development.[1]

These developments are expected to result in future operational savings in part through the elimination of driver and maintenance staff positions and reduced overtime. For the remaining workers, job responsibilities will change and new skills will be required. Even partial automation may result in job losses or a "de-skilling" of the vehicle operator role. Legal protections for transit labor may exist in collective bargaining agreements, federal or state law, and under section 13(c) of the Federal Transit Act. For transit employers that have collective bargaining agreements, there may be an obligation to bargain with the union over the decision and/or the effects of the decision to automate. If a mass layoff or plant closing is necessary, advance notice to employees may be required. This paper discusses the labor law ramifications of the decision to automate, first by reviewing when an employer has a duty to bargain under the National Labor Relations Act and the Railway Labor Act. A discussion of protective arrangements under the Federal Transit Act follows, and the paper concludes with a discussion of the Worker Adjustment and Retraining Notification Act and its state counterparts.

I. WHAT LAWS IMPOSE A DUTY TO BARGAIN?

There are three types of labor law which govern the employer-employee relationship in the transit industry: the National Labor Relations Act ("NLRA"), the Railway Labor Act ("RLA") and state-specific public sector collective bargaining statutes.[2]

[1] For more information, see the Federal Transit Administration's January 2018 Strategic Transit Automation Re-search Plan, https://www.transit.dot.gov/sites/fta.dot.gov/files/docs/research-innovation/114661/strategic-transit-automation-research-report-no-0116_0.pdf.

[2] A contractor covered by one of these three statutes may have negotiated its own collective bargaining agreement with one or more labor unions, or it may have bargaining obligations under a project labor agreement. Although it will not be discussed in greater detail herein, a project labor agreement is a pre-hire collective bargaining agreement between a project manager and one or more labor unions that establishes the terms and conditions of employment on a specific construction project.

The NLRA covers private sector employers who engage in a minimal level of interstate commerce. For trucking, bus, and shipping companies who engage in the practice of transporting goods or passengers, the minimum threshold is $50,000 in gross annual volume.[3] Other transit systems are covered if they have a gross volume of at least $250,000 per year.[4] However, certain entities are excluded from coverage under the NLRA, including the U.S. government or any wholly owned government corporation, state governments and their political subdivisions, and persons subject to the Railway Labor Act.[5] In the case of government contractors, the NLRB "will only consider whether the employer meets the definition of 'employer' under section 2(2) of the Act and whether such employer meets the applicable monetary jurisdictional standards." [6]

Filling a gap left by the NLRA, the RLA applies to "carriers": railroads, airlines and any company directly or indirectly owned or controlled by, or under common ownership with, a railroad or airline that performs a service in connection with transportation.[7] A rail carrier is "a person providing common carrier railroad transportation for compensation."[8] The RLA covers both "direct" rail and air carriers and enterprises "owned or controlled by or under common control with" a direct rail or air carrier. Direct rail carriers include freight railroads, Amtrak, other entities that provide intercity rail passenger service, and commuter rail passenger operators.[9] A railroad owned by a state or other governmental authority that provides freight transportation service has been found to be a carrier for purposes of the RLA.[10]

Finally, public employers, who are specifically excluded from coverage under the NLRA and RLA, may be covered by state-specific labor laws. Under the NLRA, for example, an entity is an exempt "political subdivision" if it "(1) was created directly by the state, so as to constitute [a] department[ ] or administrative arm[ ] of the government; or (2) [is] administered by individuals responsible to public officials or the general electorate."[11] As of this date, 36 states plus Puerto Rico and the District of Columbia have labor relations statutes applicable to some or all public employees.[12]

II. WHEN DOES AN EMPLOYER HAVE A DUTY TO BARGAIN?

At the core of labor relations is the duty to bargain with a labor organization over changes to covered employees' terms and conditions of employment. An employer may therefore have a duty to bargain with the labor union representing its employees over the decision and/or the effects of the decision to automate. Regardless of what statutory scheme governs the relationship, an employer must first determine whether the collective bargaining agreement addresses the implementation of automation, robotics or artificial intelligence in the workplace and, if so, whether the employer has agreed to bargain over the decision or if the agreement reserves such decisions to management. These matters might be addressed in work preservation, subcontracting or management rights clauses. If the collective

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[3] Jurisdictional Standards, National Labor Relations Board, available at: https://www.nlrb.gov/rights-we-protect/law/jurisdictional-standards. *See also, e.g., NLRB v. Custom Excavating*, 575 F.2d 102, 107 (7th Cir. 1978);
[4] *See, e.g., Charleston Transit Co*., 123 N.L.R.B. 1296, 1297 (1959).
[5] 29 U.S.C. § 152(2).
[6] *Management Training Corp*., 317 N.L.R.B. 1355, 1358 (footnote omitted), motion for reconsideration denied, 320 N.L.R.B. 131 (1995).
[7] 45 U.S.C. § 151 *et seq*. (1988).
[8] Douglas W. Hall & Michael L. Winston, *The Railway Labor Act*, 4th Edition at p. 3-5 n.8 (2016).
[9] *Id*. at 3-3.
[10] *Id*. at 3-9 (2016).
[11] *NLRB v. Natural Gas Util. Dist. of Hawkins County, Tenn*., 402 U.S. 600, 604-05 (1971).
[12] Although a complete analysis of the various state public sector collective bargaining laws is outside the scope of this document, most public sector labor laws were modeled after the NLRA and state agencies interpreting state law have largely relied on similar decisions under the NLRA.

bargaining agreement is silent on the issue of automation, the employer may still be required to bargain with the union regarding the decision to automate and/or its effects.

A. Duty to Bargain Generally

Two "types" of bargaining exist: decisional bargaining -- where the employer must first bargain over its planned action -- and "effects" bargaining -- where an employer must bargain over the effects of its planned action. Whether the parties must engage in decisional bargaining and/or effects bargaining will depend upon the workplace action planned by an employer.

1. National Labor Relations Act

The NLRA requires employers and unions "to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment."[13] It is an unfair labor practice for an employer to refuse to bargain with the representatives of its employees.[14] These provisions have been used by the National Labor Relations Board (NLRB) and the courts to define the scope of the duty to bargain. Three categories of bargaining subjects have developed: mandatory, permissive and illegal.[15]

The U.S. Supreme Court has held that mandatory subjects of bargaining are those referenced in the NLRA as "rates of pay, wages, hours of employment, or other conditions of employment,"[16] and as "wages, hours, and other terms and conditions of employment."[17] This language fixes the subjects about which an employer and a union are compelled by law to bargain, the subjects about which the employer is barred from taking unilateral action, and the subjects about which the employer and individual bargaining-unit members may not make individual agreements, unless the union waives its right to preempt unilateral action or individual bargaining.[18]

Even though there may not be an obligation to bargain over a permissive subject, there remains a duty to bargain over the effects of such decisions on the terms and conditions of employment of bargaining unit employees.[19] Effects bargaining is required because there may be alternatives an employer and union could implement to avoid or mitigate the change.[20] The scope of effects bargaining is very broad, so an employer, after giving notice to the union of the planned workplace action, should give the union an opportunity to request it prior to implementation.[21]

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[13] See, e.g., 29 U.S.C. § 158(d).
[14] 29 U.S.C. § 158(a)(5).
[15] Charles Morris, *The Developing Labor Law*, § 13.I.B.3 (7th ed. 2017).
[16] 29 U.S.C. § 159(a).
[17] 29 U.S.C. § 158(d).
[18] *Id*.
[19] Morris, *supra* note 15, § 16.IV.C.2.M(1)(d). *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 677 n. 15, 681-82 (1981).
[20] *The Fresno Bee*, 339 N.L.R.B. 1214 (2003).
[21] *NLRB v. Acme Indus. Prods., Inc*., 439 F.2d 40, 43 (6th Cir. 1971).

2. Railway Labor Act

One of the purposes of the RLA is to maintain the flow of rail and air commerce without work stoppages. Toward that end, while the RLA permits employees to associate and to join labor unions it also provides mechanisms to resolve labor disputes. Carriers and unions must bargain over "rates of pay, rules and working conditions."[22]

It is clear that the duty to bargain imposed by the RLA extends to those proposals directly related to "rates of pay, rules, and working conditions."[23] No carrier may change rates of pay, rules or working conditions of its employees as a class, except as provided in a collective bargaining agreement or as provided in section 6 of the RLA.[24] Section 6 requires a party to give at least thirty days' written notice of an intended change in agreements and to maintain the status quo pending resolution of the matter by the National Mediation Board.[25]

Some courts have held that the concepts of mandatory and permissive subjects of bargaining under the NLRA apply under the RLA.[26] Those that have referred to the case law under the NLRA have held that "[u]nless a dispute involves a mandatory subject, management may act unilaterally without discussing the change with the collective bargaining representative."[27] However, there is little case law on what constitutes a permissive subject of bargaining except in relation to discontinuation of a carrier's business.[28]

As is the case under the NLRA, the first inquiry must be made into the terms and conditions of the applicable collective bargaining agreement. "If there has been no waiver of [management] prerogative in the collective bargaining agreement, then the union cannot insist that the carrier bargain over prerogative matters, such as executive perks, recapitalization, rates charged shippers, and other matters that are only indirectly -- though often vitally -- related to the status of the workers represented by the union."[29]

As noted above, the Supreme Court and lower courts have recognized that even if there is no duty to bargain over a decision, there is a duty to bargain over effects of the decision on employees.[30] To the extent that there is an obligation to maintain the status quo under the RLA during effects bargaining, the obligation does not bar the employer from proceeding with the transaction because a bar would transform effects bargaining into decision bargaining.[31]

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[22] 45 U.S.C. § 152. First.
[23] *Int'l Broth. of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Airline Div. v. Southwest Airlines Co*., 842 F.2d 794, 800 (5th Cir. 1988) (citing other circuit court decisions).
[24] 45 U.S.C. § 152 Seventh.
[25] 45 U.S.C. § 156.
[26] Hall & Winston, *supra* note 8, at 6-42. *See, e.g., Nat'l RR Passenger Corp. v. Transport Workers Union of America*, 373 F.3d 121, 126 (D.C. Cir. 2004). *See also Southwest Airlines Co*., 842 F.2d at 799 ("Unless a dispute involves a mandatory subject, management may act unilaterally without discussing the change with the collective bargaining representative.").
[27] *See, e.g., Southwest Airlines Co*., 842 F.2d at 799.
[28] Hall & Winston, *supra* note 8, at 6-42.
[29] *Chicago & N.W. Transp. Co. v. Railway Labor Execs.' Ass'n*, 908 F.2d 144, 152 (7th Cir. 1990).
[30] *Pittsburgh & Lake Erie Railroad v. Railway Labor Executives' Ass'n*, 491 U.S. 490, 512 (1989).
[31] Hall & Winston, *supra* note 8, at 6-47.

B. Potential Subjects of Bargaining

Because converting to advanced driver assistance or autonomous vehicles in the transit industry is a cutting edge issue, administrative agencies and courts have not made clear whether it is a mandatory or permissive subject. However, case law exists on related topics which may be implicated by automation. Those topics – subcontracting, partial shutdown, layoffs and reassignment, and changes to the bargaining unit -- are discussed in greater detail below.

1. Subcontracting

a. National Labor Relations Act

Automation may cause the removal of work from the bargaining unit or the substitution of robotics for employees and thus be analogous to subcontracting. Subcontracting or contracting out work may be a mandatory subject of bargaining, depending upon the facts.[32] Even where bargaining over the decision to subcontract is not required, an employer may have an independent duty to bargain over the effects of such a decision.[33]

The seminal case on the issue of whether subcontracting work is a mandatory subject of bargaining is *Fibreboard Paper Products Corp. v. NLRB*.[34] In short, the employer in that case operated a manufacturing plant and had collective bargaining agreements with unions representing its maintenance employees. The employer determined it could achieve substantial cost savings by engaging an independent contractor to perform its maintenance work and informed the unions that it would do so upon expiration of the collective bargaining agreements. The union filed unfair labor practice charges against the employer because the employer had failed to bargain over the decision.

The Supreme Court held that the decision to contract out the work was a mandatory subject of bargaining, even in the absence of anti-union motivation. First, the decision did not alter the company's basic operation. Second, no capital investment was contemplated. Third, because the company merely replaced existing employees with those of an independent contractor to do the same work under similar conditions of employment, requiring the employer to bargain "would not significantly abridge [the company's] freedom to manage the business."[35] According to the Court, when an employer seeks to achieve cost savings by contracting out work that had been the responsibility of union members, it is under an obligation to first "attempt to achieve similar economies through negotiation with existing employees or to provide them with an opportunity to negotiate a mutually acceptable alternative."[36]

The often-cited concurring opinion of Justice Stewart in *Fibreboard* emphasized the limitations of the holding.

> 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

[32] Morris, *supra* note 15, § 16.IV.C.2.M.(1).
[33] *Id*.
[34] 379 U.S. 203 (1964).
[35] *Id*. at 213.
[36] *Id*. at 214.

> themselves primarily about conditions of employment, though the effect of the decision may be necessarily to terminate employment. If, as I think clear, the purpose of § 8(d) is to describe a limited area subject to the duty of collective bargaining, those management decisions which are fundamental to the basic direction of a corporate enterprise or which impinge only indirectly upon employment security should be excluded from that area.[37]

Justice Stewart's opinion concluded that Congress did not choose to give labor a heavy hand in controlling what the courts have considered the prerogatives of private business management and that a decision to give unions that control is for Congress, rather than the Board and courts, to make.[38]

The majority opinion cautioned that its holding was limited to the facts of the case and did not encompass other forms of "contracting out" or "subcontracting" such as automation.[39] However, the Board has applied the *Fibreboard* analysis to other types of contracting out.[40]

The *Fibreboard* standard has been applied in cases where, for financial reasons, an employer decided to eliminate unit jobs completely as a result of technological changes. In *Columbia Tribune*,[41] the newspaper changed from a hot metal printing process to an automated cold type process, which resulted in the elimination of bargaining unit work and, according to the employer, the creation of a unit of employees outside the scope of the unit. The Court found no reason why *Fibreboard* should not apply where, for financial reasons, an employer decided to eliminate unit jobs completely.[42] The court held that the effect of automation on the bargaining unit is a mandatory subject of bargaining and the employer unlawfully refused to bargain in good faith over a description of the appropriate bargaining unit to be represented by the union following the adoption of the new technology.[43] Whether the employer had a duty to bargain over the decision was not at issue in the case.

The court in *Columbia Tribune* relied upon the Board's decision in *Rochet d/b/a/ The Renton News Record*,[44] where the Board found an employer violated the Act by refusing to bargain with its union "over the intended change of operations [subcontracting the printing of one of its newspapers] and its effect on the composing room employees."[45] The Board in *Renton* found that the employer was faced with the decision of changing the operations or going out of business and because the change was economically necessary, the employer violated only a duty to bargain over the effects of the decision but not the decision itself.[46]

The absence of any precedent for the use of robotics or autonomous vehicles makes predictions uncertain. If the use of such technology can be analogized to contracting out work, under the three-part test of *Fibreboard*, there is an argument to be made that bargaining over the decision is not required. The third criterion for requiring bargaining -- engaging in the same or similar work under similar conditions of employment -- would be met. The first criterion -- altering the basic operation or scope of the business

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[37] *Id*. at 223.
[38] *Id*. at 225-26.
[39] *Id*. at 215.
[40] Morris, *supra* note 15, § 16.IV.C.2.M.(1)(b).
[41] *See, e.g., NLRB v. Columbia Tribune Publishing Co*., 495 F.2d 1384, 1390 (8th Cir. 1974) (citing *Town & Country Mfg. Co.*, 136 N.L.R.B. 1022 (1962), *enforced*, 316 F.2d 846 (5th Cir. 1963)).
[42] 495 F.2d at 1390.
[43] 495 F.2d at 1388-89.
[44] 136 N.L.R.B. 1294 (1962)
[45] *Id*. at 1296.
[46] *Id*. at 1298.

-- may depend upon the nature and extent of the changes. Under the second criterion, however, the decision would involve a significant capital investment, so there should be no duty to bargain over the decision.

b. Railway Labor Act

Though there is little case law under the RLA on mandatory and permissive subjects, in *Japan Air Lines Co. v. Machinists*,[47] the Second Circuit held that a union's demand that the airline terminate its practice of subcontracting its maintenance and ground service work was not a mandatory subject of bargaining where its principal beneficiaries would be persons not yet hired to fill newly-created jobs.

2. Partial Shutdown

a. National Labor Relations Act

Automation might also be analogized to a decision to shut down part of a business, if, for example, new technologies are to be moved to or consolidated in a different location or simply added in a current location, requiring a partial shutdown there. Partial shutdowns can also trigger a duty to bargain over the decision as well as the effects. [48]

To determine whether an economically-motivated decision to shut down part of a business is a mandatory subject of bargaining, the Supreme Court has applied a balancing test to a certain type of decision. In *First Nat'l Maintenance Corp. v. NLRB*,[49] the Court found there are three categories of management decisions. One category of decisions affects the employment relationship only tangentially (like advertising and product design) and such decisions are not mandatory subjects of bargaining.[50] A second category directly affects the relationship (wages, working conditions) and are mandatory subjects of bargaining.[51] The third category includes decisions that directly impact employment but focus on economic profitability rather than the employment relationship.[52] To address the third type of decision, the Court weighed the employer's need to manage business interests against the potential benefit to the union of collective bargaining and concluded that a duty to bargain exists only "if the benefit, for labor-management relations and the collective-bargaining process, outweighs the burden placed on the conduct of the business."[53]

The Board later announced it would apply a burden-shifting analysis for determining whether the decision to relocate bargaining unit work is a mandatory subject of bargaining in *Dubuque Packing Co. (II)*.[54] The Board summarized the standards as follows:

> Initially, the burden is on the General Counsel to establish that the employer's decision involved a relocation of unit work unaccompanied by a basic change in the nature of the employer's operation. [That showing will establish] prima facie that the employer's

[47] 538 F.2d 46, 52 (2d Cir. 1976).
[48] 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, 932 (1984).
[49] 452 U.S. 666 (1981).
[50] *Id*. at 676-77.
[51] *Id*. at 677.
[52] *Id*. at 677.
[53] *Id*. at 678-79.
[54] 303 N.L.R.B. 386 (1991), *enforced in part sub nom. Food & Commercial Workers Local 150-A v. NLRB*, 1 F.3d 24, (D.C. Cir. 1993), *cert. dismissed*, 511 U.S. 1138 (1994).

> relocation decision is a mandatory subject of bargaining. ... [T]he employer may [rebut] by establishing that the work performed at the new location varies significantly from the work performed at the former plant, ... that the work performed at the former plant is to be discontinued entirely and not moved to the new location, or ... that the employer's decision involves a change in the scope and direction of the enterprise. Alternatively, the employer may proffer a defense to show by a preponderance of the evidence: (1) that labor costs (direct and/or indirect) were not a factor in the decision or (2) that even if labor costs were a factor in the decision, the union could not have offered labor cost concessions that could have changed the employer's decision to relocate.[55]

Research did not disclose a case involving automation or new technology where these shifting burdens were applied. In *First National Maintenance*, the Court once again expressly declined to address the application of its holding to other types of management decisions such as automation, saying they must be considered on their particular facts.[56] Nonetheless, the Board has applied that test to automation in at least one subsequent decision.[57]

In *Pan Am. Grain Co. v. NLRB*,[58] the company underwent an ongoing modernization and automation project that reduced staffing needs. The First Circuit enforced the Board's order finding that the company had a duty to bargain over the decision to lay off employees because the layoffs were not solely motivated by its modernization program but were based partially on labor costs. Because labor costs were "a motivating factor" for the layoffs, the company had a duty to bargain with the union over the layoffs.[59]

Decisions to convert to advanced driver assistance or autonomous vehicles are the type of decisions that directly impact employment but focus on economic profitability rather than the employment relationship. If a partial shutdown is involved, the balancing test of *First National Maintenance* would apply. Work performed at the new location may vary significantly from the work performed at the former location, making the decision, prima facie, a mandatory subject of bargaining under *Dubuque*. But the employer should be able to rebut that finding by showing that the work performed at the existing location is to be discontinued entirely and not moved to the new location, or that even if labor costs were a factor in the decision, the union could not have offered labor cost concessions that could have changed the employer's decision to relocate and there is little potential benefit from bargaining.

b. Railway Labor Act

In 1960, the Supreme Court held in *Order of Railroad Telegraphers v. Chicago & North Western Railway* that under the RLA, an employer was required to bargain with the union over its decision to close certain rail stations, eliminating a number of jobs.[60] The union wanted an amendment to its current bargaining agreement to prevent the railroad from abolishing any position without the union's consent. The union threatened to strike if the employer refused to negotiate. The Court held that the district court

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[55] Morris, *supra* note 15, § 16.III.E, quoting *Dubuque Packing Co. (II)*, 303 NLRB at 391.
[56] 452 U.S. at 686 n.22.
[57] Additionally, the Second Circuit stated that *First National Maintenance* provides the standard for a newspaper's decision to update it's plants technology but did not engage in that analysis because it concluded the union waived its right to bargain over the decision. *NLRB v. Island Typographers, Inc*., 705 F.2d 44, 50 n. 8 (2d Cir. 1983).
[58] 558 F.3d 22 (1st Cir. 2009).
[59] *Id*. at 28.
[60] *Order of Railroad Telegraphers v. Chicago & North Western Railway*, 362 U.S. 330, 339-40 (1960).

could not enjoin the strike on the theory that it was unlawful for the union to seek to bargain about the consolidation or abandonment of stations.

In 1981, the Court, applying the NLRA, held in *First National Maintenance*, that in some circumstances, an employer has no duty to bargain over a decision to close part of its business. The Court distinguished its decision in *Telegraphers* as being based "on the particular aims of the Railway Labor Act and national transportation policy."[61]

Then in 1989, the Court held that an employer had no duty under the RLA to bargain with the union over a decision to sell all of its assets to a third party, but did have a duty to bargain over the effects of the decision. In that case, *Pittsburgh & Lake Erie Railroad v. Railway Labor Executives' Ass'n (P & LE)*, [62] the union sought bargaining over both the decision to sell and the effects of the decision and the employer refused to bargain over either aspect of the sale. The Court distinguished *Telegraphers* on the basis that the employer there was "seeking simply to eliminate or consolidate some of its little-used local stations" rather than deciding to "retire from the railroad business."[63]

Since the *P & LE* decision, several court of appeals decisions found no duty to bargain over the decision to sell part of the assets of a business.[64] In *Chicago & N.W. Transp. Co. v. Railway Labor Execs.' Ass'n*, where the decision was to sell one of the railroad's lines, the court addressed the ruling in *P & LE* as follows.

> The decision to sell a line is not a decision about the utilization of labor or about wages, work rules, working conditions, job rights, etc. It is a decision to reduce the extent of the railroad's business, akin to a manufacturer's decision to curtail its output or to retire unneeded capacity without replacing it. It is not a decision about labor inputs. It has of course consequences for the workers--any major business decision does. But if this were enough to make it a change in pay, work rules, or working conditions, then every significant business decision that a carrier made would be a mandatory subject of collective bargaining; there would be no management prerogatives; and *Pittsburgh & Lake Erie*, which holds that the carrier is not required to bargain over the sale of its business, would be incoherent.[65]

In another circuit court opinion, *National R.R. Passenger Corp. v. Transport Workers Union*,[66] the decision by Congress to curtail Amtrak's operations was found to be a non-mandatory subject of bargaining, within the sole discretion of management.

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[61] 452 U.S. at 686 n.23.
[62] 491 U.S. 490, 512 (1989).
[63] *Id*. at 508 n. 17. In *P&LE,* the Court also held that the carrier had no obligation under Section 2, Seventh, to serve a Section 6 notice with respect to the sale. *Id*. at 503.
[64] *Chicago & N.W. Transp. Co. v. Railway Labor Execs.' Ass'n*, 908 F.2d 144, 152 (7th Cir. 1990) (decision to sell a line); *Railway Labor Execs.' Ass'n v. Chicago & N.W. Transp. Co*., 890 F.2d 1024, 1025 (8th Cir. 1989) (decision to sell 826 miles of rail line and 126 miles of trackage).
[65] 908 F.2d at 152.
[66] 373 F.3d 121, 125 (D.C. Cir. 2004).

3. Layoffs and Reassignments

a. National Labor Relations Act

Automation is likely to displace employees, either because fewer employees are needed or because different skills are needed. Employers have a duty to bargain in good faith with unions over resulting layoffs.[67] Layoffs may already be addressed in a collective bargaining agreement, for example, by requiring layoffs be based on seniority or allowing a worker to "bump" a worker with less seniority to fill an open or remaining job. Changes to such provisions also would have to be bargained in good faith. Transit employers will want to consider in advance how existing collective bargaining agreement provisions may limit management's ability to make workforce adjustments and address any impediments in new or upcoming negotiations.

Generally, loss of bargaining-unit work due to reassignment of unit members is a mandatory subject of collective bargaining.[68] However, the Board has held that an employer does not violate the Act by unilaterally removing employees from the bargaining unit where, as a result of automation or other technological change, employees acquire the skills and job duties of a classification excluded from the unit, provided the new duties are "sufficiently dissimilar" from those of the remaining bargaining-unit members.[69] In the case of advanced driver assistance and autonomous vehicles, some classifications like mechanics may remain essentially the same while others will be eliminated or replaced, most likely with more technical or engineering positions. In some cases, maintenance functions may be paired with new requirements. Unions will be keenly interested in preserving unit work and may object to new requirements such as education and training, though often unions are amenable to education and training when it maintains the work force. Transit employers should anticipate the need to bargain over at least some of these changes in work assignments and may have leverage in the bargaining if there is an alternative of layoffs.

b. Railway Labor Act

No Supreme Court decision has addressed an employer's duty to bargain over layoffs since the Court's 1960 decision in *Telegraphers*, discussed above at section II.B.2.b. There, the Court held that an employer was required to bargain over the decision to close certain rail stations (a partial shutdown with concomitant layoffs). The Court's 1989 decision in *P & LE*, also discussed above, involved an employer's decision to sell all of its assets, a total shutdown. The Court in *P & LE* distinguished *Telegraphers* on the basis that only a partial closure was involved, and did not overturn it.

[67] Classification of an event as a decision or an effect is usually straightforward but can become muddied in layoff situations. If the decision to lay off workers is motivated by money and is not accompanied by a direct modification of the business structure, the employer will likely have to bargain over the layoff decision itself. Kenneth R. Dolin and Thomas M. Wilde, *Effects Bargaining: A Survey of the Rights and Obligations of Employers and Employee Representatives*, 10 The Labor Lawyer 269, 272-75 (1994).
[68] Morris, *supra* note 15, § 16.IV.C.2.J.
[69] *Id*.

4. Changes to the Bargaining Unit

a. National Labor Relations Act

An additional consideration is how technological changes can impact the composition of the bargaining unit. If new employees are hired into new or modified positions, questions about whether those employees should be part of the bargaining unit as an "accretion" are likely to arise. The collective bargaining agreement's definition of covered employees could direct whether the employees are part of the bargaining unit. In other instances, an employer or union can file with the NLRB a unit clarification petition (UC petition). The NLRB analyzes whether a "community of interests" exists, which includes an evaluation of bargaining history in the industry and between the parties; the similarity of duties, skills, interest and working conditions of the employees; the organizational structure of the company; and the employees' desires.[70] Changes in the company's organizational structure may so affect workplace conditions as to require the alteration of established bargaining units, if the changes are undertaken for legitimate business purposes and not to evade a bargaining obligation.[71]

Whether an employer has an obligation to bargain over changes to the composition of the bargaining unit depends upon the terms of the collective bargaining agreement or a determination by the NLRB of whether or not the new composition of work and employees is an accretion to the existing bargaining unit. In *Newspaper Printing Corp*., for example, the employer was considering replacing its hot type printing process with a cold type process and wanted complete flexibility in assigning jobs, in placing new equipment, and in determining who would operate it. The employer proposed extensive changes to the jurisdictional clause in its collective bargaining agreement and bargained to impasse over the issue. The description or size of the bargaining unit is not a mandatory subject of bargaining and insistence to impasse upon a non-mandatory subject of bargaining violates the Act.[72] The effect of automation on the bargaining unit is a mandatory subject. The court concluded the employer violated the Act: "NPC was not content with the right to bargain hard to a genuine impasse and thereafter to implement its proposed technological changes. Rather, in demanding the right to transfer work out of the unit at will, NPC sought to circumvent the Union's right to represent the employees in the composing room unit."[73]

C. How to Evaluate the Duty to Bargain

In light of the above, it is clear that the duty to bargain requires a complex analysis. Because the assessment begins with an evaluation of whether the collective bargaining agreement addresses the implementation of automation, robotics or artificial intelligence in the workplace, employers contemplating such changes would be wise to negotiate provisions reserving such decisions to management when first negotiating or renegotiating their collective bargaining agreements. These matters might be addressed in management rights or work preservation clauses. In a management rights clause,[74] an employer will want to reserve the right to make operational changes and include a "no-strike" clause that prohibits

[70] Morris, *supra* note 15, § 11.1.
[71] Id. at 11.11.E. *See also In re Frito-Lay, Inc*., 177 N.L.R.B. 820, 821 (1969).
[72] 625 F.2d 956 (10th Cir. 1980), *cert. denied*, 450 U.S. 911 (1981).
[73] *Id*. at 964.
[74] The status of a management rights clause as a mandatory subject of bargaining may depend upon whether the subject pertains to nonmandatory terms. Morris, *supra* note 15, § 16.IV.C.2.D. This is one factor in determining whether the employer bargained in good faith over such a clause. *Id*.

striking over changes during the agreement's term.[75] Clauses allowing the employer to adopt technological or automated solutions without bargaining with the union may constitute a waiver by the union of its right to bargain.[76]

Whether to bargain over the decision to automate or effects of automation should be determined based upon the unique facts of each case with the assistance of experienced legal counsel.

III. DOES THE FEDERAL TRANSIT ACT APPLY?

In addition to the duty to bargain under the NLRA, RLA and state labor laws, an employer may also have obligations under the Federal Transit Act ("FTA"). If a transit authority is receiving or seeking a construction grant or loan from the Department of Transportation Federal Transit Authority related to its efforts to automate, it will want to consider its obligations to employees affected by that project under the FTA. When federal funds are used to acquire, improve or operate a mass transit system, the FTA requires the U.S. Department of Labor (DOL) to certify that protective arrangements are in place to protect employees.

The FTA protects mass transit workers by requiring that labor standards be maintained on construction work financed with an FTA grant or loan.[77] As a precondition to receiving a grant or loan, an applicant must enter into a protective arrangement with the U.S. Department of Labor that provides for the preservation of rights and benefits of employees under existing collective bargaining agreements, the continuation of collective bargaining rights, the protection of individual employees against a worsening of their positions in relation to their employment, assurances of employment to employees of acquired transit systems, priority of reemployment, and paid training or retraining programs.[78] Before the Federal Transit Authority releases funds to an applicant, the Secretary of Labor must determine that the arrangements are fair and equitable and certify that the protective arrangements are in place. There are no provisions for waivers or exemptions from these requirements.

A. Existing Protective Arrangements - National (Model) Agreement

If the transit authority's employees are represented by a labor union, the transit authority and the union may already be signatory to the National (Model) Agreement Pursuant to Section 13(c) of the Urban Mass Transportation Act of 1964, as Amended.[79] That agreement provides in part:

> 5.(a) In the event the Recipient contemplates any change in the organization or operation of its system which may result in the dismissal or displacement of employees, or rearrangement of the working forces covered by this agreement, as a result of the Project, the Recipient shall do so only in accordance with the provisions of subparagraph (b) hereof. . . .

[75] Patrick T. Wilson, *Competing with a Robot: How Automation Affects Labor Unions*, Wake Forest Journal of Business & Intellectual Property Law (Aug. 22, 2017).
[76] *Id*.
[77] 49 U.S.C. § 5333(b) (formerly Section 13(c) of the Urban Mass Transportation Act).
[78] 49 U.S.C. § 5333(b)(2).
[79] Available at https://www.dol.gov/olms/regs/compliance/agreement.htm.

(b) The Recipient shall give to the unions representing the employees affected thereby, at least sixty (60) days' written notice of each proposed change, which may result in the dismissal or displacement of such employees or rearrangement of the working forces as a result of the Project, by sending certified mail notice to the union representatives of such employees. Such notice shall contain a full and adequate statement of the proposed changes, including an estimate of the number of employees affected by the intended changes, and the number and classifications of any jobs in the Recipient's employment available to be filled by such affected employees.

Under the National Agreement, either party may request immediate negotiations. If no agreement is reached within 20 days, any party may submit the matter to arbitration in accordance with the procedures contained in the Model Agreement, and a final decision must be reached within 60 days.[80]

Other protections in the Model Agreement include, but are not limited to:

- payment of a monthly "displacement allowance" to employees who are placed in a worse position with respect to compensation as a result of the project, for a period of up to six years;[81]

- payment of a monthly "dismissal allowance" to any employee laid off or deprived of employment as a result of the project;[82]

  for any employee who is required to change the point of his/her employment in order to retain or secure active employment with the recipient and who is required to move his or her place of residence, reimbursement for all expenses of moving his/her household and other personal effects, for the traveling expenses for the employee and members of the employee's immediate family (including living expenses for the employee and the employee's immediate family), and for his/her own actual wage loss during the time necessary for such transfer and up to five (5) working days thereafter;[83] and

- during an employee's protective period (six years from date of displacement or dismissal), priority of employment or reemployment to a dismissed employee to fill any vacant position within the jurisdiction and control of the recipient reasonably comparable to that which the employee held when dismissed, for which the employee is, or by training can become, qualified, if the employee so requests (training to be at no cost to the employee).[84]

If any employer covered by the protective arrangement rearranges or adjusts its workforce in anticipation of the project with the effect of depriving an employee of benefits under the arrangement, the provisions of the arrangement apply as of the date the employee was so affected.[85]

B. New Protective Arrangements

If the grant applicant's employees are represented by a union, the DOL refers the grant application and proposed terms and conditions of the protective arrangement to the funding recipients and the union. The DOL may refer a previously-certified protective arrangement if it still meets the requirements. If there

[80] *Id*. § 5.
[81] *Id*. § 6.
[82] *Id*. § 7.
[83] *Id*. § 11.
[84] *Id*. § 18.
[85] *Id*. § 25.

is no previously-certified arrangement, the DOL proposes the terms and conditions found in the "Unified Protective Arrangement."[86] There is a procedure for either party to submit objections to the recommended terms, but the parties are expected to engage in good faith efforts to reach mutually acceptable protective arrangements through negotiation and discussion within certain timeframes.[87] The DOL takes the position that agreements should be negotiated between recipients and affected labor groups but will impose a protective arrangement when no agreement can be reached.

If neither the grant applicant's employees nor employees of any other transit provider in the service area are represented by a union, the DOL certifies those protections contained in a "Nonunion Protective Arrangement" developed by the DOL.[88]

The protections found in the Unified Protective Arrangement and the Nonunion Protective Arrangement track those found in the Model Agreement. They apply to any employee terminated or laid off as a result of the project and the phrase "as a result of the project" includes events occurring in anticipation of, during, and subsequent to the project. The protections include a procedure for final and binding resolution of disputes over the interpretation, application and enforcement of the arrangement's terms and conditions.

An employer's obligations under a protective arrangement are so extensive and of such duration that they should be considered when an employee evaluates whether to seek funding for the acquisition, improvement or operation of a mass transit system through a construction grant or loan under the Federal Transit Act.

IV. DOES THE WORKER ADJUSTMENT AND RETRAINING NOTIFICATION ACT APPLY?

Layoff and plant closing notification laws may apply when the decision to automate results in layoffs or the loss of jobs in certain numbers. The federal Worker Adjustment and Retraining Notification Act (WARN)[89] is one such law. It supplements state and local requirements and collective bargaining agreements that require notice or other benefits for affected employees.

WARN requires employers who anticipate a plant closing or mass layoff to give 60 days' advance notice to affected workers or their labor union. Employers must also give notice to the state dislocated worker unit and to the appropriate unit of local government.[90]

Employers are covered by WARN if they have 100 or more employees.[91] Private, public and quasi-public entities operating in a commercial context and separately organized from the regular government are covered.[92] Employees covered include hourly and salaried employees and managerial and supervisory employees.[93]

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[86] 29 C.F.R. § 215.3(b)(1) and (2). The Jan. 3, 2011 Unified Protective Arrangement may be found at https://www.dol.gov/olms/regs/compliance/transit/6_UPA-01-03-11.htm.
[87] 29 C.F.R. § 215(c).
[88] 29 C.F.R. § 215.4. The Oct. 17, 2014 Nonunion Protective Arrangement may be found at https://www.dol.gov/olms/regs/compliance/transit/2014/01_NPA_101714.htm.
[89] 29 U.S.C. § 2101 *et seq*.
[90] 29 U.S.C. § 2102(a).
[91] 29 U.S.C. § 2101(a)(1).
[92] 20 C.F.R. § 639.3(a)(1).
[93] 20 C.F.R. § 639.3(e).

Notice is triggered in three situations. Notice is triggered by a plant closing which is a shutdown of a single site (one or more facilities or operating units) resulting in the loss of employment for 50 or more covered employees in any 30-day period. Employees who have worked less than six months in the last 12 months or employees who average less than 20 hours a week for the employer are not included in the count. (They are, however, entitled to notice.)[94]

Notice is also triggered by a mass layoff which is not a plant closing but results in the loss of employment for 500 or more employees in a 30-day period or for 50 to 499 employees who constitute 33 percent of those working at a single site. Employees who have worked less than six months in the last 12 months or employees who average less than 20 hours a week for the employer are not included in the count, but are entitled to notice.[95]

Finally, notice is triggered by employment losses which occur in a 30-day period for two or more groups of workers and fail to meet the threshold requirements for a plant closing or mass layoff but which together reach the threshold level, during any 90-day period, of either a plant closing or mass layoff.[96]

Notices must be in writing and must include:

- whether the planned action is expected to be permanent or temporary;
- whether the plant is being closed;
- the expected date the plant closing or mass layoff will commence, as well as the date that the affected employees will be laid off or terminated (or set forth a two-week window during which the termination will occur);
- an indication as to whether or not bumping rights exist; and
- the name and telephone number of a company official who can be reached for further information.

Penalties for violations include back pay and benefits to each aggrieved employee for the period of violation up to 60 days.[97] Failure to provide notice to the local government results in a penalty not to exceed $500 for each day of violation.[98]

WARN does not preempt, it supplements, state and local requirements and collective bargaining agreements that require other notice or benefits. .

State or local laws (sometimes called "mini-WARN acts") may require advance notice to employees of impending layoffs and plant closings or relocations. They often apply to smaller employers than the federal WARN Act. They may require more than 60 days' advance notice,[99] or require additional information be provided to government agencies with the notice.[100] Some state laws require severance

[94] 29 U.S.C. § 2101(a)(2).
[95] 29 U.S.C. § 2101(a)(3).
[96] 20 C.F.R. § 639.5(a). Additional requirements apply to the sale of a business and there are some exemptions and exceptions to the notice requirement which do not appear to apply here.
[97] 29 U.S.C. § 2104(a)(1).
[98] 29 U.S.C. § 2104(a)(3).
[99] N.Y. Lab. Law § 860 *et seq*. (90 days).
[100] Minn. Stat. § 116L.976.

pay or require the employer to pay 100 percent of health care coverage for employees and dependents to the extent that they are covered, for up to 120 days.[101]

States that currently have some type of plant closing or mass layoff law are: California, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Hampshire, New Jersey, New York, Oregon, Tennessee, Vermont, and Wisconsin. Some of these laws merely urge employers to comply with voluntary guidelines.

Employers with affected operations in these states who are contemplating automation should familiarize themselves with these laws as well as the federal WARN Act.

V. CONCLUSION

A host of potential labor issues arise with increased use of robotics and automation. Early consideration of applicable labor laws may identify opportunities for avoiding or limiting an obligation to bargain with existing labor unions over the decision to automate. It is also important for identifying notice obligations and any special responsibilities to employees under collective bargaining agreements and federal and state laws. Jobs will not change or disappear overnight and the impact autonomous vehicles will have on labor relations can be managed successfully.

[101] 26 Me. Rev. Stat. Ann. § 625-B; Conn. Gen. Stat. §§ 31-51(n), 31-51(o), 31-51(s).