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First National Maintenance Corp. v. National Labor Relations Board: Eliminating Bargaining for Low-Wage Service Workers

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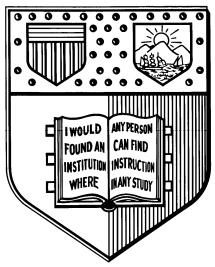

First National Maintenance Corp. v. National Labor Relations Board: Eliminating Bargaining for Low-Wage Service Workers

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The Story of *First National Maintenance Corp. v. NLRB*: Eliminating Bargaining for Low-Wage Service Workers

The maintenance workers at a Brooklyn nursing home voted to be represented by a union. As a consequence, within four months they were on the streets. They had no union, no jobs, and no right to bump or transfer into another job. From this sad story, the United States Supreme Court would, four years later, fashion a narrative of rights and freedom. Not the rights and freedom of the workers, whose very names have been lost to history. Rather, the maintenance contractor who employed them turned out to be free, to have the right, not to meet at all with their union, nor any substantive obligation to them, and the same was true of the nursing home itself.

The case was *First National Maintenance Corp. v. National Labor Relations Board* (*FNM*).[1] Every student of labor law reads it, for it clearly established the existence of a category of managerial decisions which are too important to be bargained with a union. "We conclude that the harm likely to be done to an employer's need to operate freely in deciding whether to shut down part of its business purely for economic reasons outweighs the incremental benefit that might be gained through the union's participation in making the decision, and we hold that the decision itself is *not* part of § 8(d)'s 'terms and conditions,' over which Congress has mandated bargaining."[2]

[1] 452 U.S. 666 (1981).

[2] 452 U.S. at 686 (emphasis original; two footnotes omitted).

Over two decades earlier, the Supreme Court had accepted the Board's rule that subjects of bargaining could be classed as mandatory, permissive, or illegal. This distinction is not found in the statute itself. On the contrary, as the Supreme Court later noted in the *FNM* opinion, the House of Representatives in the 1947 debates over the Taft–Hartley amendments to the NLRA had voted down a proposed list of subjects of bargaining.[3]

The distinction between mandatory and permissive subjects of bargaining was first made by the Board, rather casually, as a new way of analyzing bargaining table conduct that the Board believed prevented the reaching of agreement. As part of its interpretation of the statutory duty to bargain in good faith, the Board had long examined the substance of employer bargaining proposals as evidence of the employer's good faith. In the 1950's, some courts of appeals questioned this analysis as inconsistent with Section 8(d), added to the NLRA in the Taft–Hartley amendments,[4] particularly as interpreted by the Supreme Court.[5] The Board's response, adopting the suggestion of one court of appeals, was to divide bargaining subjects into those that might be insisted on, and others that might merely be proposed.[6] The Supreme Court accepted this analysis in the very case that adopted it, *NLRB v. Wooster Division of Borg–Warner Corporation*. Curiously, neither party in the Supreme Court challenged the division of bargaining subjects itself.[7] There though the employer was found to be in bad faith by tying

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[3] 452 U.S. at 675 n.14.

[4] Section 8(d), 29 U.S.C. § 158(d), states in part that the statutory obligation to bargain "does not compel either party to agree to a proposal or require the making of a concession."

[5] NLRB v. American Nat. Ins. Co., 343 U.S. 395 (1952) held, reversing the Board, that an employer was privileged to bargain for a broad "management rights" clause that would reserve to itself freedom of action during the life of the collective agreement.

[6] *Borg–Warner* was the first case to find an employer guilty of bad faith bargaining because of its insistence on permissive subjects of bargaining. Earlier cases had examined employer substantive bargaining proposals only as evidence of overall bad faith, e.g., Jasper Blackburn Prods. Corp., 21 NLRB 1240 (1940) (employer-dominated shop committee); Allis–Chalmers Mfg. Co., 106 NLRB 939 (1953) (insistence on contract ratification tantamount to bypassing union), *enforcement denied*, 213 F.2d 374 (7th Cir. 1954). In the latter case, the court of appeals held, reversing the Board, that any party might insist on any "statutory" bargaining subject. In *Borg–Warner*, the Board adopted this rule. The facts of *Borg-Warner* were identical to *Allis–Chalmers*: an employer insisting in negotiations that a union agree to submit last proposals for membership ratification before holding a strike vote. General Counsel had expressly not challenged the employer's overall bad faith. The Board majority asserted: "[W]e ... believe that the Respondent's liability under Section 8(a)(5) turns not upon its good faith, but rather upon the legal question of whether the proposals are obligatory subjects of collective bargaining." 113 NLRB 1288, 1291 (1955).

[7] 356 U.S. 342 (1958). The Board, of course, defended the division of bargaining subjects into mandatory and permissive. Dean St. Antoine reported that counsel for the

up negotiations in trivial issues, and it was these trivial issues that were found, for that reason, to be permissive subjects of bargaining.

First National Maintenance is different, for it found that some decisions are too important to be mandatory subjects of bargaining. The existence of such a category had been accepted in an earlier Supreme Court concurrence in *Fibreboard Paper Products Corporation v. NLRB*[8] and indeed by the Board itself.[9] *First National Maintenance*, however, was the first time the Supreme Court held that certain management decisions or prerogatives, because of their importance to management and lack of amenability for bargaining, could be undertaken unilaterally, without bargaining with the union. Since then the Supreme Court has decided no further cases in this area, so the category defined in *First National Maintenance*, and the method employed for determining its boundaries, remain authoritative.

Yet the Supreme Court's opinion has brought no clarity to this corner of law. The opinion is universally criticized for vagueness and internal inconsistency. While subsequent cases in the Board and lower courts cite *First National Maintenance* as the authoritative Supreme Court case, no case really attempts to employ its analysis, and it is impossible to find a subsequent case that one is confident would have been decided differently had *First National Maintenance* never existed. We shall see that this is largely because the Supreme Court was induced to decide a kind of hypothetical case, carefully constructed to represent an appealing limitation on the category of mandatory subjects of bargaining. The facts that the Supreme Court decided have never arisen again. Indeed, they were not the actual facts of the case itself. Finally, the Court's opinion combined the rather different analyses of two different justices, without clear indication of their relationship. The important recent developments in bargaining structures for low-wage

company "seriously considered" attacking this division, arguing that the duty to bargain in good faith attached to any subject about which any party wanted to bargain. This would have won the case for his client. Instead, however, on orders from his client, he accepted the division and argued only, and ineffectually, that his client's specific demands were in good faith. The company, showing considerably more foresight than the Board or the unions, realized that an expansive definition of mandatory subjects of bargaining would ultimately increase union power. Theodore J. St. Antoine, *Legal Barriers to Worker Participation in Management Decision-Making*, 58 Tul. L.Rev. 1301, 1305 n.25 (1984).

[8] 379 U.S. 203, 246 (1964) (Stewart, J., concurring) ("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 management decisions, which lie at the core on entrepreneurial control.").

[9] General Motors Corp., 191 NLRB 951 (1971), *review denied sub nom.* International Union, United Automobile Workers v. NLRB, 470 F.2d 422 (D.C. Cir. 1972).

service workers take place entirely outside the framework of *First National Maintenance.*

Factual Background

The Supreme Court decided a case of an employer that eliminated a portion of its operations by terminating a contract with a particular customer, an economic decision turning not at all on labor costs and completely free of anti-union hostility, a case only preserved as a legal matter because the employer refused to meet with the union at all. Could such a case ever have existed?

First National Maintenance Corporation, its lawyer later told the Supreme Court, began doing the maintenance work at Greenpark Care Center around early March 1976.[10] It is impossible now to reconstruct who did the maintenance work before, or how FNM came to be chosen. FNM's lawyer, Sanford E. Pollack, thought the work might previously have been done by Greenpark's own employees.[11]

Despite its grandiose name, FNM was a relatively small, local operation run by three childhood friends. Leonard Marsh handled the union matters and testified at the Board hearing. He was forty-four years old in the spring of 1977 and had previously worked as a garment worker, egg dealer, and window washer before his current business ventures.[12] His partner Hyman Golden was married to Marsh's sister. A third partner and friend was Arnold Greenberg, whose father had run a delicatessen on the lower east side of Manhattan that Greenberg had converted into a health food store in 1972. The partners in the maintenance company also ran (out of the same warehouse) a company distributing fruit to health food stores, Unadulterated Food Products, Inc., and, sometime by 1978, had begun to manufacture carbonated apple juice under their own name.[13] A businessman who visited their warehouse a decade later in 1989 found three quarreling partners in a chaotic and shabby warehouse; despite instructions to hold calls, their meeting was interrupted six times.[14]

FNM, according to Pollack, had no general objection to labor unions. Most of their employees were represented by unions. When they did

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[10] Transcript of Supreme Court Oral Argument at 4 ("We had some 17 months covered by the entire period of operation in the particular facility which is affected.").

[11] Telephone Interview with Sanford E. Pollack, May 12, 2004.

[12] Harry Berkowitz, *Annoyed, Frustrated (and Very Rich)*, Newsday, Nov. 25, 1996, at C8.

[13] Jon Pessah, *Kid Pals Strike it Rich*, Newsday, Nov. 3, 1994, at A37.

[14] Mark H. McCormack, *It Sometimes Pays to Hook Up with a Startup*, [Cleveland] Plain Dealer, Apr. 4, 1995, at C3.

maintenance work at factories and cafeterias, their workers were covered by a "me too" contract with whatever union represented the production workers. The partners felt differently, however, about District 1199, the union representing hospital and health care workers nationally. While nominally a district of the old Retail, Wholesale, and Department Store Union (RWD), it dwarfed its parent.[15] Its founders such as Leon Davis, still in charge in 1977, were strongly left-wing.[16] Pollack counseled his clients that 1199 was a "difficult, militant" union that they should not let into their company.

While Pollack represented FNM during 1199's successful representation campaign in March 1977, today he remembers little about the campaign itself. Unhappy as FNM's owners were about the prospect of a victory by 1199, they saw no realistic prospect of defeating the union at a Board election. The maintenance workers worked alongside Greenpark workers who were already represented by 1199, and anyway "1199 usually won elections, at least at that time." So FNM did not campaign against 1199. It had a different plan for avoiding that union, one that would have been hurt by an open display of animus to 1199. Local 1199 won the union election at FNM in March 1977.

FNM used crude tactics to avoid 1199 at another nursing home. At Haven Manor, in Far Rockaway, when FNM began doing maintenance work in 1974, 1199 tried to organize its employees. FNM instead recognized Local 690, Amalgamated Workers Union of America, a notorious sweetheart union, over the opposition of the employees who later responded by voting to deauthorize Local 690's union shop. FNM nevertheless extended the Amalgamated Workers Union collective bargaining agreement when 1199 filed an election petition in 1978.[17] The Board later held the extension to violate NLRA § 8(a)(2), since the Amalgamated Workers Union did not represent a majority of Haven Manor employees; the Administrative Law Judge expressed doubts that it existed as a union at all.[18]

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[15] It is now part of the Service Employees International Union (SEIU).

[16] Leon Fink & Brian Greenberg, *Upheaval in the Quiet Zone: A History of Hospital Workers' Union, Local 1199* 17–27 (1989). Davis retired as president in December 1981, *id.* at 210.

[17] For more on the Amalgamated Workers Union, see Priore v. Nelson, 626 F.2d 211 (2d Cir. 1980) (denying parole to former president of AWUA Local 690); U.S. v. Sanfillipo, 48 Lab.Cas. ¶ 18635 (E.D.N.Y. 1963) (criminal conviction of AWUA officers for labor kickbacks).

[18] First National Maintenance Corp., 254 NLRB 289, *enforced*, 681 F.2d 802 (2d Cir. 1981) (mem.). The Board decision in this case was issued in January 1981 but was not called to the attention of the Supreme Court, which treated FNM throughout as a company without animus toward 1199.

Greenpark offered FNM an easier, yet still risky, way of avoiding 1199. It would not be necessary to contract with a sweetheart union. FNM could simply cancel the underlying maintenance contract, which permitted either party to terminate it on thirty days' notice. The contract was not a lucrative one, even for little FNM. It netted only a $250 weekly management fee after Greenpark paid FNM's payroll costs. Marsh testified at the Board hearing that FNM was losing money at Greenpark. It is not easy to see how this could be true if Greenpark was paying all payroll costs. However, no doubt FNM was making little money and was happy enough to say goodbye to Greenpark as a customer.

The victory for 1199 in the March union election made FNM's financial situation more acute. FNM asked Greenpark administrator Simon Pelman if Greenpark could pay more money. FNM anticipated having to increase wages to its newly-unionized employees, but Pelman did not think that New York State would reimburse him for any additional payments to FNM, and refused to raise them.[19]

But while the union victory made FNM's departure from Greenpark more imperative, it also created legal complications. FNM faced a difficult choice. It could have told 1199 of its plans to drop Greenpark as a customer and bargained to impasse over that decision. Or it could have kept 1199 in the dark and announced the decision to leave Greenpark only on the day of implementing it. Each path had advantages and risks. To understand these, we must discuss the state of the duty to bargain in 1977.

Legal Background

Must a unionized employer bargain with the union before eliminating jobs? This question, which the *First National Maintenance* case was supposed to answer (and did not), was if anything even more difficult to answer in 1977. The premise of the Supreme Court's grant of certiorari was that neither the Board nor the courts of appeals had been consistent in these cases, and that premise, at least, was quite correct.

As we have seen, the legal concept of permissive subjects of bargaining was invented by the Board in 1955, almost casually, as a new way of limiting some bargaining-table conduct, insistence on unacceptable proposals, that the Board had long seen as detrimental to reaching agreement.[20] In 1961, however, the same concept became, simultaneously and

[19] Telephone Interview with Simon Pelman, April 16, 2004. Pelman was still employed at Greenpark in 2004.

[20] *See, e.g.*, Local 164, Painters, 126 NLRB 997 (1960) (employer performance bonds and worker residency requirements are not mandatory subjects of bargaining; union violates § 8(b)(3) in insisting on them).

by definition, the limit of management's power to act unilaterally.[21] Consider how this works in either of two clear, polar cases, involving management decisions that clearly are, or clearly are not, mandatory subjects of bargaining.

Consider first something that is clearly a mandatory subject of bargaining, such as wages or hours, mentioned in the statute since 1947.[22] An employer whose employees are represented by a union is no longer free to raise (or lower) wages unilaterally and would commit an unfair labor practice in doing so. The employer must first make its proposal to the union, and bargain to impasse, before it is free to act unilaterally. It need not bargain until the union's agreement is achieved—that is, there is no requirement of codetermination—and the union cannot block the unilateral change, or prolong negotiations once impasse has been reached.[23]

By contrast, consider a clearly permissive subject of bargaining, in the original, too-trivial-to-tie-up-negotiations-over sense, such as employer performance bonds. One might first question why a trivial issue, insistence on which constituted the negotiating party's lack of good faith, must automatically be an issue over which the employer retains unilateral freedom of action. Why shouldn't that trivial issue nevertheless be taken to the union if the context shows it was not a pretext for avoiding a collective bargaining agreement? A reasoned discussion of this issue cannot be found among NLRB decisions. The Board seems simply to have assumed that any issue not a mandatory subject of bargaining is

[21] Fibreboard Paper Prods. Corp., 130 NLRB 1558 (1961), *reversed on reconsideration*, 138 NLRB 550 (1962). The earlier decision held that subcontracting was not a "term and condition" of employment, and therefore management need not bargain, and was free to act unilaterally. The decision does not employ the terms "mandatory" or "permissive" subject of bargaining. It was also reconsidered, and reversed, the following year, and it was the latter decision, holding that the employer did indeed have to bargain, that was ultimately enforced by the Supreme Court. The earlier *Fibreboard* decision, soon reversed, is the first NLRB decision equating management's privilege not to bargain with its privilege to act unilaterally.

[22] In that year, as part of the Taft–Hartley amendments to the NLRA, Congress added the following definitional section, § 8(d), to the Act:

> For the purposes of this section, to bargain collectively is the 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, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession....

29 U.S.C. § 158(d) (2000).

[23] NLRB v. Katz, 369 U.S. 736 (1962).

automatically an issue on which management may act unilaterally. The Supreme Court did not actually decide this point until 1971.[24]

As we have seen, the concept of nonmandatory or permissive subjects of bargaining was created to permit Board regulation of bargaining-table conduct. Once it is equated with the limits of unilateral action, that is, not meeting with the union at all, the concept reduces the statutory duty to bargain below the level that had previously been suggested as the minimum. During the 1950's, discussions about the scope of the duty to bargain, following the most influential article, distinguished between a minimal approach, under which that duty merely reinforced the statutory obligation to recognize the union, and a broader approach, under which the duty ruled out certain bargaining table conduct.[25] The Board's concept of nonmandatory subjects of bargaining turns this distinction on its head. Under the rule equating permissive subjects of bargaining with management unilateral action, management need not even recognize the union's existence on those issues. Permissive subjects of bargaining are alibis for not recognizing the union at all. Not recognizing the union at all, and being excused for doing so, reduces the scope of the statutory duty below what had previously been thought to be the minimum, that is, reinforcing union recognition. *FNM* would eventually illustrate this well.

Must the employer meet with the union before it eliminates jobs? In the twenty-five years or so before the Supreme Court's decision in *First National Maintenance*, the Board usually held that employers had to bargain about decisions that resulted in job elimination. However, the Board never held squarely that such decisions were presumptively bargainable. It just typically found them bargainable.[26] The Board made exceptions to this normal practice in some cases in which it found the employer's decision to involve managerial prerogative, capital investment or disinvestment, or basic changes in its business. The Board never defined these terms or explained how they would be traded off against

[24] Allied Chemical and Alkali Workers Local 1 v. Pittsburgh Plate Glass Co., 404 U.S. 157 (1971) (employer's unilateral changes to health insurance benefits for already-retired employees are not an unfair labor practice since permissive subject of bargaining; § 8(d) procedures for modifying collective agreements are limited to mandatory subjects of bargaining). The *Borg-Warner* decision is not authority for this point. The permissive subject of bargaining there, over which the employer tied up negotiations, was the union's procedure for calling strikes. This was plainly an internal union issue over which the employer had no unilateral, or any other, freedom of action.

[25] Archibald Cox & John T. Dunlop, *Regulation of Collective Bargaining By the National Labor Relations Board*, 63 Harv. L.Rev. 389 (1950) (advocating limiting the scope of § 8(a)(5) to refusals to recognize the union).

[26] The most frequently-cited Board case was Ozark Trailers, Inc., 161 NLRB 561 (1966) (closing one plant).

other values that might favor bargaining, such as the impact of such decisions on employees, or the value of informing unions so as to permit meaningful bargaining.[27] The Board's requirement of bargaining over some subcontracting decisions had been upheld by the Supreme Court, but in an opinion that cautioned that it was not even requiring bargaining over all subcontracting, and invoked a medley of factors supporting the decision to require bargaining in the case at hand.[28] Courts of appeals frequently denied enforcement to Board orders requiring bargaining over job elimination, but did not converge on any alternative analysis.[29]

This unclear state of the law will obviously be most relevant when our story reaches the Supreme Court. But for now, consider its implications for FNM, and its lawyer, in the spring of 1977. As we know, FNM decided to drop Greenpark as a customer and lay off all thirty-five maintenance workers there. Ultimately they did not pay for this decision, except in litigation costs. However, at the time they made it, it was a risky one. There were no reported cases dealing with an employer that decided to eliminate jobs by termination of a particular contract. This decision could easily be characterized either as a mandatory or as a permissive subject of bargaining. Arguments in favor of calling it mandatory included the fact that the Board normally required bargaining over management decisions that resulted in job loss; that this decision involved no capital investment or disinvestment or change in corporate structure; that labor costs were essentially the only component of FNM's operation; that 1199 was newly-certified (giving the entire decision a flavor of union avoidance); and that FNM was resisting that union, not only at Greenpark, but also at Haven Manor. Arguments in favor of calling it permissive included the fact that the Board had never held

[27] Particularly puzzling was General Motors Corp., 191 NLRB 951 (1971), *review denied*, 470 F.2d 422 (D.C. Cir. 1972), in which the Board refused to require bargaining over a corporate decision to sell certain unionized divisions to what would become independent contractors who would then contract the same services to the company. Other frequently-cited decisions in which the Board had refused to require bargaining over management decisions that eliminated jobs were Summit Tooling Co., 195 NLRB 479 (1972) (closing subsidiary) and National Car Rental System, Inc., 252 NLRB 159 (1980) (closing one location and moving work twenty miles away with clear antiunion animus; duty to bargain only about effects of decision, not decision itself), *enforced as to effects bargaining*, 672 F.2d 1182 (3d Cir. 1982). The Board never satisfactorily explained the criteria that excepted these cases from its general preference to require bargaining.

[28] Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203 (1964) (invoking the construction of the statutory phrase "terms and conditions of employment", industrial practice, salience of labor costs in the decision, and the employer's "freedom to manage the business").

[29] As an attorney in the NLRB's branch of appellate courts litigation in 1975–76, several times I briefed cases in which the Board had required bargaining over decisions to eliminate jobs. All the attorneys in the branch were then keenly aware that Board decisions were not reconcilable, either on their facts or on the method of analysis.

choice of customer to be a mandatory subject of bargaining; that FNM's dissatisfaction with Greenpark was ostensibly over the size of its management fee; and that FNM had no record of anti-union animus at Greenpark (though it did at Haven Manor).

In this circumstance, many employers would have chosen to avoid legal proceedings. They would have made an appointment with the union and informed it that they were not making enough money at Greenpark and had decided to drop it as a client. They would have expressed a willingness to listen to what the union had to say, but would have stressed that the dispute was entirely about management fees, not labor costs. The negotiations would not have been complicated. Impasse might well be reached in an hour or two. At that point, this hypothetical employer would have discharged its statutory duty to bargain, which, you will recall, does not involve an obligation to reach agreement with the union or give the union any rights to block management action after impasse.

FNM did not pursue this path. Instead, it refused to meet with 1199 at all. Two days before the expiration of its contract with Greenpark, it informed the employees (not the union) that they would be dismissed. Doing this risked a Board finding that FNM was guilty of failure to bargain in good faith. In that case, FNM would normally be liable for back pay for all terminated employees, from the date of their termination until they found alternative employment. Indeed, the Board eventually did find that FNM had violated its duty to bargain and awarded just such back pay, and its order was enforced in the court of appeals. Only the intervention of the Supreme Court, something that could surely not have been predicted in 1977, saved FNM from a large backpay order that it might have avoided by a few hours of meeting with the union. Why did FNM take the risky path of not meeting with the union at all?

Sanford Pollack counseled his client FNM to accept the risky path. First, Pollack was confident that FNM would not be required to bargain. "Nobody can tell me that I have to stay in business if I'm losing money." He figured that the Board would find FNM in violation of the duty to bargain, but that the Second Circuit would deny enforcement.[30]

Second, he did not find the alternative of bargaining to impasse attractive. "I practiced for forty-five years and can't tell you what impasse is. You never know where a case on impasse goes." "I would much rather not talk at all. That way, you control the litigation. Trying to bargain to impasse makes your fate not your own to control." "There

[30] Telephone Interview with Sanford E. Pollack, May 12, 2004.

are cases where the union has been on the street for three weeks and the Board says impasse wasn't reached."[31]

Third, Greenpark's own employees were also represented by 1199. As soon as the union was told that FNM was withdrawing, a picket line would have been established that several hundred nursing home employees would have refused to cross.

Finally, however, and far from least, FNM's owners wanted absolutely nothing to do with 1199, which they were fighting vigorously (indeed, illegally) at another location. Had FNM talked to 1199 at all, the union's chief demand would have been to permit the workers doing maintenance at Greenpark to transfer to other FNM locations. Pollack compared this with "letting a virus loose in the company. We didn't want militant people to infect the other locations." Avoiding "letting a virus loose" was, Pollack said, well worth back pay for thirty-five employees, the worst that could happen if they lost the NLRB case.

So FNM informed Greenpark that it would not be renewing their contract, and withdrew from Greenpark without ever meeting with 1199.

Prior Proceedings

The unfair labor practice trial before the Board's Administrative Law Judge, on July 5, 1978, gave no hint that the case would assume any importance.

The General Counsel was represented by Stephen Appell from the Board's Brooklyn regional office. Appell, today an NLRB attorney in Manhattan, recalls only two witnesses testifying at the hearing. Edward Wecker, a union vice-president, described FNM's complete refusal to bargain with 1199. Leonard Marsh, testifying for the company, explained that FNM was losing money at Greenpark, could not persuade Greenpark to raise the management fee, and exercised its right not to renew the contract.[32]

Appell remembers that the trial was over by lunch. The General Counsel did nothing to challenge Marsh's story. Despite the fact that the Haven Manor representation, union shop deauthorization, and unfair labor practice cases were being handled contemporaneously in the same Board office, the General Counsel did not try to use information from that case to prove FNM's animus toward 1199. Nor did it call Greenpark administrator Simon Pelman who might have explained then, as he did in 2004, that FNM's purported reliance on the level of the management fee was more realistically a concern about demands for increased wages

[31] *Id.*

[32] Telephone Interview with Stephen Appell, February 29, 2004.

from the newly recognized union.[33] Indeed, at no level of the case did anyone challenge the naive assumption that an employer, whose employees had just voted to unionize, would be concerned only about its management fee, not its labor costs. Appel saw no reason to have any of the maintenance workers testify.

The Administrative Law Judge to whom the case was assigned died shortly after the hearing, and the case was assigned to Judge Thomas A. Ricci for decision on the record. Judge Ricci took a strong dislike to FNM's Leonard Marsh:

> Asked how many other nursing homes his Company services, Leonard Marsh, an officer of Respondent and one-third owner, answered "I would venture to guess between two and four." It was an evasive answer, unless Respondent's overall operations are so extensive that the secretary-treasurer cannot keep in mind how many are of a particular type.[34]

Judge Ricci found that FNM's complete refusal to meet with 1199 was "a very clear unfair labor practice." He did not distinguish FNM's obligation to bargain about the *effects* of its decision on its employees from its obligation to bargain about the *decision* itself, partly because it had done neither. He considered the cases in which the Board had held certain core managerial financial decisions to lie outside mandatory bargaining:

> If ever there was a business in which taking on, finishing, or discontinuing this or that particular job is no more than a regular and usual method of running its affairs, it is this Respondent's overall activity. There was no capital involved when it decided to terminate the Greenpark job. The closing of this one spot in no sense altered the nature of its business, nor did it substantially affect its total size.[35]

The Administrative Law Judge ordered FNM to bargain with 1199 over both its decision to eliminate its Greenpark operation and the effects of that decision on employees. He also ordered FNM to pay back pay to those employees, from their 1977 termination until agreement was reached. Six months later, without analysis, a panel of the full Board adopted his order, broadening the remedies to include a preferential hiring list for the FNM Greenpark workers—exactly what FNM most wanted to avoid—and an extension of the union's certification.

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[33] Telephone Interview with Simon Pelman, April 16, 2004.

[34] 242 NLRB 462, 464 (1979).

[35] 242 NLRB at 464.

The Board's decision didn't surprise Pollack but the subsequent decision of the court of appeals did. At the oral argument before the appellate court, William Stewart, for most of his career the only African–American attorney handling appellate litigation on behalf of the Board, represented the agency.[36] By the time of the argument in the court of appeals, Pollack had stipulated that FNM had a duty to bargain over the effects on the employees of its departure from Greenpark. Pollack delayed the actual bargaining over effects until after that court's decision "to make sure that it wouldn't turn into bargaining about anything else."[37]

The Second Circuit, in an opinion by the highly-respected district judge Morris Lasker, sitting by designation, enforced the Board's order.[38] As a result of Pollack's stipulation, the court of appeals dealt only with FNM's obligation to bargain over the decision itself. The court noted the conflict, since *Fibreboard*, between the Board's typical orders to bargain over decisions resulting in job loss, and the reluctance of the appellate courts to enforce such orders. Deciding that a *per se* rule was inappropriate in an area in which the Supreme Court (in *Fibreboard*) had expressly counseled consideration of many factors, the court followed a recent decision of the Third Circuit to state, more clearly than the Board ever had, that a presumption existed that any "partial closing" decision was a mandatory subject of bargaining.[39] It would therefore lie with employers

[36] Stewart died in 2004. Obituary, Wash. Post, Feb. 19, 2004, at B6; N.Y. Times, Mar. 8, 2004, at A17. He was a Phi Beta Kappa graduate of Indiana University, and Coif graduate of its law school, who served successively as a lieutenant in the Army, Board attorney, director of labor relations and employment opportunity for a private company, and Board attorney again, ending his career as chief counsel to then-Chair William J. Gould IV. I knew Stewart; he was always the epitome of calm and reason.

It is not clear who argued on behalf of FNM at the Second Circuit. It was either Pollack or his Associate Stuart Kirshenbaum; both recall having done the argument. Interview with Stuart Kirshenbaum, April 22, 2004.

[37] Telephone Interview with Sanford E. Pollack, May 12, 2004.

[38] 627 F.2d 596 (2d Cir. 1980).

[39] Brockway Motor Trucks v. NLRB, 582 F.2d 720 (3d Cir. 1978). This opinion was carefully studied throughout the *FNM* litigation. In a lengthy and scholarly opinion by Judge Arlin Adams, the court reviewed numerous decisions analyzing whether particular closing decisions were mandatory subjects of bargaining. (A footnote, 582 F.2d at 722 n.1, cites Rousseau, Philip Selznick, Judith Shklar, and Roberto Unger.) The court concluded that employer decisions to close portions of their operations were presumptively mandatory subjects of bargaining, but that particular economic circumstances had to be examined in each case to determine whether particular employer interests, such as a need for speed, made particular decisions not mandatory subjects of bargaining. Since that analysis had not been done, it denied enforcement to the Board's order but permitted the Board to hold additional hearings.

to bring forth evidence "that the purposes of the statute would not be furthered by imposition of a duty to bargain."

> Without an attempt to enumerate all those instances in which the presumption may be rebutted, a few examples may be noted for purposes of illustration. The employer might overcome the presumption by demonstrating that bargaining over the decision would be futile, since the purposes of the statute would not be served by ordering the parties to bargain when it is clear that the employer's decision cannot be changed. Other relevant considerations would be that the closing was due to emergency financial circumstances, or that the custom of the industry, shown by the absence of such an obligation from typical collective bargaining agreements, is not to bargain over such decisions. The presumption might also be rebutted if it could be demonstrated that forcing the employer to bargain would endanger the vitality of the entire business, so that the purposes of the statute would not be furthered by mandating bargaining to benefit some employees to the potential detriment of the remainder. This might be a particularly significant point if the number to be laid off was small and the number of the remainder was large.[40]

The court held that FNM had failed to demonstrate any of these factors, or any other that might excuse its total failure to bargain. Judge Amalya Kearse dissented, briefly, stating that "the respondent's decision in this case to conserve its capital by closing a losing operation was a matter of fundamental entrepreneurial discretion and was not 'suitable for resolution within the collective bargaining framework.' "[41]

Pollack's gamble had seemingly failed. FNM was probably not particularly troubled by a back pay remedy, or an order to bargain with 1199 that could probably be limited to the effects of its decision, nor about a small amount of severance pay. But the company now faced exactly what it had most wanted to avoid—an order requiring it to give former Greenpark maintenance employees hiring preference at its other operations. Pollack had gambled that the court of appeals would save him, but it did not. A petition for certiorari seemed unrealistic. The company was too small for such expenses, and Pollack had never taken a case to the Supreme Court.

The Supreme Court Decision

But, of course, the case did go to the Supreme Court. Someone at the U.S. Chamber of Commerce read the court of appeals decision and

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[40] 627 F.2d at 601–02.

[41] 627 F.2d at 604 (quoting *Fibreboard*).

realized that *FNM* was an ideal case for asking the Supreme Court to limit *Fibreboard*. The Chamber asked Marvin E. Frankel, then recently retired as a federal judge and head of the labor law group at the New York law firm of Proskauer Rose Goetz & Mendelsohn, to handle the case in the Supreme Court. Although Proskauer firm attorneys' names appear only on the brief submitted by the Chamber as an *amicus curiae*, they in fact prepared the petition for certiorari and both the principal and reply briefs for petitioner FNM.[42]

Why was this issue important to the Chamber? Many law professors have expressed skepticism about the importance of the definition of mandatory subjects of bargaining generally.[43] David Feller, for example, claimed that the legal distinction between mandatory and permissive subjects is "unimportant," an "academic discussion." The distinction "is only important when an unwary employer who doesn't know that something is a mandatory subject of bargaining takes unilateral action." But the distinction "makes little difference in the outcome of bargaining or the degree to which employees exercise control at the workplace," because "careful" unions may always strike over a mandatory subject.[44]

Proskauer partner Saul Kramer was amused at hearing the academic controversy and explained the Chamber's quite practical interest. "The Chamber did not spend all that money on a theoretical issue." Any management decision that is a mandatory subject of bargaining, such as the subcontracting in *Fibreboard*, "moves up the time when you have to bargain." The decision must be announced to the union early enough to permit what the Board calls "meaningful bargaining." It cannot be announced, as FNM's decision was, on the morning it was implemented. Management normally does not want to announce downsizing decisions in advance. Once such a decision is announced, there are possibilities of sabotage. "You have a period when everything goes crazy in your place, or at least there is a possibility of that, and nobody wants that in management." After announcement of a downsizing decision, production will decline, partly from union slowdowns, partly from "people looking for other jobs." The union will demand information, and this can delay or burden negotiations.[45] The *FNM* case itself shows that, on the issue of the importance of the definition of mandatory subjects of bargaining, Kramer was right and Feller was wrong. A narrow definition of manda-

[42] Telephone Interview with Proskauer partner Saul Kramer, May 11, 2004. Frankel died in 2002 (a month after his last argument in the Supreme Court).

[43] Thomas C. Kohler, *Distinctions Without Differences: Effects Bargaining in Light of* First National Maintenance, 5 Indus. Rel. L.J. 402, 421 (1983).

[44] David Feller, *Response (to Colloquium: The Labor Movement at the Crossroads)*, 11 NYU Rev. L. & Soc. Change 136, 136–39 (1982–83).

[45] Telephone Interview with Proskauer partner Saul Kramer, May 11, 2004.

tory subject of bargaining gives an employer a device to avoid union recognition; it also permits the employer to control the information available to the union and thus its capacity for economic action.

Thus, it was "an important issue for the Chamber" to seek to get the Supreme Court to adopt the *Fibreboard* concurrence and squarely find a category of important managerial prerogatives that were, for that reason, permissive subjects of bargaining. Why did *FNM* look like the case in which to pose the issue? Chamber attorney Kramer explained, "This was a very clean case" since the facts showed that FNM was "losing money." FNM terminating Greenpark was, Kramer said, "ostensibly" about its management fee, not labor costs. And the record in this case revealed no animus against 1199.[46]

The briefs prepared at the Proskauer firm carefully and accurately depicted the state of the law: the question about the scope of *Fibreboard*, the conflicts between the Board and courts of appeals. The *amicus* brief for the Chamber mainly discussed the implications of *Darlington*, a case privileging some decisions to close operations against a complaint of unlawful discrimination under § 8(a)(3).[47] These briefs did not, however, address the issue that would soon divide the Supreme Court: what should the test be for identifying mandatory subjects of bargaining? Nor would the Court get help on this issue from the other briefs. The Board's brief argued that the Board always weighs multiple factors, including the impact on management, in determining mandatory subjects of bargaining, and that *FNM* did not differ from the Board's usual approach. The AFL–CIO also appeared *amicus curiae*, filing a totally ineffectual brief, that was to play little role in the Supreme Court's analysis, arguing that an old Railway Labor Act case had actually decided that partial closings were mandatory subjects of bargaining.[48] Its brief offered no alternative way of analyzing mandatory-subject-of-bargaining cases or, more fundamentally, challenging the analytic framework. The AFL–CIO's apparent inability in this brief to imagine an alternative vision of labor law,

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[46] *Id.*

[47] Textile Workers Union v. Darlington Mfg. Co., 380 U.S. 263 (1965) (partial closing of operations motivated by antiunion animus violates § 8(a)(3) only when motivation is to chill unionism in remaining operations of that employer). The later Supreme Court opinion in *FNM* did not address the implications of *Darlington*.

[48] Order of Railroad Telegraphers v. Chicago & N. W. R. Co., 362 U.S. 330 (1960) (Norris–La Guardia Act deprives federal court of jurisdiction to enjoin strike of railroad union in protest of closing and consolidation of operations). The Supreme Court opinion dismissed the case in a footnote at the end of the opinion, 452 U.S. at 686 n.23: "The mandatory scope of bargaining under the Railway Labor Act and the extent of the prohibition against injunctive relief contained in Norris–LaGuardia are not coextensive with the National Labor Relations Act and the Board's jurisdiction over unfair labor practices."

different than that advanced by management, was unfortunately characteristic of AFL–CIO Supreme Court briefs in the postwar period; there is an interesting article waiting to be written about those briefs.

At oral argument, on April 21, 1981, Pollack represented FNM. Both he and Kramer agree that the Chamber, which was paying Pollack's and Proskauer's fees, offered Pollack money—Pollack claims $50,000—to let Judge Frankel argue the case. Pollack refused. It was his case, after all. Pollack still speaks of the day with pride. It was, he said, the most exciting thing he ever did. His son was there for the argument, and Pollack remembers how proud he felt before his son, and also how sad he felt that he would never do anything so exciting again.[49]

The Board was represented by its Deputy Associate General Counsel Norton Come who, between 1958 and 1987, argued fifty-six cases in the U.S. Supreme Court on behalf of the agency.[50] By 1981, Come was only sixty-one years old but seemed much older, at least to me at that time. Never a brilliant oralist, he was thought, during the time I served the Board, to be trusted and respected by the justices for his memory of what the Board had decided. As was his custom, he wore formal attire to the argument in *FNM*.

Most of the Court's questions for Pollack concerned practical questions such as what happened to the terminated workers (he didn't know), what had been the results of the bargaining over the effects of FNM's decision (some severance pay), and was there a successor employer (yes, the nursing home itself). Pollack was asked a hypothetical about an employer relocating work from one closed factory to a new factory, and responded that this was no different from *Fibreboard* and would therefore be a mandatory subject of bargaining.[51]

Come faced tough questioning to determine the Board's position. What about a decision to cease operations entirely because of "hassle constantly with the union"? Come: "I don't know that the Board has had that case but I would point out that there are cases that suggest that the Board would find that there might not be an obligation in that situation." What about a flat decision to go out of business because the owner wanted to retire? "The Board would be unlikely to find a bargaining obligation in that sort of a situation. But that is poles apart

[49] Telephone interview, Sanford E. Pollack, May 12, 2004.

[50] Obituary of Norton Come, Wash. Post, Mar. 19, 2002, 2002 WL 15846287.

[51] "Question [Chief Justice Burger]: Are you saying that if Ford simultaneously opened a new plant in Hamburg, Germany, employing substantially the same number of people, that would be a subject of mandatory bargaining? MR. POLLACK: Yes, Your Honor. I believe that that is correct. I believe that because of that set of circumstances the employer still remains the employer. The work is being done by a replacement group. Now, that's really what Fibreboard said." Transcript of Oral Argument at 13–14.

from the situation that we have here and the situation that we have in many of the termination cases." "Mr. Come, why is it poles apart? What is the difference between that case—maybe the man is a little older, but still, on the economic decision, he'd rather spend his money in Florida than where he was. And here [FNM] the man decides he doesn't want to spend his operation in this particular location."

> Well, I think that Judge Adams in the *Brockway* case summed it up better than I can when he pointed out that a decision to close down can be motivated by a variety of considerations. On some considerations, the union is not a very helpful interlocutor. On others, it may very well be, and what we're talking about here is that the end result is a termination of employment, a termination of the jobs of the employees.[52]

As Justice Brennan said later at conference, "Poor Come!"[53] The conference revealed a majority in favor of reversing the court of appeals and denying enforcement to the Board order. The opinion was assigned to Justice Blackmun.

The drafting of the opinion may be traced in Justice Blackmun's papers in the Library of Congress. The crucial issue became the correct method for determining which management decisions were mandatory subjects of bargaining. On this issue of method, the Court received no assistance from any of the briefs. It emerged that there were two distinct approaches within the majority. Justice Blackmun, joined by Justice Stevens, favored a multi-factor balancing test. Justice Powell, apparently speaking for Chief Justice Burger and Justices Stewart and Rehnquist, favored some categorical definitions of decisions that would not be mandatory subjects of bargaining and would not be subject to balancing. The Court's eventual published opinion combined these two perspectives, not particularly happily.

Blackmun's first draft was circulated on June 1, more than five weeks after the oral argument and close to the end of the term. While it found that FNM did not have to bargain over its decision to cease operations at Greenpark, and seems familiar to anyone acquainted with the eventual opinion of the Court, it contained three features that proved controversial among his brethren. First, it called for a balancing test, under which the determination of mandatory subjects of bargaining required analysis of neutral interests in bargaining, management's interest in avoiding it, and any public interest, and characterized *Fibreboard* as having employed such a balancing test.[54] Second, it seemed to state

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[52] Transcript of Oral Argument at 22.

[53] Blackmun Papers, Library of Congress.

[54] "[B]argaining over management decisions that have a substantial impact on the continued availability of employment should be required only if the benefit, for labor-

that decisions turning on labor costs would normally be subject to bargaining. "Only in the rare event that *labor costs* are the motivating factor behind a reduction in operations should an employer be required first to negotiate with the union over a decision to close part of its business."[55] Third, it refused to define any managerial prerogatives that would clearly escape bargaining and not even be subject to the general balancing test. "[D]ifferences between management and labor over issues that might be resolved through collective negotiation should not be excluded arbitrarily out of deference to a fixed concept of 'managerial prerogatives.' "[56]

The next day, June 2, both Justices Stevens and Powell sent memoranda to Blackmun and the conference. Stevens objected only to the language on labor costs. He thought that labor costs were not a "rare" factor in reductions in operations but rather "a significant factor in most such reductions." He also thought that the importance of labor costs in reductions in operations was not a reason for the law to compel bargaining in cases in which management had chosen not to.[57]

Justice Powell's objections were much deeper. He objected to the quoted language above on labor costs and managerial prerogatives, but, rather than suggest specific alternatives, voiced deeper objections:

> I fully agree with the result you reach in this case, but I do not subscribe to a balancing approach when the issue is the discontinuance of a losing portion of a business operation.... I view the problem of partial closings somewhat differently. I share the view that Potter [Stewart] expressed in [his concurrence in *Fibreboard*] that § 8(d) of the Act describes a "limited area subject to the duty of collective bargaining," and that excluded from this area are "managerial decisions which lie at the heart of entrepreneurial control." ... It seems to me that a balancing test is not appropriate in this context. If a partial closing is a mandatory subject of bargaining, I suppose the union could strike in support of its wishes at all the employer's plants. Companies thus may be forced to keep a losing plant open for fear of strikes at profitable plants elsewhere. I cannot ascribe to Congress an intention so severely to constrict managerial freedom—particularly since the employees' interests should be ade-

management relations and the collective bargaining process, outweighs the burden placed on the conduct of the business. The Court in *Fibreboard* implicitly performed this balancing...." June 1 draft at 17–18, Blackmun Papers, Library of Congress.

[55] June 1 draft at 28, Blackmun Papers, Library of Congress (emphasis original). The draft also has similar language at 20.

[56] *Id.* at 17.

[57] Justice John Paul Stevens to Justice Blackmun, June 2, 1981, Blackmun Papers.

quately protected by management's duty to bargain over the *effects* of the closing.

In sum, I cannot join your opinion as it is now written. Unless another Justice wishes to write, I probably will write an opinion concurring in the result.[58]

The next day, Susan G. Lahne, law clerk to Justice Blackmun, met with Paul Cane, Jr., law clerk to Justice Powell, to learn more about Justice Powell's objections and what it might take to gain his assent to the opinion. Although it was unusual for law clerks for different justices to meet to draft opinions, they did in this instance. Cane recently explained, "Unlike the impression given by *The Brethren*, cases are rarely decided by law clerks cobbling. The process of drafting an opinion is mostly on paper and transparent. This case was an exception to that. As the notes indicate, Susan Lahne and I did talk quite a bit. We would go into the interior courtyards of the Court building and argue."[59]

Justice Blackmun had already agreed with Justice Stevens to delete the language on labor costs.[60] Justice Powell objected to it, also, for reasons that did not appear in his memo to the Court. He felt that it was all too easy for any union, after the fact, to assert that any management decision might have been avoided, given hypothetical reductions in labor costs to which the union never in fact would have agreed.[61] This objection, in turn, was just a specific example of Justice Powell's more general objection to Justice Blackmun's draft. Powell thought the opinion must identify certain managerial decisions, that, categorically, would not be subject to bargaining. The decisions had to be identified with a fairly "bright line" so that the Board would never even begin proceedings, what former law clerk Cane described as a "summary judgment"-type test. Powell's problem with balancing tests was not the concept of considering many factors, but with the vagueness of a test that always depended on retrospective construction of negotiations that never happened. Lahne reported to Justice Blackmun:

Encouraging news: I spoke with Justice Powell's clerk, Paul Cane, again this afternoon and he informed me that he spoke briefly with

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[58] Letter, Justice Lewis F. Powell, Jr. to Justice Blackmun, June 2, 2004, Blackmun Papers, Library of Congress (emphasis original).

[59] Telephone Interview with Paul Cane, Jr., May 4, 2004. Cane now practices management-side labor and employment law in San Francisco. Cane's reference is to Bob Woodward & Scott Armstrong, *The Brethren: Inside the Supreme Court* (1979). Lahne is now a pension law specialist at the U.S. Department of Labor; she declined to be interviewed.

[60] SGL (Susan G. Lahne) to Justice Blackmun, June 2, 1981, Blackmun Papers.

[61] Telephone Interview, Paul Cane, Jr., May 4, 2004.

> Justice Powell this morning. He confirmed that the disagreement is over the "bright line" as to partial closings, not the rest of the analysis, and he intends to go over the opinion this afternoon and make concrete suggestions for our consideration. Justice Powell is eager to avoid writing separately, if possible.[62]

Lahne had earlier that day telephoned the other chambers. She reported that Powell spoke at least for Chief Justice Burger and Justices Stewart and Rehnquist. Justice White had not committed himself and if he joined Powell they would constitute their own majority. Lahne, presumably reflecting the views of Justice Blackmun, was most eager to retain a majority for "the larger idea, expressed in section II, that management decisions should be bargainable when to require bargaining would advance the purposes of the NLRA" and therefore felt, given the head count, that it might be necessary to adopt a brighter line for managerial prerogatives and a corresponding limitation on the Board's control.

It appears from Lahne's memoranda to Justice Blackmun that common ground proved elusive. Both sides were proceeding without any anchor in the statute itself or the Board's interpretation of it. Lahne pointed out that Cane had no statutory basis for a category of managerial prerogative, let alone one defined by a bright line. Cane pointed out that Lahne had no statutory basis for a balancing test. Both were correct, since the statute does not even provide for classifying subjects of bargaining. On June 4, Lahne was pessimistic in a memo to Justice Blackmun:

> I had a fairly long talk with Justice Powell's clerk, Paul Cane, concerning [*FNM*]. It does not look all that hopeful, but there is a small chance that we may be able to change the opinion enough to convince Powell without gutting it entirely.
>
> It appears that his preferred approach would have been simply to adopt Justice Stewart's concurrence in *Fibreboard* and to distinguish the facts of that case. To him, there *is* an area of "managerial prerogatives" that is fixed and immutable and that Congress did not intend to require bargaining about. He also believes that this decision to close part of a business falls within that removed area. His clerk, however, could not supply *any* reasoning to back that conclusion up with. It seems simply a given that certain management decisions are beyond "terms and conditions of employment."
>
> Thus, Justice Powell would prefer that we not only draw a bright line in section III, but also revise section II to remove the suggestion that we are doing any "balancing" of the good to collective bargaining against the harm to the employer. I do not think I am willing to

[62] SGL (Susan G. Lahne) to Justice Blackmun, June 3, 1981, Blackmun Papers.

> go all this way. Because Justice Powell has no alternative analysis to offer, I continue to think my analysis is preferable to no analysis at all. However, it is possible, according to his clerk, that if we muffle the language a little in section II and get rid of certain sentences that are particularly troubling to Justice Powell, he may be willing to join.
>
> What I would propose is the following. I will attempt a redraft of sections II and III, trying to remove what is especially troubling to Justice Powell without doing away with all analysis and drawing a bright line as to partial closings. If Justice Powell finds it acceptable, we will have won. If Justice Powell does not agree, I would propose circulating a modified draft to try to draw votes from Justice White, Justice Marshall, and the Chief. Perhaps also Rehnquist. I do not propose abandoning the analysis I have adopted. Of course, I stand willing to do your bidding in this matter.[63]

Lahne made very few changes in the draft. She took out the two sentences to which Justice Powell had particularly objected, the language on "labor costs" and the sentence casting doubt on a "fixed concept of 'managerial prerogative.' " The latter sentence had been preceded by a footnote, numbered 18 in both the June 1 draft and the final opinion, listing cases gradually expanding the number of issues found subject to bargaining. The new draft retained that list of cases, but now described mandatory subjects of bargaining as having "changed" rather than "increased." The footnote was now preceded by: "Congress did not explicitly state what issues of mutual concern to unions and management it intended to exclude from mandatory bargaining." This sentence has always baffled readers of the opinion since it begs the important question: Congress in fact did not explicitly state that it intended to exclude *any* subjects from bargaining, and in fact rejected proposals to do just that. Lahne also added a quotation from Justice Stewart's *Fibreboard* concurrence.

At the same time, Lahne made two language changes that arguably moved the opinion away from Justice Powell's wishes. At note 14 she had written that in 1947 Congress refused to define or limit the words "wages, hours, and other terms and conditions of employment" "for it recognized the need for flexibility and for change and growth." The latter quoted phrase became, "for it did not intend to deprive the Board of the power further to define those terms in light of specific industrial practices." Secondly, Lahne changed the opening words of section III B of the opinion, discussing the specific facts of *FNM*. It had initially said, "In order to give guidance in the application of this analysis." As revised it became, "In order to illustrate the limits of our holding." In other

[63] SGL (Susan G. Lahne) to Justice Blackmun, June 4, 1981, Blackmun Papers.

words, the second draft made clear both the Board's power (as it reversed the Board) and the limited scope of its holding.

The new opinion was circulated on June 9, along with a memorandum from Justice Blackmun which Lahne had drafted:

> I am not persuaded that I should modify the opinion to eliminate or replace the *analysis* on which it is based: that deciding whether decisions of this type, *i.e.*, decisions that have such a direct and immediate impact on jobs, should be mandatory subjects of bargaining depends on a consideration of the purposes behind the enactment of the NLRA and Taft–Hartley, which include principally the removal of industrial conflict from the sphere of overt clashes to the arena of collective bargaining supervised by the NLRB.
>
> I readily concede that Congress did not intend to bring within the mandatory subjects of bargaining *all* employment decisions. I have found nothing, however, to suggest that Congress, in passing these two acts, had in mind a clear list of subjects, even as to management decisions, that were immune from bargaining. Surely, there is nothing in the statute itself to suggest that Congress contemplated a fixed set of "managerial prerogatives" that it intended to immunize, and I have seen nothing to this effect in the legislative history. Congress intended not to require bargaining over what fell outside "wages, hours, and terms and conditions of employment," but it left further definition of those terms to the parties, the NLRB, and the courts. A conclusion that Congress itself excluded specific subjects, among them these partial closing decisions, also would substantially undermine much precedent in the Board and the lower courts, which have approved, with this Court's acquiescence, a widening sphere of mandatory subjects of bargaining, whether we like to acknowledge it or not. Thus, I think we must look elsewhere for the limiting definition.
>
> Although I agree with it, Lewis's statement that "[d]ecisions as to partial closings are solely managerial ... because they determine the basic scope of the enterprise" seems to me to be only a conclusion, which, if not supported by some more basic analysis, will provide no guidance to lower courts. Looking to whether a management decision involves a "basic" shift in operations or a "major" reallocation of capital, as most of the Courts of Appeals have done, results in essentially ad hoc distinctions. The line between "major" and "minor" and "basic" and "non-basic" becomes simply a matter of opinion, dependent on whether one favors management or labor interests. For instance, I do not perceive that the decision in this case was intrinsically any more "basic" than the subcontracting decision in *Fibreboard*. First National Maintenance apparently rou-

> tinely entered into and terminated these maintenance agreements with its customers. This was its regular manner of conducting business, and it must have resulted in employees' routinely losing their jobs. Thus, the termination of the Greenpark contract did not involve a basic shift of direction or a fundamental alteration of the company's size or shape. If anything, the subcontracting decision in *Fibreboard*, which was unprecedented and a major alteration of the way the plant was run, was a more "fundamental" change in the way the company allocated capital and shaped the enterprise.
>
> I think that the implicit basis for Lewis's conclusion is that requiring bargaining over this type of management decision would be just too burdensome for the employer. This in fact is the core of my analysis, and it contains nothing startling or even novel. The Court in *Fibreboard* explicitly considered the type of factors that I discussed in the opinion and concluded: "To hold, as the Board has done, that contracting out is a mandatory subject of collective bargaining would promote the fundamental purpose of the Act by bringing a problem of vital concern to labor and management within the framework established by Congress as most conducive to industrial peace." 379 U.S., at 211. I had not thought that the Court now wanted to overrule *Fibreboard* or to confine it to its facts, and I attempted merely to apply its analysis. My consideration of the factors present in partial closing decisions leads me to conclude that bargaining over these decisions will not incrementally improve the collective bargaining process, but in fact will have detrimental effects on the employer, thus weakening the likelihood that bargaining will reduce industrial tensions.
>
> This is as far as I can go. I hope that it will prove to be acceptable; if not, perhaps the case should be reassigned or be put over for reargument in the Fall.[64]

Ultimately, a majority of the Court, now including Justice White, agreed to sign Justice Blackmun's revised opinion. Former law clerk Paul Cane could only speculate why the other justices agreed to the revised opinion, since it differed little from the June 1 version. The new draft did include some modest changes that other justices would have viewed as positive. It was the end of the term. Reargument is a major affront. Justice Powell had wanted more reliance on Justice Stewart's *Fibreboard* concurrence, but it is referenced. If (for example) Justice Stewart or Rehnquist had already joined or was known to be about to, Justice Powell would no longer have had any negotiating leverage and the game would have been over. Cane doesn't remember whether any

[64] Justice Harry A. Blackmun, Memorandum to the Conference, June 9, 1981, Blackmun Papers.

other justice would have signed the revised opinion without Justice Powell. A final possibility, intriguing but speculative, is that Justice Powell read the following paragraph, present in both the June 1 and final drafts, to adopt some of the "bright line," categorical definitions of decisions outside bargaining that he had sought:

> [M]anagement may have great need for speed, flexibility, and secrecy in meeting business opportunities and exigencies. It may face significant tax or securities consequences that hinge on confidentiality, the timing of a plant closing, or a reorganization of the corporate structure. The publicity incident to the normal process of bargaining may injure the possibility of a successful transition or increase the economic damage to the business. The employer also may have no feasible alternative to the closing, and even good-faith bargaining over it may be both futile and cause the employer additional loss.[65]

Many readers of the opinion have been puzzled by this paragraph. "*[N]one* of these interests was implicated in this case. . . ."[66] Perhaps Justice Powell, or others, read this as the list of "bright lines" he sought, that would clearly exclude some decisions from bargaining, or even balancing, while others read them as factors that instead would, when present, enter into the balance. As we shall see, subsequent cases have not clearly adopted either position.

The Immediate Impact of First National Maintenance

The Impact of the Decision on Bargaining Practices

The Supreme Court had decided a hypothetical, carefully selected by the Chamber of Commerce as its best opportunity to establish a set of managerial prerogatives, bargainable only if management chooses. That hypothetical is the management decision that results in the elimination of jobs but: (1) is based entirely on economic considerations, (2) turns not at all on labor costs, and (3) reflects no animus toward the union. Indeed, such a hypothetical must have existed as a hypothetical long before it became the *FNM* case, much as photographs, which we naively imagine to portray reality, show subjects and compositions that existed already as paintings before photographic subjects, or even photography, even existed.[67] Law professors must have put just this hypothetical to students, in the years following *Fibreboard*, to show how that case implicitly defined a new category of permissive subjects of bargaining.

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[65] 452 U.S. at 682–83 (footnotes omitted).

[66] James B. Atleson, *Values and Assumptions in American Labor Law* 134 (1983) (emphasis in original).

[67] Peter Galassi, *Before Photography: Painting and the Invention of Photography* (1981).

The realization of such a hypothetical case must be very rare, if it exists at all. Developments in law and industrial practice following *FNM* have not revealed one clear example. It is not hard to see why. An employer with harmonious union relations, that anticipates future relations with that union, has no reason to disguise a necessary economic downsizing decision. The union will be unlikely to be able to avert the decision, but—if the decision really turns on unavoidable economic factors—the union will normally accept the decision and may be able to help implement it in the most painless way, particularly since the union retains the right to bargain about the effects of the decision. Consequently, as we shall see in the next section, employers who keep the union in the dark about downsizing decisions almost always are either planning to do the same work at a different location, or are trying to undercut or eliminate the union, or are trying to avoid bargaining about clearly bargainable issues, or, frequently, all of the above. These practical realities are more likely than the decision in *FNM* to guide employer conduct.

But did the *FNM* decision influence management behavior in a symbolic way? In the same year as the *FNM* decision, the new President, Ronald Reagan, hired replacements for striking air traffic controllers. It is often alleged that this incident emboldened private employers to hire strike replacements more frequently than previously, although in truth the existence of this increase is not easy to demonstrate, let alone its cause.[68] Did *FNM* have such a symbolic impact, emboldening managers to make unilateral changes without bargaining? The decision coincided with a recession that was particularly severe in heavy industry, commonly unionized, in the Great Lakes region. "Plant closings" and "deindustrialization" were extensively studied in the 1980's, and their causes debated from various political perspectives. Some plant closings were negotiated with labor unions, and some were not. There is no scholarly or polemical literature, from any perspective, suggesting that management showed any decreased tendency after 1981 to bargain with unions about plant closings.[69]

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[68] There are no data series that directly observe the hiring of strike replacements. U.S. General Accounting Office, *Labor–Management Relations: Strikes and the Use of Permanent Replacements in the 1970s and 1980s* (1991) surveys management and labor respondents. Michael LeRoy, *Regulating Employer Use of Permanent Striker Replacements: Empirical Analysis of NLRA and RLA Strikes 1935–1991*, 16 Berkeley J. Emp. & Lab. L. 169 (1995) surveys reported legal decisions. Both suggest increased use of strike replacements in the 1980's, possibly beginning earlier.

[69] *See* William J. Baumol, Alan S. Blinder & Edward N. Wolff, *Downsizing in America: Reality, Causes, and Consequences* (2003); Barry Bluestone & Bennett Harrison, *The Deindustrialization of America: Plant Closings, Community Abandonment, and the Dismantling of Basic Industry* (1982); Gordon L. Clark, *Unions and Communities Under Siege: American Communities and the Crisis of Organized Labor* (1989); Gilda Haas &

The Impact of the Decision on the Law

All reported real-world cases of management downsizing, without informing its union, involve some combination of relocation of work to another location, desire to save labor costs, or antiunion animus. The application of *FNM* to any of these cases remains unclear. A review of subsequent decisions demonstrates that *FNM* did not clearly change the law. It is impossible to find a single post-*FNM* case that one is confident would have come out differently had *FNM* never existed.

Certainly *FNM* did not change the way any lawyer involved in such a case would gather or present evidence. Before *FNM*, lawyers for charging parties, and the General Counsel, seeking to demonstrate that a decision was bargainable, emphasized the elimination of jobs, the lack of fundamental change in the company's operations, and any hints of antiunion animus in the record. Lawyers for employers emphasized the fundamental change in company operations; the economic necessity of downsizing; and any special factors suggesting that bargaining would have been futile (such as the company's need for speed or secrecy). These are precisely the factors that remain relevant after *FNM*.

Nor has *FNM*'s methodology, the multifactor balancing test that considers the interests of the public and the employer, been influential.[70] There do not appear to be any cases that adopt it. The Board, however, has continued to be inconsistent, sometimes approaching mandatory subjects of bargaining as the application of rules and sometimes emphasizing factors idiosyncratic to particular cases. Whatever approach the Board takes, some court of appeals will disagree with it. All sides will cite *FNM*.

Subcontracting decisions, like *Fibreboard*, show the Board at its most rule-like. The Board holds that management must bargain about decisions to subcontract that merely substitute one group of workers for another. At least where such decisions have "nothing to do with change in the 'scope and direction' of its business," *FNM*'s concerns with protecting the "core of entrepreneurial control" do not come into play,

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Plant Closures Project, *Plant Closures: Myths, Realities and Responses* (1985); Richard B. McKenzie, *Fugitive Industry: The Economics and Politics of Deindustrialization* (1984); Francis A. O'Connell, *Plant Closings: Worker Rights, Management Rights, and the Law* (1986); Lawrence E. Rothstein, *Plant Closings: Power, Politics, and Workers* (1986); Wayne R. Wendling, *The Plant Closure Policy Dilemma: Labor, Law, and Bargaining* (1984); *Plant Closings: Public or Private Choices?* (Richard B. McKenzie ed. 1984); *Plant Closing Legislation* (Antone Aboud ed. 1984).

[70] "... 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." 452 U.S. at 679.

and no balancing is necessary.[71] The D.C. Circuit has approved this analysis, at least for subcontracting decisions plainly turning on labor costs. The opinion is skeptical of the Supreme Court's opinion in *FNM*, noting that its three-prong division of management decisions, and economic analysis, make little sense.[72] That court has also approved a flat rule mandating bargaining for the decision to transfer work from unionized workers to managers.[73] On the other hand, the Third Circuit reads *FNM* to require a balancing of factors before the Board orders bargaining even of subcontracting decisions.[74] As we know from Justice Blackmun's papers, this is surely an incorrect reading of *FNM*, in which all the justices who wrote memoranda rhetorically expressed fidelity to *Fibreboard* and disclaimed any desire, as Justice Blackmun put it, "to overrule *Fibreboard* or confine it to its facts."[75]

Relocation decisions, in which work is transferred from a unionized location to another (typically nonunion), are analyzed differently.[76] The Board in *Dubuque Packing Company* articulated a balancing approach which the D.C. Circuit accepted.[77] The Board's approach though is not the freewheeling balancing of *FNM* with its consideration of all the "interests" of each side and the public.

> 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. If the General Counsel successfully carries his burden in this regard, he will have established prima facie that the employer's relocation decision is a mandatory subject of bargaining. At this juncture, the employer may produce evidence rebutting the prima facie case by establishing that the work performed at the new location varies significantly from the work performed at the former plant, establishing that the work performed at the former plant is to be discontinued entirely and not moved to the new location, or establishing that the employer's decision involves a change in the scope and direction

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[71] Mid–State Ready Mix, Div. of Torrington Industries, 307 NLRB 809 (1992).

[72] Rock–Tenn Co. v. NLRB, 101 F.3d 1441 (D.C. Cir. 1996).

[73] Regal Cinemas, Inc. v. NLRB, 317 F.3d 300 (D.C. Cir. 2003).

[74] Furniture Renters of America, Inc. v. NLRB, 36 F.3d 1240 (3d Cir. 1994).

[75] Justice Harry A. Blackmun, Memorandum to the Conference, June 9, 1981, Blackmun Papers.

[76] Recall that at the oral argument in *FNM*, the Supreme Court put a hypothetical about relocation to FNM's counsel, who responded that this would be a mandatory subject of bargaining.

[77] Dubuque Packing Co., 303 NLRB 386 (1991), *enforced sub nom.* United Food & Commercial Workers Int'l. U., Local 15–A v. NLRB, 1 F.3d 24 (D.C. Cir. 1993).

> 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.[78]

The Fourth Circuit though has rejected the approach of *Dubuque Packing*, holding that an employer has no duty to bargain at all about a decision to close anything, even if work is then transferred to a new plant.[79]

FNM has failed to appear in other contexts in which one might have expected citation to it. The Board once distinguished it as "a situation where control over the employer's decision rested with a third party."[80] If this fact is material to the holding of *FNM*, the case has little application at all. Even its author managed to forget it. Six years after *FNM*, Justice Blackmun again wrote for the Court, in a case finding a dyeing business, formed by former officers and customers of a failed unionized company, to have succeeded to its predecessor's bargaining obligation when it hired a workforce comprised mainly of employees of the predecessor. "[D]espite the Union's desire to participate in the transition between employers, it was left entirely in the dark about petitioner's acquisition."[81] Justice Blackmun had forgotten why that was.

There are few academic defenders of the *FNM* opinion, particularly its balancing approach. Most recent academic discussions of mandatory subjects of bargaining attempt to redefine the category with bright-line tests, drawn either from antitrust law,[82] or from a self-described economic approach under which some management decisions, based on subject matter, are stipulated to be efficient (ergo not bargainable), whilst others are termed opportunistic.[83] This scholarship has exerted no influence over actual cases, as we have seen. The concept of efficiency does not fit

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[78] *Id.*

[79] Dorsey Trailers, Inc. v. NLRB, 233 F.3d 831 (4th Cir. 2000).

[80] Collateral Control Corp., 288 NLRB 308, 309 n.4 (1988).

[81] Fall River Dyeing & Finishing Corp. v. NLRB, 482 U.S. 27, 39 n.6 (1987).

[82] Michael C. Harper, *Leveling the Road from* Borg–Warner *to* First National Maintenance*: The Scope of Mandatory Bargaining*, 68 Va. L.Rev. 1447 (1982).

[83] Michael L. Wachter & George M. Cohen, *The Law and Economics of Collective Bargaining: An Introduction and Application to Problems of Subcontracting, Partial Closure, and Relocation*, 136 U. Pa. L.Rev. 1349 (1988); Armen A. Alchian, *Decision Sharing and Expropriable Specific Quasi–Rents: A Theory of First National Maintenance v. NLRB*, 1 Sup. Ct. Econ. Rev. 235 (1982).

the duty to bargain in good faith. All else being equal, it is more efficient to replace five unionized workers with three, or five nonunionized workers, or five workers in China. In the absence of a duty to bargain, however, the replaced workers bear all the costs of this decision. The distribution of those costs is obviously a distributional question that is not captured by any concept of efficiency.

Over two decades after *FNM*, it remains as difficult as ever to predict whether any particular instance of downsizing is a mandatory subject of bargaining. The Supreme Court was induced to decide a hypothetical case, and there are few, if any, real cases that resemble it.

Larger instances of job elimination are, since 1998, governed by the Worker Adjustment Retraining and Notification (WARN) Act, requiring (to oversimplify) firms with at least one hundred employees to give sixty days' notice of decisions causing job loss for at least fifty employees.[84] Ironically, the very reason that motivated the Chamber of Commerce to take *FNM* to the Supreme Court—to give employers the right not to inform their unions of impending downsizing—afforded some protection by *FNM*, is now largely lost with WARN. One would expect that today unions with WARN notice of imminent downsizing are often able to extend their right to bargain about the effects of the decision to bargaining about the decision itself, but there are so far no behavioral studies that document such a development.

The Impact of the Decision on First National Maintenance and its Lawyer

First National Maintenance Corporation no longer exists under that name. Its partners, Marsh, Golden and Greenberg, soon pursued other business interests. Their carbonated apple juice, sold under the name Snapple, was not a success. The next Snapple product, bottled iced tea, was. Snapple went public in 1992 and was soon thereafter sold to Quaker Oats (it has been sold several times since). Gradually, the founders left the company as very wealthy men. Hyman Golden as late as 1996 helped his sons run an office cleaning company, "a successor to one of the businesses the Snapple founders used to own."[85] Arnold Greenberg and Leonard Marsh, looking back on their careers, offer these "tips for entrepreneurs": "Hire the best people you can afford and pay them as much as you can afford. Don't be cheap when it comes to hiring the best people because they will get a better job elsewhere. Don't be afraid to pay what you might think is an exorbitant amount to get the best people. Give your key employees a piece of the business because they'll work

[84] 29 U.S.C. §§ 2101–2109 (2000).

[85] Harry Berkowitz, *Annoyed, Frustrated (and Very Rich)*, Newsday, Nov. 25, 1996, at C8.

harder. They're not only making themselves rich; they'll make you rich."[86]

Sanford Pollack was right. His Supreme Court argument was indeed his proudest moment. Nine years later, he persuaded a Teamster pension fund of which he was counsel to deposit $30 million with Prudential Securities, which then kicked back over $100,000 to Pollack. Two years after that, he arranged for the destruction of his Florida vacation house by arson, and then removed $9.3 million from the same Teamster pension fund. He pleaded guilty to some of these (and other counts), was convicted of others, and served several years in prison.[87] Not every lawyer would have advised FNM in 1977 to risk back pay by refusing to bargain with 1199 at all. But Pollack, as we know, was a risk taker.

Conclusion

In the same spring of 1977, a different group of maintenance workers, at a condominium complex a few hundred miles from Brooklyn, worked for a maintenance contractor and were represented by a union. The maintenance contractor, like FNM, withdrew from the building. When the dust settled, the Labor Board held that the owner of the condominium buildings was their employer, with a duty to bargain with their union.[88] While there are a number of factual distinctions between this case and *FNM*, the principal distinction is Lake Ontario. These maintenance workers worked in Toronto; their labor board was the Ontario Labour Relations Board; and their case is the fountainhead of that aspect of modern Canadian labor law that often, though by no means always, finds the owner of the building to be the legal employer of maintenance employees working under a contractor.[89]

Generalization about who is the employer in Canadian labor law is difficult. Provincial labor boards and courts, like courts in the U.S. determining who is the employer, utilize a multi-factored approach that

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[86] Harry Berkowitz, *Annoyed, Frustrated (and Very Rich)*, Newsday, Nov. 25, 1996, at C8.

[87] United States v. Pollack, 91 F.3d 331 (2d Cir. 1996) (appeal of conviction); Pollack v. Hobbs, 98 F.Supp.2d 287 (E.D.N.Y. 2000) (denying motion to vacate conviction), *aff'd*, 8 Fed. Appx. 37 (2d Cir. 2001) (mem.); Local 875 IBT Pension Fund v. Pollack, 992 F.Supp. 545 (E.D.N.Y. 1998) (civil suit); In re Pollack, 640 N.Y.S.2d 790 (App.Div. 1996) (disbarment); St. Paul Fire & Marine Insurance v. Horowitz & Pollack P.C., Supreme Court, New York County, NYLJ, Feb. 13, 1998, at 24 (available on LEXIS, New York Law Journal database) (malpractice insurance void because of Pollack's material misrepresentations). All have different information about Pollack.

[88] Labourers' International Union of North America Local 183 v. York Condominium Corp. No. 46, 1977 OLRB Rep. Oct. 645.

[89] These two paragraphs derive from an unpublished seminar paper by David A. Wright, Agency Workers and Collective Bargaining Law in Canada (2000).

resists generalization across cases. Indeed, the Supreme Court of Canada has insisted on such a multi-factor approach.[90] However, it is not unusual for this multi-factor analysis to result in a finding that the owner of a building is the employer of the maintenance workers, either jointly, or nominally, employed by a contractor.[91] U.S. readers will find particularly ironic that this jurisprudence stems from a case, like *FNM* but with sharply different results, arising from the 1977 decision of a maintenance contractor to withdraw from serving a building.

If a case like *FNM* arose today, advocates and decisionmakers would be armed with several concepts and categories not in common use in 1977. First, we would understand that the case involves the "working poor," "low-wage service workers," whose jobs are growing numerically, while their wages never rise above poverty level and provide no other benefits.[92] We would understand how employment of maintenance workers by independent contractors is related to their poverty. Maintenance workers employed by contractors earn less than maintenance workers employed directly, despite equal educational attainment; are half as likely to be unionized and about a third as likely to have health insurance; and are more heavily female, African–American, Latino and Latina.[93] We would know how bargaining unit rules, secondary boycott law, and other aspects of labor law frustrate collective bargaining for low-wage maintenance workers, particularly those working for contractors.[94] We would know how successful union organization among janitors often involves lawful public pressure on the building owner who is the ultimate consumer of their services, for example in the Justice for Janitors campaigns of the Service Employees International Union.[95]

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[90] Pointe–Claire (City) v. Quebec (Labour Court), [1997] 1 S.C.R. 1015 (dictum).

[91] 1 Jeffrey Sack, Q.C., C. Michael Mitchell, & Sandy Price, *Ontario Labour Relations Board Law and Practice* §§ 2.6–2.12 (3d ed. 1997).

[92] *See, e.g.*, Barbara Ehrenreich, *Nickel and Dimed: On (Not) Getting By in America* (2001); Katherine S. Newman, *No Shame in My Game: The Working Poor in the Inner City* (1999); David K. Shipler, *The Working Poor: Invisible in America* (2004); Beth Shulman, *The Betrayal of Work* (2003).

[93] Arindrajit Dube & Ethan Kaplan, *Outsourcing, Wages, and Benefits: Empirical Evidence from the Service Sector*, paper presented at the American Economics Association Annual Meeting, Washington, D.C., January 5, 2003.

[94] Howard Wial, *The Emerging Organizational Structure of Unionism in Low–Wage Services*, 45 Rutgers L.Rev. 671 (1993); Alan Hyde, *Who Speaks for the Working Poor?: A Preliminary Look at the Emerging Tetralogy of Representation of Low–Wage Service Workers*, 13 Corn. J. L. & Pub. Policy 599 (2004).

[95] Howard Wial, *The Emerging Organizational Structure of Unionism in Low–Wage Services*, 45 Rutgers L.Rev. 671, 693–98 (1993); Christopher L. Erickson, Catherine Fisk, Ruth Milkman, Daniel J.B. Mitchell, & Kent Wong, Justice for Janitors in Los Angeles and Beyond: A New Form of Unionism in the 21st Century? *in The Changing Role of Unions:*

Today, if the maintenance workers at Greenpark worked under the supervision of Greenpark supervisors and alongside Greenpark employees—we do not know whether this was true in 1977—District 1199, union for those other employees, might seek to accrete them into the Greenpark unit, on the theory that they were jointly employed by Greenpark and FNM and shared a community of interest with Greenpark employees.[96]

It is only a matter of time before a union seeking to represent maintenance employees will claim, Canadian-style, that their employer, either individually or jointly, is the owner of the building that they maintain. It is not possible to predict how the Board will deal with this claim. In employment statutes other than the NLRA, for which federal courts are more free to make policy, courts have greatly expanded the concept of "employer" and "joint employment" in the past three years. Courts in the Second Circuit, where *FNM* arose, have found that garment workers are jointly employed by a labor contractor and the garment manufacturer who is the ultimate purchaser of their services;[97] delivery personnel for supermarkets are jointly employed by those markets and the contractors who supply their labor, despite attempts to characterize them as independent contractors;[98] and recipients of public assistance, required to work without pay on city maintenance jobs as a condition of receiving welfare grants, are employees of the city, protected by civil rights[99] and labor standards law.[100] Finding maintenance workers to be jointly employed by a maintenance contractor and a building owner would avoid the absurd result of *FNM*, in which the contractor didn't have to bargain because its choice of customers was a managerial

New Forms of Representation (Phanindra V. Wunnava, ed.) (2004); Jesús Martínez Saldaña, *At the Periphery of Democracy: The Binational Politics of Mexican Immigrants in Silicon Valley* (Ph.D. dissert., University of California, Berkeley, Ethnic Studies, 1993).

[96] M.B. Sturgis, Inc., 331 NLRB 1298 (2000); *overruled by,* H.S. Care LLC, 343 NLRB No. 76, 176 LRRM 1033 (2004).; see particularly the companion *Jeffboat* case, involving a similar accretion. The Board has changed its policies in this area many times.

[97] Ling Nan Zheng v. Liberty Apparel Co., Inc., 355 F.3d 61 (2d Cir. 2003) (FLSA); Liu v. Donna Karan International, Inc., 2001 WL 8595 (S.D.N.Y. 2001); (FLSA and state wage law).

[98] Ansoumana v. Gristede's Operating Corp., 255 F.Supp.2d 184 (S.D.N.Y. 2003) (FLSA and state wage law).

[99] United States v. City of New York, 359 F.3d 83 (2d Cir. 2004) (recipients of public assistance working without pay in Work Experience Program are statutory employees protected by Title VII against sexual harassment). Note that Title VII, like the NLRA, uses a common law test to determine who is an employer.

[100] Stone v. McGowan, 308 F.Supp.2d 79 (N.D.N.Y. 2004) (recipient of public assistance working in Work Experience Program is statutory employee who must be paid minimum wage).

prerogative, while the building owner didn't have to bargain because it hired through a contractor.

There will never again be a case like *First National Maintenance*. But, then again, there never was.