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PLANT CLOSURES AND RELOCATIONS UNDER THE NATIONAL LABOR RELATIONS ACT

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INTRODUCTION

Employers close or relocate¹ their operations for a myriad of reasons. Often their objective is to streamline operations or cut financial losses. Although closure or relocation may improve an employer's financial situation, it frequently leaves many employees at the affected plant without jobs.² Thus, plant closure or relocation decisions often pit employers' interests in improving economic conditions against employees' interests in keeping their jobs. This clash of interests could develop into a bitter, even violent, dispute that disrupts not only the employer's business, but also much of the commerce carried on in communities surrounding the employer's plant. To avoid these disruptions in commerce, Congress enacted the National Labor Relations Act (NLRA) in 1935 and amended it in 1947.³

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This article primarily expresses the viewpoint of management. The authors represent management exclusively in labor and other employment law matters.

1. For purposes of this article, a plant relocation is a transfer of equipment, work, or employees from one plant to another at a different location.

2. During 1983 and 1984, approximately one million workers lost their jobs as a result of plant closures or major layoffs by some 7,800 employers. Manufacturing workers were displaced at a rate three times the displacement rate of service industry employees. *Plant Closings or Mass Layoffs Affected One Million Workers in 1983—84, GAO Finds*, Daily Lab. Rep. (BNA) No. 84, at A-12 (May 1, 1986).

3. National Labor Relations Act of 1935, ch. 372, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 141—66 (1982)).

The primary purpose of the NLRA is to eliminate “[i]ndustrial strife which interferes with the [free] flow of commerce.”⁴ Congress recognized that a principal cause of industrial strife was the failure of employers and labor unions to confer and negotiate over matters of critical mutual concern.⁵ Consequently, one of the NLRA’s bedrock principles is that labor peace is advanced by good faith bargaining between management and labor. Section 8(d), therefore, requires management and labor “to meet at reasonable times and [confer] in good faith [with respect to] wages, hours, and other terms and conditions of employment.”⁶

The duty to bargain, however, does not impose a concomitant duty on either party to reach agreement or make concessions.⁷ Moreover, the bargaining duty applies only to mandatory subjects of bargaining identified in the NLRA: “wages, hours, and other terms and conditions of employment.”⁸ With respect to other subjects, commonly called permissive subjects, “each party is free to bargain or not to bargain.”⁹ Once an agreement is reached, however, neither party may, without the other’s consent, terminate or modify agreement terms covering mandatory subjects of bargaining.¹⁰

Another cornerstone of the NLRA is the right accorded employees to form or join a labor union.¹¹ Congress determined that prospects for labor peace were enhanced by granting employees the right to organize and engage in concerted activity to promote their interests.¹² To preserve this right, section 8(a)(3) of the NLRA prohibits employers from discriminating against employees because the employees formed or joined a labor union or engaged in protected concerted activity. This section also prohibits employers

4. 29 U.S.C. § 141(b) (1982).

5. 29 U.S.C. § 151 (1982); *Fibreboard Paper Prod. Corp. v. NLRB*, 379 U.S. 203, 211 (1964) (“One of the primary purposes of the Act is to promote the peaceful settlement of industrial disputes by subjecting labor-management controversies to the mediatory influence of negotiation.”).

6. 29 U.S.C. § 158(d) (1982). In addition, section 8(a)(5) of the Act states: “It shall be an unfair labor practice for an employer . . . to refuse to bargain collectively with the representatives of his employees.” 29 U.S.C. § 158(a)(5) (1982).

7. 29 U.S.C. § 158(d). *See also* *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342, 348—49 (1958) (There is an obligation of the employer and labor representative to meet and confer in good faith concerning employment conditions.).

8. *Wooster*, 356 U.S. at 349 (quoting 29 U.S.C. § 158(d)).

9. *Id.* at 349.

10. 29 U.S.C. § 158(d) (1982).

11. 29 U.S.C. § 157 (1982).

12. 29 U.S.C. §§ 151, 158(a)(1), (3) (1982).

from discriminating against employees in an attempt to dissuade them from forming or joining a union.¹³

The industrial conflict these NLRA provisions are meant to minimize or eliminate is precisely the sort of conflict that may arise when plants are closed or relocated. Employers that violate these provisions commit unfair labor practices. This Commentary will discuss how these provisions apply to plant closures and relocations.¹⁴ Specifically, it will discuss when closures or relocations are

13. 29 U.S.C. § 158(a)(3). "It shall be an unfair labor practice for an employer . . . by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization" *Id.*

14. This article discusses plant closures and relocations under the NLRA only. Other federal and state laws may impose obligations and constraints on employers. For instance, federal civil rights statutes prohibit employers from discharging, laying off, or transferring an employee as part of a closure or relocation based on the employee's race, color, religion, sex, national origin, or age. Civil Rights Act of 1964, tit. VII, 42 U.S.C. §§ 2000e-1—17 (1982); Age Discrimination in Employment Act, 29 U.S.C. §§ 621—634 (1982). In addition, the Employee Retirement Income Security Act, 29 U.S.C. §§ 1001—1381 (1982), may affect pension rights and other benefits of displaced employees.

A closure or relocation may also be within the scope of federal law covering breaches of a collective bargaining agreement. *See* 29 U.S.C. § 185 (1982). Furthermore, a union might challenge a closure or relocation through the grievance procedure set forth in the agreement. If the employer's action breached the agreement, an arbitrator may require the employer to reopen its closed plant and pay displaced employees back pay.

In February 1989, the recently promulgated federal Worker Adjustment and Retraining Notification Act of 1988 becomes effective. Pub. L. No. 100-379, 102 Stat. 890 (1988). The Act requires that businesses with over 100 employees provide 60 days notice of any layoff lasting six months or more that affects 50 or more employees at one site. *Id.* at §§ 2(a)(1)—(2), 3(a). The mass layoff provision would take effect if 50 or more employees at one site lose their jobs and if the affected employees make up a third or more of the workforce. *Id.* at § 2(a)(3). If 500 or more employees are to be laid off, notice of the layoff will be required even if that number does not amount to a third of the workforce. *Id.* at §§ 2(a)(3), 3(a). Employers also are required to provide notices of such layoffs to the "[s]tate dislocated worker unit . . . and the chief elected official of the unit of local government" where the "closing or layoff is to occur." *Id.* at § 3(a)(2). The 60 day period does not apply to closings and layoffs that result from business circumstances that could not be reasonably foreseen or to faltering companies that are "actively seeking capital or business" to avoid a shutdown when "the employer reasonably and in good faith believe[s] that giving the notice required would [preclude] the employer from obtaining the needed capital or business." *Id.* at § 3(b).

In addition, several states require employers to provide advance notice of a plant closure or relocation and to offer benefits, such as severance pay and continued health insurance coverage, to employees adversely affected by the closure or relocation. *See* CONN. GEN. STAT. § 31-51o (Supp. 1988); HAW. REV. STAT. §§ 394B-1 to -2, 394B-9 to -12 (Supp. 1987); ME. REV. STAT. ANN. tit. 26, § 625(B)(1)—(4), (6)—6(A) (Supp. 1988); MD. CODE ANN. § art. 83A, § 3-201 (Interim Supp. 1988); MASS. GEN. L. ch. 151A, § 71A—71G (Supp. 1988) and ch. 149, § 179B (1982); MICH. COMP. LAWS ANN. § 450.736 (West Supp. 1988); S.C. CODE ANN. § 41-1-40 (Law. Co-op. 1986); TENN. CODE ANN. §§ 50-1-601(2), -602(a) (Supp. 1988); WIS. STAT. ANN. § 109.07 (West 1988); *see also* V.I.

lawful; when closures or relocations violate the NLRA anti-discrimination provision; when an employer must bargain with its employees' union over a plant closure decision and the effects of the decision; when the NLRA, in conjunction with a collective bargaining agreement, restricts an employer's right to close or relocate; when an employer must transfer employees as part of its plant relocation; and when an employer must continue to recognize and bargain with its employees' union after a relocation. Finally, the Commentary discusses remedies that are available for NLRA violations.

I. DISCRIMINATORY PLANT CLOSURES AND RELOCATIONS

Section 8(a)(3) prohibits employers from discriminating against employees with the intent to discourage their membership in a union.¹⁵ Generally, a full or partial closure violates section 8(a)(3) if the closure is prompted by anti-union sentiment or is in conjunction with an employer's establishment of a "runaway shop."¹⁶ Similarly, a plant relocation that establishes a runaway shop or is otherwise motivated by anti-union animus violates this section.¹⁷ An employer that shuts down and liquidates its entire business does not violate the Act, regardless of the reasons for the shutdown.¹⁸ Closures and relocations based on economic reasons also do not violate section 8(a)(3).¹⁹

A prima facie case of a section 8(a)(3) violation is established if the General Counsel for the National Labor Relations Board (NLRB) makes a showing that employee conduct protected by the NLRA was the motivating factor behind the employer's decision to

CODE ANN. tit. 24, § 471 (1986). Consequently, before closing or relocating a plant, an employer should look beyond the NLRA to ascertain what other legal constraints or obligations apply.

15. 29 U.S.C. § 158(a)(3) (1982).

16. See, e.g., *Textile Workers Union v. Darlington Mfg. Co.*, 380 U.S. 263, 272-73 (1965); *Garwin Corp.*, 153 N.L.R.B. 664, 664-65 (1965), *enforced in relevant part sub nom. ILGWU v. NLRB*, 374 F.2d 295 (D.C. Cir. 1967), *cert. denied*, 387 U.S. 942 (1967). A "runaway shop" exists when the employer, motivated by anti-union sentiment, "transfer[s] its work to another plant or open[s] a new plant in another locality to replace its closed plant." *Darlington*, 380 U.S. at 272-73.

17. *Garwin*, 153 N.L.R.B. at 664-65; *Ethyl Corp.*, 231 N.L.R.B. 431, 433 (1977); *Strawsine Mfg. Co., Inc.*, 280 N.L.R.B. No. 63, 123 L.R.R.M. (BNA) 1270, 1270 (Jan. 23, 1986).

18. *Darlington*, 380 U.S. at 273-74; *NLRB v. Fort Vancouver Plywood Co.*, 604 F.2d 596, 600 (9th Cir. 1979), *cert. denied*, 445 U.S. 915 (1980).

19. *Litton Mellonics Sys. Div.*, 258 N.L.R.B. 623, 626 (1981), *enforced*, 738 F.2d 447 (9th Cir. 1984); *Weather Tamer, Inc. v. NLRB*, 676 F.2d 483, 488 (11th Cir. 1982).

close or relocate a plant.²⁰ To overcome a prima facie case, an employer must show that the closure or relocation was based on economic reasons or would have occurred even in the absence of protected activity.²¹ Otherwise, the prima facie case stands un rebutted and the employer is liable under section 8(a)(3).²²

In limited circumstances, however, the general counsel may establish a prima facie case without independent proof of anti-union motivation. If the employer's conduct discriminated, foreseeably discouraged employees from engaging in protected activity, and was "inherently destructive of employee interests,"²³ then a prima facie case is established.²⁴ The employer can rebut the prima facie case only by evincing a business justification for its conduct.²⁵

A. Plant Closures

The Supreme Court announced rules governing the closure of an entire business and partial closures in *Textile Workers Union v. Darlington Manufacturing Co.*²⁶ "[A]n employer has the absolute right to terminate his entire business for any reason he pleases" ²⁷ An employer does not, however, have an absolute right to close part of the business;²⁸ "a partial closing is an unfair labor practice under section 8(a)(3) if motivated by a purpose to chill unionism in any of the remaining plants of the single employer and if the employer may reasonably have foreseen that such closing would likely have that effect."²⁹

20. *Litton*, 258 N.L.R.B. at 623 (General Counsel must show that employee conduct protected by the NLRB motivated the closing or relocation).

21. *Id.* at 637.

22. *Wright Line*, 251 N.L.R.B. 1083, 1089 (1980), *enforced*, 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982), *cited with approval* *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 400—03 (1983). *See also* *Safelite*, 277 N.L.R.B. 782, 793 (1985); *Litton*, 258 N.L.R.B. at 637.

23. *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 33 (1967) (quoting *Labor Board v. Brown*, 380 U.S. 278, 287 (1965) (employer refused to pay vacation benefits to employees who were on strike)).

24. *Id.* at 33.

25. *Id.* at 33—34.

26. 380 U.S. 263 (1965).

27. *Textile Workers Union of America v. Darlington Mfg. Co.*, 380 U.S. at 268. An employer does not commit an unfair labor practice by closing "his entire business, even if liquidation is motivated by vindictiveness toward the union." *Id.* at 274.

28. *Id.* at 268.

29. *Id.* at 275. In *Darlington*, the employer shut down one of its textile mills after a union election victory at the mill. The Supreme Court remanded the case to the Board instructing it to determine whether the employer closed the mill to chill unionism at its remaining mills and, if so, whether the closure had that effect. *Id.* at 276—77.

In determining whether unlawful chilling occurred, the Board examines several factors: (1) any contemporaneous union activity at the facility to be closed and at the employer's other plants; (2) the geographic proximity of the employer's remaining plants to the closed facility; (3) the likelihood that employees at the remaining plants will learn of the circumstances surrounding the closure through employee interchange or contact; and (4) any representations made by the employer's agents to other employees.³⁰

The Board finds plant closures violate section 8(a)(3) when these and other relevant factors indicate an intent to chill unionism. In *B&P Trucking, Inc.*,³¹ shortly after a trucking operation was opened, a union filed a representation petition seeking to represent the drivers. Three days before a scheduled Board hearing on the union's petition, the employer closed the operation.³² The Board found that the employer's alleged economic reasons for the closure were a pretext for chilling unionism and found that the employer violated section 8(a)(3). In so holding, the Board focused on the timing of the closure in relation to the union's representation petition, statements by company officials intimating that the purpose of the shutdown was to avoid the union, and the employer's resumption of trucking operations through a subcontractor.³³ The Board has also found a violation of section 8(a)(3) when an employer's stated reasons for the closure were shifting and contradictory and the closure occurred in conjunction with other unfair labor practices.³⁴

The Board has refused to find that a plant closure violated section 8(a)(3) in other contexts.³⁵ For example, in *Armored Transport, Inc.*,³⁶ the employer, an armored trucking and messenger business, closed its San Bernardino operation and consolidated it with another operation thirty miles away after its employees engaged in a lawful economic strike.³⁷ The Board found the employer closed

30. See, e.g., *Bruce Duncan Co.*, 233 N.L.R.B. 1243 (1977), *modified on other grounds*, 590 F.2d 1304 (4th Cir. 1979); *George Lithograph Co.*, 204 N.L.R.B. 431, 431-32 (1973); *Motor Repair, Inc.*, 168 N.L.R.B. 1082, 1083 (1968).

31. 279 N.L.R.B. 693 (1986).

32. *B&P Trucking, Inc.*, 279 N.L.R.B. at 700.

33. *Id.* at 700-01.

34. *Alaska Cummins Services, Inc.*, 281 N.L.R.B. No. 161, 123 L.R.R.M. (BNA) 1189, 1189 (Sept. 30, 1986).

35. See, e.g., *Armored Transport, Inc.*, 282 N.L.R.B. No. 127, 124 L.R.R.M. (BNA) 1180 (Jan. 22, 1987); *DeSoto, Inc.*, 278 N.L.R.B. 788 (1986).

36. 282 N.L.R.B. No. 127, 124 L.R.R.M. (BNA) 1180 (Jan. 22, 1987).

37. *Id.* at 1, n.2, 124 L.R.R.M. (BNA) at 1180 n.2.

the San Bernardino facility for valid economic reasons arising from an inability to service customers during the strike. In particular, the employer lost a substantial number of accounts at the outset of the strike, could not service customers with the remaining clerical employees and supervisors, and was unable to hire replacement drivers before losing the accounts. Accordingly, the Board determined that the employer would have closed the facility simply because the drivers were absent. Although the striking employees were engaged in protected activity, it was not the protected nature of their absence that motivated the employer to close the operation.³⁸

B. Plant Relocations

Direct evidence of anti-union animus establishes a prima facie case of unlawful plant relocation. Thus, when an employer closes a plant to avoid a union at the plant and transfers the work to a new location, the employer establishes a runaway shop and thereby violates section 8(a)(3).³⁹ When there is either a closure but no transfer of work or the transfer of work requires merely a temporary and insubstantial increase in production at the new plant, there is no runaway shop.⁴⁰

Plant relocations have been held unlawful in a variety of situations. In *Garwin Corp.*,⁴¹ the employer closed a union plant in New York, laid off workers, and relocated to a nonunion plant in Florida.⁴² Although the employer maintained the relocation was due to the loss of a major customer in New York, direct evidence revealed the employer's anti-union animus.⁴³ The company's owner stated he wanted to stay out of union "clutches" in Florida and was fed up with union terrorism.⁴⁴ After the move, the company's production manager remarked that the main reason the company moved to Florida was to "get out of the union."⁴⁵ This evidence convinced

38. *Id.*

39. See *Textile Workers Union v. Darlington Mfg. Co.*, 380 U.S. 263, 272—73; *Weather Tamer, Inc. v. NLRB*, 676 F.2d 483, 491 (11th Cir. 1982).

40. *Frito-Lay, Inc. v. NLRB*, 585 F.2d 62, 67—68 (3d Cir. 1978) (employer acted to prevent the formation of a union by giving pay raises, threatening surveillance, and threatening discharge).

41. 153 N.L.R.B. 664 (1965), *enforced in part*, 374 F.2d 295 (D.C. Cir. 1967), *cert. denied*, 387 U.S. 942 (1967).

42. *Garwin Corp.*, 153 N.L.R.B. at 665.

43. *Id.* at 665, 676—80.

44. *Id.* at 671.

45. *Id.* at 672 n.12.

the Board that the employer closed the New York plant and moved to Florida to avoid bargaining with the union in New York and that the Florida plant was a runaway shop established in violation of section 8(a)(3).⁴⁶

An employer need not close an entire plant to be guilty of a runaway shop violation. In *Ethyl Corp.*,⁴⁷ the company closed part of its manufacturing operation at its Tennessee plant and moved the operation to its Louisiana plant because it feared a union election victory and subsequent strike at the Tennessee plant.⁴⁸ The Board held the relocation violated section 8(a)(3), finding that the work transfer was caused by the advent of the union at the Tennessee plant and the employer's hostility toward the union.⁴⁹

Even when an employer demonstrates substantial economic problems, the Board may find that a plant closure and relocation was caused by anti-union animus rather than economic hardship. In *Strawsine Manufacturing Co.*,⁵⁰ the employer closed a Michigan plant after contract bargaining with the union collapsed. The employer maintained that the closure was necessary due to economic problems. Three months after the closure the employer opened up a new plant 200 miles away from the old plant.⁵¹ The administrative law judge noted that the employer's economic problems were substantial, but found the economic justifications for the closure and relocation unconvincing in light of the secrecy surrounding the closure and relocation, the misrepresentations the employer made to the union regarding the relocation, and the contradictory reasons the employer gave for the relocation. The administrative law judge concluded, and the Board agreed, that the employer violated section 8(a)(3) by closing the union plant, laying off the union employees, and opening a "prototypical runaway shop" to avoid bargaining obligations to the union.⁵²

An employer's economic problems have been found to justify a company's closing one plant and transferring the plant's work to another location. In *Weather Tamer, Inc. v. NLRB*,⁵³ the company closed its Tuskegee, Alabama plant, laid off the employees, and

46. *Id.* at 680.

47. 231 N.L.R.B. 431 (1977).

48. *Ethyl Corp.*, 231 N.L.R.B. at 431.

49. *Id.* at 432-33.

50. 280 N.L.R.B. No. 63, 123 L.R.R.M. (BNA) 1270 (June 23, 1986).

51. *Strawsine Mfg. Co.*, 280 N.L.R.B. No. 63 app. at 4-17, 123 L.R.R.M. at 1270.

52. *Id.*

53. 676 F.2d 483 (11th Cir. 1982).

transferred the work to its newer Lewisburg, Tennessee plant after the employees approved a union.⁵⁴ In its initial decision, the Board determined that the closure and relocation constituted a runaway shop and had the purpose and effect of chilling unionism at the employer's other plants.⁵⁵

On appeal, the Eleventh Circuit applied the *Darlington* analysis⁵⁶ and found that the closure and relocation were motivated by business reasons rather than efforts either to chill unionism or establish a runaway shop.⁵⁷ The Tuskegee layoffs coincided with a significant decline in sales. The company-wide payroll had decreased by 200 employees. The Lewisburg plant did not hire additional employees or increase production to compensate for the Tuskegee shutdown.⁵⁸ In rejecting the Board's runaway shop finding, the court stated, "[t]he fact that Weather Tamer chose to close Tuskegee rather than its newly constructed Lewisburg facility is none of our concern. This decision was for management, not for the Board or this Court, to make."⁵⁹

The Board's decision that the closure had the purpose and effect of chilling unionism was based on a supervisor's statement to an employee that the company closed Tuskegee because employees there voted for the union. The court held this evidence insufficient noting that the record otherwise failed to establish that the employer conducted "a systematic campaign to chill unionism at its other plants."⁶⁰

Once a *prima facie* case of section 8(a)(3) discrimination is established, an employer may rebut by showing that the relocation would have occurred even in the absence of the employees' protected activity. In *Litton Mellonics Systems Division*,⁶¹ employees at the company's Woodland Hills facility frequently complained to management about the poor conditions at the facility and refused to work on one occasion because of the conditions. One day prior to this refusal, a union had filed an election petition with the Board. Management responded by threatening to discharge employees who complained about working conditions or promoted the

54. *Weather Tamer, Inc. v. NLRB*, 676 F.2d at 487.

55. *Weather Tamer, Inc.*, 253 N.L.R.B. 293 (1980).

56. *See supra* notes 26—30 and accompanying text.

57. *Weather Tamer*, 676 F.2d at 491—93.

58. *Id.* at 491.

59. *Id.*

60. *Id.* at 492—93.

61. 258 N.L.R.B. 623 (1981).

union. After these events, the employer laid off the employees and transferred their work to Sunnyvale.⁶² The Board held this evidence established a prima facie case of a discriminatory work transfer.⁶³

The employer maintained that relocation to Sunnyvale would have occurred even if the employees had not complained of working conditions or attempted to unionize. The physical conditions at Woodland Hills were unacceptable because the rooms were too small and unsatisfactorily designed, rest rooms did not meet state health and safety codes, the building lacked water fountains, and its air conditioning system was inadequate. Furthermore, another tenant in the building sought to take over its lease. The employer had sufficient unused space in Sunnyvale already under lease and much of the work was already at Sunnyvale.⁶⁴ Based on these facts, the Board was satisfied that the employer would have moved its work to Sunnyvale even absent the Woodland Hills employees' protected activity. Consequently, no section 8(a)(3) violation occurred.⁶⁵

Even if economic reasons sufficient to rebut a prima facie case exist, a closure or relocation decision may become a section 8(a)(3) violation if implementation of the decision is accelerated because of the employer's animosity toward the union.⁶⁶ Thus, an employer cannot accelerate an otherwise lawful decision to close operations upon learning of the employees' desire to unionize.⁶⁷ An employer also cannot accelerate the decision to transfer work to another plant to avoid bargaining with the union over whether the work is covered by the collective bargaining agreement.⁶⁸

62. Litton Mellonics Sys. Div., 258 N.L.R.B. at 623—25. One manager told employees to quit if they did not like the carpet glue fumes. *Id.* at 624—25.

63. *Id.* at 625.

64. *Id.*

65. *Id.* at 625—26.

66. Bridgford Distrib. Co., 229 N.L.R.B. 678, 679 (1977).

67. Preston Feed Corp., 134 N.L.R.B. 629 (1961), *enforced*, 309 F.2d 346 (4th Cir. 1962).

68. *Bridgford*, 229 N.L.R.B. at 679.

II. PLANT CLOSURE OR RELOCATION AS A MANDATORY SUBJECT OF BARGAINING

A. Decision Bargaining

Sections 8(a)(5) and 8(d) of the Act require an employer to bargain in good faith with the union representing its employees over mandatory subjects of bargaining: "wages, hours, and other terms and conditions of employment."⁶⁹ Generally, bargaining in good faith means that the employer must meet with the union, discuss mandatory subjects of bargaining, provide information relevant to the union's bargaining needs,⁷⁰ and seriously consider the union's proposals.⁷¹ Neither party is required to abandon its position or make concessions.⁷² Each must, however, bargain in good faith until an impasse is reached.⁷³ Once an impasse is reached, an employer may unilaterally implement changes "reasonably comprehended by his pre-impasse proposals."⁷⁴

Since the NLRA does not define the scope of "terms and conditions of employment," questions frequently arise whether a particular management decision, such as a plant closure or relocation decision, is a mandatory subject of bargaining. To clarify this issue, the Supreme Court and the NLRB have provided some guidelines.

The Supreme Court ruled in *Fibreboard Paper Products Corp.*

69. 29 U.S.C. §§ 158(a)(5), (d) (1982).

70. *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 303 (1979). In plant closure context, an employer may be required to furnish a substantial amount of information to the union regarding the circumstances surrounding the decision to close the plant. In *Roytype Div.*, 284 N.L.R.B. No. 88, 126 L.R.R.M. (BNA) 1134 (June 30, 1987), the Board found that a union was entitled to the employer's cost study, financial records, and data on recent subcontracting because the information was relevant to the employer's proposal to transfer unit work. The Board found that to bargain intelligently over labor cost concessions that might prevent the relocation, the union needed to understand the proportion of labor costs in the employer's overall operation. *Id.* at 1136. An employer may also be required to provide financial studies regarding the feasibility of continuing an operation, a cost analysis of a transfer operation and the operation of a new facility, a copy of a sales agreement leading to a closure, an accounting of proceeds from a sale of assets, and a full explanation of how proceeds may have been distributed. *See, e.g., St. Marys Foundry Co.*, 284 N.L.R.B. No. 30 at 3, 125 L.R.R.M. (BNA) 1146, 1147 (June 12, 1987); *Litton Microwave Cooking Prod. Div.*, 283 N.L.R.B. No. 144 at 5-8, 125 L.R.R.M. (BNA) 1081, 1082-83 (May 15, 1987).

71. *First Nat'l Maintenance Corp. v. NLRB*, 452 U.S. 666, 678 n.17 (1981).

72. *Id.*; 29 U.S.C. § 158(b) (1982).

73. An impasse is reached "after good-faith negotiations have exhausted the prospects of concluding an agreement." *Taft Broadcasting Co.*, 163 N.L.R.B. 475, 478 (1967), *enforced sub nom. American Fed'n of Television & Radio Artists v. NLRB*, 395 F.2d 622 (D.C. Cir. 1968).

74. *American Fed'n*, 395 F.2d at 624.

*v. NLRB*⁷⁵ that an employer's decision to discharge its maintenance employees and replace them with a subcontractor's employees fell within the scope of "terms and conditions of employment" of section 8(d) and, consequently, was a mandatory subject of bargaining.⁷⁶ The Court noted that the employer's decision was based on a desire to reduce labor costs and labor costs are a problem "peculiarly suitable for resolution within the collective bargaining framework."⁷⁷ The Court also noted that the employer's decision did not alter the company's basic operations; maintenance work still had to be performed in the employer's plant. Additionally, the decision did not require a capital investment but merely resulted in the employer's workers being replaced by a subcontractor's employees.⁷⁸ The Court concluded that requiring the employer to bargain over the decision "would not significantly abridge his freedom to manage the business."⁷⁹

In a caveat to the Court's ruling, Justice Stewart cautioned that not every management decision resulting in the termination of employment is a mandatory subject of bargaining.⁸⁰ Furthermore, the ruling should not be understood to require collective bargaining over management decisions that "lie at the core of entrepreneurial control."⁸¹ Management decisions that are "fundamental to the basic direction of a corporate enterprise or which impinge only indirectly upon employment security" are not mandatory subjects of bargaining.⁸²

Although *Fibreboard* did not specifically address the question of when plant closure or relocation decisions are subject to bargaining, it provided a framework for analyzing whether management decisions are mandatory subjects of bargaining. This analysis first examines the reasons behind the employer's decision and the effect the decision has on the employer's enterprise and then evaluates

75. 379 U.S. 203 (1964).

76. *Fibreboard Paper Prod. Corp. v. NLRB*, 379 U.S. at 210.

77. *Id.* at 213-14.

78. *Id.* at 213.

79. *Id.*

80. *Id.* at 218 (Stewart, J., concurring).

81. *Id.* at 223.

82. *Id.* Management decisions regarding advertising and promotion, product type and design, and financing arrangements generally are not mandatory subjects of bargaining. *Id.*; *First Nat'l Maintenance Corp. v. NLRB*, 452 U.S. 666, 676-77 (1981). Bargaining generally is required, however, over decisions regarding succession of layoffs and recalls, production quotas, and work rules. *First Nat'l Maintenance*, 452 U.S. at 677, (citing *Chemical & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 178 (1971)).

whether the collective bargaining process can resolve the problems underlying the decision.⁸³ The Supreme Court expanded upon this framework in *First National Maintenance Corp. v. NLRB*⁸⁴ when it explicitly decided whether the employer was required to bargain over a decision to close part of the company's operations.⁸⁵

First National Maintenance Corp. (FNM) provided janitorial services to commercial customers, including the Greenpark Care Center. After FNM and Greenpark failed to agree on new contract terms, FNM cancelled its contract with Greenpark and discharged the employees who serviced the Greenpark account. The employees' union filed section 8(a)(5) charges against FNM for failing to bargain over the decision to cancel the Greenpark contract.⁸⁶ The NLRB affirmed the administrative law judge's ruling that the employer had a duty to bargain over the decision and the failure to do so violated section 8(a)(5).⁸⁷

The Supreme Court reversed, recognizing that "[m]anagement must be free from the constraints of the bargaining process to the extent essential for the running of a profitable business," and must be assured "some degree of certainty" before it implements a decision that the decision will not later be held to constitute an unfair labor practice.⁸⁸ The Court declared, however, that bargaining over management decisions that affect an employee's continued 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."⁸⁹ Thus, if the burden of bargaining on management outweighs the benefits to the union, the decision is not a mandatory subject of bargaining.

The Court acknowledged the union's interest in job security for its members, in fair dealing, and in ensuring that a partial closure decision would not be made hastily or unnecessarily. The Court explained, however, that a union's interests in fair dealing is protected by section 8(a)(3), which prohibits partial closings based on anti-union animus. A union's interests in job security and prudent partial closure decisions are sufficiently protected by the requirement of section 8(a)(5) that employers bargain over the effects of

83. *Fibreboard*, 379 U.S. at 213—14.

84. 452 U.S. 666 (1981).

85. *First Nat'l Maintenance*, 452 U.S. at 667.

86. *Id.* at 668—70.

87. *Id.* at 671.

88. *Id.* at 678—79 (footnote omitted).

89. *Id.* at 679.

the decision.⁹⁰

On the other hand, the Court recognized that management may need flexibility to make decisions quickly and secretly in order to take advantage of business opportunities and to meet business exigencies. Such flexibility may be seriously encumbered if the decision must be discussed at the bargaining table before it is implemented.⁹¹ The Court observed:

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 both be futile and cause the employer additional loss.⁹²

Requiring the employer to bargain over a closure decision would provide the union with "a powerful tool for achieving delay, a power that might be used to thwart management's intentions in a manner unrelated to any feasible solution the union might propose."⁹³

After balancing these competing interests, the Court concluded that "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."⁹⁴ Thus, FNM's decision to close part of its operation was not a subject of mandatory bargaining.⁹⁵

The Court distinguished the partial closing decision in *First National Maintenance* from the decision to subcontract in *Fibreboard*. In *Fibreboard*, the decision was based on the employer's desire to reduce labor costs. The *First National Maintenance* decision was based on the employer's inability to reach an agreement with a customer. Labor costs problems are amenable to resolution through the collective bargaining process; contract problems with a customer are not.⁹⁶ Furthermore, *Fibreboard's* decision to subcontract did not significantly change its operations, but FNM's decision to shut down part of its operation was a sub-

90. *Id.* at 681—82.

91. *Id.* at 682—83.

92. *Id.* at 683.

93. *Id.*

94. *Id.* at 686.

95. *Id.*

96. *Id.* at 687—88.

stantial change.⁹⁷

The Supreme Court has not decided whether an employer must bargain over a decision to relocate a plant.⁹⁸ A plurality of the NLRB, however, concluded in *Otis Elevator Co. (Otis II)*⁹⁹ that bargaining is not required when relocation decisions turn upon a change in the nature or direction of a business.¹⁰⁰ If the decision turns upon labor costs, decisional bargaining is required.¹⁰¹ Expressly relying on *First National Maintenance Corp.*, the Board qualified this proposition; a relocation decision is not necessarily subject to bargaining simply because labor costs are among the reasons behind the decision.¹⁰² The crucial test is whether the decision "turns upon" labor costs, not whether the decision has an adverse impact on employees or whether a union can offer alternatives to relocation.¹⁰³

In *Otis II*, the employer closed a research and development facility in New Jersey, and transferred the operation and seventeen unionized research and development employees to a new research center in Connecticut. The transfer occurred because the company's technology was outdated, its product designs were too expensive and not competitive, and its research activities, diffused among several plants, were duplicative. The company believed that by consolidating its research and development work in its new research center in Connecticut it could overcome these problems.¹⁰⁴ The plurality concluded that the decision to relocate did not turn upon labor costs, but rather on a change in the nature and direction of the company's business. Consequently, the company had no

97. *Id.* at 688.

98. The Court explicitly stated, in *First Nat'l Maintenance*, that its decision expressed no view on whether plant relocation decisions are mandatory subjects of bargaining. *Id.* at 686 n.22.

99. 269 N.L.R.B. 891 (1984).

100. *Otis Elevator Co.*, 269 N.L.R.B. at 893 (*Otis II*). The Board listed examples of such decisions: selling a business, disposing of assets, restructuring or consolidating operations, investing in labor-saving machinery, subcontracting, altering financing arrangements, and making decisions affecting sales, advertising, marketing, and product design. *Id.* at n.5. Note that *Fibreboard* did not hold that all subcontracting decisions must be bargained over. It merely held that the subcontracting decision *Fibreboard* made was based on labor costs and did not substantially affect the nature and direction of *Fibreboard's* business. Consequently, the decision was a mandatory subject of bargaining. See *supra* notes 75—85 and accompanying text.

101. *Id.* at 892.

102. *Id.* at 894; See *First Nat'l Maintenance*, 452 U.S. at 682.

103. *Otis II*, 269 N.L.R.B. at 892.

104. *Id.* at 891—92.

duty to bargain over the decision.¹⁰⁵

In a concurring opinion, Member Dennis, applying the analysis of *First National Maintenance*, developed a two-step test to determine whether an employer has a duty to bargain over the decision to relocate a plant.¹⁰⁶ The first step requires a determination of whether the employer's decision is "amenable to resolution through the bargaining process."¹⁰⁷

If the relocation decision is appropriate for bargaining, the second step requires the application of a balancing test weighing the benefits and burdens of mandatory bargaining.¹⁰⁸ "[I]f the benefit, for labor-management relations and the collective bargaining process, outweighs the burden placed on the conduct of the business," bargaining is required.¹⁰⁹ Under this test a relocation decision could turn on labor costs yet still not require bargaining if the burdens of bargaining outweighed the benefits.¹¹⁰

Applying this two-part analysis to the facts in *Otis II*, Member Dennis concluded that the company's decision to consolidate its research and development functions was not based upon factors that were within the union's control.¹¹¹ Because the union had no control over the problems that prompted the relocation, the decision was not subject to collective bargaining. Thus, she did not

105. *Id.*

106. *Id.* at 895 (Dennis, M., concurring). See also *supra* text accompanying notes 84-95.

107. *Id.* at 897 (quoting *First Nat'l Maintenance*, 452 U.S. at 678). Member Dennis found that a relocation decision is amenable to resolution through bargaining if a factor over which the union has control is a significant consideration in the employer's decision to relocate. A union has control over a decision factor when it could lend assistance or offer concessions that reasonably could affect the employer's decision. *Id.* Thus, a relocation decision that "turns on labor costs" would likely fall within Member Dennis' category of decisions that are amenable to resolution through bargaining. Her opinion does not expressly answer the question of whether a relocation decision could turn on factors other than labor costs and yet still be based upon factors over which the union has control.

108. *Id.* The obvious employee benefit from bargaining is the possibility of reaching agreements that could prevent or delay a relocation. The extent to which bargaining would be an undue burden on companies will often depend upon the amount of capital required to relocate, the scope of changes in operations resulting from the relocation, and the need for speed, flexibility, and confidentiality. *Id.*

109. *Id.* at 899 (quoting *First Nat'l Maintenance*, 452 U.S. at 679).

110. *Id.*

111. *Id.* For example, the union could not have granted concessions that could have altered the fact that the company's technology was outdated and that its product designs were too expensive and not competitive. Member Dennis found that it was also unlikely that the union could have offered any solution to the problems inherent in the company's diffusive and duplicative engineering and research activities. *Id.*

proceed to the balancing step in her analysis.

Member Zimmerman offered a third test in a concurring opinion in *Otis II*. According to Member Zimmerman, bargaining over a relocation decision is mandatory when the problems compelling the decision are amenable to resolution through collective bargaining.¹¹² Although he agreed with the plurality that a decision that turns upon labor costs falls within that definition, he also found that certain decisions that do not turn upon labor costs may require bargaining nevertheless.¹¹³ Bargaining could be mandatory when the union has a capacity to propose concessions that could reasonably be expected to alleviate the company's concerns. He concluded, however, that the decision in *Otis II* was "not amenable to resolution through bargaining."¹¹⁴

Member Zimmerman's test seems to be a hybrid of the plurality's straightforward "turns upon labor costs" test and Member Dennis' complex two-step analysis. Dennis' balancing test is unwieldy and impractical. It invites litigation because rarely will a union be satisfied that the employer fairly and objectively weighed the competing interests. The "turns upon labor costs" test offers employers a simpler, more functional guideline for determining when they must bargain.¹¹⁵ Even this test presents problems, however, because it is not always clear what constitutes labor costs or the extent to which labor costs prompt a relocation decision.

Since *Otis II*, the Board has consistently applied the "turns upon labor costs" test to determine if a plant closure or relocation decision is a mandatory subject of bargaining. When the decision was based on economic reasons or affected the scope, direction, or nature of an employer's business, the Board has held that the employer had no duty to bargain over the decision.¹¹⁶ However, *Otis*

112. *Id.* at 900 (Zimmerman, M., concurring in part and dissenting in part). Member Zimmerman dissented on the collateral issue of whether the company met its obligation to bargain about the effects of the decision. *Id.* at 901.

113. *Id.* Member Zimmerman did not provide any specific examples of such decisions but indicated that they may include decisions related to overall enterprise costs that are not limited specifically to labor costs. *Id.* at 900—01.

114. *Id.* at 901.

115. *See* Local 2179, *United Steelworkers of America v. NLRB*, 822 F.2d 559, 579 (5th Cir. 1987) (holding Board may legitimately prefer *Otis II* "turns upon labor costs" test over balancing test because *Otis II* promoted greater simplicity and predictability).

116. For instance, the Board has held a plant closure and relocation decision based on the employer's efforts to reduce operating costs is not a mandatory subject of bargaining. *See, e.g., Columbia City Freight Lines, Inc.*, 271 N.L.R.B. 12 (1984) (closure and relocation decision based on efforts to reduce truck mileage, fuel costs, and over-

II has received mixed reviews in the circuit courts. The Fifth Circuit has held that the Board's "turns upon labor costs" test in *Otis II* was a reasonable interpretation of section 8(a)(5).¹¹⁷ The Fourth Circuit, however, recently vacated a Board order applying the *Otis II* test and finding that an employer violated section 8(a)(5) by failing to bargain over a plant closure decision.¹¹⁸ The court found that the "turns upon labor costs" test was inconsistent with the Supreme Court's decision in *First National Maintenance* and held that when an employer closed part of a business for economic reasons, bargaining over the decision is not required.¹¹⁹

Even the Board has found that when labor costs are involved, this factor does not necessarily mean decision bargaining is required.¹²⁰ The Board has recognized that although labor costs may be a "motivating factor" and "one of the circumstances which

lapping routes, and to maximize equipment usage); *Bostrum Div.*, 272 N.L.R.B. 999 (1984) (work transfer decision based on efforts to reduce duplication of work, costs, and services, and to discontinue use of obsolete equipment). Likewise, a decision based on a loss of major customers or a significant decline in business is not subject to required bargaining. *See, e.g.*, *ABS Indus.*, 281 N.L.R.B. No. 145, 124 L.R.R.M. (BNA) 1214 (Sept. 30, 1986) (plant closed because company lost two major customers); *Hawthorn Melody, Inc.*, 275 N.L.R.B. 339 (1985) (processor and distributor of dairy products lost 50 to 70% of business); *Mack Trucks, Inc.*, 277 N.L.R.B. 711 (1985) (plant closed and relocated because company believed it had over-invested in capital assets at a time when the market for its product was depressed); *Fraser Shipyards, Inc.*, 272 N.L.R.B. 496 (1984) (plant closed and equipment transferred to subsidiary because of recession in shipping business).

In addition, an employer is not required to bargain over a decision to close and relocate a plant when the old plant is outmoded, noncompetitive, too costly to operate, or otherwise inadequate. *See, e.g.*, *Inland Steel Container Co.*, 275 N.L.R.B. 929 (1985), *petition for review denied sub nom. Local 2179, United Steelworkers v. NLRB*, 822 F.2d 559 (5th Cir. 1987) (Board determined that plant equipment was obsolete, the plant's physical layout hampered efficiency, the facility's plumbing was insufficient, and the rain and humidity common to New Orleans caused rust problems); *Kroger Co.*, 273 N.L.R.B. 462 (1984) (egg processing facility closed because it was outmoded, not competitive, and too costly to operate); *Drummond Coal Co.*, 277 N.L.R.B. 1618 (1986) (drastic change in the nature of employer's mining equipment necessitated change in outmoded repair operations). Furthermore, a decision to close and relocate a plant is not subject to bargaining if the old plant is subject to foreclosure and the community in which the new plant is located offered the employer attractive tax breaks. *Metropolitan Teletronics Corp.*, 279 N.L.R.B. 957, 959 (1986), *enforced without opinion*, 819 F.2d 1130 (2d Cir. 1987) (Although the decision to close was not subject to bargaining, the employer was required to bargain about the potential effects the closure would have on employees.).

117. *Local 2179*, 822 F.2d at 578.

118. *Arrow Automotive Indus.*, 284 N.L.R.B. No. 57, 125 L.R.R.M. (BNA) 1188 (June 25, 1987), *vacated*, 853 F.2d 223, 228 (4th Cir. 1988).

119. *Arrow Automotive Indus. v. NLRB*, 853 F.2d 223, 228 (4th Cir. 1988).

120. *Hawthorn Melody, Inc.*, 275 N.L.R.B. 339 (1985).

stimulated the evaluation process," the closure decision may nevertheless "turn upon" the loss in business rather than labor costs.¹²¹

The Board has not precisely defined what "turns upon labor costs" means or what "labor costs" are. Thus, whether a particular decision "turns upon labor costs" presents close cases such as *Inland Steel Container Co.*¹²² Inland Steel operated a barrel fabrication plant in downtown New Orleans.¹²³ The barrel fabrication business became highly competitive after 1980 in large part because of a new demand for double-lined barrels, the fabrication of which required two applications of lining material. Because the production line at the New Orleans facility was designed to fabricate only single-lined barrels, the facility was ill-equipped to make double-lined containers.¹²⁴

Moreover, the New Orleans facility's equipment was becoming obsolete and was deteriorating. Space for remodeling and expanding the facility was negligible. The growth of New Orleans produced increased traffic around the facility, cramping its shipping and receiving operations. In addition, the humid climate and an inadequate city storm sewage system caused rust and flooding in the plant. Finally, as a result of all of these factors, by 1982 the New Orleans plant was operating at a net loss.¹²⁵

It could not be disputed, however, that high labor costs were a problem. Inland Steel's national labor agreement required that employees at the New Orleans facility receive the same wage and benefit package employees received at certain other Inland Steel facilities. Because of intense competition, Inland Steel had repeatedly attempted to remove the New Orleans plant from that contract and obtain more competitive wage and benefit rates. During negotiations for a new collective bargaining agreement in 1982, Inland Steel proposed wage and benefit reductions at the New Orleans plant, but the proposal was rejected by the New Orleans local. During continued negotiations, Inland Steel signed an option agreement to purchase property adjacent to its Canton, Mississippi, facility. Subsequently, Inland Steel's president suggested to the board of directors that the company approach the union for "monumental wage relief" at the New Orleans plant, but the direc-

121. *Id.* at 341 (citing *Otis II*, 269 N.L.R.B. 891 (1984)).

122. 275 N.L.R.B. 929 (1985), *petition for review denied sub nom. Local 2179, United Steelworkers v. NLRB*, 822 F.2d 559 (5th Cir. 1987).

123. *Inland Steel Container Co.*, 275 N.L.R.B. at 929-30 (Dennis, M., concurring).

124. *Id.* at 936 & n.16.

125. *Id.*

tors rejected the proposal.¹²⁶

In late 1982, Inland Steel notified the union it was permanently closing the New Orleans plant because of the plant's low volume of production, high operating costs, and facility limitations.¹²⁷ After the union failed to accept an invitation to make a concessionary proposal, the company proceeded to discuss only the effects of the closure.¹²⁸ Finally, the company exercised its option to buy the Canton property, closed the New Orleans facility, and moved it to Canton.¹²⁹

In finding that Inland Steel did not violate section 8(a)(5) by failing to bargain over the decision to close the New Orleans facility, the Board adopted the administrative law judge's opinion that the decision turned upon general economics rather than upon labor costs.¹³⁰ Although labor costs were a factor in the Inland Steel search for a new location, the judge found the decision to close the New Orleans plant turned upon the deteriorating and obsolete plant equipment, an inefficient plant layout, and climatic problems. The judge noted that Inland Steel's president had suggested to the board of directors that the company ask the union for wage concessions; he found, however, that because the proposal was rejected by the board of directors and never made to the union and the union never made a concrete wage concession proposal, the president's suggestion did not establish that the subsequent plant closure decision turned upon labor costs.¹³¹ *Inland Steel* thus indicates that even though labor costs are considered, discussed, and become a definite factor in a decision to close a plant, the decision to close does not necessarily turn upon labor costs.¹³²

The Board has found that decisions turned upon labor costs when the employer and union did not seriously dispute that labor costs were "the most important consideration" in the employer's decision;¹³³ when the employer offered no explanation for its work

126. *Id.* at 935.

127. *Id.*

128. *Id.* at 938 & n.19.

129. *Id.* at 935.

130. *Id.* at 929.

131. *Id.* at 937.

132. See also *Machinists Automotive Trades Dist. Lodge No. 190 v. Peterbilt Motors Co.*, 666 F. Supp. 1352, 1358 (N.D. Cal. 1987); *Drummond Coal Co.*, 277 N.L.R.B. 1618, 1619 (1986); *Hawthorn Melody, Inc.*, 275 N.L.R.B. 339, 341 (1985); *Fraser Shipyards, Inc.*, 272 N.L.R.B. 496, 496—97 (1984); *Columbia City Freight Lines, Inc.*, 271 N.L.R.B. 12, 13 (1984); *Otis II*, 269 N.L.R.B. 891, 894 (1984).

133. *Litton Microwave Cooking Prods. Div.*, 283 N.L.R.B. No. 144, at 4, 125 L.R.R.M. (BNA) 1081, 1082 (May 15, 1987).

transfer and employee layoffs except labor costs;¹³⁴ and when the sole purpose of the employer's work transfer was to escape its obligations under an existing collective bargaining agreement.¹³⁵

*Arrow Automotive Industries*¹³⁶ illustrates another variation of mandatory decision bargaining. In *Arrow*, the Board concluded that the company moved its automotive parts manufacturing plant from Massachusetts to South Carolina because labor costs at the Massachusetts plant were oppressive.¹³⁷ After expiration of the collective bargaining agreement covering the Massachusetts plant, the employees at that plant went on strike. When the union rejected the company's contract proposal, the company informed the union it was closing the plant because of declining sales and escalating production costs. The Board found that, although other factors were involved, the decision turned upon labor costs. The Board noted that the plant had been losing money since 1977, and the market for its products was declining in the northeast United States. Nevertheless, the Board concluded that the major reason for the plant losses was escalating labor costs, and that the company's decision to relocate to South Carolina was part of its strategy to service the northeast market without high labor costs. Perhaps the most telling fact was that the company raised the issue of closing and transferring the plant in direct response to the union's rejection of the company's contract proposal and after the union had proposed wage increases that would have increased the company's labor costs by hundreds of thousands of dollars annually.¹³⁸ However, the Fourth Circuit vacated the Board's decision finding that an employer may close part of a business for economic reasons without being required to bargain over the decision.¹³⁹

134. *Dahl Fish Co.*, 279 N.L.R.B. 1084 (1986), *enforced without opinion*, 813 F.2d 1254 (D.C. Cir. 1987).

135. *Brown Co.*, 278 N.L.R.B. 783 (1986), *aff'd without opinion*, 833 F.2d 1015 (9th Cir. 1987), *cert. denied*, 108 S. Ct. 1602 (1988). In *Oak Rubber Co.*, 277 N.L.R.B. 1322 (1985), the Board found the employer's "sole motivation" for relocating was to avoid wage and benefit provisions in its collective bargaining agreement. The company proposed that the union accept certain wage cuts. The company did not like the cuts which the union agreed to absorb, however, so the company relocated bargaining unit work to another plant. The Board concluded that the decision to transfer the work turned upon labor costs, and held that the company had a duty to bargain over the transfer until it reached agreement with the union or an impasse. *Id.* at 1323-25.

136. 284 N.L.R.B. No. 57, 125 L.R.R.M. (BNA) 1188 (June 25, 1987), *vacated*, 853 F.2d 223, 228 (4th Cir. 1988).

137. *Arrow Automotive Indus.*, 284 N.L.R.B. No. 57 at 8, 125 L.R.R.M. at 1190 (1987).

138. *Id.* at 2-8, 125 L.R.R.M. at 1189-90.

139. *Arrow Automotive Indus. v. NLRB*, 853 F.2d 223, 228 (1988).

The Board has held that an employer's decision to relocate and subcontract bargaining unit work was based on labor costs even though substantial economic reasons existed.¹⁴⁰ Company reports indicated that relocating the plant and subcontracting the work would save the company \$2.6 million annually in operating costs; however, \$2 million of the savings were attributable to reduced labor costs. The Board held that the company's failure to bargain over its decision violated section 8(a)(5).¹⁴¹

Thus, it is clear that when an employer's decision to close part of its business or to relocate turns upon labor costs, the employer must bargain in good faith with the union over the decision until an agreement or impasse is reached.¹⁴² Although no clear definition of "turns upon labor costs" exists, Board decisions strongly suggest that if a reduction in labor costs would prevent closure or relocation, or if the decision to close or relocate was made to reduce labor costs, the decision turns upon labor costs. Board decisions also indicate employee wages and benefits are labor costs. It might also be argued that any costs incurred under a collective bargaining agreement constitute labor costs.

The duty to bargain in good faith requires that an employer notify the union when the employer is "thinking seriously" about the decision to close or relocate.¹⁴³ This duty also requires that the employer provide information requested by the union that is relevant to the decision and that will aid the union in bargaining.¹⁴⁴ Sham

140. Roytype Div., 284 N.L.R.B. No. 88, 126 L.R.R.M. (BNA) 1134 (June 30, 1987).

141. *Id.* at 3, 126 L.R.R.M. (BNA) at 1135-36.

142. Employers sometimes argue that the union waived its right to bargain over "labor costs" closure and relocation decisions when it agreed to contract terms that give the employer an unrestricted right to close or relocate unilaterally. The Board, however, requires waivers to be "clear and unmistakable," and rarely finds a union waived its right to bargain over such decisions. *See* National Metalcrafters, Inc., 276 N.L.R.B. 90 (1985), *vacated and remanded sub nom.* UAW, Local 449 v. NLRB, 802 F.2d 969 (7th Cir. 1986); Tocco Div. of Park-Ohio Indus., 257 N.L.R.B. 413 (1981), *enforced*, 702 F.2d 624 (6th Cir. 1983); Universal Sec. Instruments, Inc., 250 N.L.R.B. 661 (1980), *enforced in relevant part*, 649 F.2d 247 (4th Cir. 1981), *cert. denied*, 454 U.S. 965 (1981). Note that a waiver of a right to bargain over the decision alone does not usually constitute a waiver of the right to bargain over the decision's effects. *See* Challenge-Cook Bros., 282 N.L.R.B. No. 2, 123 L.R.R.M. (BNA) 1237 (Oct. 24, 1986), *enforced*, 843 F.2d 230 (6th Cir. 1988).

143. Ozark Trailers, Inc., 161 N.L.R.B. 561, 569 (1966).

144. Litton Microwave Cooking Prods. Div., 283 N.L.R.B. No. 144, 125 L.R.R.M. (BNA) 1081 (May 15, 1987); Roytype Div., 284 N.L.R.B. No. 88, 126 L.R.R.M. (BNA) 1134 (June 30, 1987). On the other hand, an employer has no duty to provide information to the union regarding its decision to partially close or relocate if the decision is not a mandatory subject of bargaining. Mack Trucks, Inc., 277 N.L.R.B. 711, 767 (1985); Bostrum Div., 272 N.L.R.B. 999, 1000 (1984); *Otis II*, 269 N.L.R.B. 891,

or bad faith bargaining, or unilateral implementation of the decision without bargaining at all, violates sections 8(a)(5) and 8(d) of the Act.¹⁴⁵ Furthermore, an employer that discharges employees due to a closure or relocation that violates section 8(a)(5) also violates section 8(a)(3) by such a discharge. The Board views such employees as “derivative discriminatees.”¹⁴⁶

B. *Effects Bargaining*

Regardless of the reasons an employer closes or relocates a plant, the employer must bargain in good faith with the union over the effects of the closing or relocation.¹⁴⁷ This so-called “effects bargaining” must occur in a “meaningful manner and at a meaningful time.”¹⁴⁸ Topics discussed during effects bargaining may include whether unit employees will be permitted to transfer to the new plant; what seniority, wage, and benefit rights will carry over to the new location; severance and vacation pay for displaced employees; pension benefits; and other matters related to the treatment of employees.¹⁴⁹

An employer must give the union reasonable notice of a decision to close or relocate to allow the union time to negotiate over the decision’s effects.¹⁵⁰ Circumstances control what constitutes reasonable notice.¹⁵¹ Essentially, the notice must afford the union an opportunity to bargain when it still has some measure of bargain-

894—95 (1984); see *Challenge-Cook Bros.*, 282 N.L.R.B. No. 2, 123 L.R.R.M. (BNA) 1237 (Oct. 24, 1986), *enforced*, 843 F.2d 230 (6th Cir. 1988).

145. *Oak Rubber Co.*, 277 N.L.R.B. 1322, 1325 (1985).

146. *Id.*

147. *First Nat’l Maintenance Corp. v. NLRB*, 452 U.S. 666, 681—82 (1981); *Metropolitan Teletronics Corp.*, 279 N.L.R.B. 957 (1986), *enforced without opinion*, 819 F.2d 1130 (2d Cir. 1987).

148. *First Nat’l Maintenance*, 452 U.S. at 681—82.

149. See *NLRB v. Spun-Jee Corp.*, 385 F.2d 379, 384 (2d Cir. 1967); *NLRB v. Transmarine Navigation Corp.*, 380 F.2d 933, 939 (9th Cir. 1967); *NLRB v. Rapid Bindery, Inc.*, 293 F.2d 170, 176 (2d Cir. 1961); *ABS Indus.*, 281 N.L.R.B. No. 145, 124 L.R.R.M. (BNA) 1214 (Sept. 30, 1986).

150. *Transmarine Navigation*, 380 F.2d at 940; *Rapid Bindery*, 293 F.2d at 176; *Metropolitan Teletronics Corp.*, 279 N.L.R.B. 957, 959 (1986), *enforced without opinion*, 819 F.2d 1130 (2d Cir. 1987); *Co-Ed Garment Co.*, 231 N.L.R.B. 848, 856 (1977); *McLoughlin Mfg. Corp.*, 164 N.L.R.B. 140 (1967), *supplemented and reversed in part and affirmed in relevant part*, 182 N.L.R.B. 958 (1970), *enforced sub nom. ILGWU v. NLRB*, 463 F.2d 907 (D.C. Cir. 1972).

151. See *supra* note 14 discussing the 60-day notice requirement in the Worker Adjustment and Retraining Notification Act of 1988, Pub. L. No. 100-379, 102 Stat. 890 (1988).

ing power.¹⁵² Certainly, no notice at all violates the Act.¹⁵³ Also, once the relocation or closure has commenced, notice is insufficient.¹⁵⁴ The Board has held that two days' notice before a work transfer was reasonable.¹⁵⁵ In another instance, however, it held that three days' notice of the closure and relocation of a shipping terminal was insufficient because meaningful negotiations would have been futile at that point.¹⁵⁶ No specific number of days controls. Notice simply must be reasonable under the circumstances.¹⁵⁷

Notice must also be clear. A union will not be charged with having notice if its information about a closure or relocation is based on rumor and speculation only.¹⁵⁸ On the other hand, the union may have constructive notice even absent actual, formal notice if it has "substantial information from which it must inevitably have been aware of the [employer's] intentions."¹⁵⁹ The Board has found that a union had constructive notice of a relocation when, before relocation, it was aware that the company was losing business at its old site, employees were laid off as a result, and the company notified unit employees of their right to transfer to the new site.¹⁶⁰

Though in most cases the Board requires reasonable notice, the notice rule is not without exceptions. There is no section 8(a)(5) violation, for example, if the employer demonstrates that late notice was due to "emergency circumstances."¹⁶¹

152. See *Metropolitan Teletronics*, 279 N.L.R.B. at 959.

153. *National Car Rental Sys.*, 252 N.L.R.B. 159, 163 (1980), *aff'd as modified*, 672 F.2d 1182 (3d Cir. 1982); *Co-Ed Garment*, 231 N.L.R.B. at 856; *Arnold Graphic Indus.*, 206 N.L.R.B. 327, 329 (1973), *enforced in relevant part*, 505 F.2d 257 (6th Cir. 1974).

154. *St. Mary's Foundry Co.*, 284 N.L.R.B. No. 30, 125 L.R.R.M. (BNA) 1146 (June 12, 1987) (notice on day of closure untimely); *Metropolitan Teletronics*, 279 N.L.R.B. at 959 (concealing decision until relocation began denied union opportunity to bargain).

155. *Shell Oil Co.*, 149 N.L.R.B. 305, 307—08 (1964).

156. *Transmarine Navigation Corp.*, 152 N.L.R.B. 998 (1965), *enforced in relevant part*, 380 F.2d 933 (9th Cir. 1967).

157. See *GHR Foundry Div.*, 275 N.L.R.B. 707 (1985) (three months notice that shutdown was imminent held sufficient).

In 1987, the Bureau of Labor Statistics surveyed 196 employers in Arizona, Arkansas, Massachusetts, Texas, Washington, and Wisconsin and ascertained that employers that gave unions advance notice of layoffs or closings gave, on the average, 51 days' notice. *Daily Lab. Rep.* (BNA) No. 125, at D-1 to D-5 (July 1, 1987). See also *supra* note 14.

158. *NLRB v. Rapid Bindery, Inc.*, 293 F.2d 170, 176 (2d Cir. 1961).

159. *Hawthorn Melody, Inc.*, 275 N.L.R.B. 339, 341 (1985).

160. *Id.* at 341—42.

161. *Metropolitan Teletronics Corp.*, 279 N.L.R.B. 957, 959 (1986), *enforced without*

Once appropriate notice is given, the union must request negotiations before the employer's duty to bargain is triggered.¹⁶² The union's failure to request bargaining may constitute a waiver of its right to negotiate.¹⁶³

Bargaining rules applicable to decision bargaining apply equally to effects bargaining; the parties must bargain in good faith until they reach agreement or impasse.¹⁶⁴ In addition, the employer must provide the union with requested information relevant to the effects of the closure and relocation on employees.¹⁶⁵ An employer who refuses to bargain or bargains in bad faith violates section 8(a)(5).¹⁶⁶ Furthermore, an employer that circumvents the union and bargains directly with unit employees, over transfer rights for instance, violates section 8(a)(5).¹⁶⁷

III. THE PROHIBITION AGAINST UNILATERAL MIDTERM CHANGES IN A COLLECTIVE BARGAINING AGREEMENT

Unions have sought to prevent relocations by filing charges under section 8(d) alleging that the relocation changes the existing collective bargaining agreement without the union's consent.¹⁶⁸

opinion, 819 F.2d 1130 (2d Cir. 1987); see *Raskin Packing Co.*, 246 N.L.R.B. 78, 78 (1979) (plant closed immediately when bank discontinued line of credit plant needed to operate); *National Terminal Baking Corp.*, 190 N.L.R.B. 465, 466 (1971) (small plant losing money closed day after a second theft of its essential equipment because, as the company's president testified, theft brought the company to the "end of [its] money").

162. *NLRB v. Spun-Jee Corp.*, 385 F.2d 379, 384 (2d Cir. 1967); *American Fluorescent Corp.*, 275 N.L.R.B. 1097, 1100 (1985); *Hawthorn Melody, Inc.*, 275 N.L.R.B. 339, 342 (1985); see *GHR Foundry Div.*, 275 N.L.R.B. 707, 707 (1985).

163. *Spun-Jee*, 385 F.2d at 384.

164. See *supra* note 73 and accompanying text.

165. *Challenge-Cook Bros.*, 282 N.L.R.B. No. 2 at 4, 123 L.R.R.M. (BNA) 1237, 1238 (Oct. 24, 1986), *enforced*, 843 F.2d 230 (6th Cir. 1988) (employer required to furnish the union with requested information relevant to the effects of employer's decision to relocate operation); *Mack Trucks, Inc.*, 277 N.L.R.B. 711, 767 (1985) (information regarding the effects may include a seniority list, the names of people expected to be transferred, and a transfer timetable).

166. *Metropolitan Teletronics Corp.*, 279 N.L.R.B. 957, 959 (1986), *enforced without opinion*, 819 F.2d 1130 (2d Cir. 1987); *Columbia City Freight Lines, Inc.*, 271 N.L.R.B. 12 at n.1 (1984); *Co-Ed Garment Co.*, 231 N.L.R.B. 848, 856 (1977); *American Needle & Novelty Co.*, 206 N.L.R.B. 534, 535 (1973); *Cooper Thermometer Co.*, 160 N.L.R.B. 1902, 1912 (1966), *enforced in part*, 376 F.2d 684 (2d Cir. 1967).

167. *Otis Elevator Co.*, 283 N.L.R.B. No. 40 at 3, 124 L.R.R.M. (BNA) 1334, 1335 (Mar. 13, 1987) (*Otis III*); *Universal Sec. Instruments, Inc.*, 250 N.L.R.B. 661 (1980), *enforced in relevant part*, 649 F.2d 247 (4th Cir. 1981); *Cooper Thermometer*, 160 N.L.R.B. at 1911.

168. Unions also buttress this argument using §§ 8(a)(5) and 8(a)(1).

Section 8(d) of the Act prohibits unilateral midterm changes to terms and conditions contained in a collective bargaining agreement that are mandatory subjects of bargaining.¹⁶⁹

In *Milwaukee Spring Division*,¹⁷⁰ the company relocated its assembly operations from a union plant to a nonunion plant to avoid higher labor costs. The parties stipulated that the decision was based on labor costs and not the result of union animus, that the relocation was a mandatory subject of bargaining, and that the company met its bargaining obligation over the decision. However, the union contended that the relocation of unit work solely because of labor costs without the union's consent constituted a midterm repudiation of the collective bargaining agreement and thus violated section 8(d).¹⁷¹

The Board agreed that the decision was an unlawful midterm modification. The Board failed, however, to identify any particular term in the contract that was modified by the relocation; it simply held that so long as there is a collective bargaining agreement in effect and the union has not waived its "statutory right" to object to relocation, the employer cannot relocate without the union's consent. In examining the contract, the Board found no clear and unequivocal waiver of the union's right to object to the transfer.¹⁷²

On remand from the Seventh Circuit, the Board reversed itself, holding that the relocation did not constitute a midterm modification of the contract.¹⁷³ The Board noted that in its earlier decision it had impliedly found that the recognition and the wage and benefit clauses in the contract prohibited the transfer of bargaining unit work. The recognition clause acknowledged the union as the representative of certain classes of employees at the company's assembly operations in Milwaukee. The Board refused to infer from this clause that the parties had agreed that bargaining unit work could be performed only in Milwaukee. Rather, it indicated that the clause was intended merely to identify the employees covered by the contract. Similarly, the Board declined to infer that the wage and benefits provisions precluded the work transfer. These provisions did not limit work to Milwaukee, but merely described

169. 29 U.S.C. § 158(d) (1982).

170. 265 N.L.R.B. 206 (1982), *remanded*, 718 F.2d 1102 (7th Cir. 1983), *reversed sub nom.* Milwaukee Spring Div. II, 268 N.L.R.B. 601 (1984), *aff'd sub nom.* Automobile Workers v. NLRB, 765 F.2d 175 (D.C. Cir. 1985).

171. Milwaukee Spring Div., 265 N.L.R.B. at 207—09.

172. *Id.* at 208, 210.

173. *Milwaukee Spring II*, 268 N.L.R.B. 601, 602 (1984).

the wages and benefits due employees who performed certain work.¹⁷⁴ Finally, the Board held that, to prevent a midterm relocation of unit work, the contract must contain a provision that expressly prohibits relocation.¹⁷⁵

Since *Milwaukee Spring II*, the Board has continually applied section 8(d) narrowly in relocation cases. If the contract is silent concerning work preservation, the Board has declined to find a restriction on midterm relocation.¹⁷⁶

When the contract does contain work preservation language, the Board interprets the provisions narrowly. In *DeSoto, Inc.*,¹⁷⁷ the Board found no midterm modification based on a unilateral shut-down and transfer of unit work despite a provision prohibiting plant relocation without union consent. The contract specifically proscribed the "movement" of the plant beyond a twenty-five mile radius without the union's written consent.¹⁷⁸ The company closed the plant and transferred the unit work to other existing company facilities beyond the radius. Noting that the closure was due to excess production, the Board held that the plant was "eliminate[d]" and not "move[d]" in violation of the plant relocation provision.¹⁷⁹

The Board did not address whether a work preservation clause is a per se mandatory subject of bargaining.¹⁸⁰ Presumably, however, unless the decision turns upon labor costs, bargaining is not

174. *Id.* The company had proposed a midterm change of wages and benefits; however, it later abandoned this proposal. *Id.* Member Zimmerman dissented, contending the relocation would indirectly modify the existing wage rates. *Id.* at 605 (Zimmerman, M., dissenting).

175. *Id.* at 602.

176. See, e.g., GHR Foundry Div., 275 N.L.R.B. 707, 709 (1985) (In a case factually similar to *Milwaukee Spring II*, the Board found no violation of § 8(d) based on midterm relocation when the contract was silent on work preservation.); Inland Steel Container Co., 275 N.L.R.B. 929, 934 (1985), *aff'd sub nom.* Local 2179, United Steelworkers of America v. NLRB, 822 F.2d 559 (5th Cir. 1987) (no violation of § 8(d) based on midterm relocation when contract contains no prohibition on relocation); Litton Microwave Cooking Prods. Div., 283 N.L.R.B. No. 144 at 5, 125 L.R.R.M. (BNA) 1081, 1081 (May 15, 1987) (no violation of § 8(d) based on a midterm relocation absent a specific relocation restriction).

177. 278 N.L.R.B. 788 (1986).

178. *DeSoto, Inc.* 278 N.L.R.B. at 789. The plant relocation article provided: "The Company shall not move its plant from its present location beyond the radius of twenty-five (25) miles without the written consent of the Union, but the Union shall not withhold its consent for arbitrary or capricious reasons." *Id.*

179. *Id.*

180. Member Dennis contends that a work preservation clause is a mandatory subject of bargaining. Thus, a unilateral midterm change of a work preservation clause for any reason would violate § 8(d). *Id.* at 790 n.2 (Dennis, M., dissenting); *Otis II*, 269 N.L.R.B. 891, 899 n.16 (1984) (Dennis, M., concurring).

mandatory and, therefore, a unilateral midterm change of a work preservation clause would not violate section 8(d). In *DeSoto*, the Board found that the decision did not turn upon labor costs and thus was not subject to mandatory bargaining.¹⁸¹

An agreement to maintain certain manning levels also may be construed narrowly to allow a unilateral midterm relocation. In *Suburban Transit Corp.*,¹⁸² the contract contained a manning article that stated the company intended to maintain the current level of full-time bus drivers, provided the current level of business continued.¹⁸³ While the contract was in effect, Transit suggested several cost-saving changes to the collective bargaining agreement to offset its operating losses. One proposal included transferring work performed by its employees to the drivers of another bus company.¹⁸⁴ Although the union rejected this proposal, Transit announced and implemented the change over a two-month period.¹⁸⁵

The general counsel contended that the transfer of bus runs was prohibited by the manning article, which essentially was a work preservation clause. Furthermore, the relocation caused a reduction in wages and benefits.¹⁸⁶

The administrative law judge rejected these arguments, construing the manning article as conditionally expressing that a minimum manning level would be maintained. The judge held that the terms of the provision did not "identify the type of work to be

181. *DeSoto*, 278 N.L.R.B. at 789.

182. 276 N.L.R.B. 15 (1985).

183. *Suburban Transit Corp.*, 276 N.L.R.B. at 16 (1985). The manning article provided:

Suburban shall have the right to hire part time drivers.

It is the Company's intention to maintain at least the current level of 90 full time drivers, provided that the current level of business continues. The Company further intends to enlarge the full time work force.

Part time drivers will be used only when there is an insufficient number of full time drivers to cover all of the available work. In all cases the full time drivers shall have their choice between line and charter work provided that there are part time drivers available to cover all open line work. In all cases full time drivers shall have their choice of the biggest paying pieces of work. The Company will also attempt to satisfy full time regular run operators in the assignment of extra work, providing sufficient operators are available to cover all open work.

The limit of work available to full time drivers will be governed only by the "hours of service" regulations of the Department of Transportation, and not by the availability of part time drivers.

Id.

184. *Id.* at 17.

185. *Id.* at n.7.

186. *Id.* at 24.

preserved, or prohibit the subcontracting of certain work, as in traditional work-preservation clauses."¹⁸⁷ Because the clause did not require that unit work remain at the Transit garage or that the unit work be performed only by Transit unit employees, the decision was not precluded by the manning article.¹⁸⁸

The Board has declined to find a work preservation clause based on a provision requiring the company to "discuss" the relocation of operations with the union in advance. In *National Metalcrafters, Inc.*,¹⁸⁹ the contract also required bargaining over the effects of relocation. Based on the distinction in the clause between the words "discuss" and "negotiate," the parties' bargaining history, and other contractual terms, the Board found that the union had waived its right to negotiate over the relocation decision.¹⁹⁰ At best, the clause merely required discussion with the union prior to unilateral midterm relocation; it did not prohibit the transfer of bargaining unit work.¹⁹¹

Since *Milwaukee Spring II*, the Board has found that work preservation clauses bar midterm relocation in at least two instances. In *Brown Co.*,¹⁹² the employer unilaterally transferred cement hauling work outside of the bargaining unit during the contract term. The contract contained a work preservation article designed "to protect the work performed by employees in the bargaining unit."¹⁹³ Because the company promised to use its own equipment

187. *Id.*

188. *Id.* at 25.

189. 276 N.L.R.B. 90 (1985), *set aside and remanded sub nom.* UAW, Local 449 v. NLRB, 802 F.2d 969 (7th Cir. 1986).

190. National Metalcrafters, Inc., 276 N.L.R.B. at 91. The relocation article provided: "In the event the Company contemplates the relocation of any of its operations conducted at its present divisions in Rockford, Illinois, the Company agrees to *discuss* such relocation in advance and to *negotiate* with the Union concerning the effect of such relocation on employees." *Id.*

191. *Id.* at 91—92. In setting aside and remanding the Board's decision, the Seventh Circuit held the Board had disregarded evidence of negotiations when finding a waiver. *Local 449*, 802 F.2d at 972—75.

192. 278 N.L.R.B. 783 (1986), *aff'd without opinion*, 833 F.2d 1015 (9th Cir. 1987).

193. *Brown Co.*, 278 N.L.R.B. at 783 n.6. Article XIX of the contract provided:

It is the intent of the parties to this Agreement to protect the work performed by employees in the bargaining unit.

The Employer recognizes that it is important and desirable to utilize its own equipment and drivers to the greatest extent possible prior to using sub-haulers and/or non-Company trucks.

The Union recognizes that under certain conditions, such as those dictated by customer demands, equipment requirements, daily dispatch determinations, materials to be hauled and similar factors, that sub-haulers and/or non-Company trucks are necessary and have been so utilized

and drivers whenever possible and not to eliminate unilaterally an entire job classification, the transfer ran afoul of the work preservation language.¹⁹⁴

The Board emphasized, however, that Brown's unilateral midterm modification would violate section 8(d) only if it changed a mandatory subject of bargaining. Because the purpose of the relocation was to avoid contract wage provisions, the relocation was a mandatory subject of bargaining. Moreover, because the relocation was a mandatory subject, so too were the contract terms governing relocation and work preservation. The unilateral work transfer thus unlawfully changed contract terms covering mandatory subjects of bargaining.¹⁹⁵

In a second case, *Roytype Division*,¹⁹⁶ the Board found that a work preservation clause requiring the company to "notify and discuss" relocation with the union in order to explore alternatives to relocation prohibited midterm relocation without the union's consent.¹⁹⁷ In an effort to reduce its labor costs, Roytype subcontracted and relocated all of its bargaining unit work from Connect-

throughout the Industry for many years.

The Employer, in accordance with the above, must however, determine the number, type and location of its working equipment in conformity with its business requirements. The Employer further must be able to determine, in keeping with sound business practices, the extent to which it will replace equipment which is too costly to operate, obsolete or damaged.

Under these conditions, the Employer agrees that sub-haulers and/or non-Company trucks will not be utilized as a subterfuge to defeat the protection of the bargaining unit work.

In keeping with the above, the Union recognizes that the Employer will utilize such sub-haulers and/or non-Company trucks as required by location and classification only after all the available Company trucks at such locations and in similar classifications have been initially dispatched.

Id.

194. *Id.* at 784.

195. *Id.* at 784—85.

196. 284 N.L.R.B. No. 88, 126 L.R.R.M. (BNA) 1134 (June 30, 1987).

197. Roytype Div., 284 N.L.R.B. No. 88 at app. 3, 126 L.R.R.M. (BNA) at 1135.

Article II, Section 2 of the contract provided:

The company will not transfer work customarily performed by members of the bargaining unit to another company facility, or contract or subcontract out such work, except on the basis of unavailability of trained personnel or necessary equipment, production, requirements, or costs of manufacture or distribution. If such decision is based on the cost of manufacture or distribution, the company will notify and discuss with the union as soon as possible the reasons why it believes such action to be necessary, so that the parties may explore alternatives to such transfer of work.

Id.

icut to North Carolina, Georgia, and Mexico. The General Counsel contended the relocation modified the parties' agreement requiring the company to notify and discuss work transfers with the union.¹⁹⁸

The Board agreed, noting that the requirement of prior discussion and notification was "expressly linked to the purpose of explor[ing] alternatives to such transfer of work."¹⁹⁹ Moreover, the contract contained job retention and severance pay provisions in the event of a transfer. In this context, the Board found that the parties had agreed to bargain over transfer decisions.²⁰⁰ The Board also agreed with the judge's determination that the relocation decision was based on labor costs and thus a mandatory subject of bargaining.²⁰¹ Accordingly, the unilateral relocation violated section 8(d).²⁰²

Based on the cases above, an employer contemplating midterm relocation must make two inquiries. First, is the relocation decision a mandatory subject of bargaining? A decision is subject to bargaining if it turns upon labor costs. If labor costs are not the operative reasons for the decision, there is no violation of section 8(d), regardless of the existence of a work preservation clause.²⁰³ Second, assuming a decision turns upon labor costs, does the contract contain an express provision prohibiting the contemplated relocation? If the agreement clearly forbids the transfer, the employer must obtain the union's consent before relocating. If the contract is silent, however, the employer may, after bargaining to impasse, unilaterally implement a relocation without the union's consent.

IV. THE TRANSFER OF EMPLOYEES AS PART OF A PLANT RELOCATION

An issue that commonly arises when a plant is relocated is whether employees must be transferred to the new plant if they request a transfer. An employer has a duty to discuss employee transfers with the union during effects bargaining, but it has no

198. *Id.* at 2, 126 L.R.R.M. (BNA) at 1135. The purpose of the agreement was to provide the union an opportunity to learn why the company felt the transfer was necessary and to allow the parties to explore alternatives.

199. *Id.*

200. *Id.*

201. *Id.* at 3, 126 L.R.R.M. (BNA) at 1136.

202. *Id.*, 126 L.R.R.M. (BNA) at 1137.

203. The relocation, however, may be a violation of the work preservation clause for which the union may seek other remedies for breach of contract.

duty under the Act to transfer employees.²⁰⁴ It may not, however, establish a transfer policy that discriminates against union employees because of their union membership. Such a policy violates section 8(a)(3).²⁰⁵

Generally, proof of anti-union animus is required before the Board will declare that a transfer policy or transfer refusal violated section 8(a)(3).²⁰⁶ In *Cotter & Co.*,²⁰⁷ the employer moved its distribution center from Dallas to Corsicana, Texas. The union claimed the company violated section 8(a)(3) by refusing to allow unit employees at the Dallas center to transfer automatically.²⁰⁸ The administrative law judge stated that the company "had no statutory or contractual obligation to transfer the Dallas employees to Corsicana. [It] does have a statutory obligation not to discriminate against its employees because of their membership in a union."²⁰⁹ The employer allowed employees to apply for a transfer, did nothing to discourage them from transferring, and rejected transfer applicants for nondiscriminatory reasons only. Thus, the Board affirmed the judge's dismissal of the discrimination complaint.²¹⁰

The Board also ruled, in *Lee Norse Co.*,²¹¹ that an employer's transfer policy did not violate section 8(a)(3) despite the requirement that union employees had to apply for a transfer, whereas nonunion employees were transferred automatically.²¹² The Board held that this difference in treatment alone did not violate section 8(a)(3). It emphasized that the company's "relocation [decision] was based on legitimate economic factors;" the new plant was not an integral part of the old plant; the employer allowed unit employees to apply for transfers; and there was no evidence of anti-union animus. It rejected the notion that union employees must be

204. See generally P. MISCIMARRA, *THE NLRB AND MANAGERIAL DISCRETION: PLANT CLOSINGS, RELOCATIONS, SUBCONTRACTING, AND AUTOMATION* 240—52 (Labor Relations and Public Policy Series No. 24, 1983) [hereinafter MISCIMARRA]. Note, however, that employees may have transfer rights under their collective bargaining agreement.

205. 29 U.S.C. § 158(a)(3) (1982).

206. See, e.g., *Safelite Div.*, 277 N.L.R.B. 782 (1985) (company violated section 8(a)(3) "by laying off, refusing to transfer and refusing to recall" employees active in the union) *Id.* at 782; *National Car Rental Sys.*, 252 N.L.R.B. 159 (1980), *enforced as modified*, 672 F.2d 1182 (3d Cir. 1982) (company violated Section 8(a)(3) when it closed and relocated one of its car rental facilities with intent to keep the new facility nonunion) *Id.* at 161.

207. 276 N.L.R.B. 714 (1985).

208. *Cotter & Co.*, 276 N.L.R.B. at 715.

209. *Id.* at 742.

210. *Id.* at 714.

211. 247 N.L.R.B. 801 (1980).

212. *Lee Norse Co.*, 247 N.L.R.B. at 802.

given the same transfer benefits nonunion employees enjoy.²¹³

Previously, however, in *Coated Products, Inc.*,²¹⁴ the Board held that the company violated section 8(a)(3) by employing different transfer policies for union and nonunion employees.²¹⁵ Union employees who wanted to work at the new plant were required to resign from their jobs and reapply for employment at the new plant. Nonunion employees who sought a transfer were not required to follow this procedure.²¹⁶ The difference in transfer policies was "linked," according to the plant manager, to an employee's status as a union member. The Board concluded that the company's transfer policy was designed to exclude the union from the new plant and, therefore, violated section 8(a)(3).²¹⁷ The Board also determined that the employer violated the duty to bargain with the union over the transfer policy by refusing to answer or giving vague answers to union questions about the policy²¹⁸ and by circumventing the union and discussing transfers directly with the employees.²¹⁹

Although recent cases have required proof of anti-union animus, the Board in *Allied Mills, Inc.*,²²⁰ found the employer in violation of section 8(a)(3) without direct evidence of anti-union animus.²²¹ Relying on *NLRB v. Great Dane Trailers, Inc.*, the administrative law judge determined that the employer's refusal to transfer union employees under any circumstances was "inherently destructive of employee interests" in continued employment, and, consequently,

213. *Id.* at 802—03.

214. 237 N.L.R.B. 159 (1978).

215. *Coated Prod., Inc.*, 237 N.L.R.B. at 159.

216. *Id.* (citing the decision of the administrative law judge which is printed in the appendix to the Board's decision).

217. *Id.* at 159. See also *Joseph Magnin Co.*, 257 N.L.R.B. 656 (1981), *enforced*, 707 F.2d 1457 (9th Cir. 1983), *cert. denied*, 465 U.S. 1018 (1984). The employer's transfer policy required unit employees to quit and apply for reemployment at its new store if they wanted to work there. The Board found the purpose of the policy was to keep the new store union free; consequently, the policy violated the Act. *Id.* at 656. At first blush, *Coated Prod.* and *Joseph Magnin* appear to be inconsistent with *Lee Norse*, in that the *Lee Norse* Board ruled, contrary to its rulings in the other two cases, that a transfer policy that required union employees to apply for a transfer but imposed no such requirement on nonunion employees did not violate section 8(a)(3). *Lee Norse Co.*, 247 N.L.R.B. 801, 802—803 (1980). In the other two cases, however, there was evidence that the purpose of the transfer policies was to bar the union from the new facilities.

218. *Coated Prod.*, 237 N.L.R.B. at 166—67.

219. *Id.* at 165—66.

220. 218 N.L.R.B. 281 (1975).

221. *Allied Mills, Inc.*, 218 N.L.R.B. at 281, 288.

in violation of section 8(a)(3).²²²

In *Allied Mills*, the employer refused to consider union employees for transfer despite the union's favorable transfer proposals. The evidence established that the relocation was due to economic factors, not anti-union animus. Nevertheless, the administrative law judge concluded that the employer meant to take advantage of the relocation to escape the union.²²³

Essentially, the administrative law judge reasoned that the employer's refusal to transfer employees under any circumstances was not justified.²²⁴ This reasoning suggests that an employer has a duty to transfer employees unless there is good reason not to do so, a rationale that runs counter to earlier and later Board cases that clearly indicate an employer has no statutory duty to transfer employees.²²⁵ In light of this inconsistency, and the Board's refusal in *Lee Norse* to apply the "inherently destructive" conduct doctrine to facts similar to those in *Allied Mills*, it is not entirely clear what influence *Allied Mills* retains.²²⁶

V. THE REQUIREMENT TO RECOGNIZE AND BARGAIN WITH THE UNION AT A NEW FACILITY

When an employer closes a plant and relocates, it sometimes transfers union employees from its old plant to its new plant. The question that arises under such circumstances is whether the employer must continue to recognize and bargain with the employees' union at the new plant. The answer depends on the timing of the relocation and the extent to which the new facility is a continuation of the old plant.

Generally, if the relocation occurs during the year following the date the Board certifies the union as the employees' collective bar-

222. *Id.* at 288—89 (citing *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26 (1967)). In *Great Dane*, the Court declared that "some [employer] conduct, however, is so inherently destructive of employee interests that it may be deemed proscribed without need for proof of an underlying improper motive." 388 U.S. at 33.

223. *Allied Mills*, 218 N.L.R.B. at 282—88.

224. *Id.* at 289.

225. *See, e.g.*, *Pierce Governor Co.*, 164 N.L.R.B. 97 (1967), *aff'd sub nom.* *International Union, UAW v. NLRB*, 394 F.2d 757 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 831 (1968) (employer's failure, after good faith bargaining, to agree to give employee transfer rights did not violate the Act). *See supra* notes 204—10 and accompanying text.

226. *See* MISCIMARRA, *supra* note 204, at 249—50 (*Lee Norse* may have indirectly overruled *Allied Mills*); *cf.* *Fairmont Foods Co.*, 245 N.L.R.B. 915, 923 (1979); *Borg-Warner Corp.*, 245 N.L.R.B. 513 (1979), *enforced*, 663 F.2d 666 (6th Cir. 1981) (*per curiam*), *cert. denied*, 457 U.S. 1105 (1982).

gaining representative, but before a labor contract is reached, there is “an almost conclusive presumption” that the union enjoys a continued majority status at the new plant.²²⁷ The presumption may be overcome, however, if the employer proves that “unusual circumstances” exist; namely, that the union has dissolved, its officers and members have defected to other unions or locals, or the size of the bargaining unit has fluctuated dramatically over a brief period.²²⁸

Whether a plant relocation constitutes an additional “unusual circumstance” that would defeat the “almost conclusive” presumption of majority status depends on the nature of the relocation. If the new plant substantially carries on the same operations as the old plant and the employee contingent at the new plant is substantially the same as it was at the old plant, the company must continue to recognize and bargain with the union or it violates section 8(a)(5).²²⁹

For instance, in *Hydro-Air Equipment*,²³⁰ the administrative law judge found that the new plant was substantially a continuation of the old plant.²³¹ The new plant used the old plant’s equipment to carry on the same operations and forty-six to forty-nine percent of the workforce at the new plant were transferees from the old plant. The only significant change in the employer’s operations was a change in geographical location. Although the employer argued that a prerequisite to continued recognition of the union should be that the union actually enjoy majority support at the new plant, the judge concluded that the employer was required, under section 8(a)(5), to recognize and bargain with the union at the new site.²³²

The Board has also found that a new plant was substantially a continuation of the old plant when the employer used new equipment in the new plant and hired a significant number of new employees.²³³ Because the new equipment would not have had an impact on bargaining unit employees if it had been installed in the

227. *NLRB v. Massachusetts Mach. & Stamping, Inc.*, 578 F.2d 15, 18 (1st Cir. 1978). See also *Hydro-Air Equip., Inc.*, 277 N.L.R.B. 85, 94 (1985).

228. *Brooks v. NLRB*, 348 U.S. 96, 98 (1954); see also *Molded Accoustical Prod., Inc.*, 280 N.L.R.B. No. 163, 123 L.R.R.M. (BNA) 1354 (July 31, 1986), *enforced*, 815 F.2d 934 (3d Cir. 1987).

229. *Hydro-Air*, 277 N.L.R.B. at 94.

230. 277 N.L.R.B. 85 (1985).

231. *Hydro-Air Equip., Inc.*, 277 N.L.R.B. at 92.

232. *Id.* at 95–96.

233. *Paper Mfr. Co.*, 274 N.L.R.B. 491, 494 (1985), *enforced*, 786 F.2d 163 (3d Cir. 1986).

old plant, it had no impact on the unit employees who transferred to the new plant. The work at both plants was, consequently, the same.²³⁴ Furthermore, "virtually all" bargaining unit employees transferred to the new plant.²³⁵ Though many new employees were hired at the new plant, reducing the proportion of the old bargaining unit to forty percent of the workforce, the increase in the size of the workforce was not dramatic, but gradual over eleven months.²³⁶ Thus, the employer had a duty to continue to recognize and bargain with the union at the new plant.²³⁷

Similarly, in *Molded Acoustical Products, Inc.*,²³⁸ the administrative law judge rejected the employer's contention that its plant relocation absolved it of any continuing duty to recognize the union. In this case, the new plant was only seven miles from the old plant. Employees hired at both came from the same labor pool. Job duties, work assignments, and operations at the new plant were essentially the same as they were at the old one.²³⁹ In addition, the company transferred old plant equipment to the new plant.²⁴⁰ The Board affirmed the judge's conclusion that under these facts the employer was required to recognize the union at the new facility.²⁴¹

These post-relocation recognition principles also apply to relocations that occur during the term of a collective bargaining agreement. Thus, if a collective bargaining agreement is in effect when the relocation occurs, the company must recognize the union and abide by the collective bargaining agreement at the new location if the new location is substantially a continuation of the old plant's operations and employs substantially the same work force as did the old plant.²⁴²

234. *Id.* at 496.

235. *Id.* at 493.

236. *Id.* at 497. In addition, the judge emphasized that new employees were slotted into job classifications and seniority lists carried over from the old plant. New employees thus received the same wages and benefits as the transferred employees. *Id.*

237. *Id.* at 497-98.

238. 280 N.L.R.B. No. 163, 123 L.R.R.M. (BNA) 1354 (July 31, 1986).

239. *Molded Acoustical Prod., Inc.*, 280 N.L.R.B. No. 163 at 6-7, 123 L.R.R.M. (BNA) at 1354. On the date of the hearing, 100 of the 118 employees at the new plant were transferees from the old plant. *Id.* at 5, 123 L.R.R.M. (BNA) at 1355.

240. *Id.* at 5, 123 L.R.R.M. (BNA) at 1354.

241. *Id.* at 1, 123 L.R.R.M. (BNA) at 1354.

242. See *Central Soya Co.*, 281 N.L.R.B. No. 173, 124 L.R.R.M. (BNA) 1026 (Oct. 21, 1986); *Marine Optical, Inc.*, 255 N.L.R.B. 1241 (1981), *enforced*, 671 F.2d 11 (1st Cir. 1982); *Westwood Import Co.*, 251 N.L.R.B. 1213 (1980), *enforced*, 681 F.2d 664 (9th Cir. 1982).

If the relocation occurs after the expiration of the collective bargaining agreement, the presumption that the union enjoys majority status at the new plant still applies, but with less force. The presumption may be rebutted if the employer shows that the union actually lacks majority status or if the employer has a good faith doubt that the union enjoys majority support.²⁴³

For example, the Board held in *American Fluorescent Corp.*,²⁴⁴ that the company's good faith doubt about the union's majority status at the company's new plant relieved it of any duty to recognize the union at the plant.²⁴⁵ The relocation occurred after the collective bargaining agreement expired. Because the employer relocated to a new plant thirty-five miles from its old plant and only eleven of sixty-five bargaining unit employees transferred to the new plant,²⁴⁶ the Board found that the company had a good faith doubt.²⁴⁷

If the reason the union lacks majority support is because the employer, in violation of section 8(a)(3), refused to transfer bargaining unit employees to the new plant or applied a transfer policy that discriminated against bargaining unit employees, the Board may require that the employer recognize the union at the new plant. Thus, when an employer conceals a relocation of his business from certain employees²⁴⁸ or when an employer refuses to transfer certain employees because of their union affiliation,²⁴⁹ the presumption that the union enjoys majority status still applies.

Thus, Board decisions indicate that when a relocation occurs

243. *NLRB v. Massachusetts Mach. & Stamping, Inc.*, 578 F.2d 15, 18 (1st Cir. 1978).

244. 275 N.L.R.B. 1097 (1985).

245. *American Fluorescent Corp.*, 275 N.L.R.B. at 1102.

246. *Id.* at 1098. Less than one-third of the new plant's work force was comprised of bargaining unit employees from the old plant. *Id.* at 1099.

247. *Id.* at 1103. In *NLRB v. Massachusetts Mach. & Stamping, Inc.*, 578 F.2d 15 (1st Cir. 1978), the Board held the employer unlawfully failed to recognize the union at the new plant but the First Circuit reversed, finding the employer had a good faith doubt the union had majority support at the new plant. The court based its decision on several factors: "the Company moved to a new state;" the labor pool for the new plant was "entirely different" from the labor pool for the old plant; the [new] plant was not operating at full capacity . . . [when] it first opened;" and only 25% of the original bargaining unit transferred to the new plant. Although this group represented 50% of the work force when the new plant opened, the company reasonably expected a rapid increase in the size of the work force that would decrease this percentage. *Id.* at 18-20.

248. *Fairmont Foods Co.*, 245 N.L.R.B. 915 (1979).

249. *Fraser & Johnston Co.*, 189 N.L.R.B. 142 (1971), *enforced in part*, 469 F.2d 1259 (9th Cir. 1972).

during a certification year and before a contract is reached, or during the life of a collective bargaining agreement, a strong presumption exists that the union continues to enjoy majority support at the new site. If the relocation occurs after the collective bargaining agreement expires, however, the presumption of majority support is not as strong. If the Board finds that the union enjoys majority support at the new site, the employer must recognize and bargain with the union.

VI. REMEDIES AVAILABLE TO THE BOARD FOR ACT VIOLATIONS

Although the nature and evolution of the various remedies imposed for violations of the Act in connection with a plant closure or work relocation are outside the scope of this article, it should be noted that the Board has a relatively broad array of remedies from which to choose. Section 10(c) of the Act provides that when the Board finds that an unfair labor practice has been committed, it shall:

state its finding of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of [the Act]²⁵⁰

When an employer has violated the Act in connection with a plant closure or relocation, the Board has instituted a broad spectrum of remedies, including ordering the employer to reopen a closed plant,²⁵¹ reinstate terminated employees with full back pay,²⁵² transfer employees to a new facility and award them back pay for any work time lost,²⁵³ and bargain with a union in good faith regarding a closure or relocation decision and its effects on employees.²⁵⁴

250. 29 U.S.C. § 160(c) (1982).

251. *American Needle & Novelty Co.*, 206 N.L.R.B. 534 (1973).

252. *Id.*

253. *Joseph Magnin Co.*, 257 N.L.R.B. 656 (1981), *enforced*, 704 F.2d 1457 (9th Cir. 1983); *National Car Rental Sys.*, 252 N.L.R.B. 159 (1980), *enforced as modified*, 672 F.2d 1182 (3d Cir. 1982).

254. *Metropolitan Teletronics Corp.*, 279 N.L.R.B. 957 (1986); *Trans Marine Navigation Corp.*, 170 N.L.R.B. 389 (1968). *See also* 29 U.S.C. § 158(a)(5) (considering a refusal to bargain collectively an unfair labor practice).

SUMMARY

Although an employer may close and liquidate an entire business for any reason, the employer may not shut down part of a business or transfer work, equipment, or employees to another location to avoid bargaining with the union or to retaliate against employees for exercising their rights under the Act. A decision to close or relocate may lawfully be based on any other reason, including labor costs or other economic factors.

If, however, the decision turns upon labor costs, the employer must bargain in good faith with the union over the decision in a meaningful manner and at a meaningful time. A decision turns upon labor costs if labor costs are the sole, predominant, or operative basis for the decision. If a reduction in labor costs would prevent closure or relocation, the decision turns upon labor costs. Although the Board has not precisely defined "labor costs," any costs incurred under the collective bargaining agreement, including wages and benefits, may arguably constitute labor costs.

Good faith bargaining means that the employer must notify the union when the employer begins seriously thinking about closure or relocation. The employer must then meet with the union, provide the union with relevant information, and negotiate over the decision. The employer need not accept the union's proposals or make concessions. If the parties cannot agree after good faith negotiations, the employer may implement a decision without union approval.

Regardless of the reasons for closing or relocating, an employer must bargain in good faith with the union over the effects of a decision on employees, unless the union fails to request or clearly and unmistakably waives the right to bargain. Good faith effects bargaining requires that the employer notify the union of a decision to close or relocate prior to implementation and at a time when the union still retains some bargaining strength.

An existing collective bargaining agreement may prohibit an employer from unilaterally closing or relocating during the term of the agreement. If the agreement clearly prohibits the contemplated decision and the decision turns on labor costs, the decision cannot be implemented without the union's consent. If, however, the contract is silent on the decision and the decision does not turn upon labor costs, the employer may unilaterally implement the decision without violating the Act. If the contract clearly prohibits the decision but the decision is not based on labor costs, unilateral implementation of the decision does not violate the Act; the action, how-

ever, may constitute a breach of contract for which the union may seek other remedies.

Once the decision is implemented, the Act does not require the employer to transfer employees from a closed plant to a new facility. Employers may not, however, refuse to transfer employees based on union membership.

Under certain circumstances, an employer who moves operations to a new plant must recognize and bargain with the union that represented employees at the old plant. If the transfer occurred during the year following the Board's certification of the union as the employees' collective bargaining agent or during the life of a collective bargaining agreement, the employer must recognize the union if the new plant is substantially a continuation of the old plant. These circumstances raise an almost conclusive presumption that the union still enjoys majority support of the employees at the new plant. An employer may rebut this presumption by showing that the union lacks majority support or that the employer has a good faith doubt concerning the union's majority status. If the relocation takes place after the collective bargaining agreement has expired, the presumption that the union retains majority support is less forceful.

The NLRA's plant closing and relocation rules attempt to balance a company's interest in managing its business as it deems best and the union's interest in job security and fair treatment. These interests are not always competing, but when they do clash labor strife and disruptions in commerce may result. The rules are meant to prevent management-labor conflicts from reaching this point.

The most significant rule development over the past five years is the Board's formulation of the "turns upon" labor costs standard for determining when a closure or relocation decision is a mandatory subject of bargaining. At the crucial decision-making stage, employers most want flexibility to act quickly in their businesses' best interests and unions most want to be heard and their best interests taken into account. The "turns upon" labor cost standard determines when during this critical point management may act unilaterally.

The standard remains ill-defined but is evolving. Employers and unions must keep abreast of the evolution to understand and protect their respective rights.