Labor Law - National Labor Relations Act - Duty to Bargain Over Partial Closings

Carol A. Behers
LABOR LAW—NATIONAL LABOR RELATIONS ACT—DUTY TO BARGAIN OVER PARTIAL CLOSINGS—The United States Supreme Court had held that although an employer who terminated a contract with one of its commercial customers purely for economic reasons was required to bargain with the union about the effects of its decision, there was no duty to bargain with the union about the decision itself.


First National Maintenance Corporation (FNM), a New York corporation, provides housekeeping, cleaning, maintenance, and related services to commercial customers. It supplies contracted-for labor and supervision for a fixed fee plus labor costs.¹ FNM hires its personnel separately for each customer and does not transfer employees between locations. In 1976, FNM and Greenpark Care Center (Greenpark) entered into a contract which specified that Greenpark would pay FNM a management fee of 500 dollars a week in addition to the gross weekly payroll and fringe benefits.² This weekly fee was subsequently reduced to 250 dollars effective November 1, 1976.³

Greenpark in March 1977, issues a thirty days' written notice of cancellation to FNM because of inefficiency.⁴ The cancellation never became effective, but FNM realized that it was losing money and on June 30, 1977 asked Greenpark to restore its management fee to the 500-dollar figure. FNM informed Greenpark that if an increase were not granted by August 1, FNM would discontinue its operation at Greenpark.⁵

---

2. 452 U.S. at 668. Under the contract Greenpark also furnished all necessary supplies. The contract prohibited Greenpark from hiring any of FNM's employees for the duration of the contract and for 90 days thereafter. Id.
3. Id. at 668.
4. Id. at 669. The 30-day written notice of cancellation was specified by provisions of the contract. The cancellation did not become effective and work was extended beyond the 30-day period. Id.
5. Id. On July 25, 1977, FNM gave final notice of termination by telegram. Id.
During this period, FNM's employees at Greenpark selected a labor union as their bargaining agent. While the Greenpark contract was still in effect, FNM was notified of the union's certification and its right to bargain on behalf of FNM's employees. On July 28, without consulting the union, FNM notified its thirty-five employees of their discharge because of the termination of the Greenpark contract. The union, hearing of FNM's intention to discharge the employees, requested a delay to bargain. Because of FNM's refusal to bargain and its terminations of the Greenpark operation and discharge of its employees, the union filed an unfair labor practice charge against FNM alleging that it had violated sections 8(a)(1) and (5) of the National Labor Relations Act (Act).

The administrative law judge, relying on the National Labor Relations Board's (Board) holding in Ozark Trailers, Inc. that the closing of one plant was a mandatory subject of bargaining, determined that FNM had breached its duty to bargain with the union about the termination of the Greenpark contract and the ensuing effects on its employees. The administrative law judge

6. Id. On March 31, 1977, at a Board-conducted election, a majority of the employees selected District 1199, National Union of Hospital and Health Care Employees, Retail, Wholesale, and Department Store Union AFL-CIO as their bargaining agent. Id.

7. Id. at 669. The union was certified on May 11, 1977. Id. at 669, n.3.

8. Id. The discharge was to become effective August 1, 1977. Because of a 90-day hiring limitation clause included in the contract, Greenpark refused to hire the FNM employees as part of its staff. Id. at 669-70.

9. Id. at 669. FNM's secretary-treasurer, Leonard Marsh, informed Edward Wecker, the union's vice-president, that the termination was "purely a matter of money" and that the 30-day notice provision of the Greenpark contract made staying on beyond August 1 prohibitively expensive. Id. at 669-70.

10. Id. at 670. See National Labor Relations Act, as amended, 29 U.S.C. sections 158(a)(1) and (5) (1976). Section 158(a)(1) provides: "[I]t shall be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7. Section 158(a)(5) provides: "[I]t shall be an unfair labor practice for an employer to refuse to bargain collectively with the representatives of his employees. . ."

11. 161 N.L.R.B. 561 (1966) (employer's decision to close one of multiple plants was a mandatory subject of bargaining because it directly affected terms and conditions of employment). See National Labor Relations Act, as amended, 29 U.S.C. section 158(d) (1976) which provides in pertinent part: "[F]or the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representatives 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. . ."

12. 452 U.S. at 670-71.
found it obvious that this discharge was a change in condition of employment.\footnote{Id.} He further found that there was no capital reallocation involved in the termination of the Greenpark operation and that the closing represented neither a substantial effect on the conduct of business, nor did it have a substantial effect on the size of the total operation.\footnote{Id.} The administrative law judge recommended that FNM be required to bargain in good faith about the decision to close as well as about the effects of the termination and that FNM be required to pay the employees backpay.\footnote{Id.} The Board adopted this recommendation and additionally required FNM to make provisions for job reinstatement at Greenpark, or at its other operations if work was not recommenced at Greenpark.\footnote{Id.}

Enforcing the Board's order, the United States Court of Appeals for the Second Circuit\footnote{Id. at 671-72 & n.7.} held that FNM had a duty to bargain with the union about the decision to close its Greenpark operations.\footnote{Id. at 671. He recommended that FNM be required to pay the discharged employees backpay from the date of discharge until a bargaining agreement was reached, the bargaining reached impasse, or the union failed to request timely bargaining. \textit{Id.}} The court of appeals stated that there is no per se rule imposing a duty to bargain over a partial closing decision.\footnote{Id.} Rather, the court found that there is a rebuttable presumption that an employer has a duty to bargain over a closing of a part of one of its operations.\footnote{First National Maintenance Corp. v. NLRB, 627 F.2d 596, 603 (2d Cir. 1980), \textit{rev'd}, 452 U.S. 666 (1981).} This presumption could be rebutted, the court stated, by a showing that in a particular case the purpose of the Act would not be advanced by the imposition of a duty to bargain.\footnote{452 U.S. at 672.}

\footnote{\textit{Id.} at 670-71 & n.5.}
\footnote{\textit{Id.} at 671.}
\footnote{\textit{Id.} at 671.}
\footnote{\textit{Id.} at 672 & n.7. The court relied on the Third Circuit's holding in Brockway Motor Trucks v. NLRB, 528 F.2d 720 (3d Cir. 1978). \textit{See infra} notes 79-80 and accompanying text. The \textit{Brockway} court established a rebuttable presumption that there is a duty to bargain. \textit{See} 528 F.2d at 734-35.}
\footnote{\textit{Id.} at 672. The court noted that the presumption could be rebutted where bargaining over the decision would prove useless; the decision was due to a financial emergency; the practice throughout the industry was not to bargain over such decisions. The court rejected the \textit{Brockway} court's approach of balancing the employer's and employee's interests in bargaining to determine if the presumption was rebuttable in a particular case. \textit{Id.}}
To resolve the conflict among the circuits and the inconsistent rulings of the Board on whether there is a mandatory duty to bargain in good faith regarding the partial closing of a business, the United States Supreme Court granted certiorari. The Supreme Court reversed, holding that under the circumstances present in First National, the employer's need to operate freely in deciding to close part of its business for purely economic reasons outweighs the benefits that the union could possibly gain through participation in making that decision. The Court stated that the decision to close itself is not a part of the subjects of mandatory bargaining under section 8(d) of the Act.

Speaking for the majority, Justice Blackmun stated that the major purpose of the Act is to maintain industrial peace and preserve interstate commerce through the promotion of collective bargaining as a means of defusing and channeling conflict between labor and management. He observed that although the

22. 452 U.S. at 672-73. The decision of the court of appeals in First National was inconsistent with other circuits which did not find a duty to bargain over any management decision involving a major capital investment, a basic operational change, or unless a violation of section 8(b)(3) is found. See Royal Typewritter v. NLRB, 533 F.2d 1030 (8th Cir. 1976) (no duty to bargain where an operational change has taken place); NLRB v. Winn-Dixie Stores, Inc., 361 F.2d 512 (5th Cir. 1966), cert. denied, 385 U.S. 351 (1966) (no duty to bargain over discontinuation of warehouse cheese processing operation); NLRB v. Adams Dairy, 350 F.2d 108 (8th Cir. 1965), cert. denied, 382 U.S. 1011 (1966) (employer's decision to terminate the distribution part of its dairy business and sell its products to independent distributors was not a mandatory subject of bargaining because it involved a major capital investment). Id. at 672-73 & nn.8-9. For a discussion of section 8(b)(3), see infra note 42.

23. See National Car Rental Systems, Inc., 252 N.L.R.B. No. 27, 15 (1980) (employer's decision to terminate car leasing operations not a mandatory subject of bargaining because it affected the scope of the entire business and involved capital investment); see also Summit Tooling Co., 195 N.L.R.B. 479 (1972) (decision to close a subsidiary not a mandatory subject of bargaining because effect was similar to going out of business entirely); cf. Ozark Trailers, Inc., 161 N.L.R.B. 561 (1966) (employer's decision to shut down one of many plants was a mandatory subject of bargaining because it was a decision directly effecting "terms and conditions of employment").


25. 452 U.S. at 686. See supra note 11.


27. 452 U.S. at 674. See National Labor Relations Act, as amended, 29 U.S.C. section 151(1) (1979). Congress further enhanced the collective bargaining process by creating the National Labor Relations Board and empowering it to condemn certain conduct by unions and employers as unfair labor practices. See NLRB v. Jones and Laughlin Steel Corp., 301 U.S. 1 (1937).
parties may bargain about any subject, section 8(d) of the Act limits mandatory bargaining to concerns of "wages, hours, and other terms and conditions of employment." Accordingly, the Court reasoned that Congress deliberately left the language of section 8(d) broad to allow the Board to define the scope of mandatory bargaining in light of specific situations. Despite the broad statutory language, however, Justice Blackmun maintained that there is a limit to the scope of the mandatory subjects of bargaining.

The Court, examining various types of management decisions, ascertained that some have only an indirect impact on the employment relationship while others are more closely related to it. The Court, however, found that First National involved a third type of management decision, one that had a direct impact on employment but also focused on the economic profitability of the contract.

Considering FNM's contention that it had no duty to bargain concerning the termination of its Greenpark operations, Justice Blackmun examined whether the termination alone should be part of FNM's freedom to manage its business affairs unrelated to employment. The Court stated that the practice of man-


29. 452 U.S. at 675. Mandatory subjects generally include only those issues that center around resolution of problems in the employee-employer relationship. Id. at 675, n.13. See Ford Motor Co. v. NLRB, 441 U.S. 488 (1979) (no duty to bargain over decision to sell a retail outlet to an independent distributor). But see Fibreboard Paper Products v. NLRB, 379 U.S. 203 (1964) (decisions to subcontract work out held to be a mandatory subject of bargaining); Teamsters v. Oliver, 358 U.S. 283 (1959) (subcontracting out of work to prevent plant closing constituted a mandatory subject of bargaining).

30. 452 U.S. at 676-77. Such management decisions include choice of advertising and promotion, product design, and financial arrangements. Id. See Fibreboard Paper Products v. NLRB, 379 U.S. at 233 (Stewart, J., concurring).

31. 452 U.S. at 677. Such decisions include successive layoffs and recalls, production quota and work rules. Id.

32. Id. The Court reached this conclusion because although jobs were eliminated by the termination, the decision also involved a change in the scope of enterprise. Id.

33. Id. at 677. FNM was obligated to bargain about the results of its decision to terminate its contract with Greenpark. FNM complied with the Board's order and negotiated with the union regarding severance pay. Id. at 677, n.15.
Mandatory bargaining is only effective if the subject under consideration is one which is resolvable through the bargaining process. The Court emphasized that management must be free from the encumbrances of bargaining as far as is necessary to carry on a profitable business, and must also be able to determine with reasonable certainty when it may make a decision without fear that its action will be labelled an unfair labor practice. The Court concluded that an employer should be required to bargain over decisions substantially impacting on the availability of employment only if the advantages to the labor-management relationship are greater than the hardships placed on the administration of business.

The Court noted that it had used such an analysis in Fibreboard Paper Products v. NLRB to determine that the employer's decision to subcontract work was a subject of mandatory bargaining. The Fibreboard Court had looked at: 1) whether or not a capital investment was contemplated, 2) whether the issue is one suitable for resolution through collective bargaining, and 3) the prevalence of bargaining over this issue throughout the industry. Applying this approach to FNM's decision to close a portion of a business for economic reasons, the Court emphasized that it was important to consider whether requiring bargaining over such a decision would advance the purposes of the Act. Justice Blackmun observed that although the union is legitimately concerned about job security, its practical purpose in wanting to participate in the decision is to halt or delay the closing. The Court recognized, however, that the union must be given a chance to bargain over the effects

34. Id. at 678-79. The purpose of labelling a particular practice a subject of mandatory bargaining is to promote the fundamental aims of the Act by bringing an important labor-management concern into the framework established by Congress for the maintenance of industrial peace. The Court noted that Congress did not explicitly exclude any issues from mandatory bargaining. Id. at 678 & n.16.
35. Id. at 679.
37. 452 U.S. at 679-80.
38. Id. at 679-80. See also 379 U.S. at 211-14.
39. 452 U.S. at 680-81. The Act is intended to foster in a neutral manner a system by which the conflicts between union and management interests may be resolved. Id. See supra note 27 and accompanying text.
40. 452 U.S. at 681.
of the partial closing on the employees. The Court acknowledged that the union interest in fairness is protected by section 8(a)(3) of the Act which prohibits closings motivated by anti-union animus and which allows the Board to investigate the motivations behind a partial closing decision.

In assessing management's interest in bargaining, the Court observed that where labor costs are an important factor in a closing, management will have an incentive to voluntarily discuss alternatives and compromises that would make continuation of the business a profitable venture. Where management has a great need for speed and flexibility in meeting its business demands, however, tax considerations, the unfavorable publicity that bargaining may attract, and the possibility that bargaining may prove futile and cause the employer greater hardships discourage the employer from bargaining.

Justice Blackmun emphasized that a crucial distinction exists between permissive and mandatory bargaining and acknowledged that labeling a partial closing decision a mandatory subject accords to unions the power to circumvent management's intentions by engaging in bargaining as a delaying tactic. He acknowledged that while evidence of current labor practices is only one indication of what is feasible, labor contracts rarely contain provisions granting a right to bargain over changes in the scope of business operations.

The Court rejected the court of appeals' presumption that a duty to bargain exists failing to promote harmonious relations

41. *Id.* "Effects bargaining" is mandated by section 158(a)(5) of the Act. *Id.* See supra note 10. See also Royal Printing Plating, 350 F.2d 191 (1965); Adams Dairy, 350 F.2d 108 (1965). Given the opportunity to bargain over the effects of a partial closing decision, a union may be able to gain concessions from the employer while also securing rights to notice, information, and fair bargaining. 452 U.S. at 681-82. See supra note 34 and accompanying text.

42. *Id.* at 682. See National Labor Relations Act, as amended section 158(a)(3) (1976) which provides in pertinent part: "It shall be an unfair labor practice for an employer by discrimination in regard to hire or tenure of employment to encourage or discourage membership in any labor organization..." Justice Blackmun admonished that an employer cannot be permitted to close part of a business under the guise of economic necessity when the closing is actually motivated by anti-union animus. 452 U.S. at 682.

43. *Id.* at 682-83. Justice Blackmun observed that where there is no alternative to the closing bargaining may be both futile and costly. *Id.*

44. *Id.* at 683.

45. See 627 F.2d at 601-02. See supra notes 17-21 and accompanying text.
between employer and employee. Justice Blackmun observed that if this presumption were used, employers would have difficulty assessing whether a situation required bargaining, determining the point at which the duty to bargain would arise, and ascertaining the extent of bargaining that would be sufficient. He noted that a union would also have difficulty in assessing when it could employ economic tactics to influence an employer's decision without subjecting itself to the Board's sanctions. Justice Blackmun therefore concluded that the harm likely to be done to an employer's prerogative to close for economic reasons outweighed the benefit the union could gain through bargaining, and that a partial closing decision was not one of section 8(d)'s mandatory bargaining subjects.

Justice Blackmun distinguished the instant case from First National because FNM had no intention of replacing discharged employees or moving elsewhere; no anti-union animus claim was made by the union; and the dispute with Greenpark was solely over the size of the fee, a factor over which the union had not control. Moreover, the Court found no abrogation on the part of the employer of an existing bargaining agreement. The Court determined that although FNM did not invest large amounts of capital at its locations, the absence of significant withdrawal of capital was not crucial.

In a dissenting opinion, Justice Brennan agreed with the majority that the issue presented by First National is whether FNM's decision to discontinue work at its Greenpark operation and discharge the employees was a mandatory subject of

46. 452 U.S. at 684-85. If an employer decided not to bargain, the Board might conclude that the employer had violated its good faith duty by engaging in "surface bargaining". Id. at 685. See NLRB v. Reed and Prince Manufacturing Co., 205 F.2d 131 (1st Cir.), cert. denied, 346 U.S. 887 (1953).

47. 452 U.S. at 685-86. A union's failure to request meetings may be considered to constitute a waiver of the right to bargain. Id. See Shell Oil Co., 149 N.L.R.B. 305 (1965).

48. Id. at 686.

49. Id. at 687.

50. Id. at 688. The union was not certified as the bargaining agent until after FNM's financial difficulties had begun. Id. See supra note 6.

51. Id. at 688. The Court found FNM's decision to close the Greenpark operations analogous to the opening of a new line of business or closing a business entirely. Id.

bargaining pursuant to section 8(d) of the Act. He disagreed, however, with the majority's use of a balancing test for resolving the issue. He reasoned that the majority's test was highly speculative because the Court provided no evidence to support its contention that the benefits of bargaining to the union would have been minimal. Justice Brennan added that when employees are given a chance to bargain, compromises are often made at the bargaining table which enable the company to remain in operation, even in situations where labor costs are not at the source of a company's difficulties. He further disagreed with the majority's presumption that the employer's need for speed and flexibility in a partial closing situation would be hampered by a bargaining requirement, reasoning that in some cases the decision will be made openly and such considerations will be unimportant.

Justice Brennan stated that the Board, not the Court, was responsible for determining the scope of the statutory duty to bargain in partial closing decisions. He therefore assented to the court of appeals' rebuttable presumption analysis because he believed it was supported by recent Board decisions.

A partial closing occurs when a company that operates two or more plants chooses to close one of them while keeping the others open, or when the company discontinues a distinct portion of its operations in one plant. The difficulties encountered in determining when a partial closing decision is a mandatory subject of bargaining are exemplified by the Supreme Court's

---

54. 452 U.S. at 689-90. (Brennan, J., dissenting). See supra note 36 and accompanying text.
55. 452 U.S. at 690. (Brennan, J., dissenting). He also criticized the majority's use of a balancing test as failing to account for the employees' legitimate employment interests. Id.
56. Id. Justice Brennan referred to negotiations between Chrysler and the United Auto Workers which led to advantageous results and allowed Chrysler to remain in business. Id.
57. Id. at 690-91. (Brennan, J., dissenting). He also noted that because effects bargaining is mandatory, it was difficult to see why bargaining over the decision itself would have an adverse effect. Id. at 691.
58. Id. at 691. (Brennan, J., dissenting).
59. Id. See supra note 21 and accompanying text.
60. Id. See supra note 23 and accompanying text.
decisions in *Fibreboard Paper Products v. NLRB*61 and *Textile Workers Union v. Darlington Manufacturing Co.*62

In *Fibreboard*, the employer contended that maintenance work performed by employees within the plant could be done at less cost through a subcontractor. It therefore decided to subcontract the work and terminate the employment of the maintenance employees at the plant when their labor contract expired. The Supreme Court concluded that requiring the employer to bargain would promote the major tenets of the Act63 and held that the dismissals were mandatory bargaining subjects. In a concurring opinion, Justice Stewart emphasized that the case involved a mere substitution of one group of workers for another64 and cautioned that other types of subcontracting practices or investment decisions would not be subject to the duty to bargain.65 Although *Fibreboard* established the principle that the duty to bargain attaches to certain management decisions regarding operational changes, the decision's scope was unclear because the majority cautioned that the law in this area should be developed on a case-by-case basis.66

One year after *Fibreboard*, the Supreme Court in *Darlington*67 held that an employer has a right to close his entire business, even because of anti-union sentiments.68 However, a partial clos-

---

63. 379 U.S. at 211.
64. Id. at 217 (Stewart, J., concurring).
65. Id. at 224. (Stewart, J., concurring). Justice Stewart emphasized that the *Fibreboard* holding should not be understood to impose a duty to bargain regarding managerial decisions which lie at the core of entrepreneurial control. Id.
66. Id. at 213. See Heinsz, *The Partial Closing Conundrum: The Duty of Employers and Unions To Bargain in Good Faith*, 71 DUKE L.J. 71,77 (1981). The question remained after *Fibreboard* whether its holding would be limited to that particular factual situation or would be expanded to cover other types of subcontracting arrangements, such as the moving of a plant to another location or the partial shutdown of a business. Id.
67. 380 U.S. 263 (1965). In *Darlington*, the Textile Workers Union won an election at the plant and asked the company to bargain. The board of directors voted to close the plant, discharge the employees, and sell the equipment. The Board found that the closing was motivated by anti-union sentiments and was therefore unlawful. See 139 N.L.R.B. 241, 243 (1962).
68. 380 U.S. at 273-74. The Court reasoned that an employer, even if motivated by spite for the union, can obtain no future benefit by completely closing its enterprise. Id. at 269-74.
ing in one plant by a multiple plant employer is subject to section 8(a)(3)⁶⁹ if the Board can show that the effect of the closing was to discourage unionism, and that the employer could reasonably foresee that employees in his other plants would fear a similar closing if they continued to engage in union activities.⁷⁰

An employer will seldom be required to bargain over partial plant shutdowns under Darlington because the burden of proving that a closing was actually motivated by anti-union animus is a heavy one: an employer can usually find some economic justification for closing a plant.⁷¹ Although the Supreme Court decided the case under section 8(a)(3), rather than under section 8(a)(5), Darlington did delineate one area in which bargaining over a partial closing was required.⁷²

Also in 1965, the Third and Eighth Circuits found that employers have no legal obligation to bargain over partial closings. In NLRB v. Royal Plating and Polishing Co.,⁷³ the Court of Appeals for the Third Circuit held that in each case involving a partial closing, the interests of the employees and the purpose of securing industrial tranquility must be carefully balanced against the right of an employer to run his business.⁷⁴ The court found that the decision to close one of the plants was a major investment decision rather than a mere substitution of employees as in Fibreboard.⁷⁵ The court concluded that an employer faced with the economic necessity of either moving or consolidating the operations of a failing business has no duty to bargain with the union respecting its decision to shut down.⁷⁶

⁶⁹. See supra note 42.
⁷⁰. Id. at 275-76.
⁷¹. See Heinsz, supra note 66, at 97.
⁷². The Board found that the company violated section 8(a)(1) by dismissing the employees after the decision to close, and it violated section 8(a)(5) by refusing to honor the union's request to bargain after the decision to liquidate. The Supreme Court eliminated any consideration of sections 8(a)(1) and (5), however, by noting that the propriety of the Board's conclusion about these violations turned on whether the decision to close transgressed section 8(a)(3). See 380 U.S. at 266-67, nn.5-6.
⁷³. 350 F.2d 191 (3d Cir. 1965). The company decided, without bargaining with the union, to sell one of its plants due to the threat of condemnation proceedings by a local government. Id.
⁷⁴. Id. at 195.
⁷⁵. Id. at 196. For a discussion of the investment analysis, see infra notes 97-107 and accompanying text.
⁷⁶. 350 F.2d at 196.
In *NLRB v. Adams Dairy, Inc.*, the Court of Appeals for the Eighth Circuit held that a change in basic operating procedures took place when the dairy liquidated that part of its business handling distribution of milk products. Unlike the situation in *Fibreboard*, there was a change in the capital structure of the Adams Dairy which resulted in a recoupment of capital investment. The court reasoned that to require the dairy to bargain about its decision to close out the distribution end of its business would specifically abridge its freedom to manage its own affairs.

In 1978, the Third Circuit in *Brockway Motor Trucks v. NLRB* attempted to resolve two conflicting principles—the right of the entrepreneur to control capital assets and the statutory rights of workers to bargain collectively with their employer over conditions affecting their jobs. The *Brockway* court concluded that a partial closing that resulted in termination fell within the literal statutory language of affecting “terms and conditions of employment” and that a presumption in favor of bargaining existed. The court stated, however, that the presumption can be rebutted by a showing that when the competing interests of the employer and the employees are weighed, the employer's interests prevail.

While the courts of appeals have looked at the partial closing decision primarily from the management's perspective, the Board has emphasized the employee's interests. In 1966, the Board in *Ozark* found that the failure to bargain over the decision to close one part of the company's operations violated section 8(a)(5) even though the decision was made for purely economic reasons. The

---

78. 350 F.2d at 111. The case was factually distinguished from *Darlington* because no anti-union animus was found. *Id.*
79. 582 F.2d 720 (3d Cir. 1978). Brockway was engaged in the manufacture, sale, and service of trucks with locations throughout Pennsylvania and other states. When no agreement on a new contract could be reached at its Philadelphia plant, Brockway announced its decision to close the plant. *Id.* at 722.
80. *Id.* at 723. The Third Circuit remanded the case to the Board for fact-finding into the circumstances behind the partial closing. 251 L.R.R.M. 1515 (1980).
81. The Ozark plant was closed and dismantled for economic reasons. The union did not receive notice or an opportunity to bargain with respect to the effects of the decision upon the employees.
Board rejected the investment analysis as a justification for a partial closing decision, emphasizing that a decision to close has as great an effect on the employee's protection of his livelihood as it does an employer's capital investment. The Board concluded that bargaining to a solution will promote a means of keeping the plant open and retaining jobs and would thereby promote the harmony sought by the Act.

In 1971, the Board in General Motors Corp. announced an exception to its holdings that an employer must bargain over partial closings. The Board decided that the decision by General Motors to sell a manufacturer-owned dealership was not a mandatory subject of bargaining even though the sale caused several employees to lose their jobs. Unlike the most previous Board opinions, General Motors emphasized the withdrawal of capital and the change in the scope of business that resulted from the decision to sell, rather than the loss of jobs it caused.

In 1974, The Board in Royal Typewriter, returned to its Ozark position, holding that a partial closing and relocation was a mandatory subject of bargaining. The Board found that the company's notice to the union of the possible termination of manufacture at one plant but continued manufacture of products at another factory in the United States, approximately one week before the final closing, was inadequate. The Board in Brockway Motor Trucks reiterated its basic position that in a partial closing case an employer's decision made without bargaining violated section 8(a)(5). The Board also noted, however, that the company had not shown that its decision involved such a sig-

83. 161 N.L.R.B. at 566.
84. Id.
86. 191 N.L.R.B. at 953.
88. The Board distinguished General Motors because it involved an economic decision to sell an independent dealership, whereas in Royal Typewriter, the company had decided to close one of its plants but to continue manufacturing similar products at another facility.
89. See 209 N.L.R.B. at 1012.
90. Id. at 1012-13.
significant investment or withdrawal of capital that it affected the scope and direction of the enterprise.\textsuperscript{92} The present posture of the Board appears to require decision-bargaining over an economically motivated partial closing when the company would not be entirely removing itself from a particular line of business in so closing and there is no necessity to do so to protect fixed capital.\textsuperscript{93}

The First National Court's employment of a balancing test and determination that the interests of management in exercising its prerogatives outweighed the possible advantages that the union could gain through bargaining is consistent with the court of appeals' pro-management decision.\textsuperscript{94} The Court's holding represents a clear rejection of the Board's "prevailing interests of employee" analysis\textsuperscript{95} and an adoption of an approach emphasizing the employer's need to operate freely in decision-making.\textsuperscript{96}

In deciding whether a particular decision by management should be a mandatory subject of bargaining, two conflicting interests should be considered: (1) the importance of maintaining equality of bargaining strength between labor and management; and (2) the need to protect capital investment decisions from the influence of labor.\textsuperscript{97} Courts and the Board, in deciding which interest should prevail in a case should ask what would best serve the long-run interests of the economy.\textsuperscript{98} A rule requiring an employer to bargain over every decision would so decrease economic efficiency that in the long run the depressed economic

\textsuperscript{92} See supra note 78 and accompanying text.
\textsuperscript{94} See supra note 22 and accompanying text.
\textsuperscript{95} See supra notes 81-92 and accompanying text.
\textsuperscript{96} See 452 U.S. at 674-80.
\textsuperscript{98} Accordingly, a recurrent theme in the partial closing decision cases is the investment analysis which recognizes that it is essential to the proper functioning of the economy that capital be free to flow from one use to another. See R. LEFTWICH, THE PRICE SYSTEM AND RESOURCE ALLOCATION at 326 (Rev. ed. 1963):

Not only does the free flow of capital cause the economy to adjust to the desires of the consumer but reallocating a given amount of capital from a low yielding use to a higher yielding use results in a net increment to national income and given a fixed amount of resources, increases the efficiency of the enterprise and the economy.

\textit{Id.}
conditions would make labor worse off than without such a rule. Also, complete equality of bargaining strength would allow labor to participate in decisions best left to the judgment of management, the optimum balance of bargaining power between labor and management must, of necessity, be left in favor of the employer to the extent of preventing labor's participation in reallocation decisions.  

It has been suggested that the distinction between fixed and working capital offers a means for compromising the interests of labor with the advantages to be gained from economic efficiency. Fixed capital is invested in fixed assets like plants and equipment; working capital consists of cash and short-term investments which provide money and payment for wages. Those labor demands that relate only to working capital, such as wages or pension benefits, should be included as subjects of collective bargaining because such demands are of great importance to labor and their inclusion is not severely detrimental to economic efficiency. A partial closing that involves liquidating a fixed capital investment in plant and equipment evidences the employer's belief that the overall return on his investment is insufficient to justify continued operations at the particular location, and therefore, should be immune from collective bargaining. When the return on capital falls below the point at which the employer chooses to operate that portion of his business in question, insulating the decision to partially terminate operations is advantageous to the economy because it prevents labor from forcing the employer to remain in business to produce goods or services for which there is no longer a sufficient profit. This approach leaves partial closing decisions that affect only working capital to the bargaining process.

The Third and Eighth Circuits have adopted the "fixed versus working capital" distinction as one means of determining when

99. See Goldman, supra note 97, at 1093.
100. Id. at 1096.
101. Id. at 1095.
102. Id. at 1096.
103. Id. at 1096 n.35.
104. Id. The distinction between working and fixed capital cannot be used to distinguish between mandatory and nonmandatory subjects in general because every decision which affects working capital should not be a mandatory subject of bargaining; the distinction is only useful in the partial termination situation. Id.
mandatory bargaining will be required and have held that a partial closing decision is not a subject of mandatory bargaining. Furthermore, the Third Circuit in *Brockway*, although holding that a rebuttable presumption in favor of bargaining existed, pointed to the fact that in balancing the interests of the employer and employee to rebut the presumption, the capital investment analysis was useful. While the Board has recognized this approach, it has rejected its use in determining whether or not a particular management decision must be the subject of bargaining.

Although the Supreme Court in *First National* did not adopt the capital investment analysis, its balancing test represents at least a recognition of the approach. The Court did weigh the interests of the employer and employee and concluded that FNM did not have a duty to bargain over the continuance of operations at Greenpark when the contractual agreement was no longer profitable. In doing so, the Court relied on the importance of the management prerogative in decision-making. The opinion, however, failed to develop the impact that a significant capital investment would have on its balancing test. The Court noted that the absence of a capital investment was not crucial; yet, the courts of appeal and the Board have recognized this approach in their decision-making. The presence or absence of capital investment is an important factor throughout the partial closing cases and is an essential element of the *Fibreboard* analysis which was relied upon by the Court. Therefore, the precedential value of *First National* is indeed questionable, in regards to those partial closings which involve significant capital reallocation. Although the Court adequately distinguished *Fibreboard* by concluding that the decision to terminate the


106. *See* 582 F.2d at 723. *See supra* notes 79-80. The *First National* Court clearly rejected the presumption analysis, reasoning that such an approach would not promote harmonious employer-employee relationships because an employer would never be sure whether he could safely run the risk of choosing not to bargain. 101 S. Ct. at 2583.


108. *See* 452 U.S. at 674-80.


110. *See* 101 S. Ct. at 2579-82.
Greenpark operations represented a significant change in operations rather than a mere substitution of one group of workers for another, only future partial closing cases will reveal First National's effect.

Collective bargaining may be looked upon as the extension of basic principles and practices of democracy into industry. The sponsor of the original version of the Act made it plain in his opening statement to Congress in 1934 that the Act was aimed at least as much at changing the distribution of wealth between labor and management as at promoting efficient capital flow. Today, however, the courts in deciding which interest should prevail, put a greater emphasis on which would best serve the long-run interest of the economy.

As the number of business shutdowns increases because of economic difficulties, the issue of whether employers must negotiate with unions over a decision to close a plant assumes greater importance. Where the importance of insulating capital expenditures from the influence of labor outweighs the possible adverse effects on union bargaining strength, it necessarily follows that the decision must be immune from collective bargaining. An adoption of the "balancing of interests" test as proposed by the First National Court is a starting point for the implementation of a uniform set of rules under which the Board and the courts can operate. However, such a balancing test does not appear to be any more predictable than the rebuttable presumption analysis adopted by the Third Circuit. The task of balancing the employee's need for continued employment against the employer's need for freedom in decision-making is difficult, and the First National decision leaves the courts with almost unlimited discretion in deciding which interest will prevail.

Carol A. Behers

111. Id. at 2578-85.
113. See 78 Cong. Rec. 3443 (1934) (Remarks of Sen. Wagner): "[I]t is necessary to insure a wise distribution of wealth between management and labor, to maintain a full flow of purchasing power and prevent recurrent depressions."
114. See Goldman, supra note 97, at 1090.
115. Id.
116. See supra notes 79-80 and accompanying text.