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# To Bargain or Not to Bargain: A New Chapter in Work Relocation Decisions\*

B. Glenn George\*\*

An employer's decision to relocate bargaining unit work, whether involving only a few employees or an entire plant, traditionally has been considered an appropriate subject for bargaining by the National Labor Relations Board.<sup>1</sup> With few exceptions, the Board has required bargaining regardless of the employer's motivation. Thus, the duty to bargain was "well settled,"<sup>2</sup> whether the employer was relocating to avoid unionization,<sup>3</sup> to reduce expenses,<sup>4</sup> or to improve production at a different facility.<sup>5</sup> An employer's refusal to bargain about relocation was an unfair labor practice under section 8(a)(5) of the National Labor Relations Act (NLRA).<sup>6</sup>

In the recent decision of *Otis Elevator Co. (Otis II)*,<sup>7</sup> however, the Board abandoned this implicit per se approach and instead developed a threshold test for determining whether an employer must bargain about an economically motivated work relocation decision.<sup>8</sup> More importantly, *Otis II* was the Board's first acknowledgment that *First National Maintenance Corp. v. NLRB (FNM)*,<sup>9</sup> a 1981 Supreme Court decision, applied to this issue. In *FNM*, the Court created a balancing test, requiring collective bargaining only in those cases in which the benefit of bargaining for labor-management relations and the collective

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\*\* Assistant Professor of Law, College of William and Mary, Marshall-Wythe School of Law.

1. See *infra* notes 70-91 and accompanying text.

2. Tocco Div. of Park-Ohio Indus., Inc., 257 N.L.R.B. 413, 413 (1981), *enforced*, 702 F.2d 624 (6th Cir. 1983).

3. See cases cited *infra* note 46.

4. See, e.g., Tocco Div. of Park-Ohio Indus., Inc., 257 N.L.R.B. at 413.

5. See, e.g., *Otis Elevator Co. (Otis I)*, 255 N.L.R.B. 235 (1981).

6. See *Los Angeles Marine Hardware Co.*, 235 N.L.R.B. 720 (1978), *enforced*, 602 F.2d 1302 (9th Cir. 1979).

7. 269 N.L.R.B. No. 162, 115 L.R.R.M. (BNA) 1281 (1984).

8. See *infra* notes 92-113 and accompanying text.

9. 452 U.S. 666 (1981).

bargaining process outweighs the concomitant burden placed on the conduct of the employer's business.<sup>10</sup> Although *FNM* involved a partial closure<sup>11</sup> rather than relocation, the Board correctly recognized that *FNM* governs such related types of economically motivated decisions, yet inexplicably refused to apply the balancing test mandated by the Court.<sup>12</sup>

Until *Otis II*, the Board apparently was determined to limit *FNM* to partial closure cases,<sup>13</sup> irrespective of the seemingly broader language of the Court's decision. Following reconstitution by a new presidential administration,<sup>14</sup> however, the Board

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10. See *infra* notes 52-69 and accompanying text. The *FNM* Court was concerned only about nondiscriminatory, economically motivated decisions. *FNM*, 452 U.S. at 680. Partial closure or work relocation decisions motivated by antiunion animus present separate issues under § 8(a)(3) of the National Labor Relations Act, 29 U.S.C. § 158(a)(3) (1982), that are beyond the scope of this Article. See *Textile Workers Union of Am. v. Darlington Mfg. Co.*, 380 U.S. 263 (1965).

11. See *FNM*, 452 U.S. at 680.

12. See *infra* notes 107-43 and accompanying text.

13. See *infra* notes 87-91 and accompanying text.

14. The original opinion in *Otis I* held that the employer was obligated to bargain about its relocation decision. 255 N.L.R.B. at 236. The *Otis I* decision was issued on March 25, 1981, by Members Fanning, Jenkins, and Zimmerman, all appointees of former Democratic President Jimmy Carter. The terms of Members Fanning and Jenkins expired in December 1982 and August 1983, respectively. When the Supplemental Decision was published in *Otis II* on April 6, 1984, Chairman Dotson and Members Hunter and Dennis had been appointed by Republican President Ronald Reagan.

Alterations in the composition of the National Labor Relations Board by new presidential administrations often trigger reversals of precedent and changes of philosophy and direction. The Board consists of five members, including the chairman, appointed for staggered five-year terms by the President, subject to Senate confirmation. National Labor Relations Act (NLRA) § 3(a), 29 U.S.C. § 153(a) (1982). A President generally will have the opportunity at some point in his or her administration to appoint a majority of the Board's members. The election of President Dwight D. Eisenhower in November 1952 resulted in the first Republican administration since the creation of the Board in 1935. Following President Eisenhower's third Board appointment in March 1954, the agency reconsidered and reversed a number of the Board's precedents. See, e.g., *F. McCulloch & T. Bornstein, The National Labor Relations Board* 60-62 (1974). Similarly, the Kennedy-Johnson Board altered the Board's direction again in the 1960's. See, e.g., *Fibreboard Paper Prods. Corp. (Fibreboard II)*, 138 N.L.R.B. 550 (1962) (reversing *Fibreboard I*, 130 N.L.R.B. 1558 (1961)), *enforced*, 322 F.2d 411 (D.C. Cir. 1963), *aff'd*, 379 U.S. 203 (1964).

Other recent reversals of the current Reagan Board include *Gourmet Foods, Inc.*, 270 N.L.R.B. No. 113, 116 L.R.R.M. (BNA) 1105 (1984) (overruling *Conair Corp.*, 261 N.L.R.B. 1189 (1982)); *Rossmore House*, 269 N.L.R.B. No. 198, 116 L.R.R.M. (BNA) 1025 (1984) (overruling *PPG Indus., Inc.*, 251 N.L.R.B. 1146 (1980)); *Milwaukee Spring Div. of Illinois Coil Spring Co. (Milwaukee Spring II)*, 268 N.L.R.B. No. 87, 115 L.R.R.M. (BNA) 1065 (1984) (re-

belatedly accepted its duty to adapt *FNM* to the issue of relocation decision bargaining. The four Board members<sup>15</sup> participating in the consideration of *Otis II* agreed that the employer's decision to relocate unit work in order to consolidate duplicative research efforts and update its technology was not a mandatory subject of bargaining. The Board was unable to agree, however, on the appropriate analysis for reaching that result. Only one member attempted a facsimile of the *FNM* balancing test. The remaining Board members, in two separate opinions, created additional threshold tests that neither comply with *FNM* nor provide a consistent approach for future application.<sup>16</sup>

*FNM*, to be sure, inspired immediate and extensive criticism.<sup>17</sup> Although a more principled, or at least more predictable, approach might be preferable to the balancing test

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versing *Milwaukee Spring I*, 265 N.L.R.B. 206 (1982)); *Olin Corp.*, 268 N.L.R.B. No. 86, 115 L.R.R.M. (BNA) 1056 (1984) (overruling *Propco, Inc.*, 263 N.L.R.B. 136 (1982)); *United Technologies Corp.*, 268 N.L.R.B. No. 83, 115 L.R.R.M. (BNA) 1049 (1984) (overruling *General Am. Transp. Corp.*, 228 N.L.R.B. 808 (1977)); *Meyers Indus., Inc.*, 268 N.L.R.B. No. 73, 115 L.R.R.M. (BNA) 1025 (1984) (overruling *Alleluia Cushion Co.*, 221 N.L.R.B. 999 (1975)).

15. A vacancy existed on the Board at the time of the *Otis II* decision.

16. See *infra* notes 107-40 and accompanying text.

17. See, e.g., Gacek, *The Employer's Duty to Bargain on Termination of Unit Work*, 32 LAB. L.J. 699 (1981); Harper, *Leveling the Road from Borg-Warner to First National Maintenance: The Scope of Mandatory Bargaining*, 68 VA. L. REV. 1447 (1982); Kohler, *Distinctions Without Differences: Effects Bargaining in Light of First National Maintenance*, 5 INDUS. REL. L.J. 402 (1983); Note, *The Supreme Court, 1980 Term, Labor Law—Scope of Mandatory Bargaining Under the NLRA*, 95 HARV. L. REV. 91, 329 (1981) [hereinafter cited as Note, *The Supreme Court, 1980 Term*]; Note, *Labor Law—A Balancing of Interests Test Applied to the Duty to Bargain About a Partial Closing Decision: First National Maintenance Corp. v. NLRB*, 61 N.C.L. REV. 365 (1983) [hereinafter cited as Note, *A Balancing of Interests Test*]; Note, *Collective Bargaining Over Plant Relocation Decisions: Let's Make a Deal*, 18 NEW ENG. L.R. 715 (1983) [hereinafter cited as Note, *Let's Make a Deal*]; Note, *Employer's Duty to Bargain with Respect to Partial Termination of Business: First National Maintenance Corp. v. NLRB*, 36 SW. L.J. 793 (1982) [hereinafter cited as *Southwestern Note*]; Note, *Enforcing the NLRA: The Need for a Duty to Bargain over Partial Plant Closings*, 60 TEX. L. REV. 279 (1982); Note, *Labor Law—An Employer's Decision to Terminate Partially a Business Operation Is Not a Mandatory Subject of Bargaining*, 56 TUL. L. REV. 1065 (1982) [hereinafter cited as Note, *An Employer's Decision to Terminate*]; Comment, *Job Security, Managerial Prerogatives, and First National Maintenance*, 31 BUFFALO L. REV. 509 (1982); Comment, *Labor Law—The Employer's Duty to Bargain over a Decision to Close Part of its Business*, 12 MEM. ST. U.L. REV. 185 (1981); Comment, *Labor Law: An Employer's Duty to Bargain Concerning the Decision to Terminate Part of a Business*, 34 U. FLA. L. REV. 292 (1982) [hereinafter cited as *Florida Comment*].

selected by the Court,<sup>18</sup> this Article is not intended to add to the wealth of literature evaluating the wisdom of the *FNM* result. Certain limitations of the *FNM* decision will inevitably be reflected in the assessment of *Otis II*; this analysis, however, is based on the premise that *FNM* represents the current state of the law. Given the Court's infrequent consideration of this area in the past,<sup>19</sup> the Board's interpretation of *FNM* will likely govern employer's actions for the foreseeable future.<sup>20</sup> Consequently, following a brief statutory and case law history of the employer's duty to bargain about work relocation decisions, this Article will examine the three opinions in *Otis II*. Next, this Article will propose a methodology for applying the *FNM* balancing test and then apply it to the relocation situation. The purpose of this discussion is both to question the Board's substitution of its own tests for that required by *FNM* and to offer a formulation for application of the *FNM* test.

## I. HISTORICAL PERSPECTIVE

### A. STATUTORY HISTORY

The employer's duty to bargain with the collective bargain-

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18. See Harper, *supra* note 17, at 1462-81; Note, *A Balancing of Interests Test*, *supra* note 17, at 377; Note, *Let's Make a Deal*, *supra* note 17, at 739; Southwestern Note, *supra* note 17, at 805; Florida Comment, *supra* note 17, at 303; see also Comment, "Partial Terminations"—A Choice Between Bargaining Equality and Economic Efficiency, 14 U.C.L.A. L. REV. 1089 (1967) (analyzing factors to consider when determining if a partial closing decision is a mandatory subject of bargaining).

19. The Court's first consideration of mandatory bargaining about management decisions of this type occurred in 1964 in *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203 (1964). See *infra* notes 37-51 and accompanying text. *FNM* was not decided until seventeen years later in 1981.

20. The Board was given the "primary task" of determining an employer's bargaining obligation under the NLRA. *Ford Motor Co. v. NLRB*, 441 U.S. 488, 495 (1979). The Board has therefore maintained a policy of nonacquiescence with respect to circuit court holdings with which it disagrees. In other words, the Board considers itself bound only by Supreme Court precedent. See *Insurance Agents' Int'l Union*, 119 N.L.R.B. 768, 773 (1957), *enforced*, 260 F.2d 736 (D.C. Cir. 1958), *aff'd*, 361 U.S. 477 (1959) ("It has been the Board's consistent policy for itself to determine whether to acquiesce in the contrary views of a circuit court of appeals or whether, with due deference to the court's opinion, to adhere to its previous holding until the Supreme Court of the United States has ruled otherwise."); accord *Iowa Beef Packers, Inc.*, 144 N.L.R.B. 615, 616 (1963). When the Board disagrees with the court of appeals, the circuit court's holding is applied on remand "as the law of [the present] case only." *Hendricks County Rural Elec. Membership Corp.*, 247 N.L.R.B. 498, 498 (1980). Consequently, even if the circuit courts of appeals were to dispute the Board's *Otis II* analysis, the Board may continue to use its approach until reversed by the Supreme Court.

ing representative chosen by the employees, now found in section 8(a)(5), was imposed by the Wagner Act as part of the original National Labor Relations Act (NLRA) enacted in 1935.<sup>21</sup> Although the legislative history leaves no doubt as to the importance of collective bargaining in the scheme of the NLRA,<sup>22</sup> it provides little guidance for determining the scope of the employer's bargaining obligation. In response to concerns raised by the Board's regulation of bargaining behavior under the predecessor of section 8(a)(5),<sup>23</sup> Congress attempted in the 1947 amendments to the NLRA to define the duty to bargain.<sup>24</sup> In its proposed form, section 8(d) limited collective bargaining

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21. Wagner Act, ch. 372, § 8(5), 49 Stat. 449, 453 (1935) (current version at 29 U.S.C. § 158(a)(5) (1982)). That obligation, now found in § 8(a)(5), was stated in the negative: an employer acts unlawfully, or commits an "unfair labor practice," by "refus[ing] to bargain collectively with the representative of his employees." Such a duty gave substance to the affirmative right granted to employees in § 7 of the Act "to bargain collectively through representatives of their own choosing." The importance of the employer's duty to bargain was emphasized by Senator Wagner, the sponsor of the legislation:

[T]he right of workers to bargain collectively through representatives of their own choosing must be matched by the correlative duty of employers to recognize and deal in good faith with these representatives. The Government itself is held up to ridicule when the elections which it supervises are rendered illusory by failure to acknowledge their results.

79 CONG. REC. 7571 (1935), *reprinted in* 2 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935, at 2321, 2336 (1949) [hereinafter cited as NLRA HISTORY]. The Senate report later characterized the employees' right to bargain collectively as a "mere delusion" in the absence of a corresponding duty on the part of the employer. S. REP. NO. 573, 74th Cong., 1st Sess. 12 (1935), *reprinted in* 2 NLRA HISTORY, *supra*, at 2300, 2312.

22. See, e.g., *Hearings on S. 1958 Before the Senate Comm. on Education and Labor*, 74th Cong., 1st Sess. 43 (1935) (statement of Sen. Wagner), *reprinted in* 1 NLRA HISTORY, *supra* note 21, at 1373, 1419; *Hearings on S. 2926 Before the Senate Comm. on Education and Labor*, 73d Cong., 2d Sess. 8 (1934) (statement of Sen. Wagner), *reprinted in* 1 NLRA HISTORY, *supra* note 21, at 27, 38. The importance of collective bargaining is further reflected in the Act's preamble. See NLRA § 1, 29 U.S.C. § 151 (1982).

23. See H.R. REP. NO. 245, 80th Cong., 1st Sess. 71 (1947) (minority report), *reprinted in* NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 355, 362 (Senate Committee on Labor and Public Welfare reprint 1974) [hereinafter cited as LMRA HISTORY]; S. REP. NO. 105, 80th Cong., 1st Sess. 24 (1947), *reprinted in* LMRA HISTORY, *supra*, at 407, 430; H.R. REP. NO. 245, 80th Cong., 1st Sess. 19-23 (1947), *reprinted in* LMRA HISTORY, *supra*, at 292, 310-24.

24. Labor Management Relations Act, ch. 120, 61 Stat. 136 (1947) [hereinafter cited as LMRA]. The language of § 8(5) remained unchanged by the amendments although the section was redesignated § 8(a)(5). The LMRA also added a corresponding bargaining duty for unions in § 8(b)(3). See LMRA, ch. 120, sec. 101, § 8(b)(3), 61 Stat. 136, 141 (1947) (codified at 29 U.S.C. § 158(b)(3) (1982)).

to five categories of subjects.<sup>25</sup> Congress rejected such specificity, however, in favor of more general language requiring bargaining over "wages, hours, and other terms and conditions of employment."<sup>26</sup>

The legislative histories of sections 8(a)(5) and 8(d) are of little value in determining whether an employer's decision to relocate bargaining unit work is a "term or condition" of em-

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25. The House bill introduced designated the subjects of bargaining as:

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

H.R. 3020, 80th Cong., 1st Sess. § 2(11) (1947), *reprinted in* LMRA HISTORY, *supra* note 23, at 158, 166-67; *see* H.R. REP. NO. 245, 80th Cong., 1st Sess. 22-23 (1947), *reprinted in* LMRA HISTORY, *supra* note 23, at 292, 313-14.

26. LMRA, ch. 120, sec. 101, § 8(d), 61 Stat. 136, 140 (1947) (codified at 29 U.S.C. § 158(d) (1982)). Section 8(d) provides in relevant part:

(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 conditions of employment, or the negotiation of an agreement, or any questions arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided*, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later. . . .

ployment.<sup>27</sup> Rather than attempting an exhaustive definition, Congress intended "terms and conditions of employment" to be a flexible standard, subject to the changing circumstances and needs of labor and management.<sup>28</sup> The primary task of interpreting sections 8(a)(5) and 8(d), therefore, lies with the Board.<sup>29</sup> Although the Board's constructions are entitled to "considerable deference" from the courts,<sup>30</sup> the Supreme Court remains the ultimate interpreter of the statute.<sup>31</sup> Consequently, an analysis of the employer's duty to bargain begins

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27. The Supreme Court in *FNM* described references to plant closings in the legislative history as "inconclusive," 452 U.S. at 676 n.14, although the references that were made indicated that at least a complete closure was perceived as being beyond the scope of collective bargaining, see 70 CONG. REC. 7673 (1935) (statement of Sen. Walsh) ("No one can compel an employer to keep his factory open. . . . No one can keep an employer from closing down his factory and putting thousands of men and women on the street. So in dealing with this bill we have to recognize those fundamental things, and we have not gone into that domain."), reprinted in 2 NLRA HISTORY, *supra* note 21, at 2394; 79 CONG. REC. 9682 (1935) (statement of Sen. Griswold), reprinted in 2 NLRA HISTORY, *supra* note 22, at 3110. Specific references in the legislative history to work relocation are apparently absent.

28. The legislative reports recognize this flexibility:

This section attempts to limit narrowly the subject matters appropriate for collective bargaining. It seems clear that the definitions are designed to include collective bargaining concerning welfare funds, vacation funds, union hiring halls, union security provisions, apprenticeship qualifications, assignment of work, check-off provisions, *subcontracting of work*, and a host of other matters traditionally the subject matter of collective bargaining in some industries or in certain regions of the country. *The appropriate scope of collective bargaining cannot be determined by a formula; it will inevitably depend upon the traditions of an industry, the social and political climate at any given time, the needs of employers and employees, and many related factors.* What are proper subject matters for collective bargaining should be left in the first instance to employers and trade-unions and in the second place, to any administrative agency skilled in the field and competent to devote the necessary time to a study of industrial practices and traditions in each industry or area of the country, subject to review by the courts. It cannot and should not be strait-jacketed by legislative enactment.

H.R. REP. NO. 245, 80th Cong., 1st Sess. 71 (1947) (minority report) (emphasis added), reprinted in LMRA HISTORY, *supra* note 23, at 362; see also *FNM*, 452 U.S. at 675 ("Congress deliberately left the words 'wages, hours, and other terms and conditions of employment' without further definition, for it did not intend to deprive the Board of the power further to define those terms in light of specific industrial practices.").

29. *Ford Motor Co. v. NLRB*, 441 U.S. 488, 495 (1979); see *infra* note 59.

30. *Ford Motor Co.*, 441 U.S. at 495.

31. Cf. *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 506-07 (1979) (Court held actions of Board not within Board's jurisdiction as provided by the Act); *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 113 (1956) (Court reversed decision due to error by Board in determining applicable law).

more logically with an examination of *FNM* and the earlier Supreme Court decisions of *NLRB v. Borg-Warner Corp.*<sup>32</sup> and *Fibreboard Paper Products Corp. v. NLRB*.<sup>33</sup>

## B. THE JUDICIAL RESPONSE

### 1. Court Decisions Prior to *FNM*

The Supreme Court has directly addressed the scope of mandatory bargaining on only a few occasions since the passage of the Wagner Act in 1935. In *NLRB v. Borg-Warner Corp.*,<sup>34</sup> the Court affirmed the Board's division of bargaining issues into "mandatory" and "permissive" categories<sup>35</sup> but failed to suggest any standard for determining what subjects could be considered "mandatory" as constituting "terms and conditions of employment." At issue in the case were management's demands for a ballot clause requiring a secret employee vote on the company's last offer before the union could strike and a recognition clause identifying the union's local instead of the

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32. 356 U.S. 342 (1958).

33. See *supra* note 19. This Article does not address the well-established duty of the employer to bargain about the effects of such decisions on the employees. Such a duty was acknowledged by the Supreme Court in *FNM*, 452 U.S. at 677 n.15, and has been consistently imposed by both the Board and the lower courts, see, e.g., *NLRB v. Transmarine Navigation Corp.*, 380 F.2d 933, 939 (9th Cir. 1967); *Town & Country Mfg. Co.*, 136 N.L.R.B. 1022, 1026 (1962), enforced, 316 F.2d 846 (5th Cir. 1963).

34. 356 U.S. 342 (1958).

35. "Mandatory" subjects are those issues properly characterized under § 8(d) as "wages, hours, and other terms and conditions of employment," requiring both parties to bargain. 356 U.S. at 349. An employer's refusal to bargain about these subjects, or the unilateral implementation of a change concerning such subjects, is an unfair labor practice under § 8(a)(5). See *NLRB v. Katz*, 369 U.S. 736, 743 (1962). "Permissive" subjects, which are not conditions of employment under § 8(d), may be discussed by mutual agreement of the parties, but the insistence on such issues to the point of impasse violates the duty to bargain. *Borg-Warner*, 356 U.S. at 349.

The concept of "impasse" in labor law refers to the inability of the parties to reach an agreement after engaging in good faith negotiations. See *Taft Broadcasting Co.*, 163 N.L.R.B. 475, 478 (1967). Once an employer has bargained to impasse, it may legally make unilateral changes in working conditions consistent with its last offer to the union. *NLRB v. Katz*, 369 U.S. 736, 741-42 (1962). Factors considered by the Board in determining whether impasse has been reached include the parties' bargaining history, the parties' good faith, the length of negotiations, the significance of the issues about which the parties are unable to agree, and the understanding of each party as to the status of the negotiations. *Taft Broadcasting Co.*, 163 N.L.R.B. at 478. See generally 1 THE DEVELOPING LABOR LAW 634-39 (C. Morris 2d ed. 1983); Comment, *Impasse in Collective Bargaining*, 44 TEX. L. REV. 769 (1966) (discusses factors in considering whether an impasse exists and the significance of the impasse).

certified International as the bargaining representative. The Court merely asserted that the two proposals were not mandatory subjects of bargaining with little discussion of general principles applicable to the consideration of other bargaining issues.<sup>36</sup>

It was not until 1964 that the Supreme Court addressed the scope of mandatory bargaining in the context of economically motivated management decisions involving operational changes. In *Fibreboard Paper Products Corp. v. NLRB*,<sup>37</sup> the Court affirmed the Board's finding of a section 8(a)(5) violation<sup>38</sup> resulting from an employer's refusal to bargain about the decision to subcontract its maintenance work upon expiration of the collective bargaining agreement covering its maintenance employees.<sup>39</sup> The employer anticipated that the subcontracting would result in "substantial savings" in labor costs.<sup>40</sup> In sweeping language, the Court held that the words "terms and conditions of employment" in section 8(d) "plainly cover termination of employment which . . . necessarily results from the contracting out of work performed by members of the established bargaining unit."<sup>41</sup> The Court noted that requiring bargaining would promote the NLRA's "fundamental purpose" of encouraging peaceful settlement of disputes.<sup>42</sup> Moreover, the presence of subcontracting limitations in a significant number of collective bargaining agreements indicated the appropriateness of the issue as a subject of bargaining.<sup>43</sup> Despite its expansive language, however, the Court explicitly limited its decision to the specific type of subcontracting involved in the case, namely, the substi-

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36. *NLRB v. Borg-Warner Corp.*, 356 U.S. at 349-50.

37. 379 U.S. 203 (1964).

38. The procedural history of the case before the Board was much like that of *Otis II*, involving a reversal by the Board on reconsideration after a turnover in the Board's composition. See *supra* note 14. The original Board decision in *Fibreboard I*, 130 N.L.R.B. 1558 (1961), held that the employer had no duty to bargain about its decision to subcontract, a holding consistent with Board precedent at that time. See *Mahoning Mining Co.*, 61 N.L.R.B. 792, 803 (1945). *Fibreboard I* was decided by Members Rodgers, Leedom, Jenkins, and Fanning, with Member Fanning dissenting. Chairman McCulloch, appointed by President Kennedy in March 1961, 107 CONG. REC. 3113 (1961), replaced Member Jenkins. The Supplemental Decision in *Fibreboard II*, 138 N.L.R.B. 550 (1962), was issued on September 13, 1962, with Chairman McCulloch and Members Fanning, Leedom, and Brown forming the majority.

39. 379 U.S. at 206.

40. *Id.*

41. *Id.* at 210.

42. *Id.* at 210-11.

43. *Id.* at 211-12.

tution of one set of employees for another under similar working conditions.<sup>44</sup>

The majority opinion in *Fibreboard* offered few guidelines for distinguishing between mandatory and permissive bargaining subjects when evaluating relocation or other related types of management decisions.<sup>45</sup> As in *Borg-Warner*, the majority in *Fibreboard* used a definitional approach, simply asserting that subcontracting is "plainly" a "condition of employment" because termination of employment can result. Yet any partial closure, relocation or subcontracting decision would satisfy such a standard, despite the majority's explicit limitation to subcontracting. Such a definitional analysis seems of negligible value when dealing with a phrase as vague and open-ended as "condition of employment."<sup>46</sup>

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44. *Id.* at 215.

45. The confusion created by the majority's expansive language but limited holding was reflected in subsequent efforts to apply *Fibreboard* to other types of management decisions. The courts and the Board diverged almost immediately in their interpretation of the decision. Relying on the broad language of the *Fibreboard* majority, the Board generally held work relocation and partial closure decisions to be mandatory bargaining subjects. See, e.g., *Skaggs Drug Centers, Inc.*, 176 N.L.R.B. 737 (1969) (closing ice cream department); *Red Cross Drug Co.*, 174 N.L.R.B. 85 (1969) (closing one store in chain of drug stores), *enforced on other grounds*, 419 F.2d 1245 (7th Cir. 1969); *Drapery Mfg. Co.*, 170 N.L.R.B. 1706 (1968) (closing drapery production and installation division), *enforced in part on other grounds*, 425 F.2d 1026 (8th Cir. 1970); *Thompson Transp. Co.*, 165 N.L.R.B. 746 (1967) (closing truck terminal), *enforced in part on other grounds and remanded in part*, 406 F.2d 698 (10th Cir. 1969); *Ozark Trailers, Inc.*, 161 N.L.R.B. 561 (1966) (closure of one of employer's plants); *Gopher Aviation, Inc.*, 160 N.L.R.B. 1698 (1966) (terminating service department), *enforcement denied*, 402 F.2d 176 (8th Cir. 1968); *Weston & Brooker Co.*, 154 N.L.R.B. 747 (1965) (abolishing canteen-air-compressor position), *enforced per curiam*, 373 F.2d 741 (4th Cir. 1967); *M & A Electric Power Coop., Inc.*, 154 N.L.R.B. 540 (1965) (discontinuing "bushhog" operation); *Transmarine Navigation Corp.*, 152 N.L.R.B. 998 (1965) (closing Los Angeles terminal and relocating work), *remanded on other grounds*, 380 F.2d 933 (9th Cir. 1967); *Apex Linen Serv., Inc.*, 151 N.L.R.B. 305 (1965) (closing linen plant); *William J. Burns Int'l Detective Agency, Inc.*, 148 N.L.R.B. 1267 (1964) (terminating Omaha operations), *enforced in part on other grounds*, 346 F.2d 897 (8th Cir. 1965); *Royal Plating and Polishing Co.*, 148 N.L.R.B. 545 (1964) (closing one of two metal plating and polishing plants), *modified*, 152 N.L.R.B. 619 (1965) (supplemental decision), *enforcement denied and remanded on other grounds*, 350 F.2d 191 (3d Cir. 1965); cases cited *infra* note 85.

The appellate courts, however, tended to follow a more cautious approach, often adopting portions of Justice Stewart's analysis. See text accompanying notes 47-51; see, e.g., *NLRB v. Drapery Mfg. Co.*, 425 F.2d 1026, 1028 (8th Cir. 1970); *NLRB v. Transmarine Navigation Corp.*, 380 F.2d 933, 939 (9th Cir. 1967); *NLRB v. Royal Plating & Polishing Co.*, 350 F.2d 191, 195-96 (3d Cir. 1965); see also cases cited *infra* note 46.

46. The circuit courts of appeals, both before and after *Fibreboard*, were

Justice Stewart, disturbed by the broad language of the

equally unsuccessful in defining a standard to determine when a relocation decision was subject to mandatory bargaining. Often the circuit courts looked to the employer's underlying motivation. If there was evidence of antiunion animus in addition to the refusal to bargain, the courts usually upheld the Board's finding of a § 8(a)(5) violation. See, e.g., *NLRB v. Sea-Land Serv., Inc.*, 356 F.2d 955 (1st Cir. 1966), *enforcing* 146 N.L.R.B. 931 (1964), *cert. denied*, 385 U.S. 900 (1966); *Philadelphia Dress Joint Bd. v. NLRB*, 305 F.2d 825 (3d Cir. 1962), *enforcing* *Sidele Fashions, Inc.*, 133 N.L.R.B. 547 (1961); *NLRB v. Lewis*, 246 F.2d 886 (9th Cir. 1957), *enforcing in relevant part and remanding* *California Footwear Co.*, 114 N.L.R.B. 765 (1955); *NLRB v. Tredway*, 222 F.2d 719 (5th Cir. 1955) (per curiam), *enforcing* *Diaper Jean Mfg. Co.*, 109 N.L.R.B. 1045 (1954); *NLRB v. Gerity Whitaker Co.*, 137 F.2d 198 (6th Cir. 1942), *enforcing as modified* 33 N.L.R.B. 393 (1941), *cert. denied*, 318 U.S. 763 (1943).

The courts' reactions have been mixed, however, when the employer's relocation decision was based on economic considerations. In *NLRB v. Rapid Bindery, Inc.*, 293 F.2d 170 (2d Cir. 1961), *enforcing as modified* 127 N.L.R.B. 212 (1960), for example, the Second Circuit reversed the Board's finding of a § 8(a)(5) violation where the employer's decision to relocate was based on its inability to service its customers at its old facility. The decision was considered by the court to be "clearly within the realm of managerial discretion" and thus beyond the scope of the bargaining obligation. 293 F.2d at 176. Similarly, in *NLRB v. Transmarine Navigation Corp.*, 380 F.2d 933, 939 (9th Cir. 1967), *denying enforcement of* 152 N.L.R.B. 998 (1965), the Ninth Circuit refused to require bargaining when the employer relocated its harbor freight operation in order to continue servicing its principal customer.

In contrast, the Sixth Circuit has upheld the duty to bargain concerning relocation decisions based on economic factors in some contexts. In *Weltronic Co. v. NLRB*, 419 F.2d 1120 (6th Cir. 1969), *enforcing* 173 N.L.R.B. 235 (1968), *cert. denied*, 398 U.S. 938 (1970), the court, without discussing the company's motivation, affirmed the Board's finding of a § 8(a)(5) violation when the employer refused to bargain about any aspect of its decision to transfer part of the unit's work to its new plant in order to consolidate certain operations. *Weltronic* was later limited to its facts in *NLRB v. Acme Indus. Prods., Inc.*, 439 F.2d 40, 42 (6th Cir. 1971), in which the court rejected any "absolute" duty to bargain about an economically motivated relocation decision. Nonetheless, in *NLRB v. Production Molded Plastics, Inc.*, 604 F.2d 451 (6th Cir. 1979), *enforcing* 227 N.L.R.B. 776 (1977), the court upheld the Board's finding of a § 8(a)(5) violation based on an employer's refusal to bargain concerning a relocation decision following the loss of a major customer contract and the threatened reduction of its natural gas supply.

This mixed treatment by the circuit courts is evidenced in other cases as well. Compare, e.g., *NLRB v. International Harvester Co.*, 618 F.2d 85 (9th Cir. 1980) (employer decision to reorganize marketing and phase out fleet truck sales not subject to mandatory bargaining), *denying enforcement in relevant part of* 236 N.L.R.B. 712 (1978) and *NLRB v. Thompson Transp. Co.*, 406 F.2d 698 (10th Cir. 1969) (closure of terminal and relocation of remaining work, after loss of substantial portion of business, was not subject to bargaining), *denying enforcement in relevant part of* 165 N.L.R.B. 740 (1967) and *NLRB v. Royal Plating & Polishing Co.*, 350 F.2d 191 (3d Cir. 1965) (decision to close one of two plants was not mandatory bargaining subject), *denying enforcement of* 148 N.L.R.B. 545 (1964) with *Brockway Motor Trucks, Division of Mack Trucks, Inc. v. NLRB*, 582 F.2d 720 (3d Cir. 1978) (duty to bargain about decision to close one of truck sales and service facilities), *enforcing* 230

majority opinion, concurred.<sup>47</sup> He emphasized the limits of the Court's holding and proposed an approach that at least in part would be endorsed almost twenty years later by the *FNM* Court.<sup>48</sup> Justice Stewart divided management decisions into three categories. First, under his analysis, decisions focusing directly on working conditions or the "physical dimensions of [the] working environment," such as hours and production quotas, are well-established subjects of mandatory bargaining.<sup>49</sup> Other decisions of marginal or indirect impact on employees, such as advertising and financing, are just as obviously outside of the bargaining duty.<sup>50</sup>

The third category of decisions under Justice Stewart's analysis is comprised of those decisions that directly impact upon employees by eliminating jobs but involve the "core of entrepreneurial control," such as capital investment decisions and changes in the scope of the employer's operations. According to Justice Stewart these decisions do not involve employment conditions even though they could result in the termination of jobs. Thus, under Stewart's analysis, decisions "fundamental to the basic direction of a corporate enterprise" are excluded from the scope of bargaining imposed by sections 8(a)(5) and 8(d).<sup>51</sup>

## 2. *First National Maintenance*

In *FNM*,<sup>52</sup> a majority of the Supreme Court adopted Justice Stewart's three-part categorization of management decisions. *FNM* involved an employer's obligation to bargain about its decision to terminate one of its operations, generally characterized as a partial closure. First National Maintenance Corporation (FNM) supplied maintenance services to commercial facilities in exchange for reimbursement of labor costs plus a management fee.<sup>53</sup> FNM began its operations at the Greenpark Care Center, a nursing home, in April 1976 with a weekly fee of five hundred dollars. In November 1976, the fee was re-

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N.L.R.B. 1002 (1977) and *International Ladies' Garment Workers Union v. NLRB*, 463 F.2d 907 (D.C. Cir. 1972) (plant relocation was mandatory subject where scope of business was unaltered), *enforcing as modified* *McLoughlin Mfg. Corp.*, 182 N.L.R.B. 958 (1970).

47. Justice Stewart's concurrence was joined by Justices Douglas and Harlan. *Fibreboard*, 379 U.S. at 217 (Stewart, J., concurring).

48. See *FNM*, 452 U.S. at 676-77.

49. *Fibreboard*, 379 U.S. at 222 (Stewart, J., concurring).

50. *Id.* at 223 (Stewart, J., concurring).

51. *Id.* (Stewart, J., concurring).

52. 452 U.S. 666 (1981).

53. *Id.* at 668.

duced to two hundred and fifty dollars.<sup>54</sup> On July 25, 1977, FNM notified Greenpark of the termination of its maintenance service contract following Greenpark's refusal to restore the management fee to five hundred dollars.<sup>55</sup> The FNM employees working at Greenpark, represented by a union granted certification only four months earlier, were terminated on July 31.<sup>56</sup> The union charged FNM with violating sections 8(a)(1) and 8(a)(5) for the company's refusal to bargain about the termination decision.<sup>57</sup> The Administrative Law Judge (ALJ), in findings adopted by the Board, found FNM guilty of an unfair labor practice.<sup>58</sup> That decision was subsequently reversed by the Supreme Court.<sup>59</sup>

The *FNM* Court began its discussion of the duty to bargain by adopting the three part categorization of management decisions proposed by Justice Stewart in *Fibreboard*.<sup>60</sup> FNM's decision to terminate the Greenpark operations was considered in the third category of decisions, that is, those directly affecting the employees but involving a concern "wholly apart from the employment relationship."<sup>61</sup> For employer decisions in this category, the Court created a balancing test to determine the employer's bargaining obligation:

[In] view of an employer's need for unencumbered decisionmaking, bargaining over management decisions that have a substantial impact on the continued availability of employment should be required only if the benefit, for labor-management relations and the collective-bargaining process, outweighs the burden placed on the conduct of the business.<sup>62</sup>

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54. *Id.*

55. *Id.* at 669.

56. *Id.* at 669-70.

57. *Id.* at 670.

58. 242 N.L.R.B. 462, 462 (1979), *enforced*, 627 F.2d 596 (2d Cir. 1980), *rev'd*, 452 U.S. 666 (1981).

59. In reversing the Board's conclusion, the Supreme Court omitted any discussion of the judicial deference purportedly accorded the Board in interpreting the NLRA in general and § 8(d) in particular. Only two years before, in *Ford Motor Co. v. NLRB*, 441 U.S. 488 (1979), the Court engaged in a lengthy discussion of the "considerable deference" due the Board in determining mandatory subjects of bargaining. *Id.* at 495-98. The Court upheld the Board's conclusion in *Ford Motor Co.* that price increases for plant cafeteria and vending machine food required bargaining. *Id.* at 503.

60. 452 U.S. at 676-77; see *supra* notes 47-51 and accompanying text.

61. *FNM*, 452 U.S. at 677.

62. *Id.* at 679. The *FNM* Court reconciled the *Fibreboard* decision by focusing on the employer's motivation in *Fibreboard* for the subcontracting decision. Because the decision was based on a desire to reduce labor costs, a subject clearly "suitable" to resolution through bargaining, the *FNM* Court

Applying this test, the Court determined that "the harm likely to be done to an employer's need to operate freely in deciding whether to shut down part of its business purely for economic reasons outweighs the incremental benefit that might be gained through the union's participation in making the decision." FNM therefore was not required to bargain about its partial closure decision.<sup>63</sup>

The most disturbing and confusing aspect of the *FNM* decision was the Court's apparent adoption of a case-by-case balancing test, followed by its application of the test in such a way as to create a *per se* rule of not requiring bargaining for partial closure decisions.<sup>64</sup> Instead of considering the *actual* benefits for the union or burdens upon FNM in the circumstances presented, the Court focused on abstract speculation concerning *possible* benefits and burdens.<sup>65</sup> The Court asserted, for example, that an employer planning to close part of its operations may need to move quickly and confidentially to avoid financial losses, yet there is no indication that FNM had to move quickly or confidentially in its decision to close its Greenpark operations.<sup>66</sup>

Only after the Court rejected any duty to bargain about the partial closure decision did it return to the specific facts of the case to "illustrate the limits" of its holding.<sup>67</sup> The *FNM* Court restricted its rejection of mandatory bargaining to economically motivated partial closure decisions,<sup>68</sup> explicitly denying that its conclusion applied to other similar types of management decisions, such as plant relocations.<sup>69</sup>

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reasoned that in *Fibreboard* the Court had "implicitly engaged" in the *FNM* analysis. *Id.* at 679-80.

63. *Id.* at 686.

64. This point has been noted by numerous commentators. See, e.g., Note, *The Supreme Court, 1980 Term, supra* note 17, at 334 ("Finally, the Court constructed a *per se* rule by calculating burdens and benefits across widely divergent industries and collective bargaining configurations."); Note, *A Balancing of Interests Test, supra* note 17, at 365-66 ("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 adopt."); Note, *An Employer's Decision to Terminate, supra* note 17, at 1079 (noting the Court's "apparent statement of a *per se* rule"); Florida Comment, *supra* note 17, at 302 (observing that the Court "may have unwittingly created a *per se* rule of its own").

65. See *FNM*, 452 U.S. at 681-86.

66. See *id.* at 682-83.

67. See *id.* at 687-88.

68. See *id.* at 687-88.

69. See *id.* at 686 n.22. ("In this opinion we of course intimate no view as to other types of management decisions, such as plant relocations, sales, other

## C. THE NLRB

Prior to its decision in *Otis II*, the Board had relied on the *FNM* Court's limited holding to avoid the application of the *FNM* balancing test to relocation decisions<sup>70</sup> and to continue a long,<sup>71</sup> although not entirely consistent,<sup>72</sup> line of Board authority mandating relocation decision bargaining irrespective of the

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kinds of subcontracting, automation, etc., which are to be considered on their particular facts.").

In selecting authority to cite as examples of the types of management decisions not encompassed within its holding, the Court, interestingly, only used cases that held the employer had a duty to bargain. See, e.g., *International Ladies' Garment Workers Union v. NLRB*, 463 F.2d 907 (D.C. Cir. 1972) (employer required to bargain about decision to relocate to another state motivated by dissatisfaction with the contract work week and seniority provisions, characterized by the court as "labor costs"); *Weltronic Co. v. NLRB*, 419 F.2d 1120 (6th Cir. 1969) (transfer of wiring and electronic assembly work to new plant located three miles away, where no unit employees were laid off as a result but fourteen unit employees were already on layoff status, held to be a mandatory subject of bargaining), *cert. denied*, 398 U.S. 938 (1970); *Dan Dee W. Virginia Corp.*, 180 N.L.R.B. 534 (1970) (employer had a duty to bargain about decision to change delivery system from driver-salesmen employees to independent distributors); *Young Motor Truck Serv., Inc.*, 156 N.L.R.B. 661 (1966) (dictum) (company was obligated to bargain about decision to sell part of its business and transfer the remainder but no violation found since union was given the opportunity to bargain). The Court could certainly have selected from other appellate and Board authority rejecting the duty to bargain about relocation decisions. See, e.g., cases cited *supra* note 46 and *infra* note 80. The use of the above cases may have been intended to emphasize the narrow limit of the Court's holding with respect to partial closures as well as to suggest implicit approval for subjecting the employer to the duty to bargain about relocation decisions in at least some circumstances.

70. See cases cited *infra* note 91.

71. See *infra* notes 72-79 & 82-83 and accompanying text.

72. See *infra* note 80. The Board's early decisions requiring bargaining about work relocation decisions involved circumstances in which the employer was motivated by antiunion animus. See, e.g., *Industrial Fabricating, Inc.*, 119 N.L.R.B. 162, 172 (1957), *enforced per curiam sub nom.* *NLRB v. Mackneish*, 272 F.2d 184 (6th Cir. 1959); *California Footwear Co.*, 114 N.L.R.B. 765, 792 (1955); *Tennessee-Carolina Transp., Inc.*, 108 N.L.R.B. 1369, 1370 (1954), *enforcement denied per curiam*, 226 F.2d 743 (6th Cir. 1955); *Mount Hope Finishing Co.*, 106 N.L.R.B. 480, 495 (1953), *enforcement denied*, 211 F.2d 365 (4th Cir. 1954); *In re Howard Rome*, 77 N.L.R.B. 1217, 1218-19 (1948). There is some indication that the Board may have initially recognized an employer's right to relocate work when the decision was based on economic considerations. See, e.g., *Diaper Jean Mfg. Co.*, 109 N.L.R.B. 1045, 1055 (1954) (the Trial Examiner noted that the Act was not intended to interfere with the employer's "right to move his business anywhere he pleases"), *enforced sub nom.* *NLRB v. Tredway*, 222 F.2d 719 (5th Cir. 1955). See generally Murphy, *Plant Relocation and the Collective Bargaining Obligation*, 59 N.C.L. REV. 5, 7-8 (1980) (For its first 27 years, the Board usually found a § 8(a)(5) violation in operational changes only when an antiunion motive could be inferred. "[N]o clear theory" on economically motivated changes emerged because the Board

employer's motivation. As early as 1941, in *Gerity Whitaker Co.*<sup>73</sup> and *Brown-McLaren Manufacturing Co.*,<sup>74</sup> an employer's failure to bargain about the decision to relocate unit work was held unlawful. In *Gerity Whitaker*, an employer transferred work to a newly created company to avoid dealing with the union representing employees at its old facility.<sup>75</sup> The Board's decision to require bargaining was probably influenced by the antiunion animus involved. A few months later in *Brown-McLaren*, however, the Board suggested that a duty to bargain existed in the context of an economically based relocation decision.<sup>76</sup> Although not defining the extent of the employer's bargaining obligation under these circumstances, the Board held that "[w]hatever duty"<sup>77</sup> existed was satisfied by the employer's attempt to negotiate a wage reduction to avoid the transfer of work.<sup>78</sup> That obligation ended, however, once the company had committed itself to the relocation by acquiring the new plant site and initiating construction.<sup>79</sup>

Following these early indications of an intention to require bargaining in all relocation decision cases, the Board waived in a series of confusing holdings issued prior to 1962.<sup>80</sup> In that

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failed to distinguish between the effect of a change and the decision to change.).

73. 33 N.L.R.B. 393 (1941), *enforced as modified per curiam*, 137 F.2d 198 (6th Cir. 1943), *cert. denied*, 318 U.S. 763 (1943). The bargaining obligation considered in *Gerity Whitaker* and other cases prior to 1947 was based on § 8(5), the predecessor of § 8(a)(5). See *supra* note 23 and accompanying text.

74. 34 N.L.R.B. 984 (1941).

75. 33 N.L.R.B. at 398-407.

76. 34 N.L.R.B. at 1006. The company was losing money on goods produced for one of its primary customers due to low production quotas and high wages imposed by the parties' first collective bargaining agreement entered into on March 3, 1937. *Id.* at 998-99. The company decided to relocate in order to pay lower wages and therefore reduce production costs.

77. *Id.* at 1006.

78. *Id.*

79. *Id.* at 1006-07.

80. Compare *In re Howard Rome*, 77 N.L.R.B. 1217, 1219-20 (1948) (Board held employer had violated duty to bargain about effects of decision to relocate in another city to avoid bargaining obligation, with no mention of duty to bargain about decision itself) and *Brown Truck & Trailer Mfg. Co.*, 106 N.L.R.B. 999, 1000 (1953) (duty to bargain only about effects of relocation decision) and *Sidele Fashions, Inc.*, 133 N.L.R.B. 547, 553 (1961) (employer violated duty to bargain only by failure to give notice to union of relocation), *enforced sub nom.* *Philadelphia Dress Joint Bd. v. NLRB*, 305 F.2d 825 (3d Cir. 1962) with *California Portland Cement Co.*, 101 N.L.R.B. 1436, 1440 (1952) (duty to bargain about relocation decision), *supplemented*, 103 N.L.R.B. 1375 (1953) and *Industrial Fabricating, Inc.*, 119 N.L.R.B. 162, 172 (1957) (employer had a duty to bargain about decision to temporarily shut down and relocate work when intent was to discourage union activity). See also Note, *Duty to Bargain: Sub-*

year, the Board reversed its earlier holdings rejecting the employer's obligation to bargain about subcontracting,<sup>81</sup> a related type of management decision, and mandated bargaining in two subcontracting decision cases, *Town & Country Manufacturing Co.*<sup>82</sup> and *Fibreboard Paper Products Corp. (Fibreboard II)*.<sup>83</sup> After the Supreme Court's affirmance of *Fibreboard II*,<sup>84</sup> the Board generally was consistent in requiring bargaining over relocation decisions as well,<sup>85</sup> relying on the broad language of

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*contracting, Relocation, and Partial Termination*, 55 GEO. L.J. 879, 902-06 (1967) (noting the inconsistent results in the cases cited above).

81. See, e.g., *Fibreboard Paper Prods. Corp. (Fibreboard I)*, 130 N.L.R.B. 1558 (1961); *Mahoning Mining Co.*, 61 N.L.R.B. 792 (1945).

82. 136 N.L.R.B. 1022 (1962), *enforced*, 316 F.2d 846 (5th Cir. 1963).

83. 138 N.L.R.B. 550 (1962), *enforced sub nom. East Bay Union of Machinists v. NLRB*, 322 F.2d 411 (D.C. Cir. 1963), *aff'd sub nom. Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203 (1964).

84. 379 U.S. 203 (1964).

85. See, e.g., *Otis Elevator Co. (Otis I)*, 255 N.L.R.B. 235, 235 (1981); *Armour Oil Co.*, 253 N.L.R.B. 1104, 1121 (1981); *Ohio Brake & Clutch Corp.*, 244 N.L.R.B. 35, 35 (1979); *Coated Prods., Inc.*, 237 N.L.R.B. 159, 164-65 (1978) (dictum) (union waived right to bargain), *enforced*, 620 F.2d 289 (3d Cir. 1980); *Los Angeles Marine Hardware Co.*, 235 N.L.R.B. 720, 733 (1978) (dictum) (union waived right to bargain), *enforced*, 602 F.2d 1302 (9th Cir. 1979); *Production Molded Plastics, Inc.*, 227 N.L.R.B. 776, 776 (1977), *enforced*, 604 F.2d 451 (6th Cir. 1979); *Stone & Thomas*, 221 N.L.R.B. 573, 576 (1975); *Burroughs Corp.*, 214 N.L.R.B. 571, 579 (1974); *R.L. Sweet Lumber Co.*, 207 N.L.R.B. 529, 538 (1973), *enforced*, 515 F.2d 785 (10th Cir.), *cert. denied*, 423 U.S. 986 (1975); *American Needle & Novelty Co.*, 206 N.L.R.B. 534, 534-35 (1973); *Regal Aluminum, Inc.*, 190 N.L.R.B. 468, 469 (1971); *Royal Norton Mfg. Co.*, 189 N.L.R.B. 489, 492 (1971); *Acme Indus. Prods., Inc.*, 180 N.L.R.B. 114, 114 (1969), *enforcement denied*, 439 F.2d 40 (6th Cir. 1971); *Plymouth Indus., Inc.*, 177 N.L.R.B. 607, 611-12 (1969), *enforced per curiam*, 435 F.2d 558 (6th Cir. 1970); *Weltronic Co.*, 173 N.L.R.B. 235, 237 (1968), *enforced*, 419 F.2d 1120 (6th Cir. 1969), *cert. denied*, 398 U.S. 938 (1970); *McLoughlin Mfg. Corp.*, 164 N.L.R.B. 140, 145-46 (1967), *enforced as modified sub nom. International Ladies' Garment Workers Union v. NLRB*, 463 F.2d 907 (D.C. Cir. 1967); *McGregor Printing Corp.*, 163 N.L.R.B. 938, 939 (1967); *Spun-Jee Corp.*, 152 N.L.R.B. 943, 946 (1965), *enforcement denied*, 385 F.2d 379 (2d Cir. 1967); *International Shoe Co.*, 151 N.L.R.B. 693, 700 (1965) (dictum) (union waived right to bargain over the decision); *Standard Handkerchief Co.*, 151 N.L.R.B. 15, 18 (1965).

The Board similarly required bargaining over related types of management decisions, such as partial closures. See, e.g., *ABC Trans-Nat'l Transp., Inc.*, 247 N.L.R.B. 240, 242-43 (1980) (closing truck terminal), *modified*, 642 F.2d 675 (3d Cir. 1981); *Electrical Prods. Div. of Midland-Ross Corp.*, 239 N.L.R.B. 323, 330 (1978) (closing electrical plant), *enforced*, 617 F.2d 977 (3d Cir. 1980), *cert. denied*, 449 U.S. 871 (1980); *L.E. Davis*, 237 N.L.R.B. 1042, 1043 (1978) (eliminating unit jobs in conversion to self-service unit), *enforced in relevant part*, 617 F.2d 1264 (7th Cir. 1980); *Brockway Motor Trucks, Inc.*, 230 N.L.R.B. 1002, 1003 (1977) (closing Philadelphia area sales and service center), *enforcement denied without prejudice*, 582 F.2d 720 (3d Cir. 1978); *Great Chinese Am. Sewing Co.*, 227 N.L.R.B. 1670, 1671 (1977) (closing plant), *enforced per curiam on other grounds*, 578 F.2d 251 (9th Cir. 1978); *Production Molded*

the Court's *Fibreboard* decision.<sup>86</sup>

The Board's first opportunity to consider the effect of *FNM* on employer relocation decisions occurred only one month after the Supreme Court's decision in *Fibreboard II*. In *Tocco Division of Park-Ohio Industries, Inc.*,<sup>87</sup> an employer allegedly refused to bargain over a plant relocation decision motivated by its desire to reduce costs.<sup>88</sup> Ignoring any possible application of *FNM*, the Board characterized the bargaining obligation as "well settled" in this area, citing Board decisions prior to *FNM*.<sup>89</sup> The failure of the Board to mention *FNM* was at least

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Plastics, Inc., 227 N.L.R.B. 776, 776 (1977) (plant closed after work transfer), *enforced*, 604 F.2d 451 (6th Cir. 1979); P.B. Mutrie Motor Transp., Inc., 226 N.L.R.B. 1325, 1331 (1976) (closing truck terminal); Trading Port, Inc., 219 N.L.R.B. 298, 315 (1975) (eliminating warehouse jobs); Metro Transp. Serv. Co., 218 N.L.R.B. 534, 536 (1975) (closing part of trucking business); Edward M. Rude Carrier Corp., 215 N.L.R.B. 883, 891 (1974) (discontinuing part of transportation division), *modified*, 93 L.R.R.M. (BNA) 2297 (4th Cir. 1976); Royal Typewriter Co., 209 N.L.R.B. 1006, 1013 (1974) (closing St. Louis typewriter plant), *enforced in part on other grounds*, 533 F.2d 1030 (8th Cir. 1976); South-eastern Envelope Co., 206 N.L.R.B. 933, 948 (1973) (closing one of two plants); Ozark Trailers, Inc., 161 N.L.R.B. 561, 567-68 (1966).

For partial closures, however, the Board developed exceptions to the bargaining requirement when there was a significant change in operations, the termination of a discrete line of business, or circumstances that could not be affected through bargaining. *See, e.g.*, Brooks-Scanlon, Inc., 246 N.L.R.B. 476, 477 (1979) (no duty to bargain when partial closure attributable to decrease in supply of raw materials), *review denied sub nom.* Local 1017, Lumber & Sawmill Workers v. NLRB, 654 F.2d 730 (9th Cir. 1981); Raskin Packing Co., 246 N.L.R.B. 78, 78 (1979) (partial closure decision based on recision of credit to employer did not require bargaining although employer was obligated to bargain over effects of closure); Stanley Oil Co., 213 N.L.R.B. 219, 225 (1974) (no duty to bargain over complete termination of discrete service department); Summit Tooling Co., 195 N.L.R.B. 479 (1972) (no duty to bargain about decision to discontinue distinct tool-and-die business), *enforced per curiam*, 474 F.2d 1352 (7th Cir. 1973); General Motors Corp., 191 N.L.R.B. 951, 952 (1971) (no duty to bargain about sale of retail store), *review denied sub nom.* Auto Workers, Local 864 v. NLRB, 470 F.2d 422 (D.C. Cir. 1972).

86. *See, e.g.*, Spun-Jee Corp., 152 N.L.R.B. 943, 946 (1965); International Shoe Co., 151 N.L.R.B. 693, 699 (1965).

87. 257 N.L.R.B. 413 (1981). The decision was issued on July 30, 1981. *FNM* was decided on June 22, 1981.

88. *Id.* at 413. The case involved the relocation of work from the employer's facility in Cleveland, Ohio, to Boaz, Alabama. Although both the Board and the ALJ noted that the employer moved its operations in order to produce its products at a lower cost, there was no explanation as to whether this cost savings would result from lower wages, cheaper raw materials, lower energy costs, or some other factor. *See id.* at 413, 417.

89. *Id.* at 413. ("It is well settled that an employer has an obligation to bargain concerning a decision to relocate unit work.") The Board cited American Needle & Novelty Co., 206 N.L.R.B. 534 (1973).

disconcerting.<sup>90</sup> Even in later decisions involving similar issues in which the Board acknowledged the existence of *FNM*, its treatment of the case amounted to little more than pointing out factual distinctions as justification for *FNM*'s inapplicability.<sup>91</sup>

90. In *Whitehall Packing Co.*, 257 N.L.R.B. 193 (1981) (issued July 24, 1981), the Board similarly ignored any application of *FNM* to the relocation bargaining issue. The Board agreed with the ALJ that the employer had unlawfully failed to bargain with the union concerning its decision to relocate unit work to an "*alter ego*" company. *Id.* at 193. The employer's antiunion motivation and concurrent § 8(a)(3) violations, however, may distinguish the case from the line of authority involving economically motivated relocation decisions. See also *Ford Bros., Inc.*, 263 N.L.R.B. 92 (1982), in which the Board adopted the ALJ's decision in its entirety, holding the employer in violation of § 8(a)(5) for its failure to bargain in good faith about the decision to transfer truck driving work from its Ohio plant to its West Virginia facility, again without mention of *FNM*. Antiunion animus was also a consideration in *Ford Bros., Inc.* *Id.* at 102-03.

91. See *Carbonex Coal Co.*, 262 N.L.R.B. 1306, 1307 n.2 (1982) (employer unlawfully failed to bargain about its decision to transfer unit work, in the context of antiunion animus and other related unfair labor practices); *Bob's Big Boy Family Restaurants*, 264 N.L.R.B. 1369, 1370-71 (1982) (employer unlawfully refused to bargain about its decision to shut down its shrimp processing operation and "subcontract" that work to an outside company). In *Bob's Big Boy* the Board approved of the distinction made by the ALJ between partial closings and subcontracting. *Id.* at 1370. Rather than attempt to apply the *FNM* balancing test, the Board focused on the question of whether the employer's actions should be characterized as one type of decision or the other. Describing the company's "business" as the supplying of prepared foodstuffs to its restaurants, the majority concluded that the shrimp processing work had merely been "subcontracted" because the company continued supplying prepared shrimp to its restaurants. The only change was that the shrimp was now purchased from an outside company rather than prepared internally. *Id.* at 1370-71. A strongly worded dissent by former Chairman Van de Water and Member Hunter asserted that the discontinuance of the shrimp processing was a partial closure and that the case was consequently governed by *FNM*. *Id.* at 1373-74 (Van de Water and Hunter, dissenting).

The Board relied on *FNM*, however, when it was presented with facts parallel to those considered by the Supreme Court. See *U.S. Contractors, Inc.*, 257 N.L.R.B. 1180, 1181 (1981) (employer had no duty to bargain about its decision to terminate janitorial services provided under contract to a third party), *enforcement denied*, 697 F.2d 692 (5th Cir. 1983).

The NLRB General Counsel's approach differed significantly from that of the Board. Less than a month after *FNM*, General Counsel William A. Lubbers issued a memorandum to NLRB Regional Directors concerning the impact of the decision. 81 Mem. Off. Gen. Counsel No. 38 (July 14, 1981), reprinted in BUREAU OF NATIONAL AFFAIRS, LABOR RELATIONS YEARBOOK—1981, at 312-14 (1981) [hereinafter cited as LABOR RELATIONS YEARBOOK—1981]. While noting that the Court had explicitly left open the issue of bargaining obligations regarding "other types of management decisions," the General Counsel recognized the possible applicability of the *FNM* balancing test. LABOR RELATIONS YEARBOOK—1981, *supra*, at 312. The memorandum re-

## II. OTIS ELEVATOR

Given this background, the Board's decision in *Otis II* represented a substantial change in position. *Otis II* involved United Technologies' acquisition of Otis Elevator Company in 1975.<sup>92</sup> Otis's technology was outdated;<sup>93</sup> three separate reviews of Otis's engineering activity indicated a need to consolidate and improve the duplicative work being performed at Otis's facilities in Parsippany and Mahwah, New Jersey.<sup>94</sup> In July 1977, research and development employees from Otis's nonunionized Parsippany operation were transferred to the United Technologies research and development facility, located in East Hart-

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requested that the Regional Offices submit reports of cases involving these questions so that the impact of *FNM* could be further assessed. *Id.* at 313.

In November 1981, the General Counsel issued a second memorandum requiring the application of the *FNM* balancing test to the "other types of management decisions" referenced in *FNM*, including work relocation. 81 Mem. Off. Gen. Counsel No. 57 (November 30, 1981), reprinted in LABOR RELATIONS YEARBOOK—1981, *supra*, at 315-17. The Regional Offices were thus instructed to analyze relocation decision cases by weighing "factors which would make bargaining burdensome" against the benefit "for labor-management relations and the collective-bargaining process." *Id.* at 316. In determining this benefit, the Regional Offices were advised to "focus" on the amenability of the employer's motivation to resolution through collective bargaining. *Id.*

The General Counsel's analysis is reflected in subsequent decisions of the NLRB Division of Advice, a division of the Office of the General Counsel responsible for issuing legal advice on novel or difficult issues, 44 Fed. Reg. 34215 (1979), sec. 201.1.2. In *Stewart Sandwiches, Inc.*, 9 NLRB ADVICE MEM. REP. (LAB. REL. PRESS) ¶ 19,140 (1982), for example, the NLRB Division of Advice concluded that an employer was not obligated to bargain about its decision to consolidate its work at a single facility when high overhead did not justify the maintenance of two separate operations. *Id.* at 1424. The Division, consistent with the General Counsel's interpretation of *FNM*, relied on the fact that the employer's reasons for the relocation were not amenable to collective bargaining. *Id.*; see also 1982 Moving & Storage, 10 NLRB ADVICE MEM. REP. (LAB. REL. PRESS) ¶ 20,075 (1983) (no duty to bargain about transfer of unit work when decision was not based on labor costs or other factors amenable to collective bargaining).

Although the General Counsel's interpretation of the *FNM* balancing test may be vulnerable to criticism, see generally *infra* notes 130-133 & 135-136 and accompanying text, the effort to comply with the Supreme Court's mandate was at least a more commendable approach than the Board's efforts to ignore it.

92. *Otis II*, 115 L.R.R.M. (BNA) 1281. For a complete factual history of *Otis*, see the ALJ's decision and the Board's original decision issued in the case on March 25, 1981. *Otis I*, 255 N.L.R.B. 235 (1981). None of the factual findings were disturbed on appeal to the Board.

93. 115 L.R.R.M. (BNA) at 1281. Otis's share of the world elevator market was steadily declining, forcing the company to sell its products at less than cost simply to remain in the market. *Id.* at 1281-82.

94. *Id.* at 1282.

ford, Connecticut.<sup>95</sup> In October, management gave final approval for the transfer of seventeen bargaining unit employees from Mahwah to the East Hartford facility.<sup>96</sup> By that time construction had already begun in East Hartford on new research facilities for the Otis employees, representing a capital investment of over two million dollars.<sup>97</sup>

The professional and technical employees at Otis' engineering center in Mahwah had been represented for a number of years by the United Automobile, Aerospace & Agricultural Implement Workers of America.<sup>98</sup> When the company advised the Mahwah employees in December 1977 of the decision to transfer the Mahwah "Product Improvement Group" to East Hartford, the parties were bound by a collective bargaining agreement scheduled to expire on March 31, 1980.<sup>99</sup> The union charged Otis with committing an unfair labor practice by failing to bargain about the relocation decision, the Board issued a complaint, and the matter was tried before an ALJ.

The ALJ rejected Otis's assertion of management prerogative and held that it had unlawfully refused to bargain concerning the work relocation. The ALJ specifically found that most of the Mahwah engineers transferred performed "substantially the same work," received supervision from some of the same employees, and used "much of the same equipment" as they had at the Mahwah facility.<sup>100</sup> The ALJ was equally unimpressed with Otis's large capital expenditure for the East Hartford facility, noting that the money had been committed before the decision to relocate the Mahwah employees.<sup>101</sup> Finally, the ALJ emphasized that the decision only required Otis to discuss the relocation decision with the union; if no agreement was

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95. *Id.* Approximately 30 Parsippany employees were relocated to the East Hartford facility.

96. *Id.*

97. *Id.* In addition, the company planned a new test tower that raised Otis's total projected capital investment to approximately 3.5 million dollars.

98. *Id.* at 1282 n.2.

99. *Id.* Although there apparently was subsequent discussion between Otis officials and the Union concerning the company's rationale in transferring the employees, Otis conceded that it had not bargained about the decision. The company regarded the transfer decision as "essentially managerial in nature." *Otis I*, 255 N.L.R.B. at 244-45.

100. *Otis I*, 255 N.L.R.B. at 246. The ALJ concluded that the changes in Otis's operations were "more cosmetic or organizational than significant in terms of impact on the basic scope of the enterprise." *Id.*

101. The ALJ noted that the timing of the decisions indicated that the investment may have been related primarily to the decision to transfer the Parsippany employees, not the Mahwah employees. *Id.* at 245-46.

reached, Otis could lawfully implement its decision. The opinion noted that bargaining would not have placed any special burden on Otis.<sup>102</sup>

The Board's first consideration of *Otis*, issued on March 25, 1981, upheld the ALJ's finding of an unlawful refusal to bargain.<sup>103</sup> The Board acknowledged the substantial cost of the new research facility, but it concluded that "this investment did not signal any change in the direction of [Otis's] activities or in the character of its enterprise."<sup>104</sup> Although both the ALJ and the Board decisions were issued prior to *FNM*, they foreshadowed the second half of the *FNM* balancing test by discussing the absence of any "burden" on the conduct of Otis's business that would result from its being required to bargain about the relocation decision.<sup>105</sup> While the case was pending appeal, the

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102. *Id.* at 246 ("There is no evidence tending to show that secrecy or some other competitive consideration was required for Respondent to act quickly and decisively.").

103. *Id.* at 235. The Board members deciding *Otis I* were former Chairman Fanning, former Member H. Jenkins, Jr., and Member Zimmerman, each of whom had been appointed by President Carter. See *supra* note 14.

104. *Otis I*, 255 N.L.R.B. at 236.

105. The facts of *Otis*, as found by the ALJ, failed to establish any real detriment to Otis of mandatory bargaining about the decision to relocate the Mahwah employees, although that decision was admittedly a corollary to the decision to consolidate and update its research and development operations. *Id.* at 246. The same type of work was being performed by the transferred employees, albeit in a new location and facility. *Id.* Certainly there was no decision "akin to the decision whether to be in business at all" as there was in *FNM* when the employer closed down one of its maintenance operations. *FNM*, 452 U.S. at 677. The employer's potential need for speed, flexibility, and confidentiality, relied upon in *FNM*, *id.* at 682-83, were absent in *Otis*, *Otis I*, 255 N.L.R.B. at 246.

The capital expenditures in *Otis* should not have excused the duty to bargain. Several courts prior to *FNM* had required the existence of a substantial capital investment to justify the employer's refusal to bargain. See *NLRB v. Adams Dairy, Inc.*, 350 F.2d 108, 111 (8th Cir. 1965), *cert. denied*, 382 U.S. 1011 (1966); *NLRB v. Royal Plating & Polishing Co., Inc.*, 350 F.2d 191, 195-96 (3d Cir. 1965). Nonetheless, in relying on Justice Stewart's concurrence in *Fibreboard*, *FNM* made it clear that this factor should not be determinative. *FNM*, 452 U.S. at 688. *FNM*'s decision to terminate its Greenpark operations involved no capital expenditure, yet the Court found no duty to bargain based on the basic change in operations. Conversely, an employer should not be allowed to avoid its bargaining obligations simply by investment. Surely the duty to bargain must depend on something more than the wealth of the employer. This is particularly true in the *Otis* case given the uncertainty of whether the transfer of the Mahwah employees involved *any* capital investment; the new research facility was being built for the Parsippany employees long before any decision to relocate the Mahwah employees. See *supra* note 102 and accompanying text.

The first half of the *FNM* equation, however, is missing from the Board's

Board requested that it be remanded for reconsideration in light of *FNM*.<sup>106</sup>

The four Board members participating in the reconsideration of *Otis*, three of whom had joined the Board since the first decision,<sup>107</sup> agreed that *Otis* had no duty to bargain about its relocation decision.<sup>108</sup> In three separate opinions, each member recognized that the *FNM* analysis applied to relocation decisions, and thus implicitly agreed that Board precedent mandating relocation decision bargaining on essentially a per se basis<sup>109</sup> had to be overruled. On the appropriate interpretation of *FNM*, however, the Board diverged.

Although each of the *Otis II* opinions purported to apply *FNM* to the relocation issue presented, three of the four Board members inexplicably failed to acknowledge the benefit/burden analysis set forth in *FNM*.<sup>110</sup> Relying heavily on the need for predictability in this area, Chairman Dotson and Member Hunter concluded in their plurality opinion that "[w]hatever the merits of the [relocation] decision, so long as it does not turn upon labor costs, Sec. 8(d) of the Act does not apply."<sup>111</sup>

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initial consideration of *Otis*. At no point does the Board discuss the benefit of bargaining for labor-management relations. The obvious inability of the union to address the concerns or motivations of *Otis* in deciding to consolidate its research and development activities convinced the Board in its reconsideration of *Otis* that no bargaining obligation could be imposed. See *infra* note 163 and accompanying text. In spite of the three separate analyses of the four Board members considering the case in 1984, all agreed that the employer's reasons for its decision were not susceptible to modification or resolution by any alternatives or concessions that could reasonably be achieved through collective bargaining. *Id.*

106. *Otis II*, 115 L.R.R.M. (BNA) at 1281.

107. See *supra* note 14.

108. *Otis II*, 115 L.R.R.M. (BNA) at 1282, 1290 (Dennis, concurring), 1285 (Zimmerman, concurring in part).

109. See *supra* notes 72-91 and accompanying text.

110. See *supra* notes 60-63 and accompanying text.

111. *Otis II*, 115 L.R.R.M. (BNA) at 1282 n.3. The Dotson/Hunter analysis also seems to emphasize, however, the need for a "fundamental change in the nature and direction of the business." *Id.* at 1283. The opinion indicates at one point that a management decision can be characterized as either a change in direction for the business or a decision based on labor costs. *Id.* at 1282-83 ("[T]he critical factor to a determination whether the decision is subject to mandatory 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.") (emphasis in original). Such a formulation seems to be of little value because management decisions may turn on labor costs and involve a fundamental change in the business. The sale of a business because of unprofitability resulting from high wages is one example. Conversely, an employer's relocation of a plant in order to be closer to raw materials is an example of a decision

The opinion noted that the employer may always choose to bargain voluntarily if labor costs are one of several considerations in the employer's decision, thus implying that labor costs must be the *sole* consideration before bargaining is required.<sup>112</sup> Chairman Dotson and Member Hunter did not mention any "benefits" to labor-management relations or "burdens" on the conduct of the employer's business that might result from requiring bargaining.<sup>113</sup>

The primary deficiency of the Dotson/Hunter plurality approach is its exclusive focus on labor costs rather than the balancing of interests prescribed in *FNM*.<sup>114</sup> The plurality's rejection of determinative labels is commendable; requiring bargaining based solely on the characterization of a decision as "subcontracting" instead of "partial closure" is unlikely to yield predictable or satisfactory results.<sup>115</sup> Given the hybrid nature

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that "turns" on neither labor costs nor a fundamental change in the company's business.

In a more recent decision applying their *Otis II* analysis, Chairman Dotson and Member Hunter echo their confusing formulation without further clarification. In *Columbia City Freight Lines, Inc.*, 271 N.L.R.B. No. 5 (August 3, 1984), the Board considered an employer's decision to close two of its trucking terminals and consolidate the work at a third facility. Although labor costs was one factor in the employer's decision, cost savings from the relocation also included a variety of nonlabor items such as the elimination of duplicative overhead. *Id.*, slip op. at 3. The majority opinion of Chairman Dotson and Member Hunter concluded, just as in *Otis II*, that the employer's decision to close two terminals and relocate the work "turned not upon labor costs but upon a significant change in the nature and direction of the business and therefore was not subject to mandatory bargaining." *Id.*, slip op. at 2.

Whether a "change in operation" is required under the Dotson/Hunter analysis is uncertain. At one point their opinion in *Otis II* suggests that bargaining is required even if the decision can be considered a basic change in operations when that decision was based on a desire to reduce labor costs. *See Otis II*, 115 L.R.R.M. (BNA) at 1282-83. In *Columbia City Freight Lines*, however, Chairman Dotson and Member Hunter seem to imply that bargaining is not required *because* the employer's decision involved a change in the direction of the business. *Columbia City Freight Lines*, 271 N.L.R.B. No. 5, slip op. at 5 ("These facts establish that the decisions at issue here, no matter what they are labeled or how they are categorized, clearly turned on a fundamental change in the nature and direction of the Respondent's business."). If bargaining is not required because a decision is labeled a "change in direction," the Dotson/Hunter approach seems to engage in precisely the type of characterization analysis it purports to reject. *See infra* note 115 and accompanying text. In other words, by describing the employer's decision as a change in operations, Chairman Dotson and Member Hunter can conclude by definition that bargaining is not required.

112. *Otis II*, 115 L.R.R.M. (BNA) at 1284.

113. *Id.* at 1281-84.

114. *See supra* note 62 and accompanying text.

115. *Otis II*, 115 L.R.R.M. (BNA) at 1283.

of and multiple variations on decisions of this type, reliance on labels alone is subject to manipulation influenced by underlying social policy rather than legal principles.<sup>116</sup> Nonetheless, the Dotson/Hunter "labor costs" inquiry is decidedly narrower than *FNM* mandates. The substitution of an "either/or" threshold test for the balancing required under the *FNM* test seems inconsistent with the duty of the Board to enforce the NLRA as interpreted by the Supreme Court.<sup>117</sup>

Even assuming the Dotson/Hunter test yielded the correct result in *Otis II*, the inadequacies of this approach for future cases is apparent when applied to alternative fact situations. Consider an employer's decision to subcontract the maintenance work in its plant because of the belief that subcontracting will improve work quality. The cost of subcontracting is the same as performing the work with its own employees. *Fibreboard*,<sup>118</sup> as well as subsequent Board authority,<sup>119</sup> would dictate mandatory bargaining. In the hypothetical, as in *Fibreboard*, the employer's basic operations remain unchanged and no capital expenditure is involved.<sup>120</sup> The employer's actions concern only "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."<sup>121</sup> Furthermore, work quality has long been considered a subject suitable for bargaining.<sup>122</sup>

Similarly, application of the *FNM* balancing test, under virtually any definition of that test, would result in an obligation to bargain. Bargaining would provide substantial potential benefits. Even if the benefit for labor-management relations is defined as only amenability to resolution through collective bargaining,<sup>123</sup> the possibility of assistance by the union is apparent. The manner in which work is performed, as well as the

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116. Compare, for example, the majority and dissenting opinions in *Bob's Big Boy Family Restaurants*, 264 N.L.R.B. 1369 (1982), when the employer's decision is characterized as "subcontracting" by the majority and as a "partial closure" by the dissent. *Id.* at 1371, 1373 (Van de Water and Hunter, concurring and dissenting); see *supra* note 91.

117. See *supra* note 31 and accompanying text.

118. See *supra* notes 37-44 and accompanying text. Although the employer's motivation in *Fibreboard* was based on cost savings, this fact was not critical to the Court's conclusion.

119. *Key Coal Co.*, 240 N.L.R.B. 1013 (1979); *R.L. Sweet Lumber Co.*, 207 N.L.R.B. 529 (1973), *enforced*, 515 F.2d 785 (10th Cir. 1975).

120. *Fibreboard*, 379 U.S. at 213.

121. *Id.* at 215.

122. See *infra* note 125.

123. See *infra* notes 130-40 and accompanying text.

related issues of training and wage incentives, traditionally has been an appropriate subject of bargaining.<sup>124</sup> Moreover, requiring the company to discuss its decision with the union would involve little burden in the hypothetical presented because the maintenance work must continue in any event. The cost for the employer remains unchanged, and it is highly unlikely that management would have any need for speed, flexibility, or confidentiality in reaching its decision.<sup>125</sup>

Under the Dotson/Hunter test, however, bargaining would not be required for a subcontracting decision based on work quality. Chairman Dotson and Member Hunter, limiting the bargaining obligation to decisions based solely on labor costs, foreclose the duty to discuss any other decisions regardless of the union's ability to address the problem.<sup>126</sup> Thus, despite two Supreme Court decisions requiring bargaining in this situation, the Dotson/Hunter approach would allow the employer to implement unilaterally its decision.

This hypothetical illustrates the real danger of the Dotson/Hunter test: in practical application, it leads to the rejection of a bargaining obligation in virtually every relocation decision case. Relocation decisions are rarely based on a single factor, even though labor costs may be a predominant or determinative motivation.<sup>127</sup> As long as labor costs are not the sole

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124. *Hedison Mfg. Co.*, 260 N.L.R.B. 1037 (1982) (production standards); *Tenneco Chemicals, Inc.*, 249 N.L.R.B. 1176 (1980) (production standards); *Bio-Medical Applications*, 233 N.L.R.B. 1467 (1977) (dictum) (employee training); *Alfred M. Lewis, Inc.*, 229 N.L.R.B. 757 (1977) (production standards with accompanying counseling and disciplinary system), *enforced in part*, 587 F.2d 403 (9th Cir. 1978); *C & S Indus., Inc.*, 158 N.L.R.B. 454 (1966) (incentive wage plan); *Weston & Brooker Co.*, 154 N.L.R.B. 747 (1965) (merit wage increases); *Irvington Motors, Inc.*, 147 N.L.R.B. 565 (1964) (sales quotas), *enforced*, 343 F.2d 759 (3d Cir. 1965). *But see* *Wabash Transformer Corp.*, 215 N.L.R.B. 546 (1974) (employer should have flexibility in efforts to promote efficiency).

125. *See FNM*, 452 U.S. at 682-83.

126. *See supra* notes 111-12 and accompanying text. The Dotson/Hunter analysis may be applied expansively or narrowly depending on how the term "labor costs" is interpreted. Conceivably, "labor costs" could include work quality as a measure of level of production per man hour. But the plurality opinion offers no definition.

127. Some of the important factors to management in considering relocation, in addition to labor costs, include the cost and supply of energy, supply costs, and outdated facilities. *Hearings on Employee Protection and Community Stabilization Act of 1979: Hearings on S. 1609 Before the Comm. on Labor and Human Resources*, 96th Cong., 1st Sess. 169 (1979) (statement of G. Honeyford, Chairman, Congressional Action Comm., S. Jersey Chamber of Commerce) [hereinafter cited as *Hearings on Employee Protection*]; *id.* at 254-55 (statement of H.R. Northeast-Midwest Congressional Coalition, "The State of the Region: Economic Trends of the 1970s in the Northeast and Midwest").

motivation, bargaining will not be required under the Dotson/Hunter analysis,<sup>128</sup> regardless of the absence of any burden on the employer. If the duty to bargain can be so easily avoided, employers undoubtedly will attempt to fabricate other reasons for relocation decisions.<sup>129</sup>

Member Zimmerman's analysis is more expansive than the Dotson/Hunter approach. Member Zimmerman focused exclusively on whether the employer's decision is "amenable to resolution through collective bargaining."<sup>130</sup> Thus, whereas the plurality would require bargaining only if the employer's decision was based exclusively on labor costs,<sup>131</sup> Member Zimmerman would expand that concept to include other problems that may reasonably be resolved through union concessions. Finding that the union could not have affected Otis's decision to relocate, Member Zimmerman concluded that bargaining was not required.<sup>132</sup> Like the plurality, this analysis fails to discuss the benefit/burden balancing test established in *FNM*.<sup>133</sup>

Although Member Zimmerman's analysis would require bargaining in the subcontracting hypothetical above,<sup>134</sup> his exclusive focus on "amenability" is also inconsistent with the Supreme Court's mandate. Even ignoring the problems in defining "[a]menability to resolution through the bargaining pro-

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128. See *supra* notes 111-12 and accompanying text.

129. In *Milwaukee Spring II*, 115 L.R.R.M. (BNA) at 1068, the Board, in an opinion signed by Chairman Dotson and Member Hunter, held that an employer could transfer bargaining unit work during the term of a collective bargaining agreement in order to save labor costs without violating the § 8(d) prohibition on mid-term contract modifications. See NLRA § 8(d), 29 U.S.C. § 158(d) (1982). In support of its holding, the Board noted that this conclusion would promote "realistic" bargaining by allowing the employer to explain truthfully the motivations for its relocation decision. *Milwaukee Spring II*, 115 L.R.R.M. (BNA) at 1069. Under prior decisions finding such a relocation to be an unlawful modification of the contract's wage provisions, the Board reasoned, employers were encouraged to admit only those motivations that were unrelated to labor costs. *Id.* The result of the Dotson/Hunter analysis in *Otis II* would seem to have the very effect the Board sought to avoid in *Milwaukee Spring II*, namely, encouraging employers to manufacture reasons other than labor costs for relocating unit work in order to avoid the bargaining obligation entirely.

130. *Otis II*, 115 L.R.R.M. (BNA) at 1285 (Zimmerman, concurring in part). Member Zimmerman's analysis of *FNM* is set forth in greater detail in his dissent in *Milwaukee Spring II*, 115 L.R.R.M. (BNA) at 1069-75 (Zimmerman, dissenting).

131. See *supra* notes 111-12 and accompanying text.

132. *Otis II*, 115 L.R.R.M. (BNA) at 1285 (Zimmerman, concurring in part).

133. See *supra* note 62 and accompanying text.

134. See *supra* notes 118-26 and accompanying text.

cess,"<sup>135</sup> Member Zimmerman made no serious effort to weigh the potential or actual burden of bargaining on the conduct of the employer's business. Although his "amenability" standard is somewhat broader than the Dotson/Hunter "labor costs" approach, it is still an "either/or" threshold test. If the amenability test is met, Member Zimmerman would excuse the duty to bargain only if the employer's need for speed, flexibility, or confidentiality is "urgent,"<sup>136</sup> a concept not found in *FNM*.

Of the four Board members reconsidering *Otis*, only Member Dennis attempted to formulate a balancing test consistent with the *FNM* decision. Before reaching this test, however, Member Dennis imposed a threshold requirement that echoes Member Zimmerman's analysis: the employer's decision must be "amenable to resolution through the bargaining process."<sup>137</sup> If this threshold is met, Member Dennis would apply a benefit/burden balancing test. She not only used "amenability" as a threshold, however; it is also the single benefit of bargaining for labor-management relations in her test.<sup>138</sup> On the burden side of the balance, Member Dennis suggested several possible factors to be considered.<sup>139</sup> Because she determined that the employer's decision was not amenable to resolution through collective bargaining, Member Dennis concluded that *Otis* had no duty to bargain concerning its relocation decision.<sup>140</sup> Thus, the balancing test she described was never applied because the threshold test was not met.

Member Dennis's balancing test is consistent with *FNM*,<sup>141</sup> but her imposition of an "amenability" threshold requirement causes problems similar to those that plague the Zimmerman approach. In defining amenability, Member Dennis seemed to adopt the more expansive concept of Member Zimmerman<sup>142</sup>

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135. *Otis II*, 115 L.R.R.M. (BNA) at 1285 (Zimmerman, concurring in part).

136. *Id.*

137. 115 L.R.R.M. (BNA) at 1287 (quoting *FNM*, 452 U.S. at 678) (Dennis, concurring).

138. *Id.* at 1288 ("The second step in the analysis, therefore, involves weighing the fact that the decision is amenable to resolution through the bargaining process ('the benefit') against the constraints that process places on management ('the burden').") (Dennis, concurring).

139. Member Dennis, quoting from *FNM*, suggested five potential burdens in a nonexhaustive list: 1) the extent of capital commitment; 2) the extent of changes in operations; 3) the need for speed; 4) the need for flexibility; and 5) the need for confidentiality. *Id.* at 1288; see *infra* notes 202-11 and accompanying text.

140. *Otis II*, 115 L.R.R.M. (BNA) at 1290 (Dennis, concurring).

141. See *supra* notes 138-40 and accompanying text.

142. See *supra* notes 130-31 and accompanying text.

rather than the restrictive Dotson/Hunter "labor costs" criterion.<sup>143</sup> Should Member Dennis limit her definition of "amenability" in future opinions to those employer decisions dealing primarily or exclusively with labor costs, however, her own analysis would routinely parallel that of the Dotson/Hunter analysis.

### III. ANALYSIS AND APPLICATION OF THE *FNM* BALANCING TEST

Before addressing the appropriate application of the *FNM* balancing test, an initial determination must be made as to the types of employer decisions subject to the test. Of the three categories of management decisions described by the Supreme Court, only the third category triggers the *FNM* test.<sup>144</sup> The Court described these decisions as having a "direct impact on employment," usually termination, but involving some concern outside of the employment relationship.<sup>145</sup> Although the Court offered limited guidance in applying this standard,<sup>146</sup> it appar-

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143. See *supra* notes 111-13 and accompanying text.

144. See *supra* notes 47-51 & 60-63 and accompanying text.

145. *FNM*, 452 U.S. at 677.

146. Although the Court briefly discussed its rationale for including *FNM*'s shutdown decision within this third category, it offered little guidance for making such determinations about other types of employer decisions. See *FNM*, 452 U.S. at 677. In *Otis II*, only Member Dennis even referred to the need to make such a determination, yet she dismissed it with a single line: "The [relocation] decision had as its focus only the economic profitability of Otis' operations, but it also had a direct impact on the employment of unit employees." *Otis II*, 115 L.R.R.M. (BNA) at 1290 (Dennis, concurring). The same could be said for a decision by Otis to reduce wages. Such reasoning hardly explains why the relocation was a "Category III" decision, as it was labeled by Member Dennis. Something more must be required.

*Otis* may seem to be an "easy" case requiring little analysis as to its Category III status. It is undisputed that the employer's decision was part of a substantial reorganization and consolidation of the company's research and development efforts. See *supra* notes 93-97 and accompanying text. Chairman Dotson and Member Hunter relied heavily in their opinion on the fact that Otis's decision reflected "a change in the nature or direction of the business." *Otis II*, 115 L.R.R.M. (BNA) at 1283 ("The decision at issue here clearly turned upon a fundamental change in the nature and direction of the business, and thus was not amenable to bargaining."). Yet in *Otis I*, former Chairman Fanning, former Member Jenkins, and Member Zimmerman agreed with the determination of the ALJ that the relocation did not involve any real change "in the direction of [Otis's] activities or in the character of its enterprise." *Otis I*, 255 N.L.R.B. at 236.

This analysis suggests two questions: 1) must an employer's decision involve a change in the scope or direction of the business in order to be a Category III decision, triggering the *FNM* balancing test, and 2) do all relocation decisions fall within the Category III analysis? If work relocation, absent

ently assumed that economically motivated work relocation decisions are subject to the balancing test within the third category.<sup>147</sup>

#### A. THE BENEFITS AND BURDENS OF RELOCATION BARGAINING

As predicted by numerous commentators,<sup>148</sup> the *FNM* decision has resulted in substantial confusion regarding its application to work relocation decisions.<sup>149</sup> In spite of the apparent creation of a *per se* rule for partial closures,<sup>150</sup> the Supreme Court seems to require a balancing or weighing of interests to

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other changes in the enterprise (e.g., expansion, modernization), is considered a "change in direction" by definition, the answer to the first question may be irrelevant for immediate purposes. If a relocation decision is equivalent to a change in business direction, such decisions will always be subject to *FNM* analysis as Category III decisions.

The definitional problem also arises in the context of other types of decisions. Reconsider the proposed hypothetical involving the subcontracting of maintenance work to improve work quality but with no resulting cost savings. See *supra* text accompanying notes 119-21. The Supreme Court in *FNM* characterized such a subcontracting decision in *Fibreboard* as a Category III problem when the employer was seeking to reduce labor costs. The subcontracting of maintenance work, however, can hardly be considered a change in the "scope or direction" of a business. The distinguishing characteristic of the Category III decision must therefore be in the nature of the decision itself rather than the extent of operational change.

Thus, any business decision that does not directly concern the employment relationship (e.g., wages, work rules) but that directly affects the existence of that relationship (e.g., partial closure, automation, subcontracting) apparently must be considered a Category III decision. A decision affecting the scope and direction of the business will also invariably constitute a Category III decision, but such a requirement is evidently not mandatory. Any subcontracting decision, regardless of its motivation, therefore becomes a Category III decision subject to the *FNM* balancing test. Similarly, any relocation decision must be evaluated under the *FNM* test. The motivation for the decision only becomes significant in applying the test.

The extent of change in operations, however, may be properly considered, as suggested by Member Dennis in *Otis II*, as one factor in determining the burden on the conduct of the employer's business. *Otis II*, 115 L.R.R.M. (BNA) at 1288 (Dennis, concurring). The more substantial the change in operation, the more freedom the employer should have to act.

147. See *FNM*, 452 U.S. at 686 & n.22. Although the identification of employer decisions within this category may present difficulties independent of the application of the *FNM* balancing test to determine the bargaining issue, it is beyond the scope of this Article and will only be noted here.

148. See *supra* note 16.

149. See *supra* notes 87-91 & 107-43 and accompanying text.

150. See *supra* notes 64-67 and accompanying text. Given such a rule, the classification of the employer's action may be determinative. Deciding cases by applying labels, however, is misleading; an employer's actions may not easily fit in a single category. See *supra* notes 115-116 and accompanying text; *Otis II*, 115 L.R.R.M. (BNA) at 1284. ("Such decisions often involve elements

determine the bargaining obligation in other situations.<sup>151</sup> Unfortunately, the Court does not provide a neat checklist of the factors to be considered. The lack of specificity may indicate a recognition of the need for flexibility in analyzing diverse factual situations in a changing industrial relations climate. Consistent with congressional intent,<sup>152</sup> the Court presumably intended the scope of mandatory bargaining to be fluid and responsive to developing needs.<sup>153</sup>

Recognizing these limits on the development of a dispositive test for general use, this Article will attempt to identify the factors that should be considered in a benefit/burden analysis of a relocation decision and also suggest how these factors might be weighed in some situations. Identifying the factors to be considered in the benefit/burden analysis requires a careful reading of the *FNM* decision. As suggested, any list will be subject to change as particular cases raise unusual problems and the Board gains experience in applying the test. As an initial effort to quantify the test, however, the following discussion describes two factors to be considered on the "benefit" side of the balance<sup>154</sup> and five factors to be considered on the "burden" side of the balance.<sup>155</sup>

### 1. The Benefit for Labor-Management Relations and the Bargaining Process

Member Dennis's analysis in *Otis II* imposes a threshold requirement that the factors underlying the employer's relocation decision be amenable to resolution through collective bargaining before reaching the balancing test.<sup>156</sup> Once the

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of one or more types of decisions, such as the termination, relocation, and consolidation of the research and development operations in this case.").

151. See *supra* notes 60-67 and accompanying text.

152. See *supra* notes 21-33 and accompanying text.

153. *FNM*, 452 U.S. at 679 n.18 ("The subjects over which mandatory bargaining has been required have changed over time.").

154. The factors on the benefit side include "communication" and "amenability." See *infra* notes 156-199 and accompanying text.

155. The factors on the burden side include the employer's needs for speed, flexibility, and confidentiality, the extent of capital investment, and the extent of changes in operations. See *infra* notes 200-09 and accompanying text.

156. Member Dennis's threshold requirement of amenability should not be confused with the initial determination of whether the employer's decision can be characterized as a Category III decision subject to the *FNM* balancing test. See *supra* notes 144-46 and accompanying text. Member Dennis acknowledges in her analysis that this "Category III" determination precedes her own threshold requirement of amenability. *Otis II*, 115 L.R.R.M. (BNA) at 1287-88 (Dennis, concurring). Member Dennis thus suggests a three step process: 1)

threshold is met, this "amenability" determination constitutes the "benefit for labor-management relations and the collective bargaining process" in the first part of the *FNM* balancing test.<sup>157</sup> The benefit is limited to this single factor; thus, even if bargaining imposes no burden whatsoever on the employer, the Dennis analysis recognizes no value in bargaining unless the union "reasonably could effect" the employer's decision.<sup>158</sup> Although this "amenability factor" is unquestionably a significant and often critical aspect of the "benefit" half of the test, the *FNM* decision suggests other potential benefits ignored by Member Dennis.

In *FNM*, the Court recognized the important and *legitimate* concerns of unions in these situations, regardless of the employer's motivation.<sup>159</sup> In applying its analysis to the particular facts of *FNM* "to illustrate the limits" of the holding, the Court specifically noted that it was not "faced with an employer's abrogation of ongoing negotiations or an existing bargaining agreement."<sup>160</sup> This reference to missing factors would be meaningless unless the Court was suggesting that the existence of a collective bargaining agreement or a long-term bargaining relationship could alter the balance. Because the union in *FNM* could not affect the basis of the employer's decision, namely, the size of its management fee paid by Greenpark,<sup>161</sup> the Court's analysis indicates that the "benefit" of bargaining for the union and employees in an ongoing union/employer relationship involves something more than amenability. In other words, the bargaining process itself may serve some valuable function for "labor-management relations" in addition to any potential resolution of the employer's problems that might be achieved.<sup>162</sup>

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determining if the employer's decision is a Category III decision subject to *FNM*; 2) if so, determining if the employer's motivations are amenable to resolution through collective bargaining; and, 3) if so, balancing this amenability benefit against the burden placed on the conduct of the employer's business.

157. See *supra* note 138 and accompanying text.

158. *Otis II*, 115 L.R.R.M. (BNA) at 1288.

159. "[T]his [partial closure] decision touches on a matter of central and pressing concern to the union and its member employees: the possibility of continued employment and retention of the employees' very jobs." *FNM*, 452 U.S. at 677.

160. *Id.* at 687-88.

161. See *supra* notes 53-56 and accompanying text.

162. The existence of a stable and ongoing bargaining relationship may be related to the concept of amenability as well. It is reasonable to assume that a union's increasing familiarity with an employer's business over time will enhance its ability to develop proposals and concessions to address the company's

a. *The Communication Benefit*

Each of the *Otis II* opinions concludes that bargaining should not be required because the union could not effectively address the reasons underlying the employer's decision to relocate—the outdated technology and the duplicative research efforts.<sup>163</sup> Although the Board members' concern with fruitless negotiations is appropriate, their analyses are inadequate because they rest on an unarticulated major premise: the sole purpose of requiring collective bargaining under the NLRA is to permit a union the opportunity to present other options when the employer's proposed actions are based on considerations related to its labor relations. In other words, each of the *Otis II* opinions assumes that if the union is unable to provide concessions or alternatives that will directly affect the employer's motivation, collective bargaining should not be re-

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problems and concerns. See N. LEVIN, SUCCESSFUL LABOR RELATIONS 118 (1963) ("Very often [union representatives] will have experience due to working with production men and operating personnel, and they can be helpful [in solving company problems].").

163. *Otis II*, 115 L.R.R.M. (BNA) at 1282-83, 1285 (Dennis, concurring), 1290 (Zimmerman, concurring in part). As described by Member Dennis in her concurring opinion:

There were no labor-related considerations underlying the decision. There was nothing that the Union could have offered that reasonably could have affected management's decision. Even if the Union had offered pay or benefit cuts or proposed overtime work to increase productivity, such proposals would not have provided the Respondent with the upgraded technology it sought. It is unrealistic to believe that the Union could have guaranteed that the unit employees would develop improved design concepts. It is also unlikely that the Union could have offered an alternative solution to the problems of diffuse and duplicative engineering activity and outmoded facilities. Certainly the Union was unable to alter the fact that the parent company was located in Connecticut, not New Jersey.

*Id.* at 1290 (Dennis, concurring). Thus, even with the most optimistic view of the novel and innovative solutions that can be achieved through collective bargaining, speculation about how the union in *Otis* could have productively addressed the company's problem of outdated technology seemed a fruitless exercise.

The formulation of the "labor costs" test by Chairman Dotson and Member Hunter in the plurality opinion involves a somewhat different approach but implies a similar result. See *supra* notes 111-12 and accompanying text. "Labor costs," such as wages and fringe benefits, are clearly mandatory subjects under § 8(d) "amenable" to collective bargaining. See, e.g., *Bancroft Mfg. Co.*, 210 N.L.R.B. 1007 (1974) (paid holidays); *Gray Line, Inc.*, 209 N.L.R.B. 88 (1974) (hourly rates of pay), *enforced in relevant part*, 512 F.2d 992 (D.C. Cir. 1975); *Inland Steel Co.*, 77 N.L.R.B. 1 (pensions), *enforced*, 170 F.2d 247 (7th Cir. 1948), *cert. denied*, 336 U.S. 960 (1949). But see discussion *supra* note 111.

quired regardless of the presence or absence of any burden imposed on the employer by the duty to bargain.

The *Otis* case illustrates this point. The ALJ's factual findings suggest, if not establish, that Otis would have suffered little or no burden in bargaining with the union about its work transfer decision.<sup>164</sup> The findings also establish that the union could not affect the motivation underlying the employer's decision.<sup>165</sup> The issue facing the Board was therefore reduced to the following: assuming that requiring Otis to bargain over its decision would have imposed no burden whatsoever, should bargaining be mandated even though the union's ability to address the employer's concerns is limited or negligible? This can be answered in the affirmative only if collective bargaining has value for labor-management relations *irrespective* of any resolution or problem-solving function it more typically serves.<sup>166</sup>

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164. See *supra* notes 100-03 and accompanying text.

165. See *supra* notes 132 & 140 and accompanying text.

166. See *Fibreboard*, 379 U.S. at 214 ("[I]t is not necessary that it be likely or probable that the union will yield or supply a feasible solution but rather that the union be afforded an opportunity to meet management's legitimate complaints.") (quoting from the underlying opinion of the Court of Appeals for the District of Columbia, 322 F.2d 411, 414 (D.C. Cir. 1963)); Comment, *Duty to Bargain About Termination of Operations: Brockway Motor Trucks v. NLRB*, 92 HARV. L. REV. 768, 779-80 (1979) ("[P]articipation by employees in managerial decisions which affect their vital personal interests may be desirable for its own sake, apart from any dividends it may yield in terms of socially efficient decision-making. Such a value has implicitly been recognized in the NLRA since its inception.").

The "value" of collective bargaining referred to here should not be confused with the suggestion of some commentators that collective bargaining can be beneficial as a potential means of evolving unusual and creative solutions to an employer's problems. Certainly recent collective bargaining history has shown that companies can be greatly assisted, if not actually saved from bankruptcy, by union proposals and concessions that may be only indirectly related to the marketing or product problems at the heart of the employer's difficulties. The American automobile industry is perhaps the most dramatic example. The revitalization of the American automobile industry depended to a great extent on union concessions, even though the companies' financial crisis is often attributed to the increase in imports, rising gasoline prices, and a general economic recession. See 110 LABOR RELATIONS REPORTER (BNA) Special Report No. 23, *Labor Relations in an Economic Recession: Job Losses and Concession Bargaining* 9-14, 18-19 (July 19, 1982). For examples of other union concessions, see Note, *Let's Make a Deal*, *supra* note 17, at 744-45 n.213.

This is only to suggest, however, that traditional ideas about the types of problems that can be addressed through collective bargaining are too narrow. Thus, in determining what types of issues are "amenable" to the collective bargaining process, the argument continues, the perspective should be more expansive. See *infra* notes 198-99 and accompanying text. The scope of the duty to bargain is certainly flexible enough to encompass such expansive concepts and was intended to be so by Congress. See *supra* note 28.

In upholding the constitutionality of the NLRA shortly after its enactment, the Supreme Court stated that the "[r]efusal to confer and negotiate has been one of the most prolific causes of strife" in industrial relations,<sup>167</sup> an assertion repeated by the *FNM* Court.<sup>168</sup> Having the opportunity to understand an employer's motivations is of significant value to a union and, ultimately, to the represented employees. Personnel manuals often emphasize the importance of communication between management and employees in effective employee relations.<sup>169</sup> One of the reasons employees join unions is the perception of participation in the business operations through collective bargaining,<sup>170</sup> and communication between labor and management is considered critical in preventing union organization by those who specialize in management consulting.<sup>171</sup>

Communication does not just benefit labor or management; it also benefits "labor-management relations and the collective bargaining process."<sup>172</sup> Discussing the reasons for, and participating in, work relocation decisions must inevitably increase the likelihood that employees will understand and thus acquiesce in such management decisions without the potential interference of grievance arbitration, a breach of contract action, or a strike to protest the employer's actions.<sup>173</sup> This would serve

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167. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 42 (1937).

168. *FNM*, 452 U.S. at 674 n.11.

169. See generally HUMAN RESOURCES MANAGEMENT: PERSONNEL PRACTICES/COMMUNICATIONS ¶ 3300 (Morale, Productivity), ¶ 5500 (Communication Methods) (CCH) (1981); *How Much Do You Tell Your Employees About Their Pay?*, HUMAN RESOURCES MANAGEMENT: IDEAS & TRENDS, Pre-Publication Issue No. 1, 1-2 (CCH) (1981).

170. A. COX, D. BOK & R. GORMAN, CASES AND MATERIALS ON LABOR LAW 16 (8th ed. 1977) ("[U]nions helped to give employees a sense of participation in the business enterprises of which they are part—a function of labor unions which became important as organization spread into mass production industries.").

171. See, e.g., R. LEWIS & W. KRUPMAN, WINNING N.L.R.B. ELECTIONS: MANAGEMENT STRATEGY AND PREVENTIVE PROGRAMS 17 (PLI) (2d ed. 1979) ("A major cause of unsatisfactory employee relations is poor communications or no communications at all. It is a truism in human relations, whether at home or at work, that communicating can avoid misunderstanding. But, communicating is a two-way process. It requires listening, as well as speaking.").

172. *FNM*, 452 U.S. at 679.

173. In a report to Congress in 1902, many years before the enactment of the NLRA, the Industrial Commission stated:

The chief advantage which comes from the practice of periodically determining the conditions of labor by collective bargaining directly between employers and employees is, that thereby each side obtains a better understanding of the actual state of the industry, of the conditions which confront the other side, and of the motives

the interests of both the employer and the employees by diffusing the sense of unfairness and abuse that employees facing the consequences of unemployment undoubtedly feel.<sup>174</sup> The enhancement of mutual respect, a sense of fairness and due process, and a smooth transition are at least partial justifications for requiring collective bargaining even when no union concessions or proposals are expected to resolve the employer's underlying problems.<sup>175</sup> As the Fourth Circuit Court of Appeals has stated, "The underlying philosophy of the Labor Act is that discussion of issues between labor and management serves as a valuable prophylactic by removing grievances, real or fancied, and tends to improve and stabilize labor relations."<sup>176</sup> Consequently, the benefit to labor-management relations provided by communication is an appropriate consideration in determining whether an employer should be required to bargain about a relocation decision.<sup>177</sup>

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which influence it. Most strikes and lockouts would not occur if each party understood exactly the position of the other.

H.R. DOC. NO. 380, 57th Cong., 1st Sess. 844 (1902).

174. See generally B. BLUESTONE, B. HARRISON & L. BAKER, *CORPORATE FLIGHT: THE CAUSES AND CONSEQUENCES OF ECONOMIC DISLOCATION* 24-35 (1981); U.S. DEPT. OF H.E.W., PUB. NO. 77-224, *TERMINATION: THE CONSEQUENCES OF JOB LOSS* 174-81 (1977) (discussing the financial, psychological, and physiological effects of job loss for 100 employees terminated by the shutdown of two manufacturing plants studied).

175. In response to the argument that there is inherent value in the process of collective bargaining, the employer may counter with the converse to that argument, namely, that there is an inherent burden in requiring the employer to bargain about a decision that should be left to its own business judgment. Yet when such a decision "touches on a matter of central and pressing concern to the union and its member employees," the Supreme Court has held that this "need for unencumbered decisionmaking" must be subject to the *FNM* benefit/burden analysis. *FNM*, 452 U.S. at 677, 679; see *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 549 (1964) ("The objectives of national labor policy, reflected in established principles of federal law, require that the rightful prerogative of owners independently to rearrange their businesses . . . be balanced by some protection to the employees from a sudden change in the employment relationship.").

176. *Westinghouse Electric Corp. v. NLRB*, 369 F.2d 891, 895 (4th Cir. 1966).

177. The *FNM* Court intimated that the value of the communication benefit increases with the existence of a current collective bargaining agreement or a long-term relationship. *FNM*, 452 U.S. at 688. A collective bargaining agreement creates certain expectations of stability on the part of the union and employees that deserve some consideration. A long-term relationship between the parties enhances the prospects for mutual understanding and cooperation because each party will become more familiar with the other's problems and concerns over time. Cf. *ANTHRACITE COAL STRIKE COMMISSION REPORT*, S. DOC. 6, 58th Cong., Spec. Sess. 63 (1905) ("Experience shows that the more full

Bargaining for its own sake is beneficial as a means of fostering respect and understanding in labor-management relations, even though the primary function of bargaining remains dispute resolution.<sup>178</sup> When the employer's relocation decision is based on circumstances beyond the union's power to change, and the burden imposed by bargaining is substantial,<sup>179</sup> the Board should not require bargaining simply because of the communication benefit to labor-management relations arising from the bargaining process itself. Except in unusual circumstances,<sup>180</sup> however, bargaining will not impose substantial burdens on the employer. Requiring the employer to bargain does not obligate the employer to reach an agreement with the union;<sup>181</sup> having bargained in good faith to impasse, the employer is free to implement a relocation decision consistent with its statutory duties.<sup>182</sup> If an employer can bargain concerning its relocation decision without burdening the conduct of its business in any way, the independent benefit that communication provides to labor-management relations should tip the balance towards requiring the employer to bargain. "Much is gained even by giving each side a better picture of the strength of the other's convictions,"<sup>183</sup> and if no burdens offset that gain, bargaining should be required.

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the recognition given to a trades union, the more businesslike and responsible it becomes.").

178. See *infra* notes 184-99 and accompanying text. The *FNM* decision suggests that amenability was not intended to be the sole criteria, as it was in the Board's analysis in *Otis II*. Bargaining itself may be a benefit to "labor-management relations and the collective bargaining process" even though that process does not affect the final decision. *FNM*, 452 U.S. at 679 (emphasis added).

179. See *infra* notes 213-14 and accompanying text.

180. See *infra* notes 215-30 and accompanying text.

181. NLRA § 8(d), 29 U.S.C. § 158(d) (1982) ("For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . . but such obligation does not compel either party to agree to a proposal or require the making of a concession."); *FNM*, 452 U.S. at 678 n.16 ("The Act does not compel agreements between employers and employees. It does not compel any agreement whatever. It does not prevent the employer 'from refusing to make a collective contract. . . .' The theory of the Act is that free opportunity for negotiation with accredited representatives of employees is likely to promote industrial peace and may bring about the adjustments and agreements which the Act in itself does not attempt to compel.") (quoting *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. at 45).

182. *NLRB v. Katz*, 369 U.S. 736, 742-43 (1962); see *supra* note 35.

183. Cox, *The Duty to Bargain in Good Faith*, 71 HARV. L. REV. 1401, 1412 (1958).

b. *The Amenability Benefit*

Because the primary function of bargaining is dispute resolution, amenability to bargaining is clearly the more significant factor in weighing the benefit of bargaining. In fact, the manner in which "amenability" is defined will often predetermine the outcome on the ultimate issue of whether a bargaining obligation will be imposed. To illustrate, an employer's decision to transfer unit work in order to take advantage of a lower wage scale available in another area is almost certainly a decision "amenable to resolution through collective bargaining" under any of the analyses discussed or proposed.<sup>184</sup> Assume, however, the employer decides to relocate because of an increase in the rental rate of its present facility. Under the Dotson/Hunter test, no bargaining is required since the decision does not "turn upon labor costs."<sup>185</sup> Moreover, the Dotson/Hunter approach suggests that a decision must be based *solely* on labor costs to be "amenable."<sup>186</sup> By defining amenability narrowly, the Dotson/Hunter analysis avoids balancing and establishes almost a per se rule of no duty to bargain because relocation decisions will seldom be based solely on labor costs.<sup>187</sup>

Member Dennis apparently adopts a broader definition of

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184. Such a decision would, by definition, satisfy the "labor costs" test used by Chairman Dotson and Member Hunter, *see supra* notes 111-12 and accompanying text, as well as the "amenability" test proposed by Member Zimmerman, *see supra* notes 130-31 and accompanying text. Similarly, Member Dennis's threshold requirement of amenability would be easily met, and her analysis would also require bargaining in the absence of some unusual burden on the employer. *See supra* notes 137-39 and accompanying text.

185. *Otis II*, 115 L.R.R.M. (BNA) at 1282; *see supra* notes 118-21 and accompanying text.

186. *Otis II*, 115 L.R.R.M. (BNA) at 1283.

187. *See supra* notes 126-27 and accompanying text. The result under the Zimmerman analysis is less clear. At one point, Member Zimmerman refers to the union's ability to "affect the reasons underlying an employer's decision." *Otis II*, 115 L.R.R.M. (BNA) at 1285 (Zimmerman, concurring in part) (emphasis added). This statement suggests a narrow definition of amenability. For example, because a union does not exercise control over the employer's landlord, a decision to relocate because of a rental increase would not be amenable to bargaining. At another point, however, Member Zimmerman states that "amenability . . . necessarily encompasses situations where union concessions may substantially mitigate the concerns underlying the employer's decision, thereby convincing the employer to rescind the decision." *Id.* (Zimmerman, concurring in part) (emphasis added). A union's offer to reduce wages or benefits to offset the rental increase would mitigate the employer's concerns about the increased expense and may affect its decision. Therefore, Member Zimmerman seems to define amenability more broadly, although his analysis is somewhat ambiguous. *See also id.* at 1285 (Zimmerman, concurring in part) (emphasis added).

amenability. She refers to the union's ability to "affect . . . the employer's decision,"<sup>188</sup> which would suggest the possibility of offset bargaining. In other words, although the union may be unable to affect directly the employer's reasons for a decision, it may be able to alter the decision itself.<sup>189</sup>

The wide range of definitions used by these four Board members, all purporting to interpret and apply the same authority, illustrates the potential for manipulation in determining "amenability." Although this problem may be incapable of complete resolution, at least within the bounds of the *FNM* decision, it can be diminished by recognizing the concept of amenability as a continuum rather than an "either/or" proposition. At one end of the spectrum is a relocation decision based solely

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188. *Id.* at 1288 (Dennis, concurring) (emphasis added).

189. Similarly, the Board's General Counsel adopted a broad definition of amenability that includes offset bargaining in its guidelines issued to the NLRB regional offices concerning the application of the *FNM* decision. 81 Mem. Off. Gen. Counsel No. 57 n.13 (November 30, 1981) ("If the employer's decision is based on economic factors unrelated to labor costs (e.g., increase in rent), but union concessions in the area of labor costs could counterbalance these economic factors, the employer's decision would be considered amenable to the collective bargaining process."), reprinted in *LABOR RELATIONS YEARBOOK*—1981, *supra* note 91, at 315-17.

The Supreme Court's definition of amenability is unclear. In *FNM*, the Court seemed to focus on the union's ability to affect the underlying reason for the employer's decision. Thus, the Court noted the union's lack of control over the size of the management fee, the justification for the employer's shut-down, without discussing the possibility that wage concessions might have resulted in Greenpark's willingness to increase the fee. *FNM*, 452 U.S. at 687-88; cf. *id.* at 690 (Brennan, J., dissenting) ("Even where labor costs are not the direct cause of a company's financial difficulties, employee concessions can often enable the company to continue in operation—if the employees have the opportunity to offer such concessions."); Note, *Enforcing the NLRA*, *supra* note 17, at 311-12 ("A union can generally offset third-party factors with concessions in areas it does control. . . . An efficient business considers all possible levels of capital and labor and selects the most productive combination of two factors. . . . Futility can be determined only by the choices of the primary parties.").

Still, the facts in *FNM*, unlike the hypothetical presented, involved a problem two steps removed from the union. In the hypothetical, the union has no control over the rental rate but can directly offset the increase, leaving the ultimate determination in the hands of the employer. In *FNM*, however, Greenpark reimbursed *FNM* for all labor costs, regardless of the size of the management fee. *FNM*, 452 U.S. at 668. Even if the union had offered wage concessions, *FNM* could only have offered them to Greenpark as an incentive to increase the management fee. The final decision would have been left to Greenpark, not the employer. *Id.* at 687-88. Although the Supreme Court's discussion of "amenability" in *FNM* seems to imply the rejection of "offset bargaining" as part of that concept, such a conclusion is not necessarily precluded by the decision since the case can be factually distinguished.

on an employer's desire or need to reduce wages. This is the classic issue "amenable" to resolution through collective bargaining,<sup>190</sup> and only a substantial burden on the conduct of the employer's business should overcome the bargaining obligation. At the opposite end of the continuum is a situation such as the one presented in *Otis II*. Although it is always possible to imagine that some combination of union proposals or concessions could have affected the employer's decision in that case,<sup>191</sup> the practical "amenability" of the problems of outdated technology and duplicative research activity to the collective bargaining process was minimal.<sup>192</sup>

Between these two extremes exist a variety of factual situations that must be evaluated on a case-by-case basis. The more susceptible the problem is to resolution through collective bargaining,<sup>193</sup> the greater the burden must be on the employer to avoid the duty to bargain. A strict "either/or" definition of amenability, such as the Dotson/Hunter approach, prevents this balancing. Since the amenability factor is to be used as part of a balancing test, measuring it in shades of gray rather than simply black or white is appropriate. Certainly, the burden factor, on the other side of the balance, must be measured in this manner.<sup>194</sup> The issue is rarely whether an employer will be burdened by imposing an obligation to bargain, but rather how much it will be burdened; the amenability benefit must be assessed in the same way.

In determining the value or "degree" of the amenability benefit, the Supreme Court has offered at least one significant objective criterion: current industrial practice. Although ignored entirely by all three opinions in *Otis II*, the Court has repeatedly used this factor in considering the duty to bargain. Industrial practice, although not determinative, has been relied upon as an "indication" of the amenability of an issue to the bargaining process.<sup>195</sup> In *Fibreboard*, for example, the Court

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190. See cases cited *supra* note 164 and *infra* note 227.

191. See E. MASON, *ECONOMIC CONCENTRATION AND THE MONOPOLY PROBLEM* 199 (1957) ("There is literally no entrepreneurial activity in the production and sale of goods that cannot conceivably be influenced by union activities to the advantage of union members.").

192. See *supra* notes 92-97 and accompanying text.

193. See *infra* notes 195-99 and accompanying text.

194. See *supra* note 62 & *infra* notes 200-09 and accompanying text.

195. *FNM*, 452 U.S. at 684; see *Fibreboard*, 379 U.S. at 211 ("It is appropriate to look to industrial bargaining practices in appraising the propriety of including a particular subject within the scope of mandatory bargaining. Industrial experience is not only reflective of the interests of labor and management in

supported the imposition of a duty to bargain by concluding that subcontracting was "widely and successfully" discussed in collective bargaining, as evidenced by a number of labor contracts containing provisions on the issue.<sup>196</sup>

Although it is relevant to consider current industrial practice in determining amenability, the lack of agreements within the industry addressing an issue must not be conclusory as to its lack of amenability.<sup>197</sup> Amenability should be broadly de-

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the subject matter but is also indicative of the amenability of such subjects to the collective bargaining process.") (footnote and citation omitted).

196. 379 U.S. at 211-12. The Court cited a study in which one-fourth of the agreements surveyed contained some limitation on subcontracting. *Id.* at 212 n.7. If the Board members had referred to similar statistics in *Otis II*, they would have discovered that restrictions on shutdowns or relocations occurred in 18% of the sample contracts of all industries reviewed in one study. 2 COLLECTIVE BARGAINING NEGOTIATIONS AND CONTRACTS (BNA) § 65:3 (1983). Although this percentage is not high, it indicates some degree of amenability, at least enough to require bargaining by the employer when no burden on the conduct of its business would result.

In addition to the "all industry" figure of 18%, the study showed the presence of restrictions on shutdowns or relocations in 50% of the contracts surveyed in the apparel, furniture, rubber, leather, and maritime industries. *Id.* These statistics present the issue of whether the classification of mandatory bargaining subjects could vary by industry. The additional uncertainty for the employer that would be created by such an idea, see *FNM*, 452 U.S. at 684-85, is probably a sufficient reason in itself to avoid this result, given the confusion that already exists in determining relocation decision bargaining. Nonetheless, the concept of a variable standard is not without some support. The legislative history of § 8(d) notes that the determination of mandatory bargaining issues should be left to the Board in order that it may examine "industrial practices and tradition in each industry or area of the country." H.R. REP. NO. 245, *supra* note 28, at 71, *reprinted in* 1 LMRA HISTORY, *supra* note 23, at 362.

There is also Board precedent in other areas for applying different rules to different industries. Bargaining history within the industry, for example, is a factor considered by the Board in determining the appropriateness of a bargaining unit. *Mallinckrodt Chemical Works*, 162 N.L.R.B. 387, 397 (1966); *C. MORRIS*, *supra* note 35, at 411. Unit determinations, like the scope of mandatory bargaining, see *supra* notes 21-28 and accompanying text, were generally left by Congress to the discretion of the Board. See *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111, 134 (1944); *NLRA* § 9(b), 29 U.S.C. § 159(b) (1982). Industry practice is also a consideration in resolving jurisdictional disputes under § 10(k) of the Act, 29 U.S.C. § 160(k) (1982). *International Ass'n of Machinists, Lodge No. 1743*, 135 N.L.R.B. 1402, 1410 (1962); see *THE DEVELOPING LABOR LAW*, *supra* note 35, at 684.

197. One difficulty with using industrial practice as the measure of amenability is that it focuses on the employer's actions as opposed to its motivation. Subcontracting provisions, for example, often prohibit subcontracting in its entirety without distinguishing between subcontracting to reduce labor costs, subcontracting to improve work quality, or subcontracting to avoid restrictive seniority provisions. Yet in discussing the "amenability" factor in *FNM*, the Court was referring to the employer's motivation, namely, the refusal of Greenpark to increase the management fee. This dichotomy is evident in

financed to encourage creative and innovative bargaining.<sup>198</sup> If the union members face possible unemployment due to an employer's decision to relocate, the union will have a strong incentive to propose creative alternative solutions.<sup>199</sup>

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Member Dennis's statement that Otis would have been required to bargain about a relocation limitation (presumably regardless of the reasons for a future relocation decision) as a provision of a collective bargaining agreement even though no such duty is imposed on Otis once relocation is actually contemplated. *Otis II*, 115 L.R.R.M. (BNA) at 1289 n.16.

"Amenability" must perhaps be recognized as a two-part concept in order to be properly understood. Amenability could refer to either an employer's actions or motivations. Reconsider the employer whose rental rate has been increased by a third-party lessor. See *supra* text accompanying notes 184-96. If the employer chooses to respond to that increase by a wage reduction, that "action" is surely subject to mandatory bargaining even though the "motivation" is a factor beyond the union's power to affect directly. Should the employer choose to relocate based on the same motivation, however, there is no duty to bargain if "amenability" requires that a union be able to affect directly the employer's motivation.

Does it make sense to require bargaining in one situation but not in another when the employer is simply responding in alternative ways to the same change in circumstances? The irony of this result, at least from the employees' perspective, is that it is the relocation decision, about which bargaining is not required, that has the far greater impact on employees. The only answer may be that the first decision to reduce wages would not constitute a "third category" of management decision under Justice Stewart's *Fibreboard* concurrence adopted in *FNM*. In other words, bargaining about a wage reduction is required because it is directly concerned with the employment relationship, not because of the result of any balancing analysis under *FNM*.

198. For example, union concessions were undoubtedly critical to the revitalization of the American automobile industry, although the industry's problems of recent years have often been attributed to nonlabor factors, such as increased foreign competition, rising gasoline prices, and a general economic recession. See *supra* note 166.

199. See *supra* note 166 and sources cited therein for examples of union concession bargaining. In *FNM* the Court acknowledged the existence of cases in which union concessions had assisted or saved failing businesses. *FNM*, 452 U.S. at 681 n.19. The Court rejected such experience as a justification for imposing mandatory bargaining about partial closure decisions, however, because the situations had "come about without the intervention of the Board enforcing a statutory requirement to bargain." *Id.* Such reasoning essentially "begs the question." The Court has ignored the not unlikely possibility that the employers in question were willing to bargain with the union because they understood it to be their statutory obligation, as the Board held in its underlying decision in *FNM*. 242 N.L.R.B. 462 (1979). Given the Board's general requirement of bargaining about relocation and partial closure decisions before *FNM*, see *supra* note 85 and cases cited therein, an employer would be unlikely to risk the consequences of unlawful unilateral action, see *Kramer & Schindel, Collective Bargaining Obligations in Plant Closings, Divestitures and Other Transformations: A Management View*, in *PROCEEDINGS OF NEW YORK UNIVERSITY THIRTY-SIXTH ANNUAL NATIONAL CONFERENCE ON LABOR* § 14.01 (R. Adelman ed. 1983) ("Because the risk is so great, and judicial correction is years away, employers often bargain these decisions.").

## 2. The Employer's Burden

Identifying factors to be considered in measuring the burden of bargaining on the employer, the other half of the *FNM* balancing test, is a less complex task. In analyzing the *FNM* partial closure, the Supreme Court emphasized that the Board's concern must be with the burden on the "conduct of the business."<sup>200</sup> Any bargaining may be "burdensome" to the employer to some degree, given the time and expense involved, as well as the loss of freedom to make business decisions without union agreement.<sup>201</sup> The focus, however, must be on the potential harm to the business that may result from imposing a duty to bargain.

Although the "burden" factors suggested in *FNM* are more apparent than the "benefit" factors, the Court failed to provide any definitive guidelines. The factors considered important by Member Dennis in her *Otis II* concurrence, however, reflect a thoughtful and careful reading of *FNM*<sup>202</sup> and provide a basic framework to begin the analysis. Member Dennis proposes five factors to be considered in determining the employer's burden in a relocation situation: 1) the need for speed; 2) the need for flexibility; 3) the need for confidentiality; 4) the extent of the capital investment; and 5) the extent of the change in operations.<sup>203</sup>

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200. *FNM*, 452 U.S. at 679 (emphasis added).

201. See *id.* at 682-83; *Richfield Oil Corp.*, 110 N.L.R.B. 356, 362 (1954) ("[I]ntrusions in management affairs . . . occur whenever an employer fulfills his statutory obligation to bargain collectively.").

202. See *Otis II*, 115 L.R.R.M. (BNA) at 1288 (Dennis, concurring).

203. *Id.* The employer's needs for speed, flexibility, and confidentiality are discussed by the Supreme Court in *FNM*. 452 U.S. at 682-83. Member Dennis supplements this list with the two additional factors. *Otis II*, 115 L.R.R.M. (BNA) at 1288 (Dennis, concurring).

Although the Court expressed great concern about the possible financial impact of mandatory bargaining on the employer, it failed to acknowledge the devastating economic impact on the employees and their communities of the unemployment resulting from a partial shutdown or work relocation. By 1980, for example, almost 10,000 jobs in the steel industry were lost in a single county in Ohio. One study estimated the consequent loss of an *additional* 24,200 manufacturing jobs in other industries in the same county, representing a yearly loss of \$500 million in wages for the community. T. BUSS & S. REDBURN, *SHUTDOWN AT YOUNGSTOWN* 68-73 (1983). See generally B. BLUESTONE & B. HARRISON, *THE DEINDUSTRIALIZATION OF AMERICA* 67-72 (1982) (discussing the "multiplier effects" of plant closings on local employment and the economy). Lost wages represent only part of the problem. The value of the loss of hope and life is, of course, incalculable. Unemployment has been linked to an increased rate of suicide, as well as a variety of physical and psychological problems. *Id.* at 63-66. See generally B. BLUESTONE, B. HARRISON &

The employer's need for speed, flexibility, and confidentiality will rarely apply to a relocation decision. A relocation decision necessarily entails a decision to terminate one operation and to begin or expand another, a decision that requires substantial study and advance planning. Thus, the employer will rarely have a need for speed or flexibility.<sup>204</sup> Similarly, the extensive planning involved suggests that confidentiality often will not be essential.

Several appellate courts prior to *FNM* considered the absence or existence of a significant capital expenditure as determinative of the bargaining issue.<sup>205</sup> In *FNM*, however, the Court did not consider *FNM*'s lack of any capital investment in its decision to shut down its Greenpark operation to be "crucial."

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L. BAKER, *supra* note 174, at 24-35; Kay & Griffin, *Plant Closures: Assessing the Victims' Remedies*, 19 WILLAMETTE L.J. 199, 201-204 (1983).

The element that may be missing from this Article's proposed analysis is a high degree of predictability. The *FNM* Court seemed particularly concerned that the employer not be faced with the uncertainty and risk of not bargaining because of the potential consequences of making an erroneous decision. See *FNM*, 452 U.S. at 684-85. The need for predictability was also a primary consideration in the Dotson/Hunter analysis. See *Otis II*, 115 L.R.R.M. (BNA) at 1283. Given the introduction by the Court of a balancing test to decide these issues, however, high predictability may be an unrealistic goal. In spite of the apparent adoption of a per se test for economically motivated partial closure decisions in *FNM*, the Court's language seems to mandate the application of a balancing test for other types of "third category" management decisions. The Court was careful to limit its holding to the *FNM* facts and explicitly excluded from its opinion "other types of management decisions, such as plant relocations." See *FNM*, 452 U.S. at 686 n.22.

The use of a balancing test and the achievement of the predictability of a per se test appear irreconcilable. Perhaps the Court's concern can be utilized in close or borderline cases. Thus, where there are both some benefits to the labor-management relationship and some burdens on the conduct of the business, the decision should be in favor of the employer and find no bargaining obligation. The employer would then have some reassurance that it will receive the "benefit of the doubt" when faced with a difficult evaluation of its bargaining duty. The Court's concerns about the consequences for the employer of unlawfully refusing to bargain can be further diffused by the reluctance of the Board to impose harsh remedies in such cases. See *infra* note 231.

204. See *infra* note 213 and accompanying text.

205. See, e.g., *NLRB v. International Harvester Co.*, 618 F.2d 85, 87 (9th Cir. 1980); *NLRB v. Draper Mfg. Co.*, 425 F.2d 1025, 1028 (8th Cir. 1970); *NLRB v. Transmarine Navigation Corp.*, 380 F.2d 933, 937 (9th Cir. 1967), *denying enforcement of* 152 N.L.R.B. 998 (1965), *on remand*, 170 N.L.R.B. 389 (1968); *NLRB v. Royal Plating & Polishing Co.*, 350 F.2d 191, 195-96 (3d Cir. 1965); see also *National Car Rental*, 252 N.L.R.B. 159, 163 (1980), *enforced in relevant part*, 672 F.2d 1182 (3d Cir. 1982) (decision involving the liquidation of one of company's facilities and the sale of half the company's inventory of trucks was essentially a managerial and financial decision not requiring advance bargaining).

cial.”<sup>206</sup> Nonetheless, the Court did not exclude this factor from consideration entirely. Given the numerous court and Board decisions that have accepted the capital investment criterion as an important or determinative factor when considering the burden of the duty to bargain, and the absence of an express disavowal by the Supreme Court, Member Dennis properly included it in her list.

Similarly, Member Dennis’s inclusion of the extent of change in the employer’s operations was appropriate. The *FNM* Court considered the extent of changes in the employer’s business operations to be significant, although it did not explicitly include this factor in its discussion of the potential burden on the employer of requiring bargaining over a partial closure decision.<sup>207</sup> The Court emphasized the magnitude of the change in *FNM*’s operations, a change “akin to the decision whether to be in business at all” and “not unlike . . . going out of business entirely.”<sup>208</sup> The more fundamental and significant the business changes, the greater the interference of mandatory bargaining with the employer’s “need to operate freely.”<sup>209</sup>

### 3. Striking the Balance

Balancing the benefits against the burdens of collective bargaining on the conduct of the employer’s business by definition requires comparing two very distinct concepts. *FNM* demands that the benefits must be greater than the burdens on the employer before a bargaining obligation is imposed.<sup>210</sup> Undoubtedly, in a number of cases the result of the balancing will be evident. An employer’s decision to relocate for the purpose of reducing wages, for example, will generally be a subject of mandatory bargaining. The amenability benefit is at its highest value in such circumstances<sup>211</sup> and, combined with the communication benefit in a stable bargaining relationship,<sup>212</sup> would outweigh the burdens imposed on the employer in most in-

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206. *FNM*, 452 U.S. at 688.

207. *See id.* at 682-86.

208. *Id.* at 677, 688.

209. *Id.* at 686.

210. *FNM*, 452 U.S. at 679 (“[B]argaining over management decisions . . . should be required only if the benefit, for the labor-management relations and the collective-bargaining process, outweighs the burden placed on the conduct of the business.”). Accordingly, if the benefits and burdens are equal, no duty to bargain would be imposed.

211. *See supra* note 189.

212. *See supra* notes 167-76.

stances.<sup>213</sup> Even in situations in which the amenability value is much lower, bargaining should be routinely required when there is no corresponding burden on the conduct of the employer's business.

In other circumstances, balancing will dictate that no duty to bargain be imposed on the employer. When an employer is required to relocate in order to retain the business of its principal customer, for example, it will often be necessary to act expeditiously. The substantial need for speed and flexibility in such a case would rarely be outweighed by the benefit of collective bargaining, consisting of limited amenability value combined with the less significant communication value.<sup>214</sup>

Most situations, however, will fall between these two extremes. The application of the test proposed can be illustrated by reevaluating *Adams Dairy, Inc.*,<sup>215</sup> a case discussed in both the Dotson/Hunter and Dennis analyses in *Otis II*.<sup>216</sup> Adams Dairy processed and distributed milk and dairy products on a wholesale basis to retail outlets. Deliveries of the company's products were made by employees called "driver-salesmen," although the employer made some sales at its facility to independent distributors. The employees were paid a salary plus commission on sales. In negotiations for the parties' third contract, effective September 1, 1959, for a three-year term,<sup>217</sup> the employer expressed concern about keeping delivery costs low in order to remain competitive with rival dairies.<sup>218</sup> Only two months after this collective bargaining agreement went into effect, the company unsuccessfully sought to reopen the contract to discuss delivery costs.<sup>219</sup>

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213. Only in an unusual situation would an employer have significant need for speed and flexibility when relocating a plant. Such a substantial decision by a company more typically would follow months or even years of study and consideration, allowing sufficient opportunity for discussions with the union. See B. BLUESTONE & B. HARRISON, *supra* note 127; B. BLUESTONE, B. HARRISON & L. BAKER, *supra* note 174, at 93.

214. See *NLRB v. Transmarine Navigation Corp.*, 380 F.2d 933 (9th Cir. 1967).

215. 137 N.L.R.B. 815 (1962), *enforcement denied in relevant part*, 350 F.2d 108 (8th Cir. 1965), *cert. denied*, 382 U.S. 1011 (1966).

216. *Otis II*, 115 L.R.R.M. (BNA) at 1283 (Dotson/Hunter), 1289 (Dennis, concurring).

217. *Adams Dairy, Inc.*, 137 N.L.R.B. at 820. The driver-salesmen had been represented by the union for six years.

218. *Id.* at 820.

219. *Id.* Evidence also indicated, however, that the company was competitive with other dairies at least with respect to sales to its primary customers, representing 80% of its business. *Id.* at 820-21 n.4.

In February 1960, without prior notice to the union, Adams Dairy terminated its driver-salesmen and replaced them with independent distributors.<sup>220</sup> The equipment formerly used by the driver-salesmen was sold to the new independent distributors.<sup>221</sup> The employer had apparently been considering such a change for some time. In addition to references in the 1959 negotiations about the use of independent contractors by another dairy, the company as early as 1955 had approached its employees individually to ask if they would be interested in becoming independent distributors.<sup>222</sup>

In this situation, both benefit factors—communication and amenability—must be given substantial weight. The communication value, present to some degree in all collective bargaining, is enhanced by the presence of a long-term relationship between the parties and a current collective bargaining agreement.<sup>223</sup> Further, the facts suggest that Adams Dairy's concerns about delivery costs were primarily related to labor costs.<sup>224</sup> Labor costs are a classic example of an issue amenable to resolution through the collective bargaining process;<sup>225</sup> thus, the amenability benefit is significant.

Requiring collective bargaining by Adams Dairy would not have imposed an appreciable burden on the conduct of its business. Adams Dairy did not appear to have any special need for speed, flexibility, or confidentiality; indeed, it had discussed with its employees using independent contractors five years

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220. *Id.* at 821-22.

221. *Id.* at 822.

222. *Id.* at 820, 823 n.9.

223. See *FNM*, 452 U.S. at 688; *supra* note 177 and accompanying text.

224. See *supra* notes 217-19 and accompanying text. The Trial Examiner made no specific findings as to the employer's motivations in subcontracting the delivery work because he considered the duty to bargain about such a decision well-established by past authority. *Adams Dairy, Inc.*, 137 N.L.R.B. at 823. Specific findings on this issue would, of course, be expected in future decisions applying the balancing test developed here. Nonetheless, the evidence suggests that Adams Dairy would have responded differently had the union agreed to a decrease in wages and/or commissions when the company attempted to reopen the contract in November 1959. In their discussion of *Adams Dairy* in the *Otis II* decision, Chairman Dotson and Member Hunter apparently assumed that labor costs were not the basis of the employer's decision. See *Otis II*, 115 L.R.R.M. (BNA) at 1283. There is no explanation or cited authority for this assumption, however.

225. NLRA § 8(d), 29 U.S.C. § 158(d) (1982); *Gray Line Inc.*, 209 N.L.R.B. 88 (1974) (rates of pay), *enforced in relevant part*, 512 F.2d 992 (D.C. Cir. 1975); *Honolulu Star Bulletin, Inc.*, 153 N.L.R.B. 763 (1965) (incentive wage plans).

before implementing the change.<sup>226</sup> The two remaining factors, however, must be given some weight in the balance. Adams Dairy altered its capital structure by selling its delivery trucks to the independent distributors. Similarly, using independent contractors represented some change in operations, although not a substantial one. The company had used some independent contractors prior to the termination of the driver-salesmen, and the substance of the operations, the delivery of the products, remained unchanged.

Applying the proposed balancing test, bargaining should have been required.<sup>227</sup> The moderate burden imposed on the conduct of Adams Dairy's business by subjecting the employer to mandatory bargaining is outweighed by the substantial benefit for labor-management relations and the collective bargaining process. Had the company raised this issue in November 1959, when it sought to reopen the collective bargaining agreement, some accommodation likely would have been reached by February 1960, when the decision was implemented.

*Otis II* thus may be incorrect or, more accurately, incomplete. Even assuming the absence of any amenability value in examining the benefit of mandatory bargaining for labor-management relations, the communication value is increased by the existence of a long-term bargaining relationship between the parties and a current collective bargaining agreement.<sup>228</sup> Although less significant than the amenability value, the communication benefit must prevail when no burden is placed on the conduct of the employer's business by requiring bargaining. From the facts as described by the ALJ, the extent of the burden on Otis is unclear.<sup>229</sup> Given the substantial investment and reorganization involved in moving its research center to the new Connecticut facility, some degree of "burden" may have

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226. See *supra* note 222 and accompanying text. It is possible that factors not mentioned by the Trial Examiner caused the company to act when it did. In attempting to apply the *FNM* test retroactively, facts will inevitably be omitted from the findings that could affect the outcome.

227. The Eighth Circuit denied enforcement of the Board's imposition of a duty to bargain because the case did not involve "just the substitution of one set of employees for another;" rather, it involved a "change in the basic operating procedure" and "a change in the capital structure." *NLRB v. Adams Dairy*, 350 F.2d 108, 111 (8th Cir. 1965). Of course, *Adams Dairy* was decided sixteen years before the Supreme Court adopted a balancing approach in *FNM*.

228. *Otis II*, 115 L.R.R.M. (BNA) at 1282 n.2; see *supra* note 177 and accompanying text.

229. See *supra* notes 100-05 and accompanying text.

been present. This burden was probably sufficient to match or outweigh the limited benefit of the communication value. The ALJ suggests, however, that the investment and reorganization decisions primarily involved the nonunionized Parsippany employees, not the Mahwah bargaining unit employees.<sup>230</sup> In the absence of such findings, the Board's result cannot be properly evaluated under *FNM*.

#### 4. Flexibility in the Bargaining Obligation

The viability of the *FNM* balancing test may depend on the Board's willingness to remain flexible in determining what constitutes good faith bargaining within the context of relocation and related types of management decisions. "Bargaining in good faith" is far from a definitive concept. On the contrary, the efforts required to fulfill that obligation may vary widely depending on the exigencies involved. In one of the first decisions discussing the duty to bargain, the Board stated that "no general rule as to the process of collective bargaining can be made to apply to all cases. The process required varies with the circumstances in each case."<sup>231</sup>

Although bargaining for a new agreement may often be a lengthy process, good faith bargaining to impasse about a contemplated work relocation can be accomplished quickly if necessary.<sup>232</sup> The more immediate the employer's plight, particularly when the issue in question has only a small "amenability value," the more quickly the parties may reach an impasse. Under these circumstances, a valid impasse can be reached within a matter of days or even hours, allowing the

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230. See *supra* note 101 and accompanying text.

231. *Sands Mfg. Co.*, 1 N.L.R.B. 546, 557 (1936). The Supreme Court has similarly noted that "a statutory standard such as 'good faith' can have meaning only in its application to the particular facts of a particular case." *NLRB v. American Nat'l Ins. Co.*, 343 U.S. at 410.

232. See *Betlem Service Corp.*, 268 N.L.R.B. No. 53, 115 L.R.R.M. (BNA) 1016 (1983) (impasse was reached after only two bargaining sessions and two subsequent telephone contacts when the union refused to consider any agreement unless its terms were identical to a contract recently entered into between the union and an employer association in the same industry); *E.I. DuPont*, 189 N.L.R.B. 753, 754 (1971) (when the employer announced its intention to close the employee cafeteria on nights and weekends, impasse was reached in a matter of days because the union's proposed alternatives were "frivolous" and "the union's position was fixed, so that further discussion of these subjects would have been futile"); cf. *Gulf States Mfg. Inc. v. NLRB*, 704 F.2d 1390, 1398 (5th Cir. 1983) ("Whether an impasse exists depends on whether, in view of all the circumstances of the bargaining, further discussions would be futile.").

employer to implement its decision almost immediately, unilaterally, or as modified by union agreement.<sup>233</sup>

The power of the Board to "tailor" the bargaining obligation to the circumstances should alleviate an employer's concerns that its ability to act will be restricted.<sup>234</sup> A union's attempt to avoid or protract bargaining to delay the employer's actions—a concern expressed by the *FNM* Court<sup>235</sup>—would excuse any continuing duty to bargain on the part of the employer.<sup>236</sup> A union cannot be allowed the privilege of bargaining only to abuse its purpose. A union's resort to dilatory tactics would result in the forfeiture of its right to demand further bargaining, releasing the employer to act unilaterally.<sup>237</sup>

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233. *NLRB v. Katz*, 369 U.S. 736, 741 (1962).

234. See *Golden Bay Freight Lines*, 267 N.L.R.B. 1073 (1983), in which the Board held that the union had waived any right to bargain about the employer's partial closure decision because of its failure to respond to the company's notification. In letters of June 22 and 23, the company advised the union that it was considering closing one of its terminals. The union was asked to contact the company by July 1 if it wanted to discuss the matter. When the union did not respond, the terminal was closed on July 2. The employer's quick action was necessitated by threatened eviction because of past-due rent, as well as the threatened closure of one of its remaining facilities by the Internal Revenue Service because of defaults on taxes. *Id.* at 1076.

235. 452 U.S. at 683.

236. See *AAA Motor Lines, Inc.*, 215 N.L.R.B. 793 (1974) (employer lawfully made unilateral changes in employment terms after union's refusal to meet with company representatives to bargain about proposed contractual changes).

237. The employer's dilemma—to bargain or not to bargain—may also be considered by the Board in determining an appropriate remedy when a § 8(a)(5) violation is found. Although the *FNM* Court expressed concern about imposing "harsh remedies" on the employer should it incorrectly determine that it had no bargaining duty, see *FNM*, 452 U.S. at 684-85, the Board has rarely required reopening of a closed or relocated facility when the employer acted for economic reasons and such a remedy would place a significant burden on the company, see *Production Molded Plastic, Inc.*, 227 N.L.R.B. at 778 ("The Board, however, is reluctant to order the resumption of operations, especially where, as here, the closing is for nondiscriminatory reasons."); see also *Whitehall Packing Co., Inc.*, 257 N.L.R.B. 193 (1981); *Cleveland Freight Lines, Inc.*, 254 N.L.R.B. 324 (1981) (company ordered to suspend closing of facility in order to allow bargaining in a case where company did not answer Union's complaint filed with the Board); *Armour Oil Co.*, 253 N.L.R.B. 1104, 1104 (1981) (company's transfer of trucks to another facility in anticipation of a labor strike and the attendant potential for vandalism held not to violate NLRA); *P.B. Mutrie Motor Transp., Inc.*, 226 N.L.R.B. 1325 (1976); cf. *Smyth Mfgs. Co.*, 247 N.L.R.B. 1139, 1172 (1980) (employer ordered to reopen plant where remedy would not threaten company's thriving business); *Soule Glass & Glazing Co.*, 246 N.L.R.B. 792, 806 (1979) (employer required to reopen operations where inconvenience to employer was "relatively slight"), *modified* 652

## IV. CONCLUSION

Applying a balancing test can be difficult even when the test is clearly defined. The failure of the Supreme Court to provide concrete direction in *FNM* makes the determination of mandatory bargaining subjects an even more perplexing endeavor. The danger of close questions, however, does not justify the Board's continued refusal to attempt the task.<sup>238</sup> In *Otis II*, the Board took the initial step of acknowledging the applicability of *FNM* in considering an employer's duty to bargain about a work relocation decision. Its failure to take the second and more critical step of balancing the benefits of bargaining for labor-management relations against the burden on the conduct of the employer's business in determining the bargaining issue is indefensible.

The analysis proposed here will unquestionably require refinement as the Board gains experience in applying *FNM* to relocation and other related management decisions. Until further guidance is provided by the Supreme Court, however, the task of developing the balancing test must commence with the evaluation of those factors suggested in *FNM* as possible considerations. The need for reexamination in the future is of less concern than the Board's unfulfilled responsibility to begin this task.

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F.2d 1055 (1st Cir. 1981). The Board's usual remedy in such cases is to order the employer to bargain about the relocation or partial closure decision and award back pay to the affected employees until one of the following events occurs: 1) the parties reach agreement; 2) the parties reach a good faith bargaining impasse; 3) the union fails to request bargaining within five days of notification of the employer's willingness to bargain; or 4) the union fails to bargain in good faith. See *Cleveland Freight Lines, Inc.*, 254 N.L.R.B. at 236; *P.B. Mutrie Motor Transp. Co., Inc.*, 226 N.L.R.B. at 1325.

If the Board maintains a flexible "bargaining in good faith" definition, the burdens imposed on the conduct of the employer's business by mandating bargaining will be minimized.

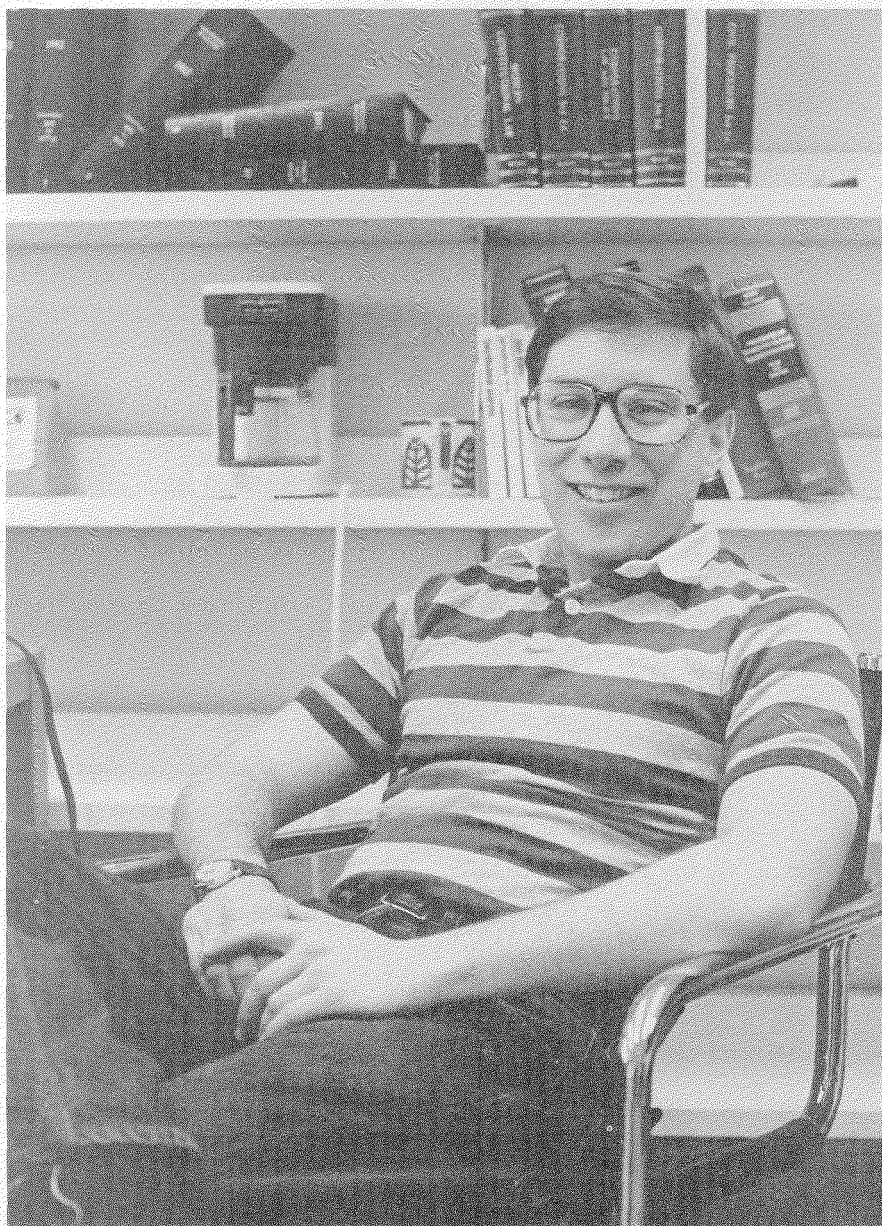
238. The Board has been required to apply equally difficult balancing analyses in other areas. In considering the rights of nonemployee union organizers to solicit on an employer's property, for example, the Board has been instructed to balance the employer's property rights against the § 7 rights of the union and employees to organize or participate in other concerted action. *NLRA* § 7, 29 U.S.C. § 157 (1982); see *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956). A similar analysis is required in determining the right of striking employees to picket their employer in a shopping mall. See *Hudgens v. NLRB*, 424 U.S. 507, 521-22 (1976).

JOHN M. SHEFFEY, B.A. 1968, Randolph-Macon College; J.D. 1971, Northwestern University School of Law. Associate Dean and Associate Professor, University of Arkansas at Little Rock School of Law. Associate, Lord, Bissell & Brook, Chicago, Illinois, 1971-1978. Author: *Securities Law Responsibilities of Issuers to Rumors and Other Publicity: Reexamination of a Continuing Problem*, 57 NOTRE DAME LAW. 755 (1982); *Reinsurance Intermediaries: Their Relationship to Reinsured and Reinsurer*, 16 FORUM 922 (1981); *Credit Life and Disability Insurance Disclosures Under Truth-In-Lending: The Triumph of Form Over Substance*, 8 FLA. ST. U.L. REV. 463 (1980).

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The opinions and conclusions of the articles published in this issue are those of their authors and do not necessarily reflect the position of the *Minnesota Law Review*.





STEVEN M. BLOCK

## In Memory of Steven M. Block, 1951-1984

*The Editors and Staff of the Minnesota Law Review dedicate this issue to Professor Steven Block. Though his stay here was short, he touched the lives of many students with his openness, his humor, and his powerful concern for the dignity of the individual.*