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Shelley Hoffman

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NOTE

EMPLOYER'S DUTY TO BARGAIN WITH RESPECT TO PARTIAL TERMINATION OF BUSINESS: *FIRST NATIONAL MAINTENANCE CORP. V. NLRB*

FOLLOWING a dispute over the amount of a management fee, the First National Maintenance Corporation cancelled its contract to provide housekeeping services to a nursing home customer. As a result, First National Maintenance discharged all thirty-five of its employees who were employed pursuant to the contract with the nursing home.¹ Prior to the discharge, however, the employees' union requested a delay from the employer for the purpose of bargaining. When the employer refused to bargain, the union filed an unfair labor practice charge with the National Labor Relations Board.² The charge alleged that the employer violated its duty to bargain in good faith "with respect to wages, hours, and other terms and conditions of employment"³ under sections 8(a)(5)⁴ and 8(d)⁵ of the National Labor Relations Act.⁶ The National Labor Relations Board⁷ upheld the charge based upon a per se rule that required bargaining over the decision to partially terminate a business.⁸ The Court of Appeals for the Second Circuit enforced the Board's order and held that, while no per se rule could govern an employer's decision to terminate part of its business, section 8(d) created a presumption of mandatory bar-

1. First National Maintenance's policy was to hire personnel separately for each customer; it did not transfer employees between locations. The contract with the nursing home prohibited the home from hiring any of First National Maintenance's employees during the term of the contract and for ninety days thereafter.

2. An unfair labor practice is defined as any unfair labor practice listed in § 8 of the National Labor Relations Act, 29 U.S.C. § 158 (1976).

3. *Id.* § 158(d).

4. *Id.* § 158(a)(5).

5. *Id.* § 158(d).

6. *Id.* §§ 151-169 (1976 & Supp. II 1978) [hereinafter referred to as the Act].

7. The Taft-Hartley Act of 1947 separated the prosecutorial and adjudicative functions of the National Labor Relations Board [hereinafter referred to as the Board] and assigned them to different branches of the agency. The General Counsel assumed the prosecutorial function and the five-member Board (expanded from three) assumed the adjudicative function. See R. GORMAN, BASIC TEXT ON LABOR LAW: UNIONIZATION AND COLLECTIVE BARGAINING 5 (1976). For a discussion of the Board's role in unfair labor practice cases and representation cases, see A. COX, D. BOK & R. GORMAN, LABOR LAW, CASES AND MATERIALS 104-13 (9th ed. 1981).

8. First Nat'l Maintenance Corp., 242 N.L.R.B. 462, 463 (1979).

gaining over such a decision.⁹ The United States Supreme Court granted certiorari. *Held, reversed*: Although the employer is required to bargain about the effects of its decision to terminate a contract with one of its commercial customers purely for economic reasons, the employer has no duty to bargain with the union as to the decision itself. *First National Maintenance Corp. v. NLRB*, 101 S. Ct. 2573, 69 L. Ed. 2d 318 (1981).

I. MANDATORY BARGAINING

Since 1935 the National Labor Relations Act has accorded the rights of unionization and collective bargaining to American workers.¹⁰ The purpose of the Act is to provide for peaceful settlement of labor disputes between companies and unions through collective negotiation.¹¹ Once a majority of eligible employees manifests a desire to form a labor organization,¹² both the employer and the union representing the employees have a duty to bargain collectively.¹³ Section 8(a)(5) of the Act provides that an employer's refusal to bargain collectively with the union's representative constitutes an unfair labor practice.¹⁴ Section 8(b)(3) places a correlative bargaining obligation upon unions.¹⁵

Congress has defined the scope of mandatory bargaining in section 8(d) as:

[T]he performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, *and other terms and conditions of employment* . . . but such obligation does not compel either party to agree to a proposal or require the making of a concession¹⁶

9. *NLRB v. First Nat'l Maintenance Corp.*, 627 F.2d 596, 601 (2d Cir. 1980).

10. Section 7 of the Act provides: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection" 29 U.S.C. § 157 (1976).

11. Section 1 of the Act provides: "It is declared to be the policy of the United States to eliminate the courses of certain substantial obstructions to the free flow of commerce . . . by encouraging the practice and procedure of collective bargaining . . . for the purpose of negotiating the terms and conditions of [workers'] employment" 29 U.S.C. § 151 (1976).

12. This is referred to as majority status. *See R. GORMAN, supra* note 7, at 105-07. The most common way to manifest majority status is through a properly conducted Board election. *Id.* at 40. Alternative ways to show majority status include authorization cards signed by a majority of employees, a petition signed by a majority of employees, a head count showing majority support, and an employer conducted poll. *Id.* at 105-07. These alternatives may not be compelled by either party, whereas the election process may be compelled if either party requests it. *Id.* at 40. The Act provides the procedure for union election. *See* 29 U.S.C. § 159(a)-(e) (1976).

13. *See R. GORMAN, supra* note 7, at 105-07.

14. 29 U.S.C. § 158(a)(5) (1976). Section 9(a) of the Act provides that the representatives selected by the employees shall be the exclusive representatives for collective bargaining. 29 U.S.C. § 159(a) (1976).

15. Section 8(b)(3) provides: "It shall be an unfair labor practice for a labor organization or its agents . . . to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section [9(a)]" 29 U.S.C. § 158(b)(3) (1976).

16. *Id.* § 158(d) (emphasis added).

Because the duty to bargain does not extend to subjects that are not considered "terms and conditions" of the employment relationship,¹⁷ the crucial question becomes: What is a term or condition of employment? The broad statutory language affords no answer; the Board has traditionally determined on a case-by-case basis what subjects will require bargaining.¹⁸

The Board first addressed this question in the 1940 case of *Singer Manufacturing Co.*¹⁹ and held that paid holidays, vacations, and bonuses are a part of the wages and working conditions of employees, and as such, are a necessary subject of collective bargaining.²⁰ Since its decision in *Singer*, the Board has designated numerous mandatory subjects of collective bargaining²¹ including work schedules,²² insurance benefits,²³ pensions,²⁴ and

17. Bargaining subjects are classified as mandatory, permissive, or illegal. See *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342, 349 (1958); R. GORMAN, *supra* note 7, at 496-98. Mandatory subjects are those dealing with "wages, hours, and other terms and conditions of employment" under § 8(d) of the Act, 29 U.S.C. § 158(d) (1976). See R. GORMAN, *supra* note 7, at 498. The sole requirement is that the parties bargain in good faith over mandatory subjects; neither § 8(a)(5) nor § 8(b)(3) of the Act legally obligates the parties to yield. *Id.* For examples of mandatory subjects, see *infra* notes 21-25 and accompanying text. Because nonmandatory subjects outside the employment relationship are considered permissive subjects of bargaining, each party is free to bargain or not to bargain. See R. GORMAN, *supra* note 7, at 498. A management decision having only an indirect impact on the employment relationship would be considered a nonmandatory subject of bargaining. Illegal subjects of bargaining are those unlawful or inconsistent with the policies of the Act. *Id.* at 529-31. An example of an illegal subject would be a racial discrimination clause in a contract. See *Hughes Tool Co.*, 147 N.L.R.B. 1573, 1577 (1964); see also Heinsz, *The Partial-Closing Conundrum: The Duty of Employers and Unions to Bargain in Good Faith*, 1981 DUKE L.J. 71, 72 n.9.

18. Although the Act is silent with respect to the Board's authority to specify mandatory subjects of bargaining, the Board has assumed this role since its creation. See *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 219 n.2 (1964) (Stewart, J., concurring); *General Motors Corp.*, 191 N.L.R.B. 951, 953-54 (1971) (Fanning, & Brown, J.J., dissenting), *enforced sub nom.* *UAW Local 864 v. NLRB*, 470 F.2d 422 (D.C. Cir. 1972). The argument could be made that by adopting a general phrase as part of § 8(d), Congress intended to preserve future interpretation by the Board. See *First Nat'l Maintenance Corp. v. NLRB*, 101 S. Ct. 2573, 2579 n.14, 69 L. Ed. 2d 318, 329 n.14 (1981).

19. 24 N.L.R.B. 444 (1940), *modified on other grounds and enforced*, 119 F.2d 131 (7th Cir. 1941).

20. 24 N.L.R.B. at 470.

21. The Board relied on §§ 8(a)(5) and 9(a) of the Act, because these were the only statutory provisions concerning subjects of collective bargaining. Later, Congress enacted § 8(d), which added "terms" of employment to the "wages, hours of employment, and other conditions of employment" previously set forth in § 9(a) of the Act. 29 U.S.C. § 158(d) (1976). For an extensive list of subjects over which employers and unions are currently required to bargain, see Heinsz, *supra* note 17, at 72.

22. *Inter-City Advertising Co.*, 61 N.L.R.B. 1377, 1384 (1945) (ordering the employer to bargain collectively with union when employer unilaterally changed working schedules), *enforcement denied on other grounds*, 154 F.2d 244 (4th Cir. 1946); *Wilson & Co.*, 19 N.L.R.B. 990, 999 (ordering company to bargain with union when company changed work schedules without prior consultation with or notice to union), *enforced*, 115 F.2d 759 (8th Cir. 1940).

23. *General Motors Corp.*, 81 N.L.R.B. 779, 791 (1949) (by its unilateral action regarding group insurance program, employer had refused to bargain collectively), *enforced*, 179 F.2d 221 (2d Cir. 1950); *W.W. Cross & Co.*, 77 N.L.R.B. 1162, 1164 (1948) (employer was under statutory duty to bargain collectively with union concerning terms of a group health and accident insurance plan), *enforced*, 174 F.2d 875 (1st Cir. 1949).

24. *Inland Steel Co.*, 77 N.L.R.B. 1, 13 (employer was under statutory duty to bargain collectively with union concerning terms of pension and retirement program), *enforced*, 170 F.2d 247 (7th Cir. 1948), *cert. denied*, 336 U.S. 960 (1949).

subcontracting.²⁵ Once an aspect of the employment relationship is found to be a mandatory subject of bargaining, either party can force the other to bargain about that subject.²⁶ Although the Act does not obligate the parties to come to an agreement, a mandatory bargaining process allows the parties to consider all the alternatives available to them before an irrevocable decision is made.²⁷

While the Board and the courts of appeals have agreed with respect to many bargaining subjects, they have manifested widely divergent approaches toward the subject of partial termination of an employer's business.²⁸ The Board has generally required an employer who is considering closing a part of his business to notify and bargain with a union over both the decision and effects of a partial termination.²⁹ The appellate courts, however, have held that the obligation to bargain concerning a partial closing extends only to the effects of the closing, because the initial decision to terminate part of a business is a prerogative of management.³⁰

The conflicting interpretations by the Board and the courts of two

25. *Timken Roller Bearing Co.*, 70 N.L.R.B. 500, 518 (1946) (employer has duty to sit down and discuss matter of subcontracting work with union when requested to do so), *enforcement denied on other grounds*, 161 F.2d 949 (6th Cir. 1947).

26. See R. GORMAN, *supra* note 7, at 496-98.

27. The Board has noted that bargaining will not restrain or obligate the employer to yield to a union's demand, but will lead to a candid discussion of the problems that face labor and management together. *Town & Country Mfg. Co.*, 136 N.L.R.B. 1022, 1027, *enforced*, 316 F.2d 846 (5th Cir. 1963). As a result the parties will frequently resolve their mutual problems to the satisfaction of each. During bargaining, business operations may be continued profitably and jobs safeguarded. *Id.* For an example of concessions made in the bargaining process, see *infra* note 82.

28. For a discussion of the duty to bargain over partial termination decisions, see generally Goetz, *The Duty to Bargain About Changes in Operations*, 1964 DUKE L.J. 1; Heinz, *supra* note 18; Murphy, *Plant Relocation and the Collective-Bargaining Obligation*, 59 N.C.L. REV. 5 (1980); Rabin, *Fibreboard and the Termination of Bargaining Unit Work: The Search for Standards in Defining the Scope of the Duty to Bargain*, 71 COLUM. L. REV. 803 (1971); Schwarz, *Plant Relocation or Partial Termination—The Duty to Decision-Bargain*, 39 FORDHAM L. REV. 81 (1970); Case Comment, *Duty to Bargain About Termination of Operations: Brockway Motor Trucks v. NLRB*, 92 HARV. L. REV. 768 (1979).

29. "Effects" bargaining involves the rights of employees that arise only as a consequence of a business termination. Severance pay, pensions, seniority, and possible reemployment in other parts of the employer's business are examples of these rights. See *infra* text accompanying notes 44-47 & 53.

30. See *Royal Typewriter Co. v. NLRB*, 533 F.2d 1030, 1039 (8th Cir. 1976) (although no duty to bargain regarding employer's decision to close a plant, duty exists to bargain with union in good faith over areas affected by decision); *Morrison Cafeterias Consol. v. NLRB*, 431 F.2d 254, 257 (8th Cir. 1970) (employer not obligated to bargain with union with respect to its decision to close cafeteria, but employer required to bargain with respect to effects of permanent closing); see also *NLRB v. Drapery Mfg. Co.*, 425 F.2d 1026, 1028 (8th Cir. 1970) (no duty to bargain because drapery work shut down as result of economic losses); *NLRB v. Thompson Transp. Co.*, 406 F.2d 698, 703 (10th Cir. 1969) (no duty to bargain because terminal closed for economic reasons); *NLRB v. Transmarine Navigation Corp.*, 380 F.2d 933, 940 (9th Cir. 1967) (duty to bargain over effects of shut down but not decision to shut down); *NLRB v. Royal Plating & Polishing Co.*, 350 F.2d 191, 196 (3d Cir. 1965) (no duty to bargain over managerial decision to close plant).

Supreme Court decisions, *Fibreboard Paper Products Corp. v. NLRB*³¹ and *Textile Workers Union v. Darlington Manufacturing Co.*,³² illustrate the different approaches taken with respect to an employer's duty to bargain in partial termination situations. In *Fibreboard* the company announced during the renegotiation of a collective bargaining agreement that substantial savings could be realized if the company subcontracted out all maintenance work performed by its employees. The company hired an independent contractor who, using the same equipment and supervisors, performed the maintenance work in the plant previously done by former employees. The Board found that the company's failure to negotiate with the union concerning its decision to contract out maintenance work violated section 8(a)(5) of the Act.³³

Affirming the Board's decision, the Supreme Court in *Fibreboard* held that: (1) the Act's mandatory language concerning a "condition of employment" clearly covers a job termination decision; (2) mandatory bargaining over subcontracting promotes industrial peace; and (3) collective bargaining agreements commonly contain subcontracting provisions as evidenced by industrial practice.³⁴ Statements indicating that the Court based its decision solely on the particular facts of the case, however, limited the expansive language in the opinion.³⁵ Furthermore, the Court pointed out that the company's decision to subcontract its maintenance work did not involve a major capital investment or a change in the company's basic operation.³⁶ In a concurring opinion Justice Stewart agreed that *Fibreboard* should be limited to its facts, and he interpreted the major-

31. 379 U.S. 203 (1964).

32. 380 U.S. 263 (1965).

33. 138 N.L.R.B. 550, 551 (1962), *enforced sub nom.* Machinists Local 1304 v. NLRB, 322 F.2d 411 (D.C. Cir. 1963), *aff'd*, 379 U.S. 203 (1964). The Board based its ruling on the doctrine established in *Town & Country Mfg. Co.*: contracting-out is a mandatory subject of collective bargaining. 136 N.L.R.B. 1022, 1027-28 (1962), *enforced*, 316 F.2d 846 (5th Cir. 1963). In *Town & Country* the Board relied primarily on *Order of R.R. Telegraphers v. Chicago & N.W. Ry.*, 362 U.S. 330 (1960). 136 N.L.R.B. at 1027-28. Although the Railway Labor Act, 45 U.S.C. §§ 151-163, 181-188 (1976), governed *Telegraphers*, the Railway Labor Act contains bargaining provisions similar to those in the National Labor Relations Act. In *Telegraphers* the union requested bargaining over a contract provision that would have required union consent before any employment position could be terminated. The Supreme Court held that the provision related to the employees' "conditions of employment" and was, therefore, a proper subject for mandatory collective bargaining. 362 U.S. at 336. Because the National Labor Relations Act requires similar bargaining over the "terms and conditions of employment," the Board in *Town & Country* held that the economically based decision to eliminate jobs through subcontracting was a mandatory subject of bargaining. 136 N.L.R.B. at 1026-28. *Telegraphers*, however, is distinguished in *NLRB v. Adams Dairy, Inc.*, 322 F.2d 553, 562 (8th Cir. 1963) (*Telegraphers* involved the Railway Labor Act and the decision to terminate affected employees left in the bargaining union), *vacated*, 379 U.S. 644, *on remand*, 350 F.2d 108 (8th Cir. 1965), *cert. denied*, 382 U.S. 1011 (1966). See Goetz, *supra* note 28, at 12; Heinsz, *supra* note 17, at 75 n.38. Because the majority in *First Nat'l Maintenance Corp. v. NLRB* barely considered *Telegraphers* and relegated it to a footnote discussion, the Supreme Court may have implicitly adopted the *Adams Dairy* distinction. See 101 S. Ct. at 2584 n.23, 69 L. Ed. 2d at 336 n.23.

34. *Fibreboard Paper Prods., Corp. v. NLRB*, 379 U.S. 203, 210-12 (1964).

35. *Id.* at 215.

36. *Id.* at 213.

ity opinion as a refusal to impose upon employers a mandatory duty to bargain over "managerial decisions, which lie at the core of entrepreneurial control."³⁷

Unlike *Fibreboard*, which involved an employer's duty under section 8(a)(5) to bargain collectively with the representative of its employees, *Textile Workers Union v. Darlington Manufacturing Co.*³⁸ arose under section 8(a)(3)'s provision that an employer's encouragement or discouragement of membership in a labor union is an unfair labor practice.³⁹ When the union campaigned to organize the employees at one of the employer's plants, the company strenuously resisted the organizational efforts and threatened to close the mill. After the workers voted to unionize, the company closed the plant and sold the equipment. The Board found that the company violated the Act by closing part of its business for discriminatory or antiunion purposes.⁴⁰ The Supreme Court remanded the case to the court of appeals, but held that while an employer had an absolute right to close its entire business for any reason, including antiunion considerations,⁴¹ partial closings for discriminatory reasons violated the Act.⁴²

Following *Darlington's* broad language about an employer's right to partially close his business for any reason but antiunionism, several appellate courts have narrowed the application of *Fibreboard*.⁴³ Moreover, the appellate courts have also seized upon *Fibreboard's* limiting language to distinguish it from other partial termination cases.⁴⁴ In contrast, the Board has focused upon the broad language in *Fibreboard* and has determined that certain management decisions involving changes in the business operations require mandatory bargaining. In *Ozark Trailers, Inc.*⁴⁵ the Board reemphasized its basic policy requiring employers to bargain over partial termination decisions and criticized the strict approach taken by several courts of appeals in applying *Fibreboard* to partial closings other than subcontracting.⁴⁶ In *Ozark Trailers* the employer closed a part of its manufac-

37. *Id.* at 223.

38. 380 U.S. 263 (1965).

39. 29 U.S.C. § 158(a)(3) (1976). Although § 8(a)(5) was not the issue in *Darlington*, that decision had a profound influence on an employer's duty to bargain in partial closing situations. See *infra* text accompanying note 59.

40. *Darlington Mfg. Co.*, 139 N.L.R.B. 241, 246-47 (1962), *enforcement denied*, 325 F.2d 682 (4th Cir. 1963).

41. *Textile Workers Union v. Darlington Mfg. Co.*, 380 U.S. 263, 273-74 (1965).

42. *Id.* at 274-76. The Court found a partial closing to be subject to § 8(a)(3)'s bar against union discrimination because, if motivated by antiunion objectives, the closing can serve to discourage employees from unionizing in the employer's other plants. *Id.* at 275.

43. The courts have found that where a termination is based solely on economic reasons, and not antiunion reasons, there is no obligation to bargain under § 8(a)(5). Unlike subcontracting, these partial closing decisions are at the "core of entrepreneurial control." See, e.g., *NLRB v. Thompson Transp. Co.*, 406 F.2d 698, 703 (10th Cir. 1969); *NLRB v. William J. Burns Int'l Detective Agency, Inc.*, 346 F.2d 897, 902 (8th Cir. 1965); see also *NLRB v. Royal Plating & Polishing Co.*, 350 F.2d 191, 195-96 (3d Cir. 1965); *NLRB v. Adams Dairy, Inc.*, 322 F.2d 553, 556 (8th Cir. 1963), *vacated*, 379 U.S. 644, *on remand*, 350 F.2d 108 (8th Cir. 1965), *cert. denied*, 382 U.S. 1011 (1966).

44. See *infra* notes 59-64 and accompanying text.

45. 161 N.L.R.B. 561 (1966).

46. *Id.* at 566-67.

turing operations without notifying or consulting the union. The Board found a violation of section 8(a)(5).⁴⁷ The Board rested its opinion solely on *Fibreboard* and held that *Darlington* did not apply to section 8(a)(5) duty-to-bargain cases.⁴⁸

The Board has not been entirely consistent with its per se approach that requires employers to bargain over partial termination decisions. In *General Motors Corp.*⁴⁹ the Board retreated from its holding in *Ozark Trailers* that an employer has a duty to bargain about partial closing decisions.⁵⁰ *General Motors* involved an economically motivated decision to sell an independent dealership. When the union heard of the possible sale, it requested, unsuccessfully, that management negotiate prior to any decision to sell. The Board noted first the number of appellate court decisions that had rejected its per se approach in partial termination cases.⁵¹ Without specifically overruling *Ozark Trailers*, the Board determined that because the decision to sell was "essentially financial and managerial in nature . . . [lying] at the very core of entrepreneurial control,"⁵² the employer was under no duty to bargain.⁵³ Three years later, in *Royal Typewriter Co.*,⁵⁴ the Board followed its original position in *Ozark Trailers*, which required mandatory bargaining.⁵⁵ Finding that in *Royal Typewriter* the company closed one of its plants, but continued to manufacture similar products at another plant, the Board distinguished *General Motors* factually.⁵⁶ In *Brockway Motor Trucks*,⁵⁷ however, the Board once again retreated from *Ozark Trailers*. The company decided to close one of its plants that manufactured, distributed, and repaired trucks. The Board reiterated its basic policy, but noted that the company had not proved that its decision involved a "significant investment or withdrawal of capital" as to "affect the scope and ultimate direction of the enterprise."⁵⁸

47. *Id.* at 564.

48. *Id.* at 565.

49. 191 N.L.R.B. 951 (1971), *enforced sub nom.* United Auto., Aerospace & Agricultural Implement Workers Local 864 v. NLRB, 470 F.2d 422 (D.C. Cir. 1972).

50. The majority opinion in *General Motors* acknowledged that the courts have accepted the Board's position in subcontracting cases, but have rejected the Board's position in cases involving management decisions such as plant closings and plant relocations. 191 N.L.R.B. at 951.

51. *Id.*

52. *Id.* at 952.

53. *Id.* The dissenting members of the Board contended that the majority relied primarily on Justice Stewart's concurring opinion in *Fibreboard* and the decisions of several courts of appeals that had rejected Board decisions applying *Fibreboard*. *Id.* at 953. The dissent further argued that the concurrence in *Fibreboard* and the dictum with respect to managerial decisions were not the law of the case. *Id.* They would have followed the Board's approach as set out in *Ozark Trailers*. *Id.*

54. 209 N.L.R.B. 1006 (1974).

55. *Id.* at 1012.

56. *Id.*

57. 230 N.L.R.B. 1002 (1977), *enforcement denied without prejudice to commencement of additional proceedings*, 582 F.2d 720 (3d Cir. 1978), *on remand*, 251 N.L.R.B. 29 (1980).

58. 230 N.L.R.B. at 1003. The Board implied that if the closing had involved a major financial reinvestment or a major change in the company's operation, there might have been no duty to bargain. *But see* Brockway Motor Trucks v. NLRB, 528 F.2d 720, 724 n.7 (3d Cir. 1978), *on remand*, 251 N.L.R.B. 29 (1980).

The appellate courts generally have rejected Board attempts to extend decision bargaining to operational changes other than factual situations nearly identical to *Fibreboard*. Five circuits have plainly indicated that they will not extend the limited facts of *Fibreboard* to establish a mandatory duty to bargain. The courts, however, have continued to uphold the well-established principle that an employer has a duty to bargain over the effects of the partial termination decision but not the decision itself. The Eighth Circuit has consistently refused to adopt the Board's view and has held that absent discrimination, management has no duty to bargain with a union over the decision to partially close its business.⁵⁹ According to the court, this decision involves a major change in the operation of the company and is inherently a management prerogative.⁶⁰ The Third,⁶¹ Sixth,⁶² Ninth,⁶³ and Tenth⁶⁴ Circuits have also limited *Fibreboard* to its facts.⁶⁵ According to these courts, if the decision represents a change in the direction of the business, mandatory bargaining would conflict with management rights. Only the Fifth Circuit,⁶⁶ and perhaps the D.C. Circuit⁶⁷ and the Second Circuit,⁶⁸ have been receptive to the Board's post-*Fibreboard* decisions.⁶⁹ On the whole the recent cases demonstrate that the Board and the courts have been moving in opposite

59. See *Royal Typewriter Co. v. NLRB*, 533 F.2d 1030, 1039 (8th Cir. 1976); *Morrison Cafeterias Consol., Inc. v. NLRB*, 431 F.2d 254, 257 (8th Cir. 1970).

60. *NLRB v. Drapery Mfg. Co.*, 425 F.2d 1026, 1028 (8th Cir. 1970); *NLRB v. Adams Dairy, Inc.*, 322 F.2d 533, 559 (8th Cir. 1963), *vacated*, 379 U.S. 644, *on remand*, 350 F.2d 108, 111 (8th Cir. 1965), *cert. denied*, 382 U.S. 1011 (1966). The appellate court held that the dairy's decision to terminate that part of its business handling distribution of milk products and to distribute its products through independent contractors was not a mandatory subject of bargaining. 322 F.2d at 562.

61. *NLRB v. Royal Plating & Polishing Co.*, 350 F.2d 191 (3d Cir. 1965) (no obligation to bargain when partial closing decision involved a major change in the direction of the company).

62. *NLRB v. Acme Indus. Prods., Inc.*, 439 F.2d 40, 42 (6th Cir. 1971) (no obligation to bargain over decision to move work of one unit to another unit).

63. *NLRB v. Transmarine Navigation Corp.*, 380 F.2d 933, 939 (9th Cir. 1967) (no obligation to bargain over decision to move shipbuilding facilities to new location when employer faced with inability to serve its primary customer).

64. *NLRB v. Thompson Transp. Co.* 406 F.2d 698, 703 (10th Cir. 1969) (no obligation to bargain over termination of part of business when employer had lost substantial part of its business and relocation involved major corporate change).

65. See *Heinsz*, *supra* note 17, at 81-82 & n.74.

66. *NLRB v. Winn-Dixie Stores, Inc.*, 361 F.2d 512, 517 (5th Cir.), *cert. denied*, 385 U.S. 935 (1966) (decision to discontinue cheese cutting and packing at employer's warehouse found to be mandatory subject of bargaining); see also *NLRB v. W.R. Grace & Co.*, 571 F.2d 279, 283 (5th Cir. 1978) (decision to discontinue part of production process found to be mandatory subject of bargaining); *NLRB v. American Mfg. Co.*, 351 F.2d 74, 80 (5th Cir. 1965) (decision to subcontract work previously done by employees found to be mandatory subject of bargaining).

67. *International Ladies Garment Workers v. NLRB*, 463 F.2d 907, 916 (D.C. Cir. 1972) (economic decision involving relocation but no major change in scope of enterprise is mandatory subject of bargaining).

68. *NLRB v. First Nat'l Maintenance Corp.*, 627 F.2d 596, 601-02 (2d Cir. 1980) (rebuttable presumption of the duty to bargain in partial closing context), *rev'd*, 101 S. Ct. 2573, 69 L. Ed. 2d 318 (1981).

69. See *Heinsz*, *supra* note 17, at 81 n.74.

directions, which undoubtedly confuses companies, unions, and employees alike.

II. *FIRST NATIONAL MAINTENANCE CORP. v. NLRB*

In *First National Maintenance Corp. v. NLRB*⁷⁰ the Supreme Court addressed the question of whether an economically motivated decision to close part of a business is a mandatory subject of bargaining. The Court held that the employer has no legal duty to bargain with the union over the decision itself to partially terminate a business, but that the employer must bargain over the effects of such a decision.⁷¹

The Court, in its analysis, first defined the scope of mandatory subjects of bargaining.⁷² Writing for the majority, Justice Blackmun identified three distinct types of management decisions: (1) those that have only an "indirect and attenuated impact on the employment relationship"; (2) those that "are almost exclusively" a part of the employment relationship; and (3) those that have a direct impact on employment, but focus only on economic profitability, a concern distinct from the employment relationship.⁷³ The Court found the management decision in *First National Maintenance* to be the third type, and promulgated a balancing test to deal with that type of management decision. The court determined that:

In view of an employer's need for unencumbered decisionmaking, bargaining over management decisions that have a substantial impact on the continued availability of employment should be required only if the benefit, for labor-management relations and the collective bargaining process, outweighs the burden placed on the conduct of the business.⁷⁴

Thus, the Court concluded that the union's benefit resulting from its participation in the decisionmaking did not outweigh the burden to the employer's business decisions based on economic factors.⁷⁵ Therefore, the

70. 101 S. Ct. 2573, 69 L. Ed. 2d 318 (1981).

71. *Id.* at 2582, 2584, 69 L. Ed. 2d at 332, 335-36.

72. For a discussion of the Board's broad leeway in defining mandatory bargaining subjects, see *supra* note 18.

73. 101 S. Ct. at 2579-80, 69 L. Ed. 2d at 329.

74. *Id.* at 2581, 69 L. Ed. 2d at 331. Although the Supreme Court had not previously formulated a balancing test regarding decisions to close, the Third Circuit in *Brockway Motor Trucks v. NLRB*, 582 F.2d 720 (3d Cir. 1978), had already expressed a similar balancing test. The *Brockway* court began its analysis with the premise that decisions to close should be mandatory subjects of bargaining absent other considerations. *Id.* at 734-35. The court relied on *Fibreboard's* interpretation of the Act's general policy favoring bargaining and on *Fibreboard's* discussion of the literal meaning of § 8(d). *Id.* at 735 (citing *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 210-11 (1964)). The court in *Brockway*, however, employed a three-part test weighing (1) the employees' interest in changing management's decision; (2) the likelihood that bargaining would cause the employer to change its decision; and (3) the management's interest in not bargaining. 582 F.2d at 735-39. This analysis assumes that in a number of potential shutdown cases the union will be able to make a useful contribution to the decisionmaking process by agreeing to concessions in exchange for continuance of operations. Concessions would primarily include the union's ability to accept wage reductions and a genuine promise of restraint when requesting future raises. See Case Comment, *supra* note 28, at 777-78.

75. 101 S. Ct. at 2584, 69 L. Ed. 2d at 335.

decision to partially close was not within the scope of "terms and conditions" subject to mandatory bargaining.⁷⁶

In formulating this new test, the Supreme Court rejected both the Board's per se rule requiring mandatory bargaining⁷⁷ and the Second Circuit's presumption of mandatory bargaining.⁷⁸ The Supreme Court determined that the presumption analysis adopted by the court of appeals was inappropriate to advance harmonious relations between employer and employee.⁷⁹ The Court noted, for example, that an employer could not easily predict the degree of bargaining required when a decision involved economic necessity.⁸⁰ The Court apparently intended to counter the uncertainty concerning the bargaining requirement for partial closings by weighing the employer's need for free decisionmaking against the union's need for participation in the decisionmaking in each particular case.

The Court seemingly distinguished *Fibreboard Paper Products Corp. v. NLRB* by disposing of the three factors relied upon in *Fibreboard* to indicate the subject's amenability to the bargaining process.⁸¹ The Court used the new benefit-burden test to dispose of the first two factors in *Fibreboard*: the literal language of the Act and the promotion of industrial peace. Resolution of the Court's benefit-burden test will determine whether the job determination decision is actually a "condition of employment" and therefore a mandatory subject of bargaining. Similarly, the outcome of the test in each instance is designed to promote industrial peace. The problem the Court confronted, however, was the third criterion set forth in *Fibreboard*: prevailing industrial practice. The court recognized that in situations where businesses have become unprofitable bargaining has produced concessions from unions whose members might consider sacrificing benefits to insure continued employment.⁸² The Court concluded, however, that bargaining over the effects of the decision could produce the same concessions as bargaining over the decision itself.⁸³

The Court found basic support for its newly formulated balancing test by noting that *Fibreboard* engaged in a balancing analysis.⁸⁴ In its application of the test the Court identified the strong conflicting interests of the employer and employees in the decision to effect a partial closing. On the employer's side, the Court recognized that management may need to act quickly and secretly in order to capitalize on business opportunities.⁸⁵ Ad-

76. *Id.*, 69 L. Ed. 2d at 335-36.

77. *See supra* text accompanying note 8.

78. *See supra* text accompanying note 9.

79. 101 S. Ct. at 2583, 69 L. Ed. 2d at 334.

80. *Id.*

81. *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 211-12 (1964); *see supra* text accompanying note 34.

82. 101 S. Ct. at 2582 n.19, 69 L. Ed. 2d at 332 n.19. The Court acknowledged that in the past unions have helped employers save declining businesses by accepting wage and benefit reductions, agreeing to increase production, and lending earned wages to the business. *Id.*

83. *Id.* at 2582, 69 L. Ed. 2d at 332.

84. *Id.* at 2581, 69 L. Ed. 2d at 331.

85. *Id.* at 2582, 69 L. Ed. 2d at 333.

ditionally, the Court recognized that the employer may be forced to close part of its business,⁸⁶ and bargaining would therefore be futile.⁸⁷ Moreover, the Court expressed concern that if it labeled this type of decision a mandatory subject of bargaining, then a union could thwart an employer's business goals.⁸⁸ Finally, the Court observed that current industry practice supported its decision, because restrictions on management are relatively rare in subcontracting or replacement provisions of collective bargaining agreements.⁸⁹

Turning its attention to the union, the Court emphasized that a union would have significant input under its right to engage in effects bargaining.⁹⁰ The Court pointed out that in contract negotiations a union could secure provisions that entitled the union to "notice, information, and fair bargaining."⁹¹ The Court added that a union would always have section 8(a)(3) protection against partial closings motivated by antiunion sentiment.⁹² Finally, the Court concluded that a union would have some control over the effects of the decision and would have sufficient opportunity to insure that the decision itself would be deliberately considered.⁹³

In a dissenting opinion Justice Brennan argued that the Court's balancing test considered only the interests of management.⁹⁴ Justice Brennan contended that this case, like *Fibreboard*, literally involved terms and conditions of employment and concerned matters crucial to employees.⁹⁵ Moreover, he criticized the application of the Court's balancing test as being speculative and failing to take into account possible concessions a union would be able to offer as a result of decision bargaining.⁹⁶ The dissent also criticized the Court's presumption that management's need for flexibility in making partial closing decisions would be frustrated by a re-

86. *Id.* at 2583, 69 L. Ed. 2d at 333.

87. *Id.*

88. *Id.*, 69 L. Ed. 2d at 334 (citing Comment, "Partial Terminations"—A Choice Between Bargaining Equality and Economic Efficiency, 14 U.C.L.A. L. REV. 1089, 1103-05 (1967)).

89. 101 S. Ct. at 2583, 69 L. Ed. 2d at 334.

90. *Id.* at 2582, 69 L. Ed. 2d at 333.

91. *Id.*

92. *Id.* Under § 8(a)(3) the Board may inquire into the motives behind a partial closing. 29 U.S.C. § 158(a)(3) (1976).

93. 101 S. Ct. at 2582, 69 L. Ed. 2d at 333.

94. *Id.* at 2586, 69 L. Ed. 2d at 337.

95. *Id.* at 2585-86, 69 L. Ed. 2d at 337. Justice Brennan also referred to Ozark Trailers, Inc., 161 N.L.R.B. 561 (1966), as support for this proposition. 101 S. Ct. at 2586, 69 L. Ed. 2d at 337.

96. 101 S. Ct. at 2586, 69 L. Ed. 2d at 338. The dissent noted, as an example, the negotiations between Chrysler Corporation and the United Auto Workers, which led to major adjustments in compensation and benefits, and allowed Chrysler to remain in business. *Id.* The dissent maintained that when employees have the opportunity to offer concessions, they can often enable the company to continue its business operations. *Id.* The only clear difference between the dissent and the majority positions as to this important question of concessions is that the majority believes the union and company can arrive at these concessions through "effects" bargaining "conducted in a meaningful manner and at a meaningful time." *Id.* at 2582, 69 L. Ed. 2d at 332. A "meaningful time" would seem to require bargaining before an irrevocable decision was made, and therefore decision bargaining would be unnecessary.

quirement to bargain.⁹⁷ Finally, the dissent objected to the Court's refusal to defer to the Board's authority and expertise in such matters.⁹⁸

While the Court's benefit-burden language and its reasoning⁹⁹ appear to make *First National Maintenance* an extremely broad holding,¹⁰⁰ the majority expressly limited its holding by turning to the specific facts of the case. First, the Court noted that the employer had no intention of replacing the discharged employees or of moving that operation elsewhere; the employer's sole purpose was to reduce its economic loss.¹⁰¹ Thus the Court left other types of management decisions, including plant relocations, sales, automation, and other kinds of subcontracting, for consideration on their particular facts.¹⁰² The Court further restricted the holding by implying that mandatory bargaining would be futile where the employer's dispute concerned only the size of the management fee, a factor over which the union had no authority or control.¹⁰³ Noting that labor costs were the basis for the decision to subcontract in *Fibreboard*, the Court distinguished the subcontracting issue in *Fibreboard* from the contract cancellation issue in *First National Maintenance*.¹⁰⁴ Thus, it is unclear whether *First National Maintenance* is limited solely to partial closings based upon nonlabor costs.¹⁰⁵ Finally, the Court noted that the employer's purpose in cancelling the contract was not to defy ongoing negotiations or the existing collective bargaining agreement, because the maintenance company's economic difficulties began before the union was selected as the bargaining representative.¹⁰⁶ This limitation implies that the result in *First National Maintenance* may not be extended to situations when the union has been selected *before* economic difficulties arise.¹⁰⁷

Although the factual limitations narrowed the scope of the *First National Maintenance* holding, the Court broadly applied the balancing test itself. Despite the Court's rejection of a *per se* rule or presumption approach, the Court came close to announcing a strong presumption against bargaining in the partial closing areas by application of its own balancing test. Moreover, the Court reaffirmed previous court of appeals decisions¹⁰⁸ when it

97. *Id.* at 2587, 69 L. Ed. 2d at 338. The dissent suggested that because management already is required to bargain over the effects of a closing, a decision would not be unduly delayed or publicized by bargaining over the closing itself. *Id.*

98. *Id.*

99. See *supra* notes 84-89 and accompanying text.

100. See Address by Professor William Gould, American Bar Association's Labor & Management Law Meeting (August 10, 1981) (published in [8-11-81] 154 DAILY LAB. REP. [BNA] D-1, D-5).

101. 101 S. Ct. at 2585, 69 L. Ed. 2d at 336.

102. *Id.* at 2584 n.22, 69 L. Ed. 2d at 335 n.22. A negative attitude toward union involvement in managerial decisionmaking permeates the Court's opinion. The attitude indicates a departure from the Court's position in *Fibreboard*. See *id.* at 2579, 69 L. Ed. 2d at 329; Gould, *supra* note 100, at D-2.

103. 101 S. Ct. at 2585, 69 L. Ed. 2d at 336.

104. *Id.*

105. Gould, *supra* note 100, at D-5.

106. 101 S. Ct. at 2585, 69 L. Ed. 2d at 336.

107. Gould, *supra* note 100, at D-5.

108. See *supra* text accompanying notes 59-65.

noted that the absence of significant investment or withdrawal of capital was not crucial where the employer's decision to halt the work represented a major change in the employer's operations.¹⁰⁹ After *First National Maintenance* the courts must determine to what extent, if any, the new balancing test will be applicable to management decisions other than partial closings.

III. CONCLUSION

In *First National Maintenance* the Court confronted the question of whether an employer must, under its duty to bargain in good faith "with respect to wages, hours, and other terms and conditions of employment," negotiate with the certified representative of its employees over its decision to close a part of its business. The Supreme Court resolved the confusion of the courts of appeals and the National Labor Relations Board over the question by announcing a balancing test regarding the duty to bargain over fundamental business decisions. The Court held that section 8(d) of the National Labor Relations Act does not obligate an employer to bargain over management decisions having a substantial impact on the continued availability of employment, if the burden placed on the conduct of the business outweighs the benefit for the collective bargaining process. The Court, in effect, rejected the Board's per se approach that had ordered management to bargain over both the effects and the decision in partial closing situations. On the other hand, the Court did not accept the approach of the majority of appellate courts that a partial closing decision based on economic concerns was an inherent management prerogative. Rather, the Court applied its balancing test to determine that in this partial closing situation the benefit to the union did not outweigh the burden imposed on management. Hence, the decision to partially close was not within the scope of "terms and conditions" subject to mandatory bargaining. The Court's opinion expressly stated that it offered no view as to other types of management decisions. Although the Court criticized the uncertainty facing employers and employees under the preexisting state of the law, *First National Maintenance*, itself, may well result in a new uncertainty as to whether management decisions other than partial closings will be considered mandatory or permissive subjects of bargaining.

Shelley Hoffman

109. 101 S. Ct. at 2585, 69 L. Ed. 2d at 337.

