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JOB SECURITY, MANAGERIAL PREROGATIVES, AND *FIRST NATIONAL MAINTENANCE*

INTRODUCTION

The Supreme Court, in *First National Maintenance v. NLRB*,¹ held that an employer's decision to shut down part of its operation for purely economic reasons was not a mandatory subject of bargaining under section 8(d) of the Labor-Management Relations Act.² This is the Court's latest pronouncement on decision-bargaining.³

The labor-management confrontation in *First National Maintenance* occurred because Congress deliberately left open the list of subjects over which management and the employees' representative must bargain.⁴ Although the content of the list of mandatory

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

2. Sections 8(a)(1) and 8(d) of the Labor-Management Relations Act, 29 U.S.C. §§ 158(a)(1) and 158(d) (1976), combine to require the employer and the employees' representative "[t]o meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment."

3. "Decision-bargaining" refers to an employer bargaining with his employees' representative prior to the implementation of a managerial decision which will have an immediate adverse effect on unit employment. An employer is free to implement the desired change after bargaining. During decision-bargaining, however, the employer's decision is theoretically not final. Unions traditionally have sought bargaining over management decisions involving automation, subcontracting, relocations, partial closings, and sale or termination of the business. See R. GORMAN, *LABOR LAW* 509-23 (1976).

Decision-bargaining differs from "effects" or "impact" bargaining. When effects bargaining alone is required, the employer's decision is presumed final, but the parties bargain over the effects to flow from the decision. Topics discussed include severance pay, seniority and pensions, and transfer rights. See *NLRB v. Transmarine Navigation Corp.*, 380 F.2d 933 (9th Cir. 1967); *NLRB v. Royal Plating and Polishing Co.*, 350 F.2d 191 (3d Cir. 1965).

4. When enacting the Taft-Hartley Amendment to the National Labor Relations Act in 1947, Congress rejected the proposal which would have expressly limited the subjects of bargaining to:

- (i) [w]ages, hours of employment, and work requirements; (ii) procedures and practices relating to discharge, suspension, lay-off, recall, seniority, and discipline, or to promotion, demotion, transfer and assignment within the bargaining unit; (iii) conditions, procedures, and practices governing safety, sanitation, and protection of health at the place of employment; (iv) vacations and leaves of absence; and (v) administrative and procedural provisions relating to the foregoing subjects.

H.R. 3020, 80th Cong., 1st Sess. § 2(11) (1947). The House Minority Report expressed the

bargaining subjects which section 8(d) envisions is unclear, the Supreme Court has determined that the statute did, in fact, create a finite set of subjects over which bargaining is mandatory.⁵ Unfortunately, however, the Court has never furnished objective criteria for distinguishing mandatory subjects from non-mandatory ones.⁶

The National Labor Relations Board (NLRB) and the courts have traditionally given meaning to ambiguous provisions of federal labor legislation by balancing the respective interests of employers and employees in an effort to achieve an interpretation which furthers federal labor law's stated purpose of maintaining "industrial peace."⁷ When a management decision, such as the par-

intent that § 8(d) be left open to future interpretation by the Board and the courts.

The appropriate scope of collective bargaining cannot be determined by a formula; it will inevitably depend upon the traditions of the industry, the social and political climate at any given time, the needs of employers and employees, and many related factors. . . . What are proper subjects of collective bargaining should be left in the first instance to employers and trade-unions, and in the second place, to any administrative agency skilled in the field and competent to devote the necessary time to a study of the industry or area of the country, subject to the review by the courts. It cannot and should not be strait-jacketed by legislative enactment.

H.R. REP. NO. 245 ON H.R. 3020, 80th Cong., 1st Sess. 71, reprinted in 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT RELATIONS ACT, at 362 (1948) (Minority Report).

5. NLRB v. Wooster Division of Borg-Warner Corp., 356 U.S. 342 (1958). In *Borg-Warner*, the Supreme Court acknowledged that labor and management may discuss and arrive at binding agreements regarding any legal subject. The Court went on, however, to hold that a party may not insist to the point of impasse on a proposal that is not a mandatory subject of bargaining. Further, a party may refuse to discuss a non-mandatory subject. Once a specific subject has been classified as mandatory, however, the parties are required to bargain over the subject if it has been proposed for discussion by either party. Thereafter, neither party may take unilateral action on the subject until an impasse in the negotiations. See *Detroit Police Officers Ass'n v. City of Detroit*, 391 Mich. 44, 214 N.W.2d 803 (1974). See also *NLRB v. W.R. Grace & Co.*, 571 F.2d 279 (5th Cir. 1978).

6. In *Borg-Warner*, for example, the Court went no further than deciding that the pre-strike ballot clause and the recognition clause desired by the company were not within the meaning of the phrase "other terms and conditions of employment." 356 U.S. at 343.

7. For a statement of the goal of maintaining industrial peace, see *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937). For two examples of the Supreme Court interpreting the Act by balancing the respective interests of employers and employees, see *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956) and *John Wiley & Sons v. Livingston*, 376 U.S. 543 (1964). In *Babcock & Wilcox*, the Court balanced the employers' property rights against the employees' organizational rights: "Organization rights are granted to workers by the same authority, the National Government, that preserves property rights. Accommodation between the two must be obtained with as little destruction of one as is consistent with the maintenance of the other." 351 U.S. at 112. The Court has also used interest balancing as the means to determine whether an arbitration provision of a collective bargaining agreement survived a merger so as to be operative against the successor corporation. In *John*

tial closing in *First National Maintenance*, improves the economic performance of the enterprise through the termination of existing employees, the employer's interest in freely operating the business directly conflicts with the employees' interest in a secure job. The Supreme Court first acknowledged the employees' interest in job security by refusing to enjoin a strike for a contract clause which would have required union consent prior to the elimination of unit jobs on the ground that such a strike constituted a "labor dispute."⁸ The employer's interest in freely managing the business has been accepted as fundamental in many decisions by both the Board and the courts.⁹ Accordingly, courts have balanced job security against managerial freedom to decide whether "industrial peace" would be furthered more effectively by submitting a decision which results in termination of employment to the collective bargaining process or by labelling it a managerial prerogative beyond the reach of mandatory bargaining.¹⁰

Unfortunately, balancing job security against managerial freedom cannot produce objective solutions to decision-bargaining cases, because these interests are incapable of being objectively weighed and compared.¹¹ The reviewing court must initially determine the weight and significance to be accorded these unquantifiable interests, and this determination is necessarily conclusive of the final decision. The respective weights accorded job security and

Wiley & Sons, the Court explained: "The objectives of national labor policy, reflected in established principles of federal law, require that the rightful prerogative of owners independently to rearrange their businesses and even eliminate themselves as employers be balanced by some protection to the employees from a sudden change in the employment relationship." 367 U.S. at 549.

8. See *Order of Railroad Telegraphers v. Chicago & N.W. Ry.*, 362 U.S. 330 (1960). In *Railroad Telegraphers*, the Court declined to enjoin the strike, because it determined that the strike was a "labor dispute" within § 13(c) of the Norris-LaGuardia Act. 29 U.S.C. § 113(c) (1976).

9. In *Textile Workers v. Darlington Mfg. Co.*, 380 U.S. 263 (1965), the Supreme Court stated that "some management decisions are so peculiarly matters of management prerogative that they would never constitute violations of § 8(a)(1)." *Id.* at 269.

10. See *Brockway Motor Trucks v. NLRB*, 582 F.2d 720, 722, 740 (3d Cir. 1978). See also *infra* text accompanying note 74.

11. The subjectivity involved in balancing the respective interests of employers and employees was recognized early in the history of labor law litigation. In *Vegeahn v. Guntner*, 167 Mass. 92 (1896), Justice Holmes (then sitting on the Massachusetts Supreme Court) stated: "The true grounds of decision are considerations of policy and of social advantage, and it is vain to suppose that solutions can be attained merely by logic and the general propositions of law which nobody disputes." *Id.* at 106 (Holmes, J., dissenting). See also *infra* notes 113-15 and accompanying text.

managerial freedom depend on whether a court balances these interests with a view toward advancing free enterprise or industrial democracy.¹² In *First National Maintenance*, the Supreme Court suggests that federal labor legislation should be interpreted against a background in which free enterprise is the paramount value.

This Comment maintains that, given the significance accorded free enterprise in the Court's conception of labor law, mandatory decision-bargaining should become the rare exception, not a process required whenever management contemplates a decision which adversely affects unit employment. Since free enterprise is the traditional foundation of our economic system, the high regard for managerial freedom expressed in *First National Maintenance* is appropriate in the absence of explicit congressional guidance.¹³ Setting the parameters of mandatory decision-bargaining requires both social and economic value judgments.¹⁴ This type of decision making is a legislative, not judicial, function.¹⁵ This Comment acknowledges, however, that Congress has declined to legislate as to the scope of an employer's duty to decision-bargain and that the Supreme Court has expressly refused to extend its holding in *First National Maintenance* beyond partial closings.¹⁶ As a consequence, and since the NLRB's general counsel presently maintains that most managerial decisions on which there has been no express Supreme Court guidance are mandatory subjects of bargaining,¹⁷ the controversy surrounding decision-bargaining will continue.

I. FIBREBOARD: THE ROOT OF DECISION-BARGAINING

A. *The National Labor Relations Board Decision*

Early NLRB decisions did not find mandatory bargaining over major management decisions, such as automation, relocation, and partial closing, to be implicit in the language of section 8(d). Ac-

12. "Industrial Democracy" refers to the doctrine that workers should participate in company decisions that "control their working lives." Summers, *Industrial Democracy: America's Unfulfilled Promise*, 28 CLEV. ST. L. REV. 29 (1979).

13. See *infra* notes 118 & 122.

14. See *Brockway Motor Trucks*, 582 F.2d at 722. See also *infra* note 114.

15. See *Ferguson v. Skrupa*, 372 U.S. 726, 730-31 (1963); *Kealey Pharmacy & Home Care Serv., Inc. v. Walgreen Co.*, 539 F. Supp. 1357, 1369 (W.D. Wis. 1982).

16. See *infra* note 142 and accompanying text.

17. See *infra* notes 144-50 and accompanying text.

cordingly, in *Fibreboard I*,¹⁸ the Board held that a company could terminate fifty in-plant maintenance workers and hire independent contractors to perform their work without bargaining over the decision. The Board's holding was fairly straightforward: "[T]he establishment by the Board of an appropriate unit does not preclude an employer acting in good faith from making changes in his business structure, such as entering into subcontracting arrangements, without first consulting the representative of the affected employees."¹⁹ The Board's rationale was that its own precedent only required bargaining over the *impact* of a decision which leads to termination of employment²⁰ and that nothing in the statutory language supported the inference that Congress intended to require bargaining over basic management decisions.²¹

While nothing in section 8(d) expressly required mandatory bargaining over economically motivated subcontracting decisions, neither did the statutory language expressly preclude the imposition of mandatory bargaining as a precondition to management decisions such as subcontracting. Thus, on reconsideration in *Fibreboard II*,²² the Board reversed its position and held that the refusal to bargain over economically motivated subcontracting decisions was an unfair labor practice.

B. *The Supreme Court Decision*

In *Fibreboard Paper Products Corp. v. NLRB*,²³ the Supreme Court affirmed the Board's decision in *Fibreboard II* and thereby set the background for the labor-management confrontation in *First National Maintenance*. The scope of the Supreme Court's decision in *Fibreboard* was narrow. It required only that an employer bargain over a decision to replace employees in an existing bargaining unit with "independent contractors [who would perform] the same work under similar conditions of employment."²⁴ The reasoning which supported the decision, however, would have

18. *Fibreboard Paper Prods. Corp.*, 130 N.L.R.B. 1558 (1961).

19. *Id.* at 1560 (footnotes omitted).

20. *Id.*

21. *Id.* at 1561. The Board perceived "basic management decisions" as decisions concerning "whether and to what extent to risk capital and managerial effect." *Id.*

22. *Fibreboard Paper Prods. Corp.*, 138 N.L.R.B. 550 (1962).

23. 379 U.S. 203 (1964).

24. *Id.* at 215.

far reaching implications regarding the freedom of an employer to implement economic decisions which cause an immediate reduction in the workforce.

The Court began its analysis in *Fibreboard* by recognizing the employees' interest in job security. It stated:

The subject matter of the present dispute is well within the literal meaning of the phrase "terms and conditions of employment." See *Order of Railroad Telegraphers v. Chicago & N.W.R. Co.* . . . A stipulation with respect to contracting out of work performed by members of the bargaining unit might appropriately be called a "condition of employment." The words even more plainly cover termination of employment which, as the facts of this case indicate, necessarily results from the contracting out of work performed by members of the established bargaining unit.²⁵

The precise meaning of this passage is controversial, as it is subject to more than one interpretation.²⁶ Regardless of its exact meaning,

25. *Id.* at 210 (citations omitted).

26. The confusion arises because two very different glosses have been put on this paragraph. The first is Justice Stewart's concurring opinion which stressed that the Court's decision must be read narrowly. Justice Stewart stated:

While employment security has thus been properly recognized in various circumstances as a condition of employment, it surely does not follow that every decision which may affect job security is a subject of compulsory collective bargaining. . . . Nothing the Court holds today should be understood as imposing a duty to bargain collectively regarding such managerial decisions, which lie at the core of entrepreneurial control.

379 U.S. at 223. In contrast to Justice Stewart's statements, the Court referred to *Order of Railroad Telegraphers v. Chicago & N.W. Ry.*, 362 U.S. 330 (1960), which involved an attempt by the union to obtain job security rights far more restrictive of managerial freedom than decision-bargaining. In *Railroad Telegraphers*, the union struck for a clause which would have made union consent a prerequisite to the elimination of unit jobs. In reaching its decision not to enjoin this strike, the Court noted:

Plainly the controversy here related to an effort on the part of the union to change the "terms" of an existing collective bargaining agreement. The change desired just as plainly referred to "conditions of employment" of the railroad's employees who are represented by the union. The employment of many of these station agents inescapably hangs on the number of railroad stations that will be either completely abandoned or consolidated with other stations. And, in the collective bargaining world today, there is nothing strange about agreements that affect the permanency of employment. . . . We cannot agree with the Court of Appeals that the union's effort to negotiate about the job security of its members "represents an attempt to usurp legitimate managerial prerogative in the exercise of business judgment with respect to the most economical and efficient conduct of its operations."

362 U.S. at 336.

The broad job security interest recognized in *Railroad Telegraphers* and the citation of that case by the *Fibreboard* Court has led some courts to conclude that management decisions which result in immediate termination of unit employment are prima facie mandatory

however, the Court, at a minimum, recognized that job security is a legitimate concern of unions and thus was willing to consider whether mandatory decision-bargaining was desirable in the circumstances of that case.

Since the Court clearly did not intend to make every decision which decreases the number of available jobs a mandatory subject of bargaining,²⁷ it had to explain why the particular subcontracting decision in *Fibreboard* should be deemed a mandatory subject of bargaining. Three reasons were offered in support of its decision. First, the Court noted that "industrial experience" indicated that subcontracting decisions were amenable to the collective bargaining process.²⁸ Second, since high labor costs prompted the company's decision, the Court believed that collective bargaining might easily produce a solution which would be satisfactory to

subjects of bargaining. See *infra* note 48 and accompanying text. The underlying assumption in *Railroad Telegraphers*, that employees have the right to prevent the elimination of their jobs, is not unanimously accepted today. See generally Comment, *Partial Terminations—A Choice Between Bargaining Equality and Economic Efficiency*, 14 UCLA L. REV. 1089 (1967). Indeed, the *Railroad Telegraphers* opinion was endorsed by only five justices, with four dissenters. The Supreme Court in *First Nat'l Maintenance* avoided discussing the continuing validity of *Railroad Telegraphers* by stating that it concerned the scope of bargaining under the Railway Labor Act, 45 U.S.C. § 152 (1976), and, therefore, was not determinative of cases arising under the NLRA. See 452 U.S. at 686, 687 n.23. The Supreme Court's refusal to interject the job security rights espoused in *Railroad Telegraphers* into the NLRA, however, is further justified by the questionable reasoning of the majority in that case. Cf. *Railroad Telegraphers*, 362 U.S. at 345-64 (Whittaker, J., dissenting) (Whittaker, J. was joined by Frankfurter, Clark, and Stewart, JJ.) (Congress did not envision that the number of existing railroad jobs would be frozen).

27. We are thus not expanding the scope of mandatory bargaining to hold as we do now, that the type of "contracting out" involved in this case—the replacement of employees in the existing bargaining unit with those of an independent contractor to do the same work under similar conditions of employment—is a statutory subject of bargaining under § 8(d). Our decision does not and need not encompass other forms of "contracting out" or "subcontracting" which arise daily in our complex economy.

379 U.S. at 215.

Justice Stewart, concurring, stated: "Decisions concerning the volume and kind of advertising expenditures, product design, the manner of financing, and sales, all may bear upon security of the workers' jobs. Yet it is hardly conceivable that such decisions so involve 'conditions of employment' that they must be negotiated with employees' bargaining representative." *Id.* at 223 (Stewart, J., concurring).

28. The Court cited Lunden, *Subcontracting Clauses in Major Contracts*, Pts. 1 & 2, 84 MONTHLY LAB. REV. 579, 715 (1961) as support for this proposition. 379 U.S. at 211 n.6. The Lunden survey indicated that approximately one-fourth of the collective bargaining agreements studied had some sort of limitations on subcontracting. *Id.* at 212 n.7.

both parties.²⁹ Finally, the Court observed that the "facts of the case" indicated that bargaining over this type of subcontracting decision would not significantly abridge management's freedom to run the business.³⁰

The *Fibreboard* opinion also addressed the company's argument that management should not have to negotiate for potential cost savings when subcontracting would achieve definite cost reductions. The company attempted to support this argument by pointing out that prior negotiations with the union had been unable to produce the desired savings. The Court replied simply: "The short answer is that, although it is not possible to say whether a satisfactory solution could be reached, national labor policy is founded upon the congressional determination that the chances are good enough to warrant subjecting such issues to the process of collective negotiation."³¹ The Supreme Court made this statement in the context of merely affording *Fibreboard's* maintenance employees the opportunity to match the cost reductions which the independent contractors offered. However, the general tone of the Court's language suggested that it had application outside the facts of the case.³²

The *Fibreboard* opinion contained a group of generalizations which could be applied outside of the context of subcontracting

29. The company was concerned with the high cost of its maintenance operation. It was induced to contract out the work by assurances from independent contractors that economies could be derived by reducing the work force, decreasing fringe benefits, and eliminating overtime payments. These have long been regarded as matters peculiarly suitable for resolution within the collective bargaining framework, and industrial experience demonstrates that collective negotiation has been highly successful in achieving peaceful accommodation of the conflicting interests.

Id. at 213-14.

30. *Id.* at 213. The "facts" which suggested that decision-bargaining would be appropriate were:

The Company's decision to contract out the maintenance work did not alter the Company's basic operation. The maintenance work still had to be performed in the plant. No capital investment was contemplated; the Company merely replaced existing employees with those of an independent contractor to do the same work under similar conditions of employment.

Id.

31. *Id.* at 214.

32. In *First Nat'l Maintenance Corp. v. NLRB*, 627 F.2d 596 (2d Cir. 1980), the court of appeals used *Fibreboard's* "short answer" to reject the company's argument for a per se no-bargaining rule for partial closing decisions. *Id.* at 601.

decision-bargaining.³³ Moreover, *Fibreboard* was the only Supreme Court decision on decision-bargaining. Accordingly, even though *Fibreboard* was expressly limited to its facts,³⁴ the application of its rationale to other management decisions by the NLRB and lower courts was inevitable. Recognizing the broad implications inherent in *Fibreboard* and the danger it would be applied to other management decisions,³⁵ Justice Stewart wrote a concurring opinion to emphasize the extremely limited nature of the decision.³⁶

II. EXPANSION OF THE FIBREBOARD RATIONALE TO PARTIAL CLOSINGS

As Justice Stewart had anticipated, *Fibreboard* did not remain limited to its facts. The Board read *Fibreboard* as recognizing that employees have an interest in the continued availability of their jobs and, therefore, that employers are not free to cut costs through the elimination of jobs without first providing the union the opportunity to make suggestions or concessions.³⁷ Thus, in *Ozark Trailers, Inc.*,³⁸ the Board held that an employer had an obligation to bargain over a partial closing decision which was prompted by operating inefficiencies. The Board specifically rejected the argument that an employer need not bargain over an economically motivated partial closing because it is a major decision which is basic to the scope of the enterprise and involves a capital commitment decision. It reasoned:

For, just as the employer has invested capital in the business, so the employee has invested years of his working life, accumulating seniority, accruing pension rights, and developing skills which may or may not be saleable to another employer. And, just as the employer's interest in the protection of his

33. See *supra* notes 25-26 and accompanying text.

34. See *supra* notes 27 & 30.

35. "[T]he Court's opinion today radiated implications of such disturbing breadth that I am persuaded to file this separate statement of my own views." 379 U.S. at 218 (Stewart, J., concurring, joined by Douglas & Harlan, JJ.) (Goldberg, J. took no part in the *Fibreboard* decision).

36. Justice Stewart's most oft-quoted suggested limitation of the Court's holding is, "Nothing the Court holds today should be understood as imposing a duty to bargain collectively regarding such managerial decisions, which lie at the core of entrepreneurial control." *Id.* at 223.

37. This interpretation of *Fibreboard* was based primarily on the Court's remark, "The words even more plainly cover termination of employment." See Rabin, *The Decline and Fall of Fibreboard*, N.Y.U. TWENTY-FOURTH CONF. ON LAB. 237, 245 (1972).

38. 161 N.L.R.B. 561 (1966).

capital investment is entitled to consideration in our interpretation of the Act, so too is the employee's interest in the protection of his livelihood.³⁹

Ozark Trailers was a very liberal interpretation of *Fibreboard*, an interpretation which the circuit courts were not quick to embrace. In *NLRB v. Royal Plating and Polishing*,⁴⁰ the Court of Appeals for the Third Circuit held that "an employer faced with the economic necessity of either moving or consolidating the operations of a failing business has no duty to bargain with the union respecting its decision to shut down."⁴¹ The court distinguished *Fibreboard* on the ground that the partial closing before it involved "a management decision to recommit and reinvest funds in the business."⁴² Similarly, in *NLRB v. Adams Dairy, Inc.*,⁴³ the Court of Appeals for the Eighth Circuit found no duty to bargain over the decision to terminate company truckdrivers and adopt a distribution system in which independent driver-salesmen would buy the milk and then distribute it to their own customers. Here the court discounted *Fibreboard* because Adams Dairy instituted "a basic operational change . . . when the dairy decided to completely change its existing distribution system by selling its products to independent contractors."⁴⁴

*Brockway Motor Trucks v. NLRB*⁴⁵ was the pivotal pro-labor case for partial closing decision-bargaining. The Court of Appeals for the Third Circuit refused to rely on *Royal Plating and Polishing*⁴⁶ as dispositive precedent and drew on the rationale of *Fibreboard* in an effort to analyze the partial closing decision-bargaining question anew.⁴⁷

39. *Id.* at 566.

40. 350 F.2d 191, 196 (3d Cir. 1965).

41. *Id.* at 196.

42. *Id.*

43. 350 F.2d 108 (8th Cir. 1965).

44. *Id.* at 111.

45. 582 F.2d 720 (3d Cir. 1978).

46. See *supra* text accompanying notes 40-42.

47. Judge Rosenn argued, in dissent, that *Royal Plating & Polishing* should not be disregarded:

I believe that the stipulation in this case, that the closing of the Philadelphia facility was solely for economic reasons, puts this case within the four corners of *Royal Plating*. The majority, however, endeavor to distinguish the instant case from *Royal Plating* on the ground that the decision to close in the latter came only after prolonged severe economic loss and a threatened condemnation of the land on which the plant was located. . . . In my view this distinction cannot be drawn validly from the reasoning of *Royal Plating*. . . . Moreover, the majority

The court began its analysis by noting that it was appropriate to determine whether mandatory decision-bargaining should be extended to partial closing decisions because these decisions, like the subcontracting decision in *Fibreboard*, lead directly to the loss of jobs.⁴⁸ After determining that the resulting termination of employment created a presumption that partial closing decisions are mandatory subjects of bargaining, the *Brockway* court found that the three justifications for subcontracting decision-bargaining stated in *Fibreboard*⁴⁹ applied with sufficient force to partial closings to warrant submitting these decisions to the collective bargaining process.⁵⁰ Since *Fibreboard* did not require bargaining over all types of subcontracting decisions, the *Brockway* court did not believe a rule which required bargaining over every partial closing decision was appropriate.⁵¹ Its final holding, therefore, was that

distinction appears to be no more than a post facto rationalization from the facts of certain cases to support a novel principle.

582 F.2d at 743-44 (Rosenn, J., dissenting).

48. Just as subcontracting is likely to lead to the termination of employment, so, too, will the closing down of an employer's plant—and thus the latter act "might appropriately be called a 'condition of employment.'" Accordingly, it would seem that there is an initial presumption, founded on statutory purposes and language, that a partial closing is a mandatory subject of bargaining.

582 F.2d at 735. At the foundation of the majority opinion was the following analysis: [T]here seems to be no justification for drawing any bright line between a partial closing situation, as to which there is decisional disagreement regarding the duty to bargain, and the subcontracting situation of *Fibreboard*, where the Supreme Court held that there was a duty to bargain. With regard to both matters, bargaining would serve an important statutory function.

Id.

49. See *supra* text accompanying notes 27-30.

50. In *Fibreboard*, the Court determined that industrial experience, the good possibility for fruitful discussion, and the insignificant burden on managerial freedom which bargaining would entail indicated that the subcontracting decision should be subject to bargaining. See *supra* text accompanying notes 28-30.

The *Brockway* court offered a Department of Labor study, in which 21.5% of the contracts surveyed were found to contain a clause dealing with the closing or removal of a plant, as evidence that industrial experience indicated that decision-bargaining may be useful. 582 F.2d at 737. The court satisfied the *Fibreboard* requirement of "a good possibility for fruitful discussion" by noting that the union could offer concessions that might alter the calculation which led to the company's decision, and by citing examples where the union and employer had combined to save a troubled enterprise. *Id.* at 736. Finally, it noted that decision-bargaining would not significantly burden managerial freedom, because all that bargaining would require was that "the two sides discuss the matter at the bargaining table." *Id.* at 738. The court continued, "Should the parties fail to reach an agreement, Brockway could then go ahead with its plan to close the plant." *Id.*

51. "As such, [per se rules] ignore the guidance of the Supreme Court in *Fibreboard*,

there existed an initial presumption that a partial closing decision is a mandatory subject of bargaining. The employer could, however, rebut this presumption with evidence that bargaining over the decision would be fruitless or unfair.⁵²

The *Brockway* holding rested on two main premises. First, the court assumed that decision-bargaining is not a significant burden on managerial freedom.⁵³ Second, it interpreted *Fibreboard* to stand for the precept that management decisions which cause termination of employment are presumed to be mandatory subjects of bargaining.⁵⁴

The *Brockway* premises constitute an overextension of the *Fibreboard* rationale. *Fibreboard* did not require bargaining over every form of subcontracting.⁵⁵ After noting that the subcontracting decision led to termination of employment, the Supreme Court went on to provide additional reasons it should be a mandatory subject of bargaining.⁵⁶ The Court observed that the company's decision did not alter its basic operation nor contemplate capital investment.⁵⁷ The company replaced existing employees with independent contractors who were to perform the same job for less compensation.⁵⁸ Only after consideration of all the facts did the Supreme Court conclude that decision-bargaining would not unduly restrict managerial freedom.⁵⁹ The Third Circuit decision in *Brockway*, therefore, was undeniably an overly expansive applica-

which by its example counselled a practical, balancing approach to the problem of articulating the scope of the employer's duty to bargain under the NLRA." 582 F.2d at 732.

52. The court mentioned closings prompted by the action of a third party, such as a condemnation of the employer's property, as in *Royal Plating*, or by the dire financial straits of the company as examples of closings where decision-bargaining would not be required. *Id.* at 738. The court did not decide whether *Brockway* had a duty to decision-bargain, because *Brockway* litigated its case on the theory that no economic partial closing decisions are mandatory subjects of bargaining. Thus, the court did not have access to the specific facts leading to *Brockway*'s decision to close its Philadelphia plant. *Id.* at 740.

53. See *Brockway*, 582 F.2d at 738.

54. *Id.* at 735.

55. 379 U.S. at 215.

56. See *supra* notes 28-30 and accompanying text.

57. 379 U.S. at 213.

58. See *supra* note 30.

59. See *supra* notes 27-30 and accompanying text. Indeed, the Court refused to grant certiorari in *Adams Dairy v. NLRB*, 350 F.2d 108 (8th Cir. 1965), *cert. denied*, 382 U.S. 1011 (1966), where the court of appeals distinguished *Fibreboard* in finding no duty to bargain over a subcontracting decision. See *supra* text accompanying notes 43 & 44.

tion of the rationale of *Fibreboard*.⁶⁰

III. FIRST NATIONAL MAINTENANCE: THE END OF EXPANSIVE APPLICATIONS OF FIBREBOARD

First National Maintenance Corporation⁶¹ decided to terminate its contract with Greenpark nursing home because it was losing money on the operation.⁶² First National informed the employees at Greenpark on July 28, 1977 that it would discontinue operations on August 1.⁶³ The administrative law judge and the Board, relying on *Ozark Trailers, Inc.*,⁶⁴ found that First National Maintenance had violated its statutory duty to bargain over the decision to discontinue its Greenpark operations.⁶⁵ The Court of Appeals for the Second Circuit,⁶⁶ largely adopting the reasoning of *Brockway*, held that there is a presumption that partial closing decisions are mandatory subjects of bargaining.⁶⁷ The court stated that this presumption could be rebutted "by showing that the purposes of the statute would not be furthered by imposition of a duty to bargain."⁶⁸ Since First National offered no evidence to rebut the

60. Cf. *Recent Decisions, Labor Law—National Labor Relations Act, In a Partial Closing the Interests of the Parties Must be Balanced to Determine Whether the Closing is a Mandatory Subject of Bargaining—Brockway Motor Trucks, Inc. v. NLRB*, 582 F.2d 720 (3d Cir. 1978), 47 GEO. WASH. L. REV. 679 (1979) (the *Brockway* court misapplied the rationale of *Fibreboard*).

61. First National Maintenance Corporation provided housekeeping, cleaning, maintenance, and related services to customers in the New York City area. First National received reimbursement of labor expenses and a fixed management fee in return for its services. The company hired personnel separately for each contract and did not transfer employees between operations. 452 U.S. at 668.

62. First National's weekly management fee was reduced from \$500 to \$250 on November 1, 1976. Operations at Greenpark continued under the reduced fee until August 1, 1977. The company informed Greenpark by telephone on June 30, 1977 that it would end its Greenpark operation on August 1 if the management fee was not restored to \$500. *Id.* at 688-89.

63. *Id.* at 669.

64. See *supra* text accompanying notes 38 & 39.

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

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

67. *Id.* at 601.

68. *Id.* This portion of the court's opinion was perceived to be a departure from *Brockway*:

[W]e disagree with *Brockway* that a determinative factor should be a balancing of the respective interests of the employer and the employees in bargaining. We believe that the determination whether to impose a duty to bargain should not depend on the relative injury to the employer and the employees, but rather on the relative merits of the arguments put forth as to those classic considerations

presumed duty to bargain, other than the assertion that it was losing money at Greenpark, the court enforced the Board's bargaining and backpay orders.⁶⁹ Because of the importance of this issue and the continuing disagreement between and among the Board and the courts of appeals,⁷⁰ the Supreme Court granted certiorari.⁷¹

In *First National Maintenance v. NLRB*,⁷² the Supreme Court, like the Second and Third Circuits, applied the *Fibreboard* rationale to partial closing decisions by balancing employee job security interests against the employer's interest in freely managing the business. Unlike the circuit courts, however, it accorded the employer's interest great deference. The Court stated that "[m]anagement must be free from the constraints of the bargaining process to the extent essential for the running of a profitable

of whether the purposes of the statute are furthered by a decision to impose a duty to bargain in a particular case.

Id. This passage does not appear to be a meaningful departure from *Brockway*. Furthering industrial peace by striking a balance between business owners' and employees' interests and rights is a purpose of the Act. *See supra* note 7. Additionally, it seems difficult to judge "the relative merits of the arguments put forth" without considering the real life implications of the arguments. Such consideration would seem to require the examination of the relative injuries to the parties involved. The fact that the Second Circuit cites clearly irrevocable decisions and economic emergency as situations where the presumption of a duty to decision-bargain would be rebutted seems to make the claimed departure from *Brockway* merely apparent. *Compare* 627 F.2d at 601 *with* 582 F.2d at 738.

69. The administrative law judge recommended an order requiring First National to bargain in good faith regarding its decision to terminate the Greenpark operation and awarding back pay to the discharged employees from the date of their discharge until the parties bargained to agreement or impasse, failed to request bargaining within a reasonable time, or failed to bargain in good faith. The Board adopted these recommendations and additionally required First National to offer the terminated employees reinstatement to their former jobs or substantial equivalents, if it agreed to resume its Greenpark operations. If operations at Greenpark were not resumed, then First National was to offer the discharged employees equivalent positions which were to be made available by the discharge of subsequently hired employees at other operations if necessary. This was the first remedial order of the Board in the partial closing decision-bargaining area that was fully enforced by a circuit court. Prior cases had declined to enforce the Board's bargaining orders, because decision-bargaining was determined to be "futile" at the time of the reviewing court's decision. *See* *NLRB v. Winn-Dixie Stores, Inc.*, 361 F.2d 512 (5th Cir. 1966); *NLRB v. Brockway Motor Trucks*, 582 F.2d 729 (3d Cir. 1978); *Electrical Prod. Div. of Midland-Ross v. NLRB*, 617 F.2d 977 (3d Cir. 1980); and *ABC Trans-Nat'l Transport, Inc. v. NLRB*, 642 F.2d 675 (3d Cir. 1981).

70. For an illustration of the conflict leading to the Court's grant of certiorari, *compare* *Ozark Trailers, Inc.*, 161 N.L.R.B. 561 (1966) and *Brockway Motor Trucks v. NLRB*, 582 F.2d 720 (3d Cir. 1978) *with* *Adams Dairy, Inc. v. NLRB*, 350 F.2d 108 (8th Cir. 1965), *cert. denied*, 382 U.S. 1011 (1966).

71. 449 U.S. 1076 (1981).

72. 452 U.S. 666 (1981).

business.”⁷³ Accordingly, the balancing equation was defined as follows:

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

The Supreme Court identified the employer's interest as the “need for speed, flexibility, and secrecy in meeting opportunities and exigencies.”⁷⁵ It further elaborated on this interest by stating:

[The company] may face significant tax or securities consequences that hinge on confidentiality of a plant closing, or a reorganization of the corporate structure. The publicity incident to the normal process of bargaining may injure the possibility of a successful transition or increase the economic damage to the business. ⁷⁶

In addition, the Court recognized the unnecessary delay which decision-bargaining might cause and the possibility that such delay might frustrate legitimate management plans and cause unnecessary economic damage to the business.⁷⁷

The Court acknowledged the employees' “legitimate concern over job security”⁷⁸ and their interest in participating in the partial closing decision.⁷⁹ It concluded, however, that these interests were not sufficient to justify imposing decision-bargaining on the employer.⁸⁰ Justice Blackmun, writing for the majority, noted that the right to effects bargaining “in a meaningful manner and at a mean-

73. *Id.* at 678-79.

74. *Id.* at 679. This balancing equation contrasts sharply with the presumption of mandatory bargaining over decisions which result in termination of employment, adopted in *Brockway*. See 582 F.2d at 735.

75. 452 U.S. at 682-83.

76. *Id.* at 683.

77. *Id.*

78. *Id.* at 682.

79. “The union's practical purpose in participating . . . will be . . . to delay or halt the closing. No doubt it will be impelled . . . to offer concessions, information, and alternatives that might be helpful to management or forestall or prevent the termination of jobs.” *Id.* at 681-82. The Court acknowledged that unions have actually aided employers in saving failing businesses. *Id.* at 681 n.19. However, the Court discounted the importance of union participation in the decision-making process by stating, “It is unlikely, however, that requiring bargaining over the decision, as well as its effects, will augment this flow of information and suggestions.” *Id.* at 681.

80. *Id.* at 686.

ingful time"⁸¹ was adequate protection of the employees' interests. Further, in situations where union concessions could change the company's decision, "management will have an incentive to confer voluntarily with the union."⁸²

Justice Blackmun determined that the Second Circuit's rebuttable presumption rule was unacceptable, because an employer would have difficulty determining when the obligation to decision-bargain existed.⁸³ Thus, the Court did not consider specific facts, such as the overall financial well-being of First National Maintenance Corporation, when assessing whether the obligation to decision-bargain existed, but instead analyzed the interests implicated by partial closing decisions in general.⁸⁴ In doing so, the Court appeared to adopt a per se no-bargaining rule for partial closing decisions. It determined that effects bargaining would provide adequate protection of workers' job security interests⁸⁵ and further decided that decision-bargaining would not add significantly to the protection of these interests, but could conceivably cause significant hardship to the employer.⁸⁶ The holding was as broad as the Court's analysis:

[W]e conclude that the harm likely to be done to an employer's need to operate freely in deciding whether to shut down part of its business purely for economic reasons outweighs the incremental benefit that might be gained through the union's participation in the decision, and we hold the decision itself is *not* part of section 8(d)'s "terms and conditions." . . .⁸⁷

In light of the Court's broad language, its rejection of the rebuttable presumption analysis, the perceived adequacy of effects bargaining, and the acknowledgement of the employer's need for certainty regarding the extent of its bargaining obligations,⁸⁸ no partial closing situation in which decision-bargaining would be mandatory appears possible. Moreover, the final portion of the opinion noted that the decision to halt work at Greenpark represented "a significant change"⁸⁹ in operations and that the absence

81. *Id.* at 682.

82. *Id.*

83. *Id.* at 684.

84. See *supra* text accompanying notes 75-82.

85. 452 U.S. at 682-83.

86. *Id.*

87. *Id.* (emphasis in original).

88. *Id.* at 680, 684.

89. *Id.* at 688.

of a significant investment commitment or withdrawal of capital is not determinative. These remarks are further evidence that *First National Maintenance* frees employers from mandatory bargaining over economically motivated partial closings decision regardless of particular fact patterns.

The final portion of the opinion, which purported to illustrate its limits, is, therefore, most confusing. Here Justice Blackmun noted that First National "had no intention to replace the discharged employees or move operations elsewhere."⁹⁰ He further observed: "[P]etitioner's dispute with Greenpark was solely over the management fee Greenpark was willing to pay. The union had no control or authority over that fee. . . . Further, the union was not selected as the bargaining representative or certified until well after petitioner's difficulties at Greenpark had begun."⁹¹ These facts could not have influenced the result in *First National Maintenance*. Replacing employees and moving operations are elements of subcontracting and relocation, not partial closings. The Court expressly refused to intimate any views on these management decisions.⁹² The other facts which Justice Blackmun offered as the limits of the decision seem equally irrelevant in the context of the remainder of the opinion. Furthermore, if these facts were significant to the outcome of the case, then the Court would be adopting a sometimes-yes-sometimes-no decision-bargaining rule similar to the rebuttable presumption rule it found "illsuited."⁹³ Accordingly, this "limits" section should not weaken the conclusion that employers have no duty to bargain over an economic partial closing decision.⁹⁴

Careful analysis reveals that the Court's reasoning in *First National Maintenance* has two major premises. First, decision-bargaining is a burden on management's freedom to run a profita-

90. *Id.* at 687.

91. *Id.*

92. *Id.* at 686 n.22.

93. *Id.* at 684.

94. The General Counsel of the NLRB has conceded that *First Nat'l Maintenance* most likely established that there is never a duty to bargain over an economic partial closing. Because of the "limits" section of opinion, however, he has told NLRB regional offices to be alert for partial closing cases "so different from both the facts and the assumptions stated in *First Nat'l Maintenance* that a different result would be warranted." See *infra* notes 151-54 and accompanying text.

ble business.⁹⁵ Second, termination of employment does not necessarily invoke mandatory decision-bargaining.⁹⁶ These premises conflict with those of the Court of Appeals for the Third Circuit articulated in *Brockway*.⁹⁷ They are, however, reconcilable with the Supreme Court decision in *Fibreboard*.⁹⁸

IV. THE BURDENS OF DECISION-BARGAINING: INCONSEQUENTIAL OR INTOLERABLE?

Both *Brockway* and *First National Maintenance* accepted the premise that managerial freedom should not be unduly burdened. The Third Circuit and the Supreme Court, however, reached opposite conclusions regarding the weight of the burden imposed by mandatory decision-bargaining. Certain inherent burdens appear to attach to all instances of decision-bargaining. For example, decision-bargaining would require numerous and lengthy meetings.⁹⁹ The duty to bargain in good faith imposes a burdensome obligation on management to provide information.¹⁰⁰ Nebulous concepts such as "surface bargaining"¹⁰¹ may lead to unfair labor practice charges and Board intervention that results in unnecessary economic loss to the business or the frustration of a legitimate business decision.¹⁰² Decision-bargaining would also compel early disclosure of

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

96. See *supra* note 74 and accompanying text.

97. See *supra* text accompanying notes 53 & 54.

98. See *supra* text accompanying notes 55-60.

99. See Rabin, *supra* note 37, at 260.

100. *Id.* Cf. *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 152-53 (1956) ("Good faith bargaining necessarily requires claims made . . . be honest claims. . . . If such an argument is important enough to be present in the give and take of bargaining, it is important enough to require some sort of proof of its accuracy."). See also *First Nat'l Maintenance*, 452 U.S. at 678-79 n.17.

101. See *NLRB v. Reed & Prince Mfg. Co.*, 205 F.2d 131 (2d Cir. 1953).

102. The Supreme Court in *First Nat'l Maintenance* considered unfair labor practice charges and Board intervention to be tangible burdens associated with decision-bargaining. See 452 U.S. at 685-86. The validity of raising the possibilities of unfair labor practice charges and Board intervention as reasons to release an employer from the obligation of decision-bargaining has been questioned. See Gould, *The Supreme Court's Labor and Employment Docket in the 1980 Term—Justice Brennan's Term*, 53 U. COLO. L. REV. 1, 11, 13-14 (1981). Despite this scholarly skepticism, the possibility of an employer being injured by an unfair labor practice charge arising from a decision-bargaining session seems very real. Cf. *Soule Glass & Glazing Co. v. NLRB*, 652 F.2d 1055 (1st Cir. 1981) (employer charged with "surface" effects bargaining and implementing its decision prior to impasse).

management's intentions,¹⁰³ thus damaging the business in terms of competition, efficiency, and employee morale.¹⁰⁴ In addition, the union, upon learning of management's intentions, may resort to economic sanctions in an effort to prevent the impending terminations and thus cause further damage to the business.¹⁰⁵

The weight of the above burdens will inevitably vary from case to case. Neither the Third Circuit in *Brockway* nor the Supreme Court in *First National Maintenance*, however, considered the weight of the burden which decision-bargaining would present within the facts of their particular cases in reaching their respective decisions.¹⁰⁶ It is impossible, therefore, to reconcile *Brockway* and *First National Maintenance* by observing that the burden of decision-bargaining was less onerous in *Brockway* than in *First National Maintenance*. Rather, the true grounds for decision depend on whether the reviewing court interprets federal labor legislation with a view towards furthering industrial democracy or free enterprise.

The *Brockway* court clearly analyzed partial closing decision-

103. See *International Ladies Garment Workers v. NLRB*, 463 F.2d 907 (D.C. Cir. 1972). In *Garment Workers*, the Court of Appeals for the District of Columbia outlined the notice requirement for decision-bargaining by stating that "[n]otice, to be effective, must be given sufficiently in advance of actual implementation of a decision to allow reasonable scope for bargaining." *Id.* at 919. The court continued, "Indeed, '[n]o genuine bargaining . . . can be conducted where [the] decision has already been made and implemented.'" *Id.* (quoting *Town & Country Mfg.*, 130 N.L.R.B. 1022, 1036 (1962)). See also *Soule Glass & Glazing Co. v. NLRB*, 652 F.2d 1055, 1089 (1st Cir. 1981).

104. See Rabin, *supra* note 37, at 260.

105. *Id.*

106. In *Brockway*, the parties stipulated that the sole issue for the court's determination was whether or not there was a duty to bargain over an economic partial closing decision. See *Brockway*, 582 F.2d at 723, 738-39. Consequently, no specific facts were available to enter into the Third Circuit's analysis.

In *First Nat'l Maintenance*, on the other hand, the Supreme Court looked to the problems which mandatory partial closing decision-bargaining would generally present to employers. For instance, the Court observed that at times management *might* require speed, flexibility, and secrecy in implementing its decision. 452 U.S. at 682. The Supreme Court also noted that significant tax and securities consequences *may* hinge on the confidentiality and timing of the plant closing. *Id.* at 683. Further, the publicity and delay which bargaining entails *could* thwart legitimate management intentions. *Id.* See *supra* notes 72-89 and accompanying text (for a full discussion of the Supreme Court's analysis). None of the general burdens which Justice Blackmun noted appear to have been actual problems facing First National Maintenance Corporation. See 452 U.S. at 677; 627 F.2d at 602. Cf. Note, *Enforcing the NLRA: The Need for a Duty to Bargain over Partial Plant Closings*, 60 *Tex. L. Rev.* 279, 293, 309 (1982) (criticizing the Supreme Court in *First Nat'l Maintenance* for ignoring the specific facts of the case).

bargaining in the context of industrial democracy. The Court of Appeals for the Third Circuit began its analysis by recognizing the employees' interest in keeping their jobs and by stating that there is a presumption that decisions which eliminate jobs are mandatory subjects of bargaining.¹⁰⁷ This analysis is consistent with the basic tenet of industrial democracy which states that employees ought to have a voice in decisions which affect their working lives.¹⁰⁸ In support of its opinion, the *Brockway* court cited sources which advocate labor-management cooperation and industrial democracy.¹⁰⁹

First National Maintenance, on the other hand, resolved the decision-bargaining question in favor of free enterprise. Thus, the Court did not adopt the position that termination of employment creates a presumption of mandatory decision-bargaining. Rather, it assumed that decision-bargaining is a burden on the employer's right to freely manage the business.¹¹⁰ In support of this analysis, the *First National Maintenance* Court referred to sources which advocate granting employers maximum freedom to structure their businesses.¹¹¹ The Court's primary emphasis on the needs of employers is best understood by reading the opinion as protecting free enterprise at the expense of industrial democracy.

The fact that the Third Circuit emphasized industrial democracy over free enterprise and decided that there was a presumption that a partial closing decision is a mandatory subject of bargaining, while the Supreme Court preferred free enterprise and found no duty to decision-bargain, confirms the hypothesis that the objective burdens imposed by decision-bargaining in the context of specific cases are not determinative of the final decision reached. Instead, the particular court's generalized perception of these burdens is controlling. The court's perception is, of course, strongly influenced by its underlying desire to advance either free enterprise or industrial democracy. A court that begins with a view to-

107. *Brockway*, 582 F.2d at 735.

108. Cf. Summers, *supra* note 12, at 29 (discussing workers' rights under the doctrine of industrial democracy).

109. The *Brockway* court cited E. LEVER & F. GOODELL, LABOR-MANAGEMENT COOPERATION (1948) and C. GOLDEN & H. RUTENBERG, THE DYNAMICS OF INDUSTRIAL DEMOCRACY (1942). See 582 F.2d at 736 nn.89 & 90.

110. 452 U.S. at 678-79.

111. Justice Blackmun twice cited Comment, *supra* note 26. See 452 U.S. at 683, 683 n.21.

ward promoting industrial democracy must necessarily find the duty to decision-bargain less burdensome than a court which begins with a philosophy favoring free enterprise.¹¹²

V. FREE ENTERPRISE AND INDUSTRIAL DEMOCRACY: CONFLICTING POLICIES IN LABOR LAW

Framing the problem of decision-bargaining as a choice between free enterprise and industrial democracy explains why the courts in *Brockway* and *First National Maintenance* perceived the burdens of decision-bargaining differently and reached opposite conclusions regarding the desirability of mandatory decision-bargaining. Interpreting section 8(d) with free enterprise as the paramount value obviously leads to a different result than an interpretation premised on the advancement of industrial democracy. Unfortunately, the legislative history of section 8(d) does not contain an express congressional declaration as to which underlying assumption should govern.¹¹³ This leaves the NLRB and the courts

112. Compare *Brockway*, 582 F.2d at 738 ("all [decision-bargaining] would require is that the two sides discuss the matter at the bargaining table") with *First Nat'l Maintenance*, 452 U.S. at 678-79 ("Management must be free from the constraints of the bargaining process to the extent essential for the running of a profitable business").

113. Congress deliberately left open the parameters of § 8(d). See *supra* note 4. The House Minority Report indicated that the primary shortcoming in the rejected shopping list of mandatory subjects was that it would exclude:

collective bargaining concerning welfare funds, vacation funds, union hiring halls, union security provisions, apprenticeship qualifications, assignment of work, check-off provisions, subcontracting of work, and a host of other matters traditionally the subject matter of collective bargaining in some industries or in certain regions of the country.

H.R. REP. No. 245 on H.R. 3020, 80th Cong., 1st Sess. 71, reprinted in 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT RELATIONS ACT, at 362 (1948) (Minority Report). The reference to subcontracting is double-edged. On the one hand, it implies managerial decisions like automation, relocation, and partial closings may be appropriate subjects of mandatory bargaining. On the other hand, subcontracting is the only managerial decision mentioned and, as *Fibreboard* demonstrates, the replacement of employees for outside labor willing to work for less compensation is often seen as the legally relevant characteristic of subcontracting. *But cf.* NLRB v. Adams Dairy, Inc., 350 F.2d 108 (8th Cir. 1965), cert. denied, 382 U.S. 1011 (1966) (no duty to bargain over a subcontracting decision which included a partial termination component). The subcontracting decision-bargaining recognized in *Fibreboard*, therefore, can be seen as necessary to ensure that employees can successfully bargain for wages and working conditions superior to those which would result from the natural operation of the labor market. The achievement of better wages and working conditions is the fundamental purpose of the NLRA. See *infra* note 116. Bargaining over economic automation, relocation, or partial closing decisions is not as essential to the achievement of improved wages and working conditions as is bargaining over *Fibreboard*

in the difficult position of having to make political judgments regarding the nature of our economic system.¹¹⁴ Moreover, since no clear legislative guidance exists, a court is certain to be criticized whether it holds for the union or management on decision-bargaining questions.¹¹⁵

Despite ambiguities found in federal labor legislation, the Supreme Court's decision in favor of managerial freedom in *First National Maintenance* is defensible. Concededly, the collective bargaining process is the primary tool which Congress envisioned to end industrial strife. The main congressional goal, however, was that collective bargaining would improve the wages and working conditions of the American worker.¹¹⁶ Requiring mandatory bar-

subcontracting. See *infra* note 117. Therefore, the former decisions can justifiably be removed from the scope of § 8(d), because mandatory bargaining over these decisions would be an *unnecessary* infringement on managerial freedom.

The specific subjects that the House Minority Report indicated might be improperly excluded by the proposed shopping list of mandatory subjects fall into four general categories: (1) compensation; (2) assignment of work; (3) job content; and (4) union security. Job safety is a fifth general category expressly mentioned by Congress. Cf. 93 Cong. Rec. 2010 (1947), reprinted in 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT RELATIONS ACT, at 867 (1948) ("Collective-bargaining issues would include only wages, hours, and work requirements; discipline, seniority, and discharge within the bargaining unit; safety, sanitation, and health; and vacations and leaves of absence."). Consideration of the bargaining subjects expressly mentioned in the legislative history of the LMRA suggests the conclusion that, although Congress finally incorporated the phrase "other terms and conditions of employment" into the language of § 8(d), it did not envision that the resulting set of mandatory subjects would be much larger than compensation, hours, safety, terms at which the job would be offered, conditions under which the job would be performed, and union security. Senator Wagner himself lends support to this thesis by his statement:

By substituting the narrower term "working conditions" for the present broader term "conditions of employment," the bill would narrow the scope of collective bargaining to exclude many subjects, such as, perhaps pension plans, insurance funds, which properly belong in the employer-employee relationship. . . .

93 CONG. REC. 3427 (1947) reprinted in 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT RELATIONS ACT, at 998 (1948).

114. The policy considerations and subjectivity involved in attempting to balance the respective interests of employers and employees were recognized early in the history of labor law litigation by Justice Holmes. In *Vegeahn v. Guntner*, 167 Mass. 92, 44 N.E. 1077 (1896), Justice Holmes stated: "The true grounds of decision are considerations of policy and social advantage, and it is vain to suppose that solutions can be attained merely by logic and the general propositions of law which nobody disputes." *Id.* at 106 (Holmes, J., dissenting). See also *Brockway*, 582 F.2d at 722 (for a less cynical version of Justice Holmes' observation).

115. Compare *Recent Decisions*, *supra* note 60 (criticizing *Brockway*) with Gould, *supra* note 102 (criticizing *First Nat'l Maintenance*).

116. The oft-cited Preamble to the National Labor Relations Act, as amended by the Labor-Management Relations Act (Taft-Hartley) states:

The denial by some employers of the right of employees to organize and the

gaining over management decisions such as partial closings is not essential for the achievement of this congressional goal.¹¹⁷ In addi-

refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce. . . .

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved [sic] that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly *adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions*, and by restoring equality of bargaining power between employers and employees.

29 U.S.C. § 151 (1976) (emphasis added). There is also legislative history which suggests that compensation and conditions of the work site were the primary subjects which Congress envisioned when enacting § 8(d). See *supra* note 113. Note also that the Preamble uses the more narrow term "working conditions" in lieu of § 8(d)'s "other terms and conditions of employment." Cf. *supra* note 113 (for Senator Wagner's perception of the distinction between "working conditions" and "conditions of employment").

This congressional preoccupation with improving wages and conditions at the job site indicates to this commentator that perhaps the NLRA ought to be viewed as a remedial statute designed to foster the development of comfortable wages and working conditions for the American worker, not the radical restructuring of our economy through the complete adoption of the doctrine of industrial democracy. *But cf.* Note, *supra* note 106, at 300 (The NLRA's view of industrial self-government seems to have been abandoned in *First Nat'l Maintenance*). Concededly, the NLRA does embrace some principles of industrial democracy, e.g., the collective bargaining process. Nevertheless, employee participation in strategic management decisions, such as partial closings, does not follow from the history and purpose of the NLRA as easily as most commentators suggest. Cf. Note, *supra* note 106, at 296-300 (the commentator makes the transition from the express goal of remedying substandard wages and working conditions to the much broader purpose of "industrial self-government" without any support from the language and purpose of the Act).

117. This statement is probably the most controversial observation in this Comment, yet it appears to stand up against the five most common arguments for mandatory decision-bargaining. The first argument is that the existence of the job is itself a "condition of employment." Cf. Note, *supra* note 106, at 300 (employees are vitally interested in decisions affecting the availability of their jobs). Cf. also text accompanying note 39 (Board's statement of an employee's investment in the job). *Fibreboard* is often invoked to support this proposition, because the opinion states that termination of employment "is well within the literal phrase 'terms and conditions of employment.'" See *supra* text accompanying note 25. However, *Fibreboard* cannot be interpreted so broadly. A literal reading of the *Fibreboard* Court's statement would mean that every management decision which leads to a reduction in the number of jobs in an enterprise is a mandatory subject of bargaining, yet the Supreme Court in *Fibreboard* did not even go so far as to require bargaining over every type of

tion, free enterprise is the traditional foundation of the American

subcontracting decision. *See supra* note 27. *See also* NLRB v. Adams Dairy, Inc., 350 F.2d 108 (8th Cir. 1965), *cert. denied*, 382 U.S. 1011 (1966). In addition to dubious statutory or judicial support, the argument that termination of employment itself is a mandatory subject of bargaining is untenable because industrial employees, according to common law principles, generally serve at their employer's discretion and do not possess any property interests or statutory guarantees which require the continued availability of their jobs. *See, e.g.*, Percival v. General Motors Corp., 539 F.2d 1126 (8th Cir. 1976); Van Der Veer v. Theile, 185 A.D. 17, 172 N.Y.S. 628 (1st Dep't 1918). *Cf.* Bishop v. Wood, 426 U.S. 341 (1976) (no property interest in job, unless created by contract or statute). *But cf.* Monge v. Beebe Rubber Co., 114 N.H. 130, 316 A.2d 549 (1974) (court acknowledges general right to terminate employee at will, but allows action for bad faith discharge). The NLRA expressly aims to improve the wages and working conditions of employees through the collective bargaining process. *See supra* note 116. The legislative history, however, contains no express modification of the common law freedom to hire and terminate employees as the business requires. *Cf.* Stone & Webster Eng'g Corp. v. NLRB, 536 F.2d 461, 467 (1st Cir. 1976) (discharge of eight union supporters for economic reasons was permissible—"The Act was not intended to guarantee that business decisions be *sound*, only that they not be the product of antiunion motivation"). Additionally, all authorities agree that an employer is free to implement an economic decision which reduces the number of employees required. *See First Nat'l Maintenance*, 452 U.S. at 678 n.17; *Jones & Laughlin Steel*, 301 U.S. at 45; *Brockway*, 582 F.2d at 738. *Cf.* Levine v. C. & W. Mining Co., 610 F.2d 432, 438 (6th Cir. 1979) ("An employer has no absolute duty to continue in business"). This acknowledged employer freedom renders both decision-bargaining and the assertion of an interest in the continued availability of employment meaningless. *See infra* note 125.

The second common argument is that even if an employee has no vested right to the continued availability of the job, mandatory decision-bargaining is, nevertheless, necessary to effectuate the right to bargain for better wages and working conditions. *Cf.*, Gould, *supra* note 102, at 18 ("The fact that there is no obligation to bargain to impasse on the decision may encourage some employers to bluff unions into economic concessions with the threat to close, knowing that management has no obligation to articulate fully the basis for the decision."). Concerns that the collective bargaining process will be emasculated are greatly overstated. A bluff based on an economic threat to close or relocate would be treated the same as a bluff based on a plea of inability to pay. In either case, the employer would be required to open company records and come forward with evidence to substantiate the claim. *See NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 152-53 (1956). Further, an employer would not execute the threatened economic partial closing if the venture in question was profitable. Similarly, the significant planning and investment associated with a relocation make relocating merely to avoid providing reasonable wages and working conditions irrational, especially since a substantial probability exists that employees at the new location would organize to improve intolerable wages and working conditions long before the company could recoup the costs of relocating. The fact that employers at present do not routinely relocate to reduce labor costs when the costs associated with notice and effects bargaining and notice and decision-bargaining are similar supports this proposition. *See infra* text accompanying notes 163-64. *Cf.* Soule Glass & Glazing Co. v. NLRB, 652 F.2d 1055 (1st Cir. 1981) (employer charged with "surface" effects bargaining and implementing its decision prior to impasse). Note, however, that though the costs associated with effects and decision bargaining are similar, there are important differences. If the decision itself is a mandatory subject, then the union could demand control over the decision as part of routine contract negotiations. *See supra* notes 3 & 5. Moreover, a strike for a contract clause requiring union consent prior

to implementing the particular management decision would seem to be proper once that decision has been classified a mandatory subject. *Cf.* *Order of Railroad Telegraphers v. Chicago & N.W. Ry. Co.*, 362 U.S. 330 (1960) (Supreme Court refused to enjoin strike for clause requiring union consent prior to the elimination of any local agent's position). *See supra* note 26 for a discussion of *Railroad Telegraphers*. *Cf. also* *NLRB v. Insurance Agents Int'l Union AFL-CIO*, 361 U.S. 477, 489 (1960) (the NLRA-LMRA scheme contemplates the parties' use of economic weapons to enforce their bargaining demands). The potential union control over the decision making process is the primary distinction between effects and decision-bargaining. *See also supra* notes 99-105 and accompanying text (for further discussion of the other impediments to managerial freedom which decision-bargaining imposes).

Closing part of the business or relocating merely to avoid dealing with a union violates § 8(a)(3), 29 U.S.C. § 158(a)(3) (1976). *See* *Textile Workers Union of America v. Darlington Mfg. Co.*, 380 U.S. 263 (1965). *See also* *First Nat'l Maintenance*, 452 U.S. at 682. Further, a partial closing or relocation that makes no economic sense would be evidence of an unlawful discriminatory motive. *See* *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26 (1967). Therefore, § 8(a)(3) refutes the third common argument for decision-bargaining that the absence of mandatory bargaining over management decisions like partial closings will adversely effect the employees' rights to organize.

The above discussion demonstrates that a policy in which decision-bargaining is an exception and not a presumption will most likely result in neither the destruction of the NLRA, nor the return of starvation wages and inhuman working conditions. Instead, the employee representative would merely lose direct control over strategic management decisions and the possibility of decision-bargaining at a point where the economic considerations prompting management's decision have gained sufficient momentum to turn decision-bargaining into what is essentially effects bargaining. *See infra* note 125. The desirability of direct employee involvement in strategic management decisions is, of course, a political question which has no logically compelled answer. *See supra* notes 106-15 and accompanying text. In addition to having questionable practical value, last minute decision-bargaining is unnecessary because, as the Supreme Court in *First Nat'l Maintenance* noted, a rational employer will voluntarily consult the union if reasonable concessions could restore vitality to a failing business. *See* 452 U.S. at 682.

The fourth argument for mandatory decision-bargaining is that such a requirement furthers the NLRA's fundamental goal of maintaining "industrial peace." *Cf. Note, supra* note 106, at 301 ("It is hardly conducive to industrial peace . . . that continued employment itself must be left to the employer's discretion"). The "industrial peace" argument more closely resembles a slogan than legal analysis. If partial closing decision-bargaining should be mandatory merely because organized labor strongly desires to participate in these decisions, then any demand on which labor or management insists must also be held mandatory. Present law, however, holds that the words of § 8(d) are words of limitation. *See* *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342 (1958). The *Borg-Warner* mandatory/permissive dichotomy does not have unquestioned acceptance. *See, e.g.,* Barron, *A Theory of Protected Employer Rights: A Revisionist Analysis of the Supreme Court's Interpretation of the National Labor Relations Act*, 59 *Tex. L. Rev.* 421, 435-38 (1981). Nevertheless, Congress has left the *Borg-Warner* doctrine intact for over 20 years. Since the list of mandatory subjects is finite, the NLRB and the courts must necessarily disturb "industrial peace" by placing limits on the bargaining demands of both labor and management. Consequently, the issue becomes which party must be disappointed. Hopefully this Comment demonstrates that decision-bargaining questions require complicated legislative judgments on the nature of our economic system and not the mere *ipse dixit* assertion that mandatory partial closing decision-bargaining is necessary to promote industrial peace. Additionally, the NLRA-LMRA scheme clearly contemplates that industrial peace will not be maintained

economy¹¹⁸ and one of the principal purposes of the National Labor Relations Act is to institutionalize labor disputes within the confines of the capitalist order.¹¹⁹ The right of workers to participate in the strategic management decisions of their employers is not a basic tenet of capitalism. The Supreme Court in *First National Maintenance*, by rendering a decision consistent with the concept of free enterprise, implicitly recognized that Congress, and not the judiciary or the NLRB, is the proper institution for making value judgments which change our social structure.¹²⁰ The NLRB and the courts should avoid implying drastic socio-economic reforms, such as decision-bargaining, into a remedial statute which never contemplated them.¹²¹ Justice Stewart takes this very position in his concurring opinion in *Fibreboard*, which stresses the uniqueness of the *Fibreboard* facts.¹²²

at all times. See *Insurance Agents*, 361 U.S. at 489.

Finally, mandatory decision-bargaining advocates assert the simple "why not?" or "what harm can it do?" Cf. *Brockway*, 582 F.2d at 738 ("We cannot accept the employer's suggestion that imposing on it a duty to [decision-bargain] would necessarily strip it of its management prerogative. . . . Rather, all that such a conclusion would require is that the two sides discuss the matter at the bargaining table"). The obvious response is that decision-bargaining, as discussed above, does impose burdens on management. See *supra* notes 99-105 and accompanying text. Concededly, effects bargaining also imposes burdens on management. See *infra* notes 163-64 and accompanying text. See also *Soule Glass & Glazing Co.*, 652 F.2d 1055 (1st Cir. 1981). The fact that management must bear the burden of effects bargaining, however, cannot serve as sufficient justification for restricting its prerogatives with mandatory decision-bargaining, or no limit would exist on the amount of inconvenience an employer could be asked to endure. The line ought to be drawn by considering the degree of encroachment on entrepreneurial freedom necessary to further the NLRA-LMRA's fundamental purpose of improving wages and working conditions through employee organization for collective bargaining. See *supra* note 116. The above analysis indicates that mandatory bargaining on managerial decisions is not a necessary intrusion on managerial freedom.

118. See R. HEILBRONER & L. THURLOW, *ECONOMICS EXPLAINED* 3 (1982); L. HACKER, *THE TRIUMPH OF AMERICAN CAPITALISM* 3-15 (1947). See also *infra* note 122 (Justice Stewart concurring in *Fibreboard*). Cf. Gould, *supra* note 102, at 7-8 ("Congress had no expectation that the elected union representative would become an equal partner in the running of the business enterprise. . . . This statement hardly comes as a surprise in this country").

119. See generally W. LEUCHTENBURG, *F. D. ROOSEVELT AND THE NEW DEAL* (1963).

120. It is a fundamental constitutional principle that legislative bodies are the proper institutions to engage in experiments concerning social and economic reforms. See *Ferguson v. Skrupa*, 372 U.S. 726, 730-31 (1963); *Kealey Pharmacy & Home Care Serv., Inc. v. Walgreen Co.*, 539 F. Supp. 1357, 1369 (W.D. Wisc. 1982). Indeed, general delegation of the authority to determine the appropriate format of the American industrial economy to the NLRB would most likely be unconstitutional. See, e.g., *Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529-30 (1935).

121. See *supra* notes 113 & 116.

122. Justice Stewart stated:

In addition to evidencing proper judicial deference to Congress in an area where the courts are institutionally ill-suited for decision making, *First National Maintenance* is a practical decision which recognizes the realities of decision-bargaining.¹²³ It is undisputed that even under mandatory decision-bargaining the employer retains the freedom to make the final decision.¹²⁴ This fact tends to make the job security offered by decision-bargaining a mere illusion. A survey by Professor Bernstein indicates that the mandatory decision-bargaining required by *Fibreboard* has had virtually no effect on an employer's subcontracting decisions.¹²⁵ If

I am fully aware that in this era of automation and onrushing technological change, no problems in the domestic economy are of greater concern than those involving job security and employment stability. . . . It is possible that in meeting these problems Congress may eventually decide to give organized labor or government a far heavier hand in controlling what until now have been considered the prerogatives of private business management. That path would mark a sharp departure from the traditional principles of a free enterprise economy. Whether we should follow it is, within constitutional limitations, for Congress to choose. But it is a path which Congress certainly did not choose when it enacted the Taft-Hartley Act.

379 U.S. at 225-26 (Stewart, J., concurring). See also *International Ass'n of Machinists v. Northeast Airlines*, 536 F.2d 975 (1st Cir. 1976); *NLRB v. Acme Indus. Prods.*, 439 F.2d 40 (7th Cir. 1971); *NLRB v. Adams Dairy, Inc.*, 350 F.2d 108 (8th Cir. 1965).

123. The Supreme Court clearly allowed the practical problems associated with decision-bargaining to enter into its analysis. See 452 U.S. at 685-86. The majority in *Brockway* believed that consideration of the practical problems of decision-bargaining was irrelevant because the question of whether the right to decision-bargaining exists is analytically separate from the right's real-world practicality. See 582 F.2d at 738 n.98. The *Brockway* majority is correct in the purely logical sense. Nevertheless, avoiding the adoption of an impractical rule that would merely increase litigation, while failing to significantly advance employee job security interests, is common sense and common sense is a valid consideration in common law decision making. Cf. *Recent Decisions*, *supra* note 60, at 697 (the *Brockway* rule is so uncertain in its application that it renders any exception from the duty to bargain illusory).

124. See *supra* note 117.

125. Bernstein, *The NLRB's Adjudication - Rule Making Dilemma Under the Administrative Procedure Act*, 79 YALE L.J. 571 (1970). The study stated:

The overwhelming majority (34 of 46 management attorneys whose clients or organizations had subcontracting problems) of those who answered the last question about cancellation or modification of subcontracting decisions replied that bargaining had not caused a modification or abandonment of the decision to shift work out of the unit. Even more impressive was the certainty and vehemence of many interviewees and questionnaire respondents that the bargaining requirement has no practical meaning. In typical replies, management lawyers, for example, characterized the requirement as "a charade; we just go through the pretense of bargaining. It means more lawyers' fees but it makes no difference in the end. [M]anagement play-acts. We go through the routine of pretending to let the union participate in the decision and after hours of taking a lot of guff, we

decision-bargaining does not protect job security in the subcontracting area, there seems little reason to extend the requirement to more major management decisions such as partial closing. Board intervention appears to offer no more than unfair labor practice charges,¹²⁶ backpay awards, and other unnecessary impediments to the execution of managerial decisions which an employer is unquestionably free to make. The Board cannot mandate union participation in strategic management decisions. It can only order decision-bargaining which will most likely occur in an antagonistic atmosphere and have no practical effect.

VI. THE IMPACT OF FIRST NATIONAL MAINTENANCE

A. *The Conceptual Implications of First National Maintenance*

First National Maintenance implied that decision-bargaining questions should be resolved in favor of promoting free enterprise, not industrial democracy. Accordingly, the Court did not consider management decisions which cause a reduction in available jobs to be prima facie mandatory subjects of bargaining. Instead, it regarded management's need for "speed, flexibility, and secrecy" as the key considerations and created a presumption against decision-bargaining. Justice Blackmun's statement that effects bargaining will usually provide adequate protection of workers' job security interests further strengthens this presumption against decision-bargaining.

First National Maintenance's strong stand against decision-bargaining and its references to the concurring opinion in *Fibreboard* may warrant the adoption of Justice Stewart's narrow interpretation of *Fibreboard*. As noted by Justice Stewart: "Analytically, this case is not far from that which would be presented if the employer had merely discharged all its employees and replaced them with other workers willing to do the same job in the same plant without the various fringe benefits so costly to the company."¹²⁷ This interpretation would, for the most part, limit *Fibreboard* to its facts. Unionized employees would receive protection from replacement by local workers willing to work for less

write a carefully drawn letter, going ahead."

Id. at 579-80 (footnote omitted).

126. See, e.g., *Soule Glass & Glazing Co. v. NLRB*, 652 F.2d 1055 (1st Cir. 1981).

127. 379 U.S. at 224 (Stewart, J., concurring).

and, consequently, would be able to bargain for better wages and working conditions than would naturally result from the competitive forces of the local labor market.¹²⁸

B. *The Conceptual Implications for Related Managerial Decisions—Automation and Relocation*

First National Maintenance suggests that there is no duty to bargain over the other managerial decisions on which the Court refused to comment, namely subcontracting (other than *Fibreboard*-type situations), automation, and relocation. Currently, the case law concerning each of these decisions is confused, with the cases which impose the the duty to decision-bargain adopting the same expansive interpretation of *Fibreboard* as did *Brockway*.¹²⁹ In *First National Maintenance*, the Court rejected *Brock-*

128. This result would be in keeping with the primary purpose behind the NLRA. See *supra* notes 113 & 117.

129. The following cases have required decision-bargaining over the managerial decisions which the Supreme Court left open in footnote 22 of *First Nat'l Maintenance*. See *International Ladies' Garment Workers v. NLRB*, 463 F.2d 907 (D.C. Cir. 1972) (relocation); *NLRB v. Winn-Dixie Stores, Inc.*, 361 F.2d 512 (5th Cir. 1966) (subcontracting). See also *NLRB v. Columbia Tribune Pub. Co.*, 495 F.2d 1384 (8th Cir. 1974) (automation). *But cf.* *Metromedia, Inc., KMBC-TV v. NLRB*, 586 F.2d 1182 (8th Cir. 1978) (argument that *Columbia Tribune* only requires effects bargaining disposed of by stating that the employer did not meet its effects bargaining obligation).

The authority cited below has found no obligation to bargain over economic relocation, automation, or subcontracting decisions. See *NLRB v. Acme Indus. Prods.*, 439 F.2d 40 (6th Cir. 1971) (no absolute duty to bargain over economic relocation decision when employer stood ready to negotiate over any and all aspects of the move other than the decision itself). See also *NLRB v. Rapid Bindery, Inc.*, 293 F.2d 170 (2d Cir. 1961) (no duty to bargain over economic relocation decision). See *Fibreboard*, 379 U.S. at 223 (Stewart, J., concurring) (reference to automation as an example of a fundamental managerial prerogative). *Cf.* *Opera on Tour, Inc. v. Weber*, 285 N.Y. 348, 34 N.E.2d 349 (1941) (strike against automation held unlawful because it bears no relation to wages, hours, "or any other conditions of employment"). See *NLRB v. Adams Dairy, Inc.*, 350 F.2d 108 (8th Cir. 1965), *cert. denied*, 382 U.S. 1011 (1966) (subcontracting case reconsidered in light of *Fibreboard*).

Current NLRB cases have held that automation, relocation, and subcontracting decisions are generally mandatory subjects of bargaining. According to the NLRB General Counsel, however, cases concerning these decisions must now be analyzed in light of the *First Nat'l Maintenance* balancing test. See *infra* notes 144-50 and accompanying text. Perhaps the most intriguing NLRB decision in light of *First Nat'l Maintenance* is *National Car Rental Sys. Inc.*, 252 N.L.R.B. 159 (1980), *enfd in part*, 672 F.2d 1182 (3d Cir. 1982). In *National Car Rental*, the company opened a new facility at Edison, New Jersey and closed its old Newark facility after transferring some of its leasing accounts to the Edison facility and selling the rest to an outside party. While *National Car's* actions resemble a relocation, the Board held that the company had no duty to bargain over the decision to initiate the sequence of events which led to the closing of the Newark facility. It used an interesting two-

way's broad interpretation of *Fibreboard*. Furthermore, the Supreme Court appears to have rejected the case-by-case approach advocated by the Second and Third Circuits in favor of an analysis of the general nature of the management decision at issue with a view toward formulating a per se rule for each category of managerial decisions.¹³⁰ Therefore, other management decisions, such as subcontracting, automation, and relocation, appear to be properly analyzed at the level of generality, without regard to the specific facts of any particular case.

Subcontracting, automation, and relocation all involve the substitution of machines or nonunion labor for union members. One commentator advocates decision-bargaining in all cases where the employer plans to substitute nonunit workers for unit workers.¹³¹ Judge Rosenn, dissenting in *Brockway*, advocated a per se no-bargaining rule for closings and partial closings.¹³² However, he agreed with the substitution doctrine and believed that subcontracting and relocation decisions should be mandatory subjects of bargaining.¹³³ *First National Maintenance* implies that the substitution of employees may not be the controlling consideration. The Court regards management's need for freedom in making signifi-

step analysis to support its conclusion. First, the Board decided there was no duty to bargain over the decision to open the Edison facility, because a resulting adverse effect on the Newark facility was "far from certain." *Id.* at 162. Second, there was no duty to bargain over the decision to sell the bulk of its leasing accounts to a third party and cease operations at Newark, because such decision was "essentially financial and managerial in nature," involving a "significant investment or withdrawal of capital" affecting the "scope and ultimate direction of an enterprise." *Id.* at 163.

A superficial reading of *National Car Rental* might lead an employer to attempt to implement a relocation without bargaining over the decision by expanding the business, opening a new, more satisfactory facility, and then making the economic partial closing decision to eliminate "unexpected" excess capacity without prior decision-bargaining. This attempt to avoid relocation decision-bargaining through use of *National Car Rental* would require the employer to produce convincing evidence that it was not clear when opening the new facility that an adverse impact on the old facility was likely. A much more important obstacle to using *National Car Rental* to plan a relocation, however, is the Board's detailed discussion of the facts of that case. The detailed factual discussion may indicate acceptance of the NLRB General Counsel's facts-of-the-case approach to relocation, automation, and subcontracting decision-bargaining cases developed in light of *First Nat'l Maintenance*. See *infra* notes 144-46 and accompanying text.

130. See *supra* note 106.

131. See Schwarz, *Plant Relocations and Partial Terminations—The Duty to Decision-Bargain*, 39 *FORDHAM L. REV.* 81, 100 (1970).

132. 582 F.2d at 747 (Rosenn, J., dissenting).

133. *Id.*

cant operational changes as a more important factor than termination of employment. Moreover, the substitution of employees was not even the major concern in the *Fibreboard* opinion.¹³⁴ In *Fibreboard*, the substitution of employees, the major role of labor costs in the company's decision, and the absence of a significant change in operations combined to create the duty to decision-bargain.

Automation and relocation are operational changes that are fundamentally different than the subcontracting decision in *Fibreboard*. For instance, in automation and relocation, labor costs are not likely to be as central to the employer's decision as they were in the *Fibreboard* subcontracting situation. An employer may wish to automate to keep in step with the current state of the art or to take advantage of available tax incentives. A relocation decision involves consideration of obsolescence or inadequacy of current facilities,¹³⁵ the company's current market structure, product distribution advantages, tax advantages, and the availability of support facilities, in addition to labor costs. A successful relocation requires a substantial amount of planning and investment in the new area.¹³⁶ Management, therefore, needs a great deal of freedom to plan and implement a relocation. Automation completely eliminates employee positions and, thus, is more closely analogous to the terminations resulting from a partial closing than to the substitution occurring in *Fibreboard* subcontracting.¹³⁷ Similarly, subcontracting that results in the employer discontinuing an entire segment of the business resembles a partial closing and may be held to be outside the scope of mandatory bargaining without conflicting with the job security interest recognized in *Fibreboard*.¹³⁸

In *First National Maintenance*, Justice Blackmun stated that

134. If substitution of employees was the controlling consideration in *Fibreboard*, then all subcontracting decisions would be prima facie mandatory subjects of bargaining. The Court, however, expressly stated otherwise. See *supra* note 27.

135. See, e.g., *National Car Rental Sys. Inc.*, 252 N.L.R.B. 159 (1980), *enfd in part*, 672 F.2d 1182 (3d Cir. 1982).

136. For a good description of the planning and effort involved in a relocation, see *Garment Workers*, 463 F.2d 907 (D.C. Cir. 1972).

137. Justice Stewart cited automation as an example of a managerial prerogative which is outside the scope of mandatory bargaining. See 379 U.S. at 223 (Stewart, J., concurring).

138. See *NLRB v. Adams Dairy, Inc.*, 350 F.2d 108 (8th Cir. 1965), *cert. denied*, 382 U.S. 1011 (1966). See also *Local 777, Democracy Union Org. Comm. v. NLRB*, 603 F.2d 862 (D.C. Cir. 1979). *But cf. Equitable Gas Co. v. NLRB*, 637 F.2d 980 (3d Cir. 1980) (no duty to bargain over a subcontracting decision when it has no adverse effect on unit employment).

effects bargaining is generally adequate protection of workers' job security interests. Moreover, *Fibreboard* decision-bargaining has neither resulted in employers revising their subcontracting decisions, nor provided meaningful protection for employees' jobs.¹³⁹ Thus, the significant change in operations which automation, relocation, and *Adams Dairy* subcontracting¹⁴⁰ entail, the unique facts present in *Fibreboard*, and the presumption against decision-bargaining established in *First National Maintenance* should result in no obligation to bargain over automation or relocation decisions.¹⁴¹

C. *The Practical Impact of First National Maintenance*

Despite the strong language against decision-bargaining in *First National Maintenance*, the opinion does contain abundant encouragement for supporters of mandatory decision-bargaining. In footnote 22, the Court expressly refused to intimate any views on other management decisions, including relocation, sales, automation, and subcontracting, different than that found in *Fibreboard*.¹⁴² Moreover, in part B of the opinion, Justice Blackmun listed the specific facts of the case as "limits" to the Court's decision.¹⁴³ Accordingly, the practical impact of *First National Maintenance* could conceivably be negligible.

The NLRB general counsel has observed that under the current Board interpretation of the law, decisions to automate, relocate, and subcontract are generally mandatory subjects of bargaining.¹⁴⁴ Cases in these areas, however, must now be examined "in light of the *First National Maintenance* balancing test . . . [to determine] whether, and to what extent, a particular decision in a given case involves factors which would make bargaining burdensome."¹⁴⁵ This inquiry, according to the NLRB general counsel, should focus on whether the employer's decision hinges on labor

139. See *supra* note 125.

140. See *supra* note 138.

141. Cf. Gould, *supra* note 102, at 16 ("At a minimum, the Court in *First National Maintenance* has enunciated a strong presumption against bargaining in the partial closing and related areas.").

142. 452 U.S. at 686 n.22.

143. See *supra* notes 90-91 and accompanying text.

144. Office of the General Counsel, Memorandum 81-83, July 14, 1981, at 1, reprinted in 107 LAB. REL. REP. (BNA) 266 (1981) [hereinafter cited as Memorandum 81-83].

145. Office of the General Counsel, Memorandum 81-57, Nov. 30, 1981, at 3, reprinted in 107 LAB. REL. REP. (BNA) 67 (1981) [hereinafter cited as Memorandum 81-57].

costs or other factors that would be amenable to resolution through the collective bargaining process.¹⁴⁶ The general counsel does not read *First National Maintenance* as mandating a general inquiry into the interests implicated by automation, relocation, and subcontracting decisions with a view toward developing per se rules which provide certainty in each of these areas. Instead, he has adopted the case-by-case approach developed by the Second and Third Circuits.¹⁴⁷ The general counsel's approach plainly ignores the Supreme Court's emphasis on management's need for certainty regarding its bargaining obligations¹⁴⁸ as well as the Court's disdain for the facts-of-the-case approach.¹⁴⁹ Under the general counsel's version of the *First National Maintenance* balancing test, an employer who failed to bargain over an automation or relocation decision could probably defend against an unfair labor practice charge by showing that labor costs were not crucial to the decision. Success, however, cannot be guaranteed since the NLRB or, perhaps, a circuit court might find that union concessions could conceivably have overcome the non-labor considerations which management advances as determinative.¹⁵⁰ The only certainty attaching to an economic decision to automate, relocate, or subcontract is that the decision will come under Board scrutiny. Further litigation in each of these areas is likely.

NLRB regional offices should *ordinarily* dismiss cases involving economic decisions to go partially out of business, according to

146. *Id.* Other factors that would be amenable to the collective bargaining process are economic considerations unrelated to labor costs that could be counterbalanced by union concessions. *Id.* at 3 n.13. These factors include a raise in rent. *Id.*

147. See *supra* notes 48-52 and accompanying text (the *Brockway* test). See also *supra* notes 67-69 and accompanying text (the Second Circuit version of the *Brockway* test). Concededly, Memorandum 81-57 does not explicitly mention the *Brockway* test or quote it verbatim. This commentator maintains, however, that the difference between a rule which requires decision-bargaining *if* the facts of the case warrant it (the general counsel's test) and a rule which requires decision-bargaining *unless* the facts of the case warrant otherwise (the *Brockway* test) is largely semantic. The observation that the two tests have different burdens of proof is not important, because of the difficulty in interpreting and weighing the facts in decision-bargaining cases. See *supra* notes 106-12 and accompanying text.

148. 452 U.S. at 679.

149. *Id.* at 684-85. Compare *supra* note 106 (the Supreme Court's general analysis of the partial closing decision-bargaining question in *First Nat'l Maintenance*).

150. See *supra* note 146. Cf. *Brockway*, 582 F.2d at 736 ("the union might agree to changes that would reduce labor expenses and thereby alter the calculation that led to the employer's determination in the first place.").

the general counsel.¹⁵¹ These types of decisions include partial closings, discontinuance of product lines, and sales of the business,¹⁵² but not consolidations.¹⁵³ The general counsel states, however, that regional offices should remain vigilant for partial closings "so markedly different from both the facts and assumptions stated in *First National Maintenance* that a different result would be warranted."¹⁵⁴ Consequently, while *First National Maintenance* has caused great controversy in academic circles,¹⁵⁵ the decision most likely will not lay to rest one of the Supreme Court's chief concerns—providing employers with "some degree of certainty beforehand as to when [they] may proceed to reach decisions without fear of later evaluations labelling [their] conduct an unfair labor practice."¹⁵⁶ As near as can be determined, the state of the law on decision-bargaining after *First National Maintenance* appears to be that an employer: (1) has no duty to bargain over a decision to go completely out of business;¹⁵⁷ (2) must bargain over the decision to hire independent contractors who would "do the same work under similar conditions;"¹⁵⁸ (3) probably does not have to bargain over a decision to sell or partially close the business;¹⁵⁹ (4) might not have to bargain over automation, relocation, or subcontracting decisions if labor costs can be shown to be irrelevant to the decision.¹⁶⁰ Clearly *First National Maintenance* far from settled the controversies surrounding mandatory decision-bargaining.

151. See Memorandum 81-57, *supra* note 145, at 4.

152. *Id.* at 4-5.

153. Memorandum 81-83, *supra* note 144, at 1. See also Memorandum 81-57, *supra* note 145, at 3. A "consolidation," according to the general counsel, is a decision to remain in the same line of business at one location rather than several. *Id.* This commentator wonders whether the definition of "consolidation" may expand to reduce the scope of decisions covered by *First Nat'l Maintenance*.

154. *Id.* at 4-5 n.19. In *First Nat'l Maintenance*, 35 employees were discharged as a result of a \$250 management fee dispute. 452 U.S. at 668-70. Since the general counsel's version of the *First Nat'l Maintenance* test includes consideration of whether union concessions might possibly alter management's decision (see *supra* note 146), a case with virtually the same facts as *First Nat'l Maintenance* emerging as the exception to its holding is an irony which is quite conceivable. See Note, *supra* note 106, at 293.

155. See, e.g., Gould, *supra* note 102; Note, *supra* note 106.

156. 452 U.S. at 679.

157. See *Darlington Mfg. Co.*, 380 U.S. at 269.

158. See *Fibreboard*, 379 U.S. at 315.

159. See *supra* notes 151-54 and accompanying text.

160. See *supra* notes 144-50 and accompanying text.

D. *The Question of "Meaningful Effects Bargaining"*

First National Maintenance may influence future cases concerning the adequacy of effects bargaining.¹⁶¹ Justice Blackmun acknowledged the union's right to notice and effects bargaining.¹⁶² He also noted, however, that management's need for secrecy and confidentiality weighed against mandatory decision-bargaining. Further, "[t]he publicity incident to the normal process of bargaining may injure the possibility of a successful transition or increase the economic damage to the business."¹⁶³ Significant advance notice and effects bargaining frustrates the need for secrecy and confidentiality to the same extent as does decision-bargaining. In a situation where management requires confidentiality and secrecy, no significant distinction can be drawn between the harm resulting from the publicity incident to decision-bargaining and the publicity incident to effects bargaining.

Presently, there does not appear to be an established notion regarding how much advance notice is sufficient to provide meaningful effects bargaining. In *Royal Plating and Polishing*,¹⁶⁴ the Third Circuit found that two weeks notice of the plant closing was inadequate. In *Burns Ford, Inc.*,¹⁶⁵ on the other hand, the NLRB found one week notice of layoffs to be sufficient.

The amount of advance notice required for meaningful effects bargaining depends on the facts of the particular case. A union which has organized several of the employer's facilities should retain enough economic power to engage in meaningful effects bargaining over the closing of one facility even if it receives no advance notice. Conversely, where the company's decision will completely eliminate the bargaining unit, the union will have no bargaining power if the employer executes the decision without providing adequate notice.¹⁶⁶ Therefore, a union which faces elimination should receive significant advance notice. However, since *First National Maintenance* recognizes that an employer may need confidentiality and secrecy when closing part of his business,

161. For a definition of effects bargaining, see *supra* note 3.

162. 452 U.S. at 681-82.

163. *Id.* at 683.

164. 350 F.2d 191 (3d Cir. 1965).

165. 182 N.L.R.B. 753 (1970).

166. See *National Car Rental Sys. Inc.*, 252 N.L.R.B. 159, 164 (1980), *enf'd in part*, 672 F.2d 1182 (3d Cir. 1982).

the need for confidentiality and secrecy should emerge as an argument against a significant advance notice requirement.¹⁶⁷

CONCLUSION

The *Fibreboard* Court stated "the words [of section 8(d)] . . . plainly cover termination of employment."¹⁶⁸ In *First National Maintenance*, the Supreme Court explained that this coverage guarantees bargaining over the effects of a decision leading to termination of employment, but does not establish a presumption of mandatory bargaining over the decision itself.

In *Fibreboard*, mandatory decision-bargaining was easily justifiable. The basic issue was whether an employer could replace employees with independent contractors who were willing to perform the same work for lower compensation. The *Fibreboard* Court simply determined that an employer should provide the union with an opportunity to match the savings offered by the independent contractor prior to implementing the decision to replace union employees with outside labor. This issue is clearly distinct from the issue of whether employees should participate in decisions concerning where a plant will operate, what equipment it will utilize, and how long it will remain open.¹⁶⁹ Despite the distinction between decisions concerning the assignment of work within a stable enterprise and decisions concerning the very structure of an enterprise, the Second and Third Circuits were willing to analogize a

167. In Memorandum 81-83, *supra* note 144, at 4-6, the general counsel reiterated the Supreme Court's observation in *First Nat'l Maintenance* that employees have the right to effects bargaining in a meaningful manner at a meaningful time. He also noted that, in this regard, early notification of the decision is essential. *Id.* The general counsel did not, however, supply any specific notification guidelines.

168. 379 U.S. at 210.

169. See *Local 777, Democratic Union Org. Comm. v. N.L.R.B.*, 603 F.2d 862, 883 (D.C. Cir. 1979) ("The law draws a distinction between those decisions 'primarily about the conditions of employment' which must be made mandatory subjects of bargaining and those while affecting the employees' working conditions, are entrepreneurial judgments fundamental to the basic direction of a corporate enterprise . . . or which substantially alter the way in which the business is conducted. The latter need not be submitted to bargaining."). *Cf.* Comment, *supra* note 26, at 1095-96 ("A distinction must be drawn between fixed capital (capital invested in relatively fixed assets like plant and equipment) and working capital (cash and short-term cash investments . . .) . . . Those labor demands which relate only to working capital, i.e., wages or pension benefits, need not be excluded from collective bargaining."). *Cf. also* *Stone & Webster Eng'g Corp. v. N.L.R.B.*, 536 F.2d 461 (1st Cir. 1976) ("The Act was not intended to guarantee that business decisions be sound, only that they not be the product of antiunion motivation.").

partial closing decision to the subcontracting decision in *Fibreboard*, solely because both decisions lead to termination of employment. This analogy resulted from reading *Fibreboard* as an endorsement of the basic tenet of industrial democracy that workers ought to have a voice in decisions which significantly affect their working lives.

The Supreme Court in *First National Maintenance*, on the other hand, appeared to proceed from two assumptions. First, that free enterprise remains the paramount value in our economy. Second, that value judgments and reforms regarding the nature of our social and economic structures are primarily the province of Congress, and not the judiciary or the NLRB. Accordingly, the Court was unwilling to find adverse impact on employment to be the controlling consideration and to expand the rationale of *Fibreboard* to include partial closings. Instead, the Supreme Court held that the right to effects bargaining was sufficient to comply with the NLRA's fundamental purpose of improving the wages and working conditions of the American worker. Since free enterprise has served as the foundation for the development of American industry, the decision in favor of managerial freedom in *First National Maintenance* is understandable in the absence of an express congressional direction to the contrary.¹⁷⁰ If our nation truly must move to embrace the principles of industrial democracy, the move should be initiated by a majority of our elected representatives, and not the majority of a court or the NLRB.¹⁷¹

Someday Congress may heed the call from both labor and management, evaluate the mandatory decision-bargaining question, and act. Until that time, however, decision-bargaining controversies will continue to appear before the Board and the courts. Given the NLRB's current facts-of-the-case approach to resolving mandatory bargaining claims relating to automation, relocation, and subcontracting decisions,¹⁷² and the conflict between this approach and that of the Supreme Court, *First National Mainte-*

170. See *supra* note 122 (Stewart, J. concurring in *Fibreboard*).

171. *Id.*

172. See, e.g., *National Car Rental Sys., Inc.*, 252 N.L.R.B. 159 (1980), *enf'd in part*, 672 F.2d 1182 (3d Cir. 1982). See also *supra* notes 144-50 and accompanying text.

nance will most likely not be the last Supreme Court decision-bargaining case.

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