THE IMPACT OF *DUBUQUE PACKING CO.* UPON THE COLLECTIVE BARGAINING PRACTICES OF ATTORNEYS AND THEIR CLIENTS

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I. INTRODUCTION

In 1991, after years of litigation, the National Labor Relations Board (NLRB) decided *Dubuque Packing Co.*[1] Involving one of the nation's largest meatpackers, *Dubuque Packing* raised the important question of when a company can relocate work without talking to its employees' union.

Briefly, in 1981, Dubuque Packing moved more than six hundred jobs from its home base of Dubuque, Iowa, to a plant in Rochelle, Illinois, formerly owned and operated by Swift Premium Company.[2] Before the company left, the union gave up five million dollars in employee wage concessions and agreed to increase the speed of the production line.[3] But the company had financial troubles, lost its local credit, and had what it called an outdated plant.[4] Within a year of its move, both the Dubuque and Rochelle plants were sold.[5]

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1. 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) (*UFCW*), *cert. granted*, 114 S. Ct. 1395, *and cert. dismissed*, 114 S. Ct. 2157 (1994).

2. *UFCW*, 1 F.3d at 26.

3. *Id.*

4. *Dubuque Packing*, 303 N.L.R.B. at 387–88.

5. *Id.* at 388.

The case was initially tried before the NLRB in 1985.[6] The NLRB created a new rule about when an employer must bargain with a union about relocating work. Where there is no proof of a "basic change" in the business, a company must bargain over its decision to relocate unless it can prove either that the move does not involve labor costs or that bargaining would be futile. Due to this result, *Dubuque Packing* could be one of the most significant developments under § 8(a)(5) of the National Labor Relations Act (NLRA) in decades by increasing the opportunity for a union to engage in important decisional bargaining.

A. Practical Questions

Beyond its contribution to labor law doctrine, what impact has *Dubuque Packing* had on the actual practice of labor/management law? Perhaps the case effected no real change in the duty-to-bargain rules; or it may have simply added to the burdens of an already troubled company without achieving any benefit for the employer, the workers, or the community. In an effort to discover whether *Dubuque Packing* has altered collective bargaining practices and effects, eighty-two practicing attorneys whose clients have been or likely will be involved in collective bargaining over the relocation of work were interviewed.[7] The survey concludes that careful judicial analysis, twice by the NLRB and twice by a reviewing court, did not result in a bright line test about the duty to bargain over relocation.

B. Preview of Survey Findings

The sample used to investigate the general understanding and interpretation of *Dubuque Packing* was comprised of labor and management attorneys with knowledge of the case. This specialized group of attorneys, about equally divided between management and union specialists, was drawn from a sufficiently wide distribution of typical clientele, industries, and geographical regions of the country.

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6. *See* Dubuque Packing Co., 287 N.L.R.B. 499 (1987), *remanded*, 880 F.2d 1422 (D.C. Cir. 1989), *rev'd*, 303 N.L.R.B. 386 (1991), *enforced sub nom.* UFCW, 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).

7. The fund for Labor Studies was created by the Lawyers Coordinating Committee of the AFL-CIO, which encourages empirical research in any area of labor relations.

The survey was divided into four parts: (1) general knowledge of the law; (2) interpretations of specific provisions; (3) attitudes about *Dubuque Packing*; and (4) bargaining strategies and experiences.

The findings of this survey suggest that general knowledge of the NLRB's language and provisions in *Dubuque Packing* is high. Some eighty percent of the attorneys queried recounted correctly some of the exact language used in the case establishing or excusing the duty to bargain. However, the survey found wide disagreement about the meaning of these provisions and the operational definitions of the terms used by the NLRB. There was no clear, universally accepted understanding of the duty-to-bargain rules of *Dubuque Packing*.

The point-by-point analysis of various provisions establishing a duty to bargain over relocations indicated that substantial disagreements occurred among management and union attorneys and between the two subsets of lawyers and the NLRB interpretation. For example, considerable uncertainty surrounded the definition of the most important part of the General Counsel's prima facie case for establishing a § 8(a)(5) violation: a "basic change" in the business, where no duty to bargain exists. There was greater interpretive agreement between the bar and the NLRB when issues involving labor costs were considered. Yet, on a few points, management and union lawyers had a radically different notion of mandatory conditions for bargaining.

Labor and management attorneys did agree on certain consequences of *Dubuque Packing*. Both groups thought that *Dubuque Packing* had only slightly, as compared to significantly, clarified the rules governing the duty to bargain. Labor and management lawyers agreed that the case had increased the range of topics over which companies and unions must bargain. A majority of both types of lawyers thought that the case had increased management's motivation to bargain. The two sectors of the bar disagreed, however, over whether *Dubuque Packing* had improved the process of bargaining.

The survey also found that relocations are not uncommon among the clients of the practicing labor and management bars. Nearly two-thirds of the attorneys interviewed for this study reported that they had confronted a relocation issue. Clearly, *Dubuque Packing* is a highly salient case in the areas of labor and management law, and its importance will likely increase.

While all of the conditions that impose a duty to bargain over relocation were not similarly crystallized in the minds of labor and management lawyers, bargaining over relocation occurs more often than not. This sample of attorneys reported that *Dubuque Packing* played a noticeable, though undramatic, role in establishing this increase in bargaining. Our evidence suggests that while *Dubuque Packing* has contributed to increased bargaining over relocation, it has had no appreciable effect in actually preventing such relocations. Most respondents saw *Dubuque Packing* as creating an incentive to bargain in order to avoid the type of potentially devastating remedies visited upon the Dubuque Packing Company itself.

C. Foreshadowing Interpretative Problems Arising from *Dubuque Packing Co.*

It is assumed that the NLRB and the Supreme Court have certain goals in mind when deciding cases. Arguably those goals are to decide the instant dispute, to interpret any relevant statute in a way consistent with its statutory purpose, to clarify the law, and possibly, to create public policy. The data suggests that most of these issues in *Dubuque Packing* are unresolved.

The instant dispute took more than a decade to resolve,[8] leaving the affected workers with no remedy for half of a generation. The law remains murky. In the issue of relocation of work and other issues, the Board and reviewing courts have exhibited a wide array of approaches and rationales for ordering or excusing bargaining, and *Dubuque Packing* has not given practitioners the direction they need to navigate certain issues. Moreover, the duty-to-bargain cases require statutory interpretation that satisfies congressional purposes and policies, so not only must lawyers and their clients understand what the Board has said the law to be, but the Board's lawmaking must comport with enabling statutes.

The Board evidently espoused no single or primary legislative

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8. After the completion of this Article, a settlement was reached before arguments were heard before the Supreme Court. Dubuque Packing Company had long been defunct, but its successor, Beef America, Inc., agreed to pay the Dubuque Packing employees back wages in order to avoid a potentially large award by the Supreme Court. In response to this settlement, the Supreme Court dismissed the writ of certiorari previously granted. Dubuque Packing Co. v. United Food & Commercial Workers, Local No. 150-A, 114 S. Ct. 2157 (1994); *see Supreme Court Drops Plans to Review Whether Bargaining is Required on Plant Relocation*, Daily Lab. Rep. (BNA) June 7, 1994, at D4.

goal in *Dubuque Packing*. The purposes of the NLRA are not universally agreed upon, and this difference of opinion can also complicate the duty-to-bargain issue. Court and Board decisions might create or endorse other national policy goals, such as to prevent relocations or layoffs. In *Dubuque Packing*, the company had already moved, but the case's application may actually avert work relocations through collective bargaining and cooperative effort. This survey suggests that at this point, it has yet to have such an effect.

Imposing a duty to bargain upon relocation decisions may simply forestall the inevitable move in many, if not most, cases. In the worst application, the duty to bargain may do nothing more than encourage procedural compliance that increases the transaction costs for both management and labor. Alternatively, if *Dubuque Packing* increases collective bargaining, parties may reach the most efficient division of available resources based upon their own and their community's pragmatic needs. Finally, if the Board simply wants to encourage collective bargaining, whatever the practical result, the Board may have done little more than expand the legal rights of unions to negotiate their own demise.

There is a dearth of empirical data to assess the impact of NLRB decisionmaking and policymaking.[9] It is hoped that this survey accomplishes what an earlier scholar, teacher, and empiricist, Julius Getman,[10] wrote about: "Empirical study has the potential to illuminate the workings of the legal system, to reveal its shortcomings, problems, successes, and illusions."[11] Do people in the field

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9. D.V. Brown, in his paper to the thirteenth annual meeting of the IRRA, noted:

> For many years I have been plagued by the uneasy feeling that while I was ready at the drop of a hat to make pronouncements on desirable public policy in the area of labor management relations, I was woefully ignorant of the actual impact of existing policies, let alone a policy as yet untried. . . . What, in fact, do we know about what happens when an order of a court or an administrative agency has been duly issued? . . . When the National Gadget Company is directed to bargain with the union of its employees, is the result one big happy family?

PHILIP ROSS, THE GOVERNMENT AS A SOURCE OF UNION POWER 7 (1965) (quoting D.V. Brown, *The Impact of Some NLRB Decisions*, 13 I.R.R.A. PROC. 18–19 (1961)).

10. Julius Getman participated in a famous empirical study of company campaigns during union organizational efforts. *See* JULIUS G. GETMAN ET AL., UNION REPRESENTATION ELECTIONS: LAW AND REALITY (1976).

11. Julius G. Getman, *Contributions of Empirical Data to Legal Research*, 35 J. LEGAL EDUC. 489, 489 (1985). Getman has noted:

> Because of my empirical work I have a vision different from many of my colleagues which adds something useful to our ongoing discussions of the nature

read *Dubuque Packing* and distinguish its egregious facts from those in their own cases? Or do they see it as a general rule which they can apply to avoid litigation?

In order to put this study in an historical and legal context, the remainder of the Article is divided into four parts. First, Part II examines how theorists, jurists, and practitioners have viewed the purposes of the National Labor Relations Act. Part III traces the chronological development of the parameters of the duty to bargain, vaguely defined in the NLRA, to determine whether there is clear law on the duty to bargain over company relocations and other business changes. Part IV attempts to explain the NLRB's analysis and rationale in *Dubuque Packing*. Finally, Part V describes the interpretations of and experiences with *Dubuque Packing* found among our sample of labor and management attorneys.

II. PURPOSES OF THE NATIONAL LABOR RELATIONS ACT

When a company argues that it may run its business without interference by a union that can contribute nothing to the decision and the union complains it is losing work without having a chance to try to save it, the NLRB has to answer a series of questions. Does the statute legalizing unions and encouraging negotiation between owners and workers mandate collective bargaining every time jobs are lost? Does the NLRA exist to redistribute wealth? Does it exist to protect business from unlawful strikes and from employing saboteurs? Once a goal is identified, how is it best reached? Are unions as institutions efficient or counterproductive?

The National Labor Relations Act literally endorses collective bargaining,[12] so one would assume that one purpose of the NLRA is

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> of legal scholarship. I have developed a strong sense of the arrogance of legal decision making. . . . Much of my labor law course is devoted to demonstrating to the students the extent to which the law rests upon assumptions by an elite group concerning the behavior of people whose lives they do not share, whose attitudes they do not understand, and to whose concerns they are indifferent.

Id. at 493.

12. The purpose clause of the National Labor Relations Act (alternatively known as the Wagner Act), which was unchanged by the Taft-Hartley Amendments, provides:

> It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and desig-

to increase bargaining and protect bargaining rights. However, there are other goals, both articulated and implied, that commentators and litigants have argued are incompatible with a broad duty to bargain: economic efficiency and the free flow of commerce. There is constant debate about the costs of collective bargaining. Almost four decades ago, Archibald Cox argued that "[t]he cost [of bargaining] is so slight that the potential gains easily justify legal compulsion to engage in the discussion."[13] Others have countered that mandatory bargaining is "a very costly form of entitlement protection."[14]

A. Effectuating the NLRA's Statutory Purpose

Some theorists claim that the direction from the Court and the Board has incorporated economic theories and has accommodated both societal and economic goals. Others are not so sanguine. For example, the Supreme Court was praised for creating a workable test in *First National Maintenance Corp. v. NLRB*.[15] In that case, the Court considered the scope of an employer's bargaining obligation in the context of management decisionmaking that affected the jobs of an entire bargaining unit.[16] In *First National Maintenance*, the Court balanced the need for unfettered entrepreneurial choice with the right of a union to negotiate its own future, especially when the union has the power to make concessions that could affect the decision.

This decision has been criticized from both sides of the bargain-

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> nation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

National Labor Relations Act (Wagner Act), ch. 372, 49 Stat. 449–450 (1935) (codified as amended at 29 U.S.C. §§ 151–169 (1988)).

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

14. Michael L. Wachter & George M. Cohen, *The Law and Economics of Collective Bargaining: An Introduction and Application to the Problems of Subcontracting, Partial Closure, and Relocation*, 136 U. PA. L. REV. 1349, 1373 (1988) (favoring negotiated problem solving between employers and unions even after very complicated description of external market conditions that ought to trigger duty to bargain).

15. 452 U.S. 666 (1981).

16. *See* Joseph R. Knight, Note, *Decision-Bargaining and the NLRA — A Plea for the Resurrection of* First National Maintenance Corp., 68 TEX. L. REV. 625 (1990); *see also* B. Glenn George, *To Bargain or Not to Bargain: A New Chapter in Work Relocation Decisions*, 69 MINN. L. REV. 667 (1985) (noting that NLRB in its own cases has wrongly failed to apply Supreme Court tests).

ing table for undermining the NLRA goal of encouraging collective bargaining. One analyst claims, "*First National Maintenance* unwittingly handed to careful, well-advised, anti-union employers a powerful weapon for chilling unionization."[17] Others conclude that *First National Maintenance* allowed unions to sabotage a firm's inherent right to manage its own business in the most efficient way, thus interfering with overall community benefit.[18]

Purely neutral economic factors outside the union's control normally insulate a management choice from the duty to bargain over a decision about how to respond to those factors. But economic criteria are not so distinct from other motivations for a move, layoff, or partial closing, which perhaps explains the Board's and Court's often confusing dissertations about duty to bargain in the context of anti-union animus. Attempts to distinguish employer decisions that patently reflect no more than a firm's response to consumer demand, for example, and therefore should not be subject to mandatory bargaining, from those decisions that are properly within the ambit of collective bargaining due to the direct impact upon workers' contributions and investments in the enterprise are based upon theoretical assumptions upon the intangible and likely nonquantifiable impact of purely economic factors.[19]

If fine distinctions were possible, much less confusion would exist. And even if, in a particular case, the Board is willing to separate lawful economic or business motives from illegal discrimination against workers' collectives, or a company's honest desire to escape union wages without having to try to bargain for concessions, we are still left with incomplete knowledge of how best to stimulate economic growth and business efficiency.[20] All of these problems are

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17. Richard Litvin, *Fearful Asymmetry: Employee Free Choice and Employer Profitability in* First National Maintenance, 58 IND. L.J. 433, 435 (1983).

18. *See, e.g.*, *The Supreme Court, 1980 Term*, 95 HARV. L. REV. 93, 329–38 (1981). The Court "overestimate[s] not only the incremental publicity and delay incident to decision-bargaining, but also the additional legal opportunities of the union to engage in business-wide strikes to pressure an employer to keep open the losing part of the enterprise." *Id*. at 333.

19. *See* Michael C. Harper, *Leveling the Road from* Borg-Warner *to* First National Maintenance: *The Scope of Mandatory Bargaining*, 68 VA. L. REV. 1447 (1982).

20. See James B. Zimarowski et al., *An Institutionalist Perspective on Law and Economics (Chicago Style) in the Context of United States Labor Law*, 35 ARIZ. L. REV. 397 (1993), in which the authors examine the various schools of economic theory, debunk the notion that there is one universal economics approach, and stress that economics is a tool based upon unproven and unprovable assumptions. The authors note: "[L]aw pro-

exacerbated by confusion about the "true" meaning of cases like *Dubuque Packing*.

If the purpose of the NLRA was — as its prime sponsor, Senator Wagner described it — to develop parameters for "sustaining workers' consummate group cooperation and management's commitment to norms of group fairness in decisions affecting the enterprise workforce's job security and its distributive share,"[21] then legal interpretations that increase bargaining make sense. The Board can choose to endorse either the distributive reallocation of power suggested by the adoption of the NLRA or management prerogatives and the free flow of capital. The Board can also try to balance these competing interests by emphasizing procedural guarantees for organized employees.

The history of the Board's protection of unions against employers' anti-union animus, even where there are clear economic reasons for relocations or layoffs,[22] suggests that worker empowerment may motivate the Board more than any sense of good business. Yet, the Board has not been liberal in its modern interpretations of mandatory bargaining topics. One writer has identified the conflicting goals of unions to increase wages and management to control costs, stating that the tension between these goals is "inevitable in a system of labor law, which, even as it places its legal imprimatur on the importance of collective employee action, must also respect . . . values [such as] managerial efficiency that are prevalent in our political culture and incorporated in the [NLRA] itself."[23]

Discussion also continues about whether unions, as institutions

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fessionals have reluctantly begun to embrace the `science' of the law and economics proponents based primarily on the strength of its advocates and a lack of methodological understanding." *Id*. at 439–40.

21. Benjamin Duke, Note, *Regulating the Internal Labor Market: An Information-Forcing Approach to Decision-Bargaining over Partial Relocations*, 93 COLUM. L. REV. 932, 980 n.231 (1993) (citation omitted); *see* Mark Barenburg, *The Political Economy of the Wagner Act: Power, Symbol, and Workplace Cooperation*, 106 HARV. L. REV. 1381 (1993).

22. *See, e.g.*, J.L.M., Inc., 312 N.L.R.B. 304, 309–10 (1993) (holding that duty to bargain existed and, according to concurring Member Raudabaugh, that *Dubuque Packing* analysis applied to layoffs and discharges — even in midst of business decline — when company's response was prompted in part by antipathy to union organizing campaign); BC Industries, Inc., 307 N.L.R.B. 1275 (1992) (imposing no duty to bargain since decision to close was motivated by economic factors unrelated to anti-union motivation).

23. PAUL WEILER, GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW 232–33 (1990).

in the marketplace, do good or ill. Former Secretary of Labor Ray Marshall has explained that employer resistance to the increased costs associated with unions does not arise in a vacuum and the labor collective is not the only cause of increased costs.[24] Some of the most severe critics of unions have argued that unions demand more than market price, limit entry of other workers, and increase cost disproportionate to demand.[25] Others, extending the conclusion of economists Richard Freeman and James Medoff that unions actually increase efficiency through optimizing productivity,[26] have rejected the concept of unions as cartels and argue that more collective bargaining is better for business.[27]

Without attempting to advocate one goal over another, one may assume that the Board and the Court have adopted the goal of creating some sort of balance between the opposing parties. This assumption obviously does not end the dispute. Once the law clearly empowers the parties to demand bargaining,[28] they must use their respective bargaining strength and abilities to create a useful, clear, and enforceable contract. Economists state that the bargaining duty and concomitant information-sharing require employers to act less strategically and that union negotiators must likewise employ less ingenuity.[29] For both sides, "there must be a common willingness among the parties to discuss freely and fully their respective claims

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24. RAY MARSHALL, UNHEARD VOICES: LABOR AND ECONOMIC POLICY IN A COMPETITIVE WORLD 139 (1987). Marshall states that "internationalization, declining productivity growth, the widening of union-nonunion wage differentials, deregulation, intensified competition, and rising unemployment all put a much higher premium on controlling labor costs." *Id*.

25. *See* Richard A. Posner, *Some Economics of Labor Law*, 51 U. CHI. L. REV. 988 (1984).

26. RICHARD B. FREEMAN & JAMES L. MEDOFF, WHAT DO UNIONS DO? 19–25 (1984).

27. *See* Cynthia L. Estlund, *Economic Rationality and Union Avoidance: Misunderstanding the National Labor Relations Act*, 71 TEX. L. REV. 921, 955–56 (1993) (endorsing "high-wage" strategy since unions increase aggregate output if members are properly motivated); Keith N. Hylton, *Efficiency and Labor Law*, 87 NW. U. L. REV. 471 (1993).

28. This supposition requires a rejection of certain applications of the Coase Theorem to labor law suggesting that bargainers will reach an efficient outcome, i.e., that each party will get what it values most, regardless of initial entitlements by the government. *See* Stewart J. Schwab, *Collective Bargaining and the Coase Theorem*, 72 CORNELL L. REV. 245 (1987). Economically, the union has no way to enforce bargaining over relocations since its strike weapon would be useless if the plant were to close.

29. "Bargaining rules exist to restrict the parties' ability to act strategically . . . [by] impos[ing] costs on the other (through strikes and lockouts) . . . [which] can result in a harmonious long-term contracting relationship" that efficiently divides property rights between the parties. Wachter & Cohen, *supra* note 14, at 1374.

and demands and, when these are opposed, to justify them on reason."[30] Opportunism and lack of candor may seem like deterrents to honest bargaining, but the NLRA implicitly prohibits both and makes the release of relevant information an enforceable duty.[31]

It may be argued that *Dubuque Packing* simply forces a company to go through the motions of bargaining when the decision to relocate or close is a foregone conclusion. By making company options a mandatory bargaining issue, however, there can be no foregone conclusions without violating the NLRA.[32] An employer must engage in good faith bargaining, which means more than "concede or we leave."[33] The company must make "a serious attempt to resolve differences and reach a common ground."[34] And the union has more at stake than trying to temporarily forestall the inevitable.[35] The duties that attend the union's entitlement to bargaining preclude a "predetermined resolve not to budge from an initial position."[36]

The Board's apparent pro-bargaining stance in *Dubuque Packing* reflects the thinking and logic of the original sponsors of the Wagner Act. Bargaining and ultimately negotiating an agreement is what the NLRA is really about; everything else, such as all the enumerated unfair labor practices, sets the stage for the parties' abilities define their own rules, relationships, and mutual decisions about making things work. "The historical significance of the duty to bargain cannot be exaggerated."[37]

In one of the early duty-to-bargain cases under the Wagner Act,

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30. NLRB v. George P. Pilling & Son Co., 119 F.2d 32, 37 (3d Cir. 1941).

31. NLRB v. Truitt Mfg. Co., 351 U.S. 149 (1956). Many analysts complain that insufficient exchange of information occurs and that companies withhold data to put unions at a disadvantage. One scholar describes collective bargaining as a form of "shadowboxing" in which the "union participates in the formation of the rules of modern industrial enterprise, but not necessarily on an equal footing." Katherine Van Wezel Stone, *The Post-War Paradigm in American Labor Law*, 90 YALE L.J. 1509, 1547 (1981). Our survey showed that union lawyers want much more information than they think they receive. That part of the survey, however, is not the focus of this Article.

32. General Electric Co., 150 N.L.R.B. 192 (1964).

33. NLRB v. Insurance Agents' Int'l Union, 361 U.S. 477, 486 (1960).

34. *Id*.

35. "[J]ust as the employer has invested capital in the business, so the employee has invested years of his [or her] working life, accumulating seniority, accruing pension rights, and developing skills that may or may not be salable to another employer." Ozark Trailers, Inc., 161 N.L.R.B. 561, 566 (1966).

36. NLRB v. Truitt Mfg. Co., 351 U.S. 149, 154 (1956) (Frankfurter, J., concurring in part and dissenting in part).

37. ROSS, *supra* note 9, at 3.

In re Singer Manufacturing Co., the Board provided a reminder that all of the other protections created by the NLRA's ban on specific unfair labor practices were intended simply to "foster collective bargaining under § 8(5)."[38] The Supreme Court shared that view in *NLRB v. Insurance Agents International Union*, concluding that "it was believed that the other rights guaranteed by the Act would not be meaningful if the employer was not under an obligation to confer with the union in an effort to arrive at the terms of an agreement."[39] In *NLRB v. American National Insurance Co.*, the Court decided that "enforcement of the obligation to bargain collectively is crucial to the statutory scheme."[40]

Theoretically, *Dubuque Packing*'s bargaining directive may lead to useful and efficient problem solving and resource use by considering the contributions both of capital and human labor. Companies may save money, employees may receive better benefits even if relocation of work occurs, and relocations may actually be averted.

B. Clarification of the Law

NLRA policy aside, it makes sense that the parties concerned need to know when and if bargaining is required. If an employer fails to bargain when it ought to do so, the penalties can be dramatic. The company may be ordered to reopen a closed facility, and it almost always must compensate the employees displaced by the move. It is wasteful and expensive for a union to demand bargaining and access to the data necessary to engage in that bargaining if the employer has no bargaining duty in the first place. Neither the judicial system nor administrative agencies can afford such waste. If the ultimate macro-economic goal is either to keep a plant open or to relocate its operations as efficiently as possible, unreasonably imposing the duty to bargain and the attendant transactions costs or needlessly litigating over the bargaining issue can serve no purpose.

However, *Dubuque Packing* is based upon assumptions that informing and bargaining with employees' representatives, who by law and custom, have little to say about company policy, will promote industrial peace, guarantee the free flow of commerce, and

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38. *In re* Singer Mfg. Co., 24 N.L.R.B. 444 (1940), *enforced*, 119 F.2d 131 (7th Cir. 1941).

39. NLRB v. Insurance Agents Int'l Union, 361 U.S. 477, 483 (1960).

40. NLRB v. American Nat'l Ins. Co., 343 U.S. 395, 402 (1952).

actually affect plant-closing decisions. A multitude of data shows that advance notice helps workers retrain, re-adjust, and possibly become re-employed,[41] but very little data exists to support the assumption that employees and their unions can prevent a relocation through concession bargaining.[42]

Dubuque Packing suggests that nearly all company relocations are subject to mandatory bargaining because labor costs are always a part of such decisions.[43] The Board, however, also offered the company two defenses to bargaining, which each side must understand in order to avoid a wasteful lawsuit or unnecessary bargaining that could drain both sides' resources and force employee concessions when there is no chance of saving jobs.

Company moves, closings, and transfers involve millions of workers.[44] Relocation will continue to be an important issue for both large and small companies with the advent of free international

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41. Arnold R. Weber & David P. Taylor, *Problems of Advance Notice, in* DEINDUSTRIALIZATION AND PLANT CLOSURE 135 (Paul D. Staudohar and Holly E. Brown eds., 1987); *see* CAROLYN C. PERRUCCI ET AL., PLANT CLOSINGS: INTERNATIONAL CONTEXT AND SOCIAL COST (1988); JOHN PORTZ, THE POLITICS OF PLANT CLOSINGS (1990).

42. Portz presents a study of several plant closings. He concludes that bargaining improved the mechanics of the closing and the financial, social, and spiritual commonwealth, even though he quotes one labor negotiator as saying, "I don't think Jesus Christ could have come down here and changed that company's mind." PORTZ, *supra* note 41, at 27.

43. It is hard to imagine too many relocations undertaken with no consideration given to labor costs. *See* PERRUCCI ET AL., *supra* note 41, at 24 (citing study by David Jaffee, *The Political Economy of Job Loss in the United States, 1970–1980, in* SOCIAL PROBLEMS 33:297–:315 (1986) (stating that level of unionization was best predictor of capital mobility)). One commentator attempted to define which management decisions leading to moves or layoffs should be exempt from bargaining: only those involving "what products are created and sold, in what quantities, for which markets, and at what prices." Harper, *supra* note 19, at 1463.

The NLRB and most economists, however, have not been willing to concede that prices are unaffected by labor costs. Recent Board cases have accepted a very broad definition of labor costs. *See* Holmes & Narver/Morrison-Knudsen, 309 N.L.R.B. 146 (1992); United States Postal Serv., 306 N.L.R.B. 640 (1992), *vacated*, 8 F.3d 832 (D.C. Cir. 1993). Jerry Hunter, former NLRB General Counsel, told the American Board Association shortly after *Dubuque Packing* was decided that it would be hard to imagine a relocation decision that did not take labor costs into account and that there is "almost an obligation to bargain if labor costs play any role at all in the relocation." Jerry M. Hunter, *Address at the ABA Annual Meeting* (Aug. 12, 1991), *quoted in* 137 Lab. Rel. Rep. (BNA) 500 (1991).

44. Between 1985 and 1989, a total of 4,326,000 employees of age 20 or above and with at least three years' tenure lost their jobs due to plant closings or relocations, "slack" work, or shift elimination. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, DISPLACED WORKERS REPORT 1985–89, at 2 (1991).

trade and global competition. It seems obvious that relocations adversely impact a disproportionate number of union workers because capital investment in organized industries has declined.[45]

Many authorities, including the Supreme Court, worry that the costs of relocation might be compounded by imposing a duty to engage in decisional bargaining with a union. The Supreme Court has noted that an employer often has the need for "speed, flexibility, and secrecy in meeting business opportunities and exigencies."[46] Beyond that need, an employer with an organized work force has to consider its "sunk costs," which economists identify as the amount the company has already spent on idiosyncratic training, equipment, and on-the-job adaptations.[47] Certainly, the costs to the workers are dramatic as well. In the case of *Dubuque Packing*, for example, nearly a thousand workers became unemployed, joining the ranks of what economists call "the newly poor."[48] By the time those union meatpackers lost their jobs, they had already given back millions in wages and deferred benefits, leaving them with less after the company's relocation.

The other costs to consider are those to both the losing and receiving communities. On a macro-economic scale, Dubuque Packing Company's move to Rochelle did nothing to improve the Illinois unemployment rate, since Dubuque Packing simply bought an old Swift Premium plant and hired Swift's former employees. At the same time, the move nearly doubled the unemployment rate in

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45. *See, e.g.*, PERRUCCI ET AL., *supra* note 41, at 24 (citing a study by David Jaffee, *The Political Economy of Job Loss in the United States, 1970–1980, in* SOCIAL PROBLEMS 33:297–:315 (1986) (stating that level of unionization was best predictor of capital mobility)); Barry T. Hirsch, *Firm Investment Behavior and Collective Bargaining Strategy*, 31 INDUS. REL. L.J. 95, 117 (1992) (noting that during the 1970s, firms invested 20% less in union shops than in non-union facilities); *see also* Estlund, *supra* note 27, at 979–80 (arguing that capital allocation decisions might be evaluated under § 8(a)(3) of NLRA to determine anti-union motivation and "proposed presumption of union avoidance" when companies refuse to bargain about relocating work); Roger W. Schmenner, *Making Business Location Decisions* 239 (1987) (showing in survey of large manufacturing companies that 66% of closed facilities were unionized, compared to 52% of unionized plants that were not closed or relocated).

46. First Nat'l Maintenance Corp. v. NLRB, 452 U.S. 666, 682–83 (1980) (evaluating duty to bargain over partial closing decision).

47. *See, e.g.*, Duke, *supra* note 21, at 964–69, and sources cited therein.

48. Lucia Mouat, *Recession-hit Dubuque Seeks New Footing*, CHRISTIAN SCI. MONITOR, June 10, 1982, § 1, at 6. The home town for the once baronial meatpacker ended up selling T-shirts emblazoned with the following question: "Will the last one leaving Dubuque please turn out the lights?" *Id*.

Iowa. The new hires in Illinois were paid less by Dubuque Packing than they had been by their old employer, Swift Premium, and still less by the Fleur-de-Lys Corporation (FDL), which bought Dubuque Packing's Illinois plant less than a year after Dubuque Packing had moved there.[49] The former Dubuque employees in Iowa were either unemployed or paid sixty-five percent less by FDL.[50] Each and every employee had considerably less spending and saving potential, and many relied on tax dollars from either unemployment or public assistance.

On a micro-economic scale, Dubuque Packing had to bear the costs of relocating.[51] Its successor, FDL, had to renovate the plants in both locations. Perforce, there was enormous personal cost to the line workers who became unemployed.

Not the least costly part of a transaction may be the cost of making a mistake about when the bargaining duty applies. The Dubuque Packing Company no longer exists. Its successors and assigns, however, faced a back-pay order covering approximately 530 workers for more than a year, from the date the company closed in Iowa until it ceased operations in Illinois,[52] a potential multi-million dollar remedy with interest continuing to accrue.[53]

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49. FDL ultimately bought Dubuque Packing's old Iowa plant, which Dubuque Packing had argued was beyond cost-effective rehabilitation.

50. The facts were meticulously described by the Administrative Law Judge in Dubuque Packing Co., Nos. 33-CA-5524, 33-CA-5528 (June 17, 1985), *reprinted in* 287 N.L.R.B. 499 (1987). Jean Tess of the Rochelle Chamber of Commerce, which was involved in negotiating with Dubuque Packing as a liaison with local political officials in offering perquisites to the company to move to Rochelle, has told of the town's disappointment with the ultimate conclusion to the relocation saga. She has stated that the FDL meatpacking employees, now employed by Beef America, have much less income than they had as Swift employees. She also said that FDL had to spend millions of dollars on the former Swift-then-Dubuque Packing-plant to comply with EPA standards. Telephone Interview with Jean Tess, Executive Director of the Rochelle Area Chamber of Commerce (Jan. 19, 1992). As reported in the first Dubuque Packing case, the company's move was alleged to have been partially motivated by the cost of rehabilitating its Iowa plant, which was later operated by FDL.

51. Often, it appears that the costs of moving work are overlooked, fantastically enough, even by the company. Such costs are well-documented, however. Barry Bluestone and Bennett Harrison argue that "when a worker is forced out of a high productivity job into a low productivity job, all of society suffers. Real productivity goes down when the experienced, skilled autoworker in Flint, Michigan, ends up buffing cars in the local car wash." BARRY BLUESTONE & BENNETT HARRISON, THE DEINDUSTRIALIZATION OF AMERICA 11 (1982).

52. *See* Dubuque Packing Co., 303 N.L.R.B. 386, 399 (1991).

53. Michael Slutsky, one of the attorneys for the United Food & Commercial Work-

The last time the Supreme Court considered management decisions that affect union workers' employment, it determined that companies had to have "some degree of certainty" about whether and when a bargaining obligation attaches to a given entrepreneurial move.[54] Clarity and the potential for wide scale factual application of a tacit legal rule is complicated by the NLRB's long-established preference for adjudication rather than lawmaking. The Supreme Court has deferred to the Board's preference for case-by-case lawmaking, noting that labor cases often present complex factual scenarios and that a multiplicity and variety of possible applications has made it "doubtful whether any generalized standard could be framed which would have more than marginal utility."[55]

C. Management Rights and Mandatory Bargaining Topics

The need to clarify the law in this context is especially acute because it implicates one of the most important vestiges of the common law pre-dating the NLRA: management's "reserved rights, inherent rights, exclusive rights which are not diminished or modified by collective bargaining."[56] Although legislation legalizing employee unions and prohibiting what economists would call rational employer behavior[57] was a radical departure from the unfettered market economy, where employers could threaten dismissal in order to force their workers to refrain from collective activity,[58] the NLRA did not completely derogate ownership rights.[59] The Supreme Court later articulated its own presumptions of the need to protect certain

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ers, the union that formerly represented some displaced workers, wondered how a defunct company might be able to pay a twenty million dollar award. Attorneys' fees in a case that began 19 years ago added considerably to the cost. See *supra* note 8 for discussion of the recent outcome of the *Dubuque Packing* litigation.

54. First Nat'l Maintenance Corp. v. NLRB, 452 U.S. 666, 679 (1980).

55. NLRB v. Bell Aerospace Co., 416 U.S. 267, 294 (1974).

56. Arthur J. Goldberg, *Management's Reserved Rights: A Labor View, in* MANAGEMENT RIGHTS AND THE ARBITRATION PROCESS 118, 123 (Jean T. McKelvey ed., 1956).

57. *See generally* Posner, *supra* note 25 (discussing economic effects on employer conduct).

58. *See* Adair v. United States, 208 U.S. 161 (1908) (holding that employer had legal right to discharge employee because employee was union member).

59. *See generally* NEIL W. CHAMBERLAIN, THE UNION CHALLENGE TO MANAGEMENT CONTROL (1948) (discussing the NLRA's effects on property rights and related economic principles).

management rights in *First National Maintenance Corp. v. NLRB*.[60]

Furthermore, "the status of major operational decisions under the subject-of-bargaining doctrine . . . has remained in almost perpetual flux."[61] There is no dearth of commentary regarding the discrete phases in the history of the Board's approach to the duty to bargain over major operational decisions.[62] If we presume Supreme Court decisions to be within NLRB precedent, there have been at least ten different approaches to decisional bargaining.[63] Often the Board has further complicated the issue by commingling discussions of refusals to bargain under § 8(a)(5) of the NLRA and unlawful anti-union discrimination under § 8(a)(3) that motivates otherwise lawful refusals to bargain.[64]

The duty to bargain is statutory. Congress was deliberately vague, however, in defining the proper subjects of bargaining.[65] Al-

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60. 452 U.S. 666, 683 n.20 (1981). The Court worried about the deleterious effects on capital that would result from making the union an "equal partner" in the business. *Id*.

61. Duke, *supra* note 21, at 939.

62. *See, e.g.*, Stanley A. Gacek, *The Employer's Duty to Bargain on Termination of Unit Work*, 32 LAB. L.J. 699 (1981); Betty Southard Murphy, *Plant Relocation and the Collective Bargaining Obligation*, 57 N.C. L. REV. 5 (1980).

63. *See, e.g.*, Claire Knitting Mills, Inc., 2 N.L.R.B. 469 (1935). *But see* Diaper Jean Mfg., 109 N.L.R.B. 1045, 1058, *enforced sub nom.* NLRB v. T.A. Tredway, 222 F.2d 719 (1st Cir. 1954). In *Diaper Jean*, the Board stated: "[T]he relocation of a plant to obtain cheaper rent, or lower taxes, or more accessible markets, or other economic considerations is privileged. Such transfer of the plant violates the Act, however, when it is caused by the employer's antipathy to the organization of his employees." *Id*. at 1058.

See First Nat'l Maintenance Corp. v. NLRB, 452 U.S. 666 (1981); Fibreboard Paper Prod. Co. v. NLRB, 379 U.S. 203 (1964); NLRB v. Wooster Div. of Borg Warner Corp., 356 U.S. 342 (1958); Milwaukee Spring Div. of Ill. Coil Spring Co., 268 N.L.R.B. 601 (1984), *aff'd sub nom.* United Auto Workers v. NLRB, 765 F.2d 175 (D.C. Cir. 1985); Otis Elevator Co., 255 N.L.R.B. 235 (1981) (*Otis Elevator I*); Otis Elevator Co., 269 N.L.R.B. 891 (1984) (*Otis Elevator II*) (containing three separate opinions with unique approaches to bargaining duty: the plurality, Member Dennis' opinion, and Member Zimmerman's opinion).

Rather than raising the issue of whether work relocation was a bargainable topic, *United Auto Workers v. NLRB* examined the employer's contractual promises regarding work preservation. Although the company had bargained to an impasse over its transfer of bargaining unit work to one of its non-union facilities, the court scrutinized the contract for any specific evidence of a promise to the union that it would not transfer its work away. *United Auto Workers*, 765 F.2d at 181–82. The court found no such evidence and consequently no unfair labor practice. *Id*. at 182; *see* Dubuque Packing Co., 303 N.L.R.B. 386 (1991); FMC Corp., 290 N.L.R.B. 483 (1988).

64. *See* Central Transp., Inc., 306 N.L.R.B. 166 (1992).

65. Archibald Cox & John T. Dunlop, *Regulation of Collective Bargaining by the National Labor Relations Board*, 63 HARV. L. REV. 389 (1950). "There is not a word in

though parties to collective bargaining agreements are free to bargain over any "legal" subject,[66] Congress has imposed on employers and unions a mandate or "duty" to bargain over certain issues.[67] Any "unilateral change as to a subject within this category violates the statutory duty to bargain and is subject to the Board's remedial order."[68]

In particular, two provisions of the NLRA combine to impose on employers a duty to bargain over "wages, hours, and other terms and conditions of employment."[69] First, § 8(a)(5) of the NLRA defines the activities constituting unfair labor practices by an employer.[70] In relevant part, it provides: "It shall be an unfair labor practice for an employer . . . to refuse to bargain collectively with the representatives of his employees."[71] Second, a definitional provision, § 8(d) of the NLRA, provides:

> For 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 with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question 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. . . .[72]

III. THE DEVELOPMENT OF BARGAINING LAW

Originally, the National Labor Relations Board decided to apply a sweeping definition of the mandatory subjects of collective bargaining, concluding that any changes in the terms and conditions of

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the hearings, in the Committee Reports or in the debates to suggest that the Act would define the subjects of collective bargaining." *Id*. at 395.

66. "Illegal" bargaining subjects include such topics as racially discriminatory contracts. *See* United Mine Workers of Am. v. Pennington, 381 U.S. 657 (1965); Independent Metal Workers Union, Local 1, 147 N.L.R.B. 1573 (1964).

67. *First Nat'l Maintenance Corp.*, 452 U.S. at 674.

68. *Id*. at 674–75.

69. *Id*. at 674.

70. NLRA, 29 U.S.C. § 158(a) (1988).

71. *Id*.

72. *Id*. § 158(d).

employment were bargainable "whether forecast by a change in plant location, the introduction of a new line of products, or otherwise."[73] A rather narrow spectrum of cases was presented to the Board, however, and many of them focused on the employer's discrimination against, or antipathy toward, the union.[74] The Board had yet to establish a clear set of rules in cases where anti-union animus was irrelevant to the resolution.

A. Classification of Bargaining Subjects

The NLRB initially attempted to settle the question by classifying subjects of bargaining as either "mandatory," over which the union can demand bargaining, or "permissive," subjects which either party may discuss at its discretion. In *NLRB v. Wooster Division of Borg-Warner Corp.*, the Supreme Court upheld the Board's classifications, finding that an employer had unlawfully insisted upon inclusion of two contract provisions that derogated union authority and thus were not "mandatory."[75] If the union chose to cede power over the issues involved — pre-strike secret votes among the workers and exclusion of the union's international as a signatory to the contract — it could do so.[76] But management insistence that the union do so was refusal to bargain under § 8(a)(5) of the NLRA.[77]

Much debate followed *Borg-Warner*, since its classification scheme automatically removed certain bargaining topics from the union's discretion. Arguably, the Board has overlooked this pragmatic case's potential to contribute to discussion and

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73. Claire Knitting Mills, Inc., 2 N.L.R.B. 469 (1935).

74. *See* Duke, *supra* note 21, at 937 (summarizing early "runaway shop" cases). In early cases, there was no clear dichotomy between refusals to bargain and the reasons for bargaining in the context of plant closings or work relocations, since the two issues were often presented together. Even where a company closed a shop, which is "peculiarly [a] matter[] of management prerogative," its motivation for the closing and the consequent "chilling effect" upon unionism in other parts of the employer's business may lead to a finding of unlawful refusal to bargain. *Id.*; *see* Textile Workers v. Darlington Mfg. Co., 380 U.S. 263, 272 (1965) (stating that "the fact that the employer may have legitimate economic reasons for the transfer or liquidation does not absolve him of his conduct if violation of his employees' statutory rights was also a motivating reason"); Garwin Corp., 153 N.L.R.B. 664, *enforced*, 374 F.2d 295 (D.C. Cir. 1965), *cert. denied*, 387 U.S. 942 (1967).

75. NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 349–50 (1958).

76. *Id.* at 350.

77. *Id.*

decisionmaking.[78]

B. "Basic Change" in the Business and Labor Costs Analysis

The NLRB continued to define the scope of bargaining on a case-by-case basis. In *Fibreboard Paper Products Corp.*, the Board considered whether an employer could subcontract its entire maintenance operation and eliminate all of the bargaining unit jobs connected with maintenance.[79] The Board found a breach of the company's duty to bargain over subcontracting despite the absence of anti-union animus.[80]

The Supreme Court enforced the Board's order against the company.[81] In doing so, without formally announcing a test the Court distinguished a "basic change" in a company's way of doing business, which would be a purely entrepreneurial decision outside the realm of collective bargaining, from a move to reduce labor costs, about which a union must be consulted. The NLRB and the Supreme Court have used this analytical framework in subsequent cases involving the duty to bargain over management decisions that lead to the loss of jobs, up to and including *Dubuque Packing*.

Fibreboard was a significant step, since it was the first case to examine the scope of mandatory bargaining in the context of a purely economic entrepreneurial decision to make operational changes. The Board and the Court agreed that a decision to use subcontracted workers who did the same jobs at the same location as the bargaining unit members they had replaced, but for less money, was not a "basic change" in the way the company did business.[82] The employer had conceded that labor costs were an issue and that its decision to subcontract bargaining unit work would

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78. Archibald Cox, *Labor Decisions of the Supreme Court at the October Term*, 44 VA. L. REV. 1057 (1958).

79. Fibreboard Paper Prods. Corp., 138 N.L.R.B. 550 (1962) (*Fibreboard II*), *aff'd*, 379 U.S. 203 (1964).

80. As it did later with Otis Elevator, the Board reconsidered the duty to bargain issue. *Id*. The original Board decision in Fibreboard Paper Prods. Corp., 130 N.L.R.B. 1558 (1961) (*Fibreboard I*), held that the employer had no duty to bargain over a decision to subcontract, a holding consistent with Board precedent at that time. The supplemental decision in *Fibreboard II*, in which the Board found a violation, compounded the confusion among companies, unions, and their lawyers.

81. Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203, 216–17 (1964) (*Fibreboard III*).

82. *Id*. at 215–17.

result in "substantial savings."[83]

In a broad statement, the Court held that the words "terms and conditions of employment" in § 8(d) of the NLRA[84] "plainly cover termination of employment which . . . necessarily results from the contracting out of work performed by members of the established bargaining unit."[85] The Court noted that requiring bargaining in such a situation would promote the NLRA's "fundamental purpose" of encouraging the peaceful settlement of disputes.[86] The Court was further convinced of subcontracting's mandatory nature by the historical inclusion of subcontracting limits in many collective bargaining agreements.[87] Despite its expansive language, however, the Court explicitly limited its decision to the specific type of subcontracting involved in the case: the substitution of one set of employees for another under nearly identical conditions.[88]

The majority opinion in *Fibreboard* did not attempt to create an irrebuttable list of mandatory and permissive bargaining subjects for use when evaluating company relocations or other related types of management decisions. "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."[89] It has been argued that "any partial closure, relocation or subcontracting decision would satisfy such a standard, despite the majority's explicit limitation to subcontracting."[90] Neither the Board nor the Court has agreed with this expanded language.

Justice Stewart, in a concurring opinion in *Fibreboard*,[91] stressed the factual limits of the majority's holding. It was his concurrence that created a framework for future resolution of duty-to-bargain cases. He concluded that the language "wages, hours and other conditions of employment" are not only words of mandate, but also words of limitation, and that a topic is not mandatory simply

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83. *Id*. at 206.
84. NLRA, 29 U.S.C. § 158(d) (1988).
85. *Fibreboard III*, 379 U.S. at 210.
86. *Id*. at 210–11.
87. *Id*. at 211–12.
88. *Id*. at 215.
89. George, *supra* note 16, at 676.
90. *Id*.
91. Justices Douglas and Harlan joined in Justice Stewart's opinion. *Fibreboard III*, 379 U.S. at 217.

because it has an impact on job security.[92]

Justice Stewart created three categories of management decisionmaking.[93] First were those decisions focusing directly on working conditions or the "physical dimensions of [the] working environment," such as hours and production quotas; these decisions are well-established subjects of mandatory bargaining.[94] Second, decisions of marginal or indirect impact on employees, such as advertising and financing, are just as clearly *outside* of the bargaining duty.[95] The third category includes those decisions that directly affect 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.[96] Even though these decisions could result in the termination of jobs, they are "fundamental to the basic direction of a corporate enterprise" and are excluded from the scope of bargaining imposed by §§ 8(a)(5) and 8(d) of the NLRA.[97] Justice Stewart's reasoning anticipated the Court's later ruling in *First National Maintenance Corp. v. NLRB*,[98] and his three-part analysis has become the vernacular among lawyers, their clients, and commentators, all of whom continue to balance management and union rights.

C. Further Definition of Mandatory Bargaining Topics

After *Fibreboard*, the NLRB seemed to expand the definition of mandatory bargaining topics by returning to its formerly broad application, despite its reiteration that "basic changes" in the way a company does business relieves it of the duty to bargain.[99] In *Otis Elevator Co.*, the Board found that the employer had a duty to bargain, because the merger of two companies that led to closing of one research and development site and relocating the work to a new combined site was not a "basic change."[100] The Board was specific in

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92. *Id*. at 220.
93. *Id*. at 222–24.
94. *Id*. at 222.
95. *Id*. at 223.
96. *Id*.
97. *Id*. at 223.
98. 452 U.S. 666 (1981).
99. Otis Elevator Co., 255 N.L.R.B. 235, 248–50 (1981) (*Otis Elevator I*), *rev'd in part*, 269 N.L.R.B. 891, *modified*, 116 L.R.R.M. 1075 (1984).
100. *Id*.

identifying which acts were unlawful violations of the NLRA:

> [B]y refusing to bargain with the Union over its decision to relocate certain of its work and operations from its Mahwah, New Jersey, facility to its East Hartford, Connecticut, facility, and the effects on unit employees resulting therefrom; by not furnishing to the Union, upon request, information admittedly relevant to Respondent's decision to relocate certain of its work and operations; and by bypassing the Union as the exclusive bargaining representative of the unit employees and dealing directly with certain of these unit employees concerning offers to transfer them from Mahwah to East Hartford.[101]

This conclusion may have been surprising, since the employer had argued fairly convincingly that it had made a major business change, which ought to insulate it from the duty to bargain.[102] The Board changed its collective mind about *Otis Elevator* after the Su-

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101. *Id*. at 235.

102. *Otis Elevator I* reports that after United Technologies acquired Otis Elevator in 1975, a study was conducted by Dr. William M. Foley, who had been deputy director of research for United Technologies. After United Technologies acquired Otis Elevator, Foley became vice president of engineering for Otis Elevator. Dr. Foley's study showed that much of the Otis Elevator engineering activity was duplicative:

> Evidently, Dr. Foley had undertaken the study because, as the Board stated, Otis had found that it was no longer competitive with either the domestic or foreign elevator markets not only with respect to sales, but also from a research and development aspect. [Otis'] management believed that the overall engineering effort would be strengthened if research and development were conducted closer to Otis' research already ongoing in Connecticut and to other major United Technologies development groups. Thus, in July 1977 the Otis research and development center, which had been located in Parsippany, New Jersey, was moved to East Hartford, where United Technologies had a research and development complement of about 1,000 employees, some of whom were working on elevator-related problems for Otis.

Id. at 235–36. The Parsippany group numbered about 50 persons, although not all of them transferred to East Hartford. In addition:

> [s]ince the research and development carried out by the Parsippany group (now in East Hartford) sometimes overlapped with the functions of the Mahwah product improvement and product development groups, it was felt that a physical merger of these groups would be beneficial to Respondent. Moreover, Respondent had evaluated the Mahwah facilities, and had found them to be outdated and inadequate to the task of carrying on the kind of research and development contemplated by Respondent. It was therefore decided that a new research facility would be built in Connecticut where the combined staffs could work together.

Id. at 236. The record does not specify whether any portion of the new facility was used by other United Technologies employees. *Id*. at 235–37.

preme Court more specifically articulated the business change and labor cost test, but not until the Board's original *Otis Elevator* decision had added to the prevailing confusion. The language about "basic change" and labor costs continues to appear as a measure of the scope of the bargaining duty, but the survey in this Article of attorneys found that the definition of each factor remains nebulous.

Finally, the Supreme Court decided a partial closing case that created a context for the Board's later holding in *Dubuque Packing*. In *First National Maintenance Corp. v. NLRB*, the Court held that the decision by a janitorial services company to close down operations at one of its several customer sites because that particular customer refused to pay the employer's price was not subject to a duty to bargain.[103] Picking up a theme stressed in Justice Stewart's concurring opinion in *Fibreboard* several years earlier, the Court declared that "there is an undeniable limit to the subjects about which bargaining must take place."[104] Furthermore, "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."[105] The Court later described the area beyond the "undeniable limit" of a union's proper concern as the sphere of an employer's "retained freedom to manage its affairs unrelated to employment."[106]

In determining whether a particular decision is sufficiently related to employment that it must be bargained over, *First National Maintenance* created a three-part test. As Justice Stewart had done earlier in *Fibreboard*, the Court identified those purely entrepreneurial decisions outside the scope of bargaining, like "choice of advertising and promotion, product type and design, and financing arrangements, [which] have only an indirect and attenuated impact on the employment relationship."[107] The Court also identified labor-related decisions subject to mandatory bargaining, "such as the order of succession of layoffs and recalls, production quotas, and work rules, [which] are almost exclusively an aspect of the relationship between employer and employee."[108]

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103. First Nat'l Maintenance Corp. v. NLRB, 452 U.S. 666, 687 (1981).
104. *Id.* at 676.
105. *Id.*
106. *Id.* at 677.
107. *Id.* at 676–77.
108. *Id.* at 677.

The more difficult bargaining issues are those in the area between purely entrepreneurial decisions and labor-related decisions. In *First National Maintenance*, the Court wrote:

> The present case concerns a third type of management decision, one that had a direct impact on employment, since jobs were inexorably eliminated by the termination, but had as its focus only the economic profitability of the [employer's] contract with [its customer], a concern under these facts wholly apart from the employment relationship. This decision, involving a change in the scope and direction of the enterprise, is akin to the decision whether to be in business at all, "not in [itself] primarily about conditions of employment, though the effect of the decision may be necessarily to terminate employment."[109]

Yet, later in its opinion the Court stated, "At the same time, this decision touches on a matter of central and pressing concern to the union and its member employees: the possibility of continued employment and the retention of the employees' very jobs."[110]

In deciding which decisions in the intermediate category must be negotiated, the Court attempted once again to separate basic business changes from simple alterations in the cost of having work done. It also added an additional benefit-and-burden test:

> The concept of mandatory bargaining is premised on the belief that collective discussions backed by the parties' economic weapons will result in decisions that are better for both management and labor and for society as a whole. This will be true, however, only if the subject proposed for discussion is amenable to resolution through the bargaining process. Management must be free from the constraints of the bargaining process to the extent essential for the running of a profitable business. It also must have some degree of certainly beforehand as to when it may proceed to reach decisions without fear of later evaluations labeling its conduct an unfair labor practice. . . . [I]n view of an employer's need for unencumbered decision-making, bargaining over management decisions that have a substantial impact on the continued availability of employment

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109. *Id*. (quoting Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203, 223 (1964) (Stewart, J., concurring)); *cf*. Textile Workers Union v. Darlington Mfg. Co., 380 U.S. 263, 268 (1965) (stating that "an employer has the absolute right to terminate his entire business for any reason he pleases").

110. *First Nat'l Maintenance*, 452 U.S. at 677.

> 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.[111]

When management's decision reflects a desire to reduce labor costs, the union may be able to offer concessions that mitigate or avoid the partial termination. By contrast, the Court reasoned, the union in *First National Maintenance* "had no control or authority over [the disputed] fee."[112] The Court then proceeded to hold that a "decision . . . to shut down part of [a] business purely for economic reasons" was not a mandatory subject of bargaining, while "intimating no view as to other types of management decisions, such as plant relocations, which are to be considered on their particular facts."[113]

In the course of reaching its decision in *First National Maintenance*, the Court did nothing to call into question its earlier reasoning in *Fibreboard*.[114] The motivation behind the subcontracting decision in *Fibreboard* was the manufacturer's need to cut the labor costs of its operations, which it did without undertaking any change in the way it did business.

Reconsidering its earlier ruling in *Otis Elevator I* that the employer violated NLRA § 8(a)(5),[115] in light of *First National Maintenance* the Board issued a second opinion in *Otis Elevator Co.*[116] The Board held that a company had no duty to bargain over a decision to discontinue its research and development activities at an outmoded facility in one state and to consolidate operations, after a merger with a larger company, in another state.[117] A two-member plurality read *First National Maintenance* as identifying the critical issue as whether a company's decision turned upon a change in the nature or direction of the business, where bargaining is not required, or whether it was motivated by labor costs, where bargaining is mandatory.[118]

A concurring opinion in *Otis Elevator II* suggested a two-step

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111. *Id*. at 678–79 (citations omitted).
112. *Id*. at 687.
113. *Id*. at 686 n.23.
114. Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203, 215 (1964).
115. Otis Elevator Co., 255 N.L.R.B. 235 (1981) (*Otis Elevator I*).
116. 269 N.L.R.B. 891 (*Otis Elevator II*), *modified*, 116 L.R.R.M. 1075 (1984).
117. *Id*. at 894–95.
118. *Id*. at 893.

analysis of those management decisions that directly affected employment but were centered on a company's economic profitability.[119] First, the Board should decide whether the decision was amenable to bargaining.[120] Second, the Board should decide whether the benefit for labor/management relations outweighed the burden placed upon the business in forestalling its decision until after bargaining with the union.[121] A third opinion held that bargaining should always take place whenever the issues were "amenable to resolution" bilaterally.[122] *Otis Elevator II* spawned extensive subsequent litigation, and the ambiguity it created forced the Board to ultimately reconsider its rules in *Dubuque Packing*.

IV. DUBUQUE PACKING CO.

The debate over bargaining continued in *Dubuque Packing*. The major issue of contention in *Dubuque Packing*, as in all company relocation cases, was whether there must be bargaining over a company relocation decision.[123]

A. The Facts of *Dubuque Packing*

Beginning about 1977, the Dubuque Packing Company, a processor and packager of beef and pork products, concluded that it was losing money at its Dubuque, Iowa, home plant and undertook a pattern of concession bargaining with its union.[124] In 1978, Dubuque Packing won an agreement from the plant's workers, who were represented by the United Food and Commercial Workers International Union (UFCW), to accelerate the "cut and kill" line and to

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119. *Id*. at 899–900.

120. *Id*. at 900.

121. *Id*. at 901.

122. *Id*.

123. 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) (*UFCW*), *cert. granted*, 114 S. Ct. 1395, *and cert. dismissed*, 114 S. Ct. 2157 (1994). The union always has the right to demand bargaining over the effects of any relocation or transfer of work, even if the relocation or transfer decision is not negotiable. Brockway Motor Trucks Div. v. NLRB, 582 F.2d 720 (3d Cir. 1978).

124. The facts of *Dubuque Packing* are drawn primarily from the District of Columbia Circuit Court decision affirming the NLRB's order. *UFCW*, 1 F.3d at 26–27, *cert. granted*, 114 S. Ct. 1395, *and cert. dismissed*, 114 S. Ct. 2157 (1994); *see* Dubuque Packing Co., 287 N.L.R.B. 499, 500–34 (1987).

produce at higher rates in return for a one-time cash payment.[125] In August 1980, Dubuque Packing received union concessions worth approximately five million dollars per year in return for the company's pledge that it would not request further concessions before the September 1, 1982, expiration of the union contract then in effect.[126]

In March 1981, however, the company demanded and received additional productivity increases in its hog kill department.[127] Despite this concession, Dubuque Packing shortly thereafter gave the required six months' notice of its intention to close its hog kill and cut operations at the Dubuque plant.[128] Various negotiating maneuvers between the company and the UFCW ensued, but the union ultimately rejected a wage freeze aimed at keeping the plant open.[129]

The following day, June 10, 1981, the company announced for the first time its plan to relocate, rather than close, its hog kill and cut department, affecting up to 900 Dubuque plant pork processing jobs.[130] The UFCW requested detailed financial information from Dubuque Packing, which the company refused to provide.[131] Dubuque Packing then advised its employees that they could save their jobs by approving its wage freeze proposal.[132]

On June 28, 1981, the wage freeze was resubmitted to the workers for a vote, accompanied by the union leadership's recommendation that they reject it until Dubuque Packing opened its books.[133] The workers voted overwhelmingly in support of the union and against the company.[134] Three days later, Dubuque Packing informed the union that its decision to close the hog kill and cut department was "irrevocable."[135] It also claimed that its plant was too old and inefficient to continue operating.[136]

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125. *UFCW*, 1 F.3d at 26.
126. *Id*.
127. *Id*.
128. *Id*.
129. *Id*.
130. *Id*.
131. *Id*.
132. *Id*.
133. *Id*.
134. *Id*.
135. *Id*.
136. *Id*.

On October 1, 1981, Dubuque Packing opened a new hog kill and cut operation at its newly-acquired Rochelle, Illinois, plant.[137] Two days later, it eliminated approximately 530 hog kill and cut jobs at the Dubuque plant.[138] On October 19, 1981, an agreement was signed granting wage concessions by the remaining workers at the Dubuque plant in return for the company's agreement to keep the nine hundred pork processing jobs in Dubuque and to extend the existing labor agreement.[139] Despite that agreement, both Dubuque Packing plants were closed and sold less than one year later.[140]

Dubuque Packing Company and the UFCW were sophisticated and mature bargainers. Dubuque Packing clearly was losing money. It had told its workers as much and had already received some concessions.[141] The UFCW demanded access to what Dubuque Packing considered proprietary information, including the company's bottom-line profitability.[142] Dubuque Packing contended that the plant was operating at a four-and-one-half million dollar loss; the union said the plant had made a million-dollar profit.[143] There was no doubt that the company's creditors were nervous and that the whole industry was suffering from competition with non-union companies hiring employees at minimum wages, small slaughtering houses that needed a smaller initial investment than large meatpackers, and an influx of imported meat — some of it imported by large domestic companies with union contracts.[144]

Negotiations were so tense that a company officer physically threatened the union's accountant and promised to sue if the accountant issued his report.[145] The union leaked information to news media in Iowa and Illinois that Dubuque Packing was secreting

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137. *Id*.
138. *Id*.
139. *Id*.
140. *Id*.
141. Dubuque Packing Co., 303 N.L.R.B. 386, 387, 395 (1991).
142. *Id*. at 395 n.26.
143. *See, e.g.*, *An Upheaval in Meatpacking*, N.Y. TIMES, June 20, 1983, at D1. This newspaper article stated:

> It is not only the smaller regional companies that have lower labor costs. Some of the larger companies also enjoy rates that are below the master agreement rate. Generally, this has been achieved by one company closing a plant and selling it to a new corporate entity that scraps the old labor agreement.

Id.
144. Dubuque Packing Co., 287 N.L.R.B. 499, 502 (1987).
145. *Id*. at 522.

assets.[146] This is the posture the negotiations were in when the company closed its doors in Dubuque.

Shortly after the Iowa plant closed, those same employees found themselves working for the Fleur-de-Lys Corporation (FDL), whose three principals had formerly been the three principals in the Dubuque Packing Company.[147] FDL reduced the hourly wage from sixteen to six dollars per hour.[148] In Illinois, the Dubuque Packing plant closed less than a year after it had opened.[149] A few months later, it was reopened by FDL.[150] The employees, many of whom worked for Swift, then Dubuque Packing, then FDL, found themselves with successive pay cuts with each new employer even though their work remained the same.

B. The *Dubuque Packing Co.* Decision

In *Dubuque Packing Co.*, the NLRB articulated a three-part analysis. It attempted to clarify the business change versus labor costs analysis while providing an additional defense of futility in bargaining situations to accommodate the Supreme Court's requirement of a cost/benefit analysis.

Under the first part of the NLRB's *Dubuque Packing* test, the Board's General Counsel initially must establish a prima facie case by proving that the employer's decision to relocate is not accompanied "by a basic change in the nature of the employer's operation."[151] In *First National Maintenance Corp.*[152] and *Otis Elevator II*,[153] the Court and Board had concluded that collective bargaining is only required in those relocation cases peculiarly suited to resolution through the bargaining process. Those are the cases where unions can actually make a difference, which almost always means making wage concessions or increasing productivity to save the company money. A company's entrepreneurial decision to change the way it does business is not within the purview of the union.

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146. *Id.*
147. *Id.* at 531.
148. *Id.*
149. *Id.* at 532.
150. *Id.*
151. Dubuque Packing Co., 303 N.L.R.B. 386, 391 (1991).
152. First Nat'l Maintenance Corp. v. NLRB, 452 U.S. 666 (1984).
153. Otis Elevator Co., 269 N.L.R.B. 891 (1984) (*Otis Elevator II*).

The second and third parts of the Board's *Dubuque Packing* test require an analysis of the employer's defenses to the charge that it failed to comply with its statutory duty to bargain. In the second part, the employer can show that it undertook a "basic change" in its operations.[154] In the third part, the employer can prove either that the relocation was not motivated by labor costs or that bargaining would have been futile even if labor costs were a factor in the decision.[155] The Board explained it this way:

> Initially, the burden is on the [NLRB] General Counsel to establish that the employer's decision involved a relocation of unit work unaccompanied by a basic change in the nature of the employer's operation. If the General Counsel successfully carries his burden in this regard, he will have established prima facie that the employer's relocation decision is a mandatory subject of bargaining. At this juncture, the employer may produce evidence rebutting the prima facie case by establishing that the work performed at the new location varies significantly from the work performed at the former plant, establishing that the work performed at the former plant is to be discontinued entirely and not moved to the new location, or establishing that the employer's decision involves a change in the scope and direction of the enterprise. Alternatively, the employer may proffer a defense to show by a preponderance of the evidence: (1) that labor costs (direct and/or indirect) were not a factor in the decision, or (2) that even if labor costs were a factor in the decision, the union could not have offered labor cost concessions that could have changed the employer's decision to relocate.[156]

The Circuit Court for the District of Columbia approved the NLRB's *Dubuque Packing* test.[157] The circuit court noted that the Board had closely followed Supreme Court precedent by:

> exempt[ing] from the duty to bargain relocations involving (1) "a basic change in the nature of the employer's operation," (2) "a change in the scope and direction of the enterprise," (3) situations in which "the work performed at the new location varies signifi-

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154. *Id*.

155. *Dubuque Packing*, 303 N.L.R.B. at 391.

156. *Id*.

157. United Food & Commercial Workers, Local 150-A v. NLRB, 1 F.3d 24, 30 (D.C. Cir. 1993) (*UFCW*), *cert. granted*, 114 S. Ct. 1395, *and cert. dismissed*, 114 S. Ct. 2157 (1994).

> cantly from the work performed at the former plant," or (4) situations in which "the work performed at the former plant is to be discontinued entirely and not moved to the new location."[158]

The circuit court also described how the Board should analyze a claim of "basic change":

> This language would appear broad enough to cover key entrepreneurial decisions such as setting the scale (e.g., the quantity of product produced) and scope (e.g., the type of product produced) of the employer's operations, and determining the basic method of production. Moreover, as to these issues, the second part of the Board's test requires an analysis based on the objective differences between the employer's old and new operations. It asks whether various types of "basic change," "change," "variance," or "discontinuance" were involved in the relocation. Where such objective differences appear, an entrepreneurial decision is deemed to have been taken, and the employer is permitted to relocate without negotiating.[159]

While noting that the "second layer of the Board's analysis is a subjective one"[160] requiring consideration of the "employer's `motivation for the relocation decision,'" the circuit court agreed that "this analysis will distinguish relocations motivated by labor costs from those motivated by other perceived advantages of the new location."[161] This language may appear sufficiently precise, but there is philosophical disagreement among analysts and practitioners about what constitutes a change in the business. Moreover, the exact definition of "labor costs" was not made clear by the Board or the court and remains in need of precise operational definition.

The third part of the *Dubuque Packing* test requires proof by the company that bargaining would be futile. The circuit court dismissed Dubuque Packing's claim that "futility" cannot be defined and agreed that employers "must have some degree of certainty be-

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158. *Id*. (quoting *Dubuque Packing*, 303 N.L.R.B. at 391).

159. *Id*.

160. *Id*.

161. *Id*. *Compare Dubuque Packing*, 303 N.L.R.B. at 390 n.9 (listing cases in which relocation decision was motivated by labor costs) *with id*. at 390 n.11 (listing cases in which relocation decision was motivated by other factors).

forehand" as to which decisions are subject to a bargaining duty.[162] The circuit court read *Dubuque Packing* as permitting an employer to relocate without negotiating where the union either would not or could not offer sufficient concessions to change the employer's decision. The circuit court approved the Board's "pledge[] to consider circumstances such as the need to implement a relocation `expeditiously' in determining whether bargaining over a relocation has reached `a bona fide impasse'; that is, the point at which a party may act unilaterally."[163]

The circuit court spent considerable time on the futility argument, trying to distinguish between what it considered an overly restrictive impossibility argument and an overly expansive assertion that no concessions would be sufficient to avert the move. The court explained:

> We pause to emphasize that our analysis of the Board's test is premised on our resolution of an important ambiguity in the Board's statement of its second affirmative defense. As stated by the Board, that defense requires an employer to establish that "the union *could not* have offered labor cost concessions that *could* have changed the employer's decision to relocate." On its face, this language might be read as an impossibility exception — a provision allowing an employer to eschew negotiations only if its union could not possibly have changed the relocation decision no matter how accommodating the union might have been at the bargaining table. This reading is strengthened by the Board's illustration of the defense, which involves a case in which an employer "would not remain at the present plant because . . . the costs for modernization of equipment or environmental controls were greater than [the value of] any labor cost concessions the union could offer." Despite this evidence, we think this defense was intended to cover situations in which bargaining would be futile, as well as ones in which it would be impossible for the union to persuade the employer to rescind its relocation decision. Immediately after setting forth its test and the above illustration, the Board stated that under the second affirmative defense, "an employer would have a bargaining obligation *if the union could and would* offer concessions that approximate, meet, or exceed the anticipated costs or benefits that prompted the reloca-

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162. *UFCW*, 1 F.3d at 32–33; *see* First Nat'l Maintenance Corp. v. NLRB, 452 U.S. 666, 679 (1981).

163. *UFCW*, 1 F.3d at 30 (citation omitted).

tion decision." Furthermore, in the next succeeding sentence and a footnote appended to it, the Board stated:

> *As an evidentiary matter*, an employer might establish that it has no decision bargaining obligation, *even without discussing the union's position on concessions*, if the wage and benefit costs of the unit employees were already so low that it was clear on the basis of those figures alone that the employees could not make up the difference. For example, if a relocation of unit work would save an employer a projected $ 10.5 million in costs for equipment modernization and environmental controls (quite apart from any labor costs), and if the employer's present labor costs totaled $ 10 million, then even if the employees were willing to work for free, the union could not offer sufficient labor cost concessions to offset the equipment and environmental savings.

We gather from this that showing the impossibility of obtaining sufficient concessions is simply one means of demonstrating the futility of bargaining *as an evidentiary matter*. And we note that the Board's aside to the effect that an employer might establish that it has no bargaining obligation, "even without discussing the union's position on concessions," implies that an employer might also establish the same proposition through a discussion of "the union's position on concessions." As we read it, the Board's test holds that no 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.[164]

The court finally rejected the company's argument that the test is so imprecise that employers are denied the degree of certainty and guidance mandated in *First National Maintenance*.[165] The court concluded that the Board need not

> establish standards devoid of ambiguity at the margins. The test announced in *Dubuque Packing* provides more than the "some" degree of certainty required by the Supreme Court. It establishes rules on which management may plan with a large degree of confidence; and while the test undoubtedly leaves areas of uncertainty

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164. *Id*. at 31 (quoting *Dubuque Packing*, 303 N.L.R.B. at 390 nn.9 & 10, 391–92 (citations omitted) (emphasis added); *First Nat'l Maintenance*, 452 U.S. at 679).

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

> 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.[166]

C. Immediate Effects of *Dubuque Packing*

The lengthy discussion of the circuit court's review and analysis is important, because it diagrams the *Dubuque Packing* decision and outlines the inquiry attempted in the following survey. However, the confidence the D.C. Circuit Court had about the application of *Dubuque Packing* may not survive real-life study. In *Dubuque Packing*, the NLRB found that the relocation was motivated by Dubuque Packing Company's desire to cut labor costs, primarily because of the evidence that the company promised not to move if the union made more concessions on wages and improved productivity. There was also clear proof that the company had industry-wide troubles and had actually lost its longstanding lines of credit with various banks. Furthermore, the Board seemed to disregard its own suggestion that a company could be excused from the duty to bargain if the union could not practicably make the wage concessions the employer would need to stay profitable, since the Board did not dispute Dubuque Packing's claim that the company's wage scale far exceeded what the industry deemed affordable.

The facts in *Dubuque Packing*, if not the holding, suggest ambiguity in the Board's definition of "basic change." Specifically, questions arise as to what factors enter the determination of labor costs and what proof is needed to demonstrate futility and avoid bargaining.

V. THE SURVEY OF LABOR/MANAGEMENT ATTORNEYS

In order to determine how practitioners interpret and apply the rules of *Dubuque Packing*, a survey was designed. The respondents comprised a "purposive sample," which means they were selected according to special criteria rather than on the basis of their "representativeness." The Authors wanted to interview only labor

166. *UFCW*, 1 F.3d at 33.

and management specialists who were familiar with the *Dubuque Packing* case and had a higher probability of actual experience with relocation decisions and bargaining.

The respondents were initially selected by contacting members of the American Bar Association Developing Labor Law Committee; the AFL-CIO Lawyers Coordinating Committee; lawyers of record who had argued or defended duty-to-bargain cases; professionals at the National Labor Relations Board, including both the former and Acting Chief Administrative Law Judges; the Director of the Office of Advice; and the General Counsel of the NLRB. Each party was asked for recommendations until certain specialists were named by several sources. Even after the final list of specialists was compiled, these respondents were allowed to nominate someone from within the firm or elsewhere who was more experienced and knowledgeable regarding *Dubuque Packing* and relocation decisions. From an initial list of approximately 120 lawyers, interviews were completed with eighty-two. Most of those lawyers who declined the invitation to be interviewed did so because of pressing time commitments or misidentification as an expert in this area of law.

A. The Sample of Attorneys

The lawyers interviewed for this study were distributed across thirty of the fifty United States and the District of Columbia. Nearly half of the lawyers interviewed practiced in six states: Ohio (nine lawyers), Illinois (eight), Pennsylvania (six), California (five), Florida (five), and Michigan (five). Approximately half of the attorneys reported having fifty or more labor or management clients. Half of the attorneys had practiced labor or management law for nineteen years or longer. Only ten attorneys interviewed had practiced labor and management law for fewer than ten years. All but one of the attorneys worked in law firms containing other labor and management specialists; half reported working in firms with six or more such specialists. Roughly a quarter worked in firms with a dozen or more labor and management specialists, and three attorneys worked in firms with more than one hundred such specialists.

Ninety-six percent of the attorneys reported having clients with experience in union bargaining. These clients operated in a variety of industries and were not concentrated in any one particular type. Only sixteen labor and seven management attorneys reported a

clientele concentrated in a particular industry, but one industry did not receive predominant mention by these attorneys.

As the results were analyzed, the sample was divided into two groups: labor/union (forty-three attorneys) or management (thirty-nine) depending upon how the attorneys responded to the following question:

> *Question 9:*
> *Would you say that the majority of the clients that you personally represent in labor/management issues are management, labor, or do you have nearly an equal mix of both?*

The sample used for this study permits generalizations applicable to the sector of the labor and management bar most experienced with collective bargaining, especially bargaining involving relocation issues. Within this specialized sector of the bar, the sample appears representative of typical clientele as well as industrial and geographical regions of the country.

B. Survey Results

The survey results and accompanying remarks from the respondents portrayed a substantial division between labor and management attorneys' interpretations of basic provisions in *Dubuque Packing*. Where ambiguity prevailed, the attorneys tended toward interpretations favoring their typical clients' interests.

Even though the survey found widespread knowledge of the holding in *Dubuque Packing*, interpretive agreement with the Board opinion did not emerge in several fairly common situations in which *Dubuque Packing* could be applied. In general, labor and management attorneys differed in their interpretations of the definition of "basic change." There was also some disagreement about the interpretation of bargainable labor costs, especially when labor costs enter the equation indirectly. The survey also showed that many companies will bargain over a relocation decision, even if they think it may not be required by law, in order to avoid costly lawsuits and potentially ruinous remedies.

1. Overall Knowledge of Dubuque Packing

The survey assessed attorneys' knowledge of *Dubuque Packing*'s

fundamental rule by first inquiring whether the attorneys were familiar with *Dubuque Packing* itself. Ninety-six percent of the attorneys replied that they were.
table 1

Knowledge of the general provisions of *Dubuque Packing* was assessed by first asking in an open-ended format what the NLRB's General Counsel must prove to establish a presumption of a duty to bargain over a relocation decision. The first part of the duty-to-bargain test requires proof that "the employer's decision involved relocation of unit work unaccompanied by a basic change in the nature of the employer's operation."[167] The bargaining duty does not apply where the employer can prove "that labor costs (direct and/or indirect) were not a factor in the decision."[168] The bargaining duty also does not apply where labor costs are considered in the decision, but bargaining would be futile because "the union could not have offered labor cost concessions that could have changed the employer's decision to relocate."[169]

The survey assessed knowledge of this provision of *Dubuque Packing* by asking the following question:

> *Question 11:*
> *Can you explain what the General Counsel must prove under* Dubuque Packing *to establish a presumption for a company's duty to bargain with the union over a proposed plant or worksite relocation?*

167. Dubuque Packing Co., 303 N.L.R.B. 386, 391 (1991).
168. *Id.*
169. *Id.* at 390.

The following responses were available:

(1) Same work done after the move. No basic change in business. Decision to move is not pure entrepreneurial prerogative.

(2) The move involves labor costs.

(3) Bargaining will not be futile.

Additional categories were created as combinations of the three major components of the test to establish the duty to bargain. A residual category, "other," was established for responses that were tangential to one or some of the tests but not entirely incorrect. A final category included those attorneys who could not answer the question or did not answer it correctly.

The results showed that attorneys were generally quite knowledgeable about the three-part *Dubuque Packing* test. Nearly all of the respondents (84%) correctly restated some aspect of the test, and nearly fifty-four percent correctly stated the first part of the test involving a prima facie showing of no "basic change" in the business operation either alone or in combination with other factors. Sixteen percent could not articulate the provisions of the first part of the test, but most of these respondents knew where to locate the provisions if needed. A slightly higher percentage of labor attorneys (21%) than management attorneys (10%) had trouble recounting *Dubuque Packing*'s exact provisions.

table 2

The survey next asked a question regarding the employer's possible defenses against mandatory bargaining over relocation. Attorneys were asked:

> *Question 13:*
> *Can you explain what employers must prove under* Dubuque Packing *to rebut the presumption of a duty to bargain over worksite relocation?*

The open-ended responses available to the attorneys were coded into categories that paralleled the responses to the previous question:

(1) Some basic change in business. Different work after move. Change in corporate structure. Decision not part of pure entrepreneurial prerogative.

(2) The move does not involve labor costs.

(3) Move involves labor costs, but futile to bargain.

Again, combinations of the major three categories were used to code the more complete answers some attorneys could provide. The most correct answer was a combination of all three prongs of the defense.

Seventeen percent of the attorneys did, in fact, mention all three prongs. The importance of the "basic change" criterion was again demonstrated: twenty-two percent of the attorneys mentioned this aspect singularly. An additional thirty-one percent mentioned it in combination with other factors. Fewer lawyers specifically mentioned the futility defense alone (8%) or in combination with other factors (26%). Sixteen percent were unable to mention these general provisions.

table 3

2. The Concept of "Basic Change"

The concept of "basic change" is probably the most essential element of *Dubuque Packing*, since an employer that can prove the occurrence of a "basic change" in business operations is exempt from the bargaining duty.[170] To assess the degree of understanding about the concept of "basic change," the survey presented several hypothetical situations and asked attorneys whether they thought each situation constituted a "basic change" or, in one question, created a duty to bargain because of a "basic change."

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170. Dubuque Packing Co., 303 N.L.R.B. 386, 391 (1991).

In examining the responses to the various hypothetical situations, the responses of labor and management attorneys were also compared. The relatively small sample size of eighty-two attorneys raised the possibility that differences between the two groups' responses were due to random chance. For this sample size, differences approaching twenty percent are referred to as "substantial" disagreement between labor and management attorneys rather than reporting exact statistical results. Smaller differences, which may be substantively important but fall short of statistical significance, will be termed "moderate" disagreement between the two groups.

The survey's first hypothetical situation involved an expansion of a business into a new product line requiring new technology:

> *Question 16:*
> *First, a business plans to add a software development division to accompany its production of computer hardware, but to locate the new division elsewhere.*

No cases dealing with these or similar facts have come before the NLRB, but NLRB staff classified this situation as likely to be a "basic change" because the production processes for computer software versus hardware would be sufficiently different.[171]

Overall, approximately half of the attorneys (51%) recognized this condition as a "basic change" (see Table 4 below). A third stated that this type of expansion did not constitute a "basic change." One in six was unsure. Sixty-four percent of the management attorneys agreed that the development of a new division of this type constituted a "basic change," but only thirty-eight percent of the labor attorneys agreed. This substantial difference indicated a rather sharp disagreement across the labor and management divisions within the practicing bar. Our conversations with NLRB officials indicated that management lawyers were more likely to agree with NLRB interpretations of this issue.

The second hypothetical condition resulted from a basic merger:

> *Question 18:*

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171. NLRB personnel interviewed included Melvin Welles, former Chief Judge of the NLRB; David Davidson, Acting Chief Judge; Barry Carney, staff; Robert Allen, Director of the Office of Advice; Jerry Hunter, former General Counsel of the NLRB. The Authors appreciate the time and insights these career Board professionals generously provided.

The employer's business is re-organized as a result of a merger which results in the relocation of some work.

A simple merger is not a "basic change," especially if the new company performs the same work as before the merger. For example, in *Owens-Brockway Plastic Products Inc.*, a post-*Dubuque Packing* case, the Board noted a major consolidation or merger that occurred about eighteen months before the new company decided to close one of its plants and relocate the work to another company-owned site, stating: "[T]he decision to close the Jeffersonville plant and relocate the work performed there was a separate and distinct company decision that did not alter the basic nature of the Respondent's operation as a manufacturer of plastic bottles and containers."[172]

A majority of respondents agreed with the NLRB interpretation that a simple merger is not a "basic change." Fifty-eight percent of all the lawyers claimed a merger did not constitute a basic change; nearly identical percentages of management and labor lawyers agreed (see Table 4 below). Even on this question, nearly a quarter of the attorneys (23%) disagreed with the NLRB interpretation.

The third hypothetical involved layoffs at one site accompanied by the shifting of work to an alternative location:

Question 19:
The employer wants to downsize at one site and send work to another.

Downsizing is generally subject to a bargaining duty because a union can offer cost-reducing alternatives, such as a change in work rules, job sharing, or productivity increases.[173]

This hypothetical condition generated the greatest agreement with the NLRB interpretation. Overall, seventy-three percent of the

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172. 311 N.L.R.B. 519, 521 (1993).

173. Holmes & Narver/Morrison-Knudsen, 309 N.L.R.B. 146, 147 (1992) (stating that where company laid off some employees in order to reduce costs to make most competitive bid for U.S. Army contract, "even if there is no basis for wage and benefit bargaining to avert the layoffs because, as the Respondent argues, it was already providing wages and benefits at the lowest level possible under the law, we disagree that there are no other bargainable, cost-saving alternatives to downsizing"); *see* Mid-State Ready Mix, Div. of Torrington Indus., Inc., 307 N.L.R.B. 809 (1993); Central Transp., Inc., 306 N.L.R.B. 166 (1992).

attorneys stated that this transformation was not a "basic change." However, the difference between management and labor attorneys was substantial: eighty-five percent of the management attorneys agreed with the NLRB interpretation, while only sixty-three percent of the labor lawyers agreed. Over a quarter of the labor attorneys viewed downsizing as a "basic change" that would exempt management from a duty to bargain.

Later in this series of questions, the survey posed another hypothetical linking the need to modernize and the resulting relocation costs. Respondents were asked if such a condition created a duty to bargain:

> *Question 30:*
> *A company wants to modernize and determines that it is less costly to move to a new site than to remodel the old plant.*

No exact precedent was found in researching the case law on this point. The Administrative Law Judge accepted a similar argument in *Dubuque Packing* as excusing the company from the duty to bargain, but the NLRB ultimately rejected this conclusion.[174] According to the Board, modernization would not necessarily be a determining factor. Rather, a case-by-case assessment of the relative costs that could be recouped through labor concessions versus the modernization and relocation alternative would govern this situation.[175] Interviews with NLRB personnel eventually led to the conclusion that this condition is uncertain and that the most appropriate response would be "unsure" about the duty to bargain.

Sixteen percent of the attorneys recognized the modernization issue as a largely unsettled area in bargaining rights. Overall, more attorneys thought that the NLRB interpretation would tend to establish a duty to bargain (49%) than not (35%) in modernization cases. In this area, labor and management attorneys differed substantially: fifty-eight percent of the labor attorneys thought a duty to bargain existed, compared to thirty-nine percent of the management attorneys.

With respect to the definition of the "basic change" criterion, the survey demonstrated that, for the most part, legal opinion paralleled

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174. Dubuque Packing Co., 303 N.L.R.B. 386, 397–99 (1991).
175. *Id*. at 396.

the NLRB interpretation. However, management and labor attorneys disagreed sharply on three of the four hypothetical situations involving "basic change." Management lawyers tended to agree with the existing NLRB interpretations more than labor attorneys did.

table 4

In addition to the questions involving hypothetical situations, the survey asked attorneys about any "basic changes" their clients may have implemented or confronted:

> *Question 21:*
> *Have any of your clients ever been involved in a case where an employer made what it considered a basic change in the operation and that change affected jobs?*

The responses to this question illustrated how large-scale changes in the nature of the business affect jobs. If "basic changes" are an infrequent occurrence, *Dubuque Packing*'s potential impact on protection of bargaining rights under these conditions would be slight. However, the results indicated that "basic changes" frequently occur: seventy-eight percent of all of the attorneys reported instances in which basic changes made in the workplace affected jobs. Management and labor lawyers reported nearly identical large numbers of changes that affected jobs. "Basic change" is obviously an active area of law.
table 5

Another way to assess attorneys' understanding of the "basic change" doctrine is to ask attorneys what types of change were involved in "basic change." The sixty-three attorneys who reported an instance of a "basic change" affecting jobs were asked the following open-ended question:

> *Question 22:*
> *Ask if Q.21= Yes.*
> *What was the basic change?*

The responses available to the attorneys were coded into nine different categories. The most common type of response (seven labor attorneys and three management attorneys of the sixty-three responding attorneys, or sixteen percent) was some form of "corporate restructuring." Four or five of these responses were questionable categorizations of a "basic change," such as consolidations and downsizing. Absent some additional information, consolidations and downsizing (the terms used by respondents) are not interpreted by the NLRB as "basic changes."

The second most frequently mentioned type of "basic change" involved the development of a new product or market. Six management and two labor attorneys (or thirteen percent of sixty-three) gave this response. The development of new products, assumed to require different types of labor skills, is on perhaps sounder footing as a "basic change." But even here, unions have negotiated responsibility for training, and therefore, new job requirements may not necessarily be classified as a "basic change." The introduction of a new technology was mentioned by seven attorneys (five management and two labor). Again, modernization rests in an unsettled area of bargaining law.

The largest category of responses included vague situations that seemingly begged the question. Twelve attorneys simply stated without elaboration that the "basic change" involved the "transfer of work" to a new site (five responses) or a "plant relocation" (seven responses). Most of these vague answers (nine of the twelve) came from labor attorneys, showing that management attorneys provided narrower definitions of "basic change" than labor attorneys.

This result could indicate a more precise understanding of the doctrine by management lawyers. Alternatively, it could show that

union clients were either never advised of the nature of the "basic change" resulting in job loss or that from their perspective, only the effects were visible. All in all, these vague and ambiguous responses reflected an imprecise understanding of what situations constitute a "basic change." The responses to this open-ended question reinforced the impression that the interpretation of the "basic change" doctrine is clouded.

Among those attorneys who reported an instance of a "basic change" that affected jobs, the survey asked the following about bargaining:

> *Question 23:*
> *Ask if Q.21= Yes.*
> *Did the union ask to bargain over the change?*

Overall, eighty-five percent of the sixty-one attorneys who answered this question reported that the union requested bargaining. Although there may not be a clear understanding of exactly what constitutes a "basic change," apparently unions actively seek bargaining anyway. Ninety-four percent of the labor attorneys who reported a "basic change" reported that the union requested bargaining over that change. Even though some labor attorneys used language that, if accurate, would exempt management from a duty to bargain, they requested bargaining nevertheless.

The survey followed the above question by asking:

> *Question 24:*
> *Ask if Q.21= Yes.*
> *Did voluntary bargaining take place?*

Overall, seventy percent of the sixty attorneys who answered this question reported that voluntary bargaining occurred. Substantial differences appeared, however, in the responses of management and labor attorneys. A large majority of the management attorneys (83%) reported that voluntary bargaining occurred, while only fifty-eight percent of the labor attorneys reported voluntary bargaining. This result did not match the definitions of "basic changes" offered by labor attorneys. Their definitions of "basic changes" were more inclusive than those given by management attorneys, who implied that a greater range of changes would obviate a duty to bargain.

Two speculations emerge to account for the substantial differ-

ence in the rates of voluntary bargaining reported by the two types of attorneys. If labor attorneys restrict their requests for bargaining to only those more limited situations in which no "basic change" occurs, management should be more likely to comply, since management's counsel would be more likely to agree. Thus, labor attorneys should have reported a higher rate of voluntary bargaining. If, on the other hand, the grey area surrounding the doctrine of "basic change" leads labor attorneys to seek bargaining regardless of whether their initial classification of the type of change is correct, or at least comports with management's definition, management may be more willing to bargain even if it believes its definition is more consistent with NLRB interpretation. In this way, ambiguity in the law can reduce the quality of labor/management relations as it increases the amount of bargaining that occurs.

3. Labor Costs and Related Issues

The survey explored the amount of agreement surrounding other aspects of *Dubuque Packing* by posing several additional hypothetical situations that held constant the "basic change" doctrine. In each of the nine following questions, respondents were asked to assume that no "basic change" had occurred and then to determine if the collateral conditions imposed a duty to bargain or not.

> *Question 26:*
> *Next, I'm going to pose several hypothetical situations that require application of* Dubuque Packing. *Assume in each that there is no basic change in the employer's operation. After I describe each situation, tell me whether you think there is probably a duty to bargain, whether there is probably no duty, or whether you're not sure. First, the decision to relocate is made largely because of lower health insurance rates at the new site.*

No case law on this specific point was found. Interviews with NLRB officials classified this condition as creating a duty to bargain because health benefits are a component in the wage package.

This condition was clearly and uniformly understood by labor and management attorneys. Ninety-five percent of the attorneys, with nearly identical proportions of labor and management attorneys, agreed with the NLRB interpretation that a relocation motivated by the costs of benefits imposes a duty to bargain.

table 6

table 6 (con't)

Next, the survey addressed the issue of the variable quality of labor:

> *Question 27:*
> *The decision to relocate is made to utilize a pool of more highly skilled labor.*

No cases on this specific point have been brought before the NLRB. NLRB personnel classified this condition as creating a duty to bargain because the training of workers is within a union's control.

While sixty percent of the attorneys agreed with the NLRB interpretation of this situation, substantial differences emerged between labor and management attorneys. More labor attorneys (72%) agreed with this NLRB interpretation than management attorneys (47%). This result demonstrated a basic ideological difference in interpretation. Management attorneys are motivated to defend and extend the range of purely entrepreneurial discretion used in running a business; labor attorneys are motivated to increase the notion of vested rights to a job. Resolution of such a fundamental difference is not likely to rest upon clearer case law, although direction from the NLRB about whether training is part of labor costs will determine its amenability to bargaining.

Another increasingly common motivation for relocation concerns governmental regulation, particularly in the area of environmental law:

> *Question 28:*
> *The decision to relocate is made to avoid environmental regulations at the old site.*

No case law was found on this point. NLRB officials implied in interviews that such a condition would not create a duty to bargain. For example, if local environmental regulations affected the rate of production, then labor costs would not be a factor and no duty to bargain would be created. However, since labor costs are amorphous, and since the NLRB has broadly defined their constituent parts,[176] if

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176. *Holmes*, 309 N.L.R.B. at 147. "Among the many alternatives to downsizing, other than reducing wages, are modified work rules, nonpaid vacations, restricted overtime, jobsharing, shortened workweek, and reassignment of work and job classifications." *Id.*

the cost of compliance can be recouped from wage savings such relocation might be a mandatory topic of bargaining.

Again, attorneys had a relatively high overall rate of agreement with the NLRB interpretation: sixty-seven percent responded that this condition created no duty to bargain. Substantial disagreement on this issue, however, existed between labor and management attorneys. Only forty-nine percent of labor versus eighty-seven percent of management attorneys agreed with the NLRB interpretation. Here, the absence of explicit case law appeared to contribute to the difference of opinion.

The next question tested attorneys' opinions regarding credit availability:

> *Question 29:*
> *The decision to relocate is made because a company's old financial backers refused credit, but a bank at a new site has offered a loan.*

Case law has established a duty to bargain in this situation. Relocation motivated by the need to secure new financing contributed directly to the decision to move Dubuque Packing, for instance.

Since the survey explicitly studied the effects of *Dubuque Packing*, high levels of agreement with NLRB interpretation were expected. However, only twenty-eight percent of the attorneys agreed with the NLRB interpretation. Labor attorneys appeared more in tune with NLRB thinking on this issue (35% agreed) than management lawyers (21%).

The survey next turned to the question of worker productivity:

> *Question 31:*
> *The decision to relocate is made because of low worker productivity.*

An Administrative Law Judge has found a duty to bargain in this situation.[177]

High levels of agreement with the NLRB interpretation and between management and labor attorneys appeared on this issue: overall, ninety-one percent agreed with the NLRB interpretation. It

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177. GNB, Inc., Case No. 4-CA-18469, 1992 NLRB LEXIS 1129 (Sept. 24, 1992).

seemed to be settled that labor costs normally include worker productivity.

The survey next inquired about an externally imposed budget constraint:

> *Question 32:*
> *The decision to relocate some work is made because the employer has to lower costs to comply with a government budget change.*

Again, case law has established a duty to bargain in this situation.[178] The Board was clear in determining that employers cannot move jobs or lay off workers without bargaining with the union, even when the impetus for the job changes is a government budget cut.[179] Employers have other options, which must be bargained over, to achieve savings necessary to comply with operating budget cuts.[180]

This appeared to be a settled area of case law: a large majority of both management (79%) and labor (77%) attorneys agreed with the NLRB interpretation.

Another settled area concerns the motivation to reduce costs due to market pressures:

> *Question 33:*
> *The decision to relocate is made to lower costs because customers demand lower prices.*

The Board has found a duty to bargain under this condition.[181]

Eighty-eight percent of the respondents, with nearly identical proportions of management and labor attorneys, agreed with the NLRB interpretation that relocations motivated purely by cost considerations impose a duty to bargain.

The recent passage of the North American Free Trade Act highlighted the possible threat of losing American jobs due to vastly different wage rates:

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178. United States Postal Serv., 306 N.L.R.B. 640 (1992), *enforcement denied*, 8 F.3d 832, 837 (D.C. Cir. 1993). In *United States Postal Serv.*, the court did not directly address the duty to bargain about layoffs. It concluded that whatever bargaining rights the union may have had were clearly waived by its contract giving the employer the right to unilaterally implement service reductions. *Id.*

179. *Id.*

180. *Id.*

181. Holmes & Narver/Morrison-Knudsen, 303 N.L.R.B. 146 (1992).

Question 34:
The company wants to move to Mexico or the Far East, where the average wage is below the minimum wage in the U.S.

Post-*Dubuque Packing* case law established a duty to bargain in this type of case, even where the company alleged it was already paying the lowest legal minimum wage.[182] By analogy, it would seem that a duty to bargain exists. Interviews with NLRB personnel netted mixed responses, however, a few suggesting that although labor costs were implicated, the bargaining may be excused under the futility defense.

A majority of labor/management attorneys agreed with the NLRB case law interpretation that a duty to bargain exists under this condition, although there was a slight difference between the perceptions of the attorneys. Fifty-five percent of management attorneys versus sixty-five percent of labor attorneys agreed.

Another hypothetical situation focused on collateral conditions affecting a duty to bargain, such as the simple downsizing of the work force:

Question 35:
The company wants to downsize without relocating any work.

The Board has imposed a duty to bargain in such a situation. It has analogized simple downsizing to other types of situations where the union could offer labor concessions other than layoffs.[183]

Somewhat surprisingly, half of the management attorneys and a plurality of the labor attorneys (43%) disagreed with the NLRB interpretation of this condition. Since downsizing commonly occurs, this misinterpretation of a duty to bargain may result in the reduction of employee rights.

In attempting to establish parameters for "labor costs" as a clearly mandatory topic, the survey next addressed the condition of

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182. *Id.* at 147.

183. *Id.*; *see* J.L.M., Inc., 312 N.L.R.B. 304, 310 (1993) (Raudabaugh, Member, concurring). In *J.L.M.*, Member Raudabaugh concurred in the Board's finding of an unfair labor practice for failure to bargain after a union organizing campaign and reiterated his belief that *Dubuque Packing* applied to layoffs and discharge even where there was a business decline. *Id.*

whether a past history of concessions established a labor cost motivation for relocating:

> *Question 37:*
> *A past history in which management extracted wage concessions to keep a plant open is persuasive evidence that a subsequent relocation was motivated by labor costs.*

Existing cases on this point indicate that the NLRB has espoused this interpretation.[184] *Dubuque Packing* actually involved lengthy negotiations over wage concessions before the company announced its decision to relocate the work.[185] The opinion suggested that the initial wage concessions precluded the company from later arguing that the move was unrelated to labor costs.[186]

Overall, a narrow majority (51%) of labor/management specialists agreed with this NLRB interpretation, but substantial disagreement appeared between the two groups of attorneys. While sixty-three percent of the labor lawyers agreed with the NLRB interpretation, only thirty-seven percent of the management attorneys reached an interpretation consistent with NLRB case law. While it was not surprising that labor lawyers observed a continuing duty to bargain, management attorneys' responses may have been affected by their clients' apprehensions about a finding that once a company asks for concessions, it is estopped from raising the other *Dubuque Packing* defenses.

The final hypothetical involving bargaining obligations involved a situation in which labor costs appear, on the surface, to be irrelevant:

> *Question 38:*
> *No duty to bargain over relocation exists if management will pay labor more at the new site than it paid workers at the old site.*

Case law indicates that the NLRB would disagree with this inter-

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184. *See* Seminole Intermodal Transp., 312 N.L.R.B. 236 (1993); Owens-Brockway Plastic Prods., Inc., 311 N.L.R.B. 519 (1993); Dubuque Packing Co., 303 N.L.R.B. 386 (1991).

185. United Food & Commercial Workers, Local 150-A v. NLRB, 1 F.3d 24, 26 (1993); *Dubuque Packing*, 303 N.L.R.B. at 387.

186. *Dubuque Packing*, 303 N.L.R.B. at 393.

pretation because there may be reasons to pay higher wages to workers who work more efficiently.[187]

While a substantial disagreement between management and labor attorneys existed on this point, a majority of both agreed with the NLRB interpretation (sixty-seven percent of management attorneys compared with ninety-three percent of labor attorneys).

With respect to the set of union bargaining rights contained in this set of questions, labor lawyers rendered interpretations more consistent with NLRB interpretations than did management lawyers. Recall that with respect to definitions of "basic change," the reverse was true.[188] Advocacy appeared to direct the focus and detail of the lawyers' interpretations.

4. Overall Consistency with NLRB Reasoning

To compute a measure reflecting the lack of consensus on NLRB interpretations, an index was created to gauge each respondent's overall agreement with NLRB interpretations. The fifteen questions above (and one question not discussed) were used to compute a score. When a respondent disagreed with the NLRB interpretation on an issue represented in a question, a score of zero was given; when a respondent agreed, a score of one. A total score was then computed, which could range from zero for a respondent who disagreed with all of the NLRB interpretations to sixteen for a respondent who agreed with all of the NLRB interpretations.

For this sample of labor and management specialists, the minimum score was one and the maximum score was thirteen. The average score for all of the attorneys was 9.5. Nearly identical average scores were obtained for both management attorneys (9.54) and labor attorneys (9.49). This overall index representing the consistency of interpretation between labor and management attorneys and the NLRB appears to show a minor difference. An item-by-item analysis indicates that there was greater interpretive agreement between the practicing bar and the NLRB on issues directly involving labor costs. In other less distinct areas, where the case law is less settled, substantial disagreements occurred.

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187. Holmes & Narver/Morrison-Knudsen, 309 N.L.R.B. 146, 146 (1992).

188. *See supra* pp. 150–158.

5. General Impact of Dubuque Packing

An objective assessment of *Dubuque Packing*'s actual effect on the incidence of collective bargaining over relocation decisions would require an extensive study based on a sample of businesses. In lieu of such an extensive and expensive study, it is possible to obtain subjective assessments of *Dubuque Packing*'s impact from labor and management specialists. The survey simply asked a sample of experts what they thought the effects of *Dubuque Packing* were.

> *Question 40:*
> *The next several questions ask you about your attitudes toward* Dubuque Packing *and its possible consequences. First, do you think that* Dubuque *has clarified the duty to bargain significantly, somewhat, or has it failed to clarify the duty?*

This assessment of the clarity of case law surrounding definitions of "basic change" and related labor costs revealed an uneven degree of clarity. Only sixteen percent of the attorneys stated that *Dubuque Packing* had "significantly" clarified the duty to bargain. Labor attorneys were slightly more likely to attribute a clarifying effect to *Dubuque Packing* than management attorneys: sixty-seven percent of the former versus fifty-six percent of the latter said the duty to bargain had been "somewhat" clarified by *Dubuque Packing*.

table 7

A change in the range of topics could be one source for the unsettled nature of the duty to bargain. The survey asked:

> *Question 41:*
> *Has the range of topics over which companies and unions must bargain been increased, remained the same, or been decreased by* Dubuque Packing*?*

A majority of both the management (68%) and labor (62%) attorneys agreed that the range of mandatory bargaining topics had been increased by *Dubuque Packing*.

Opinion was mixed about how the process of collective bargaining has been affected by *Dubuque Packing*. The survey asked:

> *Question 42:*
> *Do you think* Dubuque *has made the process of collective bargaining better, has had no impact, or has made it worse?*

Roughly a third of the labor and management attorneys (31%) thought *Dubuque Packing* had improved the collective bargaining process, but opinion differed substantially between the two sectors of the bar. Only nineteen percent of the management lawyers thought the process had been improved, compared to forty-two percent of the labor lawyers. Correspondingly, twice as many management lawyers (37%) as labor lawyers (18%) thought *Dubuque Packing* had made the collective bargaining process worse. The most common response for both types of lawyers was that *Dubuque Packing* had not had a major impact on the process of bargaining (forty-five percent of management lawyers and forty percent of labor lawyers).

Despite this modest evaluation of *Dubuque Packing*'s impact, the case appears to have influenced bargaining practices indirectly. The effect of *Dubuque Packing* on motivating bargaining can be addressed using the responses to a separate question. The survey asked in open-ended fashion:

> *Question 44:*
> *What is the most powerful reason why management would voluntarily bargain with the union over a possible plant relocation?*

The most frequent response given by attorneys involved some refer-

ence to the threat of legal entanglement. Wording varied from "to avoid a legal battle with the union" to "avoid potential liability," but forty-nine percent of the attorneys who answered this question mentioned the implicit threat of the law.

The last subjective question about *Dubuque Packing*'s effects addressed the issue of management's willingness to bargain:

> *Question 52:*
> *Do you think that management is more or less likely to bargain with labor over a possible work relocation since the* Dubuque Packing *decision, or has* Dubuque Packing *made no difference?*

A majority of both management attorneys (59%) and labor attorneys (57%) thought that *Dubuque Packing* had increased management's willingness to bargain. Importantly, almost no attorneys (5%) thought that the case had decreased management's willingness to bargain.

Overall, a surprisingly substantial level of agreement between the labor and management sectors of the bar emerged over the perceived effects of *Dubuque Packing*. Both types of lawyers agreed that *Dubuque Packing* had only somewhat, rather than significantly, clarified the duty to bargain. Both groups of lawyers agreed that the range of topics over which companies and unions must bargain had been increased. And both types of lawyers agreed that *Dubuque Packing* most likely increased management's willingness to bargain. Some of that willingness was attributable to the threat of litigation and Board remedies. Finally, more labor than management attorneys believed that *Dubuque Packing* had improved the process of bargaining.

6. Relocation and Bargaining

The NLRB's actual importance in determining bargaining rights in relocation decisions may be small if instances of relocation are infrequent. The survey contained a few questions to determine how often labor/management attorneys confronted relocation situations and to collect assessments of the role *Dubuque Packing* played in actual instances.

> *Question 70:*
> *The next several questions ask about your experiences with*

collective bargaining over relocating work. Within the past five years, since the beginning of the Bush Administration, have any of your clients contemplated, discussed with you, planned, or implemented a decision to relocate some of their work to a new site?

This question was asked of all attorneys, but over a quarter (twelve of forty-three) of the labor attorneys could not give any information about discussions they had with clients about relocations. Only thirty percent of the thirty attorneys who answered this question had discussed a possible relocation with their client. In a slightly different context, seventy-eight percent of the labor attorneys had responded that their clients had discussed a "basic change" with them. It should be noted that a few of the labor attorneys interviewed stated that management attorneys, rather than the labor attorneys themselves, would have this type of information. Thus, one should read the findings for labor attorneys very cautiously, while the results for management attorneys have a higher reliability.

Among management lawyers, eighty-nine percent reported some consideration of a relocation decision by their clients. Although labor lawyers would not be expected to be privy to the often confidential discussions regarding potential relocations held between management and counsel, thirty percent of the labor lawyers had confronted this issue. In terms of a legal issue, relocation is frequently confronted by both labor and management attorneys.

table 8

To obtain a slightly more objective assessment of *Dubuque Packing*'s influence, the survey asked several follow-up questions focusing upon the most recent instance of a contemplated relocation.

> *Question 75:*
> *Ask if Q.70= Yes.*
> *In this instance, was there bargaining over the relocation of work?*

A majority of both management attorneys (59%) and labor attorneys (57%) who had been made aware of a contemplated relocation re-

ported that bargaining over this issue had eventually occurred.

The survey then asked about the explicit role played by *Dubuque Packing* in establishing this bargaining:

> *Question 80:*
> *Ask if Q.75= Yes.*
> *How would you describe the role* Dubuque Packing *played in establishing the bargaining? Did it play a significant, small, or no role in this most recent instance?*

A relatively small percentage of both management attorneys (37%) and labor attorneys (25%) reported that *Dubuque Packing* played a "significant" role. Only a quarter (26%) of the management attorneys attributed "no role" to *Dubuque Packing*.

Since the relocation of a plant or jobs has the most profound effect on the workers, it is interesting to learn if *Dubuque Packing* actually has been able to avert such relocations. The survey asked:

> *Question 82:*
> *Ask if Q.70= Yes.*
> *In this most recent instance, did a relocation of work eventually occur?*

Among the thirty-eight attorneys who had participated in bargaining over a relocation, eighty-four percent reported that the relocation eventually took place. This finding leads to the conclusion that any direct benefits to labor derived from *Dubuque Packing* are not likely to include preservation of work at the present site.

VI. CONCLUSION

Ever since the duty to bargain with the employees' representative was imposed upon employers, the extent of this duty has been disputed. Recent business downturns, the intensification of international competition, and increased foreign investment opportunities have exacerbated the fundamental tension between management companies' ownership and investment prerogatives, on the one hand, and workers' collective rights on the other. Work relocation will continue to be an important labor/management issue, and if unions continue to play a role in our economy, their right to participate in decisions affecting the jobs of their members is of paramount

importance.

In *Dubuque Packing Co.*, the NLRB attempted to balance the competing interests involved, but the Board has yet to create a precise standard that can be commonly understood and applied by the practicing bar. The bar's inability to define the duty to bargain over relocation decisions may increase bargaining without practical benefit, since each party brings different expectations to the table. Additionally, more litigation and less cooperation will likely occur under these conditions.

One purpose of this study was to measure the current level of understanding of *Dubuque Packing*. This Article simply reports some of the survey's findings rather than advocating a particular resolution of the ambiguity surrounding the duty to bargain about relocating work. Attorneys are generally influenced by their clients' philosophical and practical interests. This general rule seems to apply quite aptly to the ways in which bargaining rules regarding relocation decisions are applied and interpreted by a very specialized portion of the labor and management bar.

The survey showed that the NLRB has had a substantial effect upon the bargaining practices of those who sit on opposite sides of the bargaining table. This impact has resulted perhaps as much from the Board's lack of clear direction — and the corresponding implications of misreading the clouded law on the duty to bargain over relocations — as from a belief in the process of collective bargaining. Ideological disagreements about the purposes of the National Labor Relations Act further complicate the issues.

However, *Dubuque Packing* clearly has increased bargaining, arguably one goal of the NLRA, although it is doubtful that it has decreased the numbers of jobs lost to relocations. Whether the bargaining has simply increased the costs of relocating work or reduced benefits for the workers whose jobs are retained, or whether bargaining may actually prevent some job loss is not yet known. If the duty-to-bargain over relocations is ultimately decided by the Supreme Court or reconsidered in another context by the NLRB, the Court's attention to clearer definitions of business change, labor costs, and futile bargaining would make bargaining more efficient with fewer of the transaction costs associated with litigation.