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LABOR LAW: NARROWING THE SCOPE OF THE EMPLOYER'S DUTY TO BARGAIN OVER JOB TERMINATION DECISIONS—*First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981).

I. INTRODUCTION

Section 8(a)(5) of the Labor Management Relations Act (the Act), as amended,¹ mandates that it is an unfair labor practice for an employer “to refuse to bargain collectively with the representatives of his employees. . . .”² The nature and scope of the duty to bargain collectively is set forth in section 8(d) of the Act: “[t]o bargain collectively is the performance of the mutual obligation . . . to meet at reasonable times and confer in good faith with respect to wages, hours and other terms and conditions of employment. . . .”³

One of the most critical yet uncertain issues regarding this statutory obligation concerns the scope of the bargaining duties arising out of the phrase “terms and conditions of employment.”⁴ The National Labor Relations Board (NLRB), which administers the Act, and the courts of appeals, which are empowered to enforce NLRB decisions, have taken divergent views of the proper scope of these duties.⁵ The rift between the NLRB and the courts is particularly

1. Labor Management Relations Act, § 8(a)(5), 29 U.S.C. § 158(a)(5) (1976) [hereinafter cited as the Act].

2. 29 U.S.C. § 158(a)(5) (1976). 29 U.S.C. § 158(b)(3) (1976) imposes a reciprocal duty on the employees' representative with regard to the employer. It provides, in relevant part, “[i]t shall be an unfair labor practice for a labor organization or its agents . . . to refuse to bargain collectively with an employer” *Id.*

3. 29 U.S.C. § 158(d) (1976). Section 158(d) reads, in part, as follows:

For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession

Id. See notes 145-48 *infra* and accompanying text for a more detailed discussion of what the duty to bargain in good faith requires.

4. 29 U.S.C. § 158(d) (1976).

5. See, e.g., text accompanying notes 75-88 *infra*. Any person, employer, or union may file an unfair labor practice charge if they believe the Act has been violated. Unless the charge clearly is without merit the NLRB will conduct an investigation of the charge and then hold informal settlement proceedings. If the claim cannot be settled informally,

acute when each interprets the bargaining obligations of employers making decisions that result in job terminations.⁶ In *First National Maintenance Corp. v. NLRB*,⁷ the United States Supreme Court, for the first time in seventeen years, attempted to interpret this statutory phrase in such a context. The result is a landmark decision that is likely to halt, if not reverse, the tendency of the NLRB and the recent trend in the courts of appeals to interpret broadly the scope of the phrase "terms and conditions of employment."⁸

This case note will place *First National* in historical perspective by tracing the development of the scope of an employer's duty to bargain over economically motivated decisions that directly result in the loss of jobs. The conflict between the NLRB and the courts regarding the proper interpretation of the statutory obligation to bargain over "terms and conditions of employment" will be outlined. Next, *First National* will be analyzed. The potential scope of *First National* and its impact on the historical development of the employer's duty to bargain over job termination decisions will be considered. Finally, the implications of *First National* for the labor law practitioner will be discussed.

II. *FIRST NATIONAL*

A. *Facts*

Petitioner, First National Maintenance Corporation (FNM), was engaged in the business of providing housekeeping, maintenance, and related services for commercial customers in the New York City area.⁹ FNM provided each of its customers with on premises labor and supervision in return for reimbursement of its labor costs and payment of a fixed fee.¹⁰ A separate labor force was hired

a hearing before an Administrative Law Judge (ALJ) is required. The decision of the ALJ may be appealed to the NLRB in Washington, D.C. The NLRB's decision may then be appealed to the United States Courts of Appeals by the losing party. The losing party may also indirectly seek judicial review by refusing to comply with the NLRB's order. The Act does not grant the NLRB any self-enforcement powers. The NLRB, therefore, must petition the courts of appeals for review and enforcement of any orders that are not voluntarily complied with. When reviewing NLRB decisions, the courts of appeals must accept as true the findings of fact of the NLRB, if they are supported by substantial evidence. The holding of the court of appeals may then be appealed to the Supreme Court of the United States. See R. GORMAN, BASIC TEXT ON LABOR LAW 7-20 (1976) for a more detailed discussion of the structure and procedures of the NLRB.

6. See notes 74-88 *infra* and accompanying text.

7. 452 U.S. 666 (1981).

8. 29 U.S.C. § 158(d) (1976).

9. 452 U.S. at 668.

10. *Id.*

for each customer, and the personnel were not transferred to other customer locations.¹¹ On April 28, 1976, FNM entered into a contract with the Greenpark Care Center (Greenpark), a Brooklyn nursing home.¹² In return for FNM maintenance services, Greenpark agreed to pay FNM five hundred dollars a week above its labor costs.¹³ The five hundred dollar fee was reduced to two hundred and fifty dollars by mutual agreement on November 1, 1976.¹⁴

By the spring of 1977, petitioner realized that it was losing money on this contract and, on June 30, 1977, requested that its weekly fee be restored to five hundred dollars.¹⁵ On July 6, 1977, FNM notified Greenpark that unless the requested fee increase was granted, FNM would use its contractual right to cancel the contract and to discontinue operations on August 1, 1977.¹⁶

While petitioner was experiencing these difficulties, District 1199, National Union of Hospital and Health Care Employees, Retail, Wholesale, and Department Store Union, AFL-CIO (the union), organized FNM's Greenpark employees and was elected and certified as their representative for collective bargaining.¹⁷ On July 12, 1977, the union vice-president, Edward Wecker, notified FNM that the union had been certified to represent the Greenpark employees and requested that collective bargaining negotiations begin.¹⁸ FNM never responded.¹⁹

On July 28, 1977, FNM notified its thirty-five Greenpark employees that they would be discharged in three days.²⁰ Wecker immediately telephoned petitioner to request a delay of the discharges for the purpose of bargaining.²¹ He was told that the termination of the Greenpark operation was due purely to financial considerations, that the decision was final, and that the notice provision of the contract made continuing beyond August 1, 1977, prohibitively expensive.²² On July 31, 1977, petitioner discontinued its Greenpark

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.* at 669.

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.* at 669-70. The FNM contract with Greenpark contained a clause requiring 30 days notice of intent to cancel. The contract also provided that staying on past the thirtieth day following notice would nullify the notice and require FNM to continue

operation and discharged the employees.²³

B. *Litigation History*

The union filed an unfair labor practice charge with the NLRB, claiming that FNM's failure to bargain over its decision to close down its Greenpark operation was a violation of section 8(a)(5) of the Act.²⁴ The Administrative Law Judge ruled that the petitioner violated section 8(a)(5) of the Act both by refusing to bargain over its decision to terminate the Greenpark contract and by refusing to bargain over the effect of that change upon union employees.²⁵ The judge reasoned that "the discharge of a man is a change in his conditions of employment In these obvious facts, the law is clear."²⁶ Hence, when an employer "wishes to alter the hiring arrangements. . . the law is . . . clear that he must first talk to the union about it."²⁷ The judge recommended that the NLRB order FNM to bargain in good faith with the union about both the decision and its effects. The judge also recommended a back pay award for the employees from the time of discharge until the time impasse or agreement was reached.²⁸ The NLRB, without further analysis, adopted the findings of the Administrative Law Judge and, in addition, required petitioner to offer reinstatement to all discharged employees.²⁹

The United States Court of Appeals for the Second Circuit enforced the NLRB order, although it adopted a different analysis.³⁰ The court reasoned that a per se rule was inappropriate because the parameters of the duty to bargain over job termination decisions were not clearly defined by either the Act or Supreme Court prece-

work for at least another 30 days. Since FNM had given notice, they did not want to stay beyond the August 1st cancellation date. Based upon financial concerns, FNM claimed it was not in a position to discuss the matter with the Union. *Id.* See *First Nat'l. Maintenance Corp.*, 242 N.L.R.B. 462 (1979), *enforced*, 627 F.2d 596 (2d Cir. 1980), *rev'd*, 452 U.S. 666 (1981).

23. 452 U.S. at 670.

24. *Id.*

25. 242 N.L.R.B. at 462 (1979).

26. *Id.* at 465.

27. *Id.*

28. *Id.* at 466. For the detailed list of contingencies that will end further back pay liability, see *id.*

29. 452 U.S. 671-72. The NLRB ordered FNM to effectuate reinstatement either by resuming its Greenpark operations or by discharging subsequently hired employees at its other operations. *Id.*

30. *NLRB v. First Nat'l. Maintenance Corp.*, 627 F.2d 596 (2d Cir. 1980) (2-1 decision), *rev'd*, 452 U.S. 661 (1981).

dent.³¹ The court decided that the proper approach was to create a presumption in favor of mandatory bargaining over such a decision.³² This presumption could be rebutted by demonstrating that “the purposes of the statute would not be furthered by imposition of the duty to bargain.”³³ The economic problems of FNM were not considered sufficiently serious to render collective bargaining futile. As a result, the court concluded the presumption in favor of bargaining was not rebutted.³⁴

The Supreme Court granted certiorari³⁵ “[b]ecause of the importance of the issue and the continuing disagreement between and among the NLRB and the Courts of Appeals. . . .”³⁶ The Court reversed the decision of the Second Circuit and thereby rejected the presumption of a duty to bargain over partial plant closing decisions.³⁷ The Court reasoned that the potential harm to an employer’s ability to operate freely in deciding whether to shut down part of its business for economic reasons outweighs any benefits that might be gained through the union’s participation in making the decision.³⁸ The Court, therefore, held that “the decision itself is *not* part of § 8(d)’s ‘terms and conditions’ . . . over which Congress has mandated bargaining.”³⁹ In order to analyze this decision accurately

31. 627 F.2d at 600-02. The court stated: “Although the rationale of *Fibreboard* is not altogether clear, we believe that the decision at least supports the rejection of a per se rule imposing a duty to bargain, since such a rigid approach would ignore additional relevant considerations. . . .” *Id.* at 601.

32. *Id.*

33. *Id.* The court then proceeded to give some examples of situations where the purposes of the Act would not be furthered by requiring bargaining. The employer might overcome the presumption by demonstrating that:

bargaining over the decision would be futile, since the purposes of the statute would not be served by ordering the parties to bargain when it is clear that the employer’s decision cannot be changed. Other relevant considerations would be that the closing was due to emergency financial circumstances, or that the custom of the industry . . . is not to bargain over such decisions. The presumption might also be rebutted if it could be demonstrated that forcing the employer to bargain would endanger the vitality of the entire business.

Id. at 601-02.

34. *Id.* at 602. The court stated: “[A]lthough certain considerations generally relating to economics may render bargaining futile and therefore nonobligatory, FNM has not shown that to be true of the considerations it claims prompted its decision to terminate the Greenpark operation.” *Id.* (footnote omitted).

35. 449 U.S. 1076 (1981).

36. 452 U.S. at 674.

37. *Id.* at 688. See note 123 *infra* for a more detailed discussion of this point.

38. 452 U.S. at 686.

39. *Id.* (emphasis in original). The Supreme Court agreed, however, that the NLRB and the Second Circuit were correct in finding a duty to bargain over the effects of the decision. *Id.* at 677 n.15.

and to understand its potential implications for the duty to bargain over other kinds of job termination decisions, it is necessary first to review the historical development of collective bargaining law.

III. HISTORY OF THE DUTY TO BARGAIN OVER "TERMS AND CONDITIONS OF EMPLOYMENT"

A. *Early Developments*

When the Labor Management Relations Act was amended in 1947, the House proposed language which specifically delineated the topics over which the employer had a duty to bargain.⁴⁰ Congress rejected this proposed language and instead decided to use the phrase, "wages, hours and other terms and conditions of employment."⁴¹ The rationale for using such broad, flexible language was based upon the belief that "[t]he appropriate scope of collective bargaining cannot be determined by a formula; it will inevitably depend upon the traditions of an industry, the social and political climate at any given time, the needs of employers and employees, and many related factors."⁴²

This approach proved to be effective as it allowed the scope of the duty to bargain to grow and change as the collective bargaining system matured.⁴³ Unfortunately, and perhaps inevitably, the

40. The House bill stated that neither party would be required to discuss any subject matter other than:

- (i) wage rates, hours of employment and work requirements; (ii) procedures and practices relating to discharge, suspension, layoff, recall, seniority, discipline, promotion, demotion, transfer and assignment with 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.

See H.R. REP. NO. 3020, 80th Cong., 1st Sess. § 101(2)(11) (1947), *reprinted in* 1 NLRB LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 40 (1948).

41. 29 U.S.C. § 158(d) (1976).

42. H.R. Rep. No. 245, 80th Cong., 1st Sess. 71 (1947), *reprinted in*, 1 NLRB LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 362 (1948).

43. *See, e.g.*, *American Smelting & Ref. Co. v. NLRB*, 406 F.2d 552, 554-55 (9th Cir.), *cert. denied*, 395 U.S. 935 (1969) (company housing); *Kroger Co. v. NLRB*, 401 F.2d 682, 687 (6th Cir. 1968), *cert. denied*, 395 U.S. 904 (1969) (profit sharing plants); *NLRB v. Houston Chapter, Ass'n Gen. Contractors, Inc.*, 349 F.2d 449, 451 (5th Cir. 1965), *cert. denied*, 382 U.S. 1026 (1966) (employment security); *Richfield Oil Corp. v. NLRB*, 231 F.2d 717, 724 (D.C. Cir.), *cert. denied*, 351 U.S. 909 (1956) (stock purchase arrangement); *W. W. Cross & Co. v. NLRB*, 174 F.2d 875, 878 (1st Cir. 1949) (insurance plans); *Inland Steel Co. v. NLRB*, 170 F.2d 247, 251 (7th Cir. 1948), *aff'd sub nom.*, *American Communications Ass'n. v. Douds*, 339 U.S. 382 (1950) (pensions); *NLRB v. J. H. Allison & Co.*, 165 F.2d 766, 768-69 (6th Cir. 1948), *cert. denied*, 335 U.S. 814 (1948)

vagueness of the phrase "terms and conditions of employment" caused conflict between the NLRB and the federal courts. This was particularly true in the area of management decisions that resulted in employee job loss.⁴⁴ The conflict stemmed from divergent views of the manner in which the duty to bargain collectively should be balanced with the need for management's freedom to act.⁴⁵

Initially, the tendency of both the NLRB and the courts was to consistently strike the balance in favor of management's right to make job termination decisions without having to bargain.⁴⁶ In

(merit wage increases). *See also* Note, *Labor Law-Plant Closing As A Subject of Mandatory Bargaining*, 4 AM. J. TR. ADV. 800, 801 n.31 (1981).

44. *See* notes 75-88 *infra* and accompanying text.

45. *See* *Ozark Trailers Inc.*, 161 N.L.R.B. 561, 566-67 (1966).

With all respect to the Courts of Appeals for the Third and Eighth Circuits, we do not believe that the question whether a particular management decision must be bargained about should turn on whether the decision involves the commitment of investment capital, or on whether it may be characterized as involving 'major' or 'basic' change in the nature of the employer's business. An employer's decision to make a 'major' change in the nature of his business, such as the termination of a position thereof, is also of significance for those employees whose jobs will be lost by the termination. 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 that may or may not be salable to another employer. . . . And, just as the employer's interest in the protection of his capital investment is entitled to consideration in our interpretation of the Act, so too is the employees interest in the protection of his livelihood

In short, we see no reason why employees should be denied the right to bargain about a decision directly affecting terms and conditions of employment which is of profound significance for them solely because that decision is also a significant one for management.

Id. *See also* Naylor, *Subcontracting, Plant Closures and Plant Removals: The Duty to Bargain and Its Practical Implications Upon the Employment Relationship*, 30 DRAKE L. REV. 203, 217 (1981). [hereinafter cited as *Subcontracting*].

46. There have been scattered NLRB decisions claiming the employer had a duty to bargain over subcontracting decisions. *See* *Shamrock Dairy, Inc.*, 124 N.L.R.B. 494 (1959); *Timken Roller Bearing Co.*, 70 N.L.R.B. 500 (1946). Most authorities, however, agree that the dicta in *Town and Country Mfg. Co.*, 136 N.L.R.B. 1022 (1962) which the N.L.R.B. adopted in *Fibreboard Paper Prods. Corp.*, 130 N.L.R.B. 1558 (1961), *rev'd on rehearing*, 138 N.L.R.B. 550 (1962), *enforced*, 322 F.2d 411 (D.C. Cir. 1963), *aff'd*, 379 U.S. 203 (1964), was the first time this position was clearly stated and followed. *See* Murphy, *Plant Relocation and the Collective Bargaining Obligation*, 59 N.C. L. REV. 5 (1980) [hereinafter cited as *Plant Relocation*]. "For the first twenty-seven years of the Act, until *Fibreboard II* in 1962, the Board usually (but not invariably) found a violation of § 8(a)(5) in operational changes only when anti-union motivation could be inferred." *Id.* at 7; Rabin, *Fibreboard and the Termination of Bargaining Unit Work: The Search for Standards in Defining the Scope of the Duty to Bargain*, 71 COLUM. L. REV. 803, 808 (1971); Note, *National Labor Relations Act—Subcontracting as Mandatory Subject of Collective Bargaining*, 31 BROOKLYN L. REV. 421, 422-23 (1965); Note, *Labor Law—Mandatory Bargaining*, 26 U. PITT. L. REV. 651 (1965) [hereinafter cited as Note, *Labor*

1962, this trend was reversed by the NLRB in *Town and Country Manufacturing Co.*⁴⁷ Dicta from *Town and Country* indicated that the employer had a duty to bargain over its decision to subcontract its trailer hauling operation and to discharge its drivers.⁴⁸ In light of this, the NLRB agreed to reconsider its earlier holding in *Fibreboard Paper Products Corp.*⁴⁹

B. Fibreboard

In *Fibreboard Paper Products Corp. v. NLRB*,⁵⁰ the employer subcontracted the work of his maintenance department to an independent contractor who agreed to do the same work at a lower cost.⁵¹ The entire bargaining unit of maintenance employees was discharged and replaced by the employees of the subcontractor.⁵² Upon rehearing, the NLRB held that the employer had a duty to bargain over his decision to subcontract the work of his maintenance department to an independent maintenance service.⁵³ This holding was upheld by the United States Court of Appeals for the District of Columbia⁵⁴ and the United States Supreme Court.⁵⁵ The Supreme Court affirmance led to a seventeen year conflict between the NLRB and the courts.⁵⁶ The Supreme Court, in affirming the finding of the NLRB and the court of appeals, held that the employer had a duty to bargain over the subcontracting decision before he implemented it.⁵⁷ The Court held:

[t]he 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 condi-

Law]. "*Fibreboard* represents the first time the court has upheld the Board position initially enunciated in *Town & Country Mfg. Co.*—that management must negotiate its decisions to subcontract. . . ." *Id.* at 654.

47. 136 N.L.R.B. 1022 (1962), *enforced*, 316 F.2d 846 (5th Cir. 1963). (The company decided to subcontract out the work of its truck drivers to an independent concern.)

48. *Id.* at 1027-28. "[E]ven if Respondent's subcontract was impelled by economic or I.C.C. considerations, we would nevertheless find that Respondent violated § 8(a)(5) by failing to fulfill its mandatory obligation to consult with the Union regarding its decision to subcontract." *Id.*

49. 130 N.L.R.B. 1558 (1961), *rev'd on rehearing*, 138 N.L.R.B. 550 (1962), *enforced*, 322 F.2d 411 (D.C. Cir. 1963), *aff'd*, 379 U.S. 203 (1964).

50. 379 U.S. 203 (1964).

51. *Id.* at 206-07.

52. *Id.* at 207.

53. *Id.* at 208.

54. 322 F.2d 411 (D.C. Cir. 1963), *aff'd*, 379 U.S. 203 (1964).

55. 379 U.S. 203 (1964).

56. *See* notes 75-77, 88 *infra* and accompanying text.

57. 379 U.S. at 215.

tions of employment—is a statutory subject of collective bargaining under [section] 8(d). Our decision need not and does not encompass other forms of “contracting out” or “subcontracting” which arise daily in our complex economy.⁵⁸

Although the holding was narrow,⁵⁹ the decision generated tremendous controversy over the potential impact of the duty to bargain on other job termination decisions. The controversy arose because the language and reasoning of the decision, taken as a whole, were potentially broad and far reaching.⁶⁰ The Court’s statement that “[t]he words ‘conditions of employment’ . . . plainly cover the termination of employment. . . .”⁶¹ has been adopted by the NLRB and broadly interpreted to mean that all employer decisions that result in job termination are subject to a mandatory duty to bargain under section 8(d) of the Act.⁶² The courts of appeals, on the other hand, have chosen to read the decision narrowly, often turning for support to the concurring opinion written by Justice Stewart.⁶³ Justice Stewart’s concurrence sought to limit the sweeping language used by the majority.⁶⁴ He concluded:

58. *Id.* See Note, *Labor Law*, *supra* note 46, at 634.

Fibreboard represents the first time the Court has upheld the Board position initially enunciated in *Town & Country Mfg. Co.*—that management must negotiate its decision to subcontract although the decision is based on economic rather than anti-union motives. By its holding the Court has continued the Board’s trend of giving unions an increasingly stronger voice in the making of management decisions which might affect the employees status. The result is that now the employer not only must negotiate the effects of a decision to subcontract (termination benefits, etc.), he also must negotiate the basic decision itself.

Id.

59. *Id.*

60. See Note, *Subcontracting, Mandatory Bargaining and the 1965 N.L.R.B. Decision*, 18 STAN. L. REV. 256, 257 (1965).

A catalyst of the confusion that seems to prevail in the general area of subcontracting is language in *Fibreboard* which can be construed to suggest (1) that subcontracting as a general matter is a mandatory subject for bargaining; and (2) that every managerial decision which results in termination of employment is a mandatory subject to bargaining.

Id. See also notes 64-87 *infra* and accompanying text.

61. 379 U.S. at 210.

62. See text accompanying notes 85-88 *infra*.

63. 379 U.S. at 218. (Stewart, J., concurring). See text accompanying notes 75-76, 88 *infra* for more detail on the court of appeals interpretation of this concurrence.

64. 379 U.S. at 218 (Stewart, J., concurring). “[T]he Court’s opinion radiates implications of such disturbing breadth that I am persuaded to file this separate statement of my own views.” *Id.*

[I]t surely does not follow that every decision which may affect job security is a subject of compulsory collective bargaining. . . .

. . . .

Decisions concerning the commitment of investment capital and the basic scope of the enterprise are not in themselves primarily about conditions of employment, though the effect of the decision may be necessarily to terminate employment. If, as I think clear, the purpose of § 8(d) is to describe a limited area subject to the duty of collective bargaining, those management decisions which are fundamental to the basic direction of a corporate enterprise or which impinge only indirectly upon employment security should be excluded from that area.⁶⁵

C. *Post Fibreboard*

1. *Darlington*

The year after *Fibreboard* the Supreme Court decided *Textile Workers Union v. Darlington Manufacturing Co.*,⁶⁶ which served to define the outer limits of *Fibreboard*. In *Darlington*, the employer closed his plant operations and discharged all plant employees in retaliation for unionizing.⁶⁷ Section 8(a)(3)⁶⁸ of the Act makes it an unfair labor practice for an employer to discriminate in hiring or in tenure of employment against those who join a union. Therefore, the issue before the Court was whether an employer could terminate his business for anti-union motives without violating the Act.⁶⁹ The Court held that an employer is free to close his entire business for any reason he desires.⁷⁰ The language used was so broad that it has been concluded that an employer who goes completely out of business has no duty to bargain with the collective bargaining representative of the employees concerning his decision.⁷¹ Hence, *Darlington*

65. *Id.* at 223.

66. 380 U.S. 263 (1965).

67. *Id.* at 266.

68. 29 U.S.C. § 158(a)(3) (1976). This section provides: "It shall be an unfair labor practice for an employer. . . by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. . . ." *Id.*

69. 380 U.S. at 268-69.

70. *Id.* at 268. "We hold that so far as the Labor Relations Act is concerned, an employer has the absolute right to terminate his entire business for any reason he pleases. . . ." *Id.*

71. See Heinsz, *The Partial-Closing Conundrum: The Duty of Employers and Unions to Bargain in Good Faith*, 1981 DUKE L.J. 71. "In view of the *Darlington* decision, the Board has conceded that no duty exists to bargain over a decision to close completely." *Id.* at 78 n.54. "[L]ittle question exists that the employer may unilaterally liqui-

defined the outer reaches of the broad language in *Fibreboard*, which had implied that all job termination decisions clearly are within the scope of the statutory requirement to bargain regarding terms and conditions of employment.⁷²

In the sixteen years that have elapsed since *Darlington*, the Supreme Court refused to further define the scope of *Fibreboard* and the duty to bargain over decisions that result in job termination.⁷³ The courts and the NLRB were left on their own to define the proper scope of this duty. The result has been nearly two decades of conflict as the courts, for the most part, have strongly resisted the NLRB's attempts to broadly construe this duty.⁷⁴

2. The Conflict

In 1965, the courts of appeals had their first opportunities to apply *Fibreboard*. In cases involving partial closing and subcontracting situations, the Third and Eighth Circuits found no duty to bargain over the job termination decisions in spite of *Fibreboard*.⁷⁵ In each case the courts relied on the limiting language of *Fibreboard*, particularly Justice Stewart's concurrence.⁷⁶

Within a year, the NLRB came forward and explicitly rejected the approach of the courts. In *Ozark Trailers, Inc.*,⁷⁷ a partial plant closing case, the NLRB said:

With all respect to the Courts of Appeals for the Third and Eighth Circuits, we do not believe that the question whether a particular management decision must be bargained about should turn

date his entire business based upon economic or anti-union motivations." *Subcontracting*, *supra* note 45, at 226.

72. See note 71 *supra*.

73. The *First National* decision was the next case in which the Court dealt with these issues. See notes 98-127 *infra* and accompanying text.

74. See *Plant Relocation*, *supra* note 46, at 17-18.

At the risk of oversimplification, the response of the judiciary to *Fibreboard* can be summed up in a single word: unfriendly. The courts generally, but not uniformly, have rejected Board attempts to extend decision-bargaining to operational changes other than to factual situations similar to the subcontracting involved in *Fibreboard*."

Id.

75. NLRB v. Royal Plating & Polishing Co., 350 F.2d 191 (3rd Cir. 1965); NLRB v. Adams Dairy, Inc., 350 F.2d 108 (8th Cir. 1965), *cert. denied*, 382 U.S. 1011 (1966); NLRB v. William J. Burns Int'l Detective Agency, 346 F.2d 897 (8th Cir. 1965).

76. See NLRB v. Royal Plating & Polishing Co., 350 F.2d 191, 196 (3rd Cir. 1965); NLRB v. Adams Dairy, Inc., 350 F.2d 108, 109-11 (8th Cir. 1965), *cert. denied*, 382 U.S. 1011 (1966); NLRB v. William J. Burns Int'l Detective Agency, 346 F.2d 897, 901-02 (8th Cir. 1965).

77. 161 N.L.R.B. 561 (1966).

on whether the decision involves the commitment of investment capital, or on whether it may be characterized as involving 'major' or 'basic' change in the nature of the employer's business. . . . An employer's decision to make a 'major' change in the nature of his business, such as the termination of a position thereof, is also of significance for those employees whose jobs will be lost by the termination. For, just as the employer has invested capital in the business, so the employee has invested years of his working life. . . . And, just as the employer's interest in the protection of his 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. . . . In short, we see no reason why employees should be denied the right to bargain about a decision directly affecting the terms and conditions of employment which is of profound significance for them. . . .⁷⁸

Since *Ozark Trailers*, the NLRB, with few exceptions,⁷⁹ has relied on broad interpretations of *Fibreboard*.⁸⁰ The NLRB has consistently held that virtually all decisions resulting in job terminations must be bargained over by the employer and the employees' representative. Employer decisions to automate operations,⁸¹ to use independent contractors,⁸² to relocate,⁸³ or to partially close a plant⁸⁴ have been held to require collective bargaining with the employees' bargaining representative. The interpretation of *Fibreboard* adopted

78. *Id.* at 566-67.

79. Five years after *Ozark Trailers*, it seemed that the NLRB had overruled this doctrine in *General Motors Corp. GMC Truck & Coach Div.*, 191 N.L.R.B. 951 (1971). The NLRB held there was no duty to bargain over a decision to sell a dealership because the matter lay "at the very core of entrepreneurial control." *Id.* at 952. *Summit Tooling Co.*, 195 N.L.R.B. 479 (1972) was seen as a further retreat from *Ozark Trailers*. Then, in 1974, the NLRB decided *Royal Typewriter Co.*, 209 NLRB 1006 (1974), where it distinguished *General Motors* and clearly stated that it did not overrule *Ozark Trailers*. *Id.* at 1012. See *Plant Relocation*, *supra* note 46, at 5. "In essence, except for *General Motors*, which the Board has sought to limit, the Board has adopted a pro-bargaining stance, emphasizing that such decisions [partial plant closings and plant relocations] fall within the ambit of the 'terms and conditions of employment.'" *Id.* at 19.

80. See *Plant Relocation*, *supra* note 46, at 19. As recently as June 22, 1981, the Supreme Court in *First National* noted that the NLRB made its decision in *First National* "[r]elying on *Ozark Trailers, Inc.*" 452 U.S. at 670.

81. See, e.g., *Richland, Inc.*, 180 N.L.R.B. 91 (1969); *Northwest Publishing Co.*, 144 N.L.R.B. 1069 (1963), *enforced*, 343 F.2d 521 (7th Cir. 1965).

82. See, e.g., *Adams Dairy, Inc.*, 137 N.L.R.B. 815 (1962) *enforcement denied*, 350 F.2d 108 (8th Cir. 1965), *cert. denied*, 382 U.S. 1011 (1966).

83. See, e.g., *Standard Handkerchief Co.*, 151 N.L.R.B. 15 (1965).

84. See, e.g., *Brockway Motor Trucks, Inc.*, 230 N.L.R.B. 1002 (1977), *enforcement denied*, 582 F.2d 720 (3rd Cir. 1978); *Ozark Trailers, Inc.*, 161 N.L.R.B. 561 (1966); *Royal Plating & Polishing Co.*, 148 N.L.R.B. 545 (1964).

by the NLRB has been labeled the *per se* approach.⁸⁵ The rationale of this approach is that because *Fibreboard* said that the terms and conditions of employment under Section 8(d) plainly cover the termination of employment,⁸⁶ a decision by management that results in job terminations, by its very nature, must be subject to the Section 8(d) requirement to bargain in good faith over terms and conditions of employment.⁸⁷

The courts rejected the NLRB's broad interpretation and continued to strictly interpret Justice Stewart's narrow concurrence in *Fibreboard*.⁸⁸ Recent courts of appeals decisions, however, have adopted a broader reading of *Fibreboard*, particularly in partial plant closing situations. In 1978, the Third Circuit became the first to adopt a presumption in favor of a duty to bargain over job termination decisions.⁸⁹ In *Brockway Motor Trucks, Inc. v. NLRB*,⁹⁰ the *per se* approach of the NLRB was rejected but the use of a rebuttable presumption of a duty to bargain over a partial closing of an employer's operations was advocated.⁹¹ Less than two years later, the

85. See, e.g., 452 U.S. 666 (1981); *Brockway Motor Trucks, Inc. v. NLRB*, 582 F.2d 720, 731-34 (1978).

86. 379 U.S. at 210.

87. See *Brockway Motor Trucks, Inc. v. NLRB*, 582 F.2d 720, 731-34 (1978); *Subcontracting*, *supra* note 45 at 203. "[T]he Board has generally required the employer to bargain with the union representative, regardless of the purity of the employers' economic motivation, if the decision has a substantial effect on the employment security of the company's employees." *Id.* at 214.

88. *Plant Relocation*, *supra* note 46, at 5. "The judiciary, however, fastening on the limiting language of Justice Stewart's concurring opinion, usually but not invariably, has come down on the side of management." *Id.* at 19; see, e.g., *Royal Typewriter Co. v. NLRB*, 533 F.2d 1030 (8th cir. 1976); *International Machinist Ass'n. v. North East Airlines*, 473 F.2d 549 (1st Cir. 1972).

89. *Brockway Motor Trucks, Inc. v. NLRB*, 582 F.2d 720 (3rd Cir. 1978).

90. 582 F.2d 720 (3rd Cir. 1978).

91. *Id.* at 735.

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 the statutory purposes and language, that a partial closing is a mandatory subject of bargaining. However, as earlier pointed out, any such presumption construed as a *per se* rule

Id. (emphasis in original) For a more complete discussion of *Brockway* see Comment, *Employer's Duty to Bargain Over A Partial Closure*, *Brockway Motor Trucks v. NLRB*, 528 F.2d 720 (3rd Cir. 1978), 10 RUTGERS-CAMDEN L.J. 747 (1979); Note, *Duty to Bargain About Termination of Operations: Brockway Motor Trucks v. NLRB*, 92 HARV. L. REV. 768 (1979); Note, *Labor Law—Duty to Bargain Over Partial Closing Decisions—Brockway Motor Trucks, Division of Mack Trucks, Inc., v. NLRB*, 28 KAN. L. REV. 157 (1979).

Seventh Circuit, in *Davis v. NLRB*,⁹² went even further and, in effect, adopted the NLRB's per se approach.⁹³ The Seventh Circuit held that the decision to convert a restaurant from full-service to self-service, which resulted in the termination of six waitresses, was subject to the duty to bargain under Section 8(d).⁹⁴

Within four months of *Davis*, the Second Circuit continued this trend of liberal interpretation of *Fibreboard* with *First National*.⁹⁵ The court decided that *Fibreboard* dictated that a presumption in favor of a duty to bargain exists for partial plant closing decisions.⁹⁶

The Supreme Court granted certiorari because of this conflict over the proper interpretation of *Fibreboard* and the proper scope of management's duty to bargain over economically motivated decisions that result in job terminations.⁹⁷

IV. ANALYSIS

A. *The Supreme Court Decision*

In *First National*, the Supreme Court focused on the fundamental goal of the Labor Management Relations Act in analyzing the bargaining duties of an employer in deciding to close part of his business.⁹⁸ That goal is to maintain industrial peace in order to preserve the free flow of interstate commerce.⁹⁹ Congress sought to promote collective bargaining between employers and representatives of their employees as the means to achieve this goal.¹⁰⁰ The Court,

92. 617 F.2d 1264 (7th Cir. 1980).

93. *Id.* at 1268. They reasoned that "the closing of a full service restaurant. . . is a 'condition of employment' for purposes of the Act because such a decision leads to the termination of at least some employees." *Id.*

94. *Id.* at 1270.

95. 627 F.2d 596 (2d Cir. 1980), *rev'd*, 452 U.S. 666 (1981).

96. *Id.* at 601.

We also agree with the *Brockway* court that the correct approach is to establish a presumption that a duty to bargain exists. A partial closing affects 'terms and conditions of employment' at least as much as does the decision to contract out which the *Fibreboard* Court found to fall within the literal meaning of the statute.

Id. (footnote omitted).

97. 452 U.S. at 674. For additional discussion of the conflict between the NLRB and the courts of appeals, see *id.* at 672-74; *Brockway Motors Trucks, Inc.*, 582 F.2d at 727-35; 5 T. KHEEL, *LABOR LAW*, § 20 at 151-75 (Bender ed. 1981); *Subcontracting*, *supra* note 45, at 213-17; *Plant Relocation*, *supra* note 46, at 12-20.

98. 452 U.S. at 674.

99. *Id.* "A fundamental aim of the Labor Management Relations Act is the establishment and maintenance of industrial peace to preserve the flow of interstate commerce." *Id.* (citing *NLRB v. Jones Loughlin Street Corp.*, 301 U.S. 1 (1937)).

100. *Id.* "Central to the achievement of this purpose is the promotion of collective

however, emphasized that while parties can choose to bargain over any legal subject, Congress expressly limited the subjects over which parties must bargain.¹⁰¹ The Congressional premise that "collective [bargaining] discussions backed by the parties' economic weapons will result in decisions that are better for both management and labor and for society as a whole will be true, however, only if the subject proposed for discussion is amenable to resolution through the bargaining process."¹⁰² The Court, therefore, concluded that there is an undeniable limit to the subjects over which Congress intended to make bargaining mandatory.¹⁰³

The Court determined that "the limitation includes only issues that settle an aspect of the relationship between the employer and the employees."¹⁰⁴ This standard then was used to divide managerial decisions into three categories.¹⁰⁵ Decisions that have only an indirect impact on the employment relationship were held to carry with them no duty to bargain¹⁰⁶ while decisions that have a direct focus and impact on some aspect of the employment relationship were found to be clearly within the scope of the duty to bargain.¹⁰⁷

bargaining as a method of defusing and channeling conflict between labor and management." *Id.*

101. *Id.*

102. *Id.* at 678.

103. *Id.* at 676.

104. *Id.* (quoting *Allied Chemical & Alkali Workers of America v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 178 (1971)).

Section 8(a) of the Act, of course, does not immutably fix a list of subjects for mandatory bargaining. . . . But it does establish a limitation against which proposed topics must be measured. In general terms, the limitation includes only issues that settle an aspect of the relationship between the employer and the employees.

Id. (quoting *Allied Chemical & Alkali Workers of America v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 178 (1971)).

105. *Id.* at 676-77.

Some management decisions, such as choice of advertising and promotion, product type and design, and financing arrangements, have only an indirect and attenuated impact on the employment relationship. *See Fibreboard*, 379 U.S., at 223 (Stewart, J., concurring). Other management decisions, such as the order of succession of layoffs and recalls, production quotas, and work rules, are almost exclusively 'an aspect of the relationship' between employer and employee. *Chemical Workers*, 404 U.S. at 178. The present case concerns a third type of management decision, one that had a direct impact on employment, since jobs were inexorably eliminated by the termination, but had as its focus only the economic profitability of the contract with Greenpark, a concern under these facts wholly apart from the employment relationship.

Id.

106. *Id.*

107. *Id.* at 677.

Decisions, such as the type made by FNM, having a direct impact on the employment relationship, are not subject to a per se rule as they focus on factors wholly apart from the employment relationship.¹⁰⁸ They must, however, be subjected to a balancing test in order to determine whether there is a duty to bargain over them.¹⁰⁹

The Court prefaced its discussion of this balancing approach with language that gave strong recognition to the interests of management. It stated that Congress did not intend the scope of the duty to bargain to be so broad "that the elected union representative would become an equal partner in the running of the business enterprise in which the union's members are employed."¹¹⁰ The Court determined: "Management must be free from the constraints of the bargaining process to the extent essential for the running of a profitable business."¹¹¹ The decisions within this realm were classified as those which are not "amenable to resolution through the bargaining process."¹¹²

The Court developed its balancing test based upon the foundation of these affirmed rights of the employer. It determined that the employer's need for unencumbered decisionmaking was so great that bargaining over decisions related to job termination should be required only when the benefits for labor-management relations and the collective bargaining process outweigh the burdens such a requirement would place on the employer's ability to efficiently conduct business.¹¹³ In applying this test to the issue before it, the Court examined the needs of both the union and management in order to

108. *Id.* This is implicit in the Court's analysis:

[T]he present case concerns a third type of management decision, one that had a direct impact on employment, since jobs were inexorably eliminated by the termination, but has as its focus only the economic profitability of the contract with Greenpark, a concern under these facts wholly apart from the employment relationship.

Id.

109. *Id.* at 677-79.

110. *Id.* at 676.

111. *Id.* at 678-79.

112. *Id.* at 678.

The concept of mandatory bargaining is premised on the belief that collective discussions backed by the parties' economic weapons will result in decisions that are better for both management and labor and for society as a whole. . . . This will be true, however, only if the subject proposed for discussion is amenable to resolution through the bargaining process. Management must be free from the constraints of the bargaining process to the extent essential for the running of a profitable business.

Id. at 678-79 (citations omitted).

113. *Id.* at 679.

determine if the benefits to employer-employee relations would outweigh the burden on managerial decisionmaking.¹¹⁴

The Court found that the interest of the union in protecting its employees from discharge could adequately be protected by three currently available devices without requiring the employer to bargain over the decision.¹¹⁵ The Court noted that the union's interest in fair dealing was protected by Section 8(a)(3), which prohibits job elimination decisions based on anti-union animus.¹¹⁶ Second, the Court pointed out that the union could seek to negotiate protection from such decisions into collective bargaining agreements.¹¹⁷ Third, the Court stated that the union has a right to bargain with management over the effects of the decision on the employees.¹¹⁸ Based on these sources of input and control, the Court concluded that it was unlikely that the additional power to bargain over the decision itself would increase the flow of information and ideas between the parties.¹¹⁹ Instead, the Court feared that granting such a right "could afford a union a powerful tool for achieving delay, a power that might be used to thwart management's intentions in a manner unrelated to any feasible solution the union might propose."¹²⁰

114. *Id.* at 681; see text accompanying notes 115-27 *infra*. Justice Brennan, in his dissent, argued that this test by its very nature "takes into account only the interest of *management*; it fails to consider the legitimate employment interest of the workers and their Union." 452 U.S. at 689 (Brennan, J., dissenting) (emphasis in original). The dissent, however, did not explain what these interests are and how the majority should have weighed them. Instead, it disputed the majority's conclusion that the benefits of requiring bargaining would be minimal in this case. The dissent pointed to the Chrysler-United Auto Workers wage concession negotiations as an example of the utility of collective bargaining as a means of solving employers financial problems. *Id.* Justice Brennan, however, ignored the crucial fact that the success of these negotiations was achieved through voluntary, not mandatory, bargaining. The dissent concluded by admonishing the majority for not deferring to the expertise of the NLRB, but then, in the same breath, adopted the approach of the Second Circuit rather than that of the NLRB. *Id.* at 691.

115. 452 U.S. at 681-82.

It is unlikely, however, that requiring bargaining over the decision itself, as well as its effects, will augment this flow of information and suggestions . . . Thus, although the union has a natural concern that a partial closing decision not be hastily or unnecessarily entered into, it has some control over the effects of the decision and indirectly may ensure that the decision itself is deliberately considered.

Id.

116. *Id.* at 682.

117. *Id.*

118. *Id.* at 681-82. For an explanation of the duty to bargain over the effects of the decision and a comparison to the duty to bargain over the decision itself, see text accompanying notes 155-62 *infra*.

119. 452 U.S. at 681; see note 115 *supra*.

120. 452 U.S. at 683.

Conversely, the corresponding burden that the duty to bargain about the decision would place on managerial freedom to act was found to be too great.¹²¹ The Court recognized that at times management “may have great need for speed, flexibility, and secrecy in meeting business opportunities and exigencies.”¹²² Moreover, the Court emphasized that the employer’s need for certainty in making rational decisions would be jeopardized by allowing the NLRB or the courts, with the aid of hindsight, to second-guess the validity of the employer’s reasons for not bargaining over the decision.¹²³ The Court pointed out that an employer could be faced with the choice between the harsh remedies of large amounts of back pay,¹²⁴ reopening a failing operation,¹²⁵ or the loss of the business opportunity through the delays and potential economic coercion by the union during collective bargaining.¹²⁶

Based on the belief that imposition on the employer of the duty to bargain over the decision would impede an employer’s ability to conduct his business profitably, while providing no offsetting benefits to the interests of the union, the Court held:

The harm likely to be done to an employer’s need to operate freely in deciding whether to shut down part of its business purely for economic reasons outweighs the incremental benefit that might be gained through the union’s participation in making the decision, and we hold that the decision itself is *not* part of § 8(d)’s “terms and conditions. . .” over which Congress has mandated bargaining.¹²⁷

B. *Scope of First National*

The Court sought to limit the reach of its holding in *First National* by noting immediately that it was not deciding whether other managerial job elimination decisions, “such as plant relocation,

121. See text accompanying note 127 *infra*.

122. 452 U.S. at 682-83 (footnote omitted).

123. *Id.* at 683.

[T]he presumption analysis adopted by the Court of Appeals seems ill-suited to advance harmonious relations between employer and employee. An employer would have difficulty determining beforehand whether it was faced with a situation requiring bargaining or one that involved economic necessity sufficiently compelling to obviate the duty to bargain.

Id.

124. *Id.*

125. *Id.* at 685.

126. See text accompanying note 120 *supra*.

127. 452 U.S. at 686 (citations omitted).

sales, and other kinds of subcontracting, automation, etc., . . .”¹²⁸ are subject to section 8(d)’s duty to bargain.¹²⁹ The reasoning behind this holding, however, has broad implications on management’s duty to bargain over such job termination decisions. These words of limitation cannot diminish the historical significance of the decision, nor can they efface the reasoning and analysis of the Court.

The Supreme Court emerged from almost two decades of silence on employer bargaining duties regarding job termination decisions. The Court’s holding stands in stark contrast to the broad readings that the NLRB traditionally, and, the courts recently, have given to *Fibreboard*.¹³⁰ The Court’s balancing test approach rejects the NLRB’s view that job termination decisions necessarily must be bargained over. The Court interpreted the language of *Fibreboard* which stated: “[T]he words of [§ 8(d)] . . . plainly cover termination of employment. . . .” to require bargaining only over the effects of the decision on employees, not the decision itself.¹³¹ The use by the courts of appeals of a presumption in favor of bargaining also was rejected.¹³² The Supreme Court reasoned that the freedom to make major business decisions would be impeded greatly by the uncertainty and risk of harsh NLRB remedies if the employer had to predict ahead of time whether his factual situation will be found sufficiently compelling to obviate the duty to bargain.¹³³

The balancing approach of the Court, by its very wording, seems to be the approach advocated for other decisions that directly eliminate jobs. The Court said: “[I]n view of an employer’s need for unencumbered decisionmaking, bargaining over management decisions that have a substantial impact on the continued availability of employment should be required only if the benefit, for labor-management relations and the collective bargaining process, outweighs the burden placed on the conduct of the business.”¹³⁴ Thus, the Court appears to have set forth this approach as the proper one, and rejected the per se and presumption approaches, for other job elimi-

128. *Id.* at 686 n.22. The Court also sought to distinguish *Fibreboard* on the basis that employees were not replaced and that non-labor costs were the basis for the decision. *Id.* at 688. In addition, the Court reserved judgment on factual situations including ongoing negotiations, anti-union motivations or collective bargaining agreements. *Id.*

129. *Id.*

130. See text accompanying notes 77-87, 89-96 *supra*.

131. 452 U.S. at 681 (quoting *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203 (1964) (brackets in original)).

132. *Id.* at 684.

133. *Id.* See note 123 *supra* and accompanying text.

134. *Id.* at 679.

nation decisions as well.¹³⁵ In decisions involving subcontracting, plant relocation, automation, mergers, and sales there appears to be the same need for certainty, speed, secrecy, and flexibility that the Court weighed so heavily in management's favor in plant closing situations. In addition, the alternatives that were found to be adequate substitutes for the union's power to bargain over the decision in *First National* also are present.¹³⁶ The timing of *First National* and the contrast of the language and concerns of that decision¹³⁷ with the language and concerns of the NLRB¹³⁸ and, recently, the courts of appeal¹³⁹ lend even greater support to a broad promanagement reading of *First National*.

It is crucial to remember that the Court applied this favorable language and this balancing approach only to those decisions focusing primarily on economic concerns outside of the employer-employee relationship and having a direct impact on terms and conditions of employment.¹⁴⁰ This language indicates that decisions

135. See *Brockway Motor Trucks, Inc. v. NLRB*, 656 F.2d 32 (3rd Cir. 1981). The *Brockway* Court held that *First National* made it clear that economically motivated decisions to partially close operations carried no duty to bargain. *Id.* at 33. This is a reversal of the *Brockway* court's trend-setting presumption in favor of bargaining which was based on its interpretation of *Fibreboard*. See Advice Memorandum of NLRB General Counsel, 108 L.R.R.M. 1071 (1981).

"It was also recognized that . . . the Employer . . . abrogated ongoing collective bargaining negotiations. This factor does not affect our conclusion . . . even though that factor was noted by the Supreme Court, its holding in *First National Maintenance* was deemed a broad one, not limited to the facts before it." *Id.* at 1072.

In order to assess the impact of *First National* on pending and future cases . . . Regional Offices are requested to submit information concerning cases that involve the issue of whether an employer has a duty to bargain over the following decisions if such decisions arguably have an impact on terms and conditions of employment; plant relocation, sub-contracting, automation, consolidation, sale of business and partial closure of business. [I]t is recognized that under current Board law, the general rule is that such decisions are subject to mandatory bargaining. . . . However, there is language in the Court's opinion which may alter the scope of the region's investigation and any litigation which may follow, and which may even alter the Section 3(d) merit determination [*i.e.*, the merits of the case] as well. [The Memorandum then cites the language of *First National's* balancing test as the reason why the NLRB position on these various management decisions may be changed]. The Court set forth a test which may apply generally to the issue of whether management decisions' are subject to mandatory bargaining.

OFFICE OF THE NLRB GENERAL COUNSEL, MEMORANDUM REGARDING FIRST NATIONAL MAINTENANCE CORP. V. NLRB, 1, 1-2 (1981).

136. See text accompanying notes 116-18 *supra*.

137. See text accompanying notes 108-113 *supra*.

138. See text accompanying notes 77-87 *supra*.

139. See text accompanying notes 88-96 *supra*.

140. See note 105 *supra* and accompanying text.

which focus on some aspect of the employer-employee relationship, rather than on some independent concern, will not come under the balancing approach. Instead they would be placed in the category of decisions that the Court indicates are items on which the employer must bargain.¹⁴¹ For example, decisions based on labor costs clearly are the kind that fall into the category of decisions focusing on some aspect of the employment relationship.¹⁴² The Supreme Court reemphasized in *First National*, as it had seventeen years before in *Fibreboard*, that “a desire to reduce labor costs . . . [is] considered a matter ‘peculiarly suitable for resolution within the collective bargaining framework.’ ”¹⁴³

First National was expressly limited to job termination decisions based on nonlabor costs.¹⁴⁴ Therefore, the focus of a job termination decision and the reasons for it will be the crucial considerations in determining if a duty to bargain over the decision has arisen. Job termination decisions that focus on aspects of the employer-employee relationship, such as productivity and labor costs, are likely to be subject to the duty to bargain. Conversely, job termination decisions that focus on matters apart from the employment relationship, such as market needs, equipment or structural problems, cost of re-

141. See notes 104-05, 107 *supra* and accompanying text.

142. 452 U.S. at 677. This second category of decisions focuses as well as impacts on some “aspect of the relationship between employer and employees.” *Id.* (quoting *Chemical Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 178 (1971)). Decisions which turn on the element of the cost of the employees’ labor seem to fall into this category. *But see* Advice Memorandum of NLRB General Counsel, 108 L.R.R.M. 1071 (1981), where the General Counsel approved of the ALJ’s use of a balancing approach to determine if there was a duty to bargain over a decision to partially close a plant, a decision that was based in part on labor costs and productivity.

It was recognized that the Employer admitted, during the ALJ hearing . . . that it considered, *inter alia*, wage rates and productivity of unit employees when choosing which plant to close, and that in bargaining the Union might have made sufficient concessions about wage rates and productivity to convince the Employer to retain operations in the facility. However, it was concluded that such a possibility was too speculative to outweigh the factors described above, especially in light of the Supreme Court’s broad holding [in *First National*] that an Employer is privileged to decide to close part of its business without bargaining with a union.

Id. at 1072. Note, however, that this is mere dicta from a non-binding interagency advisory opinion and that it is unknown if labor cost and productivity were major or minor factors in the company’s decision.

143. 452 U.S. at 680 (quoting *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. at 210).

144. *Id.* at 687-88. “[P]etitioner’s dispute with Greenpark was solely over the size of the management fee Greenpark was willing to pay. The union had no control or authority over that fee. . . . These facts in particular distinguish this case from the subcontracting issue presented in *Fibreboard*.” *Id.*

source considerations, tax consequences, and direct government regulations, are unlikely to come under the duty to bargain.

C. *Considerations for Practitioners*

In order to evaluate the practical consequences from the impact of *First National*, one must understand what is required by the duty to bargain. The duty to bargain simply is a duty to negotiate in good faith; it does not entail a duty to agree or concede.¹⁴⁵ This good faith standard requires the parties: To engage in the discussion of issues with an open mind;¹⁴⁶ to provide the other party with all relevant information and reasoning regarding their positions;¹⁴⁷ and to listen and give due consideration to the positions of the other party.¹⁴⁸ If agreement is not reached and the parties are deadlocked after complying with all good faith requirements, they are considered to be at an impasse.¹⁴⁹ Once an impasse occurs, management is free to implement its decision.¹⁵⁰ The union has a number of possible options once impasse is reached; it may accede to the change or, if a grievance procedure is in effect, it may file a grievance over the change. In addition, the union may strike if there is no contract in effect or if the contract does not preclude a strike.¹⁵¹

145. 29 U.S.C. § 158(d) (1976). Section 158(d) makes it clear that "such an obligation does not compel either party to agree to any proposal or require the making of any concession." *Id.* It imposes instead a duty "to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment" *Id.*

146. The NLRB has always construed section 8(a)(5) to require more than the mere meeting of the parties. It also requires them to have a "serious intent to adjust differences and reach an acceptable common ground." *NLRB v. Insurance Agents' Int'l. Union*, 361 U.S. 477, 485 (1960) (quoting from 1 N.L.R.B. Ann. Rep. 85-86).

147. *See NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 152 (1956), the landmark case in the area of the duty to provide information. *See also Industrial Welding Co.*, 175 N.L.R.B. 78 (1969); *Southern Saddlery Co.*, 90 N.L.R.B. 1205 (1950).

148. *See*, R. GORMAN, *BASIC TEXT ON LABOR LAW UNIONIZATION AND COLLECTIVE BARGAINING* 481-82 (1976); C. MORRIS, *THE DEVELOPING LABOR LAW*, 271-347 (1971); Cox, *The Duty to Bargain in Good Faith* 71 *HARV. L. REV.* 1401 (1958), for a detailed discussion of the duty to bargain in good faith.

149. *See Taft Broadcasting Co.*, 163 N.L.R.B. 475 (1967), *enforced sub nom.*, *AFTRA v. NLRB*, 395 F.2d 622 (D.C. Cir. 1968) for a complete discussion of the elements of impasse and the rights of the parties upon impasse.

150. R. GORMAN, *supra* note 148. "The law is clear that an employer may, after bargaining with the union to a deadlock or impasse on an issue, make unilateral changes that are reasonably comprehended within his pre-impasse proposals." *Id.* at 445 (quoting *Taft Broadcasting Co.*, 163 N.L.R.B. 475 (1967)).

151. 28 U.S.C. § 158(a) (1976) gives the employees a right to strike as a form of protected concerted activity. *Id.* Therefore, unless employees are under the terms of a contract that prohibits them from striking, they are free to do so.

This duty to bargain exists for all job termination decisions. The burdens this duty to bargain places on managerial freedom depend upon whether the employer is required to bargain over the decision itself or merely over the effects of the decisions. There is always a duty to bargain over any effects of a management decision on the terms and conditions of employment of current employees.¹⁵² It does not follow, however, that there automatically is a duty to bargain over the decision itself.

Bargaining over the effects of a decision focuses on the impact of the employer's decision on the terms and conditions of employment of the employees. This kind of bargaining requires an employer to notify the employee representative that a particular change will be forthcoming, prior to its implementation, but subsequent to the decision to make the change.¹⁵³ The employer then must bargain in good faith over the impact of the decision on the terms and conditions of employment. The issues that typically will be raised and discussed are: The possibility of the transfer of affected employees to other facilities owned by the employer; reassignment of employees to other duties within the facility; the order of layoff, if any; future obligations concerning pensions; and payment of severance pay to discharged employees.¹⁵⁴ Agreement or impasse typically will be reached quickly as there are only these few issues involved and the scope of possible discussion and negotiation, therefore, is limited.

If an employer is required to bargain over the decision as well

152. 452 U.S. at 681. "There is no dispute that the union must be given a significant opportunity to bargain about these matters of job security as part of the 'effects' bargaining mandated by § 8(a)(5)." *Id.* See, e.g., *NLRB v. Royal Plating and Polishing Co.*, 350 F.2d 191, 196 (3d Cir. 1965); *NLRB v. Adams Dairy Inc.*, 350 F.2d 108 (8th Cir. 1965), *cert. denied*, 382 U.S. 1011 (1966).

153. *NLRB v. Rapid Bindery, Inc.*, 293 F.2d 170, 176 (2d Cir. 1961), *rev'd on other grounds*, 369 U.S. 736 (1962). "The decision . . . was not a required subject of collective bargaining. . . . However, once that decision is made § 8(a)(5) requires that notice of it be given to the union so that the negotiators could then consider the treatment due to those employees whose conditions of employment would be . . . changed . . ." *Id.* See OFFICE OF THE NLRB GENERAL COUNSEL, MEMORANDUM REGARDING FIRST NATIONAL MAINTENANCE CORP. V. NLRB (1981).

With particular respect to mandatory bargaining about the effects of a decision, the Court stated that the union must be given a 'significant opportunity' to bargain. In this regard, early notification of the decision is essential. Quite obviously, it is during the period between notification and effectuation of a decision that the union can have a 'significant opportunity' to engage in 'collective discussions' with the employer and, if necessary, to have those discussions 'backed by . . . economic weapons.'

Id. at 4 (citation omitted).

154. See 5 T. KHEEL, *supra* note 97 at 145-51.

as its effects, additional burdens of bargaining are imposed. Foremost among these additional burdens is the duty to bargain *before* a decision can be made. When management seriously considers a change, it must notify the union and agree to bargain until impasse or agreement over the contemplated change.¹⁵⁵ The reasoning behind the change must be discussed and carefully analyzed. The employer must have data to support the asserted reasons for the decision and the data must be made available to the union for analysis and discussion.¹⁵⁶ Alternative solutions to the problem that has brought about the need for a change also must be completely evaluated.¹⁵⁷ This process is broad in scope and can consume a great deal of time before impasse or agreement is reached. The opportunity or solution the employer needed may be lost in this process or increased in expense such that it is no longer feasible.¹⁵⁸ The news of the contemplated change also may cause the premature loss of suppliers and customers and greatly reduce productivity.¹⁵⁹ In addition, the threat and use of the union's strike weapon can have a highly restraining effect on the employer's freedom to manage and on the free flow of commerce, as it may coerce the employer into foregoing necessary changes or opportunities.¹⁶⁰

155. 29 U.S.C. 158(a)(5) (1976). Section 8(a)(5) makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees. . ." about items within the scope of Section 8(d)'s terms and conditions of employment. *Id.* The Supreme Court in *NLRB v. Katz*, 369 U.S. 736, 743 (1962), held that an employer's unilateral change in conditions of employment is in fact a refusal to bargain and hence a violation of Section 8(a)(5). If a decision is considered a condition of employment, it cannot be made without first bargaining with the union to impasse. *Id.* at 745.

156. *See* note 147 *supra*; *see also* *General Electric Co. v. NLRB*, 466 F.2d 1177, 1182 (6th Cir. 1972); *NLRB v. Rockwell-Standard Corp.*, 410 F.2d 953, 957 (6th Cir. 1969).

157. *See* text accompanying notes 146-48 *supra*.

158. Brief for petitioner at 18, *First Nat'l Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981) [hereinafter cited as *Brief for Petitioner*]. "[D]elay . . . which may occur if such closure is subject to [a] mandatory [duty to bargain] . . . and may lead to increased losses compounded by interim departure to key personnel; declining productivity on account of reduced morale; security problems and perhaps sabotage while a confrontation ensues at the bargaining table." *Id.*

159. *Id.* *See* note 158 *supra*.

160. Brief for Petitioner at 19, *supra* note 158. *See* Comment, *Partial Terminations—A Choice Between Bargaining Equality and Economic Efficiency*, 14 *UCLA L. REV.* 1089 (1967).

[T]here is a need to protect capital investment decisions from the influence of labor. It is essential to the proper functioning of the economy that capital be free to flow from one use to another. Not only does this free flow of capital cause the economy to adjust to the desires of the consumer, but reallocating a given amount of capital from a low yielding use to a higher yielding use results

While it is true that bargaining over the effects also can result in delays, cause damage from news of these decisions, and cause strikes, the impact is much less detrimental.¹⁶¹ When there is a duty to bargain over the effects only, the decision can be made before bargaining even begins. In situations wherein bargaining over the decision is required, the decision is held in limbo and the employer must wait until impasse or agreement is reached before solid commitments or plans can be made.¹⁶² Therefore, delays, information leaks, and strike threats make the employer vulnerable and he may have to forego a change that is necessary to the continued viability of the firm.

Once the requirements and burdens of the duty to bargain are understood and evaluated, the employer must consider the likelihood that he will be required to bargain over a contemplated decision. This requires that he look at more than an analysis of the *First National* rationale in a theoretical setting. He also must evaluate the following three practical considerations. First, the contract must be examined to determine whether it has language regarding the contemplated decision. The contract can render the interpretation of *First National* and section 8(a)(5) irrelevant either by allowing a unilateral decision or by prohibiting a change altogether.¹⁶³ Second, the

in a net increment to national income and given a fixed amount of resources, increases the efficiency of the enterprise and the economy.

Id. at 1091 (citations omitted).

161. When the employer is free to make the decision before he is required to bargain he is allowed to contractually secure his opportunities. The burdens of then having to bargain over the effects are much lighter. The delays of bargaining are much shorter because the realm of issues is narrowly confined to the impact of the decision on employees "terms and conditions of employment." Further, the delays will not cause the opportunity to be lost, because it has already been secured by contract. Therefore, the damage that a strike or leaked information can cause is limited. The only issue left concerns how soon the change will be made. The damage, therefore, would be limited to a short delay in decision implementation. The lesser impact on management of the duty to bargain over the effects of the decision rather than the decision itself was recognized by the Court in *First National*. 452 U.S. at 683; see note 162 *infra*.

162. The Supreme Court in *First National* explicitly recognized this in their statement that the granting of the right to bargain over the decision "could afford a union a powerful tool for achieving delay, a power that might be used to thwart management's intentions in a manner unrelated to any feasible solution the union might propose." 452 U.S. at 683.

163. See C. MORRIS, *supra* note 148, at 333. "A party may contractually waive its right to bargain about a particular mandatory subject. Where such an assertion is raised, the test has been whether the waiver is in 'clear and unmistakable' language." *Id.* (citation omitted). See, e.g., *NLRB v. Perkins Machine Co.*, 326 F.2d 488 (1st Cir. 1964); *Druwhit Metal Products Co.*, 153 N.L.R.B. 346 (1965); *Smith Cabinet Mfg. Co.*, 147 N.L.R.B. 1506 (1964).

actions of the union must be evaluated. If the union is notified of planned change but fails to make a timely request of management to bargain, it may have waived the right to bargain over the decision.¹⁶⁴ Finally, the employer must consider the realities of labor relations litigation. The NLRB tends to construe court decisions in a light favorable to union and employee interests.¹⁶⁵ Therefore, the scope of *First National* may be narrowly interpreted and confined to its particular facts.¹⁶⁶ The employer contemplating other kinds of job termination decisions, therefore, must consider the risk of being found by the NLRB to have violated section 8(a)(5). If this risk is substantial, he must decide whether the costs and delays of appealing an unfavorable NLRB decision to the more management oriented courts outweigh the need to be free from the constraints of decision bargaining. If so, the logical decision is to negotiate over the job termination decision, even though the right not to negotiate may be meritorious under the *First National* rationale. These practical issues must be evaluated carefully. They can change a situation from one that, under the Supreme Court approach in *First National*, would be free from the duty to bargain, into one in which the decision should be bargained over.

V. CONCLUSION

For the first time in almost two decades, the Supreme Court has directly addressed the issue of an employer's duty to bargain over decisions that result in the termination of employees. The NLRB had interpreted *Fibreboard*, the Supreme Court's landmark decision in this area, to say that "terms and conditions of employment" under section 8(d) required bargaining over all job termination decisions.¹⁶⁷ The courts of appeals, until recently, had rejected the NLRB's broad interpretation of *Fibreboard* and concluded instead

164. See *Subcontracting*, *supra* note 45, at 246.

[T]he defense of waiver of the right to bargain is available to an employer under circumstances in which he is able to show that the union has clearly waived its right to negotiate based upon . . . failure of the union to pursue negotiations following timely notification and the opportunity to bargain pertaining to the employer's tentative decision.

Id.; see, e.g., *NLRB v. Spun-Jee Corp.*, 385 F.2d 379, 383-84 (2d Cir. 1967); *Key Coal Co.*, 240 N.L.R.B. 1013 (1979).

165. See text accompanying notes 77-87 *supra*.

166. There is some indication that the NLRB may interpret *First National* broadly, see note 142 *supra*. This possibility may be significantly strengthened by the recent appointment of two new members to the NLRB's National board, both of whom have management oriented backgrounds.

167. See text accompanying notes 77-87 *supra*.

that *Fibreboard* exempted from the duty to bargain employee termination decisions based on factors outside the employer-employee relationship that affect the basic scope and direction of the enterprise.¹⁶⁸

In *First National*, the Supreme Court has affirmed the traditional approach of the courts and rejected both the longstanding *per se* approach of the NLRB and the recent trend of the courts toward a rebuttable presumption in favor of bargaining.¹⁶⁹ In *First National*, the Court held that the employer's decision to terminate its maintenance contract and to discharge its thirty-five employees was not subject to the duty to bargain.¹⁷⁰ The language of the Court's balancing approach and the underlying concerns appear to be equally applicable to other decisions that focus on matters outside the employer-employee relationship and result in the discharge of employees. The Court's concerns regarding the burdens on management, the marginal benefits to the union, and the lack of amenability of the issue to the bargaining process would appear to be the same for other job termination decisions such as automation, plant relocation, plant sale or merger, and subcontracting.¹⁷¹ The actual impact of this decision, however, will depend on a number of practical considerations, the most crucial of which is how receptive the NLRB is to the policies and concerns the Supreme Court has delineated in *First National*.

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168. See text accompanying notes 74-76, 88 *supra*.

169. See text accompanying notes 131-34 *supra*.

170. 452 U.S. at 686.

171. See notes 135-39 *supra* and accompanying text.