

January 1983

Forum: Distinctions without Differences: Effects Bargaining in Light of First National Maintenance

Thomas C. Kohler

Boston College Law School, kohler@bc.edu

Follow this and additional works at: <http://lawdigitalcommons.bc.edu/lspf>

 Part of the [Comparative and Foreign Law Commons](#), [Labor and Employment Law Commons](#), and the [Law and Society Commons](#)

Recommended Citation

Thomas C. Kohler. "Forum: Distinctions without Differences: Effects Bargaining in Light of First National Maintenance." *Industrial Relations Law Journal* 5, (1983): 402-425.

This Article is brought to you for free and open access by Digital Commons @ Boston College Law School. It has been accepted for inclusion in Boston College Law School Faculty Papers by an authorized administrator of Digital Commons @ Boston College Law School. For more information, please contact nick.szydowski@bc.edu.

FORUM

Distinctions Without Differences: Effects Bargaining In Light of *First National Maintenance**

Thomas C. Kohler†

The Supreme Court recently held that an employer has no duty to bargain over its economically-motivated decision to close a part of its operations. The Court, however, reaffirmed that mitigation of the effects of a partial closure upon a jeopardized workforce is a mandatory subject of collective bargaining. At best, decision bargaining merely entails employer consideration of union-suggested alternatives to partial termination before making a final decision to close. As the duty to effects bargain is broad in scope and attaches before an employer decides irrevocably to terminate a part of its operations, the Court's exclusion of decision bargaining from the ambit of mandatory bargaining will have a minimal impact upon an employee representative's ability to bargain in effect about a partial closure decision.

[W]ords are very rascals. . .¹

In its recent decision in *First National Maintenance v. NLRB*,² the Supreme Court held that an employer's economically motivated decision to terminate a portion of its operations is not a mandatory subject of bargaining.³ The Court stated, however, that there was "no dispute" that the union representing the affected employees must be afforded "a significant opportunity" to bargain with the employer "over the effects of [such] a decision" and that this bargaining "must be conducted in a meaningful manner and at a meaningful time."⁴ The Court's holding abrogated the National Labor Relations Board's long established but uncertainly applied rule that an employer who partially terminates its operations has the duty to bargain over the decision to do so, as well as

* For his comments, suggestions and criticisms of earlier versions of this article—but particularly for his encouragement—the author wishes to thank Professor Julius Getman.

† Research Fellow, Yale Law School.

1. W. SHAKESPEARE, *TWELFTH NIGHT*, Act III, scene i.

2. 452 U.S. 666 (1981).

3. *Id.* at 686.

4. *Id.* at 681-82.

over the effects that will flow from the decision's implementation.⁵

On its face, *First National Maintenance* appears to circumscribe significantly the scope of collective bargaining and to cripple a union's ability to protect the job security of its membership. Closer examination of the opinion, however, suggests that *First National Maintenance* may work little change in an employer's bargaining obligations in the context of a partial plant closing. The impact of the case on the conduct of collective bargaining will turn ultimately on two factors: the breadth with which the Court construes the duty to effects bargain, and the time at which it concludes the duty to engage in such bargaining attaches. The language of the opinion, the precedent, and the equities involved all militate for a broad reading of the duty and to its attachment prior to the decision's implementation.

Section 8(a)(5) of the National Labor Relations Act requires an employer to "bargain collectively" with the properly designated representative of its employees.⁶ Section 8(d) of the Act defines the phrase "bargain collectively" as the mutual obligation of employer and union to meet and confer over "wages, hours, and terms and conditions of employment."⁷ To ensure that the Act could be adapted to varied and changing circumstances, Congress gave no further definition of the subjects over which bargaining must occur. Rather, it left to the National Labor Relations Board the task of determining, subject to limited judicial review, which topics fall within the ambit of the duty.⁸ The language of section 8(d) is accordingly broad and malleable, and in marking out its scope, the Board is to "appraise carefully the interests of both" labor and management⁹ in light of current "industrial realities."¹⁰

The duty to bargain fits rather uncomfortably at times in a system which presupposes the right of owners of capital to determine freely its use and management. The purpose of the duty is to afford working people the opportunity to speak with a collective voice concerning decisions which will directly affect their working lives: the breadth of the statutory language implies that an employer must bargain over any matter which might have an impact on them. Consequently, the obligation to bargain seems to severely limit the prerogatives traditionally assumed to belong to management. Both the Board and the Court, however, have sought to construe section 8(d) so as to effectuate its

5. See *Ozark Trailers, Inc.*, 161 N.L.R.B. 561, 63 L.R.R.M. (BNA) 1264 (1966).

6. 29 U.S.C. § 158(a)(5) (1976).

7. *Id.* § 158(d).

8. *E.g.*, *Ford Motor Co. v. NLRB*, 441 U.S. 488, 495-96 (1979).

9. *NLRB v. United Steelworkers*, 357 U.S. 357, 362-63 (1958).

10. *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 326 (1965) (White, J., concurring). See also *Ford Motor Co. v. NLRB*, 441 U.S. 488 (1979).

underlying purpose while leaving intact basic entrepreneurial rights. They have attempted to strike this balance chiefly through viewing the language of section 8(d) as a limitation on the bargaining obligation. In its opinion in *NLRB v. Wooster Division of Borg Warner Corp.*,¹¹ the Court adopted the Board's distinction between mandatory and permissive subjects of bargaining. Reading sections 8(d) and 8(a)(5) together, the Court concluded, in agreement with the Board, that the Act compels bargaining only as to "wages, hours, and terms and conditions of employment," i.e., issues that settle an aspect of the employment relationship.¹² Bargaining over other subjects, the Court ruled, is strictly at the election of the parties, who may not insist to impasse over them.¹³ This holding has freed employers to take unilateral action on permissive topics, and has insulated decisions concerning such matters from the reach of union-generated economic pressure and bargaining demands.

Basic entrepreneurial decisions have also been excluded from section 8(d). In *Fibreboard Paper Products Corp. v. NLRB*,¹⁴ the Court held that the subcontracting of work previously performed by unit members is a mandatory subject because the loss of jobs, which is its concomitant, affects "conditions of employment."¹⁵ Justice Stewart's seminal concurrence, however, limited the majority's holding to its facts. The Court, he stated, "most assuredly does not" hold that every managerial decision which results in the loss of employment is a mandatory subject.¹⁶ Suggesting as examples the decision to invest in labor-saving machinery and the decision to liquidate assets and to withdraw from business, Justice Stewart stated that the Act imposed no duty to bargain over matters "which lie at the core of entrepreneurial control."¹⁷ Determinations concerning the "commitment of investment capital and the basic scope of the enterprise," he continued, "are not primarily about conditions of employment," and therefore fall without the reach of the duty.¹⁸ The concurrence's narrow reading of section 8(d) with its exclusion of basic management decisions has been adopted in a number of Board and court decisions concerning the scope of an

11. 356 U.S. 342 (1958).

12. *Chemical Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 178 (1971) (discussing the distinction between mandatory and permissive topics).

13. The Court in *Borg Warner* accordingly affirmed the Board's conclusion that the employer had breached its duties under § 8(a)(5) by insisting that the collective bargaining agreement with its employees contain a clause which would have required the union to hold a pre-strike vote over whether to accept the company's last offer, and a recognition clause excluding the international union, the certified bargaining agent, as a party to the contract.

14. 379 U.S. 203 (1964).

15. *Id.* at 209.

16. *Id.* at 218.

17. *Id.* at 223.

18. *Id.*

employer's bargaining duty,¹⁹ and formed the intellectual underpinning for the majority's holding in *First National Maintenance*.

As this discussion demonstrates, the guidelines to determine the scope of the bargaining duty are, described charitably, vague; not surprisingly, the subject has been a fecund source for litigation. A major problem, of course, is that often the closer a decision comes to being capable of characterization as an exercise of entrepreneurial prerogative, the greater is its impact on the terms and conditions of an individual's employment. Consequently, determining the line between mandatory and permissive topics and, more particularly, distinguishing between decisions which lie within and without the "core of entrepreneurial control," can be, to use Melville's analogy, like trying to identify the point at which orange turns to red. No issue so well demonstrates the difficulty in striking a balance between the rights of workers and entrepreneurs as that which involves the duty of an employer to bargain over an economically motivated decision to terminate a portion of its operations. Consistent with the complexity of the problem, the law concerning the scope of the duty to discuss such a decision has had a long, tangled, and confusing development, and itself grows out of cases involving plant removals, subcontracting, and like operational modifications, which raise legally indistinguishable issues concerning the reach of the obligation.²⁰

I

DEVELOPMENT OF THE DUTY—A CURSORY SKETCH

The cases that are generally regarded as the pivotal Board decisions concerning the duty to bargain over operational changes are *Town & Country Manufacturing Co.*²¹ and *Fibreboard Paper Products Corp.*

19. See *infra* text accompanying note 47.

20. While capable of being distinguished conceptually, plant relocations and partial terminations raise virtually identical issues. Accordingly, the Board and the courts have treated the two situations analogously with regard to the duty to bargain. In *Brockway Motor Trucks v. NLRB*, 582 F.2d 720, 724 n.10 (3d Cir. 1978), for example, the court observed:

A "partial closing" is a closing of one facility by an employer having at least two plants. A variant on the situation of a partial closing is that of a plant relocation, in which one of two or more facilities is shut down and then relocated. Both a partial closing and a relocation decision should be distinguished, in the first instance, from a complete closing of an entire business, which occurs when the employer goes utterly out of business.

Circuits which had concluded that the Act requires decision bargaining over partial closings and plant relocations as well as subcontracting have considered all three situations as analogous. *E.g.*, *ABC Trans-National Transp., Inc. v. NLRB*, 642 F.2d 675, 680-81 (3d Cir. 1981); *ILGWU v. NLRB (McLoughlin Mfg. Corp.)*, 463 F.2d 907, 916 (D.C. Cir. 1972).

21. 136 N.L.R.B. 1022, 49 L.R.R.M. (BNA) 1918 (1962), *enforced*, 316 F.2d 846 (5th Cir. 1963).

(*Fibreboard II*).²² In *Town & Country*, the company had unilaterally subcontracted the trucking portion of its manufacturing operations and discharged its drivers shortly after the latter had unionized. The Board dismissed as pretextual the company's assertions that its decision was economically motivated.²³ More significantly, however, it concluded that the company had violated section 8(a)(5) by failing to negotiate with its employees' representative before discontinuing its cartage operations. The elimination of unit jobs, stated the Board, even if motivated by economic considerations, is a mandatory subject. "[P]rior discussion with a duly designated bargaining representative," the Board admonished, "is all that the Act contemplates. But it commands no less."²⁴

The Board in *Town & Country* specifically reversed its decision, issued only the year before, in *Fibreboard I*.²⁵ In that case, the General Counsel had contended that *Fibreboard*, by unilaterally subcontracting the work performed by its maintenance employees, had breached its statutory duty to bargain.²⁶ The Board, noting that the company had offered to discuss termination benefits with the union, disagreed.²⁷ The

22. 138 N.L.R.B. 550, 51 L.R.R.M. (BNA) 1101, *enforced*, 322 F.2d 411 (D.C. Cir. 1963), *aff'd*, 379 U.S. 203 (1964).

23. 136 N.L.R.B. at 1026, 49 L.R.R.M. (BNA) at 1920. The Board accordingly concluded that anti-union animus had prompted the company's actions, in violation of § 8(a)(3) of the Act, 29 U.S.C. § 158(a)(3) (1976). Section 8(a)(3) makes it 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."

24. 136 N.L.R.B. at 1027, 49 L.R.R.M. (BNA) at 1920.

25. 130 N.L.R.B. 1558, 47 L.R.R.M. (BNA) 1547 (1961).

26. General Counsel relied in part in *Shamrock Dairy, Inc.*, 124 N.L.R.B. 494, 44 L.R.R.M. (BNA) 1407 (1959), *enforced sub nom. International Bhd. of Teamsters, Local 310 v. NLRB*, 280 F.2d 665 (D.C. Cir.), *cert. denied*, 364 U.S. 892 (1960). There, the Board concluded that the employer violated section 8(a)(5) by refusing to bargain over whether the "independent contractor system of distribution" of the company's products should replace the use of employee owner salesmen. 124 N.L.R.B. at 497-98, 44 L.R.R.M. (BNA) at 1409.

27. Member Fanning strongly dissented from the majority's conclusion. In addition to citing *Shamrock Dairy*, he noted that the Board, in *Timken Roller Bearing Co.*, 70 N.L.R.B. 500, 18 L.R.R.M. (BNA) 1370 (1946), *enforcement denied on other grounds*, 161 F.2d 949 (6th Cir. 1947), had specifically adopted the Trial Examiner's finding that the company's refusal to bargain about its intention to subcontract work in the future violated its statutory obligations. Fanning further maintained that, whatever the effect of prior cases, the Supreme Court's opinion in *Railroad Telegraphers v. Chicago & N.Y. Ry. Co.*, 362 U.S. 330 (1960), was controlling. In *Railroad Telegraphers*, the Court, interpreting the analogous provisions of the Railway Labor Act, held that a contractual provision proposed by the union, which would have required union consent before the company abolished any positions held by its members, was a mandatory subject of bargaining.

The *Fibreboard I* majority distinguished these three cases on the grounds that in each, there remained in the preexisting unit persons in the company's employ represented by the union. Thus, in each, they asserted, decisions the employer might make concerning subcontracting (*Timken, Shamrock Dairy*) or partial closings (*Radio Telegraphers*) had or might have an impact on the conditions of employment of those still employed in the suit. The majority stated that, in the present case, "no employees remained in the unit to be represented by the Union, and thus there could be no impact on the employment conditions" for those who remained. Accordingly,

"broad proposition" that the statute compels an employer "to bargain . . . about its *decision* to contract out" work, the Board exclaimed, was contrary both to precedent and to the language of the Act.²⁸ The challenged action, the Board concluded, constituted a valid exercise of managerial prerogative which fell outside the reach of the bargaining duty because it did not affect conditions of employment. Upon its reconsideration of the case, the Board thoroughly recanted this position, holding squarely that Fibreboard's failure to bargain "concerning its decision to subcontract its maintenance work" constituted a violation of section 8(a)(5).²⁹

Despite the Board's protests that *Town & Country* and *Fibreboard II* represented no innovation, these cases provoked great controversy³⁰ and claims on the part of commentators that they represented "a significant departure" from prior Board decisions.³¹ A review of the perti-

they concluded that the cases did not stand for "the proposition which our colleague urges—that a union which will not represent any of the employer's employees is entitled to bargain about matters which will have an impact only when it ceases to be a representative." 130 N.L.R.B. at 1561, 47 L.R.R.M. (BNA) at 1549.

28. *Id.* at 1560, 47 L.R.R.M. (BNA) at 1548.

29. 138 N.L.R.B. at 551, 51 L.R.R.M. (BNA) at 1101. The quick reversal of *Fibreboard I* was due to a change in the Board's composition. *Fibreboard I* was issued on March 27, 1961. 130 N.L.R.B. 1560, 47 L.R.R.M. (BNA) 1547. Four members participated in this decision. Members Rodgers, Leedom, and Joseph Jenkins formed the majority, Record at 39, *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203 (1964), with Member Fanning, as noted, dissenting in part. (Fanning concurred in the majority's conclusion that the company had not violated the notice provisions of §8(d) of the Act.) Chairman McCulloch, whose appointment by President Kennedy was confirmed by the Senate on March 2, 1961, 107 Cong. Rec. 3113 (1961), had been appointed to succeed Member Jenkins, whose term had expired. Shortly thereafter, the union and the General Counsel filed motions for reconsideration, which were not acted on until September 13, 1962, when the Board issued its Supplemental Decision in *Fibreboard II*, 138 N.L.R.B. 550, 51 L.R.R.M. (BNA) 1101. In the interim, the Board issued its *Town & Country* decision, in which Chairman McCulloch and Members Brown and Fanning formed the majority. Petitioner's Brief at 6 n.2, *Fibreboard Paper Prods. Co. v. NLRB*. Because he had been the Regional Director who had signed the complaint against the company, Member Brown did not participate in the Board's Supplemental Decision in *Fibreboard*. Memorandum for NLRB at 5 n.3, *Fibreboard Paper Prods. Co. v. NLRB*.

For a general discussion of the Board's policy prior to the Kennedy appointments, see Note, *The NLRB Under the Republican Administration: Recent Trends and Their Political Implications*, 55 COLUM. L. REV. 852 (1955).

30. See, e.g., Address by Theophil C. Kammholz, General Meeting of the American Iron and Steel Institute (May 28, 1964), in 56 L.R.R.M. (BNA) 137 (1964); Address by Frederick R. Livingston, Midwest Seminar on NLRB Policy Changes, in 52 L.R.R.M. (BNA) 84 (1963); O'Connell, *The Implications of Decision Bargaining*, 16 N.Y.U. CONF. ON LABOR 99 (1961). Stating that management had been precluded from making "its own decision on the location of facilities, on the future prospects of the business," and that "it may no longer decide for itself whether it will stay in business or whether it will go out of business," Congressman Landrum introduced a bill to transfer jurisdiction over unfair labor practice cases from the NLRB to the federal district courts. 109 Cong. Rec. 16042 (1963). Landrum further stated with reference to *Fibreboard II* that "this eye opening NLRB doctrine about management prerogatives is but the latest in a long line of extra-statutory powers this Board had arrogated to itself." *Id.*

31. Note, *Duty to Bargain: Subcontracting, Relocation and Partial Termination*, 55 GEO. L.J.

ment cases, however, demonstrates that the Board's assertions were substantially correct. For, while conflicting precedent existed,³² the Board in its pre-*Town & Country* decisions had generally concluded that the abolition of unit positions constituted a matter which arose under the statutory phrase "terms and conditions of employment."³³ Accordingly, these early cases ordinarily required an employer to confer with the representative of its employees before executing any

879, 888 (1967). See also Goetz, *The Duty to Bargain About Changes in Operations*, 1964 DUKE L.J. 1; Address by Stuart Rothman, Labor Law Section of the Wisconsin Bar Ass'n (Feb. 15, 1964), in 52 L.R.R.M. (BNA) 57, 64 (1963) ("[w]hat is novel in the *Town and Country* case is the Board's statement that the employer's decision, I repeat, decision, to subcontract unit work is a mandatory subject of bargaining, requiring notice to and discussion with the collective bargaining representative"). At the time he made this address, Rothman was the Board's General Counsel. But see Address by Arnold Ordman, Labor Law Section of the Georgia Bar Ass'n (Mar. 15, 1963), in 52 L.R.R.M. (BNA) 86 (1963) (*Fibreboard II* holding "was not new, either as a matter of legal precedent or as a matter of practical and established collective bargaining history"). Ordman was chief counsel to Chairman McCulloch at the time he delivered his address and succeeded Rothman as the Board's General Counsel in May 1963.

For further discussion of the duty to bargain about operational changes, see Murphy, *Plant Relocation and the Collective-Bargaining Obligation*, 59 N.C.L. REV. 1 (1980); Schwarz, *Plant Relocation or Partial Termination—The Duty to Decision-Bargain*, 39 FORDHAM L. REV. 81 (1970); Comment, *Employer's Duty to Bargain About Subcontracting and Other "Management" Decisions*, 64 COLUM. L. REV. 294 (1964).

32. *E.g.*, Walter Holm & Co., 87 N.L.R.B. 1169, 25 L.R.R.M. (BNA) 1270 (1949); Mahoning Mining Co., 61 N.L.R.B. 792, 16 L.R.R.M. (BNA) 110 (1945).

33. *E.g.*, Shamrock Dairy, Inc., 119 N.L.R.B. 998, 41 L.R.R.M. (BNA) 1216, *supplemented*, 124 N.L.R.B. 494, 44 L.R.R.M. (BNA) 1407 (1959), *enforced sub nom.* International Bhd. of Teamsters, Local 310 v. NLRB, 280 F.2d 665 (D.C. Cir.), *cert. denied*, 364 U.S. 892 (1960); Brown Truck & Trailer Mfg. Co., 106 N.L.R.B. 999, 32 L.R.R.M. (BNA) 1580 (1953); California Portland Cement Co., 101 N.L.R.B. 1436, 31 L.R.R.M. (BNA) 1220 (1952), *supplemented*, 103 N.L.R.B. 1375, 31 L.R.R.M. 1630 (1953), Timken Roller Bearing Co., 70 N.L.R.B. 500, 18 L.R.R.M. (BNA) 1370 (1946), *enforcement denied on other grounds*, 161 F.2d 949 (6th Cir. 1947); Brown-McLaren Mfg. Co., 34 N.L.R.B. 984, 9 L.R.R.M. (BNA) 950 (1941). All of these cases involved economically motivated operational changes. The Board, however, had also long construed the Act to impose similar bargaining obligations in which operational changes were shown to have been discriminatorily rather than economically motivated. In such cases, the Board has normally found that the employer's failure to consult with the union prior to implementing the change constituted a separate violation of § 8(a)(5). See, *e.g.*, Brown Dunkin Co., 125 N.L.R.B. 1379, 45 L.R.R.M. (BNA) 1256 (1959), *enforced*, 287 F.2d 17 (10th Cir. 1961) (subcontracting unit work without prior notification and bargaining with the union violates § 8(a)(5)); Houston Chronicle Publishing Co., 101 N.L.R.B. 1208, 1215, 1245, 31 L.R.R.M. (BNA) 1195, 1196-97 (1945), *enforcement denied*, 211 F.2d 848 (5th Cir. 1954) (company's failure to consult with the union and negotiate prior to subcontracting unit work a separate violation of § 8(a)(5)); Stille Plywood Co., 94 N.L.R.B. 932, 969, 28 L.R.R.M. (BNA) 1120 (1951), *enforced as modified*, 199 F.2d 319 (4th Cir. 1952), *cert. denied*, 344 U.S. 933 (1953) (subcontracting of certain logging operations without prior notice to the union violated § 8(a)(5)); Eva Ray Dress Mfg. Co., 88 N.L.R.B. 361, 382, 25 L.R.R.M. (BNA) 1328, 1330 (1950), *enforced per curiam*, 191 F.2d 850 (5th Cir. 1951) (partial termination); Rome Prods. Co., 77 N.L.R.B. 1217, 22 L.R.R.M. (BNA) 1138 (1948) (plant removal); Pepsi Cola Bottling Co. (Montgomery), 72 N.L.R.B. 601, 19 L.R.R.M. (BNA) 1208 (1947) (violation where the company failed to notify or consult the union concerning shutdown). Not surprisingly, in cases involving discriminatory motivation such as *Brown Dunkin*, the Board had frequently relied on cases arising in the context of economically motivated changes, such as *Shamrock Dairy*, to find a violation of the duty to bargain.

change in its operations which would have adversely affected unit members' opportunities for continued employment. As with any mandatory subject, the key element in these cases was the requirement that notice and an opportunity to bargain precede the implementation of the change. Thus, for example, in its 1941 decision in *Gerity Whitaker Co.*,³⁴ the Board found that the employer's unilateral interplant relocation of bargaining unit work, which resulted in the lay-off of a substantial number of unit employees, constituted a violation of section 8(a)(5).³⁵ The Board stated that the company's actions worked "such a drastic and crucial change" in its employment conditions that "the refusal to bargain inherent in such removal, when presented as an accomplished fact, could not be cured by the bargaining that subsequently occurred" concerning the employment of some of the affected employees at the plant to which the work had been transferred.³⁶

Interestingly, it was not until *Fibreboard I* that the Board began to conceptualize the statutory requirement to confer over operational changes as a dichotomous obligation composed of separate and distinct duties to decision- and effects-bargain. Accordingly, the pre-*Fibreboard* cases typically discuss the employer's obligations in general terms, such as the duty to bargain over whether the change "should be adopted,"³⁷ or "regarding the subcontracting of work."³⁸ Significantly, in keeping with the Act's policy of free collective bargaining,³⁹ the cases do not detail the subjects such discussions were expected to encompass. The cases' language makes clear, however, that these conferences were to be catholic in scope. Among the issues which were assumed to be a natural part of such bargaining was whether some modification, concession, or suggestion of alternative approach would obviate the need or desire to effect the planned change. Bargaining was also to encompass discussion of methods of ameliorating the impact of the planned change on employees, such as opportunities for transfer, retraining, severance pay, and benefit continuation.⁴⁰ All of these top-

34. 33 N.L.R.B. 393, 8 L.R.R.M. (BNA) 275, enforced as modified per curiam, 137 F.2d 198 (6th Cir. 1942).

35. *Id.* at 406-07, 8 L.R.R.M. (BNA) at 278-79.

36. *Id.* at 407, 8 L.R.R.M. (BNA) at 279.

37. *Shamrock Dairy, Inc.*, 124 N.L.R.B. at 496, 44 L.R.R.M. (BNA) at 1409.

38. *Timken Roller Bearing Co.*, 70 N.L.R.B. at 504, 188 L.R.R.M. (BNA) at 1372.

39. *See, e.g.*, *NLRB v. American Nat'l Ins. Co.*, 343 U.S. 395 (1952).

40. *E.g.*, *Stilley Plywood Co.*, in which the Board adopted the following statement of its Administrative Law Judge:

It is settled law that an employer is obligated to notify the collective bargaining representative of his employees of any . . . contemplated changes in the wages or working conditions of his employees before putting the changes into effect, in order to afford the bargaining representative an opportunity to discuss with the employer such questions, e.g., as whether or not the changes (if adverse to the employees) can be avoided, the manner in which the changes should be effected, and the principles to govern a return, if any, to the former conditions of employment.

ics, however, were seen as interrelated parts of "terms and conditions"; hence, no attempt was made to distinguish among them.

In light of the precedent, the striking thing about *Fibreboard I* is the Board's preoccupation with the word "decision" and the images its use seemingly evoked. The Board apparently feared that by requiring *Fibreboard* to discuss alternatives to its subcontracting plan, i.e., to decision-bargain, a novel duty would be imposed on the company through which the union would gain an equal voice in determinations concerning the use and management of the employer's economic resources. The delineation between decision- and effects-bargaining was made in response to this apprehension. Through this delineation the Board attempted to separate the prerogatives of entrepreneurs and the rights statutorily guaranteed to workers into isolated spheres, thereby resolving the basic tension created by the bargaining obligation. The distinction recognizes the stake that workers have in decisions like subcontracting. It acts, however, to limit the scope of their influence as closely as possible to wage-related topics, such as severance pay and benefit continuation. It is such topics, where employee rights are most clearly established, that head-on conflicts with interests viewed as intrinsic and exclusive to management prerogatives are least likely to arise.

The Board's decisions in *Town & Country* and *Fibreboard II*, and the Supreme Court's affirmance of the latter, clearly resolved the scope of the employer's duty to bargain about subcontracting. These cases also firmly cemented the conceptualization of the obligation as composed of two analytically distinct parts. Since that time, the Board and the courts have examined an employer's statutory obligations to discuss other types of operational changes, such as plant relocations and partial closings, in terms of its duty to decision-bargain and to effects-bargain.

In *Ozark Trailers, Inc.*,⁴¹ the Board in its first post-*Fibreboard* consideration of the issue, framed a *per se* rule concerning the duty to bargain about both the decision and the effects of an employer's economically motivated discontinuance of a portion of its operations. It concluded, in reliance on the Court's *Fibreboard* opinion, that because the implementation of such decisions necessarily results in employment terminations, they affect "terms and conditions" and therefore constitute a mandatory subject.⁴² Although the Board has

94 N.L.R.B. at 969.

41. 161 N.L.R.B. 561, 63 L.R.R.M. (BNA) 1264 (1966).

42. *Id.* at 565, 63 L.R.R.M. (BNA) at 1267. In stating its conclusion, the Board acknowledged that two circuits had recently held, largely in reliance on Justice Stewart's *Fibreboard* concurrence, that an employer's decision to terminate a phase of operations was not a mandatory subject of bargaining. The Board noted that the Eighth Circuit had held in *NLRB v. Adams Dairy, Inc.*, 350 F.2d 108 (8th Cir. 1965), *cert. denied*, 382 U.S. 1011 (1966), that the dairy's deci-

carved out some exceptions to *Ozark's* application,⁴³ it has generally, albeit somewhat erratically, followed *Ozark* in cases involving partial plant closings and relocations.⁴⁴

The courts, in contrast, have commonly,⁴⁵ though not univer-

sion to change its distribution system by substituting independent contractors for its employee drivers was not a mandatory subject because it involved a "basic operational change" and a "partial liquidation and a recoup of capital investment." The Third Circuit had similarly held in *NLRB v. Royal Plating & Polishing Co.*, 350 F.2d 191 (3d Cir. 1965), that the company's determination to close one of its two plants involved a "management decision to recommit and reinvest funds in the business" and was a "major change in the economic direction of the Company" which impinged only indirectly on employment security and therefore fell outside the scope of the duty. *Id.* at 196. In contrast, the Board's focus in cases involving economically motivated decisions to subcontract or partially terminate a business would not be on the "commitment of capital" or the degree to which the decision would change the nature of the employer's business, but on the impact such a decision would have on the bargaining unit.

43. Since handing down that decision, the Board has created three categories of exceptions to *Ozark*. The first of these might be labelled a "futility" exception. In such cases, the Board concludes that factors outside the parties' direct control make bargaining over the decision useless. For example, in *Brooks-Scanlon, Inc.*, 246 N.L.R.B. 476, 102 L.R.R.M. (BNA) 1606, *petition to review denied*, 108 L.R.R.M. (BNA) 2176 (D.C. Cir. 1981), the Board declined to find a violation where the employer made a unilateral decision to close its sawmill department because of a lack of trees sufficient to support its operation.

A second line of cases in which the Board finds no duty to decision-bargain concerns situations in which an employer, by its partial closing, entirely withdraws itself from a discrete line of business. *Summit Tooling Co.*, 195 N.L.R.B. 479, 79 L.R.R.M. (BNA) 1396 (1972), *enforced*, 83 L.R.R.M. 2044 (7th Cir. 1973), is an example. Here, the employer maintained both a tool design and drafting service and a manufacturing operation. For economic reasons, it closed the latter. The Board found that § 8(a)(5) did not require bargaining "about its decision to close out its manufacturing operation because this would significantly abridge respondent's freedom to manage its own affairs." *Id.* at 480, 79 L.R.R.M. (BNA) at 1400.

A third line of exceptions, closely related to the second, finds no duty to bargain about capital investment decisions that alter the fundamental nature and direction of the enterprise. The leading case in this category is *General Motors Corp., GMC Truck & Coach Div.*, 191 N.L.R.B. 951, 77 L.R.R.M. (BNA) 1537 (1971), *enforced sub nom. UAW, Local 864 v. NLRB*, 470 F.2d 422 (D.C. Cir. 1972). Here the Board concluded that GM had no duty to bargain over its decision to sell a truck center to a dealer who would operate it under the terms of a franchise agreement. The Board stated that the Act does not require bargaining over "decisions such as this, in which a significant investment or withdrawal of capital will affect the scope and ultimate direction of an enterprise." These matters, the Board concluded, "lie at the very core of entrepreneurial control." 191 N.L.R.B. at 952, 77 L.R.R.M. (BNA) at 1539. Ironically, the second and third categories of exceptions find their roots in Justice Stewart's *Fibreboard* concurrence, which states an approach the Board specifically declined to follow in its *Ozark* decision.

44. *Compare, e.g., National Car Rental System, Inc.*, 252 N.L.R.B. 159, 161, 105 L.R.R.M. (BNA) 1263, 1266 (1980) (no duty to bargain over decision to partially terminate operations at one of employer's facilities, because decision was "essentially financial and managerial in nature" and affected "the scope and ultimate direction" of the enterprise; relying on *General Motors Corp., GMC Truck & Coach Div.*) with *National Family Opinion, Inc.*, 246 N.L.R.B. 521, 102 L.R.R.M. (BNA) 1641 (1979) (duty to bargain about decision to close portion of operations for union activities and thus discriminatory).

45. *E.g., NLRB v. International Harvester Co.*, 618 F.2d 85 (9th Cir. 1980); *NLRB v. North Carolina Coastal Motor Lines, Inc.*, 542 F.2d 637 (4th Cir. 1976); *Royal Typewriter Co. v. NLRB*, 533 F.2d 1030 (8th Cir. 1976); *NLRB v. Acme Indus. Prods., Inc.*, 439 F.2d 40 (6th Cir. 1971); *NLRB v. Thompson Transp. Co.*, 406 F.2d 698 (10th Cir. 1969); *NLRB v. Transmarine Navigation Corp.*, 380 F.2d 933 (9th Cir. 1967); *NLRB v. Royal Plating & Polishing Co.*, 350 F.2d 191

sally,⁴⁶ confined the duty to decision-bargain strictly to subcontracting. The rationale of the opinions so restricting the duty is largely that of Justice Stewart's *Fibreboard* concurrence, which stated that managerial decisions regarding the "commitment of investment capital" or the "basic scope of the enterprise" impinge only indirectly on conditions of employment and therefore do not fall within the reach of the language of section 8(d).⁴⁷ In their subsequent considerations, the lower courts have generally concluded that partial closing and relocation decisions involve determinations concerning investment and enterprise scope and thus do not constitute mandatory subjects. Like the Board, however, they have uniformly required employers to bargain over effects.

The *First National Maintenance* decision settles the uncertainties generated by the splits between and within the Board and the courts concerning the scope of an employer's bargaining duties in the context of a partial closing. The Court's opinion is the progeny of Justice Stewart's *Fibreboard* concurrence, and adopts its restrictive reading of section 8(d). Like the concurrence, the *First National Maintenance* opinion strongly parallels the Board's first *Fibreboard* decision in attempting to demarcate a bright line between the rights of employees and entrepreneurs. It also echoes the concern stated by the Board in *Fibreboard I* that by compelling an employer to bargain over such a decision, the union would thereby "become an equal partner in the running of the business enterprise in which the union's members are employed."⁴⁸ Further, the opinion reflects the Court's belief that decision bargaining is unlikely to "augment" the "flow of information and suggestions"⁴⁹ concerning alternatives to the closing, and thus that its imposition would achieve little that cannot be gained through effects bargaining. Nevertheless, like *Fibreboard I*, the opinion recognizes the interest employees have in such decisions. Accordingly, it indicates that the Act requires the union to be given a "significant opportunity to bargain" about effects and that this bargaining must occur "in a mean-

(3d Cir. 1965). *But see* NLRB v. Production Molded Plastics, Inc., 644 F.2d 451 (6th Cir. 1979) (holding that employer had duty to bargain over decision to close *and* effects; no discussion of *Acme*).

46. *E.g.*, NLRB v. W.R. Grace & Co., 571 F.2d 279 (5th Cir. 1978); ILGWU v. NLRB (McLoughlin Mfg. Corp.), 463 F.2d 907 (D.C. Cir. 1972); NLRB v. Winn-Dixie Stores, Inc., 361 F.2d 512 (5th Cir.), *cert. denied*, 385 U.S. 935 (1966). *But see* UAW, Local 864 v. NLRB, 470 F.2d 422 (D.C. Cir. 1972). Some circuits have recently shown more willingness to impose a duty to bargain about partial closing decisions. *See, e.g.*, NLRB v. First Nat'l Maintenance Corp., 627 F.2d 596 (2d Cir. 1980), *rev'd*, 452 U.S. 666 (1981); Brockway Motor Trucks, Inc. v. NLRB, 582 F.2d 720 (3d Cir. 1978) (clarifying *Royal Plating* by formulating rebuttable presumption test concerning decision bargaining). *See generally* Comment, *Duty to Bargain About Termination of Operations*: Brockway Motor Trucks v. NLRB, 92 HARV. L. REV. 768 (1979).

47. *See supra* note 17 and accompanying text.

48. First Nat'l Maintenance Corp. v. NLRB, 452 U.S. at 676.

49. *Id.* at 681.

ingful manner and at a meaningful time."⁵⁰ In order to better understand the contours of the line the Court has established between the rights of entrepreneurs and employees, and the probable impact of its holding on the collective bargaining process, it is necessary to determine the definitions of and the differences between decision and effects bargaining.

II

DECISION AND EFFECTS BARGAINING—CONTENTS OF THE DUTIES

A. Purpose and Scope

The obligation to decision-bargain simply requires an employer to notify its employees' representative that an operational change which will adversely affect employee tenure is planned,⁵¹ and to discuss and consider in good faith any suggestions the union might offer concerning alternative courses.⁵² As discussed above, the duty recognizes the interests that employees have in such alterations. It is designed to accommodate those interests by affording the union "an opportunity to engage in a full and frank discussion"⁵³ concerning the employer's plan. The chief purpose of the obligation is to allow employees the chance to protect their livelihoods by guaranteeing their collective representative an occasion to influence the employer's final decision to implement the change.⁵⁴ Consequently, the cases make clear that all factors relevant to the decision are subject to bargaining. The results of

50. *Id.* at 681-82.

51. There is no duty to bargain over operational changes which have no impact on employee tenure or working conditions. *See, e.g.,* Coca Cola Bottling Works, Inc., 186 N.L.R.B. 1050, 75 L.R.R.M. (BNA) 1551, 1552, *enforced in pertinent part sub nom.* Retail, Wholesale & Dep't Store Union v. NLRB, 466 F.2d 380, 384 (D.C. Cir. 1972) (no duty to bargain over elimination of certain machinery where decision did not significantly affect employee tenure); Westinghouse Elec. Corp. (Mansfield Plant), 150 N.L.R.B. 1574, 1576, 58 L.R.R.M. (BNA) 1257, 1258 (1965) (no duty to bargain about subcontracting that did not eliminate unit jobs or significantly affect unit interests).

52. *E.g.,* Ozark Trailers, Inc., 161 N.L.R.B. 561, 568, 63 L.R.R.M. (BNA) 1264, 1269 (1966). The Board recently explained the purpose of decision bargaining:

The underlying rationale for requiring bargaining over such matters is that the union—on behalf of and as representative of the employees—should be accorded an opportunity to engage in a full and frank discussion regarding such decisions. In this way parties are presented with an opportunity to explore possible alternatives to accommodate their respective interests and thereby resolve whatever issue confronts them in a mutually acceptable way.

Brockway Motor Trucks, 230 N.L.R.B. 1002, 1003, 95 L.R.R.M. (BNA) 1462, 1463 (1977), *enforcement denied and remanded*, 582 F.2d 720 (3d Cir. 1978), *supplemented*, 251 N.L.R.B. 29, 104 L.R.R.M. (BNA) 1515 (1980), *consent decree denying enforcement approved*, 656 F.2d 32 (3d Cir. 1981).

53. Ozark Trailers, Inc., 161 N.L.R.B. at 568, 63 L.R.R.M. (BNA) at 1268.

54. *E.g.,* Brockway Motor Trucks, 230 N.L.R.B. at 1003, 95 L.R.R.M. (BNA) at 1463; Ozark Trailers, Inc., 161 N.L.R.B. at 568, 63 L.R.R.M. (BNA) at 1268.

these discussions, the Board has noted, "are not germane" to the statutory obligation which only requires that the parties "meet and confer in good faith."⁵⁵ The Act's purpose, and the Board's sole function, it has declared, is to assure that the opportunity for such discussion exists.⁵⁶

Because the duty to decision-bargain is a more limited one than the term itself suggests, it is important to note the limits within which the Board has held it to operate. The duty clearly does not comprehend the inclusion of union representatives in management deliberations concerning operational or investment strategy, nor does it give employees an equal voice in corporate decision-making. Rather, it only requires that, upon deciding to make an operational change, the employer notify the union of the plan and entertain in good faith any alternatives the union may formulate before implementing the modification.⁵⁷ The term "decision bargaining" then is a misleading one since it intimates that a union has rights far broader than those the Board's interpretation of the Act actually recognizes. The inaccurate image of direct employee participation in management's decision-making process, which the term's use apparently evokes, probably accounts for much of the reluctance on the part of courts to impose that duty. At base, decision bargaining is no more than an industrial version of due process.

The duty to effects-bargain, in contrast, treats the employer's decision as immutable and sacrosanct. Thus, its focus is not on ways that the change might be avoided, but solely on the terms under which it will be effectuated. The duty's purpose has accordingly been described as intended to provide the union with "an opportunity to bargain over the rights of employees whose employment status will be altered by the

55. Brockway Motor Trucks, 230 N.L.R.B. at 1003, 95 L.R.R.M. (BNA) at 1463.

56. *Id.* at 1003, 95 L.R.R.M. (BNA) at 1463.

57. This point was made with great clarity in *Lange Co.*, 222 N.L.R.B. 558, 91 L.R.R.M. (BNA) 1311 (1976). There, the Board adopted the decision of the Administrative Law Judge who observed:

[I]n no case has the Board held that an employer must defer making a decision concerning terms and conditions of employment until it has first conferred with [the] representative of its employees. The requirement is that, after reaching the decision, the employer must then notify the representative and afford the opportunity to discuss that decision and to consider alternative proposals. Thus, in *Ozark Trailers* [citation omitted], the Board made clear that the illegality lay not in the fact that the employer had first made the decision before consulting with its employees' representative. The illegality lay in the implementation of that decision prior to affording the representative an opportunity to advance and discuss [an] alternative course of action. [citation omitted]

Id. at 563. See also *Love's Barbecue Restaurant No. 62*, 245 N.L.R.B. 78, 112-13, 102 L.R.R.M. (BNA) 1546, 1548 (1979), *enforced in part and remanded in part*, 640 F.2d 1094 (9th Cir. 1981); *Lemon Tree*, 231 N.L.R.B. 1168, 1176 n.35, 96 L.R.R.M. (BNA) 1204, 1204 (1976), *enforced sub nom.* *NLRB v. Joseph Macaluso, Inc.*, 618 F.2d 51 (9th Cir. 1980) (both citing the above-quoted language from *Lange*).

managerial decision,"⁵⁸ and as designed "to moderate the closing's impact on the work force."⁵⁹ Not surprisingly then, the cases frequently indicate, as did the Third Circuit's opinion in *NLRB v. Royal Plating and Polishing Co.*,⁶⁰ that "issues such as severance pay, seniority and pensions, among others, are necessarily of particular relevance and importance" as topics over which effects bargaining should occur.⁶¹

In accordance with the Act's scheme of free collective bargaining,⁶² however, the cases have not limited the scope of effects bargaining to any set list of subjects. Rather, they indicate that its scope is very broad and encompasses "any and all"⁶³ effects flowing from the decision's implementation. The most crucial of these are opportunities for continued employment at the employer's other facilities. As the Second Circuit observed in *Cooper Thermometer Co. v. NLRB*,⁶⁴ which involved a plant relocation:

The Board may reasonably interpret Section 8(a)(5), as explicated in Section 8(d) as requiring an employer . . . not merely to give reasonable notice to a recognized union and to negotiate the terms of the shut-down . . . but also to discuss with it the basis on which employees may transfer and in that connection, to give information as to the jobs in the new plant essential to the intelligent formulation of the union's requests. The most important interest of workers is in working; the Board may reasonably consider that an employer does not fulfill his obligations under Section 8(a)(5) if he refuses even to discuss with the employees' representatives on what basis they may continue to be employed.⁶⁵

While, as noted, the substance of decision and effects bargaining is unstructured, the obligation to conduct negotiations in good faith requires an employer to fully disclose to the union those of its plans and intentions which will directly affect employees' terms and conditions.⁶⁶ Thus, for example, the Board has consistently found that an employer

58. *Ozark Trailers, Inc.*, 161 N.L.R.B. at 563, 63 L.R.R.M. (BNA) at 1266 (quoting *NLRB v. Royal Plating & Polishing Co.*, 350 F.2d 191, 196 (3d Cir. 1965)).

59. *Brockway Motor Trucks v. NLRB*, 582 F.2d at 736.

60. 350 F.2d 191 (3d Cir. 1965).

61. *Id.* at 196.

62. *See supra* note 39.

63. *E.g.*, *Soule Glass & Glazing Co. v. NLRB*, 652 F.2d 1055, 1086 (1st Cir. 1981) (quoting *NLRB v. Acme Indus. Prods.*, 439 F.2d 40 (6th Cir. 1971)).

64. 376 F.2d 684 (2d Cir. 1967), *enforcing in pertinent part* 160 N.L.R.B. 1902, 63 L.R.R.M. (BNA) 1219 (1966).

65. 376 F.2d at 688. *See also* *NLRB v. National Car Rental System, Inc.*, 672 F.2d 1182, 1188 (3d Cir. 1982) ("[o]ne of the effects over which there was a duty to bargain was whether National would transfer any of Newark's employees" to its new facility in Edison, New Jersey); *NLRB v. North Carolina Motor Lines, Inc.*, 542 F.2d 637, 638 (4th Cir. 1976) (partial closing created duty to discuss opportunities for continued employment at employer's other facilities).

66. *E.g.*, *Sun Maid Growers*, 239 N.L.R.B. 346, 353, 99 L.R.R.M. (BNA) 1668 (1978), *enforced*, 618 F.2d 56 (9th Cir. 1980).

who bargains with its employees' representatives over the terms of a new agreement, but fails to inform the union that it is contemplating the shutdown of the facility for which bargaining is being conducted, violates the Act.⁶⁷ The Board and the courts have similarly found a violation where an employer notified the union that it planned to close one of its facilities, but neglected to reveal that it intended to continue the operations performed there at another of its plants.⁶⁸

B. When the Duty to Bargain Attaches

Timing lies at the core of both decision and effects bargaining. As the Court instructed in *NLRB v. Katz*,⁶⁹ "unilateral action by an employer [concerning a mandatory subject] without prior discussion with the union," constitutes a refusal to bargain.⁷⁰ Accordingly, the cases are unanimous in concluding that notice and an opportunity for bargaining over the decision and effects must precede the implementation of an operational change. They constantly remind, with a phrase that has developed into a term of art in this area, that bargaining is meaningless if the union is faced with a *fait accompli*.⁷¹

To properly discharge its obligation to decision-bargain, it is incumbent on an employer to "give the [u]nion advance notice of its intention to close and provide the [u]nion with a fair opportunity to bargain."⁷² What constitutes a fair opportunity obviously varies with the context of each case.⁷³ In general, the cases indicate that in order to make decision bargaining meaningful, the union must be given "ample and sufficient time to prepare an effective proposal"⁷⁴ in response to the

67. *E.g.*, *Lange Co.*, 222 N.L.R.B. at 563, 91 L.R.R.M. (BNA) at 1311.

68. *E.g.*, *ILGWU v. NLRB (McLoughlin Mfg. Corp.)*, 463 F.2d 907, 916 (D.C. Cir. 1972); *Republic Engraving & Designing Co.*, 236 N.L.R.B. 1150, 1155, 99 L.R.R.M. (BNA) 1306, 1306 (1978).

69. 369 U.S. 736 (1962).

70. *Id.* at 747.

71. *E.g.*, *P.B. Mutrie Motor Transp., Inc.*, 226 N.L.R.B. 1325, 1329 (1976). *See also* *ILGWU v. NLRB*, 463 F.2d at 919 (quoting *Town & Country Mfg. Co.*, 136 N.L.R.B. 1022, 1030 (1962), *enforced*, 316 F.2d 846 (5th Cir. 1963)) ("no genuine bargaining . . . can be conducted where the decision has already been made and implemented").

72. *Lemon Tree*, 231 N.L.R.B. at 1176. *See also* *Rapid Air Expediting Co.*, 220 N.L.R.B. 931, 932 (1975) ("prior notice and a meaningful opportunity to bargain").

73. In *Shell Oil Co.*, 149 N.L.R.B. 305, 57 L.R.R.M. (BNA) 1279 (1964), a case discussing an employer's duty to bargain over a decision to subcontract work, the Board stated that in applying the principles of *Fibreboard II* and *Town & Country*,

we are mindful that the permissibility of unilateral subcontracting will be determined by a consideration of the setting of each case. Thus, the amount of time and discussion required to satisfy the statutory obligation "to meet at reasonable times and confer in good faith" may vary with the character of the subcontracting, the impact on employees, and the exigencies of the particular business situation involved.

Id. at 307, 57 L.R.R.M. (BNA) at 1280.

74. *See* *Roman Catholic Diocese of Brooklyn (Bishop Ford Central Catholic High School)*, 236 N.L.R.B. 1, 24, 98 L.R.R.M. (BNA) 1359 (1978), *supplemented*, 243 N.L.R.B. 49, 101

company's plans. Thus, for example, in *Royal Typewriter Co.*,⁷⁵ the Board found that the company had not bargained in good faith when it gave the union eight days notice of its decision to close one of its plants.⁷⁶ The Board observed that the plan had been under consideration for several months during which the company had, *inter alia*, refused to supply the union with financial information concerning the termination decision.⁷⁷ In contrast, the Board concluded in *The Emporium*⁷⁸ that three weeks prior notice was sufficient, particularly in light of the fact that during this period, the union formulated no alternative proposals nor sought additional time to study the situation.⁷⁹ Not surprisingly, in order to keep the process from becoming an empty ritual, the cases also require that decision bargaining occur before the employer is irreversibly committed to effectuating the relocation or partial termination. For example, in *National Family Opinion*,⁸⁰ the Board adopted that portion of the Administrative Law Judge's decision which indicated that the company's duty to bargain over its decision to terminate one of its departments arose before the plan was "finalized."⁸¹

As noted, the Board and the courts have also consistently held that an employer must offer to bargain over the effects of a contemplated operational modification prior to implementation.⁸² Like decision bargaining, the amount of advance notice an employer is required to provide varies with the facts of each case.⁸³ In general, the cases indicate that notice must be delivered sufficiently in advance "to give the union

L.R.R.M. (BNA) 1436 (1979), *enforcement denied*, 623 F.2d 818 (2d Cir. 1980), *cert. denied*, 450 U.S. 996 (1981).

75. 209 N.L.R.B. 1006, 85 L.R.R.M. (BNA) 1501 (1974), *enforced as modified*, 533 F.2d 1030 (8th Cir. 1976).

76. *Id.* at 1013, 85 L.R.R.M. (BNA) at 1510. In enforcing the Board's order, the Court, citing *Adams Dairy*, declined to adopt the Board's view that the employer had the duty to bargain over partial closing decisions. Since the Board had not ordered any remedial relief with regard to this finding, the court found it "unnecessary to discuss this finding" further. 553 F.2d at 1039.

77. See *infra* notes 96-98 and accompanying text.

78. 221 N.L.R.B. 1211, 91 L.R.R.M. (BNA) 1079 (1975).

79. *Id.* at 1214.

80. 246 N.L.R.B. 521, 102 L.R.R.M. (BNA) 1641 (1979).

81. *Id.* at 530. Similarly, in *P.B. Mutrie Motor Transp., Inc.*, the Board adopted the decision of its Administrative Law Judge which stated, in regard to the company's failure to bargain about either the decision or the effects of its partial closing, that "it would have aided the bargaining process if the issues could have been discussed before Respondent's decision had hardened into an irrevocable position." 226 N.L.R.B. at 1330.

82. *E.g.*, *Soule Glass & Glazing Corp.*, 652 F.2d 1055 (1st Cir. 1981) and cases cited *id.* at 1085-86:

In a number of cases involving business changes such as the termination of a particular product line or the closing of one of several plants, courts have held that the employer is required to give the union notice and the opportunity to bargain with respect to the effects of the decision on unit employees before implementing the change.

Id. at 1085.

83. Thus, for example, the D.C. Circuit held on the facts in *UAW v. NLRB*, 470 F.2d 422 (D.C. Cir. 1972), that one day's notice of the sale of the company's facility was sufficient. The

a meaningful chance to offer counter-proposals and counter-arguments,"⁸⁴ or, as the Board sometimes phrases it, at a time when "a measure of balanced bargaining power" exists.⁸⁵ In contradistinction to the duty to decision-bargain, however, it appears that effects bargaining may occur after an employer is committed to the execution of its decision, but, of course, prior to its actual implementation.⁸⁶

The cases make plain that the employer's notice of intent to make an operational change must be clear and specific.⁸⁷ The obligation is not met where the employer merely makes a "limited reference" to the possibility of a closing.⁸⁸ Further, the employer is not excused from bargaining "merely because a union, after acquiring independent knowledge of a contemplated change in operation, neglects" to demand it.⁸⁹ Once such notice is given, however, the burden is on the union to demand bargaining.⁹⁰ The employer is not obligated "to seek out the bargaining representative."⁹¹ A failure on the part of the union to request bargaining after receipt of such notice is considered to be a waiver of its bargaining rights.⁹²

court took special note of company efforts to find positions for displaced employees at its other facilities.

84. *NLRB v. J.P. Stevens & Co.*, 538 F.2d 1152, 1162 (5th Cir. 1976), *quoted in* *W.R. Grace & Co.*, 571 F.2d 279, 282 (5th Cir. 1978). Similar formulations can be found in a number of cases. In *ILGWU v. NLRB (McLoughlin Mfg. Co.)*, the D.C. Circuit stated that "[n]otice, to be effective, must be given sufficiently in advance of actual implementation of a decision to allow reasonable scope for bargaining. 463 F.2d at 919. Similarly, in *Borg-Warner Corp.*, 245 N.L.R.B. 513, 102 L.R.R.M. (BNA) 1452 (1979), *enforced*, 663 F.2d 666 (6th Cir. 1981), *cert. denied*, 102 S. Ct. 2903 (1982), the Board concluded that the company bargained in bad faith by deciding to relocate parts of its operations two months before informing the union of its decision, and only ten days before the decision was implemented. The Board adopted the decision of its Administrative Law Judge which stated that such notice

hardly afforded the Union sufficient time to become fully advised of the subject matter, confer with all interested individuals involved, to formulate plans and proposals for options or alternatives to deal with the problem, present the Company with such proposals, and attempt to negotiate respecting all these matters prior to the date of the effectuation of the plan.

245 N.L.R.B. at 518. *See also* *Walter Pape, Inc.*, 205 N.L.R.B. 719, 720, 84 L.R.R.M. (BNA) 1055, 1056 (1973) (when decision is "under consideration and [is] imminent").

85. *E.g.*, *Van's Packing Plant*, 211 N.L.R.B. 692, 692, 86 L.R.R.M. (BNA) 1581, 1583 (1974).

86. *See, e.g.*, *NLRB v. National Car Rental System, Inc.*, 672 F.2d at 1188. Admittedly, this distinction is a fine one at best. In reality, there may be no way to distinguish the timing.

87. *See, e.g., id.*; *ILGWU v. NLRB (McLoughlin Mfg. Co.)*, 463 F.2d at 918; *NLRB v. Royal Plating & Polishing Co.*, 350 F.2d at 194-95; *NLRB v. Rapid Bindery, Inc.*, 293 F.2d 170, 176 (2d Cir. 1961).

88. *Stagg Zipper Corp.*, 222 N.L.R.B. 1249, 1249, 91 L.R.R.M. (BNA) 1392, 1392 (1976).

89. *Van's Packing Plant*, 211 N.L.R.B. at 698. *See also* *ILGWU v. NLRB (McLoughlin Mfg. Co.)*, 463 F.2d at 918.

90. *E.g.*, *NLRB v. Spun-Jee Corp.*, 385 F.2d 379, 383-84 (2d Cir. 1967); *Lemon Tree*, 231 N.L.R.B. at 1176, 96 L.R.R.M. (BNA) at 1204.

91. *NLRB v. National Car Rental System, Inc.*, 672 F.2d at 1188.

92. *E.g.*, *ILGWU v. NLRB (McLoughlin Mfg. Co.)*, 463 F.2d at 918; *Industrial Feeding & Catering*, 216 N.L.R.B. 1098, 88 L.R.R.M. (BNA) 1559 (1975).

C. *The Union's Right to Information*

The purpose of both decision and effects bargaining would be rendered meaningless were the employees' representative required to bargain without access to information in the employer's control concerning the issues involved. Accordingly, another aspect of the duty to bargain in good faith imposed by section 8(a)(5) includes the employer's duty to supply its employees' representative with information. A twofold test for triggering this obligation has been developed: under it, a union is entitled to receive any information which is relevant or directly related to its role as bargaining agent and which is reasonably necessary to execute this function.⁹³ "Wage and related information pertaining to employees in the unit" is presumptively relevant.⁹⁴ Other types of information to which a union has a clear right include sickness records, injury reports, insurance and workers' compensation records, pension information, and the like.⁹⁵

In the context of bargaining over partial terminations for assertedly economic reasons, access to financial information is obviously relevant. The cases indicate that an employer which claims that it cannot afford to operate a plant,⁹⁶ or that it must close a plant in order to stay competitive,⁹⁷ has the duty to substantiate those claims by supplying

93. *E.g.*, Ellsworth Sheet Metals, Inc., 224 N.L.R.B. 1506, 1509, 92 L.R.R.M. (BNA) 1590 (1976), *enforced mem.*, 603 F.2d 214 (2d Cir. 1979); Whitin Machine Works, 108 N.L.R.B. 1537, 1538, 34 L.R.R.M. (BNA) 1251, 1252 (1954), *enforced*, 217 F.2d 593 (4th Cir. 1954), *cert. denied*, 349 U.S. 905 (1955). For a general discussion of the duty to supply information, see *Soule Glass & Glazing Co. v. NLRB*, 652 F.2d 1055, 1092-95 (1st Cir. 1981).

94. *Cowles Communications, Inc.*, 172 N.L.R.B. 1909, 69 L.R.R.M. (BNA) 1100 (1968).

95. *See North Am. Soccer League*, 245 N.L.R.B. 1301, 102 L.R.R.M. (BNA) 1594 (1979) and cases cited therein.

96. Cases in which the employer asserts that it cannot meet a particular union demand because of financial inability are controlled by *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956). In *Truitt*, the company claimed that it was financially unable to grant the union's request for a wage increase. The union requested substantiation of that claim, including "full and complete information with respect to [the company's] financial standing and profits." *Id.* at 150. The Court, upholding the Board's determination, concluded that the employer's refusal to document its claim violated § 8(a)(5). The Court found the company's inability to pay increased wages "highly relevant" to their negotiations, and stated:

Good faith bargaining necessarily requires that claims made by either bargainer should be honest claims. This is true about an asserted inability to pay an increase in wages. If such an argument is important enough to present in the give and take of bargaining, it is important enough to require some sort of proof as to its accuracy.

Id. at 152-53.

97. Situations in which an employer claims that general "economic" factors compel his position have been treated similarly to "poverty" pleas under the *Truitt* doctrine. *E.g.*, *Cincinnati Cordage & Paper Co.*, 141 N.L.R.B. 72, 52 L.R.R.M. (BNA) 1277 (1963). In *Cincinnati Cordage*, the employer informed the union that it could not meet its wage demands and "stay competitive." In defending against unfair labor practice charges, the company claimed that it was not pleading "poverty" and should not be subject to the *Truitt* rule. The Board disagreed and ordered the company to furnish the union with statistical and other information to substantiate its inability to pay the requested wage increases. *See also NLRB v. Goodyear Aerospace Corp.*, 497 F.2d 747

the union with documentation.

Both the Board and the courts have applied a liberal standard of relevancy analogous to that of civil discovery, in construing a union's right to information.⁹⁸ An employer must supply information probably relevant to any permissible union demand unless it would be extremely burdensome to do so.⁹⁹ Moreover, the information obtained to make initial union demands may lead to the acquisition of further information. The liberal standard of relevancy and the incremental availability of information as negotiations progress will probably allow a union bargaining only over the effects of partial termination to obtain nearly as much financial data as it would were it bargaining over the decision to terminate as well.

III

DISCUSSION AND CONCLUSION

Although the Fourth Circuit stated confidently in *NLRB v. North Carolina Coastal Motor Lines*¹⁰⁰ that the distinction between decision and effects bargaining "is a real one,"¹⁰¹ the First Circuit may have come much closer to the truth in its opinion in *NLRB v. Soule Glass and Glazing Co.*¹⁰² when it observed that it is a "distinction which at times is difficult to draw."¹⁰³ Indeed, it may be one which in actuality barely exists.

The delineation between decision and effects bargaining, as has been noted, was first made by the Board in *Fibreboard I* in order to isolate determinations regarded as inherently entrepreneurial from the reach of the duty to bargain, and hence from employee influence. The Court's *First National Maintenance* opinion strongly resembles this ef-

(6th Cir. 1974), in which the court stated that "claims of non-competitiveness . . . are the equivalent of the claims of inability to pay the wages demanded in *Truitt*." *Id.* at 751. In *Good-year*, the company had requested that the union engage in mid-contract negotiations and consider decreases in wages that were necessary for the company to remain competitive.

98. *E.g.*, *American Needle & Novelty Co.*, 206 N.L.R.B. 534, 84 L.R.R.M. (BNA) 1526 (1973). When the employer's counsel informed union representatives that the company's Chicago plant was being closed because it was not making enough money, the Board ordered the employer to furnish information "pertinent" to its claim. *Id.* at 545. Similarly, in *Royal Typewriter Co.*, 209 N.L.R.B. 1006, 85 L.R.R.M. (BNA) 1501 (1974), enforced as modified, 533 F.2d 1030 (8th Cir. 1976), the Board concluded that the company violated the Act by failing to respond to various union requests for information, like financial data, that was necessary for the union to bargain meaningfully over the company's decision to close one of its plants. *See also* *Brazos Elec. Power Coop., Inc.*, 241 N.L.R.B. 1016, 101 L.R.R.M. (BNA) 1003 (1979), enforced, 615 F.2d 1100 (5th Cir. 1980).

99. *See* *NLRB v. Acme Indus. Co.*, 385 U.S. 432 (1967); *J.I. Case Co. v. NLRB*, 253 F.2d 149 (7th Cir. 1958).

100. 542 F.2d 637 (4th Cir. 1976).

101. *Id.* at 638.

102. 652 F.2d 1055 (1st Cir. 1981).

103. *Id.* at 1085.

fort by reading into section 8(d) an exclusion for economically motivated partial closing decisions. The opinion tries to demark a bright line between managerial prerogatives and the statutorily guaranteed rights of employees. The degree to which the two can be segregated, however, seems problematic.

The goals of decision and effects bargaining are essentially identical: to afford the affected employees' bargaining representative notice sufficiently in advance of the implementation of an operational change to permit the union the opportunity, through bargaining, to preserve jobs and otherwise protect the interests of employees. Further, their mechanical features are alike. Within their respective spheres, the scope of bargaining is equally broad, and in both, the union has the right to secure information under the employer's control which the union needs in order to bargain intelligently. Finally, and most critically, the duties attach at virtually the same time, i.e., sufficiently in advance of the implementation of a change as to permit the union a "meaningful opportunity" to bargain. In the final analysis, the differences between the two duties seem more of degree than kind. The emphasis in decision bargaining is on an exploration of alternatives which the employer may find attractive enough to forego the contemplated change. In effects bargaining, the focus is on ways to ameliorate the impact of the change's execution, particularly through discussions concerning opportunities for continued employment for affected workers at the employer's other facilities. The duties then, are actually variations on a theme.

In theory, the cases envision decision and effects bargaining occurring in sequential, isolated phases. However, because "effects are so inextricably interwoven with the decision itself," there seems no way to prevent bargaining over the former from having an impact on the latter.¹⁰⁴ Because the *First National Maintenance* opinion has upheld the duty to effects-bargain, its impact on the ability of unions to protect employee interests may be less than first expected. The consideration of a hypothetical partial closing situation may aid in illuminating this point. An imaginary business enterprise, the "Mas Corporation," operates three plants at which it produces components used in the manufacture of automobiles. In order to reduce its costs, Mas has decided to consolidate its operations and to close its plant I, the eldest and least profitable of its three facilities. Prior to *First National Maintenance*, Mas' duties, at least under the Board's general rule, would be as follows: upon reaching its decision to close plant I, Mas would have to notify the union representing the employees at that facility, Local One,

104. *Brockway Motor Trucks v. NLRB*, 582 F.2d at 736 n.91 (quoting *Ozark Trailers, Inc.*, 161 N.L.R.B. at 570, 63 L.R.R.M. (BNA) at 1269).

of its contemplated plan. As seen, such notice would have to be given before Mas was irrevocably committed to effectuating the plan, and sufficiently in advance of the closing to permit Local One an opportunity to study the situation and to formulate suggestions as to possible alternatives. At the union's request, of course, Mas would be under an obligation to supply it with documentation concerning the plant's lack of profitability, and other financial information the union might require to formulate proposals concerning severance pay, benefit continuation, and, particularly, the opportunities for affected employees to transfer to Mas' other plants. Bargaining would then proceed, during which all aspects of the plan, including alternatives to its effectuation and ways to ameliorate its impact, would be discussed. Only by consideration of the costs of the plan's implementation could the amount to be saved by the termination be ascertained.¹⁰⁵

After *First National Maintenance*, Mas, of course, need not discuss or consider any union suggestions as to alternatives to the planned closing, but must bargain about the effects of its decision. The Court's opinion indicates that this bargaining must occur at a "meaningful time," which, precedent indicates, is roughly contemporaneous with the time at which the duty to decision-bargain attaches. It appears that Mas would be under no duty to supply any information concerning its decision, such as documentation concerning the plant's profitability.¹⁰⁶

105. As the Third Circuit observed in *Brockway Motor Trucks*, even if a union is unsuccessful during "decision" bargaining in convincing the employer to adopt one of its alternatives, it may, through "effects" bargaining

still be able to avert the closing by convincing the employer that such a step would cost it more in terms of post-termination expenses, as in severance pay, than it would save. And even if the employer were to remain intransigent, the union could at least attempt to make suggestions about the decision's timing and implementation in order to moderate the closing's impact on the work force.

582 F.2d at 736. But see *IAM v. Northeast Airline, Inc.*, 473 F.2d 549 (1st Cir.), cert. denied, 409 U.S. 845 (1972), a case arising under the analogous terms of the Railway Labor Act:

To allow the union to force a company to bargain about the effects of its management decisions to the extent of forcing it to forego the proposed change in operations would be in effect to take away from it the freedom to make the decision in the first place. We have no doubt but that an employer, bargaining about the effect of a relocation on employment conditions, could refuse to discuss as unreasonable any labor protective terms that would make it prohibitively expensive to move.

Id. at 558. Interestingly, Member Rodgers made a similar argument in his dissent in *Fibreboard II*. There, he asserted that an employer should have no duty to bargain about either the decision to subcontract or its effects. He contended that the decision to continue or terminate an operation is a prerogative of management not subject to collective bargaining. To hold, therefore, that an employer can be forced to bargain over the effects of a decision to terminate necessarily renders that prerogative meaningless. For, obviously, to require an employer to bargain over this aspect of his decision does not leave him free to make the decision; in such a situation he is left, for all practical purposes, in no better position than he would have been in had he been required to negotiate with the union the whole subject of termination.

138 N.L.R.B. at 558 n.28.

106. See *NLRB v. Gibraltar Indus., Inc.*, 653 F.2d 1091, 1096-97 (6th Cir. 1981) (no employer duty to supply union with financial data on profitability and efficiency of plants; not relevant to

Mas would, however, be obligated to supply Local One with other information pertaining to transfers, and financial information by which the union could formulate economic demands concerning severance pay, insurance continuation, and the like. Through such requests, the union would probably be able to obtain most of the information to which it would have had access prior to *First National Maintenance*. Most importantly, because effects bargaining occurs prior to the implementation of a change, Local One, through the magnitude of its termination demands, might convince Mas that the continued operation of plant I, possibly under altered conditions, e.g., reductions in rates of pay or changes in contract terms concerning manning requirements, would prove cheaper in the long run than closing the facility. Finally, although the union could only insist on bargaining about effects, it might nevertheless propose alternatives to the employer's plan and, while not insisting to impasse over them, create sufficient pressure by its "effects" demands to convince the employer to agree to discuss the permissive topic of "decision." The point of this exercise is that, as a practical matter, because the duties to decision- and effects-bargain attach at the same time, their substance and results will be largely similar. The dynamics of bargaining will not permit the line between decision and effects to stand unblurred.

The ultimate meaning of *First National Maintenance* is presently unclear. As stated at the outset, much of its impact will depend upon the breadth with which the Court subsequently construes the duty to bargain effects. Several factors militate for an expansive reading. The first is the Court's express recognition of the legitimacy of employee interests in matters concerning job security. Such interests can only be protected through effects bargaining which is broad in scope and which will permit the union the opportunity to discuss "any and all" effects of a partial closing decision, particularly opportunities for continued employment of the affected employees, or for their retraining and placement with other employers. Bargaining limited solely to sterile considerations of the "incidents of termination,"¹⁰⁷ such as severance pay, obviously will not serve to vindicate such interests, and will make the Court's recognition of them an empty gesture. The second factor is the history of the development of the duty through a long line of Board and court decisions which, as seen, have uniformly indicated that the duty to effects-bargain is catholic in scope and which, in accordance with the Act's scheme of free collective bargaining, have consistently declined to restrict the range of the duty to any set list of subjects. Fur-

subjects to be discussed in bargaining effects of economically motivated partial termination decision).

107. *Fibreboard Paper Prods. Corp. (Fibreboard I)*, 130 N.L.R.B. at 1559 n.1, 47 L.R.R.M. (BNA) at 1548 n.1.

ther indication of a broad construction of the duty lies in the manner in which the Court's opinion was structured. In concluding that the Act did not compel an employer to decision-bargain, the Court stated that it found it "unlikely" that "requiring bargaining over the decision itself, as well as its effects" would "augment" the "flow of information and suggestions" concerning alternatives to the closing, the adoption of which would preserve unit jobs. It followed this statement by declaring that 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" the Court concluded is required by the Act. Finally, it must be noted that by broadly construing the duty to effects-bargain, the Court will not thereby make the union an "equal partner" in the operation of an employer's business. The employer is always free to effectuate its plan to shut-down, and the duty to effects-bargain in no way interferes with the implementation of the managerial decision. The duty only requires that the employer notify the union in advance and, upon its request, discuss with the union ways to ameliorate the impact of the change on the affected employees. Moreover, the union's ability to block or dissuade the employer from implementing its plan through the use of economic pressure will normally be minimal. A strike in this situation will probably only convince the employer to accelerate the closing, and will likely leave the employees with little but the right to preferential hire should the employer re-establish its operation.

Two closely related problems regarding the case's impact concern the time at which the duty to effects-bargain will be held to attach and the union's right in the course of such bargaining to obtain information in the hands of the employer. The Court may, of course, eventually hold that the duty to effects-bargain attaches only after the implementation of the change; it may also become more restrictive concerning the tests to be applied in determining the union's right to secure information in the effects bargaining context. As stated above, however, the cases to date have been unanimous in holding that bargaining over effects, "in order to be meaningful," must precede the implementation of the contemplated operational change. They have also been consonant in liberally enforcing the employer's duty to disclose information to the representative of its employees. If the Court was serious in its statement that bargaining over effects is yet to be "conducted in a meaningful manner and at a meaningful time," however, the likelihood of any change in these requirements is small.

The *First National Maintenance* opinion represents an attempt by the Court to protect management's ability to make basic entrepreneurial decisions free of employee influence. The line the Court has struck between decision and effects bargaining, however, appears to

be an illusory one. Much depends upon the breadth with which the Court will subsequently construe an employer's duty to effects-bargain. While it remains to be seen, precedent, the equities involved, and the language of the opinion itself lead to the conclusion that the *First National Maintenance* opinion will have only minor impact on the process of collective bargaining, at least when skilled bargainers are involved.