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NOTES

Labor Law—A Balancing of Interests Test Applied to the Duty to Bargain About a Partial Closing Decision: *First National Maintenance Corp. v. NLRB*

Sections 8 and 9 of the National Labor Relations Act¹ impose upon both employers and certified representatives of employees a duty to bargain collectively with respect to “wages, hours, and other terms and conditions of employment.”² In *First National Maintenance Corp. v. NLRB*³ the Supreme Court applied a “balancing of interests” test to the often litigated question of what constitutes a “term or condition of employment” under the Act.⁴ The Court concluded that an employer does not have a duty to bargain collectively before making an economically motivated decision to shut down a discrete portion of his maintenance operation.⁵ While the Court’s analysis might indicate that an employer would never have a duty to bargain with employees prior to making such a major decision, the terms used in the balancing test are of questionable origin, are inherently vague, and are left inadequately defined in the opinion.⁶ Moreover, at the end of its decision the Court limited its holding in a manner inconsistent with the per se rule it had just appeared to

1. 29 U.S.C. §§ 151-169 (1976). The purpose of the National Labor Relations Act is to promote collective bargaining as a means of maintaining industrial peace so as to preserve the free flow of interstate commerce. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

Section 8(a)(5) of the Act provides that an employer’s refusal “to bargain collectively with the representatives of his employees, subject to the provisions of section [9(a)]” constitutes an unfair labor practice. 29 U.S.C. § 158(a)(5) (1976).

Section 8(b)(3) states that for a labor organization or its agents “to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section [9(a)]” is an unfair labor practice. *Id.* § 159(a).

Section 9(a) provides in pertinent part that

Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representative of all employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment.

Id. § 159(a).

Section 8(d) of the Act provides as follows:

[T]o bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . . but such obligation does not compel either party to agree to a proposal or require the making of a concession. . . .

Id. § 158(d). *See also* *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342 (1958) (employer and union have duty to bargain in “good faith” over wages, hours, and other terms and conditions of employment).

2. 29 U.S.C. § 159(d) (1976); *see supra* note 1.

3. 452 U.S. 666 (1981).

4. *Id.* at 679.

5. *Id.* at 680-86.

6. *See infra* notes 73-89 and accompanying text.

adopt.⁷ Finally, the Court neglected to reconcile this decision with many of its earlier pronouncements on the matter, leaving their continued applicability in doubt.⁸ The Court's decision in *First National* is therefore more likely to confuse than to clarify the question of the scope of an employer's collective bargaining duty.

First National Maintenance Corporation (FNM) had contracted to provide maintenance services for the Greenpark Care Center on a cost-plus-fixed-fee basis.⁹ After the contract had been in effect for six months, Greenpark reduced the weekly fee paid to FNM from \$500 to \$250; the business relationship between the parties deteriorated steadily from that point. Eight months later, on June 30, 1977, after learning that its Greenpark operation had become unprofitable, FNM requested that the weekly fee be restored to \$500. Two weeks later it informed Greenpark that it would terminate the nursing home operation effective August 1 unless the fee was restored. A telegram providing final notice of termination was sent to Greenpark on July 25.

During the same time period the National Union of Hospital and Health Care Employees was conducting an organizing campaign among FNM's thirty-five Greenpark employees. A union victory resulted from an election conducted by the National Labor Relations Board; the election results were certified on May 11, 1977. By letter of July 12, the union requested that FNM meet with it in order to establish a collective bargaining agreement for the employees of the Greenpark operation.

FNM never responded to that request, but it did notify the union on July 28, 1977, that FNM would discharge the Greenpark employees effective August 1 when FNM terminated its Greenpark operation. The union's immediate efforts to forestall the termination and discharge were unsuccessful.¹⁰ On July 31 FNM terminated the operation and discharged the employees as planned. The union subsequently filed an unfair labor practice charge alleging that FNM had violated sections 8(a)(1) and 8(a)(5) of the National Labor

7. See *infra* notes 80-91 and accompanying text.

8. See *infra* notes 91-99 and accompanying text.

9. 452 U.S. at 668. The parties, First National Maintenance Corporation (FNM) and Greenpark Care Center (Greenpark) entered into a written contract on April 28, 1976. The contract specified that Greenpark would furnish all tools, equipment, materials and supplies, and would pay FNM a weekly management fee of \$500, plus the gross weekly payroll and fringe benefits. Greenpark also agreed not to hire any FNM employees during the contract term and for 90 days thereafter. *Id.*

Greenpark was one of "between two and four" nursing homes that FNM had as customers. Thirty-five of FNM's workers were employed there. *Id.* at 668 n.1. The administrative law judge concluded that the Greenpark operation constituted only a small part of FNM's total operation. *First Nat'l*, 242 N.L.R.B. 462, 465 (1979), *aff'd*, 627 F.2d 596 (2d Cir. 1980), *rev'd*, 452 U.S. 666 (1981).

10. When notified that employees would be discharged, union vice-president Edward Wecker telephoned FNM's secretary-treasurer, Leonard Marsh, requesting that FNM delay closing to allow for bargaining. Marsh refused. Additionally, a Greenpark representative refused to waive the contract's 30-day notice provision which would allow FNM to continue operations. Greenpark was also unwilling itself to hire the FNM employees because of the 90-day hiring ban in the contract. *Id.* at 670.

Relations Act by refusing to bargain with the union before closing its Greenpark operation.

The administrative law judge, relying on the Board's decision in *Ozark Trailers, Inc.*,¹¹ held that FNM had violated section 8(a)(5) by refusing to bargain regarding its decision to terminate the Greenpark operation.¹² Except for a minor change in the remedial order, the Board affirmed without further analysis.¹³ The Court of Appeals for the Second Circuit enforced the Board's order. It, however, rejected the position adopted by the administrative law judge and the Board that an employer's refusal to bargain over a partial closing decision is per se violative of section 8(a)(5).¹⁴ Rather, the court held that section 8(d) establishes a rebuttable presumption in favor of mandatory bargaining; because FNM failed to rebut the presumption, the court enforced the Board's remedial order.¹⁵

The United States Supreme Court reversed. The Court held that because "the harm likely to be done to an employer's need to operate freely in deciding whether to shut down part of its business for purely economic reasons outweighs the incremental benefit that might be gained through the union's participation in making the decision," the partial closing decision itself is not a term or condition of employment within the meaning of section 8(d) and therefore is not a mandatory subject of bargaining.¹⁶

11. 161 N.L.R.B. 561 (1966) (employer has duty to bargain over decision to terminate one of its several trucking depots).

12. *First Nat'l*, 242 N.L.R.B. 462, 466 (1979). The administrative law judge ruled that FNM was not excused from its duty to bargain, because the closing of the Greenpark operation did not involve a significant withdrawal of capital or a change in the scope or direction of the enterprise. See *infra* note 54 and accompanying text.

13. 242 N.L.R.B. at 462.

14. *First Nat'l*, 627 F.2d 596 (2d Cir. 1980). The Supreme Court, in reversing the court of appeals, noted that the court erred in enforcing the Board's order on different grounds without remanding the case to the Board for further examination of the evidence and fact-finding. 452 U.S. at 672 n.6 (citing *NLRB v. Pipefitters*, 429 U.S. 507, 522 n.9 (1977) & *SEC v. Chenery Corp.*, 318 U.S. 80, 95 (1943)). The Court nevertheless chose to decide the case on its merits. *Id.* at 672 n.6.

15. 627 F.2d at 601-03. After an extensive review of legal precedent and policy considerations, the appeals court in *First National* agreed with the conclusion reached by the Third Circuit Court of Appeals in *Brockway Motor Trucks, Inc. v. NLRB* that section 8(d) establishes an initial presumption that a partial closing decision is a mandatory subject of bargaining. *Id.* at 601 (citing *Brockway Motor Trucks, Inc. v. NLRB*, 582 F.2d 720, 735 (3d Cir. 1978)). The two courts disagreed, however, on the manner in which employers could rebut that presumption. The Third Circuit held that one must balance the interests of the parties themselves in deciding whether bargaining should be required. *Id.* The Second Circuit, on the other hand, held that the presumption could be rebutted by showing that "the purposes of the statute would not be furthered by the imposition of a duty to bargain." *Id.* Notwithstanding the different standard applied by the two courts, both required the same factual circumstances to justify an employer's refusal to bargain. In particular, the courts looked to see if bargaining over the decision would be futile because the employer had no alternative other than to close, if the decision was due to emergency circumstances, or if it was the custom of the industry to bargain over such decisions. *Id.* at 601-02. See also Comment, *Duty to Bargain About Termination of Operations: Brockway Motor Trucks v. NLRB*, 92 HARV. L. REV. 768 (1979).

The Supreme Court expressly rejected this presumption analysis as "ill suited to advance harmonious relations between employer and employee." 452 U.S. at 684.

16. 452 U.S. at 686. The Court made clear, however, that the employer must bargain about the effects of such a decision. *Id.* at 677 n.15.

Writing for the majority, Justice Blackmun emphasized that an important purpose of collective bargaining is to further the goals of the Act by helping to maintain industrial peace, thereby preserving the free flow of interstate commerce.¹⁷ To that end, Congress enacted section 8(d) as a limit on the subjects of mandatory bargaining, intending to include only issues that are part of the relationship between management and labor.¹⁸ Congress did not intend for the collective bargaining process to transform labor into "an equal partner in the running of the business enterprise."¹⁹

The Court noted that the partial termination decision at issue was based solely on the profitability of the Greenpark contract, a matter entirely unrelated to the labor-management relationship.²⁰ At the same time, however, the decision had a direct impact on that relationship in the form of employee terminations. In other words, while an aspect of the labor management relationship was not a cause of the decision, the decision clearly affected that relationship.²¹

The Court reasoned that partial closing decisions which lie outside the employer-employee relationship but which have a direct impact thereupon should be the subject of mandatory bargaining only when susceptible to resolution through the collective bargaining process, because only then will the goal of maintaining industrial peace be furthered.²² To require bargaining in other situations would be an unjustifiable encroachment on the freedom and certainty in the decision-making process that management needs to conduct its business in a profitable manner.²³ Accordingly, the Court set forth a balancing of interests approach: "[I]n view of an employer's need for unencumbered decisionmaking, bargaining over management decisions that have a substantial impact on the continued availability of employment should be required only if the benefit, for labor-management relations and the collective bargaining process, outweighs the burden placed on the conduct of business."²⁴

In applying this balancing test to the specific question of FNM's duty to

17. *Id.* at 674. See generally *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

18. 452 U.S. at 674-75. See also *Allied Chem. & Alkali Workers Local 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971). The court noted that Congress intentionally chose not to define the words "wages, hours, and other terms and conditions of employment," because it wanted to leave to the Board the task of defining the terms in light of specific industrial practices. 452 U.S. at 675 & n.14.

19. 452 U.S. at 676.

20. *Id.* at 677.

21. *Id.* at 678-79.

22. *Id.*

23. *Id.* The Court noted that to label a matter a mandatory subject of bargaining does not oblige either party to abandon its intentions or to agree with proposals advanced by the other party. On proper subjects, however, the parties must meet with the other party, provide information necessary to that party's understanding of the problem, and in good faith consider any proposal that the other party advances. *Id.* at 678 n.17. The parties "may bargain to impasse on these matters, and then use the economic weapons at their disposal in an attempt to secure their respective aims." *Id.* at 675; see also *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342 (1958); *NLRB v. American Nat'l Ins. Co.*, 343 U.S. 395 (1952). See generally Fleming, *The Obligation to Bargain in Good Faith*, 47 VA. L. REV. 988 (1961); Schwarz, *Plant Relocation or Partial Termination—The Duty to Decision-Bargain*, 39 FORDHAM L. REV. 81 (1970).

24. 452 U.S. at 679. Moreover, the Court noted that the *Fibreboard* Court "implicitly" en-

bargain about its economically motivated decision to close a portion of its operation, the Court first assessed the benefit that would accrue to the collective bargaining process, in the form of an augmented flow of ideas, information, and suggestions if union participation in the decision-making process were mandated. Noting that the employer already has a duty to bargain with the union over the *effects* of the partial shutdown decision,²⁵ and that the union's interest in bargaining over the decision itself would be the same as in "effects bargaining"—job security—the Court concluded that requiring bargaining over the decision itself would probably not augment the flow of information. Consequently, there would be little benefit to the collective-bargaining process by virtue of union participation.²⁶

In contrast, the degree to which management's interest in unencumbered decision making would be affected by a mandated duty to bargain depends on the particular facts and circumstances surrounding the decision.²⁷ In this case, however, the Court did not inquire into the particular interest of FNM that would be burdened by a mandated bargaining duty. The Court did note, however, that to require an employer to bargain over a partial closing decision could give the union a powerful coercive tool of delay to use against management for reasons other than to further a feasible solution.²⁸ In addition, evidence of current labor practices, though only an indication of what is feasible through collective bargaining, "supports the apparent imbalance weighing against mandatory bargaining."²⁹ Finally, the Court concluded that the presumption analysis adopted by the court of appeals would not advance harmonious relations between labor and management, because it failed to address the latter's need for certainty in decision making.³⁰

Justice Brennan dissented, joined by Justice Marshall, noting that Congress purposefully left the phrase "terms and conditions of employment" in-

gaged in this same analysis. *Id.* (citing *Fibreboard Paper Prod. Corp. v. NLRB*, 379 U.S. 203 (1964)). For a discussion of *Fibreboard* see *infra* notes 36-43 and accompanying text.

25. *Id.* at 681. (citing *NLRB v. Royal Plating & Polishing Co.*, 350 F.2d 191, 196 (3d Cir. 1965), & *NLRB v. Adams Dairy, Inc.*, 350 F.2d 108 (8th Cir. 1965), *cert. denied*, 382 U.S. 1011 (1966)).

26. *Id.* The union's legitimate interest in fair dealing and job security is also protected by section 8(a)(3) of the Act, which prohibits anti-union motivated partial closing effected to chill unionism at the employer's other plants. *Textile Workers Union v. Darlington Mfg. Co.*, 380 U.S. 263 (1965).

As the Court noted in *First National*:

Under § 8(a)(3) the Board may inquire into the motivations behind the partial closing. An employer may not simply shut down a part of its business and mask its desire to weaken and circumvent the union by labeling its decision "purely economic." Thus, although the union has a natural concern that a partial closing not be hastily or unnecessarily entered into, it has some control over the effects of the decision and indirectly may ensure that the decision itself is deliberately considered. It also has direct protection against a partial closing decision that is motivated by an intent to harm a union.

452 U.S. at 682.

27. *Id.* Management's concerns might include a need for "speed, flexibility and secrecy in meeting business opportunities and exigencies." Bargaining might be futile, because management has no feasible alternative other than to shut down the operation. *Id.* at 682-83.

28. *Id.* at 683.

29. *Id.* at 684.

30. *Id.*

definite. Accordingly, more deference should be given to the Board's conclusion that because a partial closing decision "clearly touches on a matter of central and pressing concern to the union and its member employees, [it] is a mandatory subject of collective bargaining."³¹ He also questioned how the Court's balancing test could foster the neutral purposes of the Act when it takes into account only management's interest in making unfettered economically motivated decisions.³² Finally, even if the balancing test is theoretically correct, the Court based its application here not on fact, but on mere speculation. Justice Brennan therefore believed that the presumption approach adopted by the court of appeals was appropriate.³³

Until 1965 employers were generally considered to have no duty to bargain with the union concerning economically motivated partial closing, partial relocation, and subcontracting decisions.³⁴ Failure to bargain over such decisions was questioned only if the decision was motivated by antiunion animus, and then usually as an 8(a)(3) violation rather than as a violation of section 8(a)(5).³⁵

In *Fibreboard Paper Products Corp. v. NLRB*³⁶ the Supreme Court held, notwithstanding an absence of antiunion motivation, that an employer had a duty under section 8(a)(5) to bargain with the union before replacing "employees in the existing bargaining unit with those of an independent contractor to do the same work under similar conditions of employment."³⁷ Although the decision was expressly limited to its facts,³⁸ Chief Justice Warren's majority opinion reasoned broadly that this result was justified because the subject matter of the dispute was within the "literal meaning" of the phrase "terms and conditions of employment."³⁹ Moreover, including "replacement decisions"

31. *Id.* at 689 (Brennan, J., dissenting).

32. *Id.* at 689 (Brennan, J., dissenting); *see also id.* at 686 n.22.

33. *Id.* at 690-91 (Brennan, J., dissenting).

34. *See* Murphy, *Plant Relocation and the Collective Bargaining Obligation*, 59 N.C.L. REV. 5, 7-8 (1980); Schwarz, *supra* note 23, at 82-83. For an in-depth study of this area before *Fibreboard*, *see* Comment, *Employer's Duty to Bargain about Subcontracting and Other "Management" Decisions*, 64 COLUM. L. REV. 294, 301-03 (1964).

35. *See* Schwarz, *supra* note 23, at 82-83. Section 8(a)(3) of the Act provides that it shall be an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment to encourage or discourage membership in any labor organization." 29 U.S.C. § 158(a)(3) (1976).

36. 379 U.S. 203 (1964).

37. *Id.* at 215. For discussions of the development of the law regarding an employer's duty to bargain, *see* Murphy, *supra* note 34; Schwarz, *supra* note 23; Comment, *supra* note 34; *Labor Law—National Labor Relations Act—In a Partial Closing, the Interests of the Parties Must Be Balanced to Determine Whether The Closing is A Mandatory Subject of Bargaining—Brockway Motor Trucks, Inc. v. NLRB*, 582 F.2d 720 (3d Cir. 1978), 74 GEO. WASH. L. REV. 679 (1979).

38. The Court stated as follows:

We agree with the Court of Appeals that, on the facts of this case, the "contracting out" of work previously performed by members of an existing bargaining unit is a subject about which the National Labor Relations Act requires employers and the representatives of their employees to bargain collectively.

379 U.S. at 209.

39. *Id.* at 210. In support of this proposition, the Court cited *Order of R.R. Telegraphers v. Chicago & N.W. Ry.*, 362 U.S. 330 (1960), a case involving an employer's duty to bargain about a partial closing decision under § 152 of the Railway Labor Act, 45 U.S.C. § 152 (1976). The Court

within the scope of collective bargaining would help effectuate the purpose of the Act, as evidenced by the prevalence of provisions dealing with this question in existing collective bargaining agreements.⁴⁰ Finally, the decision to replace employees with an independent contractor did not alter the basic scope of the company's operation, nor did it involve a significant investment of capital. Imposition of a duty to bargain about such a decision therefore would not significantly abridge the employer's freedom to manage his business.⁴¹

In a concurring opinion, Justice Stewart, alarmed by the potentially broad implications of the majority opinion, stressed the narrow holding in which he joined.⁴² He noted that not every decision affecting job security is necessarily a subject of compulsory collective bargaining. Congress did not intend the bargaining duty under section 8(d) to encroach on those management decisions that lie "at the core of entrepreneurial control" and "which are fundamental to the basic direction of a corporate enterprise."⁴³

Notwithstanding *Fibreboard's* narrow holding and the Court's later decision in *Textile Workers Union of America v. Darlington Manufacturing Co.*,⁴⁴ the National Labor Relations Board initially construed *Fibreboard* broadly.⁴⁵ In its leading post-*Fibreboard* case, *Ozark Trailers, Inc.*,⁴⁶ the Board held that an employer had a per se duty to bargain with the union before deciding to close one of its trucking depots. The Board gradually retreated from this broad rule, however, holding that under certain circumstances an employer had no duty to bargain about a closing decision.⁴⁷ At the present time, the

in that case held that the union's desire to negotiate was not "an unlawful bargaining demand." 362 U.S. at 340-41. In *First National*, amicus AFL-CIO argued that the *Order of Railroad Telegraphers* decision mandated a similar result here. 452 U.S. at 686-87 n.23. The Court rejected the argument, reasoning that "[t]he mandatory scope of bargaining under the Railway Labor Act . . . [is] not coextensive with the National Labor Relations Act and the Board's jurisdiction over unfair labor practices." *Id.* (citations omitted).

40. 379 U.S. at 210-12.

41. *Id.* at 213.

42. *Id.* at 217-18 (Stewart, J., concurring).

43. *Id.* at 223.

44. 380 U.S. 263 (1965). The Court there held that an employer has an absolute right to terminate his entire business without violating § 8(a)(3) of the Act even if done with anti-union motivation. A partial termination motivated by anti-union animus is a violation of that section, however, if done to "chill unionism" at one of the employer's remaining plants, and if the employer reasonably could have foreseen that the closing would have that effect. *Id.* at 275.

The *Darlington* Court was not presented with the question of a partial closing motivated only by economic considerations. Nevertheless, some lower courts have relied on language in that case to hold that an employer's refusal to bargain over such a decision is not a violation of § 8(a)(5). *See, e.g.*, *Morrison Cafeterias Consol., Inc. v. NLRB*, 431 F.2d 254, 257 (8th Cir. 1970) (no § 8(a)(5) violation absent concurrent violation of § 8(a)(3)). The Board, on the other hand, has held that *Darlington* is inapplicable in cases arising under § 8(a)(5). *See, e.g.*, *Ozark Trailers, Inc.*, 161 N.L.R.B. 561, 565 (1966); *Royal Plating & Polishing Co.*, 152 N.L.R.B. 619, 622 (1965).

45. *See Rabin, Fibreboard and the Termination of Bargaining Unit Work: The Search for Standards in Defining the Scope of Duty to Bargain*, 71 COLUM. L. REV. 803, 809-10 (1971). *See generally* Note, *Duty to Bargain: Subcontracting, Relocation, and Partial Termination*, 55 GEO. L.J. 879 (1967).

46. 161 N.L.R.B. 561 (1966). *See supra* note 11.

47. *See, e.g.*, *General Motors Corp., GMC Truck & Coach Div.*, 191 N.L.R.B. 951, 951-52 (1971), *aff'd sub nom. UAW v. NLRB*, 470 F.2d 422 (D.C. Cir. 1972) (transfer of truck retail sale and servicing facility termed "sale" of business and a decision "at the core of entrepreneurial control"); *Summit Tooling Co.*, 195 N.L.R.B. 479, 480 (1972) (decision to close subsidiary not a

Board seems to apply a presumption of a duty to bargain;⁴⁸ an employer can rebut that presumption by showing that management's interest in not bargaining outweighs the employees' countervailing interest in participating in the decision-making process.⁴⁹ The Board has tended to treat subcontracting, partial closing, and relocation decisions as identical for purposes of analyzing an employer's duty to bargain.⁵⁰

In contrast, the courts of appeal have generally been less willing to apply *Fibreboard* beyond its narrow fact situation.⁵¹ Only the Fifth Circuit has agreed totally with the Board's per se approach.⁵² The Second⁵³ and Third Circuits⁵⁴ have applied a presumption analysis but disagree over how the employer may rebut the inference of a duty to bargain about the decision itself.⁵⁵ The Eight, Ninth, and Tenth Circuits, on the other hand, have rejected the Board's broad application of *Fibreboard*, relying in large part on the narrow holding of the case, the language of Justice Stewart's concurring opinion, and the rationale of the Court's holding in *Darlington Manufacturing Co.*⁵⁶

The Supreme Court agreed to hear *First National* for the specific purpose of resolving this conflict between the Board and the courts of appeal.⁵⁷ One would have hoped that the Court would set forth a clear and concise method of analysis. Instead, it set forth a "balancing of interests" test that weighs questionable interests couched in terms left inherently vague and inadequately defined.⁵⁸ Moreover, the Court applied its test in a manner suggesting that an employer never has a duty to bargain over an economically-motivated decision to shut down its plant,⁵⁹ but then proceeded to limit its holding in a man-

mandatory subject of bargaining because "its practical effect was to take the Respondent out of the business of manufacturing tool and tooling products").

48. See, e.g., *Broods-Scanlon, Inc.*, 246 N.L.R.B. 476, 477 (1979). But see *First Nat'l*, 242 N.L.R.B. 462 (1979); see *supra* note 13.

49. See *Raskin Packing Corp.*, 242 N.L.R.B. 78, 84 (1979).

50. See Schwarz, *supra* note 23, at 91 n.66.

51. See *Murphy*, *supra* note 34, at 17-18.

52. *NLRB v. Winn-Dixie Stores, Inc.*, 361 F.2d 512 (5th Cir. 1966), cert. denied, 385 U.S. 935 (1966) (holding an employer's decision to discontinue cheese cutting and packing operation to be mandatory subject of bargaining because part of larger warehouse operation). The position of the District of Columbia Circuit is unclear. See *International Ladies' Garment Workers Union v. NLRB*, 463 F.2d 907 (D.C. Cir. 1972).

53. *First Nat'l*, 627 F.2d at 601-02. The Sixth and Seventh Circuits have agreed with the Second Circuit. *Davis v. NLRB*, 617 F.2d 1264 (7th Cir. 1980); but see concurring & dissenting opinion accusing majority of using per se rule, 617 F.2d at 1274 (Pell, J., concurring in part, dissenting in part); *NLRB v. Production Molded Plastics, Inc.*, 604 F.2d 451 (6th Cir. 1979).

54. *Brockway Motor Trucks, Inc.*, 582 F.2d at 735.

55. See *supra* note 20 and accompanying text. See also *First Nat'l*, 452 U.S. at 672 n.7.

56. The Eighth, Ninth, and Tenth Circuits (see *infra* notes 64 & 65) have generally held that an employer has no duty to bargain over a management decision involving a major commitment in capital investment or a basic change in the scope of its operation. See, e.g., *NLRB v. International Harvester Co.*, 618 F.2d 85 (9th Cir. 1980); *NLRB v. Thompson Transp. Co.*, 406 F.2d 698 (10th Cir. 1980); *NLRB v. Adams Dairy, Inc.*, 350 F.2d 108 (8th Cir. 1965), cert. denied, 382 U.S. 1011 (1966). See also *Rabin*, *supra* note 45, at 810-12.

57. 452 U.S. at 672-74.

58. See *infra* notes 63-88 and accompanying text.

59. See *infra* notes 78-80 and accompanying text.

ner inconsistent with the broad analysis it employed.⁶⁰ Finally, the Court neglected to reconcile its decision with several of its earlier pronouncements on the question.⁶¹ Therefore, while a pragmatic result was reached, confusion among the lower courts probably will follow, just as confusion followed the Supreme Court's decision in *Fibreboard*.⁶²

In *First National* the Court adopted a balancing-of-interests test designed to effectuate the "neutral purposes" of the Act.⁶³ But as the dissenters argued, the test adopted by the majority is flawed because it considers only the interests of management.⁶⁴ After all, how can a test that fails to consider the interests of one of the two parties involved purport to further the neutral purposes of the Act?⁶⁵ Moreover, as the Court itself argued, section 8(d) of the Act establishes a limit on the subjects of mandatory bargaining: Congress intended to include "only issues that settle an aspect of the relationship between the employer and employee."⁶⁶

One might argue that the Court's balancing approach in fact considers the interests of the bargaining unit employees, albeit indirectly. Expanding on an aspect of its analysis in *Fibreboard*, the Court noted in *First National* that the purpose of mandatory collective bargaining is to promote the purposes of the Act by subjecting labor/management disputes to a peaceful forum and thereby encouraging the flow of information and ideas about the interests of both parties in the decision.⁶⁷ The Court concluded, however, that the union's interest in bargaining over a partial closing decision is the same as its interest in "effects bargaining"—job security.⁶⁸ Therefore, to require the employer to bargain with respect to the closing decision itself, in addition to the effects of that decision, would do little to "augment this flow of information and

60. See *infra* notes 80-82 and accompanying text.

61. See *infra* notes 82-88 and accompanying text.

62. Compare *Ozark Industries, Inc.*, 161 N.L.R.B. 561 (1966) (per se duty to bargain over truck depot closing decision), with *NLRB v. International Harvester Co.*, 618 F.2d 85 (9th Cir. 1980) (no duty to bargain if decision involves significant commitment of investment capital). See *Murphy*, *supra* note 34, at 14-15 n.61.

63. See, e.g., *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970) (where state statute regulates evenhandedly to effectuate a legitimate public interest, and its effects on interstate commerce are only incidental, statute will be upheld unless burden imposed on such commerce is clearly excessive in relation to local benefit).

64. 452 U.S. at 689 (Brennan, J., dissenting). The Court itself has stated that the employees' interests are to be considered in determining mandatory subjects of bargaining. The objectives of national labor policy, reflected in established principles of federal law, require that the rightful prerogative of owners independently to arrange their businesses and even to eliminate themselves as employers be balanced by some protection to the employees from a sudden change in the employment relationship. *John Wiley & Sons v. Livingston*, 376 U.S. 543, 549 (1964). But see *Darlington Mfg. Co.*, 380 U.S. at 270. ("A proposition that a single businessman cannot choose to go out of business if he wants to would represent such a startling innovation that it should not be entertained without the clearest manifestation of legislative intent or unequivocal judicial precedent so construing the Labor Relations Act.")

65. 452 U.S. at 689 (Brennan, J., dissenting).

66. *Id.* at 676 (quoting *Allied Chem. & Alkali Workers Local 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 178 (1971) & making incorrect reference to § 8(a)).

67. 452 U.S. at 680-81.

68. *Id.* at 681.

suggestions."⁶⁹

The Court erred, however, in generalizing that the union's sole interest in bargaining over both the decision itself and the effects thereof is "job security."⁷⁰ A union given the opportunity to bargain with respect to a closing decision could offer concessions, information, and alternatives in an effort to forestall or halt the closing. A union, however, that was given only the opportunity to engage in good faith bargaining over the effects of a partial closing decision already made might choose instead to focus its efforts on getting the employer to provide pension benefits, severance pay, or retraining and reemployment programs for the discharged workers so as to minimize the impact of the termination of the operation.⁷¹ This would be especially true when labor costs had little or no effect on the closing decision, thus limiting the degree to which the union could make concessions.⁷²

Another curious aspect of the Court's opinion is its analysis of FNM's interest in having free rein to make its unilateral partial termination decision without having to bargain with the union over the issue. The Court never identified the specific interest in question, although it discussed in general terms management's need for speed, secrecy, and flexibility in decision making.⁷³ One might surmise that the Court believed that bargaining in this case would have been futile,⁷⁴ because the dispute was solely over the size of the management fee paid by Greenpark to FNM, and "the union had no control or authority of that fee" since it was paid by a third party, Greenpark.⁷⁵ At the same time, the Court may have thought that because of the importance of the management decision involved,⁷⁶ it was unnecessary to inquire whether bargaining would actually encroach on management interest; the potential for such an encroachment is enough.⁷⁷ Ultimately, the Court hinted that the real inquiry is whether the decision represents a "significant change" in the employer's operation.⁷⁸ What is the effect of the decision on the employer's business? The employer's duty to bargain will thus be determined by examining

69. *Id.*

70. *Id.*

71. See *Brockway Motor Trucks, Inc.*, 582 F.2d at 736.

72. The Court recognized that when labor costs are a major cause of the operation's unprofitability, management will have an incentive to approach labor voluntarily in an attempt to seek concessions and thereby restore the operation to a profitable status. 452 U.S. at 682. The Court also noted, however, that this will be true only if "the subject proposed for discussion is amenable to resolution through the bargaining process." *Id.* at 678 (emphasis added). In *Fibreboard*, on the other hand, the Court said that "although it is not possible to say whether a satisfactory resolution could be reached, national labor policy is founded upon the congressional determination that the chances are good enough to warrant subjecting such issues [i.e., those effecting cost savings by contracting out work] to the process of collective negotiation." 379 U.S. at 214.

73. 452 U.S. at 682-86.

74. The Court noted that management "may have no feasible alternative to closing, and even good faith bargaining over it may be both futile and cause the employer additional loss." *Id.* at 683 (footnote omitted). See also Comment, "Partial Terminations"—A Choice Between Equality and Economic Efficiency, 14 U.C.L.A. L. REV. 1089 (1967).

75. 452 U.S. at 687.

76. See *supra* notes 27-29 and accompanying text.

77. See *Brockway Motor Trucks, Inc.*, 582 F.2d at 741-50 (Rosenn, J., dissenting).

78. The absence of significant investment or withdrawal of capital is not determinative.

where the decision falls along the continuum between the decision in *First National* ("not unlike opening a new line of business or going completely out of business entirely")⁷⁹ and that in *Fibreboard* ("the replacement of employees in the existing bargaining unit with those of an independent contractor to do the same work under similar conditions of employment").⁸⁰ If this is in fact what the Court has proposed, then its balancing of interests approach will do little to clarify the confusion surrounding this issue. The Court has merely shifted the inquiry from the proper test to apply to the proper factors to consider in applying its balancing test.

The Court appears to have incorporated in the application of its balancing of interests test a per se rule that an employer will never have a duty to bargain over a decision to terminate part of its operation. A per se rule may be the result of the Court's opinion, because the benefit to the collective bargaining process that would come from the union's participation in the bargaining process would always be, at least in the Court's view, negligible, since the union's interest in such a decision would always be to protect the job security of its employee-members. Management, on the other hand, has an important interest in making its business decisions, and that interest would be encroached upon without corresponding benefit if it were required to bargain with the union about the decision before making it. Such a per se rule, of course, furthers the Court's stated objective of reducing the confusion existing between the Board and the courts of appeal. But the Court, apparently not satisfied with such a simple rule, chose to fashion a balancing test indicating how that test is to be applied in cases involving similar types of decisions, such as the decision to relocate and the decision to subcontract out work.⁸¹

Finally, the balancing approach employed by the Court also appears to be inconsistent with its "affect" analysis introduced in *Teamsters Union v. Oliver*.⁸² In that case a collective bargaining agreement was negotiated in the trucking industry which established a minimum rental that carriers would pay to truck owners who drove their own vehicles as independent contractors in place of a carrier's own employee-drivers. Although the Court did not decide whether the owner-drivers were "employees" within the meaning of the Act,⁸³ it did hold that the minimum rental fee was a mandatory subject of bargain-

Rather, the important question is whether the decision represented a significant change in the scope of the operations. 252 U.S. at 688.

79. *Id.*

80. 379 U.S. at 215.

81. Until now, the Board and the courts had treated partial termination, subcontracting, and relocation decisions in a similar manner. See Murphy, *supra* note 34, at 15-19. But in *First National* the Supreme Court "intimate[d] no view as to other types of management decisions, such as plant relocations, sales, other kinds of subcontracting, automation, etc., which are to be considered on their particular facts." 452 U.S. at 686 n.22. Arguably, the balancing approach is to be applied to at least those types of management decisions. The Court, however, implied that the interests considered in each application will vary depending on the particular situation involved. Thus that the Court did not intend to establish a per se rule that an employer never has a duty to bargain over a partial closing decision is clear.

82. 358 U.S. 283 (1959).

83. *Id.*

ing, because it was integrally related to the establishment of a stable wage structure for clearly covered employee-drivers, and therefore "affected" the "terms and conditions" of the latter group's employment.⁸⁴

The Court tacitly adopted this "affect" doctrine as one of the bases for its holding in *Fibreboard*.⁸⁵ It modified the doctrine slightly in *Allied Chemical Workers v. Pittsburgh Plate Glass Co.*,⁸⁶ in which it held that the employer did not have a duty to bargain over retirees' pension benefits because they were outside the scope of the employment relationship between management and the *existing* employees,⁸⁷ and because the question did not *vitaly* affect the terms and conditions of employment of the currently active employees.⁸⁸

On the other hand, the balancing of interests approach adopted by the Court in *First National* arguably can be reconciled with the Court's "affect" doctrine.⁸⁹ The balancing approach can be viewed as a supplementary test designed further to limit statutorily mandated bargaining over management decisions that fall outside the scope of the employment relationship—the termination of employment. Mandatory bargaining would thus be limited to those decisions in which the benefit to the collective bargaining process from the improved flow of information in the decision-making process offset the burden that such a duty would place on management's need to make such decisions freely.⁹⁰ In sum, the Court, through its balancing test, may have created an *additional* "safeguard" to protect management's autonomy in making decisions outside the direct employer-employee relationship.

The Supreme Court's decision in *First National* reached a pragmatic result. The employer, FNM, decided to terminate its Greenpark operation solely because the reduced management fee made the contract unprofitable, a cause wholly unrelated to FNM's relationship with its Greenpark employees. No doubt the Court was concerned that if an employer is held to have a duty to bargain about such a decision merely because the union could offer concessions and alternatives that would restore the Greenpark contract to a profita-

84. *Id.* at 294-95.

85. 379 U.S. at 212-13. The Court noted in *Fibreboard* that the only difference between the situation there and the one faced by the Court in *Oliver* was that "the work of the employees in the bargaining unit was let out piecemeal in *Oliver*, whereas here the work of the entire unit has been contracted out." *Id.* at 213.

86. 404 U.S. 157 (1971).

87. *Id.* at 163-71. Specifically, the Court found that the retired workers were not "employees" within the meaning of the Act. Section 2(3) of the Act defines the term "employee" to include "any employee, and [it] shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise . . ." 29 U.S.C. § 152(3) (1976).

88. 404 U.S. at 182.

89. The phrase "affect doctrine" refers to the Court's analysis in *Oliver*, as modified in *Allied Chemical Workers* to include only those matters that "vitaly affect" a term of condition of employment. See *supra* notes 84-88 and accompanying text.

90. The Court in *First National* expressly noted that it was addressing a question involving only one of the three general types of management decisions—one having as its focus the economic profitability of the operation, yet also having a direct impact on employment since layoffs are an unavoidable by-product of the decision. 452 U.S. at 677. Because of management's need to be free from the constraints of the bargaining process to the extent necessary to run a profitable business, bargaining about such a decision will be required only when justified by more significant countervailing interests. *Id.* at 678-79.

ble status, then no economically motivated management decision would be beyond the duty to bargain. Such a result would be untenable in a free enterprise system in view of management's need for freedom and certainty in its decision-making process.⁹¹ The Court agreed to consider *First National* with the stated intention of settling the disagreement between the Board and the courts of appeal on the duty to bargain over decisions that are motivated solely by economic concerns.⁹² The Court failed to do so, however, because it adopted a balancing test that weighs dubious interests of uncertain definition⁹³ to reach what might be a per se rule that an employer has no duty to bargain about an economically motivated partial termination decision.⁹⁴ The Court then qualified that apparent rule and in dicta cast further doubt on principles traditionally applied by the Board, the courts of appeal, and even the Supreme Court in similar cases.⁹⁵ In sum, though the narrow holding of *First National Maintenance Corp. v. NLRB* is a correct and pragmatic one, the Court failed in its primary task of clarifying a very muddled area of the law. Its confused application of a vague balancing of interests test is more likely to distort than to focus the issue.⁹⁶

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91. The Court appears to have placed a premium on management's need for unencumbered decision-making powers if it is to run a profitable business. *Id.*

92. *See supra* note 58 and accompanying text.

93. *See supra* notes 63-80 and accompanying text.

94. *See supra* notes 71-88 and accompanying text.

95. *See supra* notes 82-90 and accompanying text.

96. For the Board's first application of the Court's decision in *First National*, see Bob's Big Boy Family Restaurants, a Division of Marriott Corp., 264 N.L.R.B. No. 178, 111 L.R.R.M. 1354 (Sept. 30, 1982). The Board seemed to read *First National* very narrowly when it concluded that a restaurant supplier's subcontracting of its shrimp packaging operation did not amount to a partial closing and that the supplier, therefore, had a duty to bargain.