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LEADING THE HORSE TO WATER: THE EMPLOYER'S DUTY TO BARGAIN AFTER FIRST NATIONAL MAINTENANCE

Anne Frueh*

I. INTRODUCTION

Even at the best of times, the relationship between labor and management at many firms is an uneasy truce. In this age of economic overhaul and globalization of markets, it is hardly surprising that this truce has broken down often. Animosity between management and labor is particularly likely to flare up when an employer decides to subcontract, automate, or close a part of its business. Such decisions threaten employee job security and have a significant and often devastating impact upon the local community.1 Under such a state of affairs labor's and management's common goal of a profitable enterprise becomes a bone of contention: the employer wants to implement changes quickly that, in its judgment, will make its business more competitive, while the employees resist any change that will undermine job security.

In an effort to stabilize potentially explosive situations of this sort, Congress in 1935 passed the National Labor Relations Act (hereinafter the "Act" or the "NLRA").2 In doing so Congress recognized that the employee has a stake in the company for which he works and deserves some legally enforceable rights. As a result, if the employer makes a unilateral decision that affects job security, it may be engaging in an unfair labor practice. Management may be required to effect some sort of restitution such as backpay, which is potentially devastating because such a ruling may not come until after all avenues of appeal have been exhausted and several years have gone by.3

* The author would like to thank Professor Martin H. Malin for his patient assistance with the development of this Note.

1. For example, the decline of the Jones & Laughlin steel plant has decimated the town of Alliquippa, Pennsylvania: the plant formerly employed 17,000 but as of 1986 its workforce totaled only 100. The economic deterioration of the town is manifested in boarded store windows and deserted streets in the once-bustling downtown area. Labor Law Symposium on the Globalization of United States Industry, 1986 DET. C.L. REV. 669, 682.


3. See, e.g., University Health Care Center, 274 N.L.R.B. 764, 771 (1985), in which a nursing home was deemed to have engaged in unfair labor practices by failing to bargain the decision to reduce shifts from 8 to 7 1/2 hours. The Board ordered the facility to reinstate employees whose hours had been cut and to pay lost wages from 1983 to the time of reinstatement.
Employers dislike having to consult their employees before making decisions about the future of a business. The possible consequences of ignoring the employees’ right to be consulted, however, are equally unpleasant. The NLRA ostensibly requires entrepreneurs to put their sensibilities aside and discuss with employee representatives decisions that have a serious impact on job security. However, judicial and administrative interpretation has reduced the NLRA to an empty threat. While employers may be forced to gamble that their unilateral decisions to partially close, subcontract, or automate will withstand an unfair labor practices charge, it is a gamble that often pays off.

Congress’ intent in passing the NLRA was to minimize labor disputes and promote industrial democracy through the process of collective bargaining. However, the courts and the National Labor Relations Board (hereinafter the “NLRB” or the “Board”) have paid mere lip service to the democratic ideal to which the drafters of the Act aspired. In doing so, the courts and the Board have effectively sapped the strength of the organized worker and tipped the balance struck by the Act and its amendments in management’s favor.


5. Congress amended the NLRA several times in order to maintain this balance of power between management and labor. For example, the Taft-Hartley Act of 1947, Pub. L. No. 80-101, 61 Stat. 136, was passed in recognition of the unions’ greater strength and ability to dominate the bargaining process. Among other things, it imposed upon the unions the same duty to bargain as had been imposed upon the employer through the original passage of the Act. The Landrum-Griffin Act of 1959, Pub. L. No. 86-257, 73 Stat. 519, further regulated both the internal affairs of unions and their relationship with the employer. Despite Congress’ efforts, however, the Act’s balance has shifted so dramatically in favor of management that politicians and scholars alike have called for further reform.

In 1977, Congress deliberated over the Labor Reform Act, S. 2467, 95th Cong., 2d Sess. (1978); H.R. 8410, 95th Cong., 1st Sess. (1977). The House Committee on Education and Labor found that the NLRA provided no assurances that employees who exercised their right to organize would not be discriminated against or be denied the opportunity to work. The Committee identified several specific problems, namely:

1. The NLRA “allows for extensive delay in providing remedies and in holding representation elections.” Delay in the latter case means that the fairness of the election is jeopardized by the opportunity to harass employees and fire union activists.
2. The Act contains no mechanisms to deal effectively with noncompliance and dilatory tactics.
3. The NLRA’s remedies serve neither to deter employers from violating the Act nor to compensate the employees who are victims of the unlawful activity. This is because the benefits of violating the Act exceed the costs, and “[t]he backpay provision does not redress the actual harm inflicted on illegally fired employees. Further, employees wrongfully deprived of the opportunity to bargain receive no compensation at all for that loss.”


The Labor Reform Act died on the floor of the Senate. But that, according to Harvard Professor Paul Weiler, was fortuitous since the focus of the amendment was on the remedial provisions of
The Supreme Court’s interpretation of the Act mandates that the employer’s interest in running a profitable business be balanced against the benefit to the collective bargaining process of submitting the decision to negotiation. 6 Attempts by the lower courts and the Board to engage in this balancing have met with limited success because the Court’s identification of the respective interests is too indefinite to be applied easily. 7 In an effort to capsulize the Supreme Court’s balancing test, the Board developed a test of its own. 8 Under the Board’s test, if a management decision turns on labor costs it must be bargained with the employees’ representative, but management need not bargain over decisions that constitute a change in the nature and direction of the business. 9 In application this test has been too mechanical to address properly the needs of all parties involved 10 and has been abandoned recently by both the courts and the Board. 11

The Board and the courts thus have failed to develop a test that

the NLRA. Professor Weiler opined that the necessary focus of reform is on prevention. Weiler, Promises to Keep: Securing Workers’ Rights to Self-Organization Under the NLRA, 96 Harv. L. Rev. 1769, 1770 (1983). Weiler attributed the decline in union membership to the employer’s ability to coerce his employees into rejecting union representation through threats and selective firing of key union activists at crucial points in the organization campaign. Id. at 1781-86. He proposed to prevent such activity by adopting a system of “instant elections.” Under that system, the NLRB would be required to conduct an election within five days of its receipt of a certification petition. Such a “highly compressed interval” would prevent the employer from intimidating his employees into rejecting unionization. Id. at 1812.

Southern Methodist University Professor Charles Morris identified lack of vigorous enforcement of the Act by the NLRB as a major stumbling block to realizing the objectives of the Act. He criticized the Dotson Board for “operating on the premise that one of its primary functions is to protect employers.” Panelists Debate Merits of Current NLRB Decision at Meeting in Dallas, [CURRENT DEVELOPMENTS] DAILY LAB. REP. (BNA) No. 68 at A-2 (1985).

7. The First National Maintenance Court identified the competing interests as the entrepreneur’s ability to run a profitable business on the one hand versus the benefit to labor-management relations and the collective bargaining process as a whole. Id. Depending upon the judge’s philosophical slant, these interests can be “weighed” so as to render a subject mandatory or permissive on the same facts. See, e.g., Arrow Automotive Indus., 284 N.L.R.B. No. 57 (1987), enf. denied, 853 F.2d 223 (4th Cir. 1988).
9. Id. at 892.
10. For example, the Board decided that “turns on labor costs” meant that labor costs were the sole motivation for the decision. If any other factor entered into the determination, the decision became a “change in the nature and direction” of the business. See id. at n.3. Thus, all decisions that are not attributable to labor costs are lumped under the rubric of “change in the nature and direction” of a business, even when the decision rests on economics and does not involve either the nature or the direction of the enterprise. See, e.g., Columbia City Freight Lines, 271 N.L.R.B. 12 (1984) (decision to close trucking terminal designed to reduce costs, maximize efficient use of equipment, and minimize the impact of the loss of a major customer); Fraser Shipyards, 272 N.L.R.B. 496 (1984) (decision to close machine shop and subcontract work motivated by recession, lack of business, and disrepair of shop).
serves well the objectives of the NLRA and the competing interests of management and labor. Perhaps in fear of discouraging private enterprise and competition, the Supreme Court in particular has refused to allocate sufficient weight to the employee's interests to foster democracy in the workplace. This Note will examine Supreme Court and NLRB standards in light of the purposes of the NLRA and discuss proposals developed by various scholars that attempt, some more successfully than others, to develop a more equitable resolution of disputes that destroy the labor-management truce. The Note will then suggest an alternative that combines the best features of two proposed solutions to the bargaining dilemma.

II. HISTORICAL BACKGROUND

A. The National Labor Relations Act

In 1935 Congress passed the Wagner Act and gave official sanction to the labor movement. By doing so Congress hoped to promote equality of bargaining power and defuse industrial conflicts. Congress amended the Act in 1947, recognizing that the unions were using their growing economic strength to tip the balance and to overpower management at the bargaining table. The Act currently requires employers and employee representatives to bargain in good faith with respect to "wages, hours, and other terms and conditions of employment."

12. Section 7 of the Act states: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . ."


14. The Taft-Hartley amendment to § 1 states as follows:

Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.


15. The text of the section, in pertinent part, is as follows:

Sec. 8(a) It shall be an unfair labor practice for an employer—

(5) to refuse to bargain collectively with the representatives of his employees . . . .

Sec. 8(b) It shall be an unfair labor practice for a labor organization or its agents—

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees . . . .

Sec. 8(d) 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
“terms and conditions of employment” are called mandatory subjects of bargaining, for the parties are required to bargain over such topics until they reach a stalemate, or “impasse.” It is only at that point that a party may act unilaterally to change a term or condition of employment.

B. The Supreme Court

The Supreme Court first addressed the issue of whether a decision to subcontract bargaining unit work is a mandatory subject of bargaining in _Fibreboard Paper Products Corp. v. NLRB_. Fibreboard had decided to subcontract its maintenance work in its plant to Fluor Maintenance, Inc. Fluor had convinced Fibreboard’s management that Fluor could provide maintenance services at a lower cost than could Fibreboard’s in-house maintenance crew. Fluor would accomplish this by decreasing the work force, lowering the benefits, and pre-scheduling the work to be done.

Simultaneously, the collective bargaining agreement that governed Fibreboard’s maintenance employees was due to expire, and the bargaining unit’s representative contacted Fibreboard’s management to schedule a bargaining session. After some delay, Fibreboard met with the union and informed the representative of Fibreboard’s decision to subcontract its maintenance. In light of its decision, Fibreboard declined to negotiate a new contract, but offered to answer any questions that the union might have.

The parties met again and Fibreboard’s representative explained that in prior negotiations management had raised cost concerns and had received concessions from other collective bargaining units within the company but had not obtained similar relief from the maintenance crew’s unit. In an effort to reduce labor costs, the maintenance work would henceforth be done by an independent contractor.

After the maintenance employees were terminated the union filed unfair labor practice charges against Fibreboard, alleging violations of sections 8(a)(1), 8(a)(3) and 8(a)(5) of the NLRA. The NLRB dismissed the complaint but upon petition for reconsideration found that

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18. _Id._ at 206.
19. _Id._ at 205.
20. Section 8(a)(1) makes it an unfair labor practice for an employer “[t]o interfere with, re-
Fibreboard had violated section 8(a)(5) of the Act.\textsuperscript{23} The court of appeals granted enforcement and the Supreme Court affirmed.\textsuperscript{24}

The \textit{Fibreboard} facts demonstrated that collective bargaining was appropriate. Specifically, the Court pointed out that the decision to subcontract had not altered the basic operation of Fibreboard's business, nor did the company plan to make any capital investments as a result. Moreover, the subcontracting merely replaced one set of employees with another.\textsuperscript{25} In further support of the duty to bargain, the Court stated that as a matter of national labor policy, Congress had determined that collective bargaining is preferable even when the employer could cut costs by taking action without consulting the bargaining unit.\textsuperscript{26}

The Court held that subcontracting of work performed by a bargaining unit is a term and condition of employment,\textsuperscript{27} as is the resulting termination of the unit employees.\textsuperscript{28} Chief Justice Warren reasoned that a primary goal of the NLRA was to promote the peaceful settlement of labor disputes, and making subcontracting a mandatory subject of bargaining served that goal "by bringing a problem of vital . . . concern within the framework established by Congress as most conducive to industrial peace."\textsuperscript{29} Further, the fact that parties had bargained successfully over subcontracting showed that the subject was amenable to collective bargaining.\textsuperscript{30}

Justice Stewart concurred in the judgment but was disturbed by the implications of the Court's broad holding.\textsuperscript{31} He proposed that the Court limit its holding to the particular facts of the case. He declared that "conditions of employment" are conventionally regarded as the "physi-
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32. He characterized termination not as a condition of employment but as a determination of whether there is to be employment at all. Although he conceded that the Board and the courts have recognized union demands for limitations on the power to terminate as mandatory, Justice Stewart emphasized that every decision that affects job security is not necessarily subject to mandatory bargaining.33

To support his point, Justice Stewart identified three categories of management decisions: 1) decisions about conditions of employment; 2) decisions that have an indirect and uncertain impact on job security; and 3) decisions that may imperil job security or even terminate employment, but that "lie at the core of entrepreneurial control."34 He stated that decisions in the third category should not automatically be subject to the collective bargaining process. Justice Stewart agreed with the majority that the particular type of subcontracting involved here was subject to bargaining because it was akin to other traditional issues of collective bargaining,35 which fell within the first category. He explained, however, that subcontracting in general is not automatically a condition of employment.36 Both the majority and Justice Stewart declined to go further than this sort of "I-know-it-when-I-see-it-and-this-is-it" delineation of mandatory subjects of bargaining.

The Supreme Court did not address the subject again until 1981, when it decided First National Maintenance Corp. v. NLRB.37 First National Maintenance (hereinafter "FNM") provided maintenance services to various customers in New York City. Each job was staffed with a separate set of employees hired specifically for that contract. FNM had a difficult relationship with one of its customers, Greenpark Nursing Home. Greenpark reduced FNM's fee and refused to restore it. As a result, FNM decided to terminate the Greenpark contract and discharge the employees who worked there.

The employees involved recently had elected a collective bargaining representative, and when FNM refused to bargain over the decision to terminate the contract, the representative filed an unfair labor practice charge. The Administrative Law Judge ruled that FNM had violated section 8(a)(5) by refusing to bargain in good faith over the decision and

32. Id. at 222.
33. Id. at 222-23.
34. Decisions of the latter type include, for example, investment of capital and matters relating to the basic scope or direction of the enterprise. Id. at 223.
35. Such issues include compulsory retirement and layoffs according to seniority. Id. at 224.
36. Id.
its effects. The Board adopted the Administrative Law Judge’s findings and the court of appeals enforced the Board’s decision.38

The Supreme Court reversed.39 Justice Blackmun first noted that Congress did not intend to make the union “an equal partner in the running of the business enterprise. . . .”40 The Court adopted Justice Stewart’s *Fibreboard* categorization of management decisions41 and his conclusion that decisions involving a change in the scope and direction of an enterprise are not automatically subject to mandatory bargaining.42 In addition to espousing Justice Stewart’s *Fibreboard* analysis, the Court developed a balancing test to determine whether such core entrepreneurial decisions should be subject to collective bargaining. The Court saw the competing interests as promoting the goal of the NLRA to bring a “problem of vital concern to labor and management within the framework established by Congress as most conducive to industrial peace”43 on the one hand and the employer’s need for unencumbered decisionmaking on the other.44 The duty to bargain would exist only when the benefit to labor-management relations and the collective bargaining process outweighed the burden on the employer in running its business.45

In applying the balancing test, the Court characterized FNM’s decision as a partial shutdown of its business and determined that labor’s goal in this context would always be to stop or delay the closing. The burden on the employer was to be measured by considering manage-

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38. The Second Circuit held that § 8(d) of the Act creates a presumption in favor of mandatory bargaining. The presumption is rebuttable by showing that the purposes of the Act would not be furthered by imposing a duty to bargain. The Supreme Court noted that the Second Circuit erred in enforcing without remanding “for further examination of the evidence and proper factfinding.” 452 U.S. at 672.


40. 452 U.S. at 676. Justice Blackmun reasoned that although the language of the Act was open-ended, § 8(a) was intended to place a limit upon the subjects which came within its purview. He relied on the Court’s opinion in Allied Chem. & Alkali Workers v. Pittsburgh Plate Glass Co., 404 U.S. 157 (1959), which stated that the language of the section imposes a limitation on subjects to be deemed mandatory that “includes only issues that settle an aspect of the relationship between the employer and the employees.” 452 U.S. at 676 (quoting *Allied Chem. & Alkali Workers*, 404 U.S. at 178).

41. This categorization is set forth *supra*, p. 561.


43. *Fibreboard*, 379 U.S. at 211. The Court did not identify which subjects would promote this goal and which subjects would not, let alone why.

44. Justice Blackmun pointed out that the theory behind mandatory bargaining was that collective bargaining would result in decisions that are better for management, labor, and society as a whole, and that such an ideal would not be served unless management was freed from the burdens of collective bargaining to the extent necessary to run a profitable business. *First Nat’l Maintenance*, 452 U.S. at 678-79.

45. *Id.* at 679.
ment's "need for speed, flexibility and secrecy in meeting business opportunities and exigencies." 46 The Court concluded that the harm to management's ability to operate freely in deciding to terminate part of its business outweighed the benefit to the collective bargaining process. 47 It decided that the union could use the mandatory label as a tool to frustrate management objectives and delay the inevitable without ever intending to offer solutions. 48 Although the union could offer concessions and suggestions in the process of decision bargaining, 49 it could also do so while mitigating the harm to the employees that the closing caused in the process of effects bargaining. 50

The Court's opinion in First National Maintenance is detrimental to the purposes of the NLRA in several respects. First, the Court justified the decision by implying that mandating bargaining over partial closings would make labor an equal partner in the business. 51 What the Court failed to recognize is that the duty to bargain does not confer anything like equality upon labor. Management's duty is merely to bargain with no obligation to adopt any part of labor's proposals. 52 Management is free to act as it sees fit after it has bargained in good faith to impasse. 53 By removing the duty to bargain, however, the Court has destroyed labor's ability to insist on discussing the contemplated action and to use economic weapons to bring all of its influence to bear on the final decision. If a union were to strike in order to compel discussion over a non-mandatory (permissive) topic, it would be committing an unfair labor practice. 54

46. Id. at 682-83. Though Justice Blackmun identified these three factors as central to determining the extent of the burden that the collective bargaining process placed on management, he did not show how these factors applied to FNM and what business opportunities and exigencies the company had to meet with speed, secrecy, and flexibility.

47. Id. at 686.

48. Id. at 683.

49. Id. at 681.

50. Id. at 682. "Effects bargaining" is negotiating the way with which the employees will be dealt, for example, amount and terms of severance pay. Such bargaining is required by § 8(a)(5) when a decision adversely affects the employees' jobs or terminates employment.

51. See supra note 41 and accompanying text.

52. The Chairman of the Senate Committee on Education and Labor, Senator Walsh, articulated the intended impact of the NLRA on the parties' bargaining duties: "[A]ll the bill proposes to do is to escort them to the door of their employer and say, 'Here they are, the legal representatives of your employees.' What happens behind those doors is not inquired into, and the bill does not seek to inquire into it." 79 Cong. Rec. 7648, 7660 (1935).

53. Management is protected by the philosophy that collective bargaining is "a subjective limitation on the employer's entrepreneurial property rights, ostensibly only to the extent necessary to maintain industrial peace." Note, The Impasse Doctrine, 64 Chi.-Kent L. Rev. 407, 408 (1988). This means that impasse will be found in a wide variety of situations and an employer will be able to take unilateral action safely and frequently. Id.

Second, the Court seemed to justify its subordination of the employees' interest by stating that the employees were sufficiently protected by the employer's duty to bargain over the effects of the decision. Effects bargaining, the Court said, may ensure that the decision is "deliberately considered." However, once management incurs the costs of implementing the decision it will be even more reluctant to follow any of the union's suggestions. Moreover, labor's influence over the decision will be further diminished by its inability to wield its economic weapons; a strike against a closed plant is not very effective.

According to the Court, management's incentive to bargain a decision involving factors within labor's control also protects employees, for management would voluntarily bargain with its employees if it believed that by doing so it could keep its operation running profitably. However, the Court ignored the fact that bargaining would cost the employer more in terms of legal representation, employee attrition and reduced productivity than unilateral action because the employer would be forced to disclose its intentions in order to bargain over the decision. In the end, the employer would run the risk of strikes, sabotage, and bad publicity that it could have avoided with unilateral action. Unless the employer thinks that the employees are willing to make sufficient concessions (which is unlikely since bargaining strategy usually dictates that the parties demand more than they want in order to achieve their goals), there is always a bargaining disincentive, which is why mandatory bargaining is necessary in the first place.

Finally, the Court created a standard that is difficult to apply. Under First National Maintenance only the collective bargaining process and labor-management relations as a whole are equal in importance to management's interest in running a profitable business. If the duty to bargain burdens the latter more than it benefits the former, it will not be imposed. Identifying and measuring the burden is fairly easy because management can produce empirical evidence to show a burden; for example, the company's accountants can produce projections that show that company profits will be decreased or eliminated if management does

upon matters within the scope of mandatory bargaining and unlawful to insist upon matters without ... ").

55. 452 U.S. at 682.
56. For that matter, neither is a strike against an open one. See Hawaii Meat Co. v. NLRB, 321 F.2d 397, 400 (9th Cir. 1963) ("An employer is under no duty to offer to bargain, after a strike starts, about a decision to hire replacements for strikers, even on a permanent basis.").
57. This discussion is drawn from a more comprehensive study of this angle of the debate: Note, An Economic Case for Mandatory Bargaining over Partial Termination and Plant Relocation Decisions, 95 YALE L.J. 907 (1986).
not pursue a particular course. However, labor cannot produce any such projections to show benefit; any benefits to the process as a whole that would stem from bargaining over a particular issue would be speculative at best, even if the Court had identified specific factors to show benefit. Presumably a benefit would accrue if bargaining would promote industrial peace, but industrial peace is a concept, an ideal, an elusive abstraction that defies empiricism. The union could show a history of successful bargaining over the issue, but if management could not distinguish the situation on its facts, it could rightly point out that eliminating the possibility of a strike is more peaceful than inviting one. It is likely that an adjudicator would conclude that his inability to discern benefit means that none exists and that the burden on the conduct of business thus outweighs any benefit to the collective bargaining process.

C. The National Labor Relations Board

The *Fibreboard* and *First National Maintenance* decisions thus set forth what appears to be a simple dichotomy: management decisions that fall outside of the core of entrepreneurial control are inside the scope of mandatory bargaining, and those that fall within that core are outside. However, appearances are deceptive because the two decisions are factually simple and easily reconcilable. In *Fibreboard*, the company was doing nothing more than attempting to cut its labor costs, while in *First National Maintenance* the company was severing a poor relationship with one of its clients. Unfortunately for the NLRB, it was left with the task of deciding controversies that were not as factually clear cut as those two cases.

In resolving these more complex disputes, the NLRB did not balance the benefit to labor-management relations against the burden on the employer. Instead, the Board merely reviewed each management decision and deemed it either a “subcontracting” (and therefore governed by *Fibreboard*) or a “partial closing” (and thus governed by *First National Maintenance*). The following cases illustrate the Board’s label analysis.

In *Whitehead Bros. Co.*, management had decided to open its own trucking facility so that it would be able to serve its customers when outside carriers were unavailable. The in-house operation was small and met only five to ten percent of the company’s trucking needs. By 1980 management had determined that the operation would run at a substantial loss that year because the equipment was old and in need of replacement. Rather than absorb that loss, the company decided not to replace

the equipment. The company shut down its in-house operation and gave its business to outside firms.\textsuperscript{59}

The Board characterized the company’s decision as a subcontracting of bargaining unit work (and thus as a mandatory subject of bargaining) for several reasons. First, the company merely had replaced one group of employees with another. Second, it rejected the possibility of a capital investment. Third, labor costs were one factor in the company’s decision, and labor costs are amenable to collective bargaining. Finally, the company’s decision did not constitute a change in the scope or direction of its business.\textsuperscript{60} Thus, even though the company was going to lose money, not because of labor costs but because of equipment costs over which the bargaining unit had no control, it was required to bargain over the decision with the union. Under the \textit{First National Maintenance} analysis, such a decision would be characterized as “one that had a direct impact on employment, since jobs were inexorably eliminated . . . but had as its focus only the economic profitability of” the company.\textsuperscript{61}

Even more so than \textit{Whitehead Bros.}, the Board’s decision in \textit{Bob’s Big Boy Family Restaurants}\textsuperscript{62} exemplifies the Board’s difficulty with applying \textit{Fibreboard} and \textit{First National Maintenance}. Bob’s Big Boy supplied its restaurants via a commissary system. One division of the commissary processed shrimp, and the employees there would defrost, cut, and bread the shrimp and then pack it in boxes and refreeze it for distribution to the restaurants.

The company decided to discontinue the shrimp processing division, and the Administrative Law Judge found that the decision was motivated by the rising price of raw shrimp and the problems the company encountered in trying to maintain the grading size of the shrimp, which affected portion control. Fishking Processors, Inc. took over the company’s shrimp processing operations and, as part of the agreement, purchased some of the equipment Bob’s Big Boy had used. The Administrative Law Judge determined that the company had decided to get out of the shrimp processing business altogether and that the company had no duty to bargain the decision.\textsuperscript{63}

The Board overruled the Administrative Law Judge, stating that the question of whether a management decision was a mandatory subject of bargaining depended on whether it could be characterized as a decision

\textsuperscript{59} \textit{Id.} at 896.
\textsuperscript{60} \textit{Id.} at 898.
\textsuperscript{62} \textit{264 N.L.R.B.} 1369 (1982).
\textsuperscript{63} \textit{Id.} at 1377.
to subcontract unit work or to close part of its business. The Board found that the company had engaged in subcontracting of its shrimp processing business rather than a partial closing of its food preparation business. In reaching its conclusion, the Board relied on the fact that the company did not change the direction of its business; it still supplied shrimp to its restaurants. Nor did the company engage in immediate capital restructuring and investment; it merely sold some of its processing machines to Fishking, and it did so at a leisurely pace. Finally, the company’s reasons for subcontracting, rising production costs and quality control, were amenable to the bargaining process.

The dissent agreed with the Administrative Law Judge’s characterization of the company’s decision and noted inconsistencies with the majority’s reasoning in prior rulings. The dissent criticized the majority’s ruling as “a semantic broadening of the term ‘business’” and pointed out that such a definition was a direct contradiction of the facts and holding of First National Maintenance, in which the Court characterized the decision as a partial closing even though FNM stayed in the cleaning business.

The Board eventually abandoned its label analysis. In Otis Elevator Co. (hereinafter “Otis II”) the Board reconsidered a ruling it had issued in 1981 and developed a standard of its own as an interpretation of the holding in First National Maintenance.

United Technologies (hereinafter “United”) acquired Otis elevator

64. Id. at 1370.
65. Id. at 1371.
66. Chairman Van de Water and Member Hunter, concurring and dissenting in part, pointed out that the company’s decision in General Motors Corp., 191 N.L.R.B. 951 (1971) to sell one of its truck centers was characterized by the Board as a substantial change in the direction of the company’s business even though General Motors continued to manufacture and sell trucks. 264 N.L.R.B. at 1373-74.

67. 264 N.L.R.B. at 1373.
68. Id. at 1374. The dissent ignored its own logical problems in that in First National Maintenance the particular contract was terminated and the service discontinued, whereas Bob’s Big Boy still supplied shrimp to its restaurants.

69. 269 N.L.R.B. 891 (1984). Otis’ parent company, United Technologies Corp., was recently brought before the NLRB on § 8(a)(1) and 8(a)(5) unfair labor practice charges. The collective bargaining unit alleged that United had violated the NLRA by creating a new position out of two old ones, one of which was a unionized position, and by failing to include the new position in the bargaining unit. United Technologies Corp., 130 L.R.R.M. 1445 (1988), enforced, NLRB v. United Technologies Corp., 884 F.2d 1569, 1571-72 (2d Cir. 1989). The second allegation was that United had unilaterally altered a disciplinary rule, a mandatory subject of bargaining. United Technologies Corp., 130 L.R.R.M. 1087 (1988), aff’d, 884 F.2d 1569, 1574 (2d Cir. 1989).

The Board found that United had engaged in unfair labor practices on the first charge but not on the second. As for the first charge, the Board found that United had merely amalgamated the two old positions because they were inefficient and the employees in the new position simply assumed the duties of the two old ones. 884 F.2d at 1573. As for the second, the Board found that the union had waived its right to bargain over the topic. The Second Circuit affirmed. Id. at 1574.
in 1975. United performed three separate reviews of Otis' organization and technology, which reviews revealed that the technology was outdated, and that made product designs too expensive to be competitive. The reviews also showed that Otis' share of the market was declining and that the company was selling products below cost just to remain in the market. Moreover, Otis' research and development facility often duplicated the work of another United facility. As a result, United decided to close Otis' New Jersey facility and consolidate operations with United's other research and development facility in Connecticut. United had a modern research facility there and had made a capital investment in new computer facilities near its research facility to accommodate the consolidation.

A plurality of the Board found that United's decision to close Otis' research and development facility was not a mandatory subject of bargaining because the decision did not turn on labor costs. The plurality reasoned that the question of whether a decision is a mandatory subject of bargaining is "the essence of the decision itself, i.e., whether it turns upon a change in the nature or direction of the business, or turns upon labor costs; not its effect on employees nor a union's ability to offer alternatives." The Board implied that a decision did not "turn on labor costs" (fall under the obligation to bargain in good faith as required by section 8(d)) unless the sole reason for the decision was to reduce labor costs.

70. 269 N.L.R.B. at 891.
71. Id. at 892.
72. Id. at 891-92.
73. Chairman Dotson and Members Hunter, Zimmerman, and Dennis decided Otis II. Members Zimmerman and Dennis concurred in the result but put forth their own tests as to how the mandatory/permissive lines should be drawn. See id. at 897-99 (Dennis' test); id. at 900-01 (Zimmerman's test). Thus, only Chairman Dotson and Member Hunter espoused the labor costs analysis that is set forth in the text accompanying notes 74 to 76, infra.
74. The Board stated:
   In any particular case, although perhaps not here, either the soundness of the judgment or the value of these concerns [dated technology, uncompetitive products and duplicative research experiments] might be debatable. We see no value in such a debate. Whatever the merits of the decision, so long as it does not turn upon labor costs, Sec. 8(d) of the Act does not apply.
   Id. at 892 n.3.
75. Id. at 892.
76. The implication lies in the following passage:
   As we noted before, it is also evident that labor costs often are among the considerations which cause management to decide to alter the scope or direction of its business. The Court in First National Maintenance . . . reasoned that if labor costs were a factor, that element of the decision could be adequately dealt with in effects bargaining. We discern no substantial reason why this analysis is not equally applicable to other decisions which turn upon a significant change in the nature or direction of a business.
   Id. at 894.
Two Board members, Dennis and Zimmerman, concurred. Member Dennis' analysis was an attempt to remain consistent with *First National Maintenance* and to balance the competing interests. The first step of the test was to determine whether the decision was amenable to resolution through the collective bargaining process, i.e., whether the factor over which the union had control was a significant consideration in the employer's decision. A factor is a "significant consideration" if the union is able to offer help or concessions that could make a difference in the employer's decision. If so, then bargaining is required only if the benefits to the collective bargaining process outweigh the burdens placed on the employer, as those benefits and burdens were identified in *First National Maintenance*.

To determine the extent of the burden, it was necessary to examine the decision in light of the following: (a) the extent of capital commitment; (b) the extent of changes in operations; (c) the need for speed; (d) the need for flexibility; and (e) the need for confidentiality. In applying this test to the facts of the case, Member Dennis determined that United had no duty to bargain the decision because the union had no control over the factors that motivated the decision.

Member Zimmerman differed with the plurality's decision in that he thought that the employer's duty to bargain should be measured by the amenability of the decision to resolution through collective bargaining. Amenability would be determined by the union's ability to "substantially mitigate the concerns underlying the employer's decision, thereby convincing the employer to rescind its decision." If the union has this ability and the employer cannot show a need for speed, flexibility, or secrecy, then the obligation to bargain the decision exists.

Until mid-1987, the Board remained faithful to its labor costs analysis, although in application the test has failed to address many of the issues involved in each case. "Labor costs" have been limited to those decisions that truly involved costs attributable to employees. However,

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77. Member Dennis identified these interests as job security on the one hand and the economic profitability of the enterprise on the other. *Id.* at 899.
78. *Id.* at 897.
79. *Id.*
80. *Id.* at 899. Member Dennis went on to say that even if the union had some sort of control over Otis' decision, for example, if labor costs had been a significant factor, the burden placed on Otis if it were required to decision bargain would outweigh the benefits of submitting the decision to the collective bargaining process. Thus, Otis would not be required to bargain its consolidation decision. *Id.* at 900.
81. *Id.* at 901.
82. *Id.*
83. See, e.g., University Health Care Center, 274 N.L.R.B. 764, 765 (1985) (employer paid its
a "change in the nature and direction" of an enterprise has run the gamut from decisions that were based on reduction of operating costs to decisions that were based on financial losses due to a drop in the company's market.

The Board had little difficulty in determining that an employer's decision turned on labor costs when the facts demonstrated that factors such as wages and benefits were instrumental in the decision to effect the change. However, the Board did not always apply its Otis II test if another approach was available. For example, in one case the NLRB General Counsel was not required to show that a subcontracting decision turned on labor costs when the facts were identical to the facts in Fibreboard. Moreover, in 1987 the Board departed from a strict application of its labor costs analysis.

The Board seemed to reach the conclusion that a company's decision was based on a significant change in the nature and direction of the business whenever the motivation could not be tied directly to labor costs. For example, the Board found that a closure motivated by recession, lack of business, and the need for large amounts of capital to modernize a machine shop was a "significant change." It is difficult to see

nurses over $2 more than other comparable health care facilities and state legislation reduced the amount of reimbursement for health care; Pennsylvania Energy Corp., 274 N.L.R.B. 1153, 1156 (1985) (employer testified that it could not afford to pay high union rates and benefits).

84. E.g., Columbia City Freight Lines, 271 N.L.R.B. 12 (1984) (company closed terminal in order to reduce costs, eliminate duplicative services and expenditures, maximize usage of equipment and fuel, and reduce the impact of loss of a major customer).


86. For example, in University Health Care Center, 274 N.L.R.B. 764 (1985), the Center's supervisors decided to decrease the nurses' shifts by one half hour to avoid having to lay off employees. In arguing that it had no duty to bargain its decision, the Center pointed out that it paid its Registered Nurses and Licensed Practical Nurses $2 more than comparable facilities in the state and that the legislature had recently reduced the percentage of reimbursement for which health care facilities were eligible. As a result the Center sustained heavy financial losses and was attempting to meet economic concerns by shortening the shifts. Id. at 766. The Administrative Law Judge found that the Center did not make a change in the nature and scope of its business and was thus required to bargain the decision it had made. Id. at 767.

The Board also found that labor costs were the basis for the company's decision to lay off its employees and subcontract its strip mining work to an outside company in Pennsylvania Energy Corp., 274 N.L.R.B. 1153 (1985). The corporation's president testified that "the reason we didn't have union men up there was that we just could not afford to remain in operation and pay those very high pay rates and benefits." Id. at 1156.


89. Fraser Shipyards, Inc., 272 N.L.R.B. 496 (1984). It is odd that a company is deemed to be making a significant change when it is performing the same services for its customers that it always had and is merely making procedural changes in pursuit of greater profits. See also UOP, Inc., 272 N.L.R.B. 999 (1984) (company decided to subcontract because a severe drop in sales encouraged streamlining to promote efficiency and reduced production costs).
why a profitability motive is a "change" when most entrepreneurs would consider profitability a desired constant. Equally mysterious is the Board's decision that a company's efforts to get rid of outdated technology in order to remain competitive was a significant "change" in the nature and direction of its business. The desire to remain competitive is usually an unchanging corporate goal.

The Board made the determination of mandatorily bargainable subjects even more difficult when it decided *Arrow Automotive Industries*. Arrow owned plants in Hudson, Massachusetts; Spartanburg, South Carolina; Morrilton, Arkansas; and Vernon, California and in 1980-81 was in the process of replacing the latter with a newly constructed plant in Santa Maria, California. The company engaged in the remanufacture, sale, and distribution of automotive parts, and each plant supplied its own geographic area. Realizing that the collective bargaining agreement between Arrow and its Hudson employees was to expire on November 30, 1980, the company and unit representatives began hammering out the new agreement on October 22 of that year. The union presented its demands of increased wages and benefits and Arrow's representatives counteroffered. After further bargaining the employees voted to reject Arrow's offer. When the existing collective bargaining agreement expired, the employees went on strike.

Soon after the strike was called, company officials began to contemplate closing the Hudson plant and relocating the work to its Spartanburg facility. Arrow representatives notified the union of this and withdrew their counteroffer, and when the parties met again Arrow informed the union that the reason that the company was thinking about closing the plant was that it had lost $1,092,000 in 1980. The union subsequently prepared a new proposal in which it capitulated to the company's withdrawn offer in all but four areas. Company officials made


92. Id. at 1190.

93. The union demanded an annual 65-cent wage increase across the board, a "substantial" increase in compensation for truck drivers, retention of health insurance benefits with Arrow to pay the premiums, a $2.55 increase in monthly pension payments over the three years of the contract, and an increase in the term and amount of disability benefit coverage. Id. at 1189.

94. Arrow was prepared to give a yearly 45-cent wage increase, some improvements in truck driver compensation, and a $1 increase in monthly pension payments. Id.

95. The union held fast with respect to pension benefits, disability benefits, the elimination of any health insurance deductible, and the company's assumption of a pro-rata share of health insurance premium increases. Id.
no comment on the new proposal, nor did they indicate what concessions would be necessary to keep the Hudson plant open.

Arrow's board of directors ultimately voted to close the Hudson plant and relocate the work to the Spartanburg facility. They cited escalating production costs and decline in sales as their motivation. 96 The union demanded an opportunity to bargain the decision and when the company refused, the employees filed a section 8(a)(5) unfair labor practice charge. The Administrative Law Judge recommended dismissing the complaint because in his view, the company had satisfied its duty, which was to notify the union of its decision and give the union an opportunity to be heard. 97

The Board disagreed with the judge and found that Arrow had committed an unfair labor practice by refusing to bargain the decision to close the Hudson plant. Applying its *Otis II* standard, the Board found that the decision did turn on labor costs, even though such costs were not management's sole motivation (Arrow's northeast market was declining and was being served more efficiently by Arrow's Spartanburg plant). The Board said that escalating labor costs were the "major" reason for the decision and that the decision was a "direct consequence of [Arrow's] frustration with the lack of progress in resolving economic issues . . . in contract negotiations with the Union." 98

The Fourth Circuit Court of Appeals reversed the Board's decision. 99 The court emphasized the decline in the company's market share and concomitant decline in profits 100 and pointed out that studies showed that Arrow would enjoy a twenty-four percent increase in gross profit if it closed the Hudson plant. 101 The court also rejected the Board's *Otis II* standard as inconsistent with *First National Maintenance* and as unpredictable, especially in this case, because the Board had not followed its own precedent. 102 Finally, the court held that Arrow's decision to close

96. *Id.* at 1190.
97. *Id.*
98. *Id.*
99. Arrow Automotive Indus., Inc. v. N.L.R.B., 853 F.2d 223 (4th Cir. 1988). This was a fortunate turn of events for Arrow. The Board had ordered Arrow to pay back wages to its Hudson employees beginning on March 25, 1981 (the date Arrow notified the union of the decision to close the Hudson plant) until the parties either reached an agreement over the decision, reached impasse, or the union failed timely to request bargaining. 125 L.R.R.M. at 1191-92. Had the decision stood, Arrow would have been required to pay a little over 6 years of backpay to each employee in the bargaining unit.
100. The court explained that losses had begun in 1978 and that the owner was keeping the plant open primarily for sentimental reasons. 853 F.2d at 224.
101. *Id.*
102. In earlier decisions the Board had characterized the closing of an entire facility as a "change in basic direction or nature of the enterprise," see, e.g., Columbia City Freight Lines, 271
the Hudson plant was a significant change in operations under *First National Maintenance* and that Arrow had no duty to bargain its decision. The court rejected the economic reasons/labor costs distinction developed in *Otis II*, saying that there was no basis for such a distinction in Supreme Court precedents and that labor costs "are inescapably a part of the economic picture of the enterprise, and management’s consideration of them in basic business decisions does not render *First National Maintenance* inapplicable."103

III. Analysis

The myriad tests developed by the Board and the Supreme Court have failed to foster the industrial democracy that Congress hoped to achieve through the passage of104 an amendment to105 the National Labor Relations Act. Although the employer gambles when it makes a unilateral decision that impacts heavily on his employees’ job security, that gamble often pays off.106 The NLRB’s labor costs analysis creates many loopholes for the employer.107 Moreover, even if the NLRB refuses to

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103. 853 F.2d at 228.
104. Section 1 of the Act, 29 U.S.C. § 151, states in part:

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

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

105. See note 14, supra.
106. [T]he Act has from the beginning been interpreted in such a way as to minimize interference with managerial authority and entrepreneurial decision making. This counter policy to the Act’s declared purpose of giving employee representatives a voice has become increasingly important during the Act’s development. As a result of it, the reach of collective bargaining has been limited; management’s right to eliminate jobs, close down operations, and limit union access to employees has been expanded. From very early on employees who exercised their right to strike were subject to being permanently replaced. All of these conclusions were reached without regard to or in spite of, the language of the statute. They reflect what might be thought of as the Act’s “capitalist exemption.”


107. See, e.g., WXON-TV, 289 N.L.R.B. No. 80 (Mar. 31, 1988) (elimination of production department and layoff of employees not mandatory even though employer cited falling production revenues vis-a-vis rising production salaries as reason for decision), enforced, 876 F.2d 105 (6th Cir. 1989); Hawthorn Mellody, Inc., 275 N.L.R.B. 339, 341 (1985) (decision to close delivery facility to
back the employer, the courts of appeal often will. 108

Such judicial bias would not be so significant if unions were able to muster some economic support. However, unions have lost much of the strength that was theirs in the 1940s. 109 Membership in unions has decreased at a steady rate from 23.9% of the labor force in 1947 to 19.7% in 1978. 110 In 1980 only 20.9% of the nonagricultural labor force belonged to a labor union. 111 By 1988, that figure had dropped to 16.8%. 112

Several authors attribute labor's decline to various economic factors. 113 These include a shift from a predominantly blue-collar, union-oriented workforce to a white-collar service industry workforce, 114 the proliferation of multinational corporations that are better able to withstand labor's economic assaults than their more localized counterparts, 115 and the exportation of jobs resulting from the globalization of the world's economic system. 116

Others have a different perspective. They attribute labor's wane to increased managerial opposition to representation elections and illegal combat economic losses not mandatory even though management had tried to reduce costs through layoffs and labor concessions).


B. Glenn George criticized the First National Maintenance decision for creating a balancing test and then applying it in such a way as to create a per se rule of not requiring bargaining over partial closure decisions. George, To Bargain or Not To Bargain: A New Chapter in Work Relocation Decisions, 69 MINN. L. REV. 667, 680 (1985). He then opined that the Board failed to further the NLRA's policies in formulating its Otis II test, stating that in its practical application it rejects the obligation to bargain in almost all relocation decisions, and if employers are able to avoid bargaining by coming up with a reason aside from labor costs, they will often be tempted to fabricate those other reasons. Id. at 693.

109. One scholar has suggested that unions have never been very strong, and even in their heyday their power was greatly exaggerated:

The actual balance of power was masked in the post-war period by a social compact in which unions, as well as employers, stressed economic growth and supported sympathetic governmental policies. A long term view would suggest that union power has always been exaggerated and that the labor laws were often interpreted as if there were no imbalance of power.


115. Atleson, supra note 109, at 842.

discrimination against union activists.\textsuperscript{117} They contend that the structural and demographic factors outlined above do not account for the decrease because such changes have also occurred in other Western nations, but without the concomitant decline in union membership.\textsuperscript{118}

Several alternatives to the First National Maintenance and Otis II tests have been developed in attempts to take judicial bias out of the determination and to achieve a method of dispute resolution that is both fair and predictable. First National Maintenance is an extrapolation of Justice Stewart's Fibreboard concurrence. Justice Stewart felt that all decisions at the "core of entrepreneurial control" should be free from the constraints of collective bargaining. Capital investment decisions generally fall within this "core," as do changes in the nature and direction of an enterprise.\textsuperscript{119} Because Justice Stewart declined to be more definite than this, his standard is subject to very different interpretations\textsuperscript{120} and is thus not a predictable measure of the scope of an employer's duty to bargain.

Boston University Law Professor Michael Harper has defined the "core" via his "product market principle."\textsuperscript{121} Under this principle all decisions are subject to mandatory bargaining except those "that determine what products are created and sold, in what quantities, for which markets, and at what prices."\textsuperscript{122} The product market principle is based on the theory that judges should not be the ones to define the mandatory/permissive distinction because they tend to base decisions on their own ideas of what is appropriate\textsuperscript{123} and thus develop arbitrary rules. Professor Harper argues that this principle is consistent with the purposes of the NLRA, i.e., that employees be allowed to engage in concerted efforts for their mutual benefit,\textsuperscript{124} and with the strong "social policy [that] . . . consumers should decide which goods employers will produce by expressing their preferences in the marketplace, unless our general democratic institutions restrict these preferences by

\textsuperscript{117} R. Freeman & J. Medoff, What Do Unions Do? 233-39 (1984); Weiler, supra note 5, at 1778-86.
\textsuperscript{118} R. Freeman & J. Medoff, supra note 117, at 226-28; Weiler, supra note 5, at 1773 n.6.
\textsuperscript{119} Fibreboard v. NLRB, 379 U.S. 203, 223 (1964).
\textsuperscript{120} See, e.g., UOP, Inc., 272 N.L.R.B. 999 (1984) (company decided to subcontract because a severe drop in sales encouraged streamlining to promote efficiency and reduced production costs); notes 117 to 119, supra and notes 121 to 123, infra, and accompanying text.
\textsuperscript{122} Id. at 1450 (emphasis omitted).
\textsuperscript{123} Id. at 1448 (quoting Cox, Labor Decisions of the Supreme Court at the October Term, 1957, 44 VA. L. REV. 1057, 1083 (1958)).
\textsuperscript{124} Id. at 1464.
While the product market principle does provide a predictable and facially just measure of the scope of the duty to bargain, it fails to protect employees who are the product, e.g., entertainers, athletes or artisans. Such workers would be precluded from bargaining over adverse or even unsafe working conditions when such topics define the product. Employees of this type would be able to affect such decisions only indirectly by bargaining for higher wages to compensate for substandard conditions. Thus, although employers would lose their sweeping power to make decisions unilaterally, the employee would also lose control over aspects of his work that are perhaps more important than money, aspects that affect his mental and physical well-being. Adoption of the product market principle would be akin to throwing out the baby with the bathwater.

An alternative that is similar in effect to the product market principle is to abolish the mandatory/permissive distinction altogether, since the duty to bargain does not force either party to accede to the other's wishes. However, such abolition would increase the complexity and duration of bargaining sessions and would not protect the parties from attack as to their bargaining strategies or the union from attacks on the parameters of the bargaining unit.

The Second Circuit in *First National Maintenance* favored a rebuttable presumption that a decision is mandatorily bargainable unless the employer can show that the purposes of the NLRA would not be served by requiring negotiation. Such a showing could be made by demonstrating that bargaining would be futile, bargaining over the decision was not

125. *Id.* Harper also states that the NLRA does not subordimate this policy to its own goals. *Id.*

126. Harper would further limit the scope of bargaining under the product market principle so that parties could not insist on bargaining over any proposals that would allow a party to avoid its bargaining obligation, *id.* at 1486, compromise the independence of the other's bargaining strategy, *id.* at 1493, quibble over insignificant aspects of the form of the negotiations, *id.* at 1497, or force the other party to waive its right to seek remedies from the Board or the courts. *Id.* at 1499.

127. For example, skimpy outfits for waitresses and reduction of injuries through modification of the penalty system for football players would be outside of the scope of mandatory bargaining under the product market principle. *Id.* at 1466.

128. This option is set out fully in Note, The Viability of Distinguishing Between Mandatory and Permissive Subjects of Bargaining in a Cooperative Setting: In Search of Industrial Peace, 41 *VAND. L. REV.* 577, 594 (1988). The author actually espouses a more radical approach, i.e., that the bargaining unit be integrated into management's decisional structure so that labor and management could work together to achieve mutual goals. *Id.* at 596-98.

129. For example, the employer in NLRB v. Wooster Div. Borg-Warner, 356 U.S. 342 (1958), conditioned any agreement on a "ballot" clause calling for a pre-strike secret vote of employees, both union and non-union, as to the employer's last offer, which weakened the independence of the "representative" chosen by the employees. *Id.* at 350.

customary in the industry, or the employer was acting in the face of an economic emergency.\(^{131}\)

There are several problems with this standard. First, it would be very difficult for the employer to show futility unless it actually approached the bargaining unit with its plans. This is because the unit may be able to create solutions that the employer would not have foreseen without talking to the unit representatives. Thus, if the employer acts unilaterally and the unit demonstrates in litigation that it could have offered a reasonable alternative to the action the employer actually took, the Board would have to conclude that bargaining would not have been futile and that the employer committed an unfair labor practice by refusing to negotiate with the unit. On the other hand, if the employer were only required to show that it could not think of any solution that the union could offer, the duty to bargain would be a nullity.

Second, although it would be easy to show custom in the industry by the existence in collective bargaining agreements of clauses governing the disputed issue, it would not be fair to preclude one union from insisting on discussion simply because other unions had failed to extract agreements on the same issue. Third, it is unclear how much of an emergency would be necessary to avoid the duty to bargain. Presumably the mark would be somewhere between economic good health and economic death, but the point at which a "problem" would turn into an "emergency" is subject to diverse interpretation.

Member Zimmerman's Otis II test, on the other hand, goes far towards providing a fair and predictable measure of the scope of mandatory bargaining.\(^{132}\) That test calls for a presumption in favor of bargaining over decisions that impact heavily on job security and for allowing unilateral management decisions to stand only if the employer can meet one of two conditions. One condition is to demonstrate to the Board that collective bargaining would not have affected the employer's motivation.\(^{133}\) The alternative condition is to show that the circumstances required a degree of speed, secrecy, or flexibility that would have been lost if it were forced to bargain the decision with the union.\(^{134}\)

Member Zimmerman's test is in need of modification, however, because it fails in the same way as the Second Circuit's futility prong does: the employer could never meet a serious standard without revealing his


\(^{132}\) See text accompanying notes 82 and 83, supra.

\(^{133}\) Otis Elevator Corp., 269 N.L.R.B. at 900.

\(^{134}\) Id. at 901.
plans to the collective bargaining unit. Thus, instead of requiring a showing of bargaining unit impotence, most decisions should be subject to bargaining. Only decisions requiring speed, secrecy, or flexibility or proposals governing bargaining unit integrity, compromising the independence of bargaining strategies, or attempting to evade bargaining obligations should be excluded from the scope of mandatory bargaining.

At this point it is important to make a few observations. First, the obligation to bargain does not require the employer to agree to anything. Management need only make a good faith effort to come to some agreement with the unit representative. Even when the duty to bargain exists, the employer still has the option to take unilateral action after the parties have reached impasse.135

Second, placing the burden of proof of the absence of a duty to bargain on the employer protects the employer's secrets and strategies from the public eye. The employer would be entitled to exercise its discretion in making the initial mandatory/permisive determination but would be restrained from acting in bad faith because its determination would be subject to review and reversal by the Board and the courts. This placement of the burden of proof would also prevent the unit representative from playing tactical games designed to delay an inevitable decision and from leaking the gist of the employer's plans as a parting shot of sabotage.136 This is true because the employer need not reveal its plans until they are put into effect, if it determines that implementation requires speed, secrecy, or flexibility that would be precluded by decision bargaining. Conversely, if the union were required to demonstrate the existence of the duty, it would be necessary to expose the very secrets the employer needs to protect; otherwise the union could never sustain its burden. Thus, management is in the best position to make the initial decision and to back it up when necessary.

In addition to illustrating the failure of the First National Maintenance and Otis II tests, the Board decisions discussed above illustrate the utility of a modified Zimmerman analysis.137 For example, in Bob's Big Boy Family Restaurants,138 the Board focused on the "subcontracting" and "partial closing" labels in examining the company's motivation for

135. See text accompanying note 16, supra.
136. Such a safeguard would protect management from the dangers of collective bargaining that Justice Blackmun identified in First National Maintenance: "Labeling this type of decision mandatory 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.
137. See text accompanying notes 58 to 68, supra.
closing its shrimp processing commissary. The dissent demonstrated that what the majority called subcontracting (and therefore mandatory) could just as easily have been deemed a partial closing (and thus not mandatory). Because management was motivated by wage costs, benefit costs and quality control, and not by factors that called for speed, secrecy, or flexibility, there was no need to insulate the employer from the duty to bargain. Thus, the majority's position, and not the dissent's, would be proper under a modified Zimmerman analysis.

In Otis II there was also no need to protect the employer. Labor costs did play a role in United's decision to close Otis' research and development facility, and though United's primary motivation was the elimination of duplicative research and antiquated facilities, the union might have saved some jobs for its members, while United would have been free to implement its decision after bargaining was concluded.

Arrow Automotive's employees could have had a definite effect on the company's decision to close. The facts in that case show that labor costs were a primary reason for management's decision. However, the facts also show that another motivating factor may have been that Arrow would be able to save significant amounts of money in setting up its new Santa Maria plant by transferring the equipment at the Hudson plant out to California and canceling its contracts with equipment suppliers. If Arrow were able to offer some objective evidence that without speed, flexibility, or secrecy a savings opportunity would have been foreclosed, it would have sustained its burden of proof and properly avoided decision bargaining. In addition, this analysis would have allowed Arrow's employees a voice in the decision to terminate their jobs if Arrow could not sustain its burden. In this way, the democratic purpose of the National Labor Relations Act would have been fulfilled in a manner that is predictable and sensitive to the rights of all parties involved.

IV. CONCLUSION

In the years since the Wagner Act was passed and amended, the power of organized labor has waxed and waned as public perception,
economic conditions, and judicial support have fluctuated. The employee's strength in relation to that of his employer is presently at a very low ebb, and neither the National Labor Relations Board nor the courts have done much to bolster it. Congress' intent to foster industrial democracy in order to promote peace and prosperity has fallen by the wayside because of what one author has called "an unexamined exaltation of the employer's interest in unfettered control over major managerial decisions . . . ."\textsuperscript{145}

The need for a clear, objective, and easily applicable standard is particularly acute since the future of both business and labor is at stake; no one can afford to waste money to find out that they have employed the correct standard incorrectly or vice versa. Thus, if management were required to bargain all decisions unless it showed that such bargaining would result in loss of necessary speed, secrecy, or flexibility, the determination of the duty to bargain could be made swiftly and accurately without sacrificing the interests of anyone concerned.