

COMMENTS

EVOLVING CONCEPTS IN MANAGEMENT PREROGATIVES: PLANT CLOSURES, RELOCATIONS, AND MASS LAYOFFS

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I. INTRODUCTION

The United States economy has undergone a major transformation over the last sixty years. When Congress passed the National Labor Relations Act (NLRA)¹ in the mid-1930s, the nation was primarily a manufacturing economy. Since that time, the economy has evolved into a predominately service-oriented market economy. As a result, large numbers of manufacturing-related facilities have become obsolete. While our nation's economy continues to adjust to this transformation, companies are frequently forced to make economically motivated decisions such as plant closings or relocations. These types of determinations, often resulting in mass layoffs, naturally implicate workers' job security.² In making these difficult business decisions, employers must be cognizant of the labor law impli-

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1. National Labor Relations Act of 1935 (NLRA), ch. 372, 49 Stat. 449 (1935) (current version at 29 U.S.C. §§ 141-169).

2. In the first nine months of 1993, a number of corporations announced closings and layoffs that resulted in over 440,000 lost jobs. Samuel Fromartz, *General Electric, Ameritech Continue Layoff Trend*, REUTER BUS. REP., Aug. 20, 1993. For example, IBM Corp. announced more than 50,000 layoffs; Sears, Roebuck & Co., 50,000; Procter & Gamble Co., 13,000; Apple Computer, Inc., 2,500; and Marion Merrell Dow, Inc., 1,300. *Id.*

cations that accompany their actions.

Although the United States government has traditionally taken a laissez-faire, noninterventionist approach to labor law,³ recent legislation indicates a recognizable trend toward increased government activism in the private sector employment relationship. One example is the Worker Adjustment and Retraining Notification (WARN) Act which became law on August 4, 1988.⁴ The WARN Act requires employers to provide written notice to workers sixty days in advance of any layoff of five hundred or more workers or of any layoff that affects fifty or more workers who represent at least one-third of the employer's total work force.⁵ WARN also mandates that employers provide sixty days notice for any plant closing that affects fifty or more workers.⁶ Currently, the Clinton Administration is considering legislation that would substantially broaden the applicability of the WARN requirements by requiring six months advance notice of any layoff or plant closing that affects only twenty-five workers, irrespective of the company's overall size.⁷

In addition to providing advance notice of any plant closing or mass layoffs pursuant to the WARN Act, employers whose employees are unionized may also find that they have a mandatory duty to collectively bargain with their employees' authorized bargaining agent regarding decisions to layoff employees, to partially close facilities, or to relocate their business operations.⁸ Recent decisions by

3. See generally W. Gary Vause, *Symposium Overview — 1992 Critical Issues in Labor and Employment Law*, 22 STETSON L. REV. 1, 2-4 (1992). This approach is best illustrated by the fact that the United States has no federal statute requiring just cause in the discharge of private sector employees, and most states still retain the common law doctrine of employment-at-will. *Id.* at 2.

4. Worker Adjustment & Retraining Notification Act, 29 U.S.C. §§ 2101-2109 (effective February 4, 1989).

5. *Id.* §§ 2101-2102.

6. *Id.*

7. Kevin G. Salwen, *Clinton Mulls Requiring More Notice of Layoffs*, WALL ST. J., Sept. 14, 1993, at A2. Senator Howard Metzenbaum and Representative William Ford, sponsors of the original WARN legislation, are currently supporting amendments to the WARN Act that would significantly toughen its requirements. Sylvia Nasar, *Layoff Law Is Having Slim Effect*, N.Y. TIMES, Aug. 3, 1993, at D1; see *infra* notes 20-23 and accompanying text. Representative Ford introduced the American Jobs Protection Act on May 27, 1993. See H.R. 2300, 103d Cong., 1st Sess. (1993). Senator Metzenbaum is currently preparing legislation similar to H.R. 2300 for introduction in the Senate.

8. Under the NLRA's provisions, an employer is required to collectively bargain over any decision that affects employees' "wages, hours, and other terms and conditions of employment." NLRA § 8(d), 29 U.S.C. 158(d) (1988). An employer commits an unfair

courts and the National Labor Relations Board have expanded management's duty to collectively bargain over decisions lying at the core of managerial control, such as partial plant closings and relocations.

This Comment addresses the labor law ramifications surrounding managerial decisions to layoff a large number of employees and to close, partially close, or relocate existing facilities. Part II of this Comment examines the WARN Act and the recent trends related to its implementation. Specifically, this section analyzes the requirements of the WARN Act and the likelihood that Congress will expand these requirements in the coming years.

In addition to the WARN requirements, an employer may have additional legal considerations if its employees are represented by a certified bargaining agent pursuant to the NLRA.⁹ Part III of this Comment discusses the various tests applied by the courts and the National Labor Relations Board in determining whether an employer is obligated to collectively bargain over its decision to partially close or relocate its business. The discussion then analyzes the Board's most recent decisions involving plant closings and relocations and focuses primarily on whether the Board's decisions are consistent with Supreme Court precedent. Finally, this Comment concludes by briefly summarizing the evolving developments affecting management prerogatives in the area of plant closings, relocations, and mass layoffs.

II. THE FEDERAL GOVERNMENT'S REGULATION OF PLANT CLOSINGS AND MASS LAYOFFS: THE WORKER ADJUSTMENT AND RETRAINING NOTIFICATION ACT

Departing from its traditional noninterventionist approach to private sector employment relations, Congress passed the Worker Adjustment and Retraining Notification Act in 1988.¹⁰ The WARN

labor practice by refusing to bargain with its employees' bargaining representative concerning mandatory subjects of bargaining. *Id.* § 148(a)(5). See *infra* notes 31–34 and accompanying text for a discussion of management's duty to bargain under the NLRA.

9. See *supra* note 8 and accompanying text.

10. 29 U.S.C. §§ 2101–2109 (effective Feb. 4, 1989). While this Comment briefly sets forth some of the basic requirements under the WARN Act, its main focus is on proposed legislation and its effect on management. For a comprehensive review of the WARN Act's provisions, see Howard J. Weg, *Introduction to Federal Regulation of Plant Closings and Mass Layoffs*, 94 COMM. L.J. 123 (1989).

Act requires employers with one hundred or more full-time employees to provide sixty days advance notice to workers, their bargaining representative, and state government officials prior to any plant closing affecting more than fifty workers.¹¹ Sixty days notice is also required for any layoff that involves five hundred or more workers, or that affects fifty or more workers who represent at least one-third or more of the work force.¹² The sixty-day notice requirement is designed to enable workers to adjust to their pending job loss by providing them with an opportunity to plan for their economic future and to obtain new employment or necessary training prior to their termination.¹³ By requiring employers to notify the state dislocated worker unit,¹⁴ WARN also allows communities time to recruit new businesses and to coordinate worker assistance programs designed to assist dislocated workers.

While these are laudatory goals, commentators generally acknowledge that the WARN Act has had no significant impact on the length of advance notice given to employees.¹⁵ This is largely a result of exemptions,¹⁶ lack of enforcement mechanisms,¹⁷ and un

11. Worker Adjustment and Retraining Notification Act (WARN), 29 U.S.C. §§ 2101–2102 (1988).

12. *Id.*

13. 20 C.F.R. § 639.1(a) (1994).

14. The Economic Dislocation and Worker Adjustment Assistance Act requires each state to create or designate a state dislocated worker unit with the capability to provide immediate assistance to workers affected by plant closures or mass layoffs. 29 U.S.C. § 1661(b)(2) (1988).

15. One study reported that “*at most* there has been only a slight increase in the length of notice specifically provided for under the Act.” John T. Addison & McKinley L. Blackburn, *The Worker Adjustment and Retraining Notification Act: Effects on Notice Provision*, 47 INDUS. & LAB. REL. REV. (forthcoming 1994) (manuscript at 13–14, on file with Author); see U.S. GENERAL ACCOUNTING OFFICE REPORT TO CONGRESSIONAL COMMITTEES, DISLOCATED WORKERS: WORKER ADJUSTMENT AND RETRAINING NOTIFICATION ACT NOT MEETING ITS GOALS, Feb. 1993 [hereinafter GAO REPORT]; *Revisions in WARN Act Necessary to Achieve Law's Goal*, Daily Lab. Rep. (BNA) 8 (Oct. 13, 1993); Nasar, *supra* note 7, at D1.

16. Employers are exempt from the notice requirement when the layoff does not affect at least one-third of the work force at an employer's single site of employment. WARN, 29 U.S.C. § 2101(a)(3) (1988). Closures or layoffs due to the completion of a contract and strikes or lockouts are also exempt. *Id.* § 2103. Additionally, employers do not have to provide notice when the closure or layoff is due to unforeseen business circumstances or natural disasters such as floods or earthquakes. *Id.* § 2102(b)(2)(A)–(B).

17. Congress did not assign to any agency the responsibility for administering or enforcing the WARN Act's provisions. Currently, a civil suit in federal court is the only enforcement tool available to affected workers and communities. This mechanism has been used sparingly, prompting commentators to question whether the Act has met its

certainty or ignorance of WARN's requirements.¹⁸ Results from a General Accounting Office (GAO) Report to Congressional Committees indicate that more than one-half of the employers expecting a plant closure failed to provide sixty days advance notice even when the event appeared to meet the WARN Act's criteria.¹⁹

Mindful of these concerns, the Clinton Administration is presently considering revisions to the WARN Act that would require more notice and greater enforcement power.²⁰ Senator Howard Metzenbaum and Representative William Ford have prepared draft amendments that significantly alter the legislation's current application.²¹ The proposed legislation would vastly broaden WARN's applicability by requiring any employer, regardless of its size, to provide six months advance notice for any layoffs or closings that affect twenty-five or more workers.²² Additionally, the legislation seeks to strengthen WARN's enforcement mechanisms by authorizing the Department of Labor to sue to enforce WARN's notice requirements.²³

purpose. *See generally* *Revisions in WARN Act Necessary to Achieve Law's Goal*, *supra* note 15, at 8 (noting that only 94 lawsuits have been filed under the WARN Act as of September 1993). The General Accounting Office and the AFL-CIO both suggest that Congress give the Department of Labor the authority and resources to enforce WARN's provisions. *See* GAO REPORT, *supra* note 15, at 37; Nasar, *supra* note 7, at D1.

18. *See generally* GAO REPORT, *supra* note 15, at 29–32.

19. *Id.* at 24. In addition to lack of compliance by employers, the GAO report also noted the problem of too many exemptions in the current legislation. *See supra* note 16 and accompanying text. Of the 650 layoffs examined by the GAO, 415 (64%) were exempt from WARN's notice requirements. GAO REPORT, *supra* note 15, at 21. Approximately 75% of the 415 exempted layoffs were excluded because they did not affect at least one-third of the work force. *Id.*

20. *See* Salwen, *supra* note 7, at A2.

21. *See supra* note 7 and accompanying text. Representative Ford has introduced legislation to the House, *see* H.R. 2300, 103d Cong., 1st Sess. (1993), and Senator Metzenbaum, who chairs the Subcommittee on Labor, is currently preparing similar draft legislation.

22. H.R. 2300, 103d Cong., 1st Sess. (1993). One of the principal goals of the proposed legislation is the elimination of the one-third of the work force exemption. Abolishing this provision would significantly reduce the number of exemptions found in the current legislation. *See supra* note 19 and accompanying text.

23. *See supra* note 17. While the Department of Labor concurred with the GAO's conclusion that the WARN Act's enforcement provisions are inadequate, it did not take a formal position on whether it should have the authority and responsibility to enforce the law. GAO REPORT, *supra* note 15, at 37. In a letter commenting on the report, Carolyn M. Golding, the Department of Labor's Acting Assistant Secretary for Employment and Training, stated: "While it seems clear that the enforcement provisions of the law have not been adequate, we have not examined whether other alternatives, such as mandatory

Given the widespread criticism of the current law, the concepts embraced in the proposed legislation will likely gain acceptance and possibly become enacted within the next few years. These changes, if successful, would significantly alter the number of employers covered by WARN's provisions.²⁴ Under the current requirements, employers must give their workers sixty days advance notice in order to allow the affected employees time to adjust to their pending job loss.²⁵ Sixty days advance notice is a more appropriate time period than the six month period advocated in the proposed legislation. Worker productivity, motivation, and morale will often decrease after an employer notifies its employees of their pending termination.²⁶ If the notice period is increased to six months, Congress would effectively force economically troubled employers to sustain an even greater burden by prolonging the period of decreased worker productivity.

Additionally, publicity surrounding the notice would make it more difficult for financially troubled employers to retain their present customers or to obtain extensions of credit. Customers would presumably find another supplier once they learned of a pending plant closure or mass layoff, and banks and lenders would be hesitant to extend credit to the employer in this situation. Although these concerns have not presented major problems under the present sixty day advance notice requirement, they are likely to have a profound effect under a requirement that the employer give six months advance notice. Finally, by increasing WARN's applicability, Congress would make employers more reluctant to hire permanent employees. By hiring temporary workers, employers could avoid WARN's threshold number of employees requirement.²⁷

Although the WARN Act does not specifically provide for any

attorney fees for a prevailing plaintiff and the addition of liquidated or double damages for violations, would be sufficient to provide effective enforcement." *Id.* at 66.

24. The law currently exempts employers with fewer than one hundred employees. According to one recent study, companies with less than one hundred employees represent approximately 35% of the American work force. Addison & Blackburn, *supra* note 15 (manuscript at 15).

25. *See supra* text accompanying note 13.

26. The GAO Report stated that approximately 30% of employers reported a decrease in worker productivity after notification was given. GAO REPORT, *supra* note 15, at 34.

27. *See Nasar, supra* note 7, at D1 (quoting opponent of proposed legislation who stated that a tougher law would only result in increase in usage of temporary workers).

entity to enforce its provisions, affected employees and communities can bring a civil suit in federal court for violations of the WARN Act.²⁸ In conjunction with this option, the proposed legislation would also grant the Department of Labor the authority to sue to enforce the WARN Act's notice requirement.²⁹ Some commentators have expressed concern over the Department of Labor's ability to handle such a task given its limited resources.³⁰ The general consensus, however, seems to favor the agency's role in enforcing WARN's notice requirements.

In addition to having to provide advance notice to workers of a pending mass layoff or plant closure, employers with unionized employees may also have to bargain with their employees' bargaining representative regarding the decision to close or relocate a facility. The following section analyzes the various tests applied by courts and the National Labor Relations Board in determining whether an employer has a duty to collectively bargain over these types of managerial decisions.

III. MANAGEMENT'S DUTY TO COLLECTIVELY BARGAIN REGARDING DECISIONS TO RELOCATE OR PARTIALLY CLOSE A PLANT

The National Labor Relations Act³¹ obligates employers and their employees' authorized representative to bargain collectively in good faith regarding "wages, hours, and other terms and conditions of employment."³² Although the parties may voluntarily bargain over *any* subject, the duty to bargain in good faith is mandatory only when the proposed subject is encompassed within the definition of "wages, hours, and other terms and conditions of employment."³³

28. See *supra* note 17 for a discussion of WARN's enforcement mechanisms.

29. H.R. 2300, 103d Cong., 1st Sess. (1993).

30. See *generally Revisions in WARN Act Necessary to Achieve Law's Goal*, *supra* note 15, at 8.

31. National Labor Relations Act of 1935, ch. 372, 49 Stat. 449 (1935) (current version at 29 U.S.C. §§ 141–169).

32. NLRA § 8(d), 29 U.S.C. § 158(d). Both an employer and a labor organization commit an unfair labor practice by refusing to bargain over a mandatory subject of bargaining. *Id.* § 158(a)(5), (b)(3).

33. *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342 (1958). Parties must bargain in good faith regarding mandatory subjects of bargaining until an impasse is reached. *Id.* at 349. If either party refuses to bargain or unilaterally acts regarding a mandatory subject of bargaining, that party commits an unfair labor practice. *Id.* How-

Otherwise, the topic is a permissive subject of bargaining and the employer is not legally required to collectively bargain.³⁴

By enacting the language "other terms and conditions of employment," Congress intentionally rejected a House proposal that would have required bargaining over five detailed categories of management decisions.³⁵ Congress instead opted for the current broad terminology in order to accord the National Labor Relations Board and courts the flexibility to define appropriate labor/management relations in light of evolving employment practices.³⁶ Although the Board and courts have concluded that a myriad of topics are subject to mandatory bargaining,³⁷ they have often disagreed about managerial decisions lying at the core of entrepreneurial control such as plant closings and facility relocations.³⁸ Consequently, the Board

ever, the duty to bargain does not require that the parties reach an agreement on a proposed subject. *Id.* If the employer bargains in good faith until impasse and an agreement is not reached, the employer is free to act unilaterally. *Id.*

34. *Id.* Neither party is required to bargain over permissive subjects. *Id.* Furthermore, if a party insists, as a condition of acceptance, on including a permissive subject of bargaining into a collective bargaining agreement, that party commits an unfair labor practice. *Id.*

35. The proposed House version of the NLRA limited the subjects of bargaining to: (i) [w]age 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) vacation and leaves of absences; and (v) administrative and procedural provisions relating to the foregoing subjects.

H.R. 3020, 80th Cong., 1st Sess. § 2(11) (1947), reprinted in 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR/MANAGEMENT RELATIONS ACT: 1947, at 166-67 (1948).

36. *Id.* at 362. By enacting broader language, Congress manifested its intent that labor and management resolve their differences through the collective bargaining process. *Id.* The rationale for Congress' position is reflected in a House report which stated: "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." *Id.*

37. See, e.g., *Awrey Bakeries, Inc. v. NLRB*, 548 F.2d 138 (6th Cir. 1976) (layoffs and recalls); *American Smelting & Ref. Co. v. NLRB*, 406 F.2d 552 (9th Cir.) (company housing), cert. denied, 395 U.S. 935 (1969); *Coalite, Inc.*, 278 N.L.R.B. 293 (1986) (employer's insurance program); *Getty Ref. & Mktg. Co.*, 279 N.L.R.B. 924 (1986) (recreation fund); *Freedom WLNE-TV, Inc.*, 278 N.L.R.B. 1293 (1986) (Christmas bonuses); *Peerless Food Prods., Inc.* 236 N.L.R.B. 161 (1978) (grievance and arbitration procedures).

38. See, e.g., *Arrow Automotive Indus., Inc. v. NLRB*, 853 F.2d 223 (4th Cir. 1988) (no duty to bargain over economically motivated partial closing); *NLRB v. Rude Carrier*

and courts have applied various tests to determine whether an employer is obligated to bargain over decisions to partially close or relocate its plant for economic reasons.³⁹ Although an employer is not required to bargain over the decision to close its entire business operation,⁴⁰ an employer clearly has a duty to bargain over the “effects” of the decision on its employees.⁴¹ While an employer's decision to terminate its entire business has minimal legal implications under the NLRA, decisions regarding partial closings or facility relocations invoke a broader spectrum of legal considerations.

A. Supreme Court Precedent

Section 8(a)(5) and (d) of the NLRA mandates that employers bargain in good faith with their employees' authorized bargaining representative over mandatory subjects of bargaining contained within the statutory definition of “wages, hours, and other terms and conditions of employment.”⁴² The United States Supreme Court has provided limited guidance to the Board and courts in determining whether managerial decisions such as partial closings or relocations constitute mandatory subjects of bargaining. Two cases form

Corp., 541 F.2d 277 (4th Cir. 1976) (no duty to bargain over partial closing); NLRB v. Dixie Ohio Express Co., 409 F.2d 10 (6th Cir. 1969) (per curiam) (no duty to bargain over partial termination of operations caused by streamlining of business); DeSoto, Inc., 278 N.L.R.B. 788 (1986) (no duty to bargain over decision to close plant and transfer work). *But see* Electrical Prods. Div. of Midland-Ross Corp. v. NLRB, 617 F.2d 977 (3d Cir.) (duty to bargain over economically motivated decision to partially close), *cert. denied*, 449 U.S. 871 (1980); Brockway Motor Trucks v. NLRB, 582 F.2d 720 (3d Cir. 1978) (duty to bargain over economically based decision to close).

39. This Comment will not address decisions to close or partially relocate a plant because of antiunion motivation in violation of NLRA § 8(a)(3), 29 U.S.C. § 158(a)(3). An employer commits an unfair labor practice when it partially closes one of its facilities for the purpose of chilling unionism at any of its remaining facilities and where it reasonably may have foreseen the resulting chilling effect. *See Textile Workers Union v. Darlington Mfg. Co.*, 380 U.S. 263, 275 (1965).

40. This Comment will also not address an employer's decision to close its entire business. The Supreme Court has long recognized that an employer has the absolute right to close its entire business without violating § 8(a)(3) of the NLRA, 29 U.S.C. § 158(a)(3), even if the employer was motivated by anti-union animus. *See Textile Workers Union*, 380 U.S. at 268 (holding that “an employer has the absolute right to terminate his entire business for any reasons”).

41. *See Brown Truck & Trailer Mfg. Co.*, 106 N.L.R.B. 999, 1000 (1953) (stating that employer did not have duty to bargain over the decision to close, but did have duty to “advise the Union of the contemplated move and to give the Union the opportunity to bargain with respect to the contemplated move as it affected the employees”).

42. 29 U.S.C. § 158(a)(5), (d); *see supra* notes 31–34 and accompanying text.

the basic framework of the analysis for these types of issues: *Fibreboard Paper Products Corp. v. NLRB*,⁴³ and *First National Maintenance Corp. v. NLRB*.⁴⁴

In *Fibreboard*, the Supreme Court addressed the question of whether an employer's decision to contract out bargaining unit work to independent contractors required bargaining with the employees' representative.⁴⁵ Limiting its holding to the specific facts of the case, the Court held that when the employer replaced the thirty-five bargaining unit employees with independent contractors to perform the "same type of work under similar conditions of employment," the employer had an obligation to collectively bargain over its decision.⁴⁶ According to the Court, the contracting out of labor is "well within the literal meaning of the phrase 'terms and conditions of employment'" and is therefore a mandatory subject of bargaining.⁴⁷

The concurrence in the *Fibreboard* decision, written by Justice Stewart, is often cited for its classification of three types of management decisions: (1) those limited categories of decisions which clearly fall within the language "terms and conditions of employment" and are mandatory subjects of bargaining; (2) those decisions that "lie at the core of entrepreneurial control" and cannot be mandatory subjects of bargaining; and (3) decisions that "are not in themselves primarily about conditions of employment, though the effect of the decision may be necessarily to terminate employment."⁴⁸ According

43. 379 U.S. 203 (1964).

44. 452 U.S. 666 (1981).

45. *Fibreboard*, 379 U.S. at 204–05. The maintenance workers at Fibreboard Paper Products had been represented since 1937 by East Bay Union Machinists, Local 1304, United Steelworkers of America, AFL-CIO. *Id.* at 205. On July 27, 1959, four days before the expiration of the operative collective bargaining agreement, the company notified the union that, due to the high labor costs of its maintenance operation, it had decided to contract out the bargaining unit work to independent contractors. *Id.* This new policy was to take effect immediately upon the expiration of the current bargaining agreement. *Id.* at 205–06. The union filed unfair labor practice charges against Fibreboard and the Board ultimately held that the employer's refusal to bargain over its decision to subcontract its maintenance work violated § 8(a)(5) of the NLRA. *Id.* at 207–08; see *Fibreboard Paper Products Corp.*, 138 N.L.R.B. 550 (1962).

46. *Fibreboard*, 379 U.S. at 215.

47. *Id.* at 210 (citation omitted).

48. *Id.* at 220–23 (Stewart, J., concurring). Stewart stated that, although employment security is usually a "condition of employment" under § 8(d), not every managerial decision that affects an employee's job security is a mandatory subject of collective bargaining. *Id.* at 223. Justice Stewart listed two examples of managerial decisions that affect job security but are not mandatory subjects of bargaining: (1) decisions where the

to Justice Stewart, the *Fibreboard* majority opinion should not be read so broadly as to impose a mandatory duty to bargain over the third classification of decisions outlined in his analysis.⁴⁹ Justice Stewart also expressed concern that language in the majority opinion would be seized upon and used by courts to expand the limited scope of subjects which require bargaining under the NLRA's definition of "wages, hours, and other terms and conditions of employment."⁵⁰ Justice Stewart's categorization of management decisions, along with his concern over expanding the language found in the *Fibreboard* majority opinion, served as the catalyst for the Supreme Court's subsequent decision in *First National Maintenance Corp. v. NLRB*.⁵¹

In *First National Maintenance*, the Court addressed the issue of whether an employer is obligated to collectively bargain with its employees' representative regarding a decision to partially close its business for economic reasons.⁵² First National Maintenance provided contracted-for maintenance and cleaning related services to Greenpark Care Center, one of apparently two to four First National Maintenance nursing home customers.⁵³ As their business relationship deteriorated, Greenpark reduced First National Maintenance's weekly service fee by one-half and provided First National Maintenance with a thirty day notice of cancellation of their contract.⁵⁴

While First National Maintenance confronted these business difficulties with Greenpark, a union conducted an organization cam-

impact on job security is uncertain or indirect, such as decisions concerning "advertising expenditures, product design, the manner of financing, and sales;" and (2) decisions that clearly jeopardize job security or terminate jobs completely but lie at the core of entrepreneurial control, such as decisions to invest in labor-saving equipment or to liquidate all of the business' assets and go completely out of business. *Id.*

49. *Id.* at 203-04.

50. *Id.* at 220-21.

51. 452 U.S. 666 (1981).

52. *Id.* at 667.

53. *Id.* at 668 & n.1. In addition to reimbursing First National Maintenance for all of its labor costs, Greenpark also paid First National Maintenance a weekly service fee of \$500. *Id.* at 668.

54. *Id.* at 668-69. The cancellation of the contract never became effective because First National Maintenance realized that it was losing money and informed Greenpark that, unless they restored the \$500 service fee, the corporation would terminate its services. *Id.* at 669.

paign among First National Maintenance's Greenpark employees.⁵⁵ After being elected and certified, the union notified First National Maintenance of its right to bargain.⁵⁶ In response, First National Maintenance notified its Greenpark employees that they would be discharged in three days.⁵⁷ The union immediately attempted to bargain with First National Maintenance over this decision, but management informed the union that its decision was final and based solely on economics.⁵⁸ The union subsequently filed unfair labor practice charges against the company, alleging violations of §§ 8(a)(1) and 8(a)(5) of the NLRA.⁵⁹

In adopting the Administrative Law Judge's decision, the Board, without further analysis, held that First National Maintenance failed to bargain over both its decision to terminate its Greenpark employees and the resulting effects of the termination on the employees.⁶⁰ The United States Court of Appeals for the Second Circuit, espousing a different rationale for its holding, nonetheless upheld the Board's order.⁶¹ The Second Circuit rejected a *per se* duty to bargain and instead ruled that § 8(d) creates a rebuttable presumption in favor of mandatory bargaining over a decision to partially close a business.⁶² The presumption could be rebutted by the employer if it could show that: (1) bargaining over the decision would be futile; (2) the decision was the result of an emergency financial situation; or (3) bargaining over the decision was not customary in the employer's industry.⁶³

The Supreme Court reversed the Second Circuit's rebuttable

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.* at 669–70. First National Maintenance based its decision to close part of its operation solely on Greenpark's refusal to pay a higher service fee, a factor over which the union had no control. *Id.* at 687.

59. *Id.* at 670.

60. *Id.* In ruling for the union, the Administrative Law Judge reasoned that the termination of employees resulted in a change in their "condition of employment," and if required to bargain, the employer may find that the union is willing to offer concessions or alternatives that could prevent the loss of jobs. *Id.* at 670–71; see *First Nat'l Maintenance Corp.*, 242 N.L.R.B. 462, 465 (1979).

61. *NLRB v. First Nat'l Maintenance Corp.*, 627 F.2d 596 (2d Cir. 1980).

62. *Id.* at 601–02.

63. *Id.* The Supreme Court noted that the Second Circuit's opinion was at odds with other courts of appeal and Board opinions regarding economically motivated decisions to partially close. *First Nat'l Maintenance*, 452 U.S. 666, 672–73 & nn.7–10 (1981).

presumption approach and held that First National Maintenance's economic decision to close part of its operation was not a mandatory subject of bargaining under § 8(d)'s "terms and conditions of employment."⁶⁴ The Court adopted Justice Stewart's categorization of management decisions in *Fibreboard* and classified First National Maintenance's decision to partially close its business as the third type of management decision: one that has a direct impact on employment, but has as its focus the economic profitability of the company.⁶⁵ Recognizing management's need for unencumbered decisionmaking, the Court established a balancing test which weighs the employees' interest in collective bargaining with the company's interest in economic stability. The Court stated that "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."⁶⁶ Applying this new balancing test to First National Maintenance's economically motivated decision to terminate part of its business, the Court concluded that the likely harm to First National Maintenance's economic stability in requiring it to bargain outweighed any possible benefits attainable through the collective bargaining process.⁶⁷

The Supreme Court based its *First National Maintenance* holding on a number of practical considerations. First, the Court recognized that, when bargaining over a partial closing decision, the union's primary goal is to halt or delay the closing in order to protect its members' jobs.⁶⁸ Second, the Court noted that an employer would

64. *Id.* at 686. In determining what issues are subject to mandatory bargaining under § 8(d), the Court stated that "Congress had no expectation that the elected union representative would become an equal partner in the running of the business enterprise in which the union's members are employed." *Id.* at 676.

65. *Id.* at 676-77 (1981). See *supra* notes 48-51 and accompanying text for a discussion of Justice Stewart's categorization of management decisions.

66. *First Nat'l Maintenance*, 452 U.S. at 679.

67. *Id.* The Court, distinguishing the present case from its earlier *Fibreboard* decision, stressed the fact that First National Maintenance did not intend to replace the discharged workers or to move the operation elsewhere. *Id.* at 687. The decision was based solely on economic factors involving the size of First National Maintenance's management fee, something over which the union had no control. *Id.*

68. *Id.* at 681. By not requiring bargaining with the union over economically motivated partial closings, the Court recognized management's need for "speed, flexibility, and secrecy in meeting business opportunities and exigencies." *Id.* at 682-83.

have an incentive to voluntarily involve the union if labor costs were a major factor in its decision to close.⁶⁹ Specifically, an employer would attempt to seek concessions from the union in order to continue to operate its business profitably. Third, the Court evaluated current labor practices to determine the prevalence of collective bargaining provisions that require management to bargain over decisions to partially close.⁷⁰ The Court found that contract provisions granting the union the right to participate in the managerial decisionmaking process were rare, but provisions requiring advance notice of a closing and effects bargaining⁷¹ were far more common.⁷² Finally, the Court rejected the Second Circuit's rebuttable presumption rationale because it was "ill-suited" to the advancement of harmonious labor/management relations.⁷³ The Court stated that the rebuttable presumption analysis would lead to uncertainty for both parties in determining when the duty to bargain arises and when it would be satisfied.⁷⁴ Based on these considerations, the Court concluded that the resulting harm to the employer's right to make economic decisions regarding the scope and nature of its business outweighed the possible incremental benefits that might be achieved through bargaining with the union.⁷⁵

The balancing test established by the Supreme Court in *First National Maintenance* provided a guideline for the Board and courts to use in achieving equitable results in labor/management relations. However, both the Board and the various courts of appeal have been reluctant to follow the Supreme Court's guidance on the issue. Consequently, managerial decisions to partially close or relocate a business have met with inconsistent results depending upon the particular entity adjudicating the issue.

B. Relocation Decisions

In *First National Maintenance*, the Supreme Court expressly

69. *Id.* at 682.

70. *Id.* at 684.

71. See *supra* note 41 and accompanying text for an explanation of effects bargaining.

72. *First Nat'l Maintenance*, 452 U.S. at 684.

73. *Id.*

74. *Id.* at 684-86.

75. *Id.* at 686.

refused to broaden the scope of its holding to encompass managerial decisions to relocate a plant.⁷⁶ Thus, the Board and courts attempted to develop their own uniform analysis regarding relocation decisions. The Board's first attempt at developing this analysis, *Otis Elevator Co.*,⁷⁷ resulted in mixed reviews. Because the four participating Board Members proposed different rationales, the case served only to confuse the issue of whether an employer has a duty to bargain over a relocation decision.

In *Otis Elevator*, a plurality of the Board proposed an analysis that was based primarily on the employer's motivation in deciding to relocate. In the view of Chairman Dotson and Member Hunter, an employer is not required to bargain over relocation decisions which "turn[] upon a change in the nature and direction of a significant facet of its business."⁷⁸ However, if the decision "turns upon labor costs," then bargaining is required.⁷⁹ In holding that the employer did not violate § 8(a)(5) and (d) of the Act, the plurality concluded that the company's decision resulted in a change in the nature and direction of the company, and therefore, did not turn upon labor costs.⁸⁰

Member Dennis, concurring with the result, proposed a different analytical framework consisting of a two-step analysis based on her interpretation of *First National Maintenance*.⁸¹ According to Dennis, the first determination is whether the decision is even amenable to the collective bargaining process.⁸² If the decision is amena-

76. The Court intentionally limited its holding to the specific facts of this case: "In this opinion we of course intimate no view as to other types of management decisions, such as *plant relocations*, sales, other kinds of subcontracting, automation, etc., which are to be considered on their particular facts." *First Nat'l Maintenance*, 452 U.S. at 686 n.22 (emphasis added).

77. 269 N.L.R.B. 891 (1984). In 1975, United Technologies acquired Otis Elevator and commissioned a number of studies reviewing Otis' engineering and technological development. *Id.* at 891. The studies indicated that Otis' technology was outdated and the engineering work performed at its two facilities was duplicative. *Id.* This resulted in a more expensive product and a marked decline in the company's share of the world elevator market. *Id.* The company therefore decided to transfer and consolidate certain bargaining unit work from its outdated New Jersey facility to its new research and development center in Connecticut. *Id.*

78. *Id.*

79. *Id.* at 892.

80. *Id.* at 891.

81. *Id.* at 897 (Dennis, Member, concurring).

82. *Id.* (citing *First Nat'l Maintenance Corp.*, 452 U.S. 666, 678 (1981)). Member Dennis specifically adopted Justice Stewart's three categories of managerial decisions and

ble to resolution through collective bargaining, then the employer must apply the *First National Maintenance* balancing test and bargain with the union “only if the benefit . . . outweighs the burden placed on the conduct of the business.”⁸³

Applying this analytical framework to the facts of the case, Member Dennis concluded that Otis' decision to relocate its research and development operations failed the first prong of her analysis.⁸⁴ According to Member Dennis, in determining whether the employer's decision is amenable to the collective bargaining process, “[t]he key question to be answered is this: Is a factor over which the union has control (e.g., labor costs) a significant consideration in the employer's decision?”⁸⁵ A factor over which the union has control is a “significant consideration” if the union can offer concessions that reasonably could affect the employer's decision.⁸⁶ After examining the underlying reasons for Otis' decision, Member Dennis concluded that the union had no control over any of the factors involved in the employer's decision.⁸⁷

In a separate opinion, Member Zimmerman stated that an employer should only bargain over a relocation decision when the decision is “amenable to resolution through collective bargaining.”⁸⁸ Applying a broad definition to “amenable,” Member Zimmerman would require bargaining when the employer's decision is based on “overall enterprise costs not limited specifically to labor costs.”⁸⁹ Thus, under Zimmerman's view, whenever a union could offer concessions that would relieve some of the employer's economic concerns, whether these concerns were related to labor costs or not, the

tailored her analysis to the questionable third type of decision: those “that have a direct impact on employment, but have as their focus only the economic profitability of the employer's operation.” *Id.* These decisions include a wide range of managerial decisions, such as “plant relocations, consolidations, automation, and some forms of subcontracting.” *Id.*

83. *Id.* (quoting *First Nat'l Maintenance*, 452 U.S. at 679) (emphasis added by Member Dennis).

84. *Id.* at 899.

85. *Id.* at 897.

86. *Id.*

87. *Id.* The factors underlying Otis' decision were: (1) outdated technology; (2) product designs were costly and not competitive; (3) engineering work was duplicative; (4) the New Jersey facility was outdated; and (5) the acquiring company had a major research facility in Connecticut. *Id.* at 899.

88. *Id.* at 900 (Zimmerman, Member, concurring in part and dissenting in part).

89. *Id.* at 901.

decision would be amenable to bargaining.⁹⁰

The uncertainty regarding the practical application of the various tests expressed by the Board Members in *Otis Elevator* naturally presented employers with significant difficulties in determining whether their relocation decisions fell within the scope of the NLRA's bargaining obligation.⁹¹ Moreover, in the years following the *Otis Elevator* decision, no single opinion in a relocation case received the support of the majority of the Board. Instead, the Board has held that the result in any given case would be reached "under any of the views expressed in *Otis Elevator*."⁹² However, the Board recently had another opportunity to develop a comprehensive, majority-supported standard for future application in determining whether an employer's decision to relocate is a mandatory subject of bargaining. In *Dubuque Packing Co.*, the Board seized upon this opportunity and unanimously approved a new test that departed from the three tests promulgated in *Otis Elevator*.⁹³

In 1991, the Board found that Dubuque Packing committed an unfair labor practice by refusing to bargain with the union over its decision to relocate its hog kill and cut operations from its unionized plant in Dubuque, Iowa, to a newly acquired facility in Rochelle, Illinois.⁹⁴ The Board first ruled on the company's relocation in 1987 when it held that, "under any of the views expressed in *Otis Elevator*," the company's relocation decision was not a mandatory subject of bargaining.⁹⁵ However, in 1989, the United States Court of Appeals of the District of Columbia reversed, stating that the Board had inadequately explained its reasoning.⁹⁶ Stating that the case

90. *Id.* In this case, however, Member Zimmerman stated that the union could not offer any concessions that would change the employer's decision. *Id.* The employer's reasons for relocating were "entrepreneurial in scope and not directly translatable into dollar figures." *Id.* See *supra* note 87 for a discussion of the employer's reasons to relocate.

91. See *First Nat'l Maintenance v. NLRB*, 452 U.S. 666, 679 (1981) (stating that management "must have some degree of certainty beforehand as to when it may proceed to reach decisions without fear of later evaluations labeling its conduct an unfair labor practice").

92. *FMC Corp.*, 290 N.L.R.B. 483, 485 (1988).

93. *Dubuque Packing Co.*, 303 N.L.R.B. 386 (1991), *enforced sub nom.* *United Food & Commercial Workers, Local 150-A v. NLRB*, 1 F.3d 24 (D.C. Cir. 1993), *cert. granted*, 114 S. Ct. 1395, *and cert. dismissed*, 114 S. Ct. 2157 (1994).

94. *Id.* at 386.

95. *Dubuque Packing Co.*, 287 N.L.R.B. 499, 499 & n.1 (1987) (citation omitted).

96. *United Food & Commercial Workers, Local 150-A v. NLRB*, 880 F.2d 1422 (D.C. Cir. 1989).

“present[ed] hard questions — indeed, some of the most polarizing questions in contemporary labor law,” the D.C. Circuit Court urged the Board to clarify this area of the law by developing a majority-supported rule that the Board could apply in determining whether a particular decision is subject to mandatory bargaining.⁹⁷

In adopting and applying its newly created test, the Board reversed its original decision and found that Dubuque unlawfully refused to bargain over its decision to relocate.⁹⁸ The new “burden shifting” test provides that the NLRB's General Counsel⁹⁹ bears the initial burden of establishing that an employer's decision to relocate was “unaccompanied by a basic change in the nature of the employer's operation.”¹⁰⁰ Upon meeting this burden, the General Counsel establishes a *prima facie* case that the decision is a mandatory subject of bargaining.¹⁰¹

The second part of the test allows the employer to produce evidence that rebuts the General Counsel's *prima facie* case. The employer can rebut the *prima facie* case or defend its actions by establishing that: (1) the work performed at the new location varies significantly from the work performed at the former plant; (2) the work performed at the former plant is to be discontinued entirely and not moved to the new location; or (3) the employer's decision involves a change in the scope and direction of the business.¹⁰² Alternatively, the employer may defend its action by showing that: (1) labor costs (either direct or indirect) were not a factor in the relocation decision; or (2) even if labor costs were a factor in the decision, the union could not have offered labor costs concessions that could have changed the employer's decision.¹⁰³

97. *Id.* at 1439.

98. *Dubuque Packing Co.*, 303 N.L.R.B. 386, 398 (1991), *enforced sub nom.*, *United Food & Commercial Workers, Local 150-A v. NLRB*, 1 F.3d 24 (D.C. Cir. 1993), *cert. granted*, 114 S. Ct. 1395, *and cert. dismissed*, 114 S. Ct. 2157 (1994).

99. The Board's General Counsel or his designated agent is authorized to issue a complaint to any person engaging in unfair labor practices. NLRA § 10(b), 29 U.S.C. § 152(b).

100. *Dubuque Packing*, 303 N.L.R.B. at 391. The Board noted that the most significant difference between the *Otis* tests and the newly promulgated test was the allocation of the parties' burden. *Id.* at 392. Under the new *Dubuque Packing* test, the employer has the “burden of adducing evidence as to its motivation for the relocation decision.” *Id.*

101. *Id.* at 391.

102. *Id.*

103. *Id.*

Applying this new test to the facts of *Dubuque Packing*, the Board found that the General Counsel established a *prima facie* case that Dubuque's decision was a mandatory subject of bargaining.¹⁰⁴ Accordingly, the burden shifted to the employer to establish that labor costs were not a factor in its decision, and if labor costs were a factor, that the union could not have offered any labor costs concessions that could have changed their decision to relocate.¹⁰⁵ In this case, labor costs were clearly a factor in Dubuque's decision to relocate part of its business.¹⁰⁶ The employer argued that labor costs were not the determinative factor, but the Board rejected this argument and found that the issue was not whether labor costs were the *determinative* factor, but whether labor costs factored into the relocation decision *at all*.¹⁰⁷ Thus, in order to avoid mandatory bargaining, the company had to show that it would have relocated its hog kill operation regardless of any concessions the union could have made. Based on the evidence, the Board concluded that Dubuque failed to establish that the union could not have offered labor costs concessions that could have changed its decision to relocate.¹⁰⁸ Accordingly, the Board held that the employer violated § 8(a)(5) of the Act by refusing to bargain with the union over its decision.¹⁰⁹

On appeal to the District of Columbia Circuit, Dubuque argued that the Board's new test improperly interpreted Supreme Court precedent, failed to provide management with the required degree of certainty, and insufficiently protected management prerogatives.¹¹⁰

104. *Id.* at 393. The Board rejected the employer's argument that the relocation decision was just one part of an overall restructuring plan necessitated by financial problems. *Id.* Specifically, the Board concluded that the employer's decision was not one that involved a basic change in the nature or scope of its business. *Id.*

105. *Id.*

106. *Id.* Midway through the period covered by the parties' collective bargaining agreement, the employer publicly sought wage concessions from the union to use as support for its request to obtain additional financing from its lenders and as an overall attempt to keep the plant operational. *Id.*

107. *Id.*

108. *Id.* at 396. The employer argued that regardless of the fact that it sought concessions from the union, "the decision to relocate would have been made in any event due to the financial problems it had encountered with its lenders and the advantages of Rochelle's physical facility." *Id.* at 393.

109. *Id.* at 396-97.

110. *United Food & Commercial Workers, Local No. 150-A v. NLRB*, 1 F.3d 24, 28-30 (D.C. Cir. 1993), *cert. granted*, 114 S. Ct. 1395, and *cert. dismissed*, 114 S. Ct. 2157 (1994). Dubuque argued that the Board's new test is inconsistent with the Supreme Court's *First National Maintenance* decision. *Id.* at 30. Additionally, Dubuque correctly

Dubuque contended that the test failed to protect management prerogatives because relocation decisions involve the reallocation of capital and necessarily invoke core managerial rights.¹¹¹ Addressing this contention, the court of appeals interpreted the Board's test as holding that no mandatory duty to bargain exists "where bargaining would be futile — either because the union was unable to offer sufficient concessions, or because it was unwilling to do so."¹¹² Based on this interpretation, the court concluded that the test sufficiently protected management prerogatives.¹¹³

The court of appeals also rejected Dubuque's contention that the Board's test failed to comply with Supreme Court precedent and failed to provide management with sufficient certainty regarding its decisions. Specifically, Dubuque argued that a *per se* rule exempting bargaining over relocation decisions was implicit in *First National Maintenance's* reasoning.¹¹⁴ Furthermore, Dubuque argued that the Board's test insufficiently protected management prerogatives because the test is not capable of certainty in its application. Recognizing Supreme Court precedent that management must have some degree of certainty so that it "may proceed to reach decisions without fear of later evaluations labeling its conduct an unfair labor practice," the court of appeals nonetheless found that the *Dubuque Packing* test provides more than "some" degree of certainty.¹¹⁵ The court

asserted that *First National Maintenance* held that employers "must have some degree of certainty beforehand" as to which decisions are and are not subject to a mandatory duty." *Id.* (quoting *First Nat'l Maintenance v. NLRB*, 452 U.S. 666, 679 (1981)).

111. *Id.* at 30–31.

112. *Id.* at 31. The court stated that its conclusion was premised on the resolution of an "important ambiguity" in the Board's statement of its second affirmative defense. *Id.* The second affirmative defense requires that an employer establish that "the union *could not* have offered labor costs concessions that *could* have changed the employer's decision to relocate." *Id.* (quoting *Dubuque Packing Co.*, 303 N.L.R.B. 386, 391 (1991)). The court noted that this language may be read as an impossibility exception. Therefore, the court interpreted the language as intending to cover situations in which bargaining would be futile or in which unions would find it impossible to persuade the employer to change its decision to relocate. *Id.*

113. *Id.* The court stated that the test does not require bargaining over relocations that, "viewed objectively, are entrepreneurial in nature. It exempts decisions, that viewed subjectively, were motivated by something other than labor costs." *Id.* In contrast, mandatory bargaining is required over relocations that leave the business occupying much the same position as before, that were taken because of labor costs, and that offer a reasonable chance of negotiated settlement. *Id.*

114. *Id.* at 30.

115. *Id.* at 33 (quoting *First Nat'l Maintenance v. NLRB*, 452 U.S. 666, 679 (1981)).

stated that the test

establishes rules on which management may plan with a large degree of confidence; and while the test undoubtedly leaves areas of uncertainty between relocation decisions that are clearly within the exclusive prerogatives of management and those that are equally clearly subject to negotiation, these will in time be narrowed through future adjudications.¹¹⁶

Having rejected Dubuque's arguments, the court of appeals enforced the Board's order finding that Dubuque violated § 8(a)(5) by refusing to bargain over its decision to relocate its hog cut and kill operations.¹¹⁷

IV. ANALYSIS AND SUGGESTED TEST

In *First National Maintenance*, the Supreme Court acknowledged an employer's unconditional right to engage in unencumbered decisionmaking when it held that mandatory bargaining was not required for an employer's economically based decision to partially close its business.¹¹⁸ This decision reaffirmed management's prerogative to determine the nature, scope, and direction of its business when confronted with economic difficulties. Although the *First National Maintenance* Court limited its decision to partial closings,¹¹⁹ the balancing test promulgated by the majority should be used by the Board and courts of appeal in addressing a broader range of managerial decisions.

In *Otis Elevator Co.*, the Board expressed divergent views regarding the appropriate standard to apply in determining whether relocation decisions are subject to mandatory bargaining under the National Labor Relations Act.¹²⁰ Each of the Board Members, however, proposed an analysis that involved a balancing of factors similar to the balancing test established by the Supreme Court in *First National Maintenance*. Urged by the court of appeals to develop a majority supported rule, the Board, in *Dubuque Packing*, un-

116. *Id.*

117. *Id.*

118. *First Nat'l Maintenance Corp. v. NLRB*, 452 U.S. 666, 686 (1981).

119. *See supra* note 76.

120. *See supra* notes 77-90 and accompanying text for a discussion of the Board's *Otis Elevator* decision.

necessarily departed from precedent and formulated a standard that is not only inconsistent with the Supreme Court's *First National Maintenance* decision and the purpose of the NLRA, but is also confusing and burdensome to apply. Accordingly, this Comment suggests that, when confronted with managerial decisions that affect employment but have as their focus the economic profitability of the employer's business, the Board and the appellate courts should adopt the balancing test established in *First National Maintenance*¹²¹ and advocated by ex-Member Dennis in her *Otis Elevator Co.* concurring opinion.¹²²

A. Analysis of the *Dubuque Packing* Test

The District of Columbia Circuit incorrectly concluded that the Board's *Dubuque Packing* test was consistent with Supreme Court precedent. In *First National Maintenance*, the Court specifically rejected a rebuttable presumption approach as applied to partial closing decisions.¹²³ The *Dubuque Packing* test similarly establishes a rebuttable presumption against the employer when faced with a relocation decision.¹²⁴ Under the *Dubuque Packing* test, the NLRB's General Counsel has the initial burden of establishing that the employer's relocation decision was not accompanied by a basic change in the nature and scope of the employer's business.¹²⁵ If that burden is met, the burden shifts to the employer to present evidence rebutting the General Counsel's *prima facie* case.¹²⁶

The *First National Maintenance* Court rejected the rebuttable presumption approach because of the inherent uncertainty in determining when the duty to bargain arises and when it is satisfied.¹²⁷ The Court stressed that, under a rebuttable presumption approach,

121. See *supra* text accompanying note 66.

122. See *supra* text accompanying notes 81–83.

123. See *supra* text accompanying notes 73–74.

124. The Board has recently referred to the *Dubuque Packing* test as a “presumption-rebutting analysis.” *Noblit Bros., Inc.*, 305 N.L.R.B. 329, 330 n.9 (1991).

125. See *supra* note 100 and accompanying text. If the General Counsel successfully carries this burden, a *prima facie* case has been established that the employer's decision is a mandatory subject of bargaining. *Dubuque Packing Co.*, 303 N.L.R.B. 386, 391 (1991), *enforced sub nom.* *United Food & Commercial Workers, Local 150-A v. NLRB*, 1 F.3d 24 (D.C. Cir. 1993), *cert. granted*, 114 S. Ct. 1395, and *cert. dismissed*, 114 S. Ct. 2157 (1994).

126. See *supra* notes 101–103 and accompanying text.

127. *First Nat'l Maintenance Corp. v. NLRB*, 452 U.S. 666, 684–86 (1981).

an employer would find it difficult to predetermine when its decision required bargaining. If the employer chose not to bargain, it may ultimately face unfair labor practice charges and an unfavorable outcome requiring the repayment of a large amount of backpay to the discharged employees or possibly an order requiring the reopening of an economically faltering operation.¹²⁸ Thus, an employer would feel obligated to bargain over all decisions, regardless of whether these decisions were mandatory subjects of bargaining, rather than risk the possible imposition of harsh sanctions by the Board.

Likewise, unions would also have difficulty in determining whether they could use their economic powers to attempt to alter the employer's decision without risking sanctions from the Board.¹²⁹ Accordingly, the *First National Maintenance* Court found that the rebuttable presumption analysis was "ill-suited" to the advancement of harmonious labor/management relations.¹³⁰ Although the Court's statement was made in the context of a partial closing case, it is likely that a rebuttable presumption analysis would also be ill-suited in determining whether relocation decisions are subject to mandatory bargaining. Thus, the Board erred by adopting a rebuttable presumption approach in *Dubuque Packing* when the proper approach could have easily been achieved by adopting the balancing test set forth in *First National Maintenance* and subsequently advocated by Member Dennis in *Otis Elevator Co.*

The *Dubuque Packing* rebuttable presumption analysis is also inconsistent with the National Labor Relations Act. The Act was designed to promote the free flow of interstate commerce by providing employees with the right to organize and join unions and to engage in collective bargaining with management, thereby abolishing the inequality of bargaining power that had long favored management.¹³¹ The NLRA placed labor on equal ground with management by allowing organized labor to use their economic weapons in a peaceful manner to obtain concessions from management when engaged in collective bargaining.

By creating presumptions against the employer, the *Dubuque*

128. *Id.* at 684–85.

129. *Id.* at 685–86.

130. *Id.* at 684.

131. *See generally* NLRA § 1, 29 U.S.C. § 141.

Packing test disregards this equality and places management at a disadvantage because of the inherent uncertainty and undue burdens placed on management by the rebuttable presumption analysis. Rather than risk the possible imposition of harsh sanctions by the Board, employers will likely bargain with unions over issues that should not be subject to the collective bargaining process. Decisions concerning the scope and nature of an employer's business enterprise, if based solely on the economic profitability of the business and with no discriminatory motive, are strictly within the discretion of management and should not be subjected to mandatory bargaining under a proper reading of the Supreme Court's *First National Maintenance* decision. By adopting the rebuttable presumption analysis in *Dubuque Packing*, the Board unnecessarily retreated from the balancing test advocated by the Supreme Court and created an analysis that is inconsistent with the equalizing nature of the NLRA.

B. The *First National Maintenance* Balancing Test: Applicable to a Wide Range of Managerial Decisions

Although the Supreme Court limited its *First National Maintenance* holding to the specific facts of the case, its analysis is applicable to a wide range of managerial decisions. In *Otis Elevator Co.*, Member Dennis appropriately stated that the analysis should apply to decisions including, without limitation, plant relocations, consolidations, automation, and some types of subcontracting.¹³² The Board's *Dubuque Packing* test, although limited to relocation decisions, represents an unwarranted trend away from balancing the benefits of the collective bargaining process and labor/management relations against the burden placed on the employer's conduct of its

132. *Otis Elevator Co.*, 269 N.L.R.B. 891, 897 (1984) (Dennis, Member, concurring). Recall that when dealing with subcontracting decisions, the Supreme Court in *Fibreboard* held that when an employer replaces bargaining unit work with an independent contractor to do the same work under similar conditions of employment, the employer must bargain over its decision. *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 215 (1964). The Court did not, however, express an opinion as to other forms of contracting out or subcontracting. *Id.*

Member Dennis also correctly noted that no decision bargaining is required for an economically motivated partial closing or sale of the business because these decisions involve management's "retained freedom to manage its affairs unrelated to employment." *Otis Elevator*, 269 N.L.R.B. at 897 n.8 (quoting *First Nat'l Maintenance Corp. v. NLRB*, 452 U.S. 666, 677 (1981)) (citations omitted).

business.

Unlike *Dubuque Packing's* rebuttable presumption approach, the *First National Maintenance* balancing test is consistent with Supreme Court precedent and the NLRA. The balancing test places both management and labor on equal ground by balancing their respective interests. The balancing of interests is also conducive to the NLRA's purpose of settling conflicting interests in a peaceful manner through the collective bargaining process.

In developing the balancing test, the *First National Maintenance* Court recognized the union's interest in protecting its members' job security, but noted that these interests would not likely be served by requiring bargaining over the *decision* to partially close.¹³³ The Court found that the union's interest would be satisfied when the employer bargained over the *effects* of its decision.¹³⁴ The union's interest in fair dealing is also protected by § 8(a)(3)'s prohibition on partial closings motivated by anti-union animus and a desire to chill unionism at other facilities.¹³⁵

The *First National Maintenance* balancing test also recognized management's need to be free from the constraints of the bargaining process when making decisions based solely on economics and the profitability of the business enterprise. The Court correctly stated that management would have an incentive to voluntarily confer with the union to seek concessions if labor costs were a significant factor in the decision to partially close.¹³⁶ Furthermore, the Court recognized management's need for speed, flexibility, and confidentiality when dealing with complex business circumstances.¹³⁷ Based on these concerns, the Court stated that "bargaining over management decisions that have a substantial impact on the continued availability of employment should be required only if the benefit . . . out-

133. *First Nat'l Maintenance*, 452 U.S. at 681 (emphasis added).

134. *Id.* at 681–82 (emphasis added). The Court noted that effects bargaining "must be conducted in a meaningful manner and at a meaningful time, and the Board may impose sanctions to insure its adequacy." *Id.* at 682.

135. *Id.*; see *supra* note 39.

136. *First Nat'l Maintenance*, 452 U.S. at 682.

137. *Id.* at 682–83. The Court acknowledged the fact that management may be harmed by the publicity of having to bargain over a decision to partially close. *Id.* at 683. Additionally, if partial closing decisions were mandatory subjects of bargaining, unions would have an important weapon enabling them to halt or delay the decision thereby causing a greater financial risk to management. *Id.*

weighs the burden placed on the conduct of the business.”¹³⁸

The *First National Maintenance* balancing test provides the Board and the courts with a flexible approach that is useful in determining whether a large variety of managerial decisions are subject to mandatory collective bargaining. Unlike the *Otis Elevator* “turns on labor costs” analysis or the *Dubuque Packing* rebuttable presumption approach, the Supreme Court's balancing test considers all the relevant factors when determining whether courts should require bargaining. The balancing test considers the benefits of the collective bargaining process and weighs those benefits against the burdens placed on management's decisionmaking process. By adopting the rebuttable presumption approach in *Dubuque Packing*, the Board unnecessarily retreated from a comprehensive test that equally weighed the parties respective interests. The *Dubuque Packing* rebuttable presumption approach is not only inconsistent with Supreme Court precedent and the NLRA, but it also subjects management and labor to uncertainty in determining beforehand whether a particular decision is subject to mandatory bargaining.

V. CONCLUSION

Recent legislation and court decisions indicate that a number of changes are pending for management in the area of plant closings, relocations, and mass layoffs. With the passage of the Worker Adjustment and Retraining Notification Act, the federal government has indicated its willingness to intervene in the private sector employment relationship. With the recent overwhelming criticism of the WARN Act's application, it is likely that major changes will occur in the coming years. If enacted, the proposed changes would significantly increase the number of employers subject to WARN's notice requirements, increase the amount of advanced notice required from sixty days to six months, and provide for more stringent enforcement mechanisms.

Management must also contend with changes in the National Labor Relations Board's analysis of decisions lying at the core of managerial control such as partial closings and relocations. The Board has decided to forego the Supreme Court's guidance on determining whether these issues fall under § 8(d)'s “other terms and

138. *Id.* at 679.

conditions of employment.” Instead, the Board has resorted to a rebuttable presumption approach that was specifically rejected by the *First National Maintenance* Court. This change will effectively result in management being forced to delay key operational decisions and bargain with the union over decisions that otherwise would not have been decided through the mandatory collective bargaining process. The Board and courts should return to the Supreme Court's comprehensive balancing test that properly weighs the benefits of the collective bargaining process against the burdens imposed on management's decisionmaking process. When applied consistently, the *First National Maintenance* test offers an innovative and flexible approach to resolving conflicts over which decisions are subject to mandatory bargaining.