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PREDECISION BARGAINING AND THE CORE OF ENTREPRENEURIAL CONTROL: THE UPS AND DOWNS OF OTIS ELEVATOR

Ronald Turner*

INTRODUCTION

Plant closings and relocations, the subcontracting of work, and decisions about prices, products and capital investment have increasingly caused corporate transformations and dislocations throughout industry.1 The labor law implications of these decisions and other managerial endeavors which result in the restructuring and reorganization of companies are significant. Both the National Labor Relations Board ("NLRB" or "Board") and the federal courts are increasingly being asked to resolve labor-management conflicts that arise from employers’ decisions to alter the organization of work and implement changes in their enterprises.2

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2. The NLRB’s and courts’ roles in the resolution of these issues are discussed below. For a discussion of the role of arbitrators in interpreting collective bargaining contracts in plant closure and relocation cases, see Turner, Mergers, Acquisitions, and Collective Bargaining Agreement Provisions, in Government Protection of Employees Involved In Mergers and Acquisitions, supra note 1, at 353-408; Schatzki, Some Comments on the Labor-Management Law Applied To Plant Closures and Relocations, 58 Tul. L. Rev. 1373, 1375 (1984). For a discussion of other issues relative to plant shutdowns and relocations, see Barron, Causes and Impact of Plant Shutdowns and Relocations and Potential Non-NLRA Responses, 58 Tul. L. Rev. 1389 (1984) (discussing loss of jobs resulting from closures, impact on employees and communities, and possible solutions, including requiring notice to employees).

Congress addressed one aspect of plant closures in the Worker Adjustment and Retraining Notification Act, Pub. L. No. 100-379, §§ 2-10, 102 Stat. 890 (1988), 29 U.S.C.A. §§ 2101-2109 (West Supp. 1989) ("WARN Act"). The WARN Act requires employers with at least 100 employees (§ 2101(a)(1)) to provide 60 calendar days advance notice of plant closings (§ 2101(a)(2)) and of mass layoffs (§ 2101(a)(3)) to nonunion affected employees, the employees'
Much of the legal activity in the past few years has involved the question of whether the National Labor Relations Act ("NLRA" or "Act") requires representative, and to state and local government officials (§ 2102(a)). The statute exempts, inter alia, closings or layoffs related to temporary facilities and limited duration projects, (§ 2103(l)), as well as strikes or lockouts "not intended to evade" the statute. See § 2103(2).

The WARN Act is enforced by the civil penalties set forth in § 2104. Employers who fail to provide the required notice are "liable to each aggrieved employee who suffers an employment loss as a result of [the] closing or layoff for" back pay and benefits "for the period of the violation, up to a maximum of 60 days." § 2104(a)(1). Employers who fail to provide adequate notice to local government officials are also subject to a fine of up to $500 per each day of violation (a maximum of $30,000 over the 60-day notice period). § 2104(a)(3). That penalty does not apply if the employer in violation of the WARN Act pays to each aggrieved employee the full amount owed within three weeks from the date the employer ordered the shutdown or layoff. Id. See also Final Rule, Worker Adjustment and Retraining Notification, 54 Fed. Reg. 16,064 (1989) (to be codified at 20 C.F.R. § 639.1). The Department of Labor, Employment & Training Administration's comments were issued with the Final Rule. 54 Fed. Reg. 16,042-64 (Apr. 20, 1989). For an excellent summary and discussion of the WARN Act, see Miscimarra, supra note 1, at 149-92.


A significant and related issue that is beyond the scope of this Article concerns an employer's obligation to bargain over the effects of its managerial decisions, regardless of whether those decisions are themselves subject to the bargaining obligation mandated by the Act. See Miscimarra, supra note 1, at 23-27; P. MISCIMARRA, THE NLRB AND MANAGERIAL DISCRETION, supra note 1, at 16-19. See also Kohler, Distinctions Without Differences: Effects Bargaining In Light of First National Maintenance, 5 INDUS. REL. L.J. 402, 414-15 (1983) ("effects-bargaining" gives union opportunity to discuss impact of managerial decision on employees' rights); Brown Truck & Trailer Mfg. Co., 106 N.L.R.B. 999, 1000 (1953) (the employer was required "to advise the Union of the contemplated move and to give the Union the opportunity to bargain with respect to the contemplated move as it affected the employees . . .").

Thus, effects-bargaining over "issues such as severance pay, seniority and pensions, among others, are necessarily of particular relevance and importance." NLRB v. Royal Plating & Polishing Co., 350 F.2d 191, 196 (3d Cir. 1965). The scope of effects-bargaining is not limited; rather, the bargaining obligation encompasses all effects flowing from the implementation of a managerial decision. See Kohler, supra, at 415 (scope is unlimited and "[t]he most crucial . . . [effects] are opportunities for continued employment at the employer's other facilities."); Soule Glass & Glazing Co. v. NLRB, 652 F.2d 1055, 1085-86 (1st Cir. 1981) (broad scope of effects-bargaining does not include union's "forcing [the employer] to forego the proposed change" (quoting International Ass'n of Machinists & Aerospace Workers v. Northeast Airlines, Inc., 473 F.2d 549, 558 (1st Cir.), cert. denied, 409 U.S. 845 (1972))).

The effects-bargaining obligation of employers has been recently recognized and emphasized by both the United States Supreme Court and the Board. In First Nat'l Maintenance Corp. v. NLRB, 452 U.S. 666, 682 (1981), the Court admonished that effects-bargaining must take place "in a meaningful manner and at a meaningful time . . . ." Id. Similarly, the Board has consistently held that an employer violates the Act by failing to bargain over the effects of its decision. See, e.g., Stamping Specialty Co., 294 N.L.R.B. No. 56, 5 Lab. L. Rep. (CCH) ¶
an employer to collectively bargain with a labor organization before deciding to partially close or relocate particular operations. This process, generally referred to as "predecision bargaining," raises fundamental questions concerning an employer's freedom to make and implement certain entrepreneurial initiatives, and a union's involvement in matters of obvious concern to employees.

Two significant decisions have held that predecision bargaining is required in certain contexts. In First National Maintenance Corp. v. NLRB, the United States Supreme Court held that an employer's decision to close part of its business for purely economic reasons was not subject to mandatory bargaining. Similarly, in Otis Elevator Co. ("Otis II"), a Board plurality applied its view of the standards developed in First National Maintenance to construct a "business direction-labor costs" dichotomy and concluded that an employer's plant relocation decision was not subject to mandatory bargaining under the Act.

There is no dearth of scholarly comment on First National Maintenance, and this article is not intended to add to the numerous critiques and analyses

15,576 (May 31, 1989) (employer's failure to notify union of decision to discontinue product line and lay off employees denied union opportunity for effects-bargaining in violation of sections 8(a)(1) and 8(a)(5)); David Wolcott Kendall Mem. School, 292 N.L.R.B. No. 120, 5 Lab. L. Rep. (CCH) ¶ 15,407 (Feb. 14, 1989) (refusal to bargain over effects of compliance with state requirement of master's degree for faculty violated section 8(a)(5)); Ozark Trailers, Inc. 161 N.L.R.B., 561, 564 (1966) (decision to close plant without notice to union prevented effects-bargaining and violated section 8(a)(5)).

Also beyond the scope of this Article is the issue of the "midterm contract modification doctrine" which posits that certain modifications of a collective bargaining agreement during a contract term would be illegal even where the employer engaged in decision and effects-bargaining. See Los Angeles Marine Hardware Co., 235 N.L.R.B. 720 (1978), enforced, 602 F.2d 1302 (9th Cir. 1979). The Board reaffirmed the aforementioned doctrine, in Milwaukee Spring Div. of Illinois Coil Spring Co., 265 N.L.R.B. 206 (1982) [hereinafter Milwaukee Spring I], remanded without opinion, 718 F.2d 1102 (7th Cir. 1983), but subsequently rejected it in Milwaukee Spring Div. of Illinois Coil Spring Co., 268 N.L.R.B. 601 (1984) [hereinafter Milwaukee Spring II], aff'd sub nom. International Union, UAW v. NLRB, 765 F.2d 175 (D.C. Cir. 1985).

In Milwaukee Spring II, the Board concluded that the employer's mid-contract term relocation of operations was not prohibited by any term contained in the employer-union labor agreement, and rejected the arguments that the relocation modified the wage, benefits and union recognition clauses of the labor agreement. See 268 N.L.R.B. at 602. For an excellent discussion of the Milwaukee Spring litigation, see Miscimarra, supra note 1, at 64-68.


6. See, e.g., P. Miscimarra, The NLRB and Managerial Discretion, supra note 1, at 147-55 (concluding that Supreme Court's intent in First National Maintenance was subject to differing applications because of unresolved issues in the decision); George, To Bargain or Not to Bargain: A New Chapter in Work Relocation Decisions, 69 Minn. L. Rev. 667, 680 (1985) (criticizing First National Maintenance and the Supreme Court's "adoption of a case-by-case balancing test," applied "in such a way as to create a per se rule of not requiring bargaining for partial closure decisions."); Gorman, The Negligible Impact of the National Labor Relations
of that decision. Rather, this discussion focuses on the NLRB's *Otis II* decision and its progeny, and on the NLRB's current treatment of transfer, relocation and other related managerial decisions. This examination is especially timely because the NLRB has steadfastly declined to adopt any one of three approaches articulated by the Board in *Otis Elevator II*. These three approaches are as follows:

(1) the standard keyed to labor costs enunciated by former Chairman Donald Dotson and former Member Robert Hunter;  
(2) former Member Patricia Dennis' opinion which focused on amenability to bargaining and the balance between the benefits and burdens of the bargaining process; and,  
(3) the broader amenability to bargaining analysis set forth in former Member Don Zimmerman's opinion.

Board decisions applying *First National Maintenance* and *Otis II* have typically relied upon any and all of the views expressed by the Supreme Court or the Board in both of those decisions. That none of the differing *Otis II* approaches has commanded a three-Member majority of the Board is more than merely an academic point. A clearly articulated NLRB majority position would provide a more definitive rule to guide subsequent Board and court decisions. The departure of all of the Board Members who decided *Otis II* from the NLRB makes the need for guidance even more significant. In the absence of such guidance, Board

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7. See infra notes 90-97 and accompanying text.  
8. See infra notes 98-108 and accompanying text.  
9. See infra notes 109-11 and accompanying text.  
10. See infra Part III-B. As this Article was being prepared for printing, the United States Court of Appeals for the District of Columbia Circuit issued its opinion in United Food and Commercial Workers Int'l Union, Local 150-A v. NLRB, No. 88-1084 (D.C. Cir. Aug. 4, 1989) [hereinafter UFCW Int'l Union]. The court remanded the case to the NLRB because both the Board and its administrative law judge failed to explain their conclusions, and because the Board neither adopted a majority position nor explained how its conclusion was valid under all of the views of *Otis II*. Id. slip op. at 30-32. See infra notes 237-51 and accompanying text for a discussion of *UFCW Int'l Union.*
Members are obliged to chart their own course with respect to agreeing or disagreeing with, and adopting, the varying approaches in this area.\(^{11}\)

This Article traces the evolution of, and changes in, the NLRB’s predecision bargaining jurisprudence as reflected in \textit{Otis II} and its progeny. Part I presents a brief overview of the duty to bargain under the Act and the deferential standard of review applied by the federal courts of appeals to NLRB determinations of whether bargaining over a particular matter is mandatory or permissive. Part II discusses the Supreme Court decisions which have defined the duty to bargain over business conduct decisions and provided the framework for the Board’s decision in \textit{Otis II}. \textit{Otis II} and its progeny are discussed in Part III, with particular emphasis placed on the absence of a Board majority view with regard to which of the three approaches articulated therein states the test for which decisions are mandatory subjects of bargaining. As noted in Part III, the Board has recently moved away from a test focused upon labor costs in the subcontracting context, but has extended \textit{Otis II} to encompass economically-based layoff decisions.\(^{12}\) Finally, Part IV concludes that \textit{Otis II}, as applied, is not the definitive and outcome-determinative decision that it has been portrayed to be. Rather, it is imperative that an NLRB \textit{majority} decide what standard is the standard for determining what decisions are mandatory bargaining subjects, and discontinue the current (albeit institutionally safer) practice of announcing without further explanation that an employer is or is not required to predecision bargain under \textit{First National Maintenance} and any of the views expressed in \textit{Otis II}.

\section*{I. The Employer’s Duty to Bargain and Judicial Deference to NLRB Section 8(d) Rulings}

Three provisions of the NLRA govern an employer’s duty to collectively bargain with a labor organization. Section 8(a)(5) makes it an unfair labor

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  \item 12. For discussion of the application of \textit{Otis II} to subcontracting decisions, and to economically based layoff decisions, see \textit{infra} notes 165-70, and 179-89, respectively, and accompanying text.
\end{itemize}
practice for an employer\textsuperscript{13} “to refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9(a).”\textsuperscript{14} Section 9(a) provides that a labor organization chosen by a majority of employees in an appropriate bargaining unit “shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment.”\textsuperscript{15}

In construing section 8(a)(5), reference must be made to the definition of collective bargaining found in section 8(d) of the Act.\textsuperscript{16} Thus, a determination as to whether an employer has violated section 8(a)(5) by refusing to bargain collectively with the exclusive representative of an appropriate unit of his employees depends on the meaning of section 8(d). That section’s definition of the duty to bargain obligates both parties to meet at reasonable times and confer in good faith with respect to “wages, hours, and other terms and conditions of employment” i.e., mandatory subjects of bargaining.\textsuperscript{17}

\begin{itemize}
  \item Section 2(2) of the Act, 29 U.S.C. § 152(2), defines “employer” to include any person acting as an agent of the employer, but excludes the federal government, wholly owned government corporations, Federal Reserve Banks, state or political subdivisions, persons subject to the Railway Labor Act, 45 U.S.C. § 151-188 (1982), and labor organizations not acting as employers. A substantial proportion of American workers fall outside the coverage of the NLRA. Gorman, supra note 6, at 1354.
  \item See 29 U.S.C. § 158(a)(5). Unions are also required to collectively bargain in good faith with employers. See 29 U.S.C. § 158(b)(3).
  \item Section 8(d), 29 U.S.C. § 158(d), was added to the NLRA in 1947. As proposed, § 8(d) would have limited the Act’s bargaining obligation to: (1) wage rates, hours of employment, and work requirements; (2) procedures with regard to discharge, suspension, layoff, recall, seniority, discipline, promotion, demotion, transfer, and unit assignment; (3) safety, sanitation, and health conditions; (4) leaves of absence and vacations; and, (5) the administration of, and other procedures relating to, these subjects. See H.R. 3020, 80th Cong., 1st Sess. § 2(11) (1947), reprinted in Legislative History of the Labor Management Relations Act, 1947 at 158, 166-167 [hereinafter LEG. HIST.]; H.R. Rep. No. 245, 80th Cong., 1st Sess. 22-23 (1947), reprinted in LEG. HIST., supra, at 292, 313-14.
  \item Rejecting this proposal, Congress decided in favor of general language which requires bargaining over “wages, hours, and other terms and conditions of employment.” 29 U.S.C. § 158(d), quoted infra note 17. See generally First Nat’l Maintenance v. NLRB, 452 U.S. 666, 675 (1981) (Congress intended to give Board power to define § 158(d) “in light of specific industrial practices”); George, supra note 6, at 671-72 (Congress chose general rather than specific language).
  \item Section 8(d), 29 U.S.C. § 158(d), provides, in relevant part:
    \begin{enumerate}
      \item 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
The designation of a particular subject matter as a mandatory subject of bargaining triggers the statutory duty to bargain of both the employer, under section 8(a)(5) and the union, under section 8(b)(3). The duty to bargain requires management to consult with the union before taking action and prohibits certain unilateral changes in the terms and conditions of employment which are mandatory subjects of bargaining prior to reaching a bona fide impasse in bargaining. Once an impasse is reached, an

to a proposal or require the making of a concession . . . (emphasis added). The term "wages, hours, and other terms and conditions of employment" in § 8(d) "includes only issues that settle an aspect of the relationship between the employer and employees." Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co., 404 U.S. 157, 178 (1971) (citing NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342 (1958)). In Allied Chemical, for example, the Supreme Court held that the terms and conditions of employment of active employees were not "vita1ly affected by pensioners' benefits," and that such benefits were therefore not a mandatory subject of bargaining. 404 U.S. at 182 (emphasis in original).


18. See NLRB v. Katz, 369 U.S. 736 (1962) (employer's unilateral changes in merit pay increases, sick-leave policy and system of automatic wage increases prior to impasse in bargaining constituted a violation of section 8(a)(5)); NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342 (1958) (employer's insistence upon inclusion of "ballot" and "recognition" clauses, which were merely permissive subjects, in collective bargaining agreement violated § 8(a)(5)). Cf. Taft Broadcasting Co., 163 N.L.R.B. 475, 478 (1967) (negotiations were deadlocked and parties were further apart than when talks started, so impasse had been reached and unilateral change in terms and conditions of employment did not violate duty to bargain), review denied sub nom. American Fed'n of Television & Radio Artists v. NLRB, 395 F.2d 622 (D.C. Cir. 1968). For discussions of bargaining impasse and the significance thereof, see R. GORMAN, BASIC TEXT ON LABOR LAW 445-50 (1976); Turner, Impasse in the 'Real World' of Labor Relations: Where Does the Board Stand?, 10 EMPLOYEE REL. L.J. 468 (1984); Comment, Impasse in Collective Bargaining, 44 TEX. L. REV. 769 (1966).

In addition to requiring the parties to bargain to impasse, the classification of a particular subject matter as a mandatory subject of bargaining has other significant consequences for both the union and the employer. First, the parties may support insistence upon their positions with economic weapons such as a strike or lockout. First Nat'l Maintenance, 452 U.S. at 675 ("both employer and union may bargain to impasse over these [mandatory] matters and use the economic weapons at their disposal to attempt to secure their respective aims.") (citing NLRB v. American Nat'l Ins. Co., 343 U.S. 395 (1952))). Second, the employer must disclose pertinent information concerning a mandatory subject. NLRB v. Truitt Mfg. Co., 351 U.S. 149 (1956). Third, the nature of the remedies for unfair labor practices elevates the parties' assessment of a given subject to a level of critical significance. An employer who mistakenly takes the view that a subject is not mandatory but merely permissive "might be faced ultimately with harsh remedies forcing it to pay large amounts of backpay to employees who likely would have been discharged regardless of bargaining, or even to consider reopening a failing operation." First Nat'l Maintenance, 452 U.S. at 684-85, quoted with approval in, Arrow Automotive Industries v. NLRB, 853 F.2d 223, 232 (4th Cir. 1988).

Moreover, the union's assessment of the type of subject at issue may bring serious conse-
employer may lawfully institute unilateral changes which are consistent with its pre-impasse proposals made to the union. Because it is often difficult to identify the precise point in time at which an impasse is reached (and even more difficult to predict how the NLRB will rule in an impasse case), section 8(a)(5) stands as a "significant obstacle to an employer who wants to make a decision that requires major expenditures and clockwork timing but which nonetheless is the subject of mandatory bargaining."21

The general standard of mandated bargaining over "terms and conditions of employment" leaves ample room for the NLRB and the courts to construe and interpret the Act.22 The Act entrusts to the Board both the definition of the duty to bargain as set forth in section 8(a)(5), and the designation of mandatory subjects of bargaining as defined and set forth in section 8(d).23 In Ford Motor Co. v. NLRB,24 the Supreme Court stated that the

sequences to its members. Employees in one bargaining unit who stop work in protest over the employer's refusal to bargain over, say, subcontracting the work to a second unit—if the subcontracting decision is held to be a mandatory subject—may have the status of "unfair labor practice strikers." As such, they may be protected against discharge, and the employer would have to reinstate them with full backpay. But if the subcontracting decision is only a permissive subject, the work stoppage may not be protected concerted activity and, accordingly, the employees may not be protected against discharge. See Turner, supra, at 487-88. As one commentator put it, "[i]s it sound legal policy to make such greatly significant liabilities (backpay in the case of the employer, and job loss in the case of the employees) turn upon elusive characterization of the subjects of bargaining—often definitively made many months, and sometimes years, after the event?" A. Cox, D. BOK & R. GORMAN, CASES AND MATERIALS ON LABOR LAW 455 (10th ed. 1986).

19. The NLRB considers the following factors in making impasse determinations: (1) the parties' bargaining history; (2) good faith negotiations; (3) the length of negotiations; (4) the issues on which the parties disagree; and, (5) the parties' understanding regarding the status of negotiations. Taft Broadcasting, 163 N.L.R.B. at 478; Turner, supra note 18, at 471 (commenting on generality of Taft Broadcasting factors).

20. Katz, 369 U.S. at 744-45; Taft Broadcasting, 163 N.L.R.B. at 478 ("unilateral changes that are reasonably comprehended within [the employer's] pre-impasse proposals" do not violate duty to bargain).


22. Stone, supra note 1, at 88. See, e.g., United Food and Commercial Workers Int'l Union v. NLRB, No. 88-1084, slip op. at 3 (D.C. Cir. Aug. 4, 1989) (employer chose to relocate between March and October 1981, approximately eight years before appeal of Board ruling was decided); Arrow Automotive Indus., Inc. v. NLRB, 853 F.2d 223, 225 (4th Cir. 1988) ("The Board thus ordered Arrow to bargain with the union over the closing decision that had been made six years earlier.").

23. First Nat'l Maintenance v. NLRB, 452 U.S. 666, 675 (1981) ("Congress deliberately left the words 'wages, hours, and other terms and conditions of employment' without further definition, for it did not intend to deprive the Board of the power further to define those terms in light of specific industrial practices."). Accord Local Union No. 189, Amalgamated Meat Cutters v. Jewel Tea Co., 381 U.S. 676, 686 (1965) (courts are able to classify bargaining subject and NLRB did not have primary (exclusive) jurisdiction over issue whether bargaining subject was included within "terms or conditions of employment").

24. Ford Motor Co. v. NLRB, 441 U.S. 488, 497 (1979) ("Construing and applying the duty to bargain and the language of § 8(d), 'other terms and conditions of employment,' are tasks lying at the heart of the Board's function.").

NLRB's "special expertise" in classifying bargaining subjects as section 8(d) terms and conditions of employment is reason to apply such a deferential standard of review. The federal courts of appeals have accepted NLRB determinations in this area where the NLRB's "construction of the statute is reasonably defensible . . . ." If it is, the Court has instructed that the NLRB's construction must be accepted and "should not be rejected merely because the courts might prefer another view of the statute."  

II. THE SUPREME COURT'S PREDECISION BARGAINING JURISPRUDENCE

The Supreme Court's decisions in Fibreboard Paper Products Corp. v. NLRB and Textile Workers Union of America v. Darlington Manufacturing Co. represent the polar situations in which mandatory bargaining over business conduct decisions is and is not required. This part of the Article discusses these rulings as an introduction to the discussion of First National Maintenance.

A. The Fibreboard Decision

In Fibreboard Paper Products Corp. v. NLRB, the Supreme Court held that the "contracting out" of work previously performed by members of an existing bargaining unit was a subject over which section 8(a)(5) required bargaining as defined in section 8(d). Chief Justice Earl Warren, writing for the Court, noted that the primary issue before the Court was whether the employer's contracting out of plant maintenance work, previously performed by unit employees who were capable of continuing to perform the work, fell within the coverage of section 8(d). Concluding that the contracting matter was within the literal meaning of the phrase "terms and condi-

26. Id. at 495 (the Board's "judgment as to what is a mandatory bargaining subject is entitled to considerable deference.").
27. Id. at 497 (emphasis added).
28. Id. (citing NLRB v. Local Union No. 103, Int'l Ass'n of Bridge, Structural & Ornamental Iron Workers, 434 U.S. 335, 350 (1978)).
32. Id. at 211. In Fibreboard, the company sought to reduce the high cost of its maintenance operation and informed the union of its plan to obtain substantial savings by contracting out its maintenance work to an independent contractor when the collective bargaining agreements with its maintenance employees' unions expired. Id. at 206. The company later terminated its union-represented maintenance employees and contracted the maintenance work. Id. at 207.

tions of employment," the Chief Justice reasoned that to hold subcontracting a mandatory bargaining subject "would promote the fundamental purpose of the Act by bringing a problem of vital concern to labor and management within the framework established by Congress as most conducive to industrial peace." 33

In Chief Justice Warren’s view, the facts of Fibreboard illustrated the propriety of submitting the contracting dispute to bargaining:

The Company’s decision to contract out the maintenance work did not alter the Company’s basic operation. The maintenance work still had to be performed in the plant. No capital investment was contemplated; the Company merely replaced existing employees with those of an independent contractor to do the same work under similar conditions of employment. Therefore, to require the employer to bargain about the matter would not significantly abridge his freedom to manage the business. 34

The Court’s decision also noted that the employer had been concerned with the labor costs associated with its maintenance operation. According to Chief Justice Warren, the subcontracting decision was induced by the assurances of independent contractors that savings would be achieved by reducing the number of employees, their fringe benefits and overtime. 35 Acknowledging that it was “not possible to say whether a satisfactory solution could be reached” on these issues via bargaining, the Court reasoned that “national labor policy is founded upon the congressional determination that the chances are good enough to warrant subjecting such issues to the process of collective negotiation.” 36 Expressly limiting its holding to the type of subcontracting at issue, the Fibreboard Court emphasized that its decision did not encompass other forms of subcontracting, contracting out, or a variety of other business arrangements. 37

Justice Potter Stewart authored an influential concurrence. 38 Indicating his displeasure with the broad implications of the Court’s narrow decision, 39 Justice Stewart noted that the Court had not held that all employer decisions which terminate employment were mandatory subjects of bargaining, nor that subcontracting in general was such a subject. 40 Rather, Justice Stewart

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33. 379 U.S. at 211.
34. Id. at 213.
35. Id.
36. Id. at 214.
37. Id. at 215 & n.8. The Court also enforced the Board’s order which called for the employer to resume its maintenance operations and to reinstate the terminated employees with back pay. Id. at 215-17.
38. Id. at 217-26 (Stewart, J., concurring). Justices William Douglas and John Harlan joined in Justice Stewart’s concurrence.
39. Id. at 218.
40. Id. (Court did “not decide that every managerial decision which necessarily terminates an individual’s employment is subject to the duty to bargain or . . . that subcontracting decisions are as a general matter subject to that duty”).
reiterated that the Court's holding was limited to the specific facts of the case. 41

Justice Stewart's concurrence is best known for the portion of his opinion in which he set forth three categories for classifying management decisions. The first category encompassed decisions involving matters which are by definition working conditions and therefore mandatory subjects of bargaining. These matters included hours of work, the amount of work expected during those hours, relief periods, safety practices, seniority rights, and discriminatory discharges. 42 The second category included decisions such as advertising expenditures, product design, sales, and financing, the impact of which upon the job security of employees was so "indirect and uncertain" as to make such decisions only permissive subjects of bargaining. 43 The third category comprised those management decisions which eliminate jobs or at least put job security at risk, 44 but also included "managerial decisions, which lie at the core of entrepreneurial control." 45

Justice Stewart concluded that where management decisions concerned the "commitment of investment capital and the basic scope of the enterprise," such as in a decision to invest in labor-saving machinery or to liquidate assets and go out of business, they should be excluded from the mandatory bargaining requirement. 46 In terms of the employer's limited duty to bargain under section 8(d), "management decisions which are fundamental to the basic direction of a corporate enterprise or which impinge only indirectly upon employment security should be excluded." 47 The Fibreboard decision generally, and Justice Stewart's analysis in particular, are key precedents for later decisions concerning the issue of whether an employer's duty to bargain includes the obligation to bargain over particular subjects.

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41. Id. ("The Court holds no more than that this employer's decision to subcontract this work . . . is subject to the duty to bargain collectively.").
42. Id. at 222.
43. Id. at 223.
44. Id. (employer's action "may quite clearly imperil job security, or indeed terminate employment entirely").
45. Id. Justice Stewart's scheme of three categories was later adopted by the Supreme Court in First Nat'l Maintenance v. NLRB, 452 U.S. 666, 676-77 (1981). The courts of appeal routinely refer to employer decisions which involve the investment of capital and the scope of the business and also directly impact the relation between employers and employees as "Category 3" decisions. See, e.g., Local 2179, United Steelworkers v. NLRB, 822 F.2d 559, 574 (5th Cir. 1987) ("Otis II plurality rule requires bargaining for class three management decisions if, but only if, the decision 'turns upon labor costs.'"). This article refers to such decisions both by description as well as the "Category 3" label.
46. Fibreboard, 379 U.S. at 223.
47. Id. For examples of lower court adoption of portions of the Stewart analysis, see NLRB v. Drapery Mfg. Co., 425 F.2d 1026 (8th Cir. 1970); NLRB v. Royal Plating & Polishing Co., 350 F.2d 191 (3d Cir. 1965).
B. The Darlington Decision

In the following term, the Court held in *Textile Workers Union of America v. Darlington Manufacturing Co.*\(^{48}\) that an employer has an absolute right to terminate its entire business for any reason, including anti-union motives. That right, however, does not include the ability to terminate only part of a business for any reason.\(^{49}\) In *Darlington*, the employer closed and liquidated one of its facilities after a union won an NLRB representation election at that facility. The union claimed that the closing was an unfair labor practice in violation of the NLRA.\(^{50}\) Writing for the Court, Justice John Harlan noted, preliminarily, that the only issue was whether the closing had been motivated by anti-union animus and therefore violated section 8(a)(3). Moreover, he stated, there was no independent violation of section 8(a)(1) because the employer had not interfered, restrained or coerced employees in the exercise of their section 7 rights.\(^{51}\) No argument was presented, however, that section 8(a)(5) required an employer to bargain over a pure business decision to terminate an enterprise.\(^{52}\) Therefore, although *Darlington* is often cited for the proposition that an employer is not required to bargain over the decision to close a business,\(^{53}\) the Court did not directly rule on the section 8(a)(5) aspect of the plant closure therein.\(^{54}\)

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49. *Id.* at 268.
50. *Id.* at 266-67. The union asserted that the employer violated NLRA §§ 8(a)(1), (3), 29 U.S.C. §§ 158(a)(1), (3) (1982), by closing the plant, and NLRA § 8(a)(5), 29 U.S.C. § 158(a)(5) (1982), by refusing to bargain over the closing. 380 U.S. at 266-67 & nn.4, 5. The Court, however, did not decide the section 8(a)(5) issue. *Id.* at 267 n.5. NLRA § 8 provides in relevant part:

(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7; . . .

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . .

29 U.S.C. §§ 158(a)(1), (3) (1982). Section 7 of the Act protects the rights of employees to organize and join unions, to engage in collective bargaining or "other concerted activities for the purpose of collective bargaining or other mutual aid or protection," as well as the right to refrain from such activities. 29 U.S.C. § 157 (1982). For an overview of NLRA §§ 8(a)(1) and 8(a)(3), see Miscimarra, *supra* note 1, at 100-48.

51. 380 U.S. at 269 ("some employer decisions are so peculiarly matters of management prerogative that they would never constitute violations of § 8(a)(1), whether or not they involved sound business judgment, unless they also violated § 8(a)(3). ").
52. *Id.* at 267 n.5.
53. See, e.g., NLRB v. Production Molded Plastics, Inc., 604 F.2d 451, 453 (6th Cir. 1979) (court read *Darlington* as standing for proposition that complete closing was not a mandatory subject); Ozark Trailers, Inc., 161 N.L.R.B. 561, 564-65 (1966) (NLRB read *Darlington* as implying that section 8(a)(5) applies to partial closure decision).
Management's prerogatives in *Darlington* were so clearly involved in the decision to close the entire business that no interference with employee rights under the Act was present.\(^5\) Moreover, closing down the entire business did not violate section 8(a)(3), regardless of management's motive. Therefore, the Court held that "when an employer closes his entire business; even if the liquidation is motivated by vindictiveness toward the union, such action is not an unfair labor practice."\(^5\)

The key question in *Darlington* was whether a partial closing may violate section 8(a)(3). The Court held that only if the employer's motive for the partial closing was to "chill unionism" in the employer's other locations, and if such an effect was reasonably foreseen by the employer, would the partial closing violate section 8(a)(3).\(^5\)

Thus, at one end of the bargaining continuum, an employer is free to completely close down its business without violating NLRA section 8(a)(3), and *may* be free to close down some facilities without bargaining. At the other end of the continuum, *Fibreboard* requires the employer to bargain about certain subcontracting decisions. In between *Fibreboard* and *Darlington*, however, there remained a significant "zone of uncertainty" about whether employers were statutorily obligated to bargain over "business conduct decisions," such as decisions to relocate a plant, transfer work, or partially close business operations for economic or other reasons.\(^8\) One aspect of this was addressed when the Supreme Court returned to the issue sixteen years later.

**C. The First National Maintenance Decision**

In *First National Maintenance Corp. v. NLRB*,\(^5\) the Supreme Court addressed the issue of predecision bargaining over a partial closing decision.

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\(^5\) *Closed Plants*, 95 Harv. L. Rev. 1896, 1906 n.54 (1982) ("The Court explicitly disavowed ruling on § 8(a)(5)." (citing *Darlington*, 380 U.S. at 267 n.5)). See also Mid-South Bottling Co., 287 N.L.R.B. No. 146, 1987-1988 NLRB Dec. (CCH) ¶ 19,262 (Feb. 29, 1988) (employer not exempt from bargaining where decision to close facility was made shortly after union was certified as employees' exclusive representative, was for anti-union reasons, and therefore violated § 8(a)(3)).

\(^5\) Id. at 270 ("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.").

\(^5\) Id. at 273-74. The court stated that "[n]othing we have said in this opinion would justify an employer's interfering with employee organizational activities by threatening to close his plant, as distinguished from announcing a decision to close already reached by the board of directors or other management authority empowered to make such a decision." Id. at 274 n.20.

\(^5\) Id. at 275 ("a partial closing is an unfair labor practice under § 8(a)(3) if motivated by a purpose to chill unionism in any of the remaining plants of the single employer and if the employer may reasonably have foreseen that such closing would likely have that effect.").

\(^8\) Local 2179, United Steelworkers v. NLRB, 822 F.2d 559, 569 (5th Cir. 1987).

Aware that it was losing money in performing maintenance work for a customer, and having unsuccessfully sought an increase in fees from that customer, the employer, First National Maintenance Corporation, discontinued its operations at the customer's facility and discharged its employees who had been working there. In making this decision, the employer refused to bargain with the employees' union about its decision and the effects of the termination of operations on the employees. Accordingly, the NLRB ruled that the employer's refusal to bargain violated section 8(a)(5). The United States Court of Appeals for the Second Circuit enforced the Board's decision, reasoning that the employer had not rebutted the presumption that the decision was a mandatory subject of bargaining.

In reversing the Second Circuit, the Supreme Court held that the employer had no duty to bargain with the union regarding its decision to terminate the contract. Justice Harry Blackmun, writing for the Court, examined the Act's bargaining framework and the requirement that parties must bargain over mandatory subjects. He noted, however, that Congress did not intend the Act's reliance on collective bargaining to make the union "an equal partner in the running of the business enterprise in which the union's members are employed." Consequently, the Court stated the issue as being whether the employer's decision was "part of [the employer's] retained freedom to manage its affairs unrelated to employment." Moreover, the Act's emphasis on collective bargaining is justified only where the subject of bargaining "is amenable to resolution through the bargaining process." Management's pursuit of profit and its need for certainty about its duty to bargain were, in the Court's view, adequate reasons for limiting the duty to bargain. The Court then formulated a balancing test applicable to partial closing decisions. As stated by the Court, "[B]argaining . . . 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.\textsuperscript{66}

Justice Blackmun compared the interests of union and management in being involved in or excluded from decisions to close part of a business. In his view, a union would attempt to delay or prevent the closing and would offer “concessions, information, and alternatives” toward that end.\textsuperscript{66} But mandatory collective bargaining over management’s decision and its effects does not add to the amount of input from the union.\textsuperscript{67} Moreover, in Blackmun’s view, mandatory bargaining over a decision’s effects,\textsuperscript{68} taken together with section 8(a)(3), which prohibits partial closings motivated by anti-union animus, adequately protect the union’s interest.\textsuperscript{69}

Conversely, Justice Blackmun stated that management’s interest is more complex and varied. He opined that if the decision to shut down failing operations stems in significant part from labor costs, it would be in management’s interest “to confer voluntarily with the union to seek concessions that may make continuing the business profitable.”\textsuperscript{70} But, he continued, at

\textsuperscript{66} Id. at 679. The key passage of the Court’s opinion follows:

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

\textit{Id.} at 678-79 (emphasis added) (footnotes and citations omitted).

\textsuperscript{67} Id. at 681.

\textsuperscript{68} (“It is unlikely, however, that requiring bargaining over the decision itself, as well as its effects, will augment this flow of information and suggestions.”)

\textsuperscript{69} It is well established that an employer is statutorily required to bargain with a union over the effects of a closure decision, such as seniority, pension, or severance pay issues. See \textit{supra} note 3; P. Miscimarra, \textit{The NLRB and Managerial Discretion}, \textit{supra} note 1, at 158-66. \textit{See also} First Nat’l Maintenance v. NLRB, 452 U.S. 666, 681 (1981) ("There is no dispute that the union must be given a significant opportunity to bargain about" the effects of closing decisions); NLRB v. National Car Rental System, Inc., 672 F.2d 1182, 1188 (3d Cir. 1982) (employer had duty to bargain over transfer of employees to new location after decision to relocate was made); Shamrock Dairy, Inc., 119 N.L.R.B. 998 (1957) (effects on employees’ tenure and employment conditions must be bargained over), \textit{modified}, 124 N.L.R.B. 494 (1959), \textit{enforced sub nom.} International Bhd. of Teamsters v. NLRB, 280 F.2d 665 (D.C. Cir.) (per curiam), \textit{cert. denied}, 364 U.S. 892 (1960).

\textsuperscript{70} 452 U.S. at 682; \textit{accord} Textile Workers Union of America v. Darlington Mfg. Co., 380 U.S. 263 (1965); see \textit{supra} notes 48-57 and accompanying text.
other times management's interest would be in "speed, flexibility, and secrecy in meeting business opportunities and exigencies" due to tax or securities law consequences dependent on the timing of a closure, reorganization of a corporate structure, or confidentiality.71 Requiring the employer to bargain over a partial closing decision would only grant the union the power to delay management's action even absent "any feasible solution the union might propose."72 To reinforce his conclusion that bargaining over partial closing decisions should not be required, Justice Blackmun noted that collective bargaining agreement provisions granting such bargaining rights to unions were "relatively rare."73 Finally, Justice Blackmun rejected the Second Circuit's presumption analysis74 as ill-suited to advance harmonious employer-employee relations. He reasoned that case-by-case application of presumptions would create uncertainty for employers as to whether a particular decision was a mandatory subject of bargaining.75

On the facts of First National Maintenance, the Court held that the employer's interest in closing part of its business "purely for economic reasons outweigh[ed]" the marginal benefits to collective bargaining which could result were the union to participate in decision-making.76 Therefore, the Court held that bargaining over this particular decision was not mandatory. The Court made it clear, however, that it was expressing "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."77

71. Id. at 682-83.
72. Id. at 683.
73. Id. at 684.
75. 452 U.S. at 684 (presumption analysis would require an employer to "determin[e] beforehand whether it was faced with a situation requiring bargaining or one that involved economic necessity sufficiently compelling to obviate the duty to bargain").
76. Id. at 686 (the employer's partial closing decision was "not part of § 8(d)'s 'terms and conditions[ ]' . . . over which Congress has mandated bargaining." ) (emphasis in original) (citation omitted).
77. Id. at 686 n.22. Justice Brennan, joined by Justice Marshall, dissented. He disagreed with the Court's balancing test "because it takes into account only the interests of management; it fails to consider the legitimate employment interests of the workers and their union." Id. at 689 (Brennan, J., dissenting) (emphasis in original). Even if the balancing test were accurate, Justice Brennan found that it was "based solely on speculation." Id. at 690. Stating that he was "not in a position to judge whether mandatory bargaining over partial closings [was required] in all cases," Brennan agreed with the Second Circuit "that employers presumptively have a duty to bargain over" a plant closing decision, a presumption which could "be rebuffed by a showing that bargaining would be futile, that the closing was due to emergency financial circumstances, or that . . . bargaining would not further the purposes of the [NLRA]." Id. at 691 (emphasis in original).

Justice Brennan's argument that the Court engaged in speculation is on point, for the Court's focus on abstractions with respect to the possible benefits and burdens of predecision bargaining went beyond the actual facts presented in First National Maintenance. See George, supra note
First National Maintenance emphasizes that an employer must enjoy some certainty in assessing its obligation to bargain with a union over a partial closing decision. However, the Court articulated and adopted a case-by-case balancing test, applied as a *per se* rule, which provides that employers are not required to bargain about partial closing decisions. Such an analysis is inconsistent, confusing, and constitutes a significant point of controversy raised by the Court's decision.

III. *Otis Elevator II* And Its Progeny

Because the First National Maintenance Court restricted its holding to partial closing decisions and explicitly withheld ruling on any other management decisions, the question inevitably arose as to the meaning of the Court's decision in other areas, such as plant relocations, sales, automation, and subcontracting. The NLRB received the opportunity to address this question in Otis II. As noted below, the NLRA's provisions on collective bargaining and the Supreme Court's predecision bargaining jurisprudence were the sources from which the NLRB extracted the principles and fashioned the rules which now govern an employer's obligation to bargain over various classes of business conduct and entrepreneurial decisions.

A. The Otis Elevator II Decision

The NLRB's first rulings after First National Maintenance mandated predecision bargaining over plant relocation decisions. Indeed, the Board

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6. at 680. For example, the Court reasoned that an employer's need for speed, flexibility, and confidentiality must be recognized and protected. However, no such considerations were apparent in First National Maintenance.


79. See P. Miscimarra, *The NLRB And Managerial Discretion*, supra note 1, at 153; George, *supra* note 6, at 680; *The Supreme Court, 1980 Term*, 95 *Harv. L. Rev.* 91, 330 (1981) (the Court "fashioned an apparently per se rule excluding partial closings from the mandate to bargain").


81. For discussion of this point, see P. Miscimarra, *The NLRB And Managerial Discretion*, supra note 1, at 153.

82. 452 U.S. at 686 n.22.


84. See, *e.g.*, Tocco Div. of Park-Ohio Indus., Inc., 257 N.L.R.B. 413, 414-15 (1981)
applied the Court's ruling in First National Maintenance to a 1981 case which presented the same issue, namely a partial closing decision. These rulings were consistent with earlier Board analysis and precedent, and reflected the limited application of First National Maintenance by the NLRB's General Counsel. Then, in Otis II, the NLRB revisited the issue (employer's decision to transfer work without bargaining violated NLRA); Whitehall Packing Co., 257 N.L.R.B. 193 (1981) (employer had duty to bargain over decision to transfer unit work and effects of decision). These decisions, which were issued approximately one month after First National Maintenance, did not mention the Court's decision. See also Bob's Big Boy Family Restaurants, 264 N.L.R.B. 1369, 1371-72 (1982) (failure to bargain about decision to close shrimp processing operation and subcontract work to outside company unlawful); Ford Bros., Inc., 263 N.L.R.B. 92, 102-03 (1982) (A.L.J. opinion) (with no mention of First National Maintenance, the NLRB ruled that the employer violated § 8(a)(5) by failing to bargain about its decision to transfer work from Ohio to West Virginia; anti-union animus was also a factor); Carbonex Coal Co., 262 N.L.R.B. 1306, 1307 n.2 (1982) ("an employer may not simply shut down part of its business and mask its desire to weaken and circumvent the union by labeling its decision 'purely economic.'" (quoting First Nat'l Maintenance, 452 U.S. at 682)).

85. See U.S. Contractors, Inc., 257 N.L.R.B. 1180 (1981) (Board ruled that employer's pre-election conduct violated § 8(a)(1) and that partial closure of business was not mandatory subject), enforcement denied, 697 F.2d 692 (5th Cir. 1983) (court held that settlement agreement entered into by parties estopped Board from litigating pre-settlement conduct including partial termination of business after contested election).

86. Professor B. Glenn George has noted that an employer's right to relocate work when the decision is based on economic considerations may have been initially recognized by the NLRB in the 1950s. George, supra note 6, at 681 n.72 (citing Diaper Jean Mfg. Co., 109 N.L.R.B. 1045, 1055 (1954), enf'd sub nom. NLRB v. Tredway, 222 F.2d 719 (5th Cir. 1955)). Professor George also notes that in 1941, in Gerity Whitaker Co., 33 N.L.R.B. 393 (1941), enforced as modified, 137 F.2d 198 (6th Cir.) (per curiam), cert. denied, 318 U.S. 763 (1943), and Brown-McLaren Mfg. Co., 34 N.L.R.B. 984 (1941), the employers' failures to bargain about decisions to relocate unit work were held to be unlawful. See George, supra note 6, at 682.

87. In July 1981, former NLRB General Counsel William A. Lubbers issued a memorandum recognizing the potential application of First National Maintenance to management decisions. See NLRB General Counsel on Duty to Bargain Cases I, reprinted in 1981 Labor Relations Yearbook (BNA) 312-14 (1982) (NLRB General Counsel Guideline Memorandum GC 81-38, July 14, 1981). In November 1981, Lubbers issued another memorandum which instructed NLRB Regions to apply the First National Maintenance balancing test to the types of management decisions referred to by the Court in that case, including work relocations. See NLRB General Counsel on Duty to Bargain Cases II, reprinted in 1981 Labor Relations Yearbook (BNA), supra, at 315-17 (NLRB General Counsel Guideline Memorandum GC 81-57, Nov. 30, 1981). Lubbers stated that a weighing of factors which would make bargaining burdensome against the benefit for labor-management relations and collective bargaining should be undertaken in cases involving decisions to relocate, subcontract, automate or consolidate. Id. at 316.

88. Otis Elevator Co., 269 N.L.R.B. 891 (1984). This NLRB decision reversed the Board's earlier decision in Otis Elevator Co., 255 N.L.R.B. 235 (1981) [hereinafter Otis I], wherein the NLRB decided that the employer unlawfully refused to bargain with the union over the decision to close and consolidate certain research work and programs. That case was decided by former Chairman John Fanning and former Members Howard Jenkins and Don Zimmerman. While Otis I was pending before the United States Court of Appeals for the District of Columbia Circuit, the NLRB moved for a remand of the case for reconsideration in light of First National Maintenance. That motion was granted in August 1981. Otis II, 269 N.L.R.B. at 891.
of whether an employer must bargain over an economically based decision to relocate work. United Technologies Corporation had acquired Otis Elevator Company in 1975 and decided to consolidate all its research and development operations in Connecticut. As a result of the consolidation, Otis Elevator’s research operations at two New Jersey locations were terminated.  

1. The Plurality Opinion

In a plurality opinion, former Chairman Donald Dotson and former Member Robert Hunter concluded that the employer’s decision to discontinue the use of one research facility and transfer the work to another facility was not subject to mandatory bargaining. Quoting the passage in First National Maintenance which sets forth the Supreme Court’s balancing test, the plurality stated that the employer’s decision, “[g]ood or bad,” was beyond the reach of section 8(d). The decision to close the facility was based on its obsolete technology and noncompetitive product, the duplicative research and development operations which resulted from having two facilities, and the availability of a new and larger research center. The plurality noted that the employer’s decision also stemmed from an evaluation of the different facilities, and that labor costs might have been among the circumstances that led to the evaluation. The employer’s decision itself, however, was based on a comparison of the facilities, and it “did not turn upon labor costs . . . .” Although the employer’s decision affected its employees, the test is whether the decision “turns upon a change in the nature or direction of the business, or turns upon labor costs; not its effect on employees nor a union’s ability to offer alternatives.” Because the decision at issue in Otis II “clearly turned upon a fundamental change in the nature and direction of the business,” the plurality determined that the decision was not subject to mandatory collective bargaining. 

Elaborating on their decision, Dotson and Hunter expressly relied on Justice Stewart’s concurring opinion in Fibreboard and his view that the bargaining obligation of section 8(d) did not extend to “Category 3” management decisions which are fundamental to the direction of the corporate enterprise or which indirectly impinge on employment security. Relying as well on the First National Maintenance Court’s analysis with

89. 269 N.L.R.B. at 892.
91. 269 N.L.R.B. at 892.
92. Id. (“These facts establish that the . . . [employer’s] decision did not turn upon labor costs even though that factor may have been one of the circumstances which stimulated the evaluation process which generated the decision.” (footnote omitted)).
93. Id. (emphasis in original).
94. Id.
95. See supra notes 44-47 and accompanying text for a discussion of “Category 3” decisions.
regard to management’s need for certainty, flexibility, speed, and secrecy, the plurality held that section 8(d) does not apply to decisions affecting the scope, direction, or nature of a business. The label given to the decision, however, was not important to Dotson and Hunter; bargaining is required only where the employer’s decision turns upon labor costs. Thus, under the Dotson-Hunter analysis, the duty to bargain under section 8(d) attaches to managerial decisions, whether characterized as subcontracting, reorganization, consolidation, or relocation, only “if the decision in fact turns on direct modification of labor costs and not on a change in the basic direction or nature of the enterprise.”

2. The Dennis Formulation

Concurring in the result, former Member Patricia Diaz Dennis did not agree with the plurality’s analysis regarding the test for determining mandatory subjects of bargaining. Relying on First National Maintenance, Dennis constructed a separate framework utilizing a two-part analysis applicable to the type of managerial decisions that fell into Fibreboard’s third category. That category, which Dennis stated refers to decisions impacting directly on employment and which are focused only on the “economic profitability” of the employer’s operation, includes employer decisions on “plant relocations, consolidations, automation, and subcontracting.”

The first part of the Dennis analysis involves determining whether the employer’s decision is amenable to resolution through bargaining. The key question posed by Dennis is as follows: “Is a factor over which the union has control (e.g., labor costs) a significant consideration in the employer’s decision?” Dennis defined the “significant consideration” factor as one over which the union was “in a position to lend assistance or offer concessions” which could “make a difference” in the employer’s decision. Thus, stated Dennis, bargaining is not required where decisions are based on factors over which the union has no control, or where the union has control over only insignificant factors.

96. 269 N.L.R.B. at 893. Included among these decisions are selling all or part of a business; disposal of assets; restructuring or consolidation of operations; subcontracting; investment in labor-saving machinery; changes in the methods of finance or sales; advertising; product design; and “all other decisions akin to the foregoing.” Id. at 893 n.5.

97. Id. at 893. Finding that the employer’s decision did not turn upon labor costs, the plurality dismissed the decision bargaining allegations of the complaint, and remanded the effects-bargaining allegations to the A.L.J. for further consideration. Id. at 895.

98. 269 N.L.R.B. at 895 (Dennis, Member, concurring). Dennis noted the three categories of management decisions set forth in Justice Stewart’s Fibreboard concurrence which were also recognized by the Supreme Court in First National Maintenance. See supra notes 42-47 and accompanying text.

99. 269 N.L.R.B. at 897 (Dennis, Member, concurring).

100. Id. The plurality also recognized that labor costs are often among the considerations which management examines in these cases. Id. at 894.

101. Id. at 897.
If the first part of the test is met, the second part of the Dennis analysis requires weighing the degree to which the decision is amenable to bargaining against the burden of the bargaining process on management. This burden element includes the extent of capital commitment or of changes in operations, and the need for speed, flexibility, and confidentiality. Dennis also placed the burden on the General Counsel of the Board to prove that: (1) "a factor over which the union has control was a significant consideration in the employer's decision"; and, (2) the benefit for the bargaining process outweighed the burden of bargaining on the business.

Applying her analytical framework to the employer's decision to consolidate its research operations in *Otis II*, Member Dennis concluded that it clearly fell within the second category of the *Fibreboard-First National Maintenance* formulation—it was an employer's decision which was not amenable to bargaining. Finding that none of the factors motivating the employer's decision in *Otis II* were within the union's control, Dennis determined that no labor-related considerations underlay the decision. For example, union proposals to cut pay or benefits or to work overtime to increase productivity would not have provided updated technology. Nor could union employee guarantees have improved design concepts, offered alternative solutions to the employer's duplicative engineering facilities, or changed the fact that the parent company was located in Connecticut rather than New Jersey. Dennis agreed, therefore, that the employer's decision was not amenable to resolution through collective bargaining, and concurred in the plurality's dismissal of that allegation of the Union's complaint.

Dennis went on to explain that she would not have necessarily concluded that the decision was a mandatory bargaining subject even if labor costs had been a significant consideration in the decision. If labor costs had been key, Dennis stated, balancing the "benefit" against the "burden" would have nevertheless obligated the General Counsel to prove that the amenability of the decision to resolution through bargaining outweighed the constraints which bargaining places on management. Because the employer's decision involved a substantial capital investment and a significant change in operations, Member Dennis agreed with the plurality that the employer had not violated the Act by refusing to engage in predecision bargaining.

3. The Zimmerman Position

Former Member Don Zimmerman agreed with the plurality and Member Dennis that the employer had not violated section 8(a)(5) by not bargaining

102. *Id.* See also *First Nat'l Maintenance v. NLRB*, 452 U.S. 666, 679 (1981) (setting forth the Court's "balancing" test).
103. 269 N.L.R.B. at 897 (citing *First Nat'l Maintenance*, 452 U.S. at 679, 680, 682-83, 688).
104. *Id.*
105. *Id.* at 899-900.
106. *Id.* at 900.
107. *Id.*
over its decision. In his view, an employer's decision which is motivated by labor costs is a mandatory subject of bargaining. Unlike the plurality, however, Zimmerman would not confine an employer's bargaining obligation simply to decisions which turn on labor costs.\textsuperscript{109} If the union can affect the employer's decision in those situations, Zimmerman's formulation would require the employer to bargain in the absence of a showing of the employer's need for speed, flexibility, or secrecy.\textsuperscript{110} According to Zimmerman, the union in \textit{Otis II} could not have affected the employer's decision because no union concession could have altered the employer's concerns. Those concerns were entrepreneurial in scope and did not translate directly into dollar figures. Thus, Zimmerman concluded that the employer's decision was outside the scope of the mandatory bargaining obligation.\textsuperscript{111}

4. \textit{The Meaning of Otis II}

The \textit{Otis II} plurality reviewed the Supreme Court's \textit{Fibreboard} and \textit{First National Maintenance} rulings and derived a "business direction-labor costs" dichotomy which excluded the employer's entrepreneurial decision from the scope of section 8(d).\textsuperscript{112} The Board's conclusion largely draws support from the Supreme Court's language in the cases mentioned above. However, the Board plurality's labor costs standard went beyond the Court's analysis of whether an employer's decision was amenable to bargaining based on an examination of the underlying reasons for the decision.\textsuperscript{113} The concept of an entrepreneurial decision is vague, and the labor costs standard does not require the explicit balancing of the benefits and burdens of bargaining as set forth in \textit{First National Maintenance}.\textsuperscript{114}

Although each of the \textit{Otis II} opinions relied on and applied the reasoning in \textit{First National Maintenance}, the plurality (Chairman Dotson and Member Hunter) and Member Zimmerman did not expressly acknowledge the Supreme Court's balancing test. The Dotson-Hunter labor costs standard may be predictable and is perhaps easier to apply, but it appears to be narrower from the union's viewpoint than the \textit{First National Maintenance} test, because it would apparently exclude from mandatory bargaining those decisions where labor costs were not the sole reason for the decision. Similarly, Member Zimmerman, who did not adopt the Dotson-Hunter position and

\textsuperscript{109} \textit{Otis II}, 269 N.L.R.B. at 900-01 ("A decision may be amenable to resolution through bargaining where the employer's decision is related to overall enterprise costs not limited specifically to labor costs.") (Zimmerman, Member, concurring in part and dissenting in part).

\textsuperscript{110} Id. at 901.

\textsuperscript{111} Member Zimmerman dissented from the Board's remand of the effects-bargaining issue. Id. at 901.

\textsuperscript{112} \textit{See Modjeska, The Reagan NLRB, Phase I, 46 Ohio St. L.J. 95, 115 (1985) ("The Board also extracts from \textit{Fibreboard} and \textit{First National [Maintenance]} a business direction-labor cost dichotomy, excluding the former from the limited scope of section 8(d).")}.

\textsuperscript{113} Id.

\textsuperscript{114} Id.
instead would have required an analysis of a decision's amenability to bargaining, also did not call for weighing the burden of bargaining on the conduct of the employer's business. Zimmerman's test was broader than the plurality's test, but was also an "either/or" analysis which excused the bargaining obligation (once the amenability threshold was met) only where the employer's need for speed, flexibility, or confidentiality was established.115

In contrast, Member Dennis articulated an approach which drew on the First National Maintenance balancing test. She would apply the balancing test only if a threshold test was met—whether the employer's decision was amenable to resolution through bargaining. Where that threshold is met, Dennis would then balance the benefits and burdens of bargaining.

Despite the plurality's adoption of the labor costs standard, the NLRB Regional offices were initially instructed to investigate Otis II-type cases in a manner consistent with the balancing analysis articulated in First National Maintenance. In June 1984, Acting General Counsel (and former NLRB Member) Wilford Johansen issued a guideline memorandum ("Memorandum") which required Regional offices to investigate and assess the following matters:

(1) a complete description of the change, including particularly whether it is part of a larger change involving other parts of the enterprise;
(2) the underlying reasons for the change;
(3) whether, in the context of those reasons and the relationship between the parties, the decision was amenable to resolution through the process of collective bargaining; and,
(4) what, if any, burdens would bargaining place on the employer.117

Upon completion of the investigation, the Memorandum provided that the Regions were to resolve these issues:

(1) Does the decision involve a change in the nature and direction of a significant facet of the enterprise?
(2) What are the reasons lying behind the decision?
(3) Is the decision amenable to resolution through the process of collective bargaining and, if so, do the benefits of bargaining outweigh the burdens that bargaining would place on the employer?118

To assist the Regions in making their determinations, the Memorandum provided a chart which is set forth in the Table below.119 The chart reflects

115. George, supra note 6, at 694 ("If the amenability test is met, Member Zimmerman would excuse the duty to bargain only if the employer's need for speed, flexibility, or confidentiality is 'urgent,' a concept not found in [First Nat'l Maintenance].") (footnote omitted).
117. Id. at 365.
118. Id. at 365-66.
119. Id. at 365.
the reality that, notwithstanding the *Otis II* plurality's labor costs approach, the NLRB General Counsel would continue to investigate this class of cases under a balancing test which recognized the employer's motivation with respect to labor costs as only one part of the formula. As noted in the Memorandum, the General Counsel concluded that many areas fall on the arguably mandatory (and therefore arguably bargainable) side of the line.

**TABLE**

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<tr>
<th>Does the decision involve a change in the nature and direction of a significant facet of the business?</th>
<th>Is the decision motivated by labor costs?</th>
<th>Is the decision amenable to resolution through the process of collective bargaining and, if so, do the potential benefits of bargaining outweigh the burdens that such bargaining would place on the employer?</th>
<th>Conclusion</th>
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In examining the progeny of *Otis II*, one must focus on the status of each of the preceding views in light of the questions remaining open after the Board’s ruling. In particular, the next section considers whether, after *Otis II*, an additional Board member adopted the Dotson-Hunter view, thereby creating a majority position, or whether the Dennis or Zimmerman positions found support, thereby clouding the picture of what is required of an employer in making decisions to relocate, subcontract, or consolidate its operations. The question of whether the General Counsel continued to take an expansive view in investigating *Otis II* cases, i.e., one which went beyond
the labor costs standard as indicated in the General Counsel’s Memorandum discussed above, will also be considered.

B. The Progeny of Otis II

1. 1984-1985 Rulings

In the first post-Otis II decisions, Board Members applied their separate Otis II opinions and approaches to reach the same results in most cases. Those NLRB decisions applying Otis II during this period illustrate the absence of a majority view with respect to the application of either the “business direction-labor costs” dichotomy, or the “amenability to bargain” and “benefits-burden balancing” approach.

For example, the Board held that one employer who closed a machine shop and subcontracted out the work did not violate section 8(a)(5) because the decision was motivated by a recession, lack of business, and the need for substantial capital in order to modernize. Chairman Dotson and Member Hunter concluded that the facts established that the employer’s decision turned on a fundamental change in the nature and direction of the business. Concurring, Member Zimmerman agreed that the employer’s decision was not a mandatory subject of bargaining, because the factors influencing its decision were factors over which the union had little or no control.

Similarly, the Board concluded in another case that an employer’s decision to consolidate and subcontract its operations and transfer work was not a mandatory subject of bargaining. Dotson and Hunter found that the employer was merely attempting to restore the enterprise to economic viability by reducing operating costs, eliminating the duplication of work, costs and services, and was responding to the deterioration of the quality of its product caused by obsolete equipment. Thus, Dotson and Hunter concluded that the employer’s decision did not turn on labor costs “although such costs were a factor” in the decision. Member Dennis agreed, concluding that in light of the factors raised by the employer, its decision was not amenable to bargaining.

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121. Id. at 497. In so concluding, they acknowledged that the employer had testified at the unfair labor practice hearing that employee wages and benefits placed it at an economic disadvantage; nevertheless they reasoned that “this factor did not prompt the [employer’s] action.” Id. at 496-97.
122. Id. at 497 (Zimmerman, Member, concurring) (“To the extent that labor costs were a factor, it is evident . . . that those costs were an insignificant consideration in the [employer’s] decision.”).
124. Id. at 1000.
125. Id. at 1000-01 (Dennis, Member, concurring in the result). To the extent that labor costs were a factor, Dennis reasoned that such costs were an insignificant consideration. Id. at 1001. See also Kroger Co., 273 N.L.R.B. 462 (1984) (employer decision to close facility and
A Board panel consisting of Chairman Dotson and Members Hunter and Dennis again applied their separate approaches to arrive at the same result in a case which arose from an employer's decision to subcontract installation work due to a large influx of work orders. Applying their Otis II analysis, Dotson and Hunter found that the decision affected the scope of the business and was therefore not bargainable. Agreeing with that result, Member Dennis relied on her Otis II concurrence and concluded that the subcontracting decision had only an indirect and attenuated impact on the employment relationship.

The same panel split, however, in a similar subcontracting case where the employer had agreed to retain an independent contractor to provide it with maintenance and service work. Applying the Otis II labor costs standard, Dotson and Hunter held that the decision turned not upon labor costs, but upon a significant change in the nature and direction of the business because the employer's purpose in subcontracting was to reduce its overhead costs across the board. Although labor costs were one component of overhead costs, the employer had no intention of performing the service work with its own employees. The majority therefore concluded that there was no duty to bargain under Otis II.

Dissenting in part, Member Dennis concluded that the employer's subcontracting decision was a mandatory bargaining subject. She reasoned that the subcontractor performed the same work that the employer's employees performed, and used the same tools and equipment in the same work area. Dennis applied her two-part Otis II analysis to find, first, that the subcontracting decision was amenable to resolution through bargaining. In her view, the union could have made offers that would have reasonably affected the employer's decision, since labor costs were a component of the costs which the employer sought to reduce. Second, Dennis found no significant change subcontract operations centered on scarcity of raw materials and outmoded facility; thus, decision is not subject to mandatory bargaining); Columbia City Freight Lines, 271 N.L.R.B. 12 (1984) (decision to close trucking terminal and consolidate operations not subject to mandatory bargaining where employer sought to reduce costs, eliminate duplication of services, and maximize usage of equipment and fuel).

127. Id. at 1410.
128. Id. at 1410 n.3.
129. Garwood-Detroit Truck Equip. Inc., 274 N.L.R.B. 113 (1985). The independent contractor also agreed to pay a percentage of the employer's rent and utility bills and to provide liability and other insurance for the employer. Notifying the employees and union of the subcontracting, the employer stated that it was eliminating the subcontracted operations to prevent economic chaos and because of astronomical losses. Id. at 113. The A.L.J., concluding that the case was governed by Fibreboard, found that the employer was obligated to bargain about its decision. Id. at 115.
130. Id. (agreement offered employer a wide variety of financial relief, including the "obvious savings in payroll costs . . .").
131. Id. However, the NLRB found that the employer unlawfully failed to bargain with the union about the effects of the subcontracting decision on unit employees. Id. at 115-16.
in the nature and direction of the employer's business because the same work was being performed at the same location for the same customers. Dennis therefore concluded that the benefits of bargaining outweighed any burden placed on management.132

After these initial post-Otis II rulings, the Board sought to clarify the labor costs standard, beginning with a case in which Dotson, Hunter and Dennis agreed that the employer had violated section 8(a)(5) by not bargaining over a subcontracting decision.133 Dotson and Hunter determined that the employer's decision turned upon labor costs (which was the reason that it ended its relationship with its joint employer) and that these costs entered into its new relationship with the contracting employer.134 Furthermore, the Board found that there was no change in the nature or direction of the business; the only difference being that the employer used a different group of employees for the same operations. Applying her Otis II analysis, Member Dennis agreed that labor costs were a significant consideration in the employer's decision. She further found that the benefit of bargaining outweighed its burden because the employer's decision involved no capital commitment, virtually no change in operations, and involved no evidence of a need for speed, flexibility, or confidentiality.135

The same panel held that an employer was not obligated to bargain over its decision to close and transfer its delivery operation after losing a major customer and fifty to seventy-percent of its business.136 Although the NLRB's administrative law judge ("A.L.J.") found that labor costs were a motivating factor in the decision, the Board nonetheless declared that the decision must turn on labor costs. In particular, the Board stated that labor costs "must be more than merely 'one of the circumstances which stimulated the evaluation process' . . . for a bargaining obligation to attach."137 Joining in the result, Member Dennis stated that the reason for the transfer of the delivery operation—the loss of a major customer—was wholly outside of the union's control. Thus, the union could have lent no assistance nor offered any concessions which could have reasonably affected the employer's decision.138

Yet another case involved subcontracting which was expressly implemented because of employee wages and benefits, the employer's inability to afford
the luxury of in-house labor, and the need to reduce employee related costs.\textsuperscript{139} It was clear to the Board that the employer's decision to subcontract turned upon labor costs and was therefore bargainable. Concurring in the result, Member Dennis found that the employer's reasons revealed that labor costs were a significant consideration in the subcontracting decision, a decision which did not represent a significant change in business operations or present the burden elements of the need for speed or confidentiality.\textsuperscript{140}

The foregoing decisions reveal the adherence of former Chairman Dotson and former Member Hunter to the labor costs standard and offer examples of the questions and quanta of proof necessary to establish a violation under \textit{Otis II}. Dotson and Hunter continued to require the isolation of labor costs as the only possible rationale for a decision, and as a prerequisite to a finding of unlawful refusal to predecision bargain. Member Dennis agreed with the panel majority in most cases, and only parted company with Dotson and Hunter where the employer was subcontracting work which would be performed at the same location for the same company customers. In doing so, Dennis continued to apply the two-part analysis set forth in her \textit{Otis II} concurrence and took a broader look at the issues underlying the employer's decision.

2. \textit{Selected Recent Rulings}

a. Initial adherence to the Dotson-Hunter labor costs standard

Changes in the NLRB's membership introduced yet another factor relative to \textit{Otis II} analysis, and presented the question of whether the Dotson-Hunter or Dennis formulations, or some variation thereof, would win out. For example, former Member Marshall Babson joined Chairman Dotson and Member Dennis to find no duty to bargain over an employer's relocation decision.\textsuperscript{141} In that case, the employer had decided to transfer work previously done at a repair shop. The employer also decided to close the repair shop because of technological developments in machinery and a major reduction in repair work needed by the company.\textsuperscript{142} Reasoning that the employer's decision turned not upon labor costs, but upon a change in the nature and


\textsuperscript{140} \textit{Id.} at 489 (Dennis, Member, concurring in the result). For other examples of the application of \textit{Otis II} during this time period, see Oak Rubber Co., 277 N.L.R.B. 1322 (1985) (former Members Johansen and Marshall Babson relied on \textit{First Nat'l Maintenance} and any of the views expressed in \textit{Otis II}); Mack Trucks, Inc., 277 N.L.R.B. 711 (1985) (employer's decision to close plant and transfer work not mandatory subject of bargaining); Griffith-Hope Co., 275 N.L.R.B. 487 (1985) (employer violated Act by subcontracting without first bargaining with the union); Nurminco, Inc., 274 N.L.R.B. 764 (1985), \textit{enforced}, 786 F.2d 1170 (8th Cir. 1986) (employer obligated to bargain over decision to lay off bargaining unit employees and distribute their work to nonbargaining unit employees).

\textsuperscript{141} Drummond Coal Co., 277 N.L.R.B. 1618 (1986).

\textsuperscript{142} \textit{Id.} at 1618-19.
direction of a significant facet of its business, the Board held that the
decision was excluded from section 8(d) bargaining. Member Dennis con-
curred in the result applying her Otis II analysis.\textsuperscript{143} Member Babson also
agreed with the decision, concluding that the ruling was consistent with First
National Maintenance and "with any of the views expressed in Otis Eleva-
tor."\textsuperscript{144} Interestingly, Babson adhered to that view throughout his tenure
with the NLRB.

Furthermore, in yet another transfer case, the Board held that an em-
ployer's transfer of work was a mandatory subject of bargaining because
the transfer was undertaken for the sole purpose of escaping the employer's
wage obligations under an existing collective bargaining agreement.\textsuperscript{145} Mem-
ber Babson joined Chairman Dotson and Member Dennis, again stressing
that the Board's conclusion was consistent with First National Maintenance
and any of the views expressed in Otis II.\textsuperscript{146}

b. The trend away from the labor costs standard as the dispositive test

Former Board Member Johansen also entered the picture in 1986. Con-
sidering the employer's transfer of work in Morco Industries, Inc.,\textsuperscript{147} he
agreed with Dotson and Dennis that the employer had not violated the Act
by bypassing predecision bargaining. In reaching that result, the Board noted
that the employer's physical plant had reached its limits for expansion, and
that the employer lost orders because of a lack of facilities. In addition to
the employer's capital investment and increased capacity, the Board noted
that the employer did not attempt to undermine the union or escape con-
tractual labor costs.\textsuperscript{148}

One notable aspect of Morco is the absence of the labor costs language
and analysis found in previous decisions issued by Dotson and Hunter. The
Morco panel instead engaged in a more expansive review of the facts
underlying the employer's decision. That change may be attributable to the
fact that Johansen did not subscribe to the "business direction-labor costs"

\textsuperscript{143} Id. at 1619 n.4 (Dennis, Member, concurring in the result).
\textsuperscript{144} Id. at 1619 n.3. Interestingly, the NLRB deferred the issue of whether the employer
failed to engage in effects-bargaining to the arbitrator. See id. at 1619-20. The NLRB's deference
to arbitration doctrine was first stated in Spielberg Mfg. Co., 112 N.L.R.B. 1080 (1955) and
was refined in Olin Corp., 268 N.L.R.B. 573 (1984).
\textsuperscript{145} Brown Co., 278 N.L.R.B. 783 (1986), remanded without opinion, 833 F.2d 1015 (9th
\textsuperscript{146} 278 N.L.R.B. at 785 n.7. The Board also held that the employer's midterm modification
of the contract violated § 8(a)(5). Id. at 785; see Milwaukee Spring II, 268 N.L.R.B. 601 (1984),
For other examples of applications of Otis II, see Metropolitan Teletronics Corp., 279
N.L.R.B. 957 (1986), enforced without opinion, Metro Tele-Tronics v. NLRB, 819 F.2d 1130
(2d Cir. 1987); DeSoto, Inc., 278 N.L.R.B. 788 (1986).
\textsuperscript{147} 279 N.L.R.B. 762 (1986).
\textsuperscript{148} Id. at 763.
dichotomy of the *Otis II* plurality. Thus, the opinions of Dennis and Johansen are reflected in the tone and analysis set forth in *Morco*. The notion that the labor costs standard was no longer the dominant view had suddenly surfaced, a notion that would ultimately be confirmed in later Board decisions.

The trend away from the Dotson-Hunter labor costs standard as the dispositive analysis continued in decisions issued by the Board throughout 1987. For example, the Board considered an employer’s decision to terminate its trucking operations and subcontract unit work without bargaining with the union. There, the A.L.J. applied the *Otis II* plurality test in concluding that the subcontracting was a mandatory bargaining subject in that the decision turned upon labor costs rather than a change in the nature and direction of the business. Agreeing with the A.L.J., Members Babson and Johansen found it “unnecessary in this case to choose among [the *Otis II*] tests since in their view the same result is dictated regardless of which test is applied.” Babson and Johansen reasoned that the case was governed by *Fibreboard*, and concluded that it was clear that had the employees agreed to a wage freeze, the work would not have been subcontracted. The employer neither closed part of its business nor changed the scope or direction of the enterprise, and still provided truck delivery service to its clients. Thus, as in *Fibreboard*, the employer “merely replaced existing workers with those of an independent contractor to do the same work under similar conditions of employment.”

Concurring, Chairman Dotson argued for application of the plurality decision he and Member Hunter issued in *Otis II*. Because he concluded that the employer’s decision turned upon labor costs, Dotson agreed that the subcontracting decision was a mandatory subject of bargaining.

In another case, the Board Members relied on *First National Maintenance*, as well as all the views of *Otis II*, to hold that an employer was obligated to bargain over its subcontracting and relocation decisions. A consultant’s cost study projected that the employer could save $2.6 million in manufacturing costs, $2 million of which was attributed to labor costs, if certain work was subcontracted. That fact, plus the absence of change in product, manufacturing process, or production technology, led the NLRB to conclude that the bargaining obligation attached. Member (now Chairman) James Stephens and Member Johansen stated that this conclusion was consistent

149. Dennis again relied on her *Otis II* concurrence. See id. at 763 n.3.
151. *Id.* slip op. at 9, 1986-1987 NLRB Dec. (CCH) at 32,461.
152. *Id.* slip op. at 12, 1986-1987 NLRB Dec. (CCH) at 32,462 (quoting *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 213 (1964)).
153. *Id.* slip op. at 17, 1986-1987 NLRB Dec. (CCH) at 32,463.
with First National Maintenance and all the views of Otis II. Only Chairman Dotson relied on the labor costs standard of Otis II.

Johansen, Babson and Stephens continued their reliance on First National Maintenance and all of the Otis II analyses in subsequent cases. For example, Johansen and Stephens held to their view, in the face of a Dotson dissent, in Plymouth Stamping Div., Eltec Corp. Finding that the employer unlawfully failed to bargain over a transfer and subcontracting decision, Johansen and Stephens reasoned that, the decision was bargainable under any of the views of Otis II, including the labor costs standard of the Otis II plurality opinion. In their view, the employer's decision turned upon labor costs because "had the [employer] obtained the specific cost concessions it desired, it would not have transferred its parts assembly operation ... ".

Unlike previous decisions, Johansen and Stephens attempted to demonstrate in Plymouth Stamping how the other views expressed in Otis II applied. The first part of the Dennis analysis was satisfied because labor costs were a significant factor in the employer's decision. As to the second part of the Dennis balancing test, the employer's subcontracting decision did not involve a substantial capital commitment nor depend on a need for confidentiality. Nor were flexibility and speed obstacles to bargaining. Thus, Johansen and Stephens concluded that the benefit derived from bargaining outweighed the burden which bargaining imposed on the employer. The Zimmerman view would also require bargaining, they stated, for the employer's attempts to obtain concessions "demonstrate[d] that the union could reasonably have been expected to respond to the [employer's] concerns and alter" the employer's plans.

155. Id. slip op. at 5, 1986-1987 NLRB Dec. (CCH) at 32,297.
156. Id. slip op. at 5 n.4, 1986-1987 NLRB Dec. (CCH) at 32,297 n.4.
159. Id. slip op. at 7, 1987-1988 NLRB Dec. (CCH) at 32,881. The employer had informed the union that to keep jobs in the plant it would need substantial wage reductions, a freeze on cost of living adjustments, reduced health benefits, a decrease in paid holidays, relief from certain work rules, and changes in the grievance procedure. Id.
160. See supra notes 98-108 and accompanying text for a discussion of the two-step analysis articulated by Member Dennis' concurring opinion in Otis II.
162. See supra notes 109-111 and accompanying text for a discussion of Member Zimmerman's concurring opinion in Otis II.
Chairman Dotson dissented from the majority’s holding that the employer had unlawfully failed to bargain. He concluded that the employer’s decision did not turn upon labor costs, although such costs were considered, because the employer’s subcontracting was an attempt to restore the enterprise to economic viability. Accordingly, Dotson concluded that the employer had no obligation to bargain.

With the expiration of Chairman Dotson’s term, the last of the original and principal proponents of the labor costs standard departed from the NLRB, and the important issue for the labor-management community concerned the direction the Board would take in future Otis II cases. Would Board members continue to rely on all of the views expressed in Otis II, or would the NLRB finally settle on a more definitive rule and analysis?

c. The Board’s continued reliance upon all the views expressed in Otis II

The Collateral Control Corp. case sheds some light on these questions, for the Board’s decision therein retreated from the Otis II labor costs test in the subcontracting context. A Board panel consisting of Chairman Stephens and Members Babson and Johansen held that the employer violated section 8(a)(5) by, among other things, failing to bargain with the union with respect to a subcontracting decision. The most significant aspect of the decision is the following passage:

The issue presented here is whether, in order to establish the mandatory bargaining status of an employer’s decision to subcontract unit work, the General Counsel must sustain a burden of showing that the decision turned on labor costs where "all that is involved is the substitution of one group of workers for another to perform the same task in the same plant under the ultimate control of the same employer." The Board concluded that, under Fibreboard and First National Maintenance, the General Counsel does not bear that burden. In reaching this conclusion, the Board reasoned that in evaluating the nature of a management decision, the appellation of the decision is not important. In its view, bargaining over subcontracting does not turn on the label, but rather on the substance of the decision itself and its amenability to resolution through collective bargaining. In any event, the Board stated, "we find nothing in any of the opinions expressed in Otis Elevator that would disturb the principles of the Supreme Court’s decision in Fibreboard."

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164. Id. slip op. at 30, 1987-1988 NLRB Dec. (CCH) at 32,888 (Dotson, Chairman, concurring in part and dissenting in part) (employer substantially restructured its capital and left parts assembly business).


166. Id. slip op. at 2, 1987-1988 NLRB Dec. (CCH) at 32,484 (emphasis added) (quoting Fibreboard Corp. v. NLRB, 379 U.S. 203, 224 (1964) (Stewart, J., concurring)).

167. Id. slip op. at 2, 1987-1988 Dec. (CCH) at 32,484 (citing Otis II, 269 N.L.R.B. 891, 893 (1984)).

168. Id.
Applying *Fibreboard* and *First National Maintenance*, the NLRB determined that: (1) the employer continued to perform the same functions as the subcontractor it enlisted; (2) the employer's desire to reduce labor costs was the partial basis and motivation for its decision, and the parties could have explored alternatives which would have forestalled or prevented the elimination of jobs; and (3) the prevalence of bargaining over subcontracting as a matter of industrial practice indicates that the "amenableability of subcontracting to negotiation is at least to some extent a function of this type of management decision itself."169 Thus, the Board concluded that the decision to lay off unit employees and subcontract unit work was a mandatory subject of bargaining under section 8(d).170

New Board Member Mary Cracraft did not join with Chairman Stephens and Member Babson in their reliance on *First National Maintenance* and all of the views expressed in *Otis II* in another case involving an employer's transfer of work.171 The Board ruled that the transfer of certain work from a bargaining unit to another entity was a mandatory subject of bargaining because the motivation for the transfer was to cut labor costs. Because the employer unilaterally transferred the work, the NLRB concluded that the employer's conduct violated section 8(a)(5). Although Stephens and Babson stated that the transfer decision was a mandatory subject of bargaining under *First National Maintenance* and any of the views expressed in *Otis II*,172 Member Cracraft did not join in that statement.

The NLRB recently both endorsed the labor costs standard and continued to rely on all of the views expressed in *Otis II*. In *WXON-TV, Inc.*,173 the employer, without bargaining with the union, decided to eliminate its production department because of insufficient revenues generated by that department.174 Relying on *Otis II*, the Board panel, consisting of Chairman

169. *Id.* slip op. at 8, 1987-1988 NLRB Dec. (CCH) at 33,486. In addition, the Board found that the parties' collective bargaining agreement did not expressly mention a union intention to waive bargaining on subcontracting, for "subcontracting was not clearly and unmistakably included in" the labor agreement's management rights clause or other provisions. *Id.* slip op. at 9, 1987-1988 NLRB Dec. (CCH) at 33,486-87. For a discussion of waiver, see Metropolitan Edison Co. v. NLRB, 460 U.S. 693, 708 (1983).

170. The Board expressly relied on Collateral Control Corp., 288 N.L.R.B. No. 41, 1987-1988 NLRB Dec. (CCH) ¶ 19,363 (Mar. 31, 1988) in *Ford Bros., Inc.*, 294 N.L.R.B. No. 10, 5 Lab. L. Rep. (CCH) ¶ 15,532 (May 23, 1989). In that case, the Board adopted the A.L.J.'s conclusion that the employer unlawfully failed to bargain over its decision to subcontract certain operations. *Id.* slip op. at 2 n.3, 5 Lab. L. Rep. (CCH) at 29,161 n.3. The Board also found that, under any view expressed in *Otis II*, the employer had an obligation to bargain over its decision to close two terminals and transfer trucking operations to another state. *Id.*


172. *Id.* slip op. at 3 n.3, 1987-1988 NLRB Dec. (CCH) at 33,526 n.3.


174. The Board found that in 1984 production income fell to $6,900 from $100,000 annually. *Id.* slip op. at 2, 1987-1988 NLRB Dec. (CCH) at 33,792. In 1984, production salaries reached $184,000. *Id.* After efforts to increase production revenues proved unsuccessful, the employer
Stephens and Members Johansen and Babson, declared that "[t]he critical factor . . . is whether the decision turns upon a change in the nature or direction of the business, or turns upon labor costs."\(^{175}\) Contrary to the A.L.J.,\(^ {176}\) however, the Board found that the essence of the employer's decision to eliminate the department was based on the department's failure to generate revenues sufficient to justify its existence, i.e., turned on a fundamental change in the direction of its business. This finding, stated the Board, was "warranted under any of the views expressed" in \textit{Otis II}.\(^ {177}\) Recognizing that labor costs (salaries) may have played a substantial role, the Board determined that the department was not economically viable because of insufficient revenues, irrespective of salaries.\(^ {178}\) The Board held, therefore, that the employer did not violate the Act by not bargaining with the union prior to its decision to eliminate the department.

d. Articulated reasons for the Board's ruling under both the Dotson-Hunter and Dennis approaches

The NLRB's statements that \textit{First National Maintenance} and all of the views expressed in \textit{Otis II} supported the conclusions it reached in the foregoing cases were often unaccompanied by either analysis or explication. In the absence of such analysis, one could only take the Board at its word. Recently, however, the Board articulated reasons for its ruling under both the Dotson-Hunter and Dennis approaches in \textit{Lapeer Foundry \\& Machine, Inc.},\(^ {179}\) a case in which the Board applied \textit{Otis II} to an employer's economically-based layoff decision.

Layoff decisions generally are considered a management right over which an employer is not required to bargain. Collective bargaining agreements may contain provisions which set forth the mechanism of layoffs, but most do not provide for union participation in the decision. In \textit{Lapeer Foundry}, a Board panel consisting of Members Stephens, Johansen and Babson considered what bargaining obligation the employer assumed concerning unilateral layoffs caused solely by economic factors. The Board concluded that "an employer's decision to lay off employees for economic reasons is a mandatory subject of bargaining and that the [employer] violated the Act by failing to bargain over its layoff decision and the effects of that decision."\(^ {180}\)

decided to eliminate the department and terminate the department's three employees. \textit{Id.} slip op. at 3, 1987-1988 NLRB Dec. (CCH) at 33,792.

175. \textit{Id.} (citing \textit{Otis II}, 269 N.L.R.B. 891, 892 (1984)).

176. The A.L.J. had concluded that the employer's comparison of salaries to declining income showed that labor costs were the central reason for eliminating the department. \textit{Id.} slip op. at 4, 1987-1988 NLRB Dec. (CCH) at 33,792.

177. \textit{Id.} slip op. at 4 n.5, 1987-1988 NLRB Dec. (CCH) at 33,792 n.5.

178. \textit{Id.} slip op. at 5, NLRB Dec. (CCH) at 33,792 (although employer had referred to cost of salaries, "it does not follow that the decision . . . must have 'turned upon' labor costs").


In so concluding, the Board both applied the *Otis II* plurality's labor costs standard and Member Dennis' two-part analysis. With respect to the former, the Board noted that businesses confronted with economic problems such as declining sales, excessive inventory, or an unprofitable department may have several options available to address these problems. These options include the layoff of employees, the shut-down of a department, the consolidation of operations, or the transfer of work. Where management decides to implement layoffs, stated the Board, employees' terms of employment are directly affected. By contrast, decisions to shut down or consolidate operations involve a direct modification of the enterprise. Under the *Otis II* plurality's test, the decision to shut down part of a business or consolidate operations affects the scope, direction, or nature of the business and need not be bargained over. On the other hand, layoff decisions which turn upon labor costs, such as in *Lapeer Foundry*, must be bargained over.

According to the Board, the same conclusion was mandated under the Dennis two-part analysis. Because it is assumed that layoffs will result in reduced labor costs, "labor-related considerations therefore form the basis for the decision." The Board stated that unions control this factor, and can offer alternatives to layoffs such as wage reductions, modified work rules, and part-time schedules. The Board thus concluded that the layoff decision was amenable to resolution through the collective bargaining process. As to the burden placed on management, the Board reasoned that layoff decisions do not involve investment of capital, alteration of operations, or a need for confidentiality. While recognizing that management has legitimate concerns with speed and flexibility in effectuating layoffs in order to remedy economic problems, the Board opined that management's burden in bargaining over layoff decisions is outweighed by the benefits of bargaining. Consequently, "the decision to lay off employees for economic reasons is a mandatory subject of bargaining."

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181. Id. slip op. at 6, 1987-1988 NLRB Dec. (CCH) at 33,924 ("This decision, like the decision to reduce worker's wages, necessarily turns on labor costs because the decision itself is to modify terms of employment in order to save money during economic downturns.").

182. Id. ("Those decisions had only a secondary effect of altering employees' terms of employment.") (emphasis in original).

183. Id.

184. Id.

185. Id.

186. Id. The Board noted that it will require unions to make timely requests to bargain once notice of a proposed decision to lay off employees is given, and will also require that bargaining occur in a timely and meaningful fashion. Id. slip op. at 7 n.10, 1987-1988 NLRB Dec. (CCH) at 33,924 n.10.

187. Id. slip op. at 7-8, 1987-1988 NLRB Dec. (CCH) at 33,924. The Board instructed that an employer must provide notice to the union concerning the decision to lay off employees and the effects of that decision, and must engage in meaningful bargaining. If a union fails to request bargaining upon notice of the layoff decision, the Board will find that the employer has satisfied its bargaining obligation. Id. (citing NLRB v. Advertisers Mfg. Co., 823 F.2d 1086 (7th Cir. 1987)).
The Board limited its holding, however, by stressing that *Lapeer Foundry* applies only to economically motivated layoff decisions and does not apply to economically based partial closings, consolidations, transfers of work, or layoffs occurring pursuant to a labor agreement.\(^{188}\) As found by the Board, the layoffs in *Lapeer Foundry* resulted from a lack of orders and were effectuated by the employer, without notice to or bargaining with the union, to address that economic problem. Thus, under *Lapeer Foundry*, and in the absence of controlling contractual provisions, decisions to lay off employees for economic reasons must be bargained over.\(^ {189}\)

One problem with the *Lapeer Foundry* decision is the Board's focus on the layoff decision and its isolation of that decision from the underlying facts. The loss of a major customer or an economic downturn, even if temporary, are conditions outside of management's control which it must nonetheless address in order to insure the continued and profitable operation of the enterprise. In that respect, the employer's response to such developments will involve managerial discretion, and is essentially no different than its assessment of the same or similar factors which may result in a partial closure, consolidation, or transfer of work. In either case, the employer is simply exercising managerial discretion in deciding how best to address business problems. Under the Board's analysis, however, the same employer who may legally and unilaterally decide to partially close or consolidate operations based on economic grounds, which may include labor costs concerns, is on different footing where it decides to lay off employees because of those same or similar economic reasons.

The decision in *Lapeer Foundry* may have a significant impact on unionized employers. Where labor agreements do not clearly and unequivocally waive a union's bargaining rights, an employer may be required to bargain over a layoff decision. As to employers with labor agreements which contain layoff provisions, the meaning and impact of *Lapeer Foundry* remains unclear. Predictably, unions will now seek to bargain over layoff decisions where contractual layoff provisions refer only to the method of layoff and where the management rights clause, if any, does not expressly include layoff decisions as a right reserved to managerial discretion.

### C. Summary and Evaluation

The NLRB's record in applying *Otis II* is characterized by the absence of either a definitive majority view or an endorsement of any one of the variant

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188. *Id.* slip op. at 9, 1987-1988 NLRB Dec. (CCH) at 33,925.
189. *Id.* The layoff decision "was to effect changes in . . . employees' terms of employment in order to reduce labor costs during a period of economic difficulty. The [employer] was thus obligated to bargain over this decision." *Id.* See also Stamping Specialty Co., 294 N.L.R.B. No. 56, 5 Lab. L. Rep. (CCH) ¶ 15,576 (May 31, 1989) (applying *Lapeer Foundry*, the Board held that employer violated section 8(a)(5) by failing to bargain over its decision to lay off employees).
views expressed in that decision. Prior to the departure of Chairman Dotson and Member Hunter, there was still a possibility that a majority would apply the “business direction-labor costs” standard as the definitive test. In cases decided after their departure, however, the NLRB has taken an institutional position which often fails to promote the predictability and certainty so essential to this area of the law. Because Board members repeatedly state that a decision is, or is not, a mandatory subject of bargaining under any of the *Otis II* analyses, employers cannot rely solely on the arguably more predictable Dotson-Hunter labor costs standard when deciding whether to bargain over certain managerial decisions.

In assessing which of the variant *Otis II* tests would be adopted by a majority of the Board in future relocation, transfer, and similar cases, it is this author’s view that the labor costs standard is the preferable approach. The labor costs standard is a predictable and easily understood test which reflects the *First National Maintenance* Court’s emphasis on the need for certainty and predictability in this area of the law. To be sure, the balancing and amenability tests articulated by the Dennis and Zimmerman *Otis II* concurring opinions can be reconciled with *First National Maintenance*, and it is not suggested here that the labor costs standard is the only standard which is consistent with *First National Maintenance*. However, in view of the fact that the Supreme Court has not foreclosed the Board’s multifarious approach in areas other than partial closings, the nature of the corporate transactions reviewed by the Board in *Otis II*-type cases demand a readily understandable and more easily applied test such as the labor costs standard.

Apart from the question of which *Otis II* analysis should be applied is the broader issue of the Board’s refusal to adopt a majority view or to articulate an approach which offers a detailed analysis of its application of all the *Otis II* views in specific cases. That “refusal to choose among the various views expressed in *Otis II* must be viewed as disappointing, if not unconscionable, from the perspective of employers, unions, and affected employees.” Thus, regardless of one’s views with regard to the proper test to apply in managerial decision cases, the labor-management community must be able to conduct their affairs in light of a clearly articulated and established legal test. The Board must both recognize and resolve this issue in the near future.

Absent the Board’s adoption of a definitive majority rule, all legal advice given in this area must take into account and rely upon all of the views in *Otis II*, including Member Dennis’ concurrence which employed a “benefits-burden balancing” analysis. Such conservative and protective advice is warranted by the General Counsel’s determination that NLRB Regions must review cases under both the labor costs and amenability to bargaining

190. See Miscimarra, *supra* note 1, at 81.
191. See *supra* note 77 and accompanying text.
standards set forth in the plurality and concurring opinions. Thus, an unfair labor practice charge which alleges an employer's failure to bargain over a management decision could result in: (1) an investigation which reviewed the reasons underlying the employer's decision; and (2) a determination as to whether the benefits of bargaining outweighed the burdens that bargaining would impose on the employer.\(^{193}\)

In the subcontracting context, the NLRB has now concluded, definitively and unequivocally, that the General Counsel does not bear the burden of proving that an employer's decision was motivated by labor costs.\(^{194}\) While one may quarrel with either the latter conclusion or with the labor costs standard itself, the Board's declaration on the fundamental point of labor costs in the subcontracting context at least provides some clarity and guidance to both management and labor.

The Otis II plurality's labor costs standard has nonetheless been criticized by commentators as being inconsistent with the First National Maintenance balancing test.\(^{195}\) That criticism, and the well-founded but variant analytical tests proposed by the Board members, may have resulted in an institutional reluctance by the NLRB to adopt a single, determinative standard. Moreover, by relying on all of the views expressed in Otis II, the Board may have acted with an eye toward judicial review of its predetermination bargaining decisions, particularly during the absence of appellate court review of the Otis II line of cases. That review has now begun.

### IV. Appellate Review of Otis II

#### A. The Fifth Circuit: Local 2179

The Board successfully defended the Otis II labor costs standard in Local 2179, United Steelworkers v. NLRB,\(^ {196}\) the first appellate review of that case. The United States Court of Appeals for the Fifth Circuit affirmed a Board decision that an employer's plant relocation decision was not subject to mandatory bargaining under section 8(d).\(^ {197}\) The court stated that the central issue was whether the Otis II labor costs standard was sustainable under

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195. See, e.g., George, supra note 6, at 699; Gorman, supra note 6, at 1365-66.
196. 822 F.2d 559 (5th Cir. 1987).
197. Inland Steel Container Co., 275 N.L.R.B. 929 (1985), review denied, 822 F.2d 559 (5th Cir. 1987). In Inland Steel, the A.L.J., affirmed by the Board, concluded that the employer's decision to relocate production from Louisiana to a plant in Mississippi was not primarily motivated by, and did not turn on, labor costs considerations. Both the A.L.J. and the Board relied on the Otis II plurality's "turns upon labor costs" standard. Id. at 929 n.1, 937.
First National Maintenance, which held that an employer’s partial closing decision based on economic motives was not a mandatory subject of bargaining.

The union contended that First National Maintenance required the NLRB to apply the Supreme Court’s balancing test to each type of employer decision involving either entrepreneurial control or an impact on job security or employment itself. According to the union, such an application of the First National Maintenance balancing test would yield one rule applicable to all plant relocation decisions regardless of the facts or circumstances. In the alternative, the union argued that First National Maintenance required the Board to apply the Supreme Court’s balancing test on a case-by-case basis to the particular facts of each case arising from an employer’s decision in this area. The NLRB, however, prevailed against the union’s challenge, with the Fifth Circuit rejecting the latter’s arguments and holding that the NLRB acted within its discretion in applying the “turns upon labor costs” standard to plant relocation decisions.

With respect to the union’s first argument, the court conceded that the language of First National Maintenance did offer some basis for the union’s claim that the NLRB was required to adopt a per se rule in plant relocation cases. In particular, the court noted, a per se rule would be more predictable than the labor costs standard. Nevertheless, because First National Maintenance recognized management’s need for free and speedy operation, “it would seem anomalous to wholly sacrifice those goals to the evidently subsidiary goal of enhanced predictability, especially where in many instances the decision would not be amenable to resolution through the bargaining process.” Furthermore, the Fifth Circuit reasoned that First National Maintenance applied only to partial closings done “purely for economic reasons,” that is, situations where labor costs were an important factor but not a crucial circumstance. The court also reasoned that it was unclear whether First National Maintenance required mandatory bargaining in cases where labor costs were the entire motivation for a partial plant closing. In support of its reasoning, the court noted that the Supreme Court had limited

198. Local 2179, United Steelworkers, 822 F.2d at 561.
199. “Category 3” decisions are discussed supra at notes 44-47 and accompanying text.
200. Local 2179, United Steelworkers, 822 F.2d at 576.
201. Id.
202. Id. The court noted that it was not deciding whether the NLRB may properly apply the same analysis to other types of Category 3 decisions. Id. at 576 n.25.
203. Id. at 576.
204. Id. The court stated, “[d]oubtless greater predictability would be enhanced by holding that all plant relocation decisions are subject to mandatory bargaining, as opposed to only those which turn on labor costs.” Id. However, the court noted that the employer would generally be aware of whether its decision turned on labor costs, and further observed that the union would often be sufficiently informed to protect its rights. Id.
205. Id. (emphasis in original).
206. Id. (quoting First National Maintenance, 452 U.S. at 686).
its holding to the specific facts before it, 207 and had indicated "no view as to other types of management decisions." 208 Thus, the Fifth Circuit concluded that First National Maintenance did not call for a per se, across the board rule with regard to topics of mandatory bargaining.

The court likewise rejected the union's second argument that First National Maintenance required a "benefits and burdens of bargaining" test to be applied on an ad hoc basis. The court stated that, "[g]iven the inherent unquantifiability of many of the factors considered important in First National Maintenance . . . an ad hoc approach would likely be far more destructive of predictability than the Board's 'turns upon labor costs' standard." 209 Furthermore, the court concluded that the First National Maintenance Court would have expressly stated that it was requiring ad hoc balancing in all cases, had it actually done so. Therefore, the court would not arrive at such a rule by implication.

The Fifth Circuit thus determined that the ruling in First National Maintenance did not extend beyond economically motivated partial closings, or at least not beyond those which did not turn on labor costs. Furthermore, the court expressly read First National Maintenance as disclaiming any particular substantive result. The court did recognize that First National Maintenance suggested that the Board should give significant consideration to management prerogatives, and that the extent to which bargaining over business conduct decisions have an impact on employment is both meaningful and practical. However, the Fifth Circuit did not read the Supreme Court's decision as dictating any particular methodology which the Board should follow.

For example, the Fifth Circuit considered the concurring opinions in Otis II, 210 and determined that the Board was not required to adopt any one of the formulas proposed therein. As the court stated:

We believe the Board could legitimately conclude that the "turns upon labor costs" standard was preferable because of its greater simplicity and predictability. In essence that standard performs the balancing by determining that where, and only where, the decision turns on labor costs it is sufficiently likely to be amenable to resolution through collective bargaining as to outweigh the burden of management constraints. 211

Accordingly, in the absence of clearer direction from the Supreme Court, the Fifth Circuit declined to impose a specific methodology on the Board. 212

207. Id. at 577 (citing First National Maintenance, 452 U.S. at 687).
208. Id. (quoting First National Maintenance, 452 U.S. at 686 n.22).
209. Id.
210. See supra notes 98-111 and accompanying text for a discussion of the concurring opinions of Members Dennis and Zimmerman in Otis II.
211. Local 2179, United Steelworkers, 822 F.2d at 579.
212. Id. at 580. The court additionally noted language in First National Maintenance which indicated that mandatory bargaining is not required "even where 'labor costs are an important factor in . . . the [employer's] decision to close]'" Id. at 579 (quoting First Nat'l Maintenance,
The court did hold, however, that the Otis II labor costs standard was a reasonably defensible interpretation of First National Maintenance. The court viewed the labor costs standard as a principled attempt to respond to First National Maintenance and Fibreboard; one that avoided both a rigid per se approach as well as an unpredictable and administratively difficult ad hoc approach. The court stated that the Board’s application of the labor costs standard to a plant relocation decision was neither inconsistent with, nor an unprincipled construction of, the Act. Thus, under a deferential review of the Board’s ruling, the court was willing to endorse the labor costs standard in preference to the various other standards which the Board had rejected.

The Fifth Circuit’s reading of First National Maintenance indicates that it refused to foreclose the Board’s use of the labor costs standard. First National Maintenance only involved a partial closing, and intimated no view as to other types of management decisions. The Fifth Circuit therefore declined to hold that the Supreme Court’s decision required ad hoc balancing or any other methodology in the case before it. Moreover, the Fifth Circuit found that the Board could properly conclude that the labor costs standard was a simpler and more predictable test. Consequently, the court upheld both the Board’s selection and application of that test.

B. The First Circuit: Westinghouse Broadcasting

After its successful defense of the labor costs standard in the Fifth Circuit, the Board succeeded in enforcing its order requiring an employer to undo unilateral subcontracting in NLRB v. Westinghouse Broadcasting & Cable, Inc. There, the United States Court of Appeals for the First Circuit

452 U.S. at 682). Other language, moreover, suggested that all economically-based partial closings “are exempt from mandatory bargaining.” Id. (citing First National Maintenance, 452 U.S. at 685). Accordingly, the Fifth Circuit did not read First National Maintenance as requiring a test broader than the labor costs standard.

213. See supra notes 24-28 and accompanying text (discussing Ford Motor Co. v. NLRB, 441 U.S. 488 (1979)).

214. Local 2179, United Steelworkers, 822 F.2d at 580. The Fifth Circuit was “more inclined to deference in our review of the Board’s efforts to select a workable and principled approach from among a universe of at least partially flawed alternatives.” Id. The court’s view of the Otis II plurality decision as the “dominant, binding opinion of the Board” has since been rejected by the District of Columbia Circuit in UFCW Int’l Union, Local 150-A v. NLRB, No. 88-1084, slip op. at 22 n.5 (D.C. Cir. Aug. 4, 1989).

The Fifth Circuit noted that the case involved two interrelated decisions, “each clearly lying at the core of entrepreneurial control.” Local 2179, United Steelworkers, 822 F.2d at 578. The employer’s decision to permanently close one of its facilities was similar to a partial closing, and the decision to acquire a new facility at a different location to perform some or all of the closed facility’s functions “[did] not enhance the adverse effects on the employees at the closed facility. Nor [did] it significantly dilute the character of the overall transaction as one lying at the core of entrepreneurial control.” Id.

concluded that the employer's decision to eliminate a bargaining unit and to subcontract unit work fell squarely within the holding of \textit{Fibreboard}.\footnote{216} Neither party contested the Board's application of the \textit{Otis II} labor costs rule. Rather, the employer asserted that the subcontracting decision did not turn upon labor costs because it resulted from a change in the direction of the business caused by the elimination of the unit. Unpersuaded by the employer's assertion, the court reasoned that there was no logical reason for the employer's decision other than labor costs. Noting the employer's efforts to maintain "the lowest personnel costs necessary to produce the desired product," the court determined that it was immaterial that the work force reduction resulted from the sale of a division of the company.\footnote{217}

The First Circuit also applied the \textit{First National Maintenance} balancing test, and concluded that the employer's decision was also amenable to resolution through the bargaining process. Among other things, the court noted that collective bargaining could have affected the employer's decision in that union proposals could have addressed the employer's financial and service needs.\footnote{218}

\section*{C. The Fourth Circuit: Arrow Automotive}

In spite of the favorable rulings in the Fifth and First Circuits, the Board encountered rough sledding in the United States Court of Appeals for the Fourth Circuit. In \textit{Arrow Automotive Industries, Inc. v. NLRB},\footnote{219} the court held that an employer did not have to bargain over a decision to close one of its facilities in Massachusetts and transfer the work to South Carolina. In so holding, the court overturned the NLRB's decision and determined

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\item order which held that the employer's decision to subcontract assembly work was a mandatory subject of bargaining. Relating the \textit{Otis II} plurality opinion to a parenthetical, the Sixth Circuit instead relied on \textit{Fibreboard, First National Maintenance}, and \textit{NLRB v. Production Molded Plastics, Inc.}, 604 F.2d 451, 453 (6th Cir. 1979) (subject is mandatory if "collective bargaining in advance of the decision might have produced a union offer which could have affected the decision to transfer the jobs."). \textit{Plymouth Stamping}, 870 F.2d at 1116-17.
\item 216. \textit{Westinghouse Broadcasting}, 849 F.2d at 22. The employer sold a separate division which employed eleven individuals. After the sale, the employer's parent directed the employer to reduce its staff by eleven positions. The employer then decided to terminate a unit of news department carriers. \textit{Id.} at 17.
\item 217. \textit{Id.} at 23.
\item 218. \textit{Id.} (The A.L.J. found that "the Union . . . could have shown the Company that it could save more money and receive superior service by retaining the [employees] and possibly expanding the scope of their duties."). \textit{Id.}
\item 219. 853 F.2d 223 (4th Cir. 1988). In \textit{Arrow Automotive Industries, Inc.}, 284 N.L.R.B. No. 57, 1986-1987 NLRB Dec. (CCH) ¶ 18,949 (June 25, 1987), the Board concluded that the employer was obligated to bargain over its 1981 decision to close a Massachusetts facility, and transfer the work to South Carolina because of escalating production costs and a declining market. In the Board's view, the employer's decision turned on labor costs and was a mandatory subject of bargaining. \textit{Id.} slip op. at 8, 1986-1987 NLRB Dec. (CCH) at 32,505. Members Johansen and Babson additionally relied on \textit{First National Maintenance} and any of the views set forth in \textit{Otis II}. \textit{Id.} slip op. at 8 n.4, 1986-1987 NLRB Dec. (CCH) at 32,505 n.4.
\end{itemize}
that the Otis II labor costs standard was "flatly inconsistent with First National Maintenance."220

After reviewing in detail the Supreme Court's analysis in First National Maintenance, the Fourth Circuit criticized Otis II in several respects. Noting the Dotson-Hunter labor costs analysis, the court stated:

"[T]he Board's labor-costs standard provides scant guidance or predictability to companies faced with fundamental business decisions. It also establishes an exception to the First National Maintenance decision that threatens to swallow its rule. As one commentator has noted, the Board's standard is problematic in itself because "management decisions may turn on labor costs and involve a fundamental change in the business.""221

The parties in Arrow Automotive had stipulated that part of the reason the employer closed the Massachusetts facility was the declining market served by that plant. In the Fourth Circuit's view, however, the labor costs standard might "require bargaining where a management decision is based on other considerations in addition to labor costs."222 Moreover, the court found the labor costs standard's definition of entrepreneurial control to be unclear because the court would not have predicted that closing a manufacturing plant was excluded from such control.223

Furthermore, the court found no distinction between "labor costs" and "economic reasons" for a plant closing. As the court stated,

"Economic reasons" are not reasons distinct and apart from a desire to decrease labor costs. The Supreme Court uses the term "economic reasons" in contrasting business decisions from decisions based on anti-union animus. . . . Labor costs are inescapably a part of the economic picture of the enterprise, and management's consideration of them in basic business decisions does not render First National Maintenance inapplicable.224

According to the court, the Board's labor costs standard was "flatly inconsistent" with First National Maintenance, the Supreme Court having "made clear that bargaining over the decision is not required."225 With regard to labor costs, the Fourth Circuit quoted the Supreme Court as stating that "labor costs are an important factor in a failing operation and the decision to close, [and] management will have an incentive to confer voluntarily with the union to seek concessions that may make continuing the business profitable."226 Comparing the maintenance company's decision in First National Maintenance to terminate a contract with Arrow Automotive's

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220. Arrow Automotive, 853 F.2d at 228.
221. Id. at 227 (quoting George, supra note 6, at 689 n.111 (emphasis in quotation)).
222. Id. at 228 (emphasis in original).
223. Id. ("In this case, the Board concluded that the closing of an entire manufacturing facility was not such a change [in the direction or nature of the enterprise]. Yet this result would not have been easy to predict on the basis of earlier Board decisions.").
224. Id.
225. Id.
226. Id. (quoting First Nat'l Maintenance, 452 U.S. at 682) (emphasis added).
shutdown of an entire manufacturing facility, the Fourth Circuit concluded that, under the Supreme Court’s ruling, Arrow’s decision had significantly changed its operations.

In the Fourth Circuit’s view, the parties' stipulation that economic factors (decreasing sales and increased production costs) prompted the closing, even though the employer was frustrated with the course of labor relations, did not place the closing decision outside of First National Maintenance. The employer’s attitude toward labor relations might have led to an evaluation of the facility, but if the closing itself was not motivated by anti-union animus, the Fourth Circuit would not require bargaining.

The Fourth Circuit then applied First National Maintenance to the specific facts of Arrow Automotive. The court found no reason to believe that bargaining would have had any effect inasmuch as the company’s decision stemmed from a forty-percent decline of the market the company served. In addition, current labor practice suggested to the court that the decision was not suited to resolution through bargaining, because contract provisions covering relocations or closings were not common. The Fourth Circuit also noted that full effects bargaining had taken place, the employer had not refused to bargain with the union, and the employer had no history of committing other unfair labor practices.

Turning to the burden which bargaining would place on the employer, the court reasoned that the magnitude of the decision to close the entire facility and reallocate capital underscored management’s need for certainty. In the court’s view, the labor costs standard would leave management “at sea as to whether it had an obligation to bargain,” because management’s decision to close and transfer would remain vulnerable to an adverse Board ruling. Speed, flexibility and competitiveness may also be sacrificed, the court determined, where management is required to bargain to impasse over a

227. Id. at 229. The Board contended that the employer’s bargaining decision was prompted by its frustration with the bargaining process.

228. Id. at 229. (‘Frustration with the course of labor relations may well play a part in prompting a company to consider closing a facility, but absent the unfair labor practices covered by Darlington,’ bargaining is not required). For a discussion of Darlington, 380 U.S. 263 (1965), see supra notes 48-57 and accompanying text.

229. Id. at 229-30.

230. Id. at 232 (uncertainty results because “an employer could never be certain when a decision might eventually be found by the Board to be too closely related to labor costs.”).
closing decision. Finally, the court found a real possibility that a mandatory bargaining obligation would give a union a powerful tool for delay and would require the continued operation of an unprofitable plant.

Obviously the court showed no deference to the Board in rejecting its analysis and ruling. The Fourth Circuit stated that the Supreme Court remains the final arbiter of the meaning of the Act, and the Court's decisions are binding upon both the Board and the lower courts. Accordingly, the Fourth Circuit concluded that the employer's decision in *Arrow Automotive* fit squarely within *First National Maintenance*. The harm done to the employer's need to operate freely in making its shutdown decision for economic reasons outweighed the incremental benefit that might have been gained in bargaining.

Thus, unlike the Fifth Circuit, the Fourth Circuit saw no need to defer to a Board ruling which it concluded was flatly inconsistent with *First National Maintenance*. The court determined the labor costs standard of *Otis II* to be unpredictable and an exception which could swallow the balancing test set forth in the Supreme Court's decision. Additionally, the Fourth Circuit found that a Board rule which requires an employer to speculate as to whether labor costs are sufficiently and closely related to the employer's decision will result in uncertainty, rather than the predictability called for by *First National Maintenance*. Furthermore, the Fourth Circuit found no distinction between economic reasons and labor costs, reasoning that labor costs are an essential and inescapable part of the economic picture of any business.

**D. The Seventh Circuit: W.W. Grainger**

In contrast to the Fourth Circuit, the Seventh Circuit recently deferred to the Board's labor costs standard in *W.W. Grainger, Inc. v. NLRB*. In that case, the Board had ruled, *inter alia*, that an employer violated section 8(a)(5) of the Act by cancelling a contract with a company which provided the employer with drivers. The drivers had requested compensation for "branch time," or non-driving time spent at distribution points or retail destinations. The employer rejected the request and subsequently contracted with another entity.

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231. Id. (In shutdown cases, "management may need to act swiftly in winding down the operation and reallocating or selling property and equipment.").

232. Id. Chief Judge Winter dissented, arguing that the NLRB's decision was supported by substantial record evidence and that the court should defer to that ruling. In his view, the employer's decision fell within the category of management decisions to which *First National Maintenance* balancing should be applied: the employer's action was a relocation and not a partial closing; the employer was motivated by the employees' rejection of its contract offer; and the union had control over escalating production costs (including health insurance costs). *Id.* at 238-39 (Winter, C.J., dissenting).

233. 860 F.2d 244 (7th Cir. 1988).
Agreeing that the employer's cancellation of the contract was a mandatory subject of bargaining, the court relied on the Otis II plurality's distinction between decisions which turn on labor costs and those which involve basic changes in the employer's enterprise.\(^\text{234}\) Giving due deference to the Board's expertise with respect to mandatory bargaining subject determinations,\(^\text{235}\) the court concluded that the final event which caused the employer to terminate its contract was the controversy surrounding the costs of branch time, an issue which turned upon labor costs.\(^\text{236}\) Thus, the court concluded the contract issue was a mandatory subject of bargaining.

**E. The D.C. Circuit: UFCW Int'l Union, Local 150-A**

In August 1989, the United States Court of Appeals for the District of Columbia Circuit issued a significant decision which discussed at length the Board's practice of determining whether an employer's decision is, or is not, a mandatory subject of bargaining under the three Otis II opinions and the different analyses set forth in those opinions. In *UFCW International Union, Local 150-A v. NLRB*,\(^\text{237}\) the court rejected the Board's 1987 summary affirmance of an A.L.J.'s decision that the employer's relocation of certain operations from Dubuque, Iowa to Rochelle, Illinois did not turn upon labor costs, but rather turned upon a fundamental change in the scope, nature and direction of the employer's business.\(^\text{238}\) In so doing, two members of the Board's three-member panel stated that the employer was not obligated to bargain under any of the views expressed in Otis II.\(^\text{239}\)

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234. *Id.* at 248 (In *Otis II*, "the Board held that where a decision turns upon labor costs, the employer was obligated to bargain. Only where the decision turns upon a change in the nature or direction of the business, was management free to act independently.").

235. *Id.* (citing Ford Motor Co. v. NLRB, 441 U.S. 488, 495 (1979)).

236. *Id.* (issue of branch time "certainly appears to involve a direct labor cost"). Although the cancellation of the agreement was held to be a mandatory bargaining subject, the court determined that the union had waived its right to bargain over the subject. Finding that the union had notice and an opportunity to negotiate over the matter, the court found no violation of § 8(a)(5) of the Act. *Id.* at 248-50.


238. This case involved the employer's 1981 relocation of its hog kill and hog cut operations from Dubuque, Iowa to Rochelle, Illinois. The union alleged that the employer breached its bargaining duty by failing to engage in predetermination bargaining before the relocation. Hearings were held before an A.L.J. of the Board in 1983, and the parties filed final briefs with the A.L.J. before the Board decided *Otis I*.

The A.L.J.'s decision, released in 1985, relied on *Otis II* in concluding that the relocation did not turn upon costs. *Id.* slip op. at 12. In his decision, the A.L.J. noted, *inter alia*, that the employer had been unsuccessful in raising from banks or the federal government five million dollars needed to modernize the Dubuque, Iowa facility; that the employer had lost its credit line and future financing was uncertain; and that the Rochelle, Illinois facility to which operations were relocated was a smaller, newer, and more modern facility. *Id.* slip op. at 12.

The District of Columbia Circuit initially reviewed the Supreme Court's decisions in *Fibreboard* and *First National Maintenance*,240 as well as the three separate opinions and tests set out by the Board in *Otis II*.241 Noting that *Fibreboard* and *First National Maintenance* did not compel the approaches taken by the Board in *Otis II*,242 the court concluded that, with respect to questions of relocation, "each of the *Otis II* approaches gives at least a plausible reading to the requirements of *First National Maintenance*."243 In the court's view, however, the *First National Maintenance* Court's sensitivity to management prerogatives made it difficult to maintain that bargaining over relocation decisions would be required anytime labor costs are a factor. As the court reasoned:

Ascertaining whether or not a decision to relocate "turns upon labor costs," or whether it is "amenable" to collective bargaining, provides acceptable, albeit restricted, proxies for identifying management decisions that do not require special "speed, flexibility, and secrecy," and which would be fruitful subjects of negotiations between management and labor. What the *Otis II* standard lacks by way of underemphasis of mandatory bargaining, it arguably compensates for with greater simplicity and predictability—perhaps subsidiary, but not altogether unimportant goals under the Act. These are the sorts of factors that courts have long charged the Board with balancing.244

... Notwithstanding its views of the broad acceptability of *Otis II*, the court ultimately concluded that the Board's decision in *UFCW Int'l Union* "falls short of the standards of reasoned decisionmaking that we customarily require in judicial review."245 Citing to *Otis II* and prior Board decisions, the court opined that in the past the Board had ascertained the basis upon which relevant decisionmakers arrived at their decision. "[T]he relevant factors must have been contemporaneous with or have predated the decision itself, and the exercise must involve an effort to determine what was actually in the minds of those making the decision."246 In that regard, the court noted that the A.L.J.'s opinion, which the Board adopted, simply justified the employer's decision without stating that any person with responsibility for making the relocation decision actually believed that it turned on any factor other than labor costs.

Thus, stated the court, if the Board adheres to the "turns upon labor costs" standard in relocation decisions, the Board must: (1) identify the factors considered "in determining the employer's contemporaneous motive for its decision"; and, (2) "apply those factors . . . to determine whether the contemporaneous evidence . . . support[ed] the conclusion that . . . the

241. Id. slip op. at 18-21.
242. Id. slip op. at 21.
243. Id. slip op. at 23.
244. Id. slip op. at 24-25.
245. Id. slip op. at 25.
246. Id. slip op. at 26.
decision 'turned upon' entrepreneurial factors, rather than labor costs.'"247 If, however, the Board chooses to apply a justification analysis of the employer's actions, the court instructed the Board to: (1) explain why it has taken that approach; and, (2) identify the factors controlling its determination.248

Turning to the Board's affirmance of the A.L.J.'s decision, the court addressed the Board's consistent declination to choose among the three Otis II opinions when deciding predecision bargaining cases. Acknowledging that the Otis II opinions "share certain common understandings," the court noted that the Otis II plurality and concurring opinions differ in certain significant respects.249 The D.C. Circuit remanded the case back to the Board because, in the court's view, the Board had to take a definitive stance:

[T]he Board must accept responsibility for clarifying and identifying the standards that are guiding its decisions. We urge the Board to look seriously at the present case on remand and to attempt to articulate a majority-supported statement of the rule that the Board will be applying now and in the future in determining whether a particular decision is subject to mandatory bargaining or not.250

If the Board declined to articulate a majority rule, the court instructed the Board to then explain its conclusion that the Otis II opinions would all yield the same result. Finding nothing in the record showing that there was a need for secrecy, speed, or flexibility in Dubuque Packing Company's relocation decision, the court also found no indication that any such need would exist that could not have been accommodated within the context of mandatory bargaining.251

247. Id. slip op. at 28 (emphasis added).
248. Id. slip op. at 29.
249. Id. slip op. at 31. The court noted, inter alia, that Member Zimmerman's opinion would apparently require bargaining even where labor costs were not the direct cause of a relocation decision, "but when labor concessions might nevertheless offset the concerns that are motivating the decision." Id. (emphasis in original).
250. Id.
251. Id. slip op. at 32. The court also criticized the Board for its failure to reconcile its result in Dubuque Packing Company with the results reached in prior Board decisions, particularly Plymouth Stamping Div., Eltec. Corp., 286 N.L.R.B. No. 85, 1987-1988 NLRB Dec. (CCH) ¶ 19,088 (Nov. 19, 1987), enforced, 870 F.2d 1112 (6th Cir. 1989). UFCW Int'l Union, slip op. at 32-33.

In addition, the court concluded that the Board improperly ignored the union's argument that, even if no duty to bargain arose with respect to the relocation decision, the bargaining obligation did arise when the employer sought to renegotiate certain modifications to mandatory subjects during the term of the parties' collective bargaining agreement. If the Board concluded on remand that the employer had no duty to bargain over the relocation decision, the court stated that it expected the Board to address the question of whether the good faith bargaining obligation arises when an employer brings both permissive and mandatory subjects to the table and seeks concessions on the mandatory subjects in exchange for company agreements on the permissive subjects. UFCW Int'l Union, slip op. at 34-35. "We find no clear answer to this question in the Board's precedent, and thus we leave it to the Board, in its expertise, to confront the claim initially." Id. at 35.
The District of Columbia Circuit's remand of the Dubuque Packing Co. case serves as a significant opportunity for the Board to clarify its Otis II analysis and definitively resolve the uncertainty and ambiguity flowing from its subsequent reliance on all of the different standards set forth therein. While a majority statement of the rule applicable to these cases would be preferred, it must be noted that the Board has recently attempted to explain the analysis supporting its conclusion that all of the Otis II tests lead to the same result. For example, in Lapeer Foundry, the Board applied both the labor costs standard and Member Dennis' two-part analysis in concluding that an employer violated the Act by failing to bargain over a layoff decision. Similarly, in The Reece Corporation, a panel majority of the Board ruled that an employer's decision to transfer work was a mandatory subject of bargaining since the decision essentially turned upon labor costs. The majority in Reece also applied the Dennis test, concluding that labor costs were a significant consideration in the employer's decision which could have been addressed and negated by union concessions. Furthermore, the majority opined that under the Zimmerman test, the decision would clearly be a mandatory subject of bargaining because it was motivated by labor cost concerns which union concessions could have substantially mitigated.

Given these isolated attempts to apply all of the Otis II tests, it is not a foregone conclusion that the Board will adopt one majority test and abandon the others.

In addition, the Board's choice between the contemporaneous motive and justification analyses as the proper standard of review of an employer's managerial decision will certainly impact upon the investigation and litigation of Otis II-type cases. Under a contemporaneous motive analysis, the focus of the Board's and the courts' inquiry would be upon the factors and evidence actually considered by the decisionmaker prior to and at the time of the decision. Under a justification analysis, the focus would be upon those factors which establish that the decision was or could be justified as evidenced by a subsequent review of factors which, although not actually considered at the time of the decision, demonstrate that the decision was...
not a mandatory subject of bargaining. This issue bears watching as the Board reconsiders its decision in UFCW Int'l Union.

F. Summary and Evaluation

Will the Board continue its current approach of relying on the variant views of Otis II and the differing interpretations of First National Maintenance set forth in the NLRB's 1984 decision, or will the Board's decision and analysis in the case remanded by the District of Columbia Circuit result in a majority rule governing future relocation cases? Will other federal courts of appeals join with the Fifth and Seventh Circuits in endorsing the labor costs standard as a reasonably defensible interpretation of First National Maintenance? Or will other courts reach a different result and find, as did the Fourth Circuit, that the "turns upon labor costs" standard is inconsistent with the "benefits/burden balancing" analysis of First National Maintenance? These questions will likely be the subject of future litigation and disposition by the NLRB, the lower courts and, perhaps ultimately, the Supreme Court.

CONCLUSION

Employers, labor organizations, and employees are directly affected by the legal standards applied in entrepreneurial decision and control cases. Because NLRB resolution of the question of whether decision bargaining is required in plant closings, relocations, and subcontracting is of obvious importance, a clear, coherent and predictable standard is warranted. The NLRB shoulders the responsibility of clearly delineating the boundaries of managerial discretion in this area pursuant to an analysis which, at the very least, applies and explains an identifiable test and methodology.258

If a decision falls within the mandatory bargaining obligation of the NLRA, all segments of the labor-management community are entitled to assert their rights with some certainty of legal support.259 If predecision bargaining is not required, employers should be able to avail themselves of the benefits of lawful unilateral action which is unencumbered by lengthy and costly litigation before the NLRB and the courts.260 The public policy of management discretion in this area is not promoted where the legality of the employer's action is uncertain and is only decided years after an entrepreneurial decision is made.

To promote certainty and direction, the Board should clarify which of the Otis II tests must be satisfied in predecision bargaining cases. As a practical matter, compliance with the Otis II plurality's labor costs test and/or the Dennis and Zimmerman formulations, as well as the General Counsel's Otis

258. P. Miscimarra, The NLRB and Managerial Discretion, supra note 1, at 348.
259. Id.
260. Id.
Memorandum, requires that an employer be prepared to defend its actions under the benefits-burden balancing test as well as the labor costs standard. Sole reliance on the latter standard could be risky.

Given the circuit court’s differing views regarding the labor costs standard, it may be posited that the Board has a duty to take a definitive stance and to further explore and explain its methodology in deciding predecision bargaining cases. In any event, the NLRB’s and courts’ treatment of this issue ensures that questions with regard to the Board’s application of Otis II will continue to be points of uncertainty and contention in the foreseeable future.

261. See UFCW Int’l Union, slip op. at 36-37 (court insisted on “well-articulated reasoning in Board opinions” to insure that Board decisionmaking was not arbitrary and capricious); cf. Nielsen Lithographing Co. v. NLRB, 854 F.2d 1063 (7th Cir. 1988). Regarding the employer’s duty to disclose information under NLRB v. Truitt Mfg. Co., 351 U.S. 149 (1956), the Seventh Circuit stated, “[f]aced with a conflict both in the circuits and its own decisions, the Board had the duty to take a stance, to explain which decisions it agreed with and why, and to explore the possibility of intermediate solutions.” Nielsen Lithographing, 854 F.2d at 1067.