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ECONOMICALLY MOTIVATED RELOCATIONS OF WORK AND AN EMPLOYER'S DUTIES UNDER SECTION 8(d) OF THE NATIONAL LABOR RELATIONS ACT: A THREE-STEP ANALYSIS

Edward P. O'Keefe* & Seamus M. Tuohey**

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The ideas, analyses and opinions expressed in this article represent those of the authors and not necessarily the firms with which they are associated.

I. Introduction

Over the past decade the continued rapid development of industrial technology, the rise of a global marketplace and an unsteady worldwide economy have forced American businesses in increasing numbers to implement major structural changes in order to attract capital, resources and customers.¹ Changes such as automation, partial or total plant closures and even complete termination and subsequent reorganization of employing enterprises have become commonplace.² These phenomena are most pronounced and have had the most devastating effect in urban industrialized areas of the United States.³

The implementation of such entrepreneurial decisions often have a direct and adverse effect on employees involved by generally causing relocations, layoffs and terminations.⁴ Consequently, employees and their unions,⁵ state and local officials,⁶ and federal legislative⁷ and

1. See B. BLUESTONE, B. HARRISON & L. BAKER, *CORPORATE FLIGHT* 38 (1981); J. GORDUS, P. JARLEY & L. FERMAN, *PLANT CLOSINGS AND ECONOMIC DISLOCATIONS* 18 (1981).

2. See generally *Labor Relations in an Economic Recession*, 110 LAB. REL. REP. (BNA) (special report) (July 19, 1982) [hereinafter cited as BNA REPORT] (job losses and concession bargaining); J. GORDUS, P. JARLEY & L. FERMAN, *supra* note 1 (comprehensive review of plant closings).

3. See Rees, *Regional Industrial Shifts in the U.S. and the Internal Generation of Manufacturing Growth Centers in the Southwest*, in *INTERREGIONAL MOVEMENTS AND REGIONAL GROWTH* 51-71 (W. Wheaton ed. 1979); BNA REPORT, *supra* note 2, at 23-54; *Another Steel Town at the Crossroads*, *INDUSTRY WEEK*, Sept. 1, 1980, at 21; *Actions Taken to Aid Auto Industry*, *MONTHLY LAB. REV.*, Sept. 1980, at 59-60; *Firestone to Close Six Plants*, *MONTHLY LAB. REV.*, May 1980, at 55-56; *Where Job Layoffs Will Strike Next*, *U.S. NEWS & WORLD REP.*, Nov. 16, 1981, at 87-88. The United States Congressional Budget Office estimates that there could be as many as 2.1 million dislocated workers in 1983, and that they will be mostly older, experienced workers. *Unions Advised to Develop Programs to Assist Laid-Off or Displaced Workers*, *DAILY LAB. REP. (BNA)* A-9 (Dec. 15, 1982) (quoting AFL-CIO Human Resources Development Institute).

4. See B. BLUESTONE, B. HARRISON & L. BAKER, *supra* note 1, at 24-27; B. BLUESTONE & B. HARRISON, *THE DEINDUSTRIALIZATION OF AMERICA* 18 (1982). Employee concession of wages and benefits have rapidly become the mechanism through which employees try to cooperate with their industrial employers to prevent adverse effects caused by major structural changes. With depressed economic circumstances causing workers to join the jobless ranks, news items recounting labor concessions appear daily. See *Teamsters Agree to Tentative Pact With Concessions*, *N.Y. Times*, Jan. 16, 1982, at A1, col. 5; *Ford Calls for Sacrifices by Union to Gain Protection of Auto Jobs*, *N.Y. Times*, Jan. 16, 1982, at A10, col. 1; *G.M. and Auto Workers to Link Cut in Wages to Lower Car Prices*, *N.Y. Times*, Jan. 13, 1982, at A1, col. 4; *Teamsters, Truckers, Begin Talks Early; Some Assistance Seen for Ailing Industry*, *Wall St. J.*, Dec. 2, 1981, at 3, col. 3.

5. BNA REPORT, *supra* note 2, at 9-14, 20-21. As a reaction to the growing number of major business changes, the amount of contractual protection against

administrative bodies⁸ have attempted to restrict the increasing number of business closings and other reinvestment decisions which result in employee dislocation.

Some of the most strident resistance to major organizational business alterations has come from the National Labor Relations Board.⁹ In a series of administrative decisions¹⁰ and federal court actions,¹¹ the

layoffs has grown. See *Basic Patterns in Layoff, Rehiring and Work Sharing Provisions*, DAILY LAB. REP. (BNA) E-1 (March 9, 1983); *Job Security Playing More Crucial Role in 1982 Bargaining Than in Any Prior Negotiating Round*, DAILY LAB. REP. (BNA) C-1 (Jan. 25, 1982); *Contracts Offer More Relocations Aid For Transferred Workers, BLS Study Finds*, DAILY LAB. REP. (BNA) A-1, (Aug. 31, 1981); *Plant Transfer Rights Available to Half of Those Covered by Major Bargaining Pacts, BLS Survey Shows*, DAILY LAB. REP. (BNA) A-4, (Aug. 28, 1981).

6. Boland, *Unholy Alliance: Church Groups, Legal Services Corp. Launch Attack on U.S. Steel*, BARRON'S, June 2, 1980, at 9, col. 1. At least two states have enacted legislation limiting an employer's right to implement certain structural changes in its business organization such as transfer of work. See ME. REV. STAT. ANN. tit. 26, § 625-B (Supp. 1982-1983); WIS. STAT. ANN. § 109.07 (West Supp. 1982-1983). In addition, many states have such legislation pending. See McKenzie, *Frustrating Business Mobility*; Miller, *Manufacturing Relocations in the United States 1969-1975*, in PLANT CLOSINGS: PUBLIC OR PRIVATE CHOICES 7, 19 (R. McKenzie ed. 1982); BNA REPORT, *supra* note 2, at 57-64.

7. BNA REPORT, *supra* note 2, at 55.

8. See notes 115-20, 124-30, 165-78, 186-200 & 203-19 *infra* and accompanying text.

9. The National Labor Relations Board (NLRB or Board) was created by the National Labor Relations Act, Pub. L. No. 74-198, 49 Stat. 449 (1935) (codified at 29 U.S.C. §§ 151-167 (1976)). See note 18 *infra*. In 1947, the Board's size and authority was expanded by the Taft-Hartley Act, Pub. L. No. 80-101, 61 Stat. 136 (1947) (codified at 29 U.S.C. §§ 141-144, 151-167, 171-187 (1976)). See note 18 *infra*. The Board is composed of five members, each of whom are appointed by the President, with approval by the Senate, and serve five-year terms. 29 U.S.C. § 153(a) (1976). The duties of the Board are two-fold: to conduct secret ballot elections among employees in units appropriate for collective bargaining for the purpose of determining whether the employees desire representation by a labor organization, 29 U.S.C. § 153(d) (1976), and to prevent unfair labor practices. *Id.* § 159(b), (c). A General Counsel is also appointed by the President, with the approval of the Senate, and serves for a term of four years. The General Counsel supervises all attorneys employed by the Board, except those attorneys on the immediate staffs and under the direction of Board Members. He also supervises the officers and employees in the Board's regional offices. By statute, he has final authority to investigate unfair labor practice charges and to issue or refuse to issue complaints and to prosecute them. *Id.* § 153(d). The Board appoints an executive secretary and such attorneys, field examiners, regional directors, and other employees as it deems necessary for the proper performance of its duties. *Id.* § 154(a). A regional director is an agent designated by the Board to manage a region. 29 C.F.R. § 102.5 (1980). There are 33 regions throughout the United States. *Areas Served by Regional and Subregional Offices*, NLRB CASE HANDLING MANUAL (CCH) ¶ 28,991 (July 1980).

10. See notes 165-78, 186-200 & 203-19 *infra* and accompanying text.

11. See notes 132, 140, 179-85 & 201-02 *infra* and accompanying text.

Board has sought to limit employer attempts to implement sweeping changes in their operations without prior consultation, and in certain circumstances prior agreement, with bargaining representatives of affected employees.

The most recent development in this series of decisions is the case of *Milwaukee Spring Division of Illinois Coil Spring Co.*¹² In *Milwaukee Spring*, the Board held that the employer unlawfully transferred work during the term of its collective bargaining agreement¹³ without the prior consent of its employees' collective bargaining agent.¹⁴ The most disturbing element of this decision is the Board's unequivocal reaffirmance of prior holdings¹⁵ that implementation of an employer's unilateral decision to relocate all or part of a business operation, regardless of prior bargaining, constitutes an unlawful modification of an existing collective bargaining agreement, in violation of sections 8(d)¹⁶ and 8(a)(5)¹⁷ of the National Labor Relations Act.¹⁸ *Milwaukee*

12. 265 N.L.R.B. No. 28, 111 L.R.R.M. 1486 (1982), *petition for review filed*, No. 82-2736 (7th Cir. October 27, 1982).

13. 265 N.L.R.B. No. 28, 111 L.R.R.M. at 1490. Collective bargaining agreements are contracts or mutual understandings between a labor organization representing an employer's employees and the employer. Such agreements generally set forth the employees' terms and conditions of employment such as wages, hours, working conditions, discipline, health and accident insurance, retirement, pensions, promotions, layoffs, technical changes, and a host of minor items. H. ROBERTS, ROBERTS' DICTIONARY OF INDUSTRIAL RELATIONS 15 (2d ed. 1971). Nearly all agreements contain procedures for resolving disputes concerning the interpretation and application of the contract, usually culminating in binding arbitration. A. COX, D. BOK & R. GORMAN, CASES AND MATERIALS ON LABOR LAW 515 (9th ed. 1981).

14. 265 N.L.R.B. No. 28, 111 L.R.R.M. at 1490. Collective bargaining agents are the exclusive representatives of the employees in the bargaining unit with respect to wages, hours and other terms and conditions of employment. 29 U.S.C. § 159(a) (1976). Collective bargaining agents are selected by a majority of the employees in a bargaining unit. *Id.* § 159. Such agents are either recognized voluntarily by an employer or certified by the Board after a Board-conducted election. *Id.*

15. See notes 165-78 & 186-200 *infra* and accompanying text.

16. Section 8(d) of the Act, 29 U.S.C. § 158(d) (1976), provides in relevant part as follows:

For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any 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: *Provided*, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or

Spring takes on particular importance because the Board adopted a sweeping analysis, easily adaptable to a broad range of fundamental managerial decisions.

This Article will address the legal and practical issues which arise under the Act in connection with fundamental alterations of a business enterprise. Initially, the Article will review relevant Board and judicial precedent and the general principles which have developed concerning management's right to implement a variety of changes in operation. Thereafter, it will discuss the current application of these principles to Board and court decisions concerning one type of fundamental business change: relocation of bargaining unit work,¹⁹ and the

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

Id.

17. Section 8(a)(5) provides that "[i]t shall be an unfair labor practice for an employer . . . [t]o refuse to bargain collectively with the representatives of his employees. . . ." *Id.* § 158(a)(5).

18. The National Labor Relations Act (NLRA or Act) is comprised of the National Labor Relations (Wagner) Act of 1935, Pub. L. No. 74-198, 49 Stat. 449 (codified at 29 U.S.C. §§ 151-167 (1976)), the Labor-Management Relations (Taft-Hartley) Act of 1947, Pub. L. No. 80-101, 61 Stat. 136 (codified at 29 U.S.C. §§ 141-144, 151-167, 171-187 (1976)), and the Labor-Management Reporting and Disclosure (Landrum-Griffin) Act of 1959, Pub. L. No. 86-257, Tit. VII, 73 Stat. 519 (codified at 29 U.S.C. §§ 153, 158-160, 164, 186-187 (1976)). Section 7 of the Act provides that "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining . . ." 29 U.S.C. § 157 (1976). In addition, it places duties upon both employers and labor organizations to bargain in good faith with respect to terms and conditions of employment. *Id.* § 158(d). Violation of this duty is an unfair labor practice under § 8(a)(5) of the Act. *Id.* § 158(a), (b). The Board initially determines whether an action constitutes an unfair labor practice. *Id.* § 160(a). The United States Circuit Courts have the power to review the Board's decisions. *Id.* § 160(e), (f).

19. Relocation is a term of art which has no precise legal meaning. In relocation, essentially identical jobs are available at the new site and employees of the old facility are either transferred or discharged. Relocation includes three distinct categories: (1) an employer abandons an existing plant and transfers the entire business to a new location, *see* *McLoughlin Mfg. Corp.*, 182 N.L.R.B. 958 (1970), *enforced as modified sub nom.* *International Ladies Garment Workers Union*, 463 F.2d 907 (D.C. Cir. 1972); (2) a particular operation of an employer's plant is transferred to a new facility while continuing other operations at the old location, *see* *Tennessee-Carolina Transp., Inc.*, 108 N.L.R.B. 1369, 1370 (1954), *enforcement denied and remanded*, 226 F.2d 743 (6th Cir. 1955); (3) a multi-plant employer simply transfers production contracts from one plant to another, *see* *Industrial Fabricating, Inc.*, 119 N.L.R.B. 162, 164 (1957), *enforced*, 272 F.2d 184 (6th Cir. 1959). *Murphy, Plant Relocation and the Collective Bargaining Obligation*, 59 N.C.L. Rev. 5, 13 n.53 (1980).

restrictions imposed by the Act upon an employer who is contemplating such action. Finally, the authors will propose a three-step analysis which the Board and courts should consider when faced with questions concerning an employer's duty in future relocation cases, particularly those cases which present factual and legal considerations different from those presented in *Milwaukee Spring*.²⁰

II. The Statute: A Mandate for Collective Bargaining

Through the National Labor Relations Act,²¹ Congress sought to "protect interstate commerce from the paralyzing consequences of industrial war"²² by imposing an enforceable duty on labor and management to meet and confer in good faith with respect to "wages, hours and other terms and conditions of employment."²³ This Congressionally mandated system of collective bargaining is the hallmark and central concern of the Act.²⁴ The Act seeks to promote industrial

20. For the reasons stated at note 244 *infra*, it is submitted that the Board's decision in *Milwaukee Spring* is unsupported by well-reasoned precedent and contrary to longstanding legal principles. Therefore, to the extent the decision is allowed to stand, it should be strictly limited to its facts.

21. 29 U.S.C. §§ 141-187 (1976).

22. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 41 (1937). The fundamental legislative policy underlying the Act is set forth in the Act itself. Congress sought "to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions . . . by encouraging the practice and procedure of collective bargaining. . . ." 29 U.S.C. § 151 (1976). This policy was cited by the Supreme Court in *Sears, Roebuck & Co. v. Carpenters*, 436 U.S. 180, 190 (1978). For the Board's comments on this policy, see *United Aircraft Corp.*, 192 N.L.R.B. 382, 387 (1971), *modified on other grounds*, 534 F.2d 422 (2d Cir. 1975).

23. 29 U.S.C. § 158(d). As originally enacted in 1935, the Act set forth an employer's duty to bargain in very general terms and did not state specifically the scope of that duty. National Labor Relations Act of 1935, Pub. L. No. 74-198, 49 Stat. 449. To clarify the extent of the obligation established in § 8(a)(5), Congress, in 1947, enacted § 8(d) which explicitly defined the duty of both labor and management to bargain collectively and set forth in very general terms the subjects within the scope of the duty to bargain. Labor Management Relations Act of 1947, Pub. L. No. 80-101, 61 Stat. 136. The original House bill contained a specific listing of the issues subject to mandatory bargaining. H.R. 3020, 80th Cong., 1st Sess. § 2(11) (1947), *published in* H.R. REP. No. 245, 80th Cong., 1st Sess. 48-49 (1947). Congress, however, rejected this attempt to "straight-jacket" and to "limit narrowly the subject matters appropriate for collective bargaining," *id.* at 71 (minority report), in favor of the more generalized listing of "wages, hours, and other terms and conditions of employment" now found in § 8(d), 29 U.S.C. § 158(d) (1976).

24. See note 22 *supra*. See also § 1 of the Act in which Congress further recognized that "the refusal by some employers to accept the procedure of collective bargaining led to strikes. . . ." 29 U.S.C. § 151 (1976). This principle has long been recognized by the Supreme Court. See *Jones & Laughlin Steel Corp.*, 301 U.S. at 42;

peace by mandating that the conflicting interests of labor and management subject themselves to the mediatory influence of face-to-face collective bargaining concerning their differences as to terms and conditions of employment.²⁵

A. Scope of the Duty

The duty imposed on labor and management by the Act to bargain collectively applies only to “*terms and conditions of employment*”,²⁶ a phrase which is contained, yet undefined in the Act.²⁷ The Board and the courts have sought to define an employer’s duty in terms of whether a subject of bargaining is mandatory, permissive or illegal.²⁸ For subjects encompassed within the phrase terms and conditions of employment, bargaining is mandatory.²⁹ As to all others, bargaining

Carey v. Westinghouse Elec. Corp., 375 U.S. 261, 271 (1964) (the Act “is primarily designed to promote industrial peace and stability by encouraging the practice and procedure of collective bargaining . . .”) (quoting International Harvester Co., 138 N.L.R.B. 923, 925-26 (1962), *aff’d*, 327 F.2d 784 (7th Cir. 1964)). See also First Nat’l Maintenance Corp. v. NLRB, 452 U.S. 666, 674 (1981) (purpose of the Act “is the promotion of collective bargaining as a method of defusing . . . conflict between labor and management”); Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203, 211 (1964) (purpose “of the Act is to promote peaceful settlement of industrial disputes by subjecting . . . controversies to . . . negotiation”).

25. 29 U.S.C. § 158(d) (1976). See note 22 *supra*.

26. NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342, 349 (1958).

27. See note 23 *supra*.

28. *Wooster Div. of Borg-Warner Corp.*, 356 U.S. at 348-49. Reading §§ 8(a)(5) and 8(d) together, the Court declared that

these provisions establish the obligation of the employer and the representative of its employees to bargain with each other in good faith with respect to “wages, hours and other terms and conditions of employment” The duty is limited to those subjects, and within that area neither party is legally obligated to yield As to other matters, however, each party is free to bargain or not to bargain, and to agree or not to agree.

Id. at 349 (citing NLRB v. American Nat’l Ins. Co., 343 U.S. 395 (1952)).

29. 356 U.S. at 349. The range of subjects which have been found to be mandatory subjects of bargaining is quite broad and includes such diverse matters as compensation, *Oughton v. NLRB*, 118 F.2d 486, 498 (3d Cir. 1941), *cert. denied*, 315 U.S. 797 (1942); pensions, *Inland Steel Co. v. NLRB*, 170 F.2d 247, 251 (7th Cir. 1948), *cert. denied*, 336 U.S. 960 (1949); profit-sharing plans, *Winn-Dixie Stores v. NLRB*, 567 F.2d 1343 (5th Cir. 1977), *cert. denied*, 439 U.S. 985 (1978); bonuses, *Singer Mfg. Co. v. NLRB*, 119 F.2d 131, 136-37 (7th Cir.), *cert. denied*, 313 U.S. 595 (1941); stock purchase arrangements, *Richfield Oil Corp. v. NLRB*, 231 F.2d 717, 724 (D.C. Cir. 1956); merit wage increases, *NLRB v. J. H. Allison & Co.*, 165 F.2d 766, 768-69 (6th Cir.), *cert. denied*, 335 U.S. 814 (1948); insurance schemes, *W. W. Cross & Co. v. NLRB*, 174 F.2d 875, 878 (1st Cir. 1949); company housing, *American Smelting & Ref. Co. v. NLRB*, 406 F.2d 552, 554-55 (9th Cir.), *cert. denied*, 395 U.S. 935 (1969); hiring practices, *NLRB v. Houston Chapter, Assoc. Gen. Contractors of Am., Inc.*, 349 F.2d 449, 451 (5th Cir. 1965); layoffs and recalls,

is either permissive³⁰ or illegal.³¹ Although bargaining is required with respect to mandatory subjects, concession or agreement is not.³² Consequently, either party may take a position fairly held on a mandatory subject and bargain to impasse.³³ This right, however, does not extend to permissive subjects.³⁴ Parties to negotiations may not bargain to impasse over, and thus condition agreement upon, a permissive subject of bargaining.³⁵

The Act also requires that where the parties have reached agreement, the terms of which are embodied in a contract for a particular period, each must maintain "in full force and effect . . . all the terms

Awrey Bakeries, Inc. v. NLRB, 548 F.2d 138 (6th Cir. 1976); operation of employer's seniority program, Industrial Union of Marine & Shipbuilding Workers v. NLRB, 320 F.2d 615, 620 (3d Cir. 1963); "most favored nation" clauses, Dolly Madison Indus., Inc., 182 N.L.R.B. 1037 (1970); and even the price of food in company cafeterias, Ford Motor Co. v. NLRB, 441 U.S. 488, 494-95 (1979).

30. Permissive subjects include, *inter alia*, the scope of a bargaining unit, Douds v. International Longshoremen's Ass'n, 241 F.2d 278, 282 (2d Cir. 1957), and including supervisors in a bargaining unit, NLRB v. Retail Clerks Int'l Ass'n, 203 F.2d 165 (9th Cir. 1953).

31. Certain subjects may not be agreed upon by any party under the Act. See, e.g., NLRB v. National Maritime Union, 175 F.2d 686 (2d Cir. 1949), *cert. denied*, 338 U.S. 954 (1950) (hiring hall provision which gives preference to union members); Penello v. United Mine Workers, 88 F. Supp. 935 (D.D.C. 1950) (closed shop); Amalgamated Lithographers, Local 17, 130 N.L.R.B. 985 (1961) (hot cargo clause in violation of § 8(e) of the Act), *enforced*, 309 F.2d 31 (9th Cir. 1962).

32. 29 U.S.C. § 158(d) (1976).

33. *Wooster Div. of Borg-Warner Corp.*, 356 U.S. at 349. Impasse has been defined as a deadlock in negotiations between the employer and the collective bargaining agent of the employees. H. ROBERTS, *supra* note 13, at 193. Whether an impasse exists is a matter of judgment. In *Taft Broadcasting Co. v. AFTRA*, 163 N.L.R.B. 475 (1967), the Board explained:

The bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to which there is disagreement, the contemporaneous understanding of the parties as to the state of the negotiations, are all relevant factors to be considered in deciding whether an impasse in bargaining existed.

Id. at 478.

34. 356 U.S. at 349.

35. *Id.* While parties to negotiations may choose to bargain over a permissive subject of bargaining, no amount of bargaining will transform a permissive subject into a mandatory subject of bargaining. *Id.* In *NLRB v. Davidson*, 318 F.2d 550 (4th Cir. 1963), the court stated:

A determination that a subject which is non-mandatory at the outset may become mandatory merely because a party had exercised this freedom [to bargain or not to bargain] by not rejecting the proposal at once, or sufficiently early, might unduly discourage free bargaining on non-mandatory matters. Parties might feel compelled to reject non-mandatory proposals out of hand to avoid risking waiver of the right to reject.

Id. at 558.

and conditions of the existing contract . . . until the expiration date of the contract.”³⁶ Moreover, the Act expressly provides that:

the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract.³⁷

Thus, section 8(d) of the Act has a dual nature: it mandates a system by which labor and management may resolve their differences with respect to terms and conditions of employment and, upon resolution of those differences, prohibits unilateral modification of that agreement by any party for its full term.

B. Enforcement of the Duty

The dual mandates of section 8(d) are enforced by sections 8(a) and (b) of the Act.³⁸ The primary enforcer of section 8(d) as to employers is section 8(a)(5),³⁹ which renders unlawful an employer's refusal to bargain in good faith with its employees' representative.⁴⁰ Refusals by an employer to bargain in good faith under section 8(a)(5) include not only direct refusals to bargain over terms and conditions of employment,⁴¹ but also any unilateral actions⁴² which alter such terms and

36. 29 U.S.C. § 158(d) (1976). Section 8(d) states that the parties must maintain all of the “terms and conditions of the contract.” *Id.* The Supreme Court, however, has limited this requirement to maintaining only those terms of a contract which constitute mandatory subjects of bargaining. *See Allied Chem. & Alkali Workers of Am., Local Union No. 1 v. Pittsburgh Plate Glass Co., Chem. Div.*, 404 U.S. 157 (1971).

37. 29 U.S.C. § 158(d) (1976).

38. Section 8(a) of the Act prohibits unfair labor practices by an employer. *Id.* § 158(a). *See* notes 39-50 *infra* and accompanying text. Section 8(b), on the other hand, prohibits union unfair labor practices, including restraint or coercion of employees in the exercise of rights guaranteed under § 7, 29 U.S.C. § 158(b)(1) (1976), and “refus[ing] to bargain collectively with an employer. . . .” *Id.* § 158(b)(3).

39. 29 U.S.C. § 158(a)(5) (1976).

40. *Id.* Section 8(b)(3) of the Act extends a similar prohibition to unions. *See* note 38 *supra*.

41. *See, e.g., NLRB v. Highland Park Mfg. Co.*, 110 F.2d 632 (4th Cir. 1940) (refusal to enter into any agreement with union); *General Elec. Co.*, 150 N.L.R.B. 192 (presentation of a single, acceptable comprehensive offer as final in conjunction with extensive attempt to sell the package directly to the employees held to be a refusal to bargain in good faith), *vacated and remanded*, 382 U.S. (1966), *enforced*, 418 F.2d 736 (2d Cir. 1969), *cert. denied*, 397 U.S. 965 (1970); *NLRB v. Truitt Mfg.*, 351 U.S. 149 (1956) (refusal to provide information necessary to conduct collective bargaining).

conditions, even absent an existing agreement.⁴³ Section 8(a)(5) also prohibits unilateral modifications of the terms of a labor agreement during its effective period.⁴⁴

Section 8(a)(1) of the Act⁴⁵ further regulates employer action by prohibiting an employer from interfering with, restraining or coercing employees in the exercise of their rights under section 7.⁴⁶ As a refusal to bargain necessarily interferes with employees' rights to collectively bargain concerning terms and conditions of employment, violations of section 8(a)(5) derivatively violate section 8(a)(1).⁴⁷

Section 8(a)(3) prohibits an employer from engaging in discrimination with regard to any term and condition of employment to discourage membership in any labor organization.⁴⁸ Violations of section

42. Unilateral action is action by one of the parties to a collective bargaining agreement independent of the desires or wishes of the other, often without prior notice or consultation. H. ROBERTS, *supra* note 13, at 549.

43. Generally, in determining whether an unlawful refusal to bargain has occurred, all the relevant facts of a case are studied in determining whether the employer or the union is bargaining in good or bad faith, i.e., the "totality of conduct" is the standard through which the "quality" of negotiations is tested. NLRB v. Stevenson Brick & Block Co., 393 F.2d 234 (4th Cir. 1968); B. F. Diamond Construction Co., 163 N.L.R.B. 161 (1967), *enforced*, 410 F.2d 462 (5th Cir. 1969). In Rhodes-Holland Chevrolet Co., 146 N.L.R.B. 1304 (1964), the Board stated:

In finding that Respondent violated its obligation to bargain in good faith, we, like the Trial Examiner, have not relied solely on the position taken by Respondent on substantive contract terms, a factor which, standing alone . . . might not have provided sufficient basis for the violation found, but have considered that factor as simply one item in the totality of circumstances reflecting Respondent's bargaining frame of mind.

Id. at 1304-05. The "totality of conduct" doctrine, generally, stems from NLRB v. Virginia Elec. & Power Co., 314 U.S. 469 (1941). Certain types of conduct, such as unilateral action, however, have been viewed as per se refusals to bargain, without regard to any considerations of good or bad faith. See NLRB v. Katz, 369 U.S. 736 (1962); NLRB v. American Mfg. Co., 351 F.2d 74 (5th Cir. 1965) (unilateral grant of wage increase); McLean v. NLRB, 333 F.2d 84 (6th Cir. 1964) (unilateral grant of health insurance). Of course, unilateral changes are permissible where there is no contract in effect and the parties have reached a legitimate impasse, or the union has waived its right to contest a unilateral change. See Almeida Bus Lines, Inc., 333 F.2d 729 (1st Cir. 1964); U.S. Lingerie Corp., 170 N.L.R.B. 750 (1968).

44. Nassau County Health Care Facilities Ass'n, 227 N.L.R.B. 1680, 1683 (1977); C & S Indus. Inc., 158 N.L.R.B. 454, 457 (1966).

45. 29 U.S.C. § 158(a)(1) (1976).

46. *Id.*

47. The Board has noted since its inception that "a violation by an employer of any of the four subdivisions of section 8 . . . is also a violation of subdivision (1)." 3 N.L.R.B. ANN. REP. 52 (1939). The employer's motive generally is not considered in determining whether it has violated § 8(a)(1). Cooper Thermometer Co., 154 N.L.R.B. 502, 503 n.2 (1965).

48. Section 8(a)(3) provides that it is an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of

8(a)(3) generally do not involve violations of the duty to bargain under sections 8(d) and 8(a)(5). However, certain unilateral employer actions which violate section 8(a)(5) have been held to be so inimical to employee rights to engage in concerted activities that they constitute not only refusals to bargain in good faith, but also violations of section 8(a)(3).⁴⁹ The Board and courts have reasoned that such acts are "inherently destructive" of employees' statutory rights and thus violate section 8(a)(3).⁵⁰

In sum, the Act places two types of restrictions upon an employer's decision to implement substantial alterations in its operations. First, to the extent a substantial alteration changes mandatory terms and conditions of employment, section 8(d) imposes upon an employer a duty to bargain concerning the decision to implement the alteration.⁵¹ Second, where there is a collective bargaining agreement in effect, section 8(d) prohibits employer action which modifies or otherwise changes any mandatory term or condition of employment contained in the agreement.⁵²

employment to encourage or discourage membership in any labor organization." 29 U.S.C. § 158(a)(3) (1976). Thus, violations of § 8(a)(3) generally require a showing of an employer's intention to discourage union membership. *See American Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 311 (1965); *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 805 (1945).

49. *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 34 (1967).

50. *Id.* See note 250 *infra* for further discussion of the Board's application of the "inherently destructive" doctrine in the context of relocations of bargaining unit work.

51. See notes 26-37 *supra* and accompanying text. Section 8(d) does not require either party to make concessions, if agreement cannot be made. 29 U.S.C. § 158(d) (1976). Once impasse in negotiations is reached, an employer is free to implement its decision. *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 318 (1965); *Newspaper Printing Corp. v. NLRB*, 692 F.2d 615, 620 (6th Cir. 1982). See notes 29-35 *supra* and accompanying text. It is important to note, however, that the right to unilaterally implement a change in terms and conditions of employment only extends to implementing an employer's last proposal. *Eddie's Chop Shop*, 165 N.L.R.B. 861 (1967). No greater benefits or change may be implemented. *Id.*

Regardless of whether an employer is obligated to bargain concerning the decision to implement a substantial alteration in its operations, it will, in any event, be obligated to bargain over the effects or impact that such a decision will have on bargaining unit employees under § 8(d) and (a)(5) of the Act. *See, e.g., First Nat'l Maintenance Corp. v. NLRB*, 452 U.S. 666, 681 (1981) (employer under duty to bargain over effects of partial closing); *NLRB v. Royal Plating & Publishing Co.*, 350 F.2d at 191, 196 (3d Cir. 1965) (employer must bargain over effects of plant closing); *Otis Elevator Co.*, 255 N.L.R.B. 235 (1981) (same); *American Needle & Novelty Co.*, 206 N.L.R.B. 534 (1979) (duty to bargain over effects of plant relocation); *Ozark Trailers, Inc.*, 161 N.L.R.B. 561 (1966) (same). Bargainable issues may include severance pay, seniority, pensions, and transfer rights, among others. *See NLRB v. Royal Plating & Publishing Co.*, 350 F.2d at 191.

52. See note 36 *supra* and accompanying text.

Although the Board and the courts have issued numerous decisions defining the scope of an employer's duty under section 8(d),⁵³ considerable disagreement remains as to the extent to which certain employer actions, such as a plant relocation, constitute unlawful conduct.⁵⁴ This disagreement is best understood by reviewing the Board and court decisions which concern an employer's bargaining duties with respect to a variety of substantial business alterations.

III. Judicial and Administrative Construction of the Duty to Bargain

The Board has long held that the decision to implement certain substantial alterations of a business which result in the termination of bargaining unit work is subject to the collective bargaining process.⁵⁵ As early as 1946, the Board held that an employer must bargain prior to making a decision to subcontract work performed by its employees.⁵⁶ In 1962, the Board reaffirmed its position concerning subcontracting decisions in *Town & Country Manufacturing Co.*⁵⁷ Significantly, the Board read the mandate of section 8(d) broadly, stating that "the elimination of unit jobs, albeit for economic reasons, is a matter within statutory phrase 'other terms and conditions of employment' and is a mandatory subject of collective bargaining within the meaning of Section 8(a)(5) of the Act."⁵⁸ The Board reasoned that,

53. See *Continental Ins. Co. v. NLRB*, 495 F.2d 44 (2d Cir. 1974), enforcing, 204 N.L.R.B. 1013 (1973); *Underwriters Adjusting Co.*, 214 N.L.R.B. 388 (1974); *Ramona's Mexican Food Prods., Inc.*, 203 N.L.R.B. 663 (1973), *aff'd*, 531 F.2d 390 (9th Cir. 1975).

54. See Harper, *Leveling the Road from Borg-Warner to First National Maintenance: The Scope of Mandatory Bargaining*, 68 VA. L. REV. 1447 (1982); Murphy, *Plant Relocation and the Collective Bargaining Obligation*, 59 N.C.L. REV. 5 (1980); Comment, *First National Maintenance Corp. v. NLRB: Partial Closings and the Duty to Bargain*, 48 BROOKLYN L. REV. 307 (1982).

55. *Fibreboard Paper Prods. Corp.*, 130 N.L.R.B. 1558 (1961) (subcontracting), supplemented, 138 N.L.R.B. 550 (1962), enforced, 322 F.2d 411 (D.C. Cir. 1963), *aff'd*, 379 U.S. 203 (1964); *Cooper Thermometer Co.*, 160 N.L.R.B. 1902 (1966) (transfer of employees), enforced, 376 F.2d 684 (2d Cir. 1967); *Dixie Ohio Express Co.*, 167 N.L.R.B. 573 (1967) (reorganization of operations), enforcement denied, 409 F.2d 10 (6th Cir. 1969); *Renton News Record*, 136 N.L.R.B. 1294 (1962) (automation). See Fastiff, *Changes in Business Operations: The Effects of the National Labor Relations Act and Contract Language on Employer Authority*, 14 SANTA CLARA LAW. 281 (1974); Tiballi, *Mandatory Subjects of Bargaining-Operational Changes*, 17 FLA. L. REV. 109 (1964); Note, *Application of the Mandatory-Permissive Dichotomy to the Duty to Bargain and Unilateral Action: A Review and Reevaluation*, 15 WM. & MARY L. REV. 918 (1974).

56. *Timken Roller Bearing Co.*, 70 N.L.R.B. 500 (1946), enforcement denied on other grounds, 161 F.2d 949 (6th Cir. 1947).

57. 136 N.L.R.B. 1022 (1962), enforced, 316 F.2d 846 (5th Cir. 1963).

58. 136 N.L.R.B. at 1027.

although the Act does not require an employer to yield to a union's demand that a subcontract not be made, "experience has shown . . . that candid discussion of mutual problems by labor and management frequently results in their resolution with attendant benefits to both sides."⁵⁹ The emphasis in *Town & Country* upon utilization of the collective bargaining process for the presentation and discussion of the parties' respective positions concerning major business decisions⁶⁰ laid the foundation for the Supreme Court's landmark decision in *Fibreboard Paper Products Corp. v. NLRB*.⁶¹

A. *Fibreboard*

In *Fibreboard*, the Supreme Court confronted the issue of whether an employer's purely economic decision to subcontract bargaining unit work was a "term and condition of employment" rendering it a mandatory subject of bargaining.⁶² Consistent with the Board's focus in *Town & Country*, the Court analyzed the employer's bargaining duty in terms of whether the subject at issue "was a problem of [such] vital concern to labor and management"⁶³ that it should be brought

59. *Id.*

60. *Id.*

61. 379 U.S. 203 (1964), *aff'g*, 138 N.L.R.B. 550 (1963).

62. 379 U.S. at 209. In *Fibreboard*, the employer operated a plant in which its unionized employees provided maintenance services. Upon determining that substantial cost savings were possible if it utilized outside contractors to perform maintenance work, the employer engaged the services of an outside contractor and laid off its maintenance workers without prior bargaining with their union. *Id.* at 206. The Board found that, although the employer was not motivated by union animus in its decision to subcontract out the plant's maintenance work, it had violated § 8(a)(5) of the Act by its failure to negotiate with the union with regard to its decision to subcontract its maintenance work. 130 N.L.R.B. 1558 (1961), *supplemented*, 138 N.L.R.B. 550 (1962). The District of Columbia Circuit court affirmed the Board's finding and enforced the Board order that the employer bargain with the union in good faith concerning its decision to subcontract. 322 F.2d 411 (D.C. Cir. 1963).

63. 379 U.S. at 211. The Board has broad authority to fashion appropriate remedial sanctions for an employer's unlawful failure to bargain over a change in its business operations. Section 10 of the NLRA stipulates that the Board, upon finding that an unfair labor practice has been committed, "shall issue . . . an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of [the Act] . . ." 29 U.S.C. § 160(c) (1976). In *Fibreboard Paper Prods. Corp.*, 379 U.S. 203, 216 (1964), the Supreme Court stated:

[Section 10(c)] "charges the Board with the task of devising remedies to effectuate the policies of the Act." The Board's power is a broad discretionary one, subject to limited judicial review. The Board's order will not be disturbed unless it can be shown that the order is a patent attempt to

“within the framework [of collective bargaining] established by Congress as the most conducive to industrial peace.”⁶⁴

The Court held that the employer's decision to subcontract unit work constituted the type of activity which could benefit from collective bargaining. It reasoned that the employer's decision was suitable for collective bargaining because industrial experience had demonstrated that such decisions could generally be amicably resolved, and the employer had merely replaced one group of employees with another without substantial change in his investment.⁶⁵

B. *Darlington*

In 1965, the Supreme Court issued its second major decision concerning an employer's duty under the Act with regard to substantial alterations in its enterprise: *Textile Workers Union of America v.*

achieve ends other than those which can fairly be said to effectuate the policies of the Act.

Id. at 216 (citations omitted).

Generally, where the Board has found a violation of the Act based upon an employer's unlawful unilateral action, it has ordered the employer to bargain in good faith with the union, to cease and desist from further actions which have been deemed to be unlawful, to restore the status quo through reinstatement with back pay of all terminated employees, and even to reestablish its operations. *See, e.g.*, *Jay's Foods, Inc.*, 228 N.L.R.B. 423 (1977) (unlawful subcontracting resulted in Board order requiring reinstatement with back pay plus interest and a complete abrogation of all subcontracts which were entered into prior to negotiations with the union), *enforced in part*, 573 F.2d 438 (7th Cir. 1978); *Ohio Brake & Clutch Corp.*, 244 N.L.R.B. 35 (1979) (Board ordered the employer to bargain over decision and effects of a relocation); *Local 57, Int'l Ladies Garment Workers Union v. NLRB*, 374 F.2d 295 (D.C. Cir.) (following employer's unlawful plant relocation, Board ordered full reinstatement of employees, compensation for lost earnings and employer bargaining irrespective of union majority, following the relocation), *cert. denied*, 387 U.S. 942 (1967). Section 10(j) of the Act authorizes the Board, “upon issuance of a complaint . . . charging that any person has engaged in or is engaging in an unfair labor practice, to petition any United States district court . . . for appropriate temporary relief or restraining order.” 29 U.S.C. § 160(j) (1976). The Board has sought and obtained such relief in the context of cases involving relocations of bargaining unit work. *See* note 199 *infra*.

64. 379 U.S. at 211.

65. *Id.* at 213. Justice Stewart, joined by Justices Douglas and Harlan, filed a concurring opinion. *Id.* at 217. Justice Stewart sought to limit the scope of the majority opinion. He stated that the majority opinion did not decide that every managerial decision which terminates an individual's employment would be necessarily held to be a mandatory subject of bargaining. *Id.* at 218. In particular, he remarked:

Nothing the Court holds today should be understood as imposing a duty to bargain collectively regarding such managerial decisions which lie at the core of entrepreneurial control. Decisions concerning the commitment of

*Darlington Manufacturing Co.*⁶⁶ Unlike *Fibreboard*, which involved an employer's obligation under section 8(a)(5) of the Act in the context of a well-established bargaining relationship, *Darlington* arose under section 8(a)(3)⁶⁷ in the course of a union's drive to organize the employees at one of the employer's plants.⁶⁸ Because of its section 8(a)(5) implications, however, the *Darlington* case warrants more than passing consideration.

In 1956, the Textile Workers Union commenced organizational activity among the *Darlington* mill employees.⁶⁹ The employer responded in various ways, including alleged threats to close its facility should the union be successful in an NLRB election.⁷⁰ When the union won the election, *Darlington* closed the mill in November, 1956 and sold the plant's machinery and equipment in its entirety one month later.⁷¹ The union countered by filing unfair labor practice charges alleging violations of sections 8(a)(1), (3) and (5) of the National Labor Relations Act.⁷²

The Board found that *Darlington* was part of a single integrated enterprise, *Deering Milliken & Co.*⁷³ By closing an entire facility in response to the union's victory in the representation election, *Deering*

investment capital and the basic scope of the enterprise are not in themselves primarily about conditions of employment, though the effect of the decision may be necessarily to terminate employment.

Id. at 223.

66. 380 U.S. 263 (1965).

67. 29 U.S.C. § 158(a)(3) (1976). *See* notes 48-50 *supra* and accompanying text for a discussion of § 8(a)(3).

68. 380 U.S. at 266-67.

69. *Id.* at 265.

70. *Id.*

71. *Id.* at 266.

72. *Id.* at 266-67. Pursuant to § 10(b) of the NLRA, 29 U.S.C. § 160(b) (1976), an unfair labor practice case is initiated when a private party files a "charge" with the appropriate NLRB regional office that an unfair labor practice has been committed. 29 C.F.R. § 102.9 (1982). The regional office investigates the charge, and the regional director decides whether to issue a complaint. *Id.* § 102.15. If a complaint is issued, a Board attorney from the regional office prosecutes the case, which is tried in a formal hearing before an administrative law judge (ALJ). *Id.* § 102.35. The ALJ makes findings of fact and then issues a recommended decision and order either indicating the appropriate remedy or suggesting that the complaint be dismissed. *Id.* § 102.45. The charging party, respondent, or General Counsel of the NLRB in Washington, D.C., may file exceptions to this recommended order. *Id.* § 102.46. If no exceptions are filed, the order automatically becomes final as an order issued by the Board. *Id.* If timely exceptions are filed, the case is transferred to the NLRB, which then issues its own final decision and order. *Id.*; *see*, Comment, *supra* note 54, at 315-16.

73. 139 N.L.R.B. 241, 252 (1962).

Milliken was found to have violated sections 8(a)(1), (3), and (5).⁷⁴ The Fourth Circuit, however, denied enforcement of the Board's Decision and Order, holding that the employer had an absolute right to close all or part of its business regardless of its motivation for doing so.⁷⁵

Before the Supreme Court, the union contended that an employer who goes completely out of business to avoid unionization violates the Act.⁷⁶ Rejecting the union's argument, the Court observed:

A proposition that a single businessman cannot choose to go out of business if he wants to, would represent such a startling innovation that it should not be entertained without the clearest manifestation of legislative intent or unequivocal judicial precedent so construing the Labor Relations Act. We find neither.⁷⁷

It is important to note that since *Darlington* is a section 8(a)(3) case,⁷⁸ it did not raise the question of whether section 8(a)(5) requires an employer to bargain concerning a purely business decision to terminate its enterprise in its entirety.⁷⁹ However, the case has been relied upon repeatedly for the proposition that an employer's decision to terminate his entire enterprise is beyond the legitimate reach of sections 8(d) and 8(a)(5).⁸⁰

C. First National Maintenance

After *Darlington*, the Board attempted to place further limitations on an employer's right to implement alterations in its business operations.⁸¹ Although the Board did continue to provide lip service⁸² to

74. *Id.* at 244-53.

75. 325 F.2d 682 (4th Cir. 1963).

76. 380 U.S. at 269-70.

77. *Id.* at 270.

78. *Id.* at 268. Section 8(a)(3) prohibits an employer from engaging in discrimination in regard to any term or condition of employment so as to discourage labor membership organization. 29 U.S.C. § 158(a)(3) (1976).

79. 380 U.S. at 268. See Rabin, *Fibreboard and the Termination of the Bargaining Unit Work: The Search for Standards in Defining the Scope of the Duty to Bargain*, 71 COLUM. L. REV. 803, 818 (1971); Schwarz, *Plant Relocation or Partial Termination—The Duty to Decision Bargain*, 39 FORDHAM L. REV. 81, 85-86 (1970).

80. See *Brockway Motor Trucks Div. of Mack Trucks v. NLRB*, 582 F.2d 720 (3d Cir. 1978); *Morrison Cafeterias Consol., Inc. v. NLRB*, 431 F.2d 254, 257 (8th Cir. 1970); *NLRB v. Royal Plating & Polishing Co.*, 350 F.2d 191, 196 (3d Cir. 1965); *NLRB v. Burns Int'l Detective Agency*, 346 F.2d 897, 902 (8th Cir. 1965).

81. *Metro Transp. Servs. Co.*, 218 N.L.R.B. 534 (1975) (employer has duty to bargain over partial plant closing); *Ozark Trailers, Inc.*, 161 N.L.R.B. 561 (1966) (same); *L.E. Davis*, 237 N.L.R.B. 1042 (1978) (economically motivated decision to convert restaurant into cafeteria held to be mandatory bargaining subject), *enforced*

Justice Stewart's admonition in *Fibreboard* that the duty to bargain does not reach to managerial "decisions concerning the commitment of capital and the basic scope of the enterprise,"⁸³ the Board continued to strictly limit various employer actions.⁸⁴ The Board's restriction on one such major business change reached its apex and was overruled by the Supreme Court in *NLRB v. First National Maintenance Corp.*⁸⁵ The facts before the Court in *First National Maintenance* presented the middle ground between *Fibreboard* and *Darlington*—the partial closure of a business for economic reasons.⁸⁶

The issue before the Supreme Court was whether an employer's decision to partially close its business solely for economic reasons was within the scope of its duty to bargain under section 8(d). As in *Fibreboard*,⁸⁷ the Court emphasized that "[c]entral to the achieve-

sub nom. Davis v. NLRB, 617 F.2d 1264 (7th Cir. 1980); McLoughlin Mfg. Corp., 182 N.L.R.B. 958 (1970) (duty to bargain over relocation), *supplementing* 164 N.L.R.B. 140 (1967), *enforced as modified sub nom.* International Ladies' Garment Workers Union v. NLRB, 493 F.2d 907 (D.C. Cir. 1972); Morco Indus., Inc., 255 N.L.R.B. 146 (1981) (same). Cf. Summit Tooling Co., 195 N.L.R.B. 497 (1972) (employer under no duty to terminate distinct line of business), *enforced sub nom.*, United Auto. Workers v. NLRB, 470 F.2d 422 (D.C. Cir. 1973).

82. See Otis Elevator Co., 255 N.L.R.B. 235, 246 (1981); Brockway Motor Trucks, Div. of Mack Trucks, 230 N.L.R.B. 1002, 1003 (1977), *rev'd*, 582 F.2d 720 (3d Cir. 1978).

83. 379 U.S. at 223.

84. See Otis Elevator Co., 255 N.L.R.B. 235 (1981); Brockway Motor Trucks, Div. of Mack Trucks, 230 N.L.R.B. 1002 (1977), *rev'd*, 582 F.2d 720 (3d Cir. 1978); Royal Typewriter Co., 209 N.L.R.B. 1006 (1974), *enforcement denied*, 533 F.2d 1030 (3d Cir. 1976); Acme Indus. Prods., 180 N.L.R.B. 114 (1969), *enforcement denied*, 439 F.2d 40 (6th Cir. 1971).

85. 452 U.S. 666 (1981).

86. In *First Nat'l Maintenance*, the employer provided cleaning and maintenance services for commercial customers, including several nursing homes. One of its nursing homes, Greenpark, paid First National Maintenance (FNM) a fixed professional service fee and also reimbursed its labor costs. 452 U.S. at 668. In 1976, Greenpark announced that it would pay FNM only half of its original service fee. *Id.* at 668. After determining that it was losing money at the lower service fee, FNM discontinued its operations at Greenpark without notifying or consulting with the union certified to represent its employees there. *Id.* at 669. In response to FNM's unilateral action, the union filed unfair labor practice charges alleging failure to bargain concerning the decision to discontinue servicing Greenpark. *Id.* at 670. The Board held that the company was under an obligation to bargain with the union concerning its decision to cease services at Greenpark. *First Nat'l Maintenance Corp.*, 242 N.L.R.B. 462 (1979). The Second Circuit affirmed the Board's decision and enforced its order that the company bargain in good faith over its decision to partially close. 627 F.2d 596 (2d Cir. 1980). The Supreme Court reversed. 452 U.S. 666 (1981). The Court held that, while an employer is obligated to bargain over the effects of a partial closing decision, it is under no duty to bargain with respect to the decision itself. *Id.* at 681, 686.

87. *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203 (1964) (discussed at notes 60-61 *supra* and accompanying text).

ment of [creating industrial peace] is the promotion of collective bargaining as a method of defusing and channeling conflict between labor and management."⁸⁸ Building upon, and indeed quoting from, the analysis previously applied in *Fibreboard*,⁸⁹ the Court set forth a balancing test to determine whether a particular subject constitutes a mandatory subject of bargaining: "*bargaining over management decisions which have a substantial impact on the availability of employment should be required only if the benefit, for labor-management relations and the collective bargaining process, outweighs the burden placed on the conduct of the business.*"⁹⁰ The Court underscored that the proper focus when determining an employer's bargaining duty with respect to a particular managerial decision is whether the decision is "suitable for resolution within the collective bargaining framework."⁹¹

Applying its test to the facts before it, the Court held that the employer's decision to partially close its business operation was not amenable to collective bargaining and, therefore, "[was] *not* part of Section 8(d)'s 'terms and conditions' over which Congress has mandated bargaining."⁹²

While the Supreme Court in *First National Maintenance* appeared to limit the scope of its holding to cases involving partial closures,⁹³ the Board's General Counsel⁹⁴ has instructed the Board's Regional Directors to analyze cases involving employer decisions to substantially alter business operations, including but not limited to partial closures, to determine whether each decision is "amenable to resolution through the collective bargaining process."⁹⁵ The General Counsel's approach

88. 452 U.S. at 674.

89. 379 U.S. at 203.

90. 452 U.S. at 679 (emphasis added).

91. *Id.* at 680 (quoting *Fibreboard*, 379 U. S. at 214).

92. *Id.* at 686. The Supreme Court noted that "under § 8(a)(5) bargaining over the effects of a [partial closing] decision must be conducted in a meaningful manner and at a meaningful time, and the Board may impose sanctions to insure its adequacy." *Id.* at 681-82.

93. 452 U.S. at 686 n.22. The Court noted that it "intimate[d] no view as to other types of management decisions, such as plant relocations, sales, other kinds of subcontracting, automation, etc., which are to be considered on their particular facts." *Id.*

94. NLRB General Counsel Memorandum 81-57, 1981 Lab. Rel. Yearbook (BNA) 315 (November 30, 1981) [hereinafter cited as General Counsel's Memorandum].

95. *Id.* at 316. In many cases, however, the Board and the circuit courts have seemingly ignored *First Nat'l Maintenance* in determining whether an employer has an obligation to bargain concerning certain managerial decisions other than partial closures. See Tocco Div. of Park-Ohio Indus., Inc., 257 N.L.R.B. 413 (1981) (em-

provides some indication that the Board, and perhaps the courts, will read *First National Maintenance* broadly and apply it as a general test by which to determine mandatory subjects of bargaining.

IV. The Duty to Maintain Terms of a Collective Bargaining Agreement Under Section 8(d)

Although an employer which is party to a collective bargaining agreement satisfies its duty to bargain with respect to a decision to change its operations, the Act may still prohibit unilateral implementation of that decision by the employer during the effective term of its agreement.⁹⁶ Section 8(d) of the Act prohibits midterm repudiation or modification by one party of the terms of a collective bargaining agreement covering mandatory subjects of bargaining, absent the consent of the other.⁹⁷ Moreover, violations of section 8(d) are also held to violate the good faith bargaining requirement of section 8(a)(5) of the Act.⁹⁸ Thus, in *Nassau County Health Facilities Association*,⁹⁹ an employer's refusal to grant wage increases required by a

ployer failed to bargain over decision to relocate), *enforced*, 112 L.R.R.M. (BNA) 3089 (6th Cir. 1983); *General Motors Corp., Inland Div.*, 257 N.L.R.B. 820 (1981) (employer did not violate § 8(a)(5) by subcontracting without first bargaining since decision was economically motivated, employer had past practice of subcontracting, and there were minimal adverse effects on bargaining unit employees); *Olinkraft, Inc.*, 252 N.L.R.B. 1329 (1980) (no per se duty to decision bargain over subcontracting, absent evidence of substantial adverse impact on employees), *enforced in part and remanded*, 666 F.2d 302 (5th Cir. 1982). *But see* *Bob's Big Boy Family Restaurants, Div. Marriot Corp.*, 264 N.L.R.B. No. 178, 111 L.R.R.M. 1354 (1982) (Board distinguished *First Nat'l Maintenance* in case concerning employer's decision to subcontract).

96. 29 U.S.C. § 158(d). *See* note 102 *infra* and accompanying text.

97. *Id.* Section 8(d)'s protection of collective bargaining agreements has been described as "convaluted." Summers, *Labor Law Decisions of the Supreme Court, 1961 Term*, ABA LAB. REL. LAW PROC. 51, 67 (1962), and "mysterious", *The Developing Labor Law*, in ABA SEC. LAB. REL. LAW 477 (C. Morris ed. 1971). Indeed, one commentator has gone so far as to predict that the Supreme Court "may be even more puzzled than was Alice in the queen's croquet game" when it attempts to interpret section 8(d). Summers, *supra*, at 67.

98. *Allied Chem. & Alkali Workers of Am., Local Union No. 1 v. Pittsburgh Plate Glass Co., Chem. Div.*, 404 U.S. 157, 159, 183-88 (1971) (citing with approval *NLRB v. Scam Instrument Corp.*, 394 F.2d 884, 886-87 (7th Cir.), *cert. denied*, 393 U.S. 980 (1968)); *NLRB v. C & C Plywood Corp.*, 385 U.S. 421, 425 (1967). *See* *NLRB v. Hyde's Supermarket*, 339 F.2d 568, 571-72 (9th Cir. 1964); *Teamsters Local Union No. 574*, 259 N.L.R.B. 344, 350 (1981); *KCW Furniture Co.*, 247 N.L.R.B. 541 (1979), *enforced*, 634 F.2d 436 (9th Cir. 1980); *Oak Cliff-Golman Baking Co.*, 207 N.L.R.B. 1063 (1973), *enforced*, 505 F.2d 1302, *cert. denied*, 423 U.S. 826 (1975); *Milk Drivers Local 783*, 147 N.L.R.B. 264 (1964); *Proctor Mfg. Corp.*, 131 N.L.R.B. 1166 (1961).

99. 227 N.L.R.B. 1680 (1977).

collective bargaining agreement¹⁰⁰ was deemed a violation of sections 8(d) and 8(a)(5). Despite the employer's assertion that it was unable to pay the contractual wage, the Board found that the employer unilaterally modified the terms of its contract.¹⁰¹ The Board explained that:

An employer acts in derogation of his bargaining obligation under Section 8(d) of the Act, which was designated to stabilize during a contract term agreed-upon conditions of employment, and hence violates Section 8(a)(5), when without consent of the union, he modifies terms and conditions of employment contained in a contract between the employer and the union, or otherwise repudiates his undertakings under the contract before the term of the contract has run its course—and *this even though he has previously offered to bargain with the union on the subject and the union has refused*.¹⁰²

Section 8(d), however, insulates only those contract terms embodied in an agreement which concern mandatory subjects of bargaining.¹⁰³ In *Allied Chemical & Alkali Workers of America v. Pittsburgh Plate Glass Co., Chemical Division*,¹⁰⁴ the Supreme Court reversed a Board decision¹⁰⁵ that an employer's unilateral change in the benefits of retirees set forth in an existing collective agreement constituted a midterm modification in violation of section 8(d).¹⁰⁶ The Court reasoned that section 8(d) protects only those contract terms which concern mandatory subjects of bargaining.¹⁰⁷ Since retirement

100. *Id.* at 1680-81.

101. *Id.* at 1686.

102. *Id.* at 1683 (citing *C & S Indus., Inc.*, 158 N.L.R.B. 454, 456-58 (1966)) (emphasis added). Nor is it any defense to an employer's modification or repudiation of such a contract during midterm that it has bargained to impasse concerning the terms it wishes to modify or abandon, since such terms are "frozen as . . . term[s] or condition[s] of employment for the contract period involved *absent mutual consent* of the contracting parties to their alteration or qualification . . ." *NLRB v. Scam Instrument Corp.*, 394 F.2d at 887 (emphasis added). *Accord* *N.L. Indus., Inc. v. NLRB*, 536 F.2d 786, 790 (8th Cir. 1976); *Oak Cliff-Golman Baking Co.*, 207 N.L.R.B. at 1064.

103. *Allied Chem. & Alkali Workers of Am., Local Union No. 1 v. Pittsburgh Plate Glass Co., Chem. Div.*, 404 U.S. 157 (1971).

104. *Id.*

105. 177 N.L.R.B. 911 (1969).

106. 404 U.S. at 183-86.

107. *Id.* at 186-87. In particular, the Court reasoned: "Accordingly, just as § 8(d) defines the obligation to bargain to be with respect to mandatory terms alone, so it prescribes the duty to maintain only mandatory terms without unilateral modification for the duration of the collective-bargaining agreement." *Id.* at 185-86. Thus, as with the duty to bargain, the force of the Act does not extend to the maintenance of permissive subjects even where those subjects are contained in a contract. *Id.*

benefits were deemed to be permissive subjects of bargaining,¹⁰⁸ the employer was not obligated under section 8(d) to maintain such benefits, even while the parties' contract was still in effect.¹⁰⁹ Accordingly, under *Pittsburgh Plate Glass*, if a contract term constitutes a permissive subject of bargaining, section 8(d) does not prohibit unilateral termination or modification thereof during the effective term of that agreement.¹¹⁰

The principles discussed in the foregoing section have been recently applied by the courts¹¹¹ and the Board in the context of relocations of bargaining unit work.¹¹²

V. An Employer's Right to Relocate Bargaining Unit Work: NLRB and Court Decisions

A. The Duty to Bargain

1. Before *First National Maintenance*

In a series of decisions after *Fibreboard*, and prior to *First National Maintenance*, the Board consistently held that an employer must bargain over its decision to terminate operations at one facility and transfer bargaining unit work to another facility.¹¹³ The Board has applied the same standard concerning the requirement to bargain

108. *Id.* at 188.

109. *Id.* at 186-87.

110. The repudiation or modification of a contract term which constitutes a permissive subject of bargaining may, however, be a breach of contract for which the injured party might have another remedy, such as a suit for damages under § 301 of the Act. 29 U.S.C. § 185 (1976). See *Pittsburgh Plate Glass*, 404 U.S. at 186-87 ("[o]nce parties have made a collective bargaining contract the enforcement of that contract should be left to the usual processes of the law and not to the National Labor Relations Board").

111. See notes 179-185, 201 *infra* and accompanying text.

112. See notes 162-227 *infra* and accompanying text.

113. *Whitehall Packing Co.*, 257 N.L.R.B. 193 (1981); *Otis Elevator Co.*, 255 N.L.R.B. 235 (1981); *Ohio Brake & Clutch Corp.*, 244 N.L.R.B. 35 (1979); *Coated Prod., Inc.*, 237 N.L.R.B. 159 (1978), *enforced*, 106 L.R.R.M. 2364 (3d Cir. 1980); *P.B. Mutrie Motor Transp., Inc.*, 226 N.L.R.B. 1325 (1976); *Stone & Thomas*, 221 N.L.R.B. 573 (1975); *Burroughs Corp.*, 214 N.L.R.B. 571 (1974); *R.L. Sweet Lumber Co.*, 207 N.L.R.B. 529 (1973), *enforced*, 515 F.2d 285 (10th Cir.), *cert. denied*, 423 U.S. 986 (1975); *American Needle & Novelty Co.*, 206 N.L.R.B. 534 (1973); *Regal Aluminum, Inc.*, 190 N.L.R.B. 468 (1971); *McLoughlin Mfg. Corp.*, 182 N.L.R.B. 958 (1970), *enforced as modified sub nom.* *International Ladies Garment Workers Union v. NLRB*, 463 F.2d 907 (D.C. Cir. 1972); *Plymouth Indus., Inc.*, 177 N.L.R.B. 607 (1969), *enforced*, 435 F.2d 558 (6th Cir. 1970); *Weltronic Co.*, 173 N.L.R.B. 235 (1968), *enforced*, 419 F.2d 1120 (6th Cir. 1969); *Standard Handkerchief Co.*, 151 N.L.R.B. 15 (1965).

whether such transfers are to be conducted before, during or after the effective period of a collective bargaining agreement.¹¹⁴

In one of its first decisions after *Fibreboard* concerning relocation, the Board held that an employer must bargain over the decision to relocate bargaining unit work.¹¹⁵ In *Standard Handkerchief Co.*,¹¹⁶

114. See, e.g., Tocco Div. of Park-Ohio Indus., 257 N.L.R.B. at 415 (employer required to bargain over decision to relocate after expiration of contract); Otis Elevator Co., 255 N.L.R.B. at 235 (employer required to bargain over decision to relocate during term of contract); Stone & Thomas, 221 N.L.R.B. at 577 (employer required to bargain over decision to relocate after certification of union as employees collective bargaining representative but before contract negotiated).

115. *Standard Handkerchief Co.*, 151 N.L.R.B. 15 (1965). The Board's approach concerning an employer's duty to bargain over relocation had developed over a number of years. The initial trend was to require bargaining over the decision to relocate. See *Gerity Whitaker Co.*, 33 N.L.R.B. 393 (1941), *enforced as modified per curiam*, 137 F.2d 198 (6th Cir. 1942); *Brown-McLaren Mfg. Co.*, 34 N.L.R.B. 984 (1941); *California Portland Cement Co.*, 101 N.L.R.B. 1436 (1952), *supplemented*, 103 N.L.R.B. 1375 (1953). *But see* *Brown Truck & Trailer Mfg. Co.*, 106 N.L.R.B. 999 (1953) (duty to bargain limited to effects of decision to relocate). The Board's position was eventually clarified in *Town & Country Mfg. Co.*, 136 N.L.R.B. 1022 (1962), *enforced*, 316 F.2d 846 (5th Cir. 1963), and *Fibreboard Paper Corp.*, 138 N.L.R.B. 550 (1962), *enforced*, 322 F.2d 411 (D.C. Cir. 1963), *aff'd*, 379 U.S. 203 (1964). For a detailed discussion of the evolution of the Board's policy in this area, see Note, *Duty to Bargain: Subcontracting, Relocation and Partial Termination*, 55 GEO. L.J. 879, 901-08 (1967).

116. 151 N.L.R.B. at 15. The Board has held that an employer must notify and offer to commence bargaining with the union representing its employees concerning a decision to relocate "once he has reached the point of thinking seriously about taking such an extraordinary step. . . ." *Ozark Trailers, Inc.*, 161 N.L.R.B. 561, 569 (1966); *see also* *McLoughlin Mfg. Corp.*, 182 N.L.R.B. 958 (1970). However, an employer is relieved of its obligation to notify and bargain with a union over a decision to relocate all or part of its operations where the relocation does not detrimentally impact on bargaining unit employees. See *Morco Indus. Inc.*, 255 N.L.R.B. 146 (1981) (employer relieved of its obligation to bargain over economically motivated decision to relocate work from plant in Tampa, Florida to a new plant in Long Beach, Mississippi, since Tampa facility continued to operate at full capacity and no layoffs of bargaining unit employees required); *Rochester Tel. Corp.*, 190 N.L.R.B. 161 (1971) (employer did not unlawfully fail to bargain over decision to implement time measurement plan where union's evidence failed to establish impact on bargaining unit); *Westinghouse Elec. Corp.*, 153 N.L.R.B. 443 (1965) (employer not required to bargain over decision to subcontract bargaining unit work). In the context of the employer's decision to subcontract bargaining unit work, the Board in *Westinghouse* stated:

[A]n employer's obligation to give prior notice, and an opportunity to bargain concerning particular instances of subcontracting, does not normally arise unless the subcontracting will effect some change in the terms and conditions of employment of the employees involved. Consistent with this view, the Board has refused to find a violation of Section 8(a)(5) where the employer's allegedly unlawful unilateral action resulted in no "significant detriment" to employees in the appropriate unit.

Id. at 446.

the employer operated a plant in New York City. For strictly economic reasons, the employer moved its plant elsewhere in New York State without notifying or bargaining with the union representing its employees.¹¹⁷ The Board held that "by proceeding unilaterally, and without notice to the Union to move its plant . . . Respondent failed and refused to bargain in good faith with the collective bargaining representative of its employees."¹¹⁸ Consistent with this decision, a three-member panel of the Board in *American Needle & Novelty Co.*¹¹⁹ proclaimed that "[i]t is well-settled that an employer has an obligation to bargain concerning a decision to relocate unit work."¹²⁰

117. 151 N.L.R.B. at 17. The General Counsel conceded that Respondent's decision to move its plant from New York City to Amsterdam was not discriminatorily motivated, and was made only for economic reasons. *Id.* Nevertheless, the General Counsel contended that the employer unlawfully failed to bargain in good faith with the union over its decision to move its plant. *Id.*

118. *Id.* at 18 (relying on *Town & Country Mfg. Co.*, 136 N.L.R.B. 1022, *enforced on other grounds*, 316 F.2d 846 (5th Cir. 1963)). See *Fibreboard Paper Prods. Corp.*, 138 N.L.R.B. 550 (1962), *enforced*, 322 F.2d 411 (D.C. Cir 1963), *aff'd*, 379 U.S. 203 (1964).

119. 206 N.L.R.B. 534 (1973).

120. *Id.* A union may waive its statutory right to bargain concerning an employer's relocation of bargaining unit work. *Tocco Div. of Park-Ohio Indus.*, 257 N.L.R.B. 413 (1981), *enforced*, 112 L.R.R.M. 3089 (BNA) (6th Cir. 1983). However, the Board and the courts require that a waiver of bargaining rights must be "clear and unmistakable." *Tocco Div. of Park-Ohio Indus.*, 257 N.L.R.B. at 414; *NLRB v. Pepsi-Cola Distrib. Co.*, 646 F.2d 1173 (6th Cir. 1981), *cert. denied*, 102 S. Ct. 1993 (1982); *Beacon Journal Publishing Co. v. NLRB*, 401 F.2d 366 (6th Cir. 1968); *C & C Plywood*, 148 N.L.R.B. 414, 416, *enforcement denied*, 351 F.2d 224 (9th Cir. 1965), *rev'd and remanded*, 385 U.S. 421 (1967). See *Walter B. Cooke, Inc.*, 262 N.L.R.B. No. 74 (1982), 111 L.R.R.M. 1152 (1982) (where contract expressly permitted subcontracting, unilateral exercise of employer's right found to be lawful); *Amoco Prod. Co.*, 233 N.L.R.B. 290 (1977) (contract reserved to employer the right to make changes in the scope of the bargaining unit). *Consolidated Foods Corp.*, 183 N.L.R.B. 832 (1970) (contract provided that "the employer shall have the exclusive right to at all times change, modify, or cease its operation, processes, or production . . ."); *International Shoe Co.*, 151 N.L.R.B. 693 (1965) (the employer retained the "sole" right to decide who and how many employees to hire and how to sell and distribute the company's product). *But see AFC Indus., Inc.*, 231 N.L.R.B. 83 (1977) (absence of contractual restriction on subcontracting does not constitute waiver of union's right to bargain over decision), *enforced*, 592 F.2d 422 (8th Cir. 1979); *Universal Sec. Instruments, Inc. v. NLRB*, 649 F.2d 247 (4th Cir. 1981) (no waiver of right to bargain over closing even though contract contained broad management rights clause), *cert. denied*, 454 U.S. 965 (1981).

A union may also waive its right to bargain over an employer's decision to relocate by its failure to request bargaining once it has been notified of the impending decision. See *Reiter's Dairy, Inc.*, 9 N.L.R.B. ADVICE MEMO REP. ¶ 19,102 (June 15, 1982) (union's business agent, once having learned of employer's impending decision to relocate, failed to request decision bargaining); *Harnischfeger Corp.*, 8 N.L.R.B. ADVICE MEMO. REP. ¶ 18,197 (July 31, 1981) (union waived right to decision bar-

Employers, relying upon Justice Stewart's oft-cited concurrence in *Fibreboard*,¹²¹ have attempted to justify their failure to bargain over a decision to relocate bargaining unit work on the grounds that an economically motivated decision to terminate operations at one plant and transfer the work to another plant is not a mandatory subject of bargaining.¹²² They have argued that such a decision is removed from the realm of mandatory bargaining because it involves a significant withdrawal of capital affecting the scope and ultimate direction of the enterprise and lies at the very core of entrepreneurial control.¹²³

Illustrative of the Board's reaction to these employer arguments is *Otis Elevator Co.*¹²⁴ In *Otis Elevator*, the employer operated a unionized plant in New Jersey.¹²⁵ As part of a plan to restructure its entire research and development operations, the employer spent in excess of three million dollars to construct a new research and development center in Connecticut.¹²⁶ Thereafter, during the term of its collective

gain); *Allen Materials, Inc.*, 8 N.L.R.B. ADVICE MEMO. REP. ¶ 18,233 (Sept. 30, 1981) (no timely demand for decision bargaining); *cf. Kimberly Clark Corp.*, 8 N.L.R.B. ADVICE MEMO. REP. ¶ 18,235 (Sept. 30, 1981) (opportunity to bargain rejected). For a further discussion of the Board's application of these waiver doctrines, see note 244 *infra*.

121. 379 U.S. at 223 (Stewart, J., concurring).

122. See *Otis Elevator Co.*, 255 N.L.R.B. 235 (1981); *International Harvester Co.*, 227 N.L.R.B. 85 (1976), *enforcement denied*, 618 F.2d 85 (9th Cir. 1980); *Transmarine Navigation Corp.*, 152 N.L.R.B. 998 (1965), *enforcement denied and remanded for reconsideration on the merits*, 380 F.2d 933 (9th Cir. 1967), *on remand*, 170 N.L.R.B. 389 (1968).

123. See cases cited at note 122 *supra*.

124. 255 N.L.R.B. 235 (1981).

125. *Otis*, a wholly owned subsidiary of United Technologies, is a New Jersey corporation engaged in the manufacture, research, development, sale, and distribution of elevators and related products. *Otis* owns and operates a number of facilities, including a facility in Mahwah, New Jersey. *Id.* at 241. Local 989, United Automobile, Aerospace and Agricultural Implement Workers of America represents a unit of professional and technical employees in *Otis*' engineering division, which is headquartered in Mahwah, New Jersey. In December, 1977, there were approximately 274 employees in the bargaining unit. The parties entered into a collective bargaining agreement in April 1977 which was effective until March 31, 1980. *Id.* at 242 n.1.

126. *Id.* at 236. In 1975, United Technologies Corporation acquired *Otis*. At the time of the takeover it was determined that *Otis*' engineering activity was very diffuse; the company's research and development activities were being performed in many locations throughout New Jersey, New York, Colorado and Canada and there was some overlapping of functions. United Technologies maintained a major research and development center with approximately 1,000 employees in East Hartford, Connecticut. *Id.* at 241. Following recommendations by a consulting firm and after its review of *Otis*' engineering operations, United's board of directors decided to centralize *Otis*' research and development operations with the parent corporation's facilities in and around the Hartford, Connecticut area. Thus, in 1977, with construction of a new facility already under way in East Hartford, the company notified

bargaining agreement and without first bargaining with the union over its decision, the company relocated 17 of its 350 bargaining unit employees and its research and development operations to the new facility in Connecticut.¹²⁷ The Board held that Otis' actions violated section 8(a)(5) of the Act.¹²⁸

Otis had contended that the magnitude of its corporate reorganization and capital expenditure made the decision to transfer work improper for collective bargaining.¹²⁹ The Board rejected the employer's argument, however, reasoning that, (1) although it consolidated its research and development operations in one location, the employer continued to perform the relocated work, albeit at a different location; (2) such actions did not constitute a major corporate reorganization; and (3) while the employer spent in excess of three million dollars to construct a new facility, this investment did not signal any change in the direction of the employer's activities, or in the character of its enterprise.¹³⁰

Local 989 of its decision to consolidate and restructure Otis' engineering functions. *Id.* at 242.

127. *Id.* at 236. The union responded to Otis' unilateral relocation by filing a charge with the Board alleging that Otis violated § 8(a)(1) and (5) of the Act by refusing to bargain with the union over its decision to relocate work from Mahwah, New Jersey to East Hartford, Connecticut, and the effects of that decision on unit employees. *Id.* at 241.

128. *Id.* at 235.

129. *Id.* Otis argued that the transfer of employees and the construction of the new facility in Connecticut involved such a substantial shift in its assets and operations that bargaining about the decision to transfer the 17 unit employees would be a significant abridgment of its freedom to invest its capital and manage its business. *Id.*

130. *Id.* The Board explained that bargaining with the union concerning the transfer of 17 unit employees would not significantly abridge Otis' prerogative to carry on its business. Moreover, while recognizing that Otis spent in excess of three million dollars to construct a new facility to house the relocated work, the Board noted that Otis continued to design and manufacture elevators, albeit with modernized facilities and with a more expeditious arrangement of its research and development personnel. Thus, the Board explained, Otis had not undergone a basic capital reorganization whereby it conveyed any portion of its assets or operations to another entity, terminated any of its activities or liquidated any of its holdings in achieving its objectives. *Id.* Cf. *National Car Rental System, Inc.*, 252 N.L.R.B. 159 (1980) (Board held that employer did not unlawfully fail to bargain concerning its decision to sell most of its truck and lease accounts, close its existing Newark, New Jersey facility and transfer all remaining accounts to another facility, reasoning that the employer's decision "involved a 'significant investment or withdrawal of capital' as to 'affect the scope and ultimate direction of the enterprise' and was essentially financial and managerial in nature") (relying on *General Motors Corp., GMC Truck & Coach Div.*, 191 N.L.R.B. 951 (1971), *enforced sub nom.* *International Union, United Auto. Workers of Am. Local 864 v. NLRB*, 470 F.2d 422 (D.C. Cir 1972)), *enforced as modified*, 672 F.2d 1182 (3d Cir. 1982).

The circuit courts have not always agreed with the Board as to an employer's duty to bargain concerning a relocation, and, on occasion, have refused to enforce Board orders requiring employers to bargain about decisions to transfer unit work.¹³¹ Thus, in *NLRB v. Transmarine Navigation Corp.*,¹³² the Ninth Circuit denied enforcement of a Board order requiring the employer to bargain with the union over its economically motivated decision to terminate its Los Angeles harbor operations and relocate to Long Beach, California.¹³³ The company

131. See, e.g., *NLRB v. International Harvester Co.*, 618 F.2d 85 (9th Cir. 1980) (company which was losing \$10,000,000 per month on "fleet sales" of trucks under no duty to bargain over decision to reorganize its marketing structure and phase out fleet sales since it was highly unlikely that bargaining would have ameliorated the company's financial difficulties); *NLRB v. Acme Indus. Prods.*, 439 F.2d 40 (6th Cir. 1971) (no obligation to bargain over decision to relocate standard production unit to another plant); *NLRB v. Thompson Transp. Co.*, 406 F.2d 698, 703 (10th Cir. 1969) (no obligation to bargain over closing of a terminal where evidence indicated that employer had lost the "major part" of its business and relocation involved a major commitment of capital and a fundamental alteration of the corporate enterprise. Hence, the circuit court found that "[n]o amount of collective bargaining could erase the economic facts that gave rise to the Company's decision to close . . ."); *NLRB v. Transmarine Navigation Corp.*, 380 F.2d 933 (9th Cir. 1967) (employer's decision, based solely on economic reasons, to terminate its business and reinvest in a different enterprise was not a mandatory subject of bargaining).

132. 152 N.L.R.B. 998 (1965), *enforcement denied and remanded for reconsideration on the merits*, 380 F.2d 933 (9th Cir. 1967), *on remand*, 170 N.L.R.B. 389 (1968).

133. The employer operated as a freight agent, ship broker, steamship agent, and terminal operator at Los Angeles harbor. The company's guards were represented by the American Federation of Guards, Local No. 1. The employer had a collective bargaining agreement with the union which was executed in 1962, with an expiration date of June 30, 1965. The contract was in effect at the time of the events described herein. 380 F.2d at 934.

During the summer of 1963, the Japanese government ordered the consolidation of Japanese shipping companies. This order had a direct effect upon the company's principal customer, thus creating the need for Transmarine to maintain larger shipyard facilities. In September, 1963, the company executed a joint venture agreement with a stevedoring company. Pursuant to this agreement, the company was to terminate its operations in Los Angeles and relocate to Long Beach, California as a minority partner. *Id.* After this agreement was executed, the company offered positions with the new company to most of its guards employed in the Los Angeles harbor. The guards declined the company's offer of employment, however, because at that time they were earning substantially higher wages than were offered at the new location. *Id.* at 935.

On October 24, 1963, the company announced in a bulletin sent to all employees that, effective November 1, 1963, all guards would be terminated. Thereafter, the company wrote to the union informing it that the company would soon cease business at its present location, and that the parties' collective bargaining agreement would no longer be in effect after relocation. The union filed charges with the Board alleging that the company had unlawfully refused to bargain over the decision to relocate its operations in violation of § 8(a)(1) and (5) of the Act. *Id.*

was faced with the prospect of losing its main customer if it did not shut down its Los Angeles operations. The court concluded that requiring the employer to confer with the union would not have served any effective purpose.¹³⁴ Thus, the court held that "the Company's decision, based solely on greatly changed economic conditions, to terminate its business and reinvest its capital in a different enterprise in another location as a minority partner was not a subject of mandatory collective bargaining within the meaning of §8(a)(5)."¹³⁵

Similarly, in *NLRB v. Acme Industrial Products, Inc.*,¹³⁶ the Sixth Circuit declared that an employer had no *absolute* duty to bargain with a union over the decision to relocate part of its manufacturing operations to another plant.¹³⁷ More recently, in *Royal Typewriter*

134. *Id.* at 939.

135. 380 F.2d at 939. The court relied on *NLRB v. Rapid Bindery, Inc.*, 293 F.2d 170 (2d Cir. 1961). In that case, a bindery plant owner in Dunkirk, New York became unable to adequately service its principal customers in Buffalo. Thus, the employer formed a new entity near Buffalo and transferred its operations from its old plant. *Id.* at 171. This relocation was dictated solely by economic considerations. The Board held that the employer violated § 8(a)(5) by failing to give notice to and bargain with the union. *Id.* at 172. In modifying the Board's order, the Second Circuit stated that the decision to relocate was not a mandatory subject of bargaining. *Id.* at 176. *See also* *International Harvester Co.*, 227 N.L.R.B. 85 (1976) (where the court denied enforcement of a Board order requiring the employer to bargain over the restructuring of its fleet sales accounts), *enforced in part*, 618 F.2d 85 (9th Cir. 1980). *Cf.* *NLRB v. Johnson*, 368 F.2d 549, (9th Cir. 1966) (employer's plan to discontinue part of its operations and contract out floor-covering installation work mandatory subject of bargaining); *Cooper Thermometer Co. v. NLRB*, 376 F.2d 684 (2d Cir. 1967) (company's refusal to bargain with the union over partial termination of its operations and the employee's relocation to a new plant constituted a violation of § 8(a)(5)).

136. 439 F.2d 40 (6th Cir. 1971), *denying enforcement to* 180 N.L.R.B. 114 (1969). The employer maintained a plant in Madison Heights, Michigan for a number of years. In September, 1968, the employer notified the union representing its employees that it was moving its operations to a new facility and that all employees would be offered the opportunity to transfer. The union requested negotiations. Thereafter several meetings were held between the parties. The employer refused to negotiate concerning the decision to relocate; however, it stood ready to bargain over effects of the relocation. The union filed § 8(a)(5) and (1) charges with the Board. *Id.* at 41.

137. 439 F.2d at 42-43. The court distinguished this case from its earlier decision in *NLRB v. Weltronic Co.*, 419 F.2d 1120 (6th Cir. 1969), *cert. denied*, 398 U.S. 938 (1970). First, the court noted that its holding in *Weltronic* was limited to its facts. Second, the court noted that the employer in *Weltronic* moved a substantial portion of its unit work without any notice to the union and without bargaining over the effects of the transfer. In the instant case, the employer stood ready and willing to bargain over every aspect of the decision except the decision itself. 439 F.2d at 42-43. In 1979, the Sixth Circuit again imposed a duty to bargain over an economically motivated transfer of work and machinery to another site. *See NLRB v. Production Molded Plastics, Inc.*, 604 F.2d 451, 452-53 (6th Cir. 1979). The court qualified its

Co. v. NLRB,¹³⁸ the Eighth Circuit rejected the Board's finding that a company's decision to close one of its plants and transfer work to another plant was a mandatory subject of bargaining.¹³⁹ The court held that "absent union animus, a company has no legal duty to bargain with a union over the decision to partially shut down its operations because of economic reasons."¹⁴⁰

2. After *First National Maintenance*

The Board's general rule requiring an employer to bargain over a decision to transfer bargaining unit work, as well as the circuit court decisions enforcing or denying Board orders on this issue, predate the Supreme Court's decision in *First National Maintenance Corp. v. NLRB*.¹⁴¹ As previously discussed, the Court in *First National Maintenance* "intimate[d] no view as to other types of management decisions, such as plant relocations . . . which are to be considered on their particular facts."¹⁴²

The Board and the courts have yet to apply *First National Maintenance* to an employer's decision to relocate or consolidate bargaining unit work.¹⁴³ However, an Administrative Law Judge (ALJ) recently applied the balancing test of *First National Maintenance*¹⁴⁴ to deter-

decision, however, by noting that the employer's decision did not involve "any major commitment of capital to a new enterprise nor any withdrawal from a previous line of company endeavor." *Id.* at 453.

138. 533 F.2d 1030 (8th Cir. 1976), *denying enforcement to* 209 N.L.R.B. 1006 (1974).

139. *Id.* at 1039. In March, 1969, Royal informed the union that it intended to shut down its plant and resume the production of portable electric typewriters elsewhere on a permanent basis. The union demanded that the company bargain over the decision to relocate its operations; the company refused but willingly engaged in effects bargaining. *Id.* at 1034. The union filed charges with the Board alleging violations of § 8(a)(1) and (5) of the Act. The Board held that the employer violated § 8(a)(1) and (5) by failing to bargain with the union over its decision to close its plant and resume operations elsewhere. *Id.* at 1035.

140. *Id.* at 1039. The court did not specifically address the question of whether an employer must bargain over the decision to relocate unit work; however, the fact that the employer in this case was closing its plant and relocating its operation renders the conclusion implicit in the court's decision.

141. 452 U.S. 666 (1981).

142. *Id.* at 686 n.22.

143. The Board's decision in Tocco Div. of Park-Ohio Indus., 257 N.L.R.B. 413, *enforced*, 112 L.R.R.M. 3089 (6th Cir. 1983), was issued on July 30, 1981, approximately one month after the Supreme Court's decision in *First Nat'l Maintenance*. The Board held that the employer violated § 8(a)(1) and (5) by refusing to bargain over the decision to relocate bargaining unit work. The Board did not rely on *First Nat'l Maintenance* for its holding. *Id.*

144. The Supreme Court's balancing test provides that "bargaining over management decisions that have a substantial impact on the continued availability of em-

mine that an employer unlawfully failed to bargain over the decision to relocate its operations during the term of its collective bargaining agreement where the motive for the relocation was to reduce labor rates.¹⁴⁵ Although recognizing that the Supreme Court in *First National Maintenance* intimated no view as to relocations,¹⁴⁶ the ALJ stated that "if the Court intended to apply a balancing test with respect to all cases of unit work relocation decisions, that test applied to the facts herein lead me to conclude that the [employer's] decision was a mandatory subject of bargaining."¹⁴⁷ The ALJ reasoned that since the employer's decision to relocate work was dependent upon its employees' willingness to agree to a lower wage rate, "[t]he managerial decision . . . was thus clearly amenable to the collective bargaining process."¹⁴⁸

3. NLRB General Counsel and Division of Advice

The NLRB General Counsel has stated that, contrary to Board precedent, decisions to relocate will not automatically be viewed as a mandatory subject of bargaining. Rather, in accordance with the Supreme Court's balancing test in *First National Maintenance*, decisions to relocate (e.g., relocations, subcontracting, consolidations,

ployment 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." 452 U.S. at 679.

145. Heat Transfer Group, Gulf and Western Mfg. Co., No. JD-381-82 (Sept. 7, 1982) (no exception taken, unpublished decision). The employer did not file exceptions to the Administrative Law Judge's decision. Therefore, the Board automatically adopted the ALJ's decision and recommended order. See 29 C.F.R. § 102.48 (1982). The employer operated facilities in Illinois and Kentucky. In 1980, after it had entered into a renewal of its collective bargaining agreement covering the Illinois facility, the company began to experience a significant loss of business in its product line which was produced at that location. Slip op. at 4-5. It concluded that the loss was attributable to the company's high labor costs. To remedy its economic problem, the company decided on two alternatives: either gain concessions in its contractual wage rates from its Illinois employees, or relocate production to a facility where it would obtain lower wage rates. *Id.* at 5. Accordingly, the company approached the union representing its Illinois employees, and stated that it would be necessary for the union to lower the contractual wage rates to a par with its competitors, or the company would relocate the bargaining unit work. *Id.* at 8. When the union refused to grant concessions on wage rates, the company implemented the relocation. *Id.* at 11-12.

146. *Heat Transfer*, slip op. at 18.

147. *Id.* at 19. Accordingly, the ALJ ordered that the employer restore the equipment and fixtures used in the Illinois facility. *Id.* at 35.

148. *Id.* at 19. A § 10(j) injunction *pendente lite* was also issued in the *Heat Transfer* case. See *Zipp v. Bohn Heat Transfer Group*, 110 L.R.R.M. 3013 (C.D. Ill. 1982).

etc.) will be scrutinized to determine whether they are "based on labor costs or other factors that would be amenable to resolution through the collective bargaining process."¹⁴⁹

Consonant with the General Counsel's application of the *First National Maintenance* balancing test, the NLRB's Division of Advice¹⁵⁰ concluded in *Stewart Sandwiches, Inc.*¹⁵¹ that no further proceedings against an employer were warranted where the employer had closed a facility and transferred unit work to another location without first bargaining with the union.¹⁵² There, the employer unilaterally decided to close its Detroit facility and consolidate remaining bargaining unit work at its Flint, Michigan warehouse during the term of its contract with the union representing its employees.¹⁵³ The employer's decision was based solely on the fact that its overhead was too high to justify continued maintenance of a separate Detroit facility.¹⁵⁴ The employer informed the union that its Detroit contract would not be applied at Flint.¹⁵⁵

Utilizing the *First National Maintenance* balancing test,¹⁵⁶ the Division reasoned that, while relocations of bargaining unit work are presumptively mandatory subjects of bargaining, "that presumption [in this case] is rebutted by evidence indicating that the Employer's determination to consolidate its operations . . . was based solely on economic considerations unrelated to labor costs or other factors which arguably would be amenable to the collective bargaining process."¹⁵⁷ The Division observed that "even if the Union had made labor

149. General Counsel's Memorandum, *supra* note 94, at 316.

150. The Division of Advice is a division of the Office of the General Counsel. Its function is to render substantive legal advice in cases which involve novel or complex issues of national interest or which involve developing and changing areas of the law. The Division also processes requests for injunctive relief under § 10(j) of the Act, litigates injunction cases in Federal Appellate courts, and indexes and classifies Board and court decisions under the Act. *New Developments Summary of Operations*, N.L.R.B. CASE HANDLING MANUAL (CCH) ¶ 30,340 (Feb. 23, 1983).

151. 112 L.R.R.M. (BNA) 1422 (NLRB Div. of Advice Sept. 15, 1982).

152. *Id.* at 1423. *Cf.* *Midwest Bus Lines*, 9 N.L.R.B. ADVICE MEMO. REP. ¶ 19,045 (Jan. 22, 1982) (under *First Nat'l Maintenance* balancing test no duty to bargain over economically motivated decision to sell a distinct line of business). *But see* *Polaris E-Z-Go*, 9 N.L.R.B. ADVICE MEMO. REP. ¶ 19,006 (Oct. 30, 1981); *United Wire & Supply Corp.*, 8 N.L.R.B. ADVICE MEMO. REP. ¶ 18,224 (Sept. 30, 1981); *Toledo Foreign Trade Zone Operations, Inc.*, 8 N.L.R.B. ADVICE MEMO. REP. ¶ 18,207 (Aug. 28, 1981).

153. 112 L.R.R.M. at 1422.

154. *Id.* at 1422.

155. *Id.* at 1423.

156. *Id.* (citing *First Nat'l Maintenance*, 452 U.S. 666 (1981)).

157. *Id.* at 1424.

cost concessions, such concessions would not have modified or reversed the Employer's closure decision."¹⁵⁸ Thus, it concluded that the employer was under no statutory obligation to bargain over the decision to consolidate its remaining Detroit operations into its Flint facility.¹⁵⁹

In sum, the foregoing discussion illustrates that, despite over twenty years of Board and court precedent, the scope of an employer's duty to bargain concerning a decision to relocate bargaining unit work remains unsettled.¹⁶⁰

B. Mid-Contract Restriction on Relocation

Prior to 1974, the focus of the Board's analysis with respect to a transfer of unit work was primarily limited to whether an employer had a duty to bargain over the decision to relocate.¹⁶¹ In 1974, how-

158. *Id.*

159. *Id.* The Division answered the union's allegations that the employer unlawfully modified the parties' contract by relocating its operations by stating that where "an employer's decision to transfer and consolidate unit work was not amenable to the collective bargaining process and, thus was not a mandatory subject of bargaining under Section 8(d), it was considered unnecessary . . ." to reach the issue of whether the employer's relocation constituted a midterm modification. *Id.* at 1424 n.11. For further discussion see notes 232-34 *infra*.

160. An employer violates § 8(a)(3) and (1) of the Act by engaging in conduct which is "inherently destructive" of important employee rights, even absent specific evidence of unlawful intent. See *NLRB v. Great Dane Trailers*, 388 U.S. 26, 33-34 (1967); *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 380 (1967). Where, as part of a plan to escape the obligations of a collective bargaining agreement, an employer terminates and refuses to reinstate employees, such action clearly is "inherently destructive" of employee rights and thus violates § 8(a)(3). See *NLRB v. Triumph Curing Center*, 571 F.2d 462, 474 (9th Cir. 1978); *Local 57, Int'l Ladies Garment Workers Union v. NLRB*, 374 F.2d 295, 299 (D.C. Cir. 1967), *cert. denied*, 395 U.S. 980 (1967); *NLRB v. Preston Feed Corp.*, 309 F.2d 346, 350 (4th Cir. 1962); *NLRB v. Wallick*, 198 F.2d 477, 484 (3d Cir. 1952); *Coated Prods.*, 237 N.L.R.B. 159 (1978), *enforced*, 106 L.R.R.M. 2364 (3d Cir. 1980); *Lloyd Wood Coal*, 230 N.L.R.B. 234 (1977), *enforcement granted in part, denied in part*, 585 F.2d 752 (5th Cir. 1978). See also *Am-Del Co. Inc.*, 225 N.L.R.B. 698 (1979) (employer converted employees to independent contractors to escape provisions of its contract with union); *Big Bear Supermarkets No. 3*, 239 N.L.R.B. 179 (1978) (employer franchised store to escape provisions of its contract with union), *enforced*, 640 F.2d 924 (9th Cir.), *cert. denied*, 449 U.S. 920 (1980); *Rushton & Mercier Woodworking Co.*, 203 N.L.R.B. 123 (1973) (employer violated § 8(a)(1), (2), (3) and (5) by closing its facilities, laying off its union employees and resuming operations with another union under the name of its wholly-owned subsidiary), *enforced by published opinion*, 86 L.R.R.M. 2151 (1st Cir. 1974); *Rome Prods. Co.*, 77 N.L.R.B. 1217 (1948) (employer's sale of business to a sham corporation to avoid dealing with the union held to be an unfair labor practice).

161. See cases cited and discussed in notes 113-40 *supra* and accompanying text.

ever, a new type of analysis was introduced:¹⁶² whether an employer may transfer bargaining unit work during the effective period of a collective bargaining agreement despite the fact that (1) such transfers are not prohibited by the contract, (2) the employer bargains in good faith with the union to impasse and (3) the employer is not motivated by union animus.¹⁶³ To the consternation of management, the Board, with limited approval by the circuit courts, has held that an employer may not effect such transfers under certain circumstances.¹⁶⁴

In *University of Chicago*,¹⁶⁵ an employer operated a number of hospitals and clinics on its campus. All functions carried on in these buildings were placed under the administrative direction of the University's Biological Sciences Division (BSD).¹⁶⁶ The University employed approximately 10,500 persons, 900 of whom were represented by American Federation of State, County, and Municipal Employees' Union (AFSCME).¹⁶⁷ Of this number, approximately 200 were assigned to the BSD and were classified as custodians, responsible for cleaning patient and non-patient care areas in the hospital complex.¹⁶⁸ The University also had successive collective bargaining agreements with the Service Employees International Union (SEIU).¹⁶⁹ The SEIU represented approximately 300 of the University's employees, including 125 custodians, nineteen of whom were administratively placed under the auspices of the BSD.¹⁷⁰

In September 1970, the University and SEIU renewed their collective bargaining agreement for a two-year period.¹⁷¹ In July 1971, the

162. See *University of Chicago*, 210 N.L.R.B. 190 (1974), *enforcement denied*, 514 F.2d 942 (7th Cir. 1975).

163. 514 F.2d at 949.

164. See cases cited and discussed in notes 165-219 *infra* and accompanying text.

165. 210 N.L.R.B. 190 (1974).

166. *Id.* at 191.

167. *Id.* at 191-93.

168. *Id.* at 193.

169. *Id.* The principal function of the custodians who were represented by SEIU was to provide janitorial services in specifically designated areas of the hospital complex. Their primary responsibilities included the following: (1) wet-mopping classrooms, offices, laboratories and corridors, (2) picking up glass and other debris, (3) emptying wastepaper baskets and ashtrays, and (4) stripping and waxing floors. These employees did not wash walls, clean hospital bedrooms, operating rooms, or other areas devoted principally to the immediate treatment of clinical patients. *Id.*

170. *Id.* Many of the areas of the complex to which AFSCME members were assigned were devoted to patient care, and therefore required a higher degree of cleanliness than did the complex's administrative offices, classrooms, and other areas which were cleaned by SEIU's members. For the most part, employees of the two unions utilized certain benchmarks, such as a doorway or an archway, to delineate the boundaries of their respective cleaning responsibilities. *Id.*

171. *Id.* at 194.

University advised SEIU that the hospital was experiencing difficulties stemming from the maintenance of its hospital complex by two bargaining units of janitorial employees.¹⁷² The University informed the union that it wanted to raise the sanitation level in those portions of the hospital buildings then serviced by SEIU employees, and that the only feasible solution was to transfer all SEIU hospital custodial work to the jurisdiction of AFSCME.¹⁷³ SEIU objected to the proposed transfer, in part because it was to result in a pay cut for its members who were to be transferred and a net reduction in the overall bargaining unit.¹⁷⁴ The University nevertheless implemented the transfer.¹⁷⁵

The Union responded by filing section 8(a)(1) and (5) charges.¹⁷⁶ The Board held that the University's unilateral removal of bargaining unit work from SEIU's jurisdiction in midterm of the parties' existing contract constituted an impermissible modification of the recognition clause of the contract, in violation of section 8(d).¹⁷⁷ The Board also held that "the payment of unit employees under different pay scales thus constitutes an impermissible modification of the wage provisions of the . . . [SEIU] contract in mid-term."¹⁷⁸

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.* at 195. Of the 14 employees laid off, 12 accepted positions performing the transferred work under the jurisdiction of AFSCME. Of the 12 employees who accepted transfer, three received the same wages as before their transfer; the other nine employees suffered varying reductions in their hourly rates because they were assigned to labor grades whose wage rates were lower under AFSCME's agreement. Each of the 12 employees was required to join and pay dues to AFSCME since its contract contained a union security clause. *Id.*

176. *Id.* at 191. The SEIU alleged that the University failed to bargain in good faith over the decision to transfer work to the jurisdiction of AFSCME, unlawfully modified the parties' collective bargaining agreement by implementing the transfer without the union's consent, and unlawfully rendered assistance and support to AFSCME by effecting the transfer. *Id.*

177. *Id.* at 199. The recognition clause of the collective bargaining agreement recognized SEIU as the exclusive bargaining agent for employees employed in specific job classifications. *Id.* at 193-94. The Board held that the recognition clause in the parties' collective bargaining agreement necessarily included the specific areas in the hospital complex in which the transferred SEIU employees had worked, and that, by effecting the transfer of work, the University repudiated both the recognition clause in the contract, as well as the terms and conditions of employment of SEIU members in violation of § 8(a)(1), (5) and § 8(d). *Id.* at 190, 199.

178. *Id.* at 198. The Board had applied a similar analysis prior to its decision in *University of Chicago*. In *Weltronic Co.*, 173 N.L.R.B. 235 (1968), *enforced*, 419 F.2d 1120 (6th Cir. 1969), the employer manufactured, sold and distributed resistance welding controls, plant central equipment and related products at its six plants located in Michigan and Ontario, Canada. In 1967, without prior notice to the union which represented its employees, the employer moved its wiring and assembly work during the term of its collective bargaining agreement from its Southfield, Michigan

The Seventh Circuit denied enforcement of the Board's decision and order.¹⁷⁹ The court held that the recognition clause in the parties' collective bargaining agreement could not be interpreted to provide that the University was prohibited from unilaterally effecting transfers within the employer's hospital complex, since (1) the contract did not specifically provide for such a prohibition¹⁸⁰ and (2) the parties' past practice indicated a history of unilateral transfers.¹⁸¹ The court explained that "unless transfers are specifically prohibited by the bargaining agreement, an employer is free to transfer work out of the bargaining unit if, "(1) the employer complies with *Fibreboard Paper Products v. NLRB* . . . by bargaining in good faith to impasse; and (2) the employer is not motivated by anti-union animus. . . ." ¹⁸²

The Seventh Circuit observed that the University had fulfilled its bargaining obligation,¹⁸³ and that there was neither a contention nor any evidence that its transfer of work was motivated by union animus.¹⁸⁴ The court emphasized that "the sole reason for the decision to transfer the work was the necessity to raise the level of sanitation in the [hospital] complex."¹⁸⁵

facility to another plant located three miles away. 173 N.L.R.B. at 236. The Board adopted in relevant part the Trial Examiner's finding that the employer violated § 8(a)(1) and (5) by transferring unit work without first bargaining with the union over its decision, and by unilaterally changing terms and conditions of employment by paying employees at rates less than those provided for in its contract with the union. Unlike *University of Chicago*, however, the Board did not specifically rely on § 8(d) for its decision. *Id.* at 235, 237. It affirmed the Trial Examiner's recommendation and ordered the employer to bargain in good faith with the union over the decision to relocate. 173 N.L.R.B. 235, 238. The Sixth Circuit affirmed the Board's decision, 419 F.2d at 1120.

179. *University of Chicago v. NLRB*, 514 F.2d 942 (7th Cir. 1975).

180. 514 F.2d at 948. The Court rejected the Board's attempt to construe the enumeration of employee classifications in the recognition clause of the parties' agreement as a jurisdictional clause which restricted bargaining unit transfers. *Id.*

181. *Id.* The Court emphasized that the University had a past practice of transferring custodial work from one union to the other; that there was never any definite line of demarcation as to the unions' division of cleaning responsibilities; and that no part of BSD was ever cleaned solely by the custodians of either union. *Id.*

182. 514 F.2d at 949 (citing *Textile Workers v. Darlington Mfg. Co.*, 380 U.S. 263 (1965)).

183. *Id.* The Board conceded that the University had bargained in good faith with SEIU in advance of its decision to transfer the work. *Id.*

184. *Id.*

185. *Id.* Two years after the Court's decision in *University of Chicago*, the Board turned a deaf ear to the Seventh Circuit when it decided *Boeing Co.*, 230 N.L.R.B. 696 (1977), *enforcement denied*, 581 F.2d 793 (9th Cir. 1978). In affirming without comment an Administrative Law Judge's rulings, findings and conclusions, the Board once again held that a clause in the parties' agreement recognizing the International Union of Operating Engineers, AFL-CIO, as bargaining agents for Boeing's welders,

Three years later, in *Los Angeles Marine Hardware Co., a Division of Missions Marine Associates, Inc.*,¹⁸⁶ the Board adopted without comment an Administrative Law Judge's decision that an employer violated sections 8(a)(1), (3) and (5) when, without the union's consent, it laid off several of its employees and relocated bargaining unit work during the term of the parties' agreement.¹⁸⁷ The ruling was upheld despite evidence that the employer had bargained in good faith over the decision to remove the work, and was motivated solely by economic considerations.¹⁸⁸

The employer was a party to a collective bargaining agreement covering its recreational sales employees.¹⁸⁹ In 1975, faced with a substantial operating loss at that facility,¹⁹⁰ the company unsuccessfully sought to reduce the wages of its recreational sales employees during its negotiations for a renewal of its contract, and again in 1976 when the contract provided for a wage reopener.¹⁹¹ After the union refused to grant wage concessions during the contract's wage reopener period,¹⁹² the employer announced that it was relocating its recreational sales operations to two other plants in California.¹⁹³ Shortly thereafter, and without the union's consent, the employer terminated all of its twenty-three recreational sales employees and relocated its operation.¹⁹⁴

id. at 698, prohibited the employer from unilaterally reassigning bargaining unit work to the jurisdiction of another union during the term of a collective bargaining agreement. The employer's action in *Boeing* was held to be an unlawful modification of the agreement under § 8(d) and hence, a violation of § 8(a)(5) of the Act. 230 N.L.R.B. at 696, 704. The Ninth Circuit denied enforcement of the Board's order, relying on the Seventh Circuit's reasoning in *University of Chicago*. 581 F.2d at 793.

186. 235 N.L.R.B. 720 (1978).

187. *Id.* at 720, 737-38.

188. *Id.* at 732-33.

189. *Id.* at 721.

190. *Id.* at 722. In 1975 the employer determined that it was necessary to obtain economic relief from the union since a survey of its competitors disclosed that the employer's labor costs were \$1.40 per hour higher than those of its highest paying competitor. By 1976, the employer determined that it would have an annual operating loss of \$170,000, with additional cash flow problems. *Id.*

191. *Id.* A wage reopener is a provision in a collective bargaining agreement which permits either party to reopen the contract during its term to renegotiate wages. H. ROBERTS, *supra* note 13, at 575.

During the 1975 negotiations leading to the execution of the agreement, and again in 1976 when the contract provided for a wage reopener, the employer attempted to obtain economic relief from the union in its recreational sales area. This effort proved unsuccessful on both occasions. 235 N.L.R.B. at 722.

192. 235 N.L.R.B. at 722.

193. *Id.*

194. *Id.* at 724-25.

The company did not apply the contract's terms to the newly hired recreational sales employees at the new facilities, and in fact, the new employees were paid less than the contractual rate.¹⁹⁵ The union filed charges with the Board alleging that the employer violated sections 8(d), 8(a)(1) and 8(a)(5) by unilaterally modifying its contract mid-term.¹⁹⁶

The Administrative Law Judge found that section 8(d) of the Act precluded the employer from making a midterm modification in the contract without the consent of the union, and that the parties' collective bargaining agreement applied to the other plants.¹⁹⁷ He explained that, "notwithstanding the persuasiveness and validity of the employer's economic straits, an employer is not free, without union consent to make midterm modifications in wage rates . . . , nor to remove work from the bargaining unit . . . , nor to replace all unit employees."¹⁹⁸ The ALJ concluded: "[f]or to permit relocation alone to vary this result would mean that employers would be permitted to achieve by indirection that which . . . employers [are] denied the opportunity to achieve by direct means under Section 8(d) of the Act."¹⁹⁹ The Board

195. *Id.* at 732.

196. *Id.* at 720, 738. The union also filed charges alleging that the employer's discharge of 23 unit employees, and the subsequent refusal to hire these individuals at the new locations, constituted a violation of § 8(a)(3). *Id.* at 731.

197. *Id.* at 735-36.

198. *Id.* The Administrative Law Judge reached these conclusions notwithstanding his findings that (1) the employer had been confronted with a legitimate adverse economic problem prior to and during its negotiations with the union, *id.* at 732-33, (2) the employer's decision to relocate "was an economic one and was not based upon unlawful considerations," *id.* at 733, (3) there was no basis for finding that the employer failed to satisfy its bargaining obligations owed to the union concerning the relocation and its effects on unit employees, *id.*, and (4) there was no basis for finding that the employer had made efforts to discourage employees from seeking employment at the employer's other plants, *id.*

199. *Id.* at 735. The Board has recently sought and obtained injunctive relief under § 10(j) of the Act against employers who have threatened to relocate bargaining unit work. Thus, in *Eisenberg v. Suburban Transit Corp.*, 112 L.R.R.M. 2708 (BNA) (D.N.J. 1983), the employer announced that it would relocate its bus service operations from one terminal to another, transfer bargaining employees, and make unilateral changes in terms and conditions of employment after the union refused to grant wage concessions during midterm negotiations. *Id.* at 2711. The union filed unfair labor practice charges with the Board alleging violations of § 8(a)(1), (3), (5) and § 8(d). *Id.* at 2708. The Board subsequently petitioned the New Jersey District Court for a temporary injunction to enjoin the employer from relocating its operations pending a final determination of the unfair labor practice charges before the Board. *Id.* The court granted the Board's petition and enjoined the employer from relocating its operations. *Id.* 2712. See also *Kobell v. Thorson Tool Co.*, 112 L.R.R.M. (BNA) 2397 (M.D. Pa. 1982); *Zipp v. Bohn Heat Transfer Group*, 110 L.R.R.M. 3013 (D. Ill. 1982) (federal district courts of Pennsylvania and Illinois,

adopted the ALJ's conclusions without comment, as well as his recommended order.²⁰⁰ The Ninth Circuit enforced the Board's order,²⁰¹ observing that the employer's actions "amounted to a midterm repudiation of the [contract], in violation of Sections 8(d) and 8(a)(1) and (5)."²⁰²

The principles established by the foregoing cases were recently affirmed by the Board in *Milwaukee Spring Division, Illinois Coil Spring Co.*²⁰³ There, a three-member panel held that an employer violated sections 8(a)(1), (3), (5) and 8(d) of the Act when it transferred assembly work in midcontract from its unionized plant to a non-union facility, after unsuccessful attempts to secure midterm wage concessions from the union.²⁰⁴

One of the employer's three divisions, Milwaukee Spring, was a party to a collective bargaining agreement covering its production employees.²⁰⁵ The agreement was effective from April, 1980 through March, 1983.²⁰⁶ In January, 1982, the employer asked the union to forego a contractual wage increase due on April 1 and grant other concessions.²⁰⁷ This request was precipitated by the employer's loss of

respectively, granted Board petitions for temporary injunctive relief under § 10(j) of the Act, pending final determinations of the unfair labor practice charges by the Board).

200. 235 N.L.R.B. at 720.

201. *Los Angeles Marine Hardware Co. v. NLRB*, 602 F.2d 1302 (9th Cir. 1979). See *Brown Co.*, 243 N.L.R.B. 769, *enforcement denied and remanded for reconsideration on the merits*, 109 L.R.R.M. 2663 (9th Cir. 1981). In *Brown*, a Board majority found that the employer discontinued its cement hauling operations, laid off its drivers and transferred trucks to another division to evade its wage obligations under the collective bargaining agreement, in violation of § 8(a)(1) and (3). 243 N.L.R.B. at 772. The Board deemed it unnecessary to pass on the § 8(a)(5) allegation. *Id.* at 771. The § 8(a)(3) violation was based on the *Los Angeles Marine* theory that the employer's actions were inherently destructive of employee interests. *Id.* at 771. See note 250 for further discussion of the Board's current application of the "inherently destructive" doctrine. The Ninth Circuit denied enforcement of the Board's decision and order and remanded the case to the Board for a determination of whether the employer was given the right under the terms of its collective bargaining agreement to transfer the work. 109 L.R.R.M. 2663 (9th Cir. 1982).

202. 602 F.2d at 1307. The court also agreed with the Board that the employer violated § 8(a)(3) of the Act by discharging 23 unit employees as a result of the relocation. *Id.* at 1307-08.

203. 265 N.L.R.B. No. 28, 111 L.R.R.M. 1486 (1982).

204. 111 L.R.R.M. at 1490.

205. *Id.* at 1486-87. The Milwaukee Spring Division employees were represented by UAW, Local 547. The division employed approximately 99 bargaining unit employees; 35 of these employees worked in the company's assembly operations and 42 worked in molding operations. *Id.*

206. *Id.* at 1487.

207. *Id.*

a major contract resulting in a \$200,000 per month decline in revenues.²⁰⁸

During the employer's discussions with the union, it proposed relocating its assembly operations to another division.²⁰⁹ During these discussions the employer informed the union that wage concessions were necessary to maintain the viability of the facility.²¹⁰ After notification of the union's vote against concessions,²¹¹ the employer relocated its assembly operations.²¹² The union filed charges alleging that the employer had unlawfully modified the parties' contract during its term.²¹³

Before the Board, the parties stipulated that the relocation of assembly operations was due solely to the comparatively higher labor costs under the agreement between the employer and the union.²¹⁴ It was further stipulated that the employer had fulfilled its duty to bargain with the union over the decision to relocate these assembly operations, and that the employer had been willing, and remained willing, to engage in bargaining with the union over the effects of its decision.²¹⁵

The Board concluded that the employer's decision to transfer its assembly operations constituted a midterm modification within the meaning of section 8(d).²¹⁶ The Board held that the employer was not free to take such action without the consent of the union or without waiver of the union's statutory right to object to such action.²¹⁷ Since the union did not consent to the employer's relocation and the parties'

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.*

214. *Id.*

215. *Id.* For a discussion of an employer's duty to bargain concerning the effects of a relocation of bargaining unit work, as well as effects of other substantial alterations of its business enterprise, see note 51 *supra*.

216. 111 L.R.R.M. at 1490. The Board reached this decision even though the parties' collective bargaining agreement did not contain a restriction of the employer's right to transfer work. *Id.* at 1489. Chairman Van de water stated that his finding of violations rested on the parties stipulation that the employees' transfer of assembly operations was motivated by comparatively higher union wage rates and an inadequate return on investment. *Id.* at 1490 n.7. He also stated that the outcome of the Board's decision might have been different if the employer had faced bankruptcy or if the short-term viability of the corporation were in jeopardy. *Id.* at 1488 n.3.

217. *Id.* at 1490. The Board also held that the resultant layoffs of bargaining unit employees as a consequence of the employer's decision to transfer constituted independent violations of § 8(a)(1) and (3). *Id.* The Board invoked the so called *Los*

agreement did not clearly and unequivocally waive the union's statutory right to object to such action,²¹⁸ the Board ordered the employer to rescind its decision to transfer its assembly line operations and to restore the status quo ante.²¹⁹

The Board's decision in *Milwaukee Spring*, constitutes an unwarranted and unsupportable extension of section 8(d) which, if allowed to stand, should be limited to its facts. Distilled to its essence, the Board's holding should be applied only to those cases where an employer, presented with a union's refusal to accept midterm contract modifications, relocates bargaining unit work specifically to achieve the desired modification.²²⁰ Where implementation of an employer's decision to relocate is not motivated by a desire to change mandatory subjects of bargaining contained in a collective bargaining agreement,

Angeles Marine theory to find that the employer's unilateral relocation was inherently destructive of its employee's § 7 rights and thus a violation of § 8(a)(3). *Id.* at 1488.

218. *Id.* at 1490.

219. *Id.* The Board also ordered the employer to recall and reinstate any employees laid off as a result of the decision to transfer its assembly operations and to make such employees whole for any loss of earnings they might have suffered, with back pay computed on a quarterly basis, with interest. *Id.*

The Board, on occasion, has ordered employers to recognize and bargain with the union representing its employees after relocating during a contract term. Thus, in *Westwood Import Co.*, 251 N.L.R.B. 1213 (1980), *enforced*, 681 F.2d 664 (9th Cir. 1982) the employer bargained over the decision to relocate its plant during the term of its contract, and the effects of that decision on unit employees. Without reaching agreement, the employer closed and relocated its plant and refused to recognize the union as its employees' bargaining representative at the new location or to comply with the terms of its collective bargaining agreement. The union filed § 8(a)(5) charges with the Board, alleging that the employer had failed to bargain in good faith. 251 N.L.R.B. at 1213. The Board ordered the employer to recognize and bargain with the union at the new facility since there was a continuity of operations and a substantial percentage (40%) of the employees at the new plant were transferrees from the former facility. *Id.* at 1214, 1216 n.8. Interestingly, the union never alleged a midterm modification of the parties' contract in violation of § 8(d). *See also* *Marine Optical, Inc.*, 255 N.L.R.B. 1241 (1981), *enforced*, 671 F.2d 11 (1st Cir. 1982); *cf.* *Massachusetts Machine & Stamping, Inc.*, 231 N.L.R.B. 801 (1977) (employer lawfully withdrew recognition from union after relocating its plant at expiration of contract where only 11 of 22 employees transferred to new facility and the company moved to different state with an entirely different labor pool), *enforcement denied*, 578 F.2d 15 (1st Cir. 1978); *Trell Restaurant, Inc.*, 9 N.L.R.B. ADVISE MEMG. REP. ¶ 19,100 (June 11, 1982).

220. *See* note 244 *infra* for a further discussion of the Board's current extension of § 8(d) in the context of relocations. Pursuant to the Board's current application of § 8(d) principles, unlawful midterm modifications are not limited to contract terms which contain wages. Any contract term which expressly sets forth an agreed upon term and condition of employment may not be modified for the duration of that agreement without the consent of both parties. *See* note 102 & 142 *supra* and accompanying text.

its decision should not constitute a direct or indirect violation of section 8(d).²²¹ Thus, the Board's decision should be read as a mere reaffirmance of the proposition that, under section 8(d), neither party to a contract may use its economic muscle to force midterm modifications of its agreement.²²² This conclusion was reached by the Board's Division of Advice in three recent memoranda.

In *Chino Mines Co.*,²²³ an employer operated two geographically separated facilities, a mine and a concentrator.²²⁴ It was a party to labor agreements with three unions, all of which represented maintenance employees at the concentrator.²²⁵ As part of a modernization plan, the employer closed its concentrator, constructed a new facility, and created new classifications within one unit to perform all maintenance work at the new concentrator.²²⁶ The remaining unions filed charges with the Board, alleging that the employer had unilaterally modified their contracts.²²⁷

The Division of Advice found that the employer's decision to close its concentrator involved a significant investment of capital and was motivated by economic considerations unrelated to the labor costs of

221. See *Milwaukee Spring Div. Illinois Coil Spring Co.*, 265 N.L.R.B. No. 28, 111 L.R.R.M. 1486 (1982). Indeed, under the principles established by the Supreme Court in *Allied Chem. Workers of Am., Local Union No. 1 v. Pittsburgh Plate Glass, Chem. Div.*, 404 U.S. 157 (1971), the Board's holding necessarily must be so limited. As discussed, *Pittsburgh Plate Glass* established the principle that § 8(d)'s protection against midterm modifications only extends to contract terms containing mandatory subjects of bargaining. *Id.* at 186-87. Relocations, unaccompanied by an employer's unsuccessful attempt to obtain mid-contract concessions, do not per se constitute unlawful modifications or terminations of a collective bargaining agreement. This conclusion is implicit in numerous Board decisions concerning relocations. Thus, in *University of Chicago*, 210 N.L.R.B. 190 (1974), *enforcement denied*, 514 F.2d 942 (7th Cir. 1975), the Board was compelled to proceed through a convoluted and strained conversion of the applicable labor agreement's recognition clause into a jurisdiction clause. Similarly, in *Milwaukee Spring*, 111 L.R.R.M. at 1486, if relocations per se constituted contract modifications, the entire analysis of unlawful indirect modification would have been unnecessary.

222. See notes 165-219 *supra* and accompanying text. The Board also has held that a union commits an unfair labor practice when it engages in a strike to modify an existing bargaining agreement. See *Brewery Delivery Employees Local Union 46*, 236 N.L.R.B. 1160, 1173-74 (1978); *Chauffeurs, Salesmen and Helpers Local 572*, 223 N.L.R.B. 1003, 1008 (1976); *New York Local No. 1190, Communication Workers of Am.* 204 N.L.R.B. 782, 784-85 (1973); *Telephone Workers Union of New Jersey, Local 827*, 189 N.L.R.B. 726, 734 (1971).

223. 112 L.R.R.M.1419 (BNA) (NLRB Div. of Advice Jan. 7, 1983).

224. *Id.* at 1419.

225. *Id.*

226. 112 L.R.R.M. at 1420.

227. *Id.*

its union's contracts.²²⁸ Thus, the employer's decision did not constitute a mandatory subject of bargaining.²²⁹ The Division also noted that, since the employer's decision was not a mandatory subject of bargaining, its implementation of that decision was not an unlawful midterm modification of the parties' contract in violation of section 8(d).²³⁰ The Division reasoned that:

the prohibition against mid-term modification contained in Section 8(d) is limited to unilateral changes involving mandatory subjects of bargaining. And, decisions which involve a significant investment or withdrawal of capital affecting the ultimate scope and direction of an enterprise generally are not deemed mandatory subjects of bargaining.²³¹

Similarly, in *Stewart Sandwiches*,²³² the Division concluded that a refusal to bargain charge should be dismissed where the employer had relocated work from a union facility to a non-union facility during the term of a labor agreement.²³³ The Division determined that the employer's decision was implemented for reasons unrelated to the terms of the labor agreement in effect at the union facility; it therefore refused to consider whether the employer's decision constituted a midterm modification.²³⁴

Finally, in *Greyhound Lines, Inc.*,²³⁵ a union represented clerks at the employer's terminal in Chicago.²³⁶ As part of a regional consolidation of accounting functions, the employer relocated the work of six accounting clerks from the Chicago facility to a facility in Cleveland.²³⁷ Although the Cleveland facility was organized, employees received \$1.50 per hour less than their counterparts in Chicago.²³⁸ The Regional Director sought advice whether it should issue a complaint alleging a violation of section 8(d) based upon the Board's decision in

228. *Id.* at 1421. See *National Car Rental Sys., Inc.*, 252 N.L.R.B. 159 (1980), *enforced as modified*, 672 F.2d 1182 (3d Cir. 1982); *General Motors Corp., GMC Truck & Coach Div.*, 191 N.L.R.B. 951 (1971), *enforced sub nom.* *International Union, United Auto. Workers of Am. Local 864*, 470 F.2d 422 (D.C. Cir. 1972).

229. 112 L.R.R.M. at 1421.

230. *Id.* at 1421-22.

231. *Id.* at 1421.

232. 112 L.R.R.M. 1422 (NLRB Div. of Advice Sept. 15, 1982).

233. *Id.*

234. *Id.* at 1424 n.11 (citing *Pittsburgh Plate Glass*, 404 U.S. at 185-88).

235. 112 L.R.R.M. (BNA) 1437 (NLRB Div. of Advice March 2, 1983).

236. *Id.*

237. *Id.*

238. *Id.*

Milwaukee Spring.²³⁹ The Division of Advice found that the employer's consolidation decision was purely "to improve convenience and speed in processing the work"²⁴⁰ and not motivated by a desire to reduce contractual wage rates.²⁴¹ Consequently, the Division recommended dismissal of the section 8(d) allegations of the complaint.²⁴²

Although the Board attempted to portray its holding in *Milwaukee Spring* as a logical extension of prior decisions,²⁴³ in the opinion of the authors, the decision, as well as the precedent upon which it relied, constitutes an unwarranted and indeed unsupportable extension of section 8(d)²⁴⁴ Moreover, it should be expected that the Board and the

239. *Id.* In *Greyhound Lines*, the Regional Director had previously issued a complaint alleging violations of § 8(a)(5) by the employer's failure to consult with the union prior to consolidating its operations. *Id.*

240. *Id.*

241. *Id.*

242. *Id.* With regard to the wage differential between the Chicago and Cleveland facilities, the Division found:

Further, the mere fact that the Employer will save \$1.50 per hour per employee in wages at the new location was not considered sufficient, in and of itself, to indicate labor cost was part of the Employer's motivation for the transfer. In this regard, it was noted that there is no other evidence that the Employer's asserted reason of consolidation is not actually the sole reason.

Id.

243. 111 L.R.R.M. at 1488-89.

244. If limited to its facts, the Board's holding in *Milwaukee Spring* deems unlawful employer relocations based upon a desire to escape contractually established labor costs. However, this holding arguably lays the foundation upon which the Board may eventually prohibit employer relocations effected, in whole or in part, for other reasons. Thus, under the *Milwaukee Spring* rationale, a midterm relocation based even in part on an employer's desire to obtain relief from onerous *non-economic* contract terms (e.g., work rules, seniority provisions, etc.) may constitute an unlawful contract modification. 111 L.R.R.M. at 1489; see also *Quarterly Report of NLRB General Counsel William A. Lubbers*, DAILY LAB. REP. (BNA) D-1 (Jan. 5, 1983) [hereinafter cited as *General Counsel's Quarterly Report*]; *Abbey Medical/Abbey Rents, Inc.*, 264 NLRB No. 129, 111 L.R.R.M. 1683, n. 1 (1982); *Pet, Inc., Bakery Division*, 264 NLRB No. 166, 111 L.R.R.M. 1495 (1982). The possibility that *Milwaukee Spring* will be thus extended underscores the critical need for re-examination of the decision.

It has long been established in this country that courts will not, and should not, rewrite contracts entered into between two or more parties which have been freely bargained for. *NLRB v. Nash Finch Co.*, 211 F.2d 622, 626 (8th Cir. 1954) ("if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred, and shall be enforced by courts of justice"). Moreover, it is clear that the Board is not authorized to control or set any terms of a collective bargaining agreement or otherwise sit in judgment upon the substantive terms of a collective bargaining agreement. *H.K. Porter Co. v. NLRB*, 397 U.S. 99 (1970); *NLRB v. Insurance Agents*, 361 U.S. 477 (1960); *NLRB v. American Insurance Co.*, 343 U.S. 395 (1953).

Indeed, the United States Constitution provides that: "No State shall . . . pass any . . . law impairing the obligation of contracts . . ." U.S. CONST. art. 1, § 10, cl. 2. Although this provision does not by its terms extend to the federal government and its administrative bodies, it has been held to express a general public policy prohibiting the impairment of contracts by federal government action. See *Hepburn v. Griswold*, 75 U.S. 603 (1869); *John McShain, Inc. v. District of Columbia*, 205 F.2d 882 (D.C. Cir. 1953) (protection against impairment of contracts is provided by the Fifth Amendment); *accord* *Rivera v. Patino*, 524 F. Supp. 136 (N.D. Cal. 1981). The *Milwaukee Spring* decision is founded upon assumptions which represent an unwarranted circumvention of these longstanding principles of law.

Traditionally, collective bargaining has been viewed as a process by which organized labor secures rights from management which are, in turn, incorporated into the parties' contract. Pursuant to this process, if a union wishes to circumscribe an employer's right to relocate, or otherwise transfer work during the term of the parties' contract, it is incumbent upon the union to obtain through contractual negotiations language which prohibits or limits this right. Where a union is successful in this respect, the employer will ordinarily have gained from the union concessions in other areas in exchange for conceding the right to relocate. The Board ignored in *Milwaukee Spring* the principle that management retains certain inherent rights unless knowingly and affirmatively waived. Thus, unless contractually waived, management reserves the right to relocate work before, during or after the effective period of contract. The Board's approach turns traditional bargaining on its head by proceeding on the inaccurate premise that management has no inherent right to relocate work during the term of a labor agreement unless the employer has affirmatively obtained through negotiations the clear and unequivocal right to do so. See, e.g., *Tocco Div. of Park-Ohio Indus.*, 257 N.L.R.B. 413 (1981). In effect, the Board has unilaterally written a clause into every collective bargaining agreement which prohibits midterm relocations. This intrusion into the arena of private sector collective bargaining appears to be part of the Board's longstanding attempt to inappropriately construe collective bargaining contracts as employment guarantees. See *University of Chicago*, 210 N.L.R.B. 190 (1974) (Board attempt to construe recognition clause in parties' contract as work jurisdiction clause); *Boeing Co.* 230 N.L.R.B. 696 (1977) (same). The Courts should continue to reject these attempts. See, e.g., *University of Chicago v. NLRB*, 514 F.2d 942, 948 (7th Cir. 1975) ("[a]s we read the cases, unless transfers are specifically prohibited by the bargaining agreement, an employer is free to transfer work out of the bargaining unit if: (1) the employer complies with *Fibreboard* . . . by bargaining in good faith to impasse; and (2) the employer is not motivated by anti-union animus . . .")

The Board's approach also fails to recognize that by inferring a contractual prohibition on midterm employer actions which involve mandatory bargaining subjects, the employer loses the opportunity to consciously yield certain management rights to a union and to demand something in return for those rights which it has yielded. Thus, even contractual silence results in the acquisition of rights for the union; i.e., the union retains all it does not clearly and unmistakably yield.

Rather than engaging in convoluted, unwarranted and unsupported contract analysis, the Board should defer such contractually-based issues to arbitrators. The interpretation of labor contracts has historically been the province of arbitrators, subject, of course, to court review. See 29 U.S.C. § 185 (1976). Indeed, arbitrators have long been called upon by labor and management to decide issues concerning the permissibility of an employer's relocation of work in light of relevant contract language. See *Spielberg Mfg. Co.*, 112 N.L.R.B. 1080 (1955); *Linde Co.*, 40 Lab. Arb., 1073 (1963); *Sivyer Steel Casting Co.*, 39 Lab. Arb. 449 (1962); *ASA Brothers Co., Inc.*, 31 Lab. Arb. 426 (1958). Furthermore, court review of arbitration awards provides a workable system by which these awards may be kept consistent with established principles of law. Simply put, the Board should remove itself from the

courts will soon face relocations²⁴⁵ unattended by employers' earlier attempts to obtain contract modifications, or later admissions that a decision to relocate was based upon a desire to modify existing contractual terms.²⁴⁶ However, in light of the continuing support by the General Counsel,²⁴⁷ the Division of Advice²⁴⁸ and the courts,²⁴⁹ for the

business of analyzing collective bargaining contracts, a business which it is not equipped to conduct.

Finally, the Board's action hinders the very collective bargaining system which it was long ago called upon to foster by discouraging bargaining and fostering deceit. Unions will have no incentive to negotiate solutions to employer economic problems; rather, they may simply refuse to negotiate during a contract term. If, in response, employers act unilaterally in the interest of marketplace survival, the Board may well continue to issue complaints and, perhaps, seek federal court injunctions under § 10(j) of the Act, 29 U.S.C. § 160(j) in order to enjoin employer from taking the desired actions. *See e.g.*, *Zipp v. Bohn Heat Transfer Group*, 110 L.R.R.M. 3013(D. Ill. 1982); *Kobell v. Thorenson Tool Co.*, 112 L.R.R.M. (BNA) 2397 (M.D. Pa. 1982). As a future consequence, employers will be encouraged to construct "lawful" reasons upon which their relocation decisions are based in order to avoid unfavorable Board and court decisions. *See Milwaukee Spring*, 111 L.R.R.M. at 1486 n. 4 (noting that employer admitted it had relocated to avoid onerous wage rates and implying that absent such a motivation, no violation would have been found.) Moreover, employers may avoid midterm negotiation altogether for fear that the Board or a court may view their willingness to bargain as evidence that they were motivated by a desire to modify contract terms. *Id.*

245. Cases involving unlawful relocations of bargaining unit work have quickly become of national interest. *See notes 3 & 6 supra*. Indeed the NLRB's General Counsel dedicated his first 1983 quarterly report to this topic. *General Counsel's Quarterly Report, supra note 244*, at D-1. In his report, the General Counsel examined several cases involving employer relocations which have recently come before the Board. These cases were decided upon a request for advice or on appeal from a regional director's dismissal of unfair labor practice charges. The report also covers relocation cases in which the Board authorized § 10(j) proceedings before federal district courts. Finally, the report contains a breakdown of all § 10(j) cases authorized by the Board for the first six months of calendar year 1982. *Id.*

246. As a result of recent Board and court developments circumscribing an employer's right to relocate work during the term of a contract, employers who desire to repudiate or modify contract terms by relocating all or part of their operations may well be expected to present reasons other than onerous contract terms as a motivation for such action. This development would parallel those cases where employers have advanced legitimate business reasons for the discipline or discharge of employees for their union activities. *See Wright Line, a Div. of Wright Line, Inc.*, 251 N.L.R.B. 1083 (1980), *enforced*, 662 F.2d 889 (1st Cir. 1981), where the Board stated that "[i]n modern day labor relations, an employer will rarely, if ever, baldly assert that it has disciplined an employee because it detests unions or will not tolerate employees engaging in union or other protected activities. Instead, it will generally advance what it asserts to be a legitimate business reason for its action." *Id.* at 1083-84. Indeed, the *General Counsel's Quarterly Report, supra note 244*, states that the Board will continue to face a proliferation of cases concerning relocations. *Id.* at D-1.

247. *See General Counsel's Quarterly Report, supra note 244*.

248. *See Chino Mines, Co., Inc.*, 112 L.R.R.M. at 1419; *Greyhound Lines, Inc.*, 112 L.R.R.M. (BNA) at 1437.

249. *See Hendrix v. Acme Markets*, 113 L.R.R.M. 2036 (BNA) (D. Neb. 1983); *Kobell v. Thorenson Tool Co.*, 112 L.R.R.M. 2397 (BNA) (M.D. Pa. 1982); *Zipp v.*

Board's decision in *Milwaukee Spring*, the authors propose a rational approach which would limit the decision's impact.

VI. Proposed Three-Step Analysis

Under the Board's current approach to resolving issues arising from relocations of bargaining unit work, the reconciliation of section 8(d) of the Act with an employer's inherent right to manage its investment by determining the location of its business requires a three-step analysis. Initially, the employer's motivation for relocating must be determined. The outcome of this determination must then be considered in light of the Supreme Court's balancing test in *First National Maintenance* to determine whether the employer is under a duty to bargain with the union over the decision to relocate.²⁵⁰ Finally, where the employer has a duty to bargain over the decision, and there is a

Bohn Heat Transfer Group, 110 L.R.R.M. 3013 (D. Ill. 1982); Gottfried v. Echlin, 113 L.R.R.M. (BNA) 2349 (E.D. Mich. April 13, 1983).

250. See Heat Transfer Group, Gulf and Western Mfg. Co., No. JD-381-82, slip op. at 19 (Sept. 7, 1982); Stewart Sandwiches, Inc., 112 L.R.R.M. (BNA) at 1424; General Counsel's Memorandum, *supra* note 94, at 316.

As one commentator has aptly noted, the Board has erroneously invoked its "inherently destructive" doctrine in the context of plant relocations. See Remarks On Plant Relocations By Attorney John S. Irving, Jr., DAILY LAB. REP. (BNA), D-1 (May 9, 1983)[hereinafter cited as Remarks]. In three recent cases the Board held that employers' unilateral relocations were inherently destructive of employees' § 7 rights, and therefore no independent evidence of unlawful union animus was needed to establish violations of §§ 8(a)(1) and (3) of the Act. See Los Angeles Marine Hardware, 602 F.2d at 736; Brown Co., 243 N.L.R.B. at 771; *Milwaukee Spring*, 111 L.R.R.M. at 1488.

It is the opinion of the authors that the Board has mistakenly assumed that collective bargaining agreements are, in effect, job guarantees; that employees have an inherent right under section 7 of the Act not to have work relocated during the term of a labor agreement and; thus, where an employer relocates without obtaining prior union consent, and the contract's management rights clause does not contain a waiver of the union's bargaining rights, such action is "inherently destructive" of the employees' § 7 rights.

The Board's current approach in this respect invokes the "inherently destructive" doctrine as a mere substitute for independent evidence of an employer's unlawful motive. In this way, the Board has circumvented the crucial yet controversial analysis of the inherent right of management to relocate its enterprise in the interest of business necessity, or even survival. Moreover, the present application of this doctrine allows the Board to arrive at the result which it appears to prefer without having to enunciate with any precision the source and nature of the § 7 rights which have allegedly been "inherently destroyed". Remarks, *supra*.

If the Board is going to continue to consider an employer's motivation in determining the lawfulness of a midterm relocation, the authors propose that it fairly conduct an extensive and detailed analysis of the facts underlying such motivation, rather than merely applying the sweeping "inherently destructive" doctrine as a substitute for careful evaluation of the evidence submitted in support of the unlawful motive allegations.

collective bargaining agreement in effect, the employer's motivation must be considered to determine whether a unilateral relocation would constitute an indirect midterm modification or repudiation of a term of that agreement.²⁵¹ Each of the above determinations are distinct yet inseparable steps in the analysis which must be conducted prior to a final determination of when and under what circumstances an employer may lawfully relocate bargaining unit work.

The critical inquiry in ascertaining the lawfulness of a relocation of bargaining unit work is the employer's motivation for such action. With respect to the duty to bargain over a decision to relocate, the factors involved in an employer's decision may be determined by analyzing his motivation. If these factors are amenable to the collective bargaining process, the balancing test of *First National Maintenance* requires that the employer bargain over its decision to relocate.²⁵² With regard to unlawful midterm modifications, the employer's motivation reveals whether it is attempting to evade express contract terms covering mandatory subjects of bargaining.²⁵³ Such evasion constitutes an unlawful midterm modification.²⁵⁴

Motivation is determined by viewing the employer's conduct as a whole.²⁵⁵ In cases where an employer's decision involves a number of factors,²⁵⁶ the authors propose an approach similar to that applied by

251. See *Heat Transfer Group*, slip op. at 19.

252. 452 U.S. at 678-79.

253. *Los Angeles Marine Hardware Co.*, 602 F.2d at 1306-07; *Milwaukee Spring*, 265 N.L.R.B. No. 28, 111 L.R.R.M. at 1487-88; *Boeing Co.*, 230 N.L.R.B. at 700-04.

254. See cases cited in note 252 *supra*.

255. In employee discharge cases where a union has alleged a § 8(a)(3) violation, the Board looks not only to direct evidence of union animus, *see, e.g.*, *W.T. Grant Co.*, 210 N.L.R.B. 622 (1974) (anti-union comments prior to discharge), but also to such circumstantial evidence as: (1) delay in discharge after employer has knowledge of breach of work rules, *National Grange Mut. Ins. Co.*, 207 N.L.R.B. 431 (1973); (2) a departure from established procedures for discharge, *Richmond Refining Co., Inc.* 212 N.L.R.B. 16 (1974); (3) and employer's subsequent change in position with respect to explaining the reason for discharge. *Holiday Inn of Henryetta*, 198 N.L.R.B. 410 (1972), *enforced*, 488 F.2d 498 (10th Cir. 1973). See also *Heat Transfer Group*, slip op. at 20 ("[h]owever, the Board may consider the totality of an employer's conduct 'to assess its motivation in determining whether it was really engaging in surface bargaining with no genuine interest of reaching agreement'").

256. An employer's decision to relocate bargaining unit work may be based in some cases, on considerations completely unrelated to its employee's terms and conditions of employment, *see, e.g.*, *Brooks-Scanlon, Inc.*, 246 N.L.R.B. 476 (1979) (insufficient supply of timber for sawmill operation); *Raskin Packing Co.*, 246 N.L.R.B. 78 (1979) (bank suddenly cancelled employer's line of credit); or, in other cases, on considerations well within their scope. See, *e.g.*, *Heat Transfer Group, Gulf and Western Mfg. Co.*, No. JD-381-82 (Sept. 7, 1982) (wages).

the Board in employee discharge cases.²⁵⁷ Relocations, as with discharges, are not per se unlawful under the Act.²⁵⁸ Discharges, however, may not be made based upon union animus.²⁵⁹ Similarly, relocations motivated by factors amenable to the collective bargaining process may not be made unilaterally.²⁶⁰ Moreover, unilateral relocations motivated by a desire to modify terms of a contract covering mandatory subjects of bargaining are unlawful.²⁶¹

In discharge cases where an employer's motivations are mixed, the Board in *Wright Line, Division of Wright Line, Inc.*²⁶² adopted a three-step approach. First, the General Counsel must make a prima facie showing that the decision to discharge was based upon union animus.²⁶³ Once the General Counsel establishes his prima facie case, the burden of going forward shifts to the employer to show that it would have reached the same decision even in the absence of union animus.²⁶⁴ The burden then shifts back to the General Counsel to demonstrate that the reasons proffered by the employer are pretextual, or that the discharge would not have occurred but for the employer's union animus.²⁶⁵ This approach can be readily applied for determining an employer's motivation in relocation cases.

257. See Bosanac, *Concession Bargaining, Work Transfers and Midcontract Modification*: Los Angeles Marine Hardware Company, 1983 LAB. L.J. 72, 78.

258. Since Board and Court cases involving an employer's failure to bargain over a decision to relocate, as well as implementation of such a decision during the term of a collective bargaining agreement, most often arise within the context of unfair labor practice proceedings, § 10(c) of the N.L.R.A., 29 U.S.C. § 160(c) (1976), as well as § 7(c) of the Administrative Procedure Act, 5 U.S.C. § 556 (1976), requires the General Counsel to prove the employer's guilt by a preponderance of the evidence. See *NLRB v. Wright Line, Div. of Wright Line, Inc.*, 662 F.2d 899 (1st Cir. 1981).

259. 29 U.S.C. § 158(a)(3). See *Edward G. Budd Mfg. Co. v. NLRB*, 138 F.2d 86 (3d Cir. 1943).

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

261. *Los Angeles Marine Hardware*, 602 F.2d at 1307; *Milwaukee Spring*, 265 N.L.R.B. No. 28, 111 L.R.R.M. at 1487; *Boeing Co.*, 230 N.L.R.B. at 700.

262. 662 F.2d 899 (1st Cir. 1981), enforcing, 251 N.L.R.B. 1083 (1980).

263. 662 F.2d at 904. The Board in its *Wright Line* decision held that once the General Counsel establishes his prima facie showing, the burden of proof shifts to the employer to show that it would have reached the same decision even in the absence of union animus. 251 N.L.R.B. at 1089. However, this approach has been rejected by several circuit courts. See *NLRB v. Transportation Management Corp.*, 674 F.2d 130 (1st Cir. 1982), cert. granted, 51 U.S.L.W. 3378 (U.S. Nov. 15, 1982) (No. 82-168); *NLRB v. Wright Line, Div. of Wright Line, Inc.*, 662 F.2d 899 (1st Cir. 1981). Throughout the authors' analysis, the burden of proof remains with the General Counsel to prove the employer's unfair labor practice by a preponderance of the evidence.

264. 662 F.2d at 904.

265. 251 N.L.R.B. at 1087.

Under *First National Maintenance*, the nature and extent of an employer's bargaining obligation depends on whether the decision to relocate is amenable to collective bargaining. A decision is amenable to collective bargaining if the employer's intention is to change the terms and conditions of employment of its bargaining unit employees.²⁶⁶

Where an employer has a duty to bargain over a decision to relocate, unilateral action on its part may constitute an unlawful midterm modification. Because section 8(d) prohibits any unilateral change in contractual terms, an employer may not unlawfully transfer its operations to effect a desired modification in contract terms. Thus, where an employer's sole motivation for relocating unit work is to reduce or otherwise modify specific contractual terms, section 8(d) prohibits such a transfer, absent union consent. Further, where the employer's reason for relocating work involves a combination of factors, application of the *Wright Line* approach will determine the propriety of its actions.

VII. Conclusion

The conflicting and often confusing state of the law concerning an employer's duties under section 8(d) with respect to relocations of bargaining work may be resolved by focusing upon a critical issue — motive. It is an employer's motive for relocating which triggers rights and duties under the Act. Thus, if an employer is motivated by a desire to unilaterally change terms and conditions of employment, a

266. 452 U.S. at 677-78. The General Counsel arguably goes beyond the scope of the Supreme Court's balancing test by suggesting that a decision to relocate should be deemed amenable "[i]f the employer's decision is based on economic factors unrelated to labor costs (e.g., raise in rent), but union concessions in the area of labor costs could counterbalance these economic factors. . . ." General Counsel Memorandum, *supra* note 94, at 316 n.13. It is submitted that, where an employer's decision is based purely on economic factors unrelated to specific terms and conditions of employment, the employer is relieved from bargaining over the decision to relocate even though union concessions might counterbalance the factors underlying the employer's decision. The duty to bargain, and the penalties for an unlawful failure to do so, should not be contingent upon whether an after-the-fact review indicates a willingness by the union to offer concessions. Rather, in accordance with the *First National Maintenance* balancing test, the issue is whether the employers' reasons are per se amenable to the collective bargaining process. Where they are not, the employer's need to operate freely in deciding whether to relocate purely for economic reasons outweighs the incremental benefit that might be gained through the union's participation in making the decision itself. In such cases, the Supreme Court's decision in *First National Maintenance* dictates that the decision to relocate is not a subject over which Congress has mandated bargaining.

relocation decision will probably be deemed a mandatory subject of bargaining. Conversely, if terms and conditions of employment do not form the controlling basis of a relocation decision, an employer should be under no duty to bargain over that decision. Moreover, where a collective bargaining agreement is in effect, a unilateral relocation may constitute an unlawful midterm modification of the agreement only if that decision is motivated primarily by a desire to change one or more express terms contained in the agreement which cover mandatory subjects.

Most cases involving an employer's decision to relocate, however, do not present facts which clearly indicate the motivation behind the decision. In such cases, the foregoing three-step analysis should be applied under which the employer's motivation for relocating may be determined. A similar approach has been applied in unlawful employee discharge cases. It is submitted that such an approach would provide a logical and predictable basis upon which relocation cases may be decided in the future by the Board and the courts.

