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THE VIABILITY OF THE COLLECTIVE BARGAINING PROCESS: CORPORATE TRANSFORMATIONS AS UNCHANNELED BARGAINING POWER

by

James B. Zimarowski*

Thus far, the process of collective bargaining in the 1980's has not been kind to labor interests. Because the economic weapons and bargaining power of the employers and the unions has historically been unequal, the National Labor Relations Act was passed to create the collective bargaining process as a forum for dispute resolution. A forum for dispute resolution must have a broad jurisdiction and then is only effective if the alternative avenues do not exist, or are, at best, less attractive. However, fundamental issues in the decision making process relating to labor-management relations are decided unilaterally by the employer, often with court and National Labor Relations Board (NLRB) approval, rather than through the collective bargaining process. The union, therefore, is forced to fight for its organizational existence, often with attendant residual effects upon commerce and society. Thus, the resort to economic weapons, the condition that the National Labor Relations Act (NLRA) sought to correct, is becoming the norm rather than the exception.

This situation has been brought about by a number of social

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and economic factors\(^1\) including unacceptably high unemployment resulting in a buyers' market for labor, structural unemployment in the major industries such as steel, mining, and automobile manufacturing, rampant underemployment and the substitution of part-time for full-time workers, short-sighted legal, economic and political conservatism, a world wide recession, divisiveness between and within labor organizations, and the highest rate of business failures since the 1930's. The factors have had a negative effect on labor interests, the collective bargaining process and workplace democracy in the United States.

Many of these factors have been present in varying degrees since the passage of the Wagner Act of 1935 (NLRA).\(^2\) The difference today is due to the above factors and to constituencies which have focused, defined and exploited the inadequacies of the national labor laws in the name of unfettered managerial decision making and myopic concepts of economic efficiency and capital mobility. The Supreme Court and the Reagan appointees to the National Labor Relations Board,\(^3\) following the current political and economic climate, have been sympathetic to the interests of business organizations while demonstrating an indifference to openly hostile attitude to the interests of labor and the resulting social costs arising from the increased labor-management tensions.\(^4\) Moreover, many business organizations, which never accepted the legislatively mandated policy of encouraging collective bargaining, continue to be aggressively hostile to labor interests at every level.\(^5\) Finally, public opinion and

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Congress have been, at best, indifferent to the viability of labor laws and the collective bargaining process. Labor-management relations have therefore been allowed to erode through neglect and the lack of an effective system of remedies. Unfortunately, those who violate labor laws and employee rights are not stigmatized as are other law-breakers, and, therefore, employers flout the law with virtual impunity. In fact, labor law violations are simply considered as a cost in the employer's financial projections and cost-benefit analyses. Since violations of labor law are viewed as mala prohibita and carry little or no residual effect, any remedy must be swift and substantial to alter the cost-benefit calculations and induce compliance.

The issues generated by these factors question whether labor, government, business and society have made any commitment to the fulfillment of the policies enunciated in the federal labor laws. This article addresses the continued viability of the collective bargaining process as a forum for dispute resolution in view of the bargaining power imbalance created when employers make unilateral decisions over corporate changes and transformations.
The threat and/or implementation of major corporate changes and transformations are potent sources of bargaining power for employers. If corporate transformations are not channeled through the collective bargaining process which provides for notice and access to information, the entire process of collective bargaining can become a blind ritual with important substantive issues decided by the unilateral use of economic weapons. Moreover, any negotiated agreement between labor and management could be evaded by the employer without incurring the sanctions of the unfair labor practice provisions. This demonstrable inequality of bargaining power and lack of a viable forum to channel these disputes may signal an erosion of the collective bargaining system and the demise of industrial self-governance.

I. CONCEPTUAL AND STATUTORY BACKGROUND

A. The Policy of the National Labor Relations Act

The policy of labor legislation is summarized in Section 1, Findings and Policies of the National Labor Relations Act ("NLRA" or "Act"). Section 1 enunciated three fundamental and interdepen-

363 U.S. 574, 580 (citations and footnotes omitted).
10. Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co., 404 U.S. 157 (1971). The union can seek contract damages through a Section 301 action. Additionally, injunctive relief may also be available if the underlying dispute is subject to the arbitration clause in the collective bargaining agreement. However, the relief available is largely inadequate considering that the collective bargaining agreement covers more than mere economic relationships. If the parties' only protection is through litigation, the system of bargaining becomes a strained and futile process. Moreover, the action is dependent on sufficient notice of the change which the employer will be reluctant to provide.

The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and
dent policy rationales. First, disruptions in interstate commerce occasioned by the industrial/economic warfare of employers and employees had reached unacceptable levels. Second, this situation was, in part, the product of an inequality of bargaining power between employees and employers. And third, since conflict cannot be eliminated, a process of collective bargaining is an acceptable forum in which to channel industrial conflict and thereby mediate the disruptive impact of unchecked conflict in interstate commerce. The recognition of inequality of bargaining power and the attempt to structure a forum amenable to dispute resolution is fundamental in all labor legislation.

In articulating labor law policy, Congress recognized the basic tenets of employee-employer relationships established by industrial relations theorists. First, the concept of employment has more than a mere economic importance to the individual employee. Second, by

unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid of protection.

See also A. Cox, LAW AND THE NATIONAL LABOR POLICY (1960), and C. Gregory & H. Katz, LABOR AND THE LAW (3d ed. 1979).

A complete historical development is beyond the scope of this article. There are numerous texts on labor history and labor law which will provide the reader with background essential to assess properly labor-management relations. See, e.g., P. Foner, HISTORY OF THE LABOR MOVEMENT IN THE UNITED STATES. (1947); R. Gorman, BASIC TEXT ON LABOR LAW (1976); CCH, LABOR LAW COURSE (25th ed., 1983); U.S. INDUSTRIAL RELATIONS 1950-1980: A CRITICAL ASSESSMENT (J. Stieber, R. McKersie & D. Mills eds. 1981). See R. Boyer & H. Morais, LABOR'S UNTOLD STORY (1955) (a view of labor history from labor's perspective). See generally J. Goldberg, E. Ahern, W. Haber, & R. Oswald, FEDERAL POLICIES AND WORKER STATUS SINCE THE THIRTIES (1976).

12. See supra note 11. See also 2 NATIONAL LABOR RELATIONS BOARD, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT (1949) and 2 NATIONAL LABOR RELATIONS BOARD, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT RELATIONS ACT (1947).


cause conflict between the parties is inevitable, efforts should be made to channel the conflict to an appropriate forum and avoid a power confrontation.\textsuperscript{15} Third, there can be no freedom of contract in the absence of freedom to contract.\textsuperscript{16} Fourth, a proper function of law is to protect the weaker party from the excesses of the stronger.\textsuperscript{17}

\textsuperscript{15} See supra note 14.


\textsuperscript{17} See generally J. R. Commons \& J. Andrews, \textit{Principles of Labor Legislation} (4th rev. ed. 1967). One function of law is to provide inducements and restrictions on scarce resources to advance the public good. Most importantly, the legislative enactments are concerned with the long term good for society, not necessarily the myopic goals and interests of individuals and employers. Professor J.R. Commons in his classic work \textit{The Legal Foundations of Capitalism} stated the proposition as:

The public is not any particular individual, it is a classification of activities in the body politic deemed to be of value to the rest of the public rather than a classification of individuals. . . . This [public purpose] is the process of classification and reclassification according to the purposes of the ruling authorities, a process which as advanced with every change in economic evolution and every change in feelings and habits towards human beings, and which is but the proportioning and repropor- tioning of inducements to willing and unwilling persons, according to what is believed to be the degree of desired reciprocity between them. For, classification is the selection of a certain factor, deemed to be a limiting factor, and enlarging the field of that factor by restraining the field of other limiting factors, in order to accomplish what is deemed to be the largest total result from all. . . . Thus, when the hoped for welfare of women and children comes to be believed to be a limiting factor in the national economy, their hours of labor are reduced or their minimum wages raised, by imposing new duties on employers or parents, under the belief that merely this new apportionment of freedom or collective power, regardless of other changes in the quantity of labor, or of national resources, or of individual efficiency, will increase the national welfare. So with all other legislative and judicial decisions which determine Freedom in one direction by imposing liability in the opposite direction. . . . It is often charged against legislation that the state does not create wealth—only private activity is wealth producing. The charge is, of course, true. Legislation only classifies activities and proportions the inducements to wealth-producers. Individuals do the rest. . . . But they may waste the commonwealth by bad proportioning, may enlarge it by good proportioning.

J.R. Commons, \textit{The Legal Foundations of Capitalism} 328-30 (1968).

The proportioning of resources also includes the proportioning and reproportioning of power in a society and gives rise to the establishment of economic as well as political systems. See M. Tigar \& M. Levy, \textit{Law and the Rise of Capitalism} (1977).

Legal forums have always had difficulty with technical jargon. Juries as well as judges have been baffled by "experts" using statistics, testing, and technical jargon without understanding the basic assumptions, parameters, and limitations of the instrument or process. In reality this results in problems being disguised and thereby defined away. For example, the current Board places emphasis on the "economic" or "labor cost" motivation of business decisions as a litmus test to determine the applicability of good faith bargaining, viewing decisions motivated by "productivity" or "quality control" in the bailiwick of managerial discretion. But such a distinction is illogical. Economics predominate all managerial decision making (assuming they are economically rational operators in our capitalist system). In fact, productivity is
B. The Forum for Collective Bargaining

The goal of the NLRA was to minimize disruptions in interstate commerce by altering the balance of bargaining power through legislated protections of the rights of employees to organize and bargain collectively.\(^{18}\) To insure that employees' section 7 rights to organize and bargain collectively can be meaningfully exercised, the National Labor Relations Board ("NLRB" or "the Board") was created and empowered to effectuate the policies of the Act. The Board oversees the labor union selection process and institutes sanctions against labor practices by employers or unions deemed deleterious to the process of collective bargaining.\(^{19}\) Unfortunately, the Board's interpretation and application of the policies of the Act has been inconsistent. Although deferral to Board expertise is considered a canon of statutory construction, the courts frequently overturn Board decisions which they deem economically unsound or which fail to accommodate the traditional interests of employers.\(^{20}\)

measured by labor costs (man hours, crew size, etc.) to units produced and quality control is also a function of labor costs. To argue that these decisions are not based on labor costs components is to deny the basic assumptions and motivations upon which the capitalist system operates. Yet, artificial distinctions are made and are accepted by the Board and the courts. These distinctions distance the trier of fact from the policies of the Act and the 'public purpose' served by the reproportioning of resources in the public good. Thus long term policy gives way to short term, myopic interests. This further encourages the parties to diffuse and disguise the true issues.

18. Section 7 provides employees with the right to organize. Employees shall have the right to self organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).


20. See, e.g., Ozark Trailers, Inc., 161 N.L.R.B. 561, 63 L.R.R.M. (BNA) 1264 (1966). Case law abundantly demonstrates that the courts have no reluctance to substitute their judgment on the facts as well as the interpretation of the law in place of the Board. However, given the Board's proclivity to establish rules and policy by adjudication rather than through an administrative law rulemaking process, this is not wholly unexpected or, in many cases, unwarranted.

The impact of political and economic posturing by the Board and the courts should not be discounted lightly. Professor Herbert Simon examined decisionmaking processes and observed that the crucial elements are the constraints, valuations and assumptions the decision makers use in decision definition, not necessarily the final decision power itself. H. SIMON, ADMINISTRATIVE BEHAVIOR: A STUDY OF DECISION MAKING PROCESSES IN ADMINISTRATIVE ORGANIZATIONS (3d ed. 1976). See also C. PERROW, COMPLEX ORGANIZATIONS: A CRITICAL ESSAY (1972).

Building on this basic observation, Professor James Atleson argues that labor policy has
Prior to the Taft-Hartley amendments\textsuperscript{21} to the Act, all matters of concern between the parties could potentially be channeled through the collective bargaining process. In this manner, the Board, through section 8(a)(5),\textsuperscript{22} could facilitate exchange between labor and management and reduce conflict.\textsuperscript{23} There were no distinctions between mandatory or permissive bargaining items and no category of issues was reserved for the unilateral decision making of the employer. There were simply legal bargaining items and illegal bargaining items.\textsuperscript{24} The Board did not decide preemptively which topics should be discussed nor could they compel agreement on a particular issue. The Board simply facilitated the process of meaningful exchange.

Following the second world war, during a period of labor unrest, Congress amended the Act extensively. The amendments added protection to the viability of the collective bargaining agreement by adding sections 8(d)\textsuperscript{25} and 301\textsuperscript{26} and by creating unfair labor practices applicable to the union.\textsuperscript{27} Importantly, the amendments set the groundwork for an elaboration of the duty to bargain in good faith.

Section 8(d) specified good faith bargaining with respect to "wages, hours, and other terms and conditions of employment . . . or any question arising thereunder" and could be viewed as an articulation and expansion of existing labor law policy.\textsuperscript{28} As Justice

\begin{small}

\textsuperscript{22} Section 8(a)(5) provides: "[i]t shall be an unfair labor practice for an employer . . . to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title." 29 U.S.C. § 158(a)(5) (1983).
\textsuperscript{24} See generally Cox, Labor Decisions of the Supreme Court at the October Term, 1957, 44 Va. L. Rev. 1057 (1958); H. Wellington, Labor and the Legal Process (1968).
\textsuperscript{27} 29 U.S.C. § 158(b) (1983).
\textsuperscript{28} Section 8(d) provides in part:

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not

\end{small}
Harlan's dissent in *NLRB v. Wooster Division of Borg-Warner* forcefully argues, the section may be viewed as merely descriptive of substantive matters open to discussion by the parties. Justice Harlan based his analysis upon the legislative history and policy of section 8(d) and, recognizing the preemptive impact of a mandatory-permissive bargaining classification, argued that the "Board possessed no statutory authority to regulate the substantive scope of the bargaining process insofar as lawful demands of the parties were concerned." He argued that the policies of the Act demanded a retention of the legal-illegal distinction in bargaining items.

However, as the *Borg-Warner* Court held it is also arguable that the duty to bargain is limited by section 8(d) to only those factors named. Following this narrow interpretation, the *Borg-Warner* Court created the poorly defined demarcation between mandatory and permissive bargaining items.

With the recognition that sections 8(d), 8(a)(5), and 8(b)(3) require only good faith bargaining and not agreement, such distinctions seem unnecessary under the Act. Moreover, because bargain-

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30. Id. at 354.
31. Id. (emphasis in original). The majority in *Borg-Warner* held: [T]hese provisions establish the obligation of the employer and the representative of its employees to bargain with each other in good faith with respect to "wages, hours, and other terms and conditions of employment . . . ." The duty is limited to those subjects, and within that area neither party is legally obligated to yield. As to other matters, however, each party is free to bargain or not to bargain, and to agree or not to agree. Id. at 349 (citation omitted).
32. Violations of the duty to bargain in good faith are of two general types. A per se violation simply looks to the subject matter at issue and the necessary effect of the alleged violation.

A refusal to negotiate in fact as to any subject which is within section 8(d), about
ing items backed up by economic threats have a higher probability of inclusion in the agreement, the Court has placed the preemptive determination of the substance of collective bargaining in the Board's and lower court's control. Furthermore, it is a violation of the duty to bargain in good faith to take a conflict over a permissive bargaining item to impasse. Therefore, the mandatory-permissive dichotomy not only defines the substance of bargaining but enforces its determinations by denying the use of bargaining power to induce agreement and even discussion under penalty of Board sanction.\textsuperscript{3}

The removal of areas of concern from the collective bargaining process by redefining them does not eliminate the conflict. Moreover, the requirements of notice and access to information generally apply only to mandatory and not to permissive bargaining items. This further exacerbates the power imbalance between the parties. Thus, the effectiveness of the collective bargaining process as a forum for dispute resolution can be significantly hampered if major issues of concern, such as the termination and modification of unit work and employment through corporate transformation decisions, can be unilaterally decided outside the process.

C. Notice and Information Access in the Collective Bargaining Process

Integral to the obligation to bargain in good faith are the re-
lated issues of meaningful notice and information access. Notice of a proposed change in an existing collective bargaining agreement must satisfy the provisions of section 8(d). If the proposed change concerns an issue not covered by an existing collective bargaining agreement and the parties have not waived their rights by contract, the notice requirement turns upon the mandatory-permissive bargaining item distinction. If the change concerns a mandatory bargaining item, notice which is meaningful and timely must be given, and the parties must bargain in good faith to impasse before any change can be unilaterally implemented. If the proposed change is classified as a permissive bargaining item, the change may be implemented unilaterally by the employer without notice or consultation with the union, even in the face of a specific clause to the contrary in the collective bargaining agreement.

Information access in "concession bargaining" is not conceptually different from the bargaining exchange process in "normal bargaining." The information issue, however, takes on added importance and is necessary to establish credibility, verify the good faith of the concession demands, and prevent a miscalculation in bargaining. Financial information regarding an employer's inability to pay,

34. To be meaningful, the notice must be given sufficiently in advance of any unilateral action. Notice, however, is power and by controlling or limiting notice a party can foreclose an opponent from preparing an adequate response or from marshalling other forces for retaliation. Thus it is in the interests of a party to attempt to limit notice and improve one's bargaining position and power. Such individual attempts to limit notice are inapposite to the policy of the Act, but, without the incentive of swift and adequate remedy, a party will maximize its individual power and position through limited notice and information access.


37. Id.

38. In NLRB v. Truitt Mfg. Co., 351 U.S. 149 (1955), the Court held: Good faith bargaining necessarily requires that claims made by either bargainer should be honest claims. This is true about an asserted inability to pay an increase in wages. If such an argument is important enough to present in the give and take of bargaining, it is important enough to require some sort of proof of its accuracy. And it would certainly not be far fetched for a trier of fact to reach the conclusion that bargaining lacks good faith when an employer mechanically repeats a claim of inability to pay without making the slightest effort to substantiate the claim . . . . We do not hold, however, that in every case in which economic inability is raised as an argument against increased wages it automatically follows that the employees are entitled to substantiating evidence. Each case must turn upon its particular facts. The inquiry must always be whether or not under the circumstances of the particular case the statutory obligation to bargain in good faith has been met.

Id. at 152.
as distinguished from an unwillingness to pay (the "poverty plea"), is subject to limited discovery.

Interesting questions arise on the scope of financial discovery in the context of interlocking and conglomerate employers and the parent-subsidiary operations where costs, sales and profits can be transferred by intraorganizational transactions. Moreover, if "honest claims" require good faith and information verification, is an employer required to substantiate his overt statement, or perhaps not so subtle hint, that unless the union complies with his demands the operation must be sold, closed or relocated or a bankruptcy petition must be filed? If corporate transformations are permissive bargaining items, there may be no requirement to provide access to information or to bargain in good faith. Arguably, if they are "important enough to present in the give and take of bargaining" they should be considered mandatory bargaining items.

D. Bargaining Power

Bargaining power or bargaining leverage is the ability of one party to induce its opponent to accede to its demands and position. One view of bargaining power is the ability to inflict a penalty for non-compliance. The converse is the willingness to incur the consequences of not reaching an agreement. The power may be actual that is, the party has the power to exercise and inflict costs of disagreement, or perceived, that is, a party may believe its opponent has the ability to inflict a cost of disagreement. The distinction only becomes important if negotiations fail to achieve settlement and the costs of disagreement are imposed.

As a bargaining strategy, an employer can always refuse to pay the requested increase. The Act demands bargaining in good faith, not agreement. An unwillingness to accede to an opponent's demands may be a violation of the duty to bargain in good faith, but only if the totality of the circumstances and conduct so dictate.

40. See supra note 38.
41. Noted labor economist Neil Chamberlain conceptualized bargaining power as follows:

\[
\text{Bargaining Power of A} = \frac{\text{Costs to B of disagreement with A's terms}}{\text{Costs to B of agreement with A's terms}}
\]

\[
\text{Bargaining Power of B} = \frac{\text{Costs to A of disagreement with B's terms}}{\text{Costs of A of agreement with B's terms}}
\]

N. Chamberlain, Collective Bargaining (1951), chap. 10.

Professor Chamberlain suggested that agreement would not be reached until the equations exceeded one. The costs of disagreement must be greater than the costs of agreement. Id. at 221-22.

42. See generally N. Fraiser & K. Hipel, Conflict Analysis: Models and Resolu-
Bargaining power, strategy and tactics are situational and dynamic. In the context of collective bargaining negotiations, industrial relations theorists have had difficulty defining with particularity the components of the bargaining structure. Obviously the major source of bargaining power for the union is the ability to strike. The employer, on the other hand, has the ability to control and eliminate the unit work.

The bargaining power mix of the parties also includes macroeconomic factors such as unemployment and area wage measures in a particular industry, location and prices, and microeconomic factors such as the financial strength of the firm, the inelasticity of product demand, the supply of materials, the technological substitutes for labor and the ratio of labor costs to total costs of production. Economic sources are but one component of a party's bargaining power mix. Technological, interpersonal, political, and organizational equity factors and perceptions affect the power mix.

Public perceptions and public pressure also play an important role in the power mix. The ability of a party to externalize the inconvenience and place blame on an outside party is useful in gaining support among various constituencies and placing pressure on its opponent. Adopting the classic negotiating strategy of good guy-bad guy, the employer usually is able to deny responsibility, placing the blame on other factors. For example, the employer may claim that labor's greed or international competition is the root cause of all their problems, or that free market economies demand they close or relocate abroad. Employers never cite poor management, poor pro-


43. The evaluation process that underlies tactical action in bargaining can be divided into three steps. First, bargainers evaluate their own power capability and that of their opponents. Second, given these perceptions of power, bargainers consider the likelihood that the power capability will actually be used. Third, in the context of their power situation, bargainers evaluate their own tactical options and attempt to anticipate their opponent's tactics.


46. Id. at 49-55.

47. See, e.g., C. LOUGHRAN, NEGOTIATING A LABOR CONTRACT 42 (1984).

duction layout and design, short sighted forecasts and planning, or poor product quality as a root cause of their problems. Even if these criticisms are leveled by business journals, they are often ignored by the public or subsumed to the politics of the moment. 49

Collective bargaining is not a zero sum game in which one side wins while the other side loses. 50 The collective bargaining agreement establishes ongoing relationships and is more like a constitution than a commercial contract. Moreover, both sides will seek to avoid organizational dissolution even to the extent of irrational and destructive decision making. If organizational dissolution is threatened or imminent, an organization will exercise all its remaining power to counter the attack or to inflict as much damage on an opponent as possible. 51

In the industrial relations literature the strike weapon, as a union cost of disagreement, is the basis of defensive planning for the management negotiation team. 52 If an employer can successfully weather a strike, his bargaining strength is obviously increased. The employer's ability to weather a strike is dependent upon the company's financial condition, the demand and market for its products, and its ability to operate and supply customers. 53 Other components of bargaining leverage include public opinion, the threat of litigation, and work stoppages at other facilities. 54

The ability to control the unit work is the employer's strongest weapon. The exercise of control over the bargaining unit work can include not only the lockout, but also subcontracting, technological substitution, plant closures, relocations and consolidations, organizational restructuring and other forms of corporate transformations. The threat and/or implementation of these weapons are useful in securing union agreement with employer terms and therefore constitute a major component of the employer's bargaining power mix. 55


50. See R. Richardson, COLLECTIVE BARGAINING BY OBJECTIVES (2d ed. 1985).

51. Without the employer there is no work, and it makes no sense for a labor union to drive an employer to liquidation. The employer should also recognize that victories of the moment can have a negative long term impact. Unredressed inequities can result in employee defensive behaviors including sabotage, high absenteeism and turnover, poor quality control, low productivity and morale, and employee soldiering. See generally W. French, The PERSONAL MANAGEMENT PROCESS (4th ed. 1978).


53. Id. at 32-39.

54. Id. at 412-13.

55. Employers and unions will use whatever power and means are at their disposal to
In *H.K. Porter Co. v. NLRB* 56 the Court stated:

The object of [the NLRA] was . . . to insure that employers and their employees could work together to establish mutually satisfactory conditions [and] that through collective bargaining the passions, arguments, and struggles of prior years would be channeled into constructive, open discussions leading, it was hoped, to mutual agreement. 57

In order to have meaningful negotiations, the bargaining power of both parties, should be channeled through the mediating effects of the collective bargaining process. Thus, the union’s strike weapon and the employer’s lockout weapon are expressly controlled by section 8(d). Moreover, costs of disagreement often are defined and described in specific collective bargaining items such as no strike and no lockout clauses. It would be illogical to assume that the policies of the Act would channel and control only one party’s ability to inflict a cost of disagreement while protecting and encouraging the unilateral exercise of a similar power exercise by the other. However such a situation will result if corporate transformation decisions are classified as permissive bargaining items wholly outside the mandated process of collective bargaining. Such unchecked power can seriously undermine the very existence of a free labor movement in the United States. A country “cannot have a free and democratic society without a free and democratic labor movement.” 58

II. CORPORATE TRANSFORMATIONS

A. Developing an Analytical Framework

In analyzing whether a particular corporate transformation is a mandatory bargaining item, the Board and the courts have attempted to balance a variety of often conflicting interests with the policies established by the federal labor laws. 59 These interests have secure their bargaining objectives. A party’s assurance that they will not exercise a particular weapon is situational and the product of trust and credibility. A valid presumption is that a party will threaten and/or exercise any and all legal, and in many cases illegal, power at their disposal. 

57. Id. at 103.
59. The NLRB has been admonished by the Court for attempting to dictate the substance of the collective bargaining agreement to the parties. With the unique structure of the NLRA and the mandatory-permissive bargaining item dichotomy established under *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342 (1958), it is a central thesis of this article that the mandatory-permissive determination preemptively determines substance by altering
included the need for predictability in the collective bargaining process, the maximization of traditional employer flexibility in decision making, the dynamic nature of labor-management problems, and the conflicting interests generated by the impact of such decisions on individual employees, local communities, and society.  

The above interests are further complicated by the inclusion of several situational factors. Each factor can be tied to a particular section of the NLRA, thereby bringing additional interests into the analysis. Thus, the analysis can turn not only on the determination of whether a particular corporate transformation is a mandatory bargaining item within the ambit of 8(d) and 8(a)(5) but also upon the employer’s motive for the change, the timing of the change imple-

the bargaining power mix. This is accomplished simply by channeling some economic weapons through the collective bargaining process while leaving others unchecked and de facto in the exclusive control of the employer. Since these elements in a party's bargaining power mix are interrelated, the result is an imbalance in bargaining power both in the perceived and actual components. This is not to argue that employers should be denied the use of corporate transformations as an economic weapon, only that they be channeled through the collective bargaining process as mandatory bargaining items afforded the union notice and information access under section 8(a)(5). The Court addressed a related issue in American Ship Building Co. v. NLRB, 380 U.S. 300 (1965):

While a primary purpose of the National Labor Relations Act was to redress the perceived imbalance of economic power between labor and management, it sought to accomplish that result by conferring certain affirmative rights on employees and by placing certain enumerated restrictions on the activities of employers. . . . Having protected employee organization in countervailance to the employer's bargaining power, and having established a system of collective bargaining whereby the newly coequal adversaries might resolve their disputes, the Act also contemplated resort to economic weapons should more peaceful measures not avail. Sections 8(a)(1) and '8(a)(3) do not give the Board a general authority to assess the relative economic power of the adversaries in the bargaining process and to deny weapons to one party or the other because of its assessment of that party's bargaining power. Id. at 316-17 (citing NLRB v. Brown, 380 U.S. 278 (1965)).

[W]hen the Board moves in this area . . . it is functioning as an arbiter of the sort of economic weapons the parties can use in seeking to gain acceptance of their bargaining demands. It has sought to introduce some standard of properly "balanced" bargaining power, or some new distinction of justifiable and unjustifiable, proper and 'abusive' economic weapons into . . . the Act . . . . We have expressed our belief that this amounts to the Board's entrance into the substantive aspects of the bargaining process to an extent Congress has not countenanced. American Ship Bldg. Co., 380 U.S. at 317-18 (citing NLRB v. Insurance Agents' Int'l Union, 361 U.S. 477, 497-98 (1960)).

60. The list articulated in the text is not meant to be exhaustive. Board and court decisions have attempted to articulate the various interests of labor and management in their interpretation of the NLRA. These interests are often subject to political and economic influences as well as legal interpretations of the Act. See, e.g., First National Maintenance Corp. v. NLRB, 452 U.S. 666 (1981); NLRB v. Bildisco & Bildisco, ___ U.S. ___, 104 S. Ct. 1188 (1984).

To determine the rights of the parties with respect to corporate transformations under the labor laws, the Board and the courts have focused upon three Supreme Court decisions, *Fibreboard Paper Products Corp. v. NLRB*, 63 *Textile Workers Union v. Darlington Manufacturing Co.*, 64 and *First National Maintenance Corp. v. NLRB*. 65 Although these decisions were expressly confined to their facts, the Board and the lower courts have developed an analytical paradigm to determine the applicability of sections 8(d), 66 8(a)(1), 67 8(a)(3) 68 and 8(a)(5) 70 to corporate transformations. 71 The para-

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64. 379 U.S. 203 (1964).


67. See supra note 28.

68. Section 8(a)(1) provides: "It shall be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title." 29 U.S.C. § 158(a)(1) (1983).

69. Section 8(a)(3) provides:

   It shall be an unfair labor practice for an employer 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: Provided, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: Provided further, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.


70. See supra note 22.

71. This paradigm appears in partial form in the Board’s recent treatment of the plant relocation issue. Although there are considerable differences in form, all Board Members ap-
digm consists of two threshold questions: (1) does the transformation significantly alter the scope and direction of the enterprise, and (2) are the underlying issues precipitating the change amenable to resolution through the collective bargaining process. If both questions are answered in the affirmative, a balancing of interests analysis is performed. A further examination of this paradigm is instructive in identifying the working assumptions implicit in both the Court's and Board's approach to the issue of corporate transformations.

1. The First Threshold Question: Does the transformation significantly alter the scope of the enterprise?

The first question in the analysis was articulated by the Court in *Fibreboard Paper Products Corp. v. NLRB.* At the expiration of the existing collective bargaining agreement, Fibreboard unilaterally decided to subcontract out its maintenance operations. Fibreboard argued that such decisions were not mandatory bargaining items protected by section 8(d) and 8(a)(5) and therefore the company was under no obligation to give notice and information to the union or to bargain concerning the decision. The Supreme Court held, in an opinion limited to the particular factual situation, that such a decision was a mandatory bargaining item. Justice Stewart in a
highly influential concurring opinion rearticulated and narrowed the conceptual basis of the Court's opinion. Justice Stewart's analysis relating to changes in the basic scope of the enterprise has been used by the Board and the courts to distinguish between mandatory and permissive bargaining items in the corporate transformation context, and expressly established the first threshold question in the analysis.\textsuperscript{76}

gaining also seems well designed to effectuate the purposes of the National Labor Relations Act. One of the primary purposes of the Act is to promote the peaceful settlement of industrial disputes by subjecting labor-management controversies to the mediatory influence of negotiation. The Act was framed with the awareness that refusals to confer and negotiate had been one of the most prolific causes of industrial strife. [footnotes and citations omitted] To hold, as the Board has done, that contracting out is a mandatory subject of collective bargaining 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.

379 U.S. at 210-11.

76. Analytically, this case is not far from that which would be presented if the employer had merely discharged all its employees and replaced them with other workers willing to work on the same job in the same plant without the various fringe benefits so costly to the company. While such a situation might well be considered a section 8(a)(3) violation upon a finding that the employer discriminated against the discharged employees because of their union affiliation, it would be equally possible to regard the employer's action as a unilateral act frustrating negotiation on the underlying questions of work scheduling and renumeration, and so an evasion of its duty to bargain on these questions, which are concededly subject to compulsory collective bargaining. . . . Insofar as the employer frustrated collective bargaining with respect to these concededly bargaining issues by its unilateral act of subcontracting this work, it can be properly found to have violated its statutory duty under section 8(a)(5).

This kind of subcontracting falls short of such larger entrepreneurial questions as what shall be produced, how capital shall be invested in fixed assets, or what the basic scope of the enterprise shall be. In my view, the Court's decision in this case has nothing to do with whether any aspects of those larger issues could under any circumstances be considered subjects of compulsory bargaining under the present law.

\textit{Id.} at 224-25 (Stewart, J., concurring) (emphasis added).

Justice Stewart's articulation of the "scope of the enterprise" was very broad and allows for diverse readings. From the tenor of the concurrence, particularly its discussion of the mandatory-permissive bargaining item dichotomy and its potential effects, it is the opinion of the author that Justice Stewart would recognize the employer's incentive to avoid the collective bargaining obligation and he would not subscribe to an overly broad reading of employer prerogatives.

In many of these areas the impact of a particular management decision upon job security may be extremely indirect and uncertain, and this alone may be sufficient reason to conclude that such decisions are not 'with respect to . . . conditions of employment.' Yet there are other areas where decisions by management may quite clearly imperil job security, or indeed terminate employment entirely. An enterprise may decide to invest in labor-saving machinery. Another may resolve to liquidate its assets and go out of business. Nothing the Court holds today should be understood
The decision in *Textile Workers Union v. Darlington Manufacturing Co.* is interesting not only for its contribution to legal precedent in this area, but also as an illustration of the inadequacy of the labor laws and the derisive attitudes held by some employers. In *Darlington*, the employer vigorously resisted the employees' efforts to organize a union and used a variety of both legal and illegal methods, including threats to close the plant if the union was selected. After the union won recognition, the employer closed the plant.

The Court, in a 7-0 decision, identified one of the few bright lines in this complex area.

First, the Court distinguished a “complete” plant closing from a “partial” plant closing. The term “complete” under the Court’s view refers to the entire nature of the corporate entity or ownership interests, and not to a subsidiary, single division or component. Thus, while an employer may choose at any time to go “completely” out of business for any reason, including antiunion animus, a “partial” plant closing may result in a violation of the NLRA.

If the closing is part of a larger operation, an unfair labor practice will be found when:

> the persons exercising control over a plant that is being closed for antiunion reasons (1) have an interest in another business, whether or not affiliated with or engaged in the same line of commercial activity as the closed plant, of sufficient substantiality to give promise to their reaping a benefit from the discouragement of unionization in that business; (2) act to close their plant with the purpose of producing such a result; and (3) occupy a relationship to the other business which makes it realistically foreseeable that its employees will fear that such business will also be closed down if they persist in imposing a duty to bargain collectively regarding such managerial decisions, which lie at the core of entrepreneurial control. Decisions concerning the commitment of investment capital and the basic scope of the enterprise are not in themselves primarily about conditions of employment, though the effect of the decision may be necessarily to terminate employment.

*Id.* at 223.

77. 380 U.S. 263 (1965).
78. *Id.* at 265-66.
79. *Id.* at 266.
80. *Id.* at 271-73.

We are not presented here with the case of a “runaway shop” whereby Darlington would transfer its work to another plant or open a new plant in another locality to replace its closed plant. Nor are we concerned with a shutdown where employees, by renouncing the union, could cause the plant to reopen. Such cases would involve discriminatory employer action for the purpose of obtaining some benefit from the employees in the future. [footnotes omitted]

*Id.* at 272-73.
in organizational activities.\textsuperscript{81}

The second major contribution of the \textit{Darlington} decision was the articulation of the interplay between sections 8(a)(1) and 8(a)(3).\textsuperscript{82} The Court established a balancing test for section 8(a)(1) violations which are independent of section 8(a)(3) overtones.\textsuperscript{83} The Court also articulates two additional points. First, there is a group of management decisions which significantly affect the employment rights of the workers, but do not constitute an unfair labor practice.\textsuperscript{84} Such a distinction can be fitted into the mandatory-permissive bargaining item dichotomy discussed by Justice Stewart in his \textit{Fibreboard} concurring opinion. Second, the \textit{Darlington} Court removed from the analysis of the employer's motive the soundness or wisdom of the business judgment.\textsuperscript{85} Although the courts do not substitute their own judgment for that of the employer, by reviewing the specific procedural components and parameters of business judgments, they invariably must review the substance of the business judgments.

In \textit{First National Maintenance Corp. v. NLRB}\textsuperscript{86} the Court further developed the analytical paradigm. \textit{First National Maintenance} involved a partial plant closing. The employer and the union had not yet negotiated a collective bargaining agreement and the employer had limited control over the underlying reasons for the partial closing.\textsuperscript{87} There was no allegation of antiunion animus.\textsuperscript{88}

\textsuperscript{81} \textit{Id.} at 275-76.
\textsuperscript{82} [T]he Board was correct in treating the closing only under section 8(a)(3). Section 8(a)(1) provides that it is an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of" section 7 rights. Naturally, certain business decisions will, to some degree, interfere with concerted activities by employees. But it is only when the interference with section 7 rights outweighs the business justification for the employer's action that section 8(a)(1) is violated. [citations omitted] A violation of section 8(a)(1) alone presupposes an act which is unlawful even absent a discriminatory motive. Whatever may be the limits of section 8(a)(1), some employer decisions are so peculiarly matters of management prerogative that they would never constitute violations of section 8(a)(1), whether or not they involved sound business judgment, unless they also violated section 8(a)(3).
\textit{Id.} at 268-69.
\textsuperscript{83} In \textit{First National Maintenance} the Court would interpret the interests protected by §§ 8(d) and 8(a)(5) as more akin to the balancing analysis of § 8(a)(1) than the determination required in § 8(a)(3) violations. \textit{See infra} notes 100-105 and accompanying text.
\textsuperscript{84} 380 U.S. at 268-69.
\textsuperscript{85} \textit{Id.}
\textsuperscript{86} 452 U.S. 666 (1981).
\textsuperscript{87} \textit{Id.} at 687-88.
\textsuperscript{88} \textit{Id.} at 687.
Citing extensively from the *Fibreboard* decision, the majority distinguished three types of management decisions based upon the scope and direction of business alteration, as articulated by Justice Stewart in *Fibreboard*. Policy decisions which were historically considered management prerogatives and had only an indirect impact on employee rights and the employment relationship were not mandatory bargaining items under sections 8(d) and 8(a)(5).

Decisions which have a direct impact upon the employment relationship and fall within the literal meaning of "wages, hours, and other terms and conditions of employment" are mandatory bargaining items. The Court, however, fails to articulate clear lines of demarcation between decisions clearly managerial and those clearly controlled by section 8(d). Presumably, issues determined as arising under either of the above would not require any further analysis.

Decisions related to the issue of corporate transformations comprise the third category of management decisions. They have a significant impact on employment, but are so intertwined with changes "in the scope and direction of the enterprise, [as to be] akin to the decision whether to be in business at all." The definition of a 'significant' impact on employment and whether the language "akin to whether to be in business at all" are words of limitation defining the scope of this category are unsettled. In this third category the Court

89. *Id.* at 676-77.
90. These decisions according to the Court, include "choice of advertising and promotion, product type and design, and financing arrangements." *Id.*
91. Professor Harper of Boston University suggested a return to the two tier classification of employer decisions. Decisions not affecting the scope and direction of the enterprise would be considered mandatory. Harper, *Leveling the Road from Borg-Warner to First National Maintenance: The Scope of Mandatory Bargaining*, 68 Va. L. Rev. 1447 (1982). His operational definition of the category of nonmandatory bargaining items could be conceptualized as "all decisions that determine what products are created and sold, in what quantities, for which markets, and at what prices." *Id.* at 1450 (emphasis in original).

Professor Harper's operational definition is particularly useful in the manufacturing context and provides a predictable line of demarcation between mandatory and permissive bargaining items. Like all attempts to fashion operational definitions, it too has its limitations. While readily usable in the production context, it fails to achieve satisfactory results when applied to the service industry model. Whether this is a result of describing the product supplied in the service model or of Harper's operational definition is debatable. The author, however, believes it is the former. Nevertheless, it is no easy task to describe a service product. Although the author is always skeptical of balancing of interest articulations, it is clear that in the service industry the employee and the service product are so intertwined that to grant the employer unilateral decision making over its service market could seriously imperil employees' rights to affect their terms and conditions of employment. *See id.* at 1465-71.

93. *See infra* notes 139-49.
adds the second threshold question to the analytical paradigm.

2. The Second Threshold Question:

Are the underlying issues precipitating the change amenable to resolution through the collective bargaining process?

_Fibreboard_ implicitly addressed this question by limiting disputes actionable under sections 8(d) and 8(a)(5) to those which have a significant impact on employment.\(^{94}\) Whatever the _First National Maintenance_ Court means by this question, (the opinion is silent as to any express operational definition), will be left to later courts to decide. If amenability to collective bargaining constitutes a significant impact on employment then the question is unnecessary as it is already a component of the initial determination to place this decision in a particular category.\(^{95}\) If it is defined to include only those areas under union control as determined by the ability to facilitate change through the granting of concessions or mutually advantageous work rule changes, then the Court will be making a determination as to the substance of the outcome of bargaining—a position not supported in section 8(d) or in the policy of the NLRA.\(^{96}\) Moreover, such a determination is premature since the ability to facilitate change and properly evaluate the validity of the employer’s position is situational and a product of meaningful exchanges of information and positions.\(^{97}\)

Amenability to resolution through collective bargaining may simply be construed to establish that section 8(a)(5) applies only to bargaining items which are “normally” discussed at the bargaining table.\(^{98}\) This is problematic for a variety of reasons. First, the dis-

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94. 379 U.S. at 209-11.
95. A common sense prerequisite to bargaining is that management’s decision must cause a “significant adverse impact” upon the bargaining unit employees or on the customarily performed unit work. See, e.g., Westinghouse Elec. Corp., 150 N.L.R.B. 1574, 58 L.R.R.M. (BNA) 2689 (1965) (no duty to bargain over subcontracting out of work not normally performed by bargaining unit). “[A]n employer[’s] decision having no such impact is, like a decision relating to employees outside the bargaining unit altogether, insufficiently related to the ‘terms and conditions of employment’ of the employees in the bargaining unit.” R. GORMAN, BASIC TEXT ON LABOR LAW 513 (1976).
96. In NLRB v. American Nat’l Ins. Co., 343 U.S. 395, 404 (1952), the Court held that it is not necessary that it be likely or probable that the union will yield or provide a feasible solution but rather that the union be afforded an opportunity to meet management’s legitimate complaints. See also, American Ship Bldg. Co. v. NLRB, 380 U.S. 300 (1965).
97. The _First National Maintenance_ Court apparently did not share this view. See 452 U.S. at 680-81, 683.
98. The Court discusses the usefulness of current bargaining practice as a factor in the mandatory-permissive bargaining item analysis but then fails to state what impact, if any, bargaining practices had on their analysis. See id. at 684.
tinctions between mandatory and permissive bargaining items should not rest on something as unpredictable as the general bargaining trends. Second, and more important, collective bargaining is a dynamic process of exchange between the parties and should not be confined to the static forms of the past. Moreover, such a view begs the question. Therefore, at its best, the second threshold question is premature and adds nothing to the analysis. At its worse, it allows personal and political preferences and traditional employer-employee assumptions to be substituted for impartial judicial enforcement of the legislative mandate.

3. The First National Maintenance Balancing Test

If either of the threshold questions is answered in the negative, the subject is not a mandatory bargaining item, and the analysis ends. If the two threshold questions are answered in the affirmative, a section 8(d) and 8(a)(5) balancing test is to be applied: "bargaining over management decisions that have a substantial impact on 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." The Court's articulation of the content of the interests to be balanced is incomplete. First, no "benefits" to the labor-management relationship were specified. The "needs" of management were articulated as the "need for speed, flexibility, and secrecy" and for the ability to take advantage of tax and securities consequences. Such "needs" are speculative and require business judgment. Consistent decisions will be almost impossible, particularly because the courts cannot inquire into the soundness of the business decision. Moreover,

99. The classification of mandatory or permissive is determinative of which subjects are discussed at the bargaining table and which subjects are included in the final agreement. See supra note 59 and accompanying text.

100. 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.

452 U.S. at 678-79 (footnotes and citations omitted).

101. Id. at 679.

102. Id. at 688-91 (Brennan, J., dissenting).

103. Id. at 682-83.
the Court cited no facts to support which, if any, of the interests were present. Arguably, even without specific management interests the court could find that there is no duty to bargain.\textsuperscript{104}

The Court has created a presumption in favor of the employer's unilateral treatment of a bargaining item, and left to the Union the burden of establishing that bargaining is a requirement.\textsuperscript{105} This presumption apparently has its roots in the traditional assumptions of employer-employee relations: the need for unfettered management decision making and predictability. To determine whether such traditional assumptions should take precedence over a statutory mandate, the commitment of the Court to the enforcement of the statute must be questioned. The NLRA deserves no less than a presumption in its favor when balanced against traditional management interests.

Moreover, there is nothing in the NLRA or its legislative history to support the imposition of a balancing test for 8(a)(5) violations or the presumption against the mandatory bargaining item classification. The test, as articulated by the Court, indicates that

\textsuperscript{104} This criticism of the decision has been cited by a plethora of writers. One of the more articulate comments appears in J. ATLESON, VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW (1983):

Although Blackmun purported to create a balancing test and to focus upon the amenability of the dispute to resolution via the bargaining process, the dissenting Justice Brennan correctly noted that the test used considers only the interests of management. Moreover, the majority's feeling that the dispute is not resolvable through negotiation is based only upon speculation. Indeed, the appellate court had reached the opposite conclusion. Blackmun stressed the "need for speed, flexibility and secrecy," the need for confidentiality, and the need to avoid "futile" bargaining because the union would otherwise have a weapon for delay that could "thwart management's intentions in a manner unrelated to any feasible solution the union might propose." It is depressing to note that none of these interests was implicated in this case, nor did Blackmun even argue that secrecy or the other concerns cited justify the refusal to bargain in this situation. If this result is based upon a balancing of interests, it is surely an odd approach. Only one side of the balance is considered, and the managerial interests conceivably involved do not even have to actually be present.

\textit{Id.} at 134. [footnotes omitted] Still another problem with the Court's analysis is the double counting of employer interests. The test is structured in such a way that employer interests are balanced against the interests of labor-management relations. But are not employer interests part of the calculation of interests in labor-management relations? Therefore, employer interests are counted on both sides of the equation. See Litvin, \textit{Fearful Asymmetry: Employee Free Choice and Employer Profitability in First National Maintenance}, 58 Ind. L. Rev. 433 (1983).

\textsuperscript{105} \textit{First Nat'l Maintenance Corp.}, 452 U.S. at 684. \textit{See Brockway Motor Trucks v. NLRB}, 582 F.2d 720 (3d Cir. 1978). The Court's treatment of the \textit{Brockway} presumption in favor of bargaining and its creation of a presumption against bargaining is discussed in detail in Section B Plant Closures, \textit{see infra} notes 115-118 and accompanying text.
after a determination has been made that (1) the subject matter in question does not significantly alter the employer's scope of business, (2) it has the requisite impact on the employment relationship, and (3) it is a subject amenable to resolution through the bargaining process, it is then subject to the balancing test. ¹⁰⁶

It is interesting to reverse the roles and apply the Court's paradigm to an employer protest over a section 8(b)(3) violation—the union failure to bargain in good faith. Assume the employer insists to impasse on a contract clause covering sympathy strikes and the crossing of picket lines. ¹⁰⁷ From the union's point of view, restrictions on this type of decision affect its ability to market its product (labor), infringe upon its members' protected (traditional) rights, and constrain its relationship with other labor organizations. The Union's decision to strike, like the employer's unilateral decision to make operational changes has a significant impact on the employment relationship and regardless of the bargaining parameters, can be discussed. Assuming that the threshold questions of the paradigm are answered in the affirmative, balancing test factors must be established. Weighing the benefits of the labor-management relationship against the burdens placed upon the decision making process of the union is problematic. The decision making process of the labor organization is not rooted in the economic traditions of business orga-

¹⁰⁶. 452 U.S. at 678-79.

¹⁰⁷. A no-strike clause in a collective bargaining agreement is a mandatory bargaining item. NLRB v. Norwalk Ship Bldg. & Drydock Corp., 195 F.2d 632 (4th Cir. 1952). However, it is unsettled whether the related areas of sympathy strikes, the crossing of picket lines, and unfair labor practice strikes are mandatory bargaining items. The broad categorization of a no-strike (economic strikes) clause does not cover these areas of protected activity unless an express waiver of these rights is contained in the contract. See, e.g., Boys Markets, Inc. v. Retail Clerks Union Local 770, 398 U.S. 235 (1970); Mastro Plastics Corp. v. NLRB, 350 U.S. 270 (1956). See also Delaware Coca-Cola Bottling Co. v. General Teamster Local Union 326, 624 F.2d 1182 (3d Cir. 1980); Shell Oil Co., 77 N.L.R.B. 1306, 22 L.R.R.M. (BNA) 1138 (1948); Jacksonville Bulk Terminals v. International Longshoremen's Ass'n, 457 U.S. 702 (1982). See generally Lutsky, Labor Law—No Strike Clause—When "Any" Strike Does Not Include a Sympathy Strike: Broadly Worded No-Strike Clause Is Insufficient to Act as a Waiver of Union's Right to Sympathy Strike, 26 VILL. L. REV. 795 (1981) and R. GORMAN, BASIC TEXT ON LABOR LAW 610-13 (1976). The Board has indicated that the no-strike clause will be reexamined and, given the Board's conservative views, it may decide to construe broadly such clauses as waivers of protected rights under the Act. Whether such a view can be reconciled with Boys Markets is an open question. If they do adopt this approach, it will be interesting to examine how the Board reconciles broad language constituting a waiver of protected rights with their requirements of specific contract clauses to prevent plant relocations. See Illinois Coil Spring II, 268 N.L.R.B. 601, 115 L.R.R.M. (BNA) 1065 (1984). The present Board began the redefining of the no strike clause in Indianapolis Power & Light Co., 1984-85 NLRB Dec. (CCH) 17,040 (1985) holding that a no strike clause now will implicitly include sympathy actions. Such an implicit waiver of statutory rights may indicate a redefining of the waiver of rights standard also.
nizations or in the experience and training of the judges. Therefore, one can anticipate that the “burdens” placed upon the union decision making process would rarely outweigh the benefits to labor-management relations.

Moreover, such an analysis is not supported in the statute and it elevates traditional market assumptions above the mandate of the NLRA. Nevertheless, the union’s decision making process as well as the employer’s should be entitled to protection. However, regulation of the union’s economic weapons (the strike in its various forms) serves the policies and mandate of the NLRA. Why then should the same analysis not apply to the regulation of corporate transformations? The employer’s use of corporate transformations, even if they take the form of traditional employer prerogatives, are still economic weapons.

4. “Decision” and “Effects” Bargaining

The Fibreboard, Darlington Mills, and First National Maintenance decisions acknowledge the dichotomy between “decision” bargaining and “effects” bargaining. In addressing an employer’s duty to bargain over operational changes before Fibreboard, the Board made no distinction between the initial decision and the effects of that decision. Recognizing that changes in the basic operation have a significant impact upon both the employment relationship and traditional managerial decision making, the Board sought to reach a compromise between the policies of the labor laws and the traditional employer decision making prerogatives. Thus the Board’s concept of the employer’s duty to bargain was divided into two distinct parts: the bargaining over the decision itself and the bargaining over the effects of implementing the decision. This narrow reading of section 8(d) has no support in the legislative history or in any specific section of the NLRA. It is simply a Board and Court-created


mechanism to reserve to management what traditionally was viewed as theirs alone—decisions related to the operation of the enterprise.

An employer can be required to engage in effects bargaining but not decision bargaining. In decision bargaining the employer must notify the union and comply with any union request for information before making an irrevocable commitment to one decision path.\textsuperscript{110} The notice must be reasonable and the employer must entertain, in good faith, alternatives generated by the union. Effects bargaining on the other hand, occurs after the employer's irrevocable decision has already been made.\textsuperscript{111} Therefore, access to information regarding the underlying reasons used to arrive at the employer's decision may not be available to the union, which is concerned only with the impact of the decision on the work force. Thus notice, substantive information access, and the ability to offer alternative solutions based upon a proper analysis of a complete data base are much more limited in effects than in decision bargaining. In a practical sense, effects bargaining is equivalent to no duty to bargain since the union will be left with little if any bargaining power to back up its demands.

\textit{First National Maintenance} aptly illustrates the decision-effects bargaining dichotomy. The Court viewed the company's decision to close one part of its operations for economic reasons as a non-mandatory bargaining item, and, therefore, no decision bargaining was required. However, the employer was required to engage in effects bargaining to "be conducted in a meaningful manner and at a meaningful time, and the Board may impose sanctions [under section 8(a)(5)] to insure its adequacy."\textsuperscript{112} The practical significance of "meaningful manner and . . . meaningful time" is still to be determined. Recent Board decisions suggest a narrow reading and disregard the Court's articulated operational standards of effects bargaining.\textsuperscript{113}

\begin{itemize}
\item 110. See Kohler, \textit{supra} note 108, at 413-18.
\item 111. \textit{Id.} at 418-20.
\item 112. 452 U.S. at 682.
\item 113. Kohler, \textit{supra} note 108, at 419-20 expresses the view that there is no significant distinction between effects and decision bargaining in terms of notice and information access. While Kohler's argument is persuasive, the Board has created a distinction by their inaction in articulating the operational parameters of "meaningful time and meaningful manner." Compare the Board's prior view in Ozark Trailers, Inc., 161 N.L.R.B. 561, 63 L.R.R.M. (BNA) 1264 (1966):
\begin{quote}
While meaningful bargaining over the effects of a decision to close may in the circumstances of a particular case be all that the employees' representative can actually achieve, especially where the economic factors guiding the management decision to close or to move or to subcontract are so compelling that employee conces-
\end{quote}
\end{itemize}
Assuming there is a conceptually based distinction between decision bargaining and effects bargaining, several problematic analytical points become evident. First, the current Board interprets section 8(d) to allow that a bargaining issue can be mandatory in one component and permissive in the other; a narrow reading of section 8(d), the NLRA, and the legislative history does not support such an interpretation.

Second, effects bargaining apparently requires no specificity but simply a general duty applicable to all mandatory bargaining items. Therefore, an operational change which indirectly modifies mandatory bargaining items such as wages, hours and job tenure is conceptually at odds with the Board’s recent decisions denying the application of section 8(d) to mid-term modifications of collective bargaining agreements unless a specific contract clause is modified or changed.

Third, proper managerial decision making requires an analysis of all relevant criteria at the time the decision is made. The addition of new criteria and data to the decision making process, such as the effects on the employment relationship, undermines the decision process. Proper management requires that the effects of the decision be programmed into the decision. How can management bargain in good faith without reevaluating the original decision? If they are to reevaluate their original decision including the new data inputs from the effects of the decision, the process of alternative generation is better served if notice and information are exchanged. The notice and information should be provided to the community and to the labor organization since each has a vested interest in the organization and can be instrumental in alternative generation. Effects bargaining constrains the decision making process by denying it access to all possible alternative suggestions. It does not adequately serve the interests of labor-management relations, labor organizations, or the public interests but only the interests of egocentric employers.

\textit{Id.} at 570 (emphasis in original).

Moreover, the Board has recently created some speculation that effects bargaining information access will be constrained. \textit{See} Otis Elevator Company, 269 N.L.R.B. 891, 115 L.R.R.M. (BNA) 1281 (1984).

B. Application of the Analytical Framework

1. Plant Closures

A plant closure is the termination of the employment relationship at a given location in which (1) the work is permanently lost and (2) the employer does not transfer the work or the enterprise to another location or to another component of the workforce.\(^{115}\)

In order to determine the rights and duties of the parties under the labor laws other factors such as the breadth of the change, the timing of the change, and the employer's motive must be analyzed. These factors are essential to determine the remedies available to the union faced with a plant closing. The importance of another factor, the scope of an employer's ownership interests, is as yet undetermined and has its origins in the landmark *Darlington Mills* decision.\(^{116}\)

In analyzing the scope of the employer's duty to bargain over plant closings, the Board and the courts have imposed neither a per se duty to bargain nor a presumption in favor of a bargaining duty. Instead each case is determined on its particular facts.

Upon an analysis of the plant closing cases, three key analytical components become apparent. First, a distinction is made between complete and partial plant closures. Second, the rationale for the change is loosely identified as either economic or antiunion. And the third key component focuses on the presence or lack of an existing and enforceable collective bargaining agreement. The remedies identified can include arbitration, section 301 actions to compel enforcement of the collective bargaining agreement or of an arbitration agreement or award, or the Board remedies through the enforcement of sections 8(d), 8(a)(5), or 8(a)(3). The following chart is offered as

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115. This definition is provided as an aid to distinguish plant closures from other corporate transformations resulting in the termination of the employment relationship such as plant relocations, subcontracting, reassignment and displacement of workers by automation. See, e.g., *Brockway Motor Trucks v. NLRB*, 582 F.2d 720 (3d Cir. 1978). See also P. Miscavigra, *supra* note 109.

Some of these decisions are clearly different in kind from a decision to close a portion of a business. Thus, for example, decisions to relocate a plant, to subcontract unit work, to eliminate unit jobs through automation, or to consolidate operations are not "akin to [a] decision whether to be in business at all." That is, the employer does not plan to withdraw from business activity, either wholly or partially. Instead, the employer *intends to remain in the same business*, albeit elsewhere (relocation), or through the use of subcontractors (subcontracting), or with different equipment (automation), or at one location rather than several (consolidation). [footnotes omitted]

W. Lubbers, General Counsel, Memorandum of 30 November 1981, No. 81-57.

The following section focuses on Board remedies found in sections 8(d), 8(a)(5), and 8(a)(3) and encompasses the scope of an employer's duty to bargain over plant closures and the mandatory-permissive bargaining item dichotomy. Although an 8(a)(3) action is not directly addressed to the duty to bargain, such an action can be used to protect indirectly the integrity of the collective bargaining process by altering the bargaining power mix to partially counter the unilateral power exercises by the employer.

2. Complete or Partial Closings

The analysis of an employer's duty to bargain over plant closings must address the distinction between a "partial" closing and a "complete" closing. After Darlington Mills and First National Maintenance, an employer can completely terminate the enterprise

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117. This conceptual aid is not meant to be all inclusive. It simply identifies the paths available to the parties in analyzing a plant closure decision. It is entirely possible that the remedy paths identified will be closed out as the courts and the Board define with some particularity the factual basis upon which these actions must be based.
for economic or anti-union reasons without violating sections 8(d), 8(a)(5), and 8(a)(3). "A proposition that a single businessman cannot choose to go out of business if he wants to would represent such a startling innovation that it should not be entertained without the clearest manifestation of legislative intent or unequivocal judicial precedent." However, it remains difficult to articulate operational definitions of complete versus partial closings.

Although each case is determined on its facts, when distinguishing between partial and complete closings the Board and the courts have not clearly drawn the lines beyond the complete termination of the enterprise (the employer going completely out of business). This is one of the distinctions the *Darlington Mills* decision specifically addressed. Therefore the decision could be narrowly construed to define a complete closing as the employer completely going out of business.

But the factual patterns do not accommodate such a simple distinction. An employer can terminate one part of a plant in a multiplant operation so that the jobs are permanently lost and the work is not moved to the other plants. This can result in the complete termination of a product line, operation or area "akin to the decision whether to be in business at all." Such changes resulting in a termination of an employer's entire business/product line have not been defined as either a complete or a partial closing. Further, if such closures are considered complete, must the employer stay completely closed or can he subsequently reopen bypassing duty to bargain and the liability for any unfair labor practice?

*Darlington Mills* specifically addressed the issue of integrated and nonintegrated ownership interests and control of diverse operations. Closures were viewed as partial if the employer expected to derive some future benefit or power leverage in the employee-employer relationship. Importantly, however, *Darlington Mills* addressed the 8(a)(3) discrimination and not the duty to bargain under 8(d) and 8(a)(5). Arguably, the decision does not apply to the issue of an employer's duty to bargain. A different analysis may therefore be required for a refusal to bargain case. However, *Darlington Mills* may stand for the proposition that because an employer can com-

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118. See *Darlington Mills*, 380 U.S. at 270.
119. Id.
120. *First Nat'l Maintenance Corp.*, 452 U.S. at 677. The Supreme Court in *Darlington* did not directly address this issue. 380 U.S. at 266-67. *See also P. MISCIMARRA, supra* note 109, at 134-39.
121. 380 U.S. at 271-72, 275-76.
pletely terminate his business for any reason, cutting off any action under 8(a)(3), a complete termination may also cut off any action under 8(a)(5), including not only decision bargaining but also effects bargaining.

First National Maintenance was categorized by the Court as a partial closing. The Court concluded that "an employer's need to operate freely in deciding whether to shut down part of its business" prevents categorizing such a decision as a mandatory bargaining item. Although closing the Greenpark facility resulted in the termination of specific jobs and no transfer of operations, it did not lead to the termination of all similar work as Greenpark was one of many locations served by First National Maintenance. Thus, it does not fall within the narrow category of complete closings of the entire enterprise.

However, the Court limited the holding to its facts, and used language difficult to reconcile with partial closure terminology. The Court stated "[t]he decision to halt work at this specific location represented . . . a change not unlike opening a new line of business or going out of business entirely." If partial closings can be akin to "going out of business entirely," what are the distinguishing factors of a complete closing? If there is no analytical distinction between partial and complete closings and both require the analytical paradigm set out in First National Maintenance, then Darlington Mills' distinction between complete and partial closures may have no application to the 8(a)(5) context and must be confined to the 8(a)(3) context.

The First National Maintenance Court, however, treats Darlington Mills as precedent for the proposition that an employer can completely terminate his entire business for any reason. If the Court has adopted the limiting language of Darlington Mills which holds that no future benefits or "unfair advantage" can be gained by the ownership interests to the 8(a)(5) duty to bargain context, it may be concluded that the Court intends to narrowly confine a complete termination to that category of closings where no future economic or anti-union benefits can accrue to the ownership interests of the integrated and nonintegrated enterprises. It is unclear, how-

122. 452 U.S. at 686 (emphasis added).
123. 452 U.S. at 687-88.
124. Id. at 688.
125. Id. at 682.
126. Id. This again highlights the crucial role definitions play in the analysis, particularly, the distinction between complete and partial closures.
ever, whether the General Counsel must prove only that future benefits are foreseeable or if it must be established that the employer intended to gain the benefit or unfair advantage.\textsuperscript{127} If intent is required, the General Counsel must meet a substantial burden of proof, effectively evading the 8(a)(3) action. Moreover, by declaring a bargaining item permissive, the use of economic weapons and the protections of the collective bargaining process are denied, and one party is granted an "unfair advantage."

Such gymnastics may be unnecessary if the analytical paradigm developed in the previous section is carried to an extreme but a determination that a closing is "complete" may, under the \textit{Darlington Mills} decision, preclude the need to use the analytical paradigm. The Court has not addressed the issue of effects bargaining where there is a complete closing. Although, it is probable that effects bargaining would be required, the Board’s treatment of the notice and information issues again become critical. The union will be left with limited self help remedies at a time when the 8(a)(5) avenue for worker protection is devoid of all union bargaining power necessary to force timely and meaningful negotiations.

3. \textit{The Rationale for the Closure}

If the closure is complete, the employer’s rationale for the closure is immaterial to the analysis since no 8(a)(3) action will lie and, as argued above, no 8(d) and 8(a)(5) duty to bargain over the decision to close will be imposed.\textsuperscript{128} If the closure is categorized as partial, the employer’s rationale becomes significant. An employer’s rationale can be grouped into two general categories: decisions prompted by an antiunion animus and decisions prompted by eco-

\textsuperscript{127} "[T]he union's legitimate interest in fair dealing is protected by [section] 8(a)(3), which prohibits partial closings motivated by antiunion animus, when done to gain an unfair advantage. [citation omitted] Under [section] 8(a)(3) the Board may inquiere into the motivations behind partial closing. 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."

\textit{Id.} at 682. \textit{See also Darlington,} 380 U.S. at 271-73.

nomic considerations. Additionally, a third classification includes the complex question of mixed motive decisions requiring a preliminary analysis of the employer's motive for the partial closure of a plant, line, operation, or area.

Under the Darlington Mills rationale, if an employer closes part of the enterprise with the intent to restrain workers in the other components of his enterprise in the exercise of their section 7 rights, a violation of 8(a)(3) is established. The Darlington Mills decision focused on the future benefits an employer might gain from such a closure. If the employer with an antunion animus closes part of his enterprise but has no intent to influence workers in the other components of the enterprise, no 8(a)(3) action lies. Thus, although the potential remedies to the individual workers may, in fact, parallel those available in the 8(a)(5) context, an added burden is imposed and a demonstration of future, rather than present, harm is required. The requirement for an 8(a)(3) action of an external harm to other employment relationships in an employer’s enterprise, rather than a cause of action accruing to the individual workers, has been criticized extensively by legal scholars. The necessary proof of intent


The Court's phrasing of the required findings is puzzling, but the core of the requirement is plain. It is not enough that Deering Milliken discharged part of its employees because they voted for the union. It is not enough that such discharge had the effect of intimidating the remaining employees. There must be express finding that the motivation for discharging some is to intimidate the others. The Board may have little difficulty in making the necessary findings in this case, but only because of the employer's lack of finesse. If a multi-plant employer closes his only unionized plant but vigorously asserts to his other employees that the closure was solely for economic reasons, proof of the necessary purpose to intimidate the remaining employees may be extremely difficult. Indeed, such motivation may in fact be absent, for it is enough for the employer that he has escaped collective bargaining in the only plant where the employees chose to unionize. Similarly, if a runaway employer reopens in a non-union area under a new name, concealing from his new employees that he is a fugitive from collective bargaining, proof of either the purpose or the effect of intimidating his new employees will be impossible. He is content to be rid of the union for the time being, and if his new employees organize, he can make another quiet escape. This scarcely guarantees to employees the right to bargain through representatives of their own choosing.

Summers, supra at 66-67 (cited in P. Atleson, supra note 104, at 140-41).

An employer's use of threats and "predictions" of plant closures to secure a bargaining advantage is beyond the scope of this article. See generally P. Miscimara, supra note 109, at 252-60. Fundamentally the same underlying concerns are present. If corporate transformations are permissive bargaining items, the employees will not have access to notice and information sufficient to properly evaluate the employer's purported rationale. In this situation, Professor Summer's concerns over employer finesse in hiding the true rationale are obviously quite valid.
and future harm is in the control of the employer and can be easily concealed. The Court has, in effect, provided employers with a highly efficient means to violate the Act with virtual impunity.

Discriminatory partial plant closings under section 8(a)(3) are further complicated by mixed motive closings and the doctrine of "inherently destructive" employer conduct. If the employer closes part of an enterprise for both economic and antionion reasons the Board, and recently the Court, have adopted the Wright Line analysis to determine the applicability of an 8(a)(3) action. Under the Wright Line doctrine, it must be established that "but for" the anti-union animus by the employer the decision to partially close the operation would not have been implemented. The employer has the burden of producing sufficient evidence of legitimate business reasons for his decision in order to prevail in the section 8(a)(3) action.

In NLRB v. Great Dane Trailers, the Court held that some conduct by an employer is so "inherently destructive" to workers' section 7 rights that direct proof of an employer's discriminatory intent or purpose is not required. Whether such inferences are per-
Corporate Transformations

missible in the plant closing context has been questioned by some scholars. Focusing on the literal language of Darlington Mills and the assumption that the employer’s prerogatives in this area should be given preferential treatment, they argue that the General Counsel has the burden of proving by direct evidence that the “purpose,” not just the foreseeable consequence, of the employer’s conduct was aimed at achieving the prohibited effect.

The holding in Great Dane Trailers allowed an employer’s intent to be inferred from the foreseeability of his actions, and cannot easily be reconciled with the language in Darlington Mills which requires a “showing of motivation which is aimed at achieving the prohibited effect.” However, Great Dane Trailers was decided two years after Darlington Mills. Such inferences may be proper given Great Dane’s recognition of the employer’s right to rebut the evidence presented by the union, and his virtual exclusive control and access to the true reasons behind the conduct. The Board has equated a foreseeable discriminatory effect with an intended effect, thereby incorporating the ‘inherently destructive’ doctrine into the discriminatory partial plant closings. However, given the current Board’s predilection to favor employer prerogatives over the policies of the labor laws, it is entirely probable that by focusing on the literal language of Darlington Mills they may deny the use of the ‘inherently destructive’ doctrine in the plant closing area and impose a nearly impossible evidentiary burden upon the general counsel.

The classification as a mandatory bargaining item of an economic decision to partially close a plant has been subject to different treatment by the Board and the courts. The disagreement has been primarily on whether, and to what degree, the NLRA constrains traditional employer prerogatives. Viewed on a continuum, the Board, in Ozark Trailers, adopted an analysis biased in favor of finding the closure decision to be a mandatory bargaining item under business justifications for the conduct. Thus, in either situation, once it has been proved that the employer engaged in discriminatory conduct which could have adversely affected employee rights to some extent, the burden is upon the employer to establish that he was motivated by legitimate objectives since proof of motivation is most accessible to him.

sections 8(d) and 8(a)(5). The circuit courts, although not in complete agreement, struck a middle ground in two highly influential opinions, *Brockway Motor Trucks v. NLRB*\(^ {140} \) and *First National Maintenance Corp. v. NLRB*\(^ {141} \) and adopted a rebuttable presumption in favor of the NLRA and the duty to bargain. The Supreme Court, in *First National Maintenance*, adopted an analysis biased in favor of employer prerogatives. The Court held that the closure decision was not a mandatory bargaining item.\(^ {142} \) Before continuing with the Court’s treatment of partial closures in *First National Maintenance* it is instructive to reexamine the labor law and collective bargaining policies articulated by the previous Boards and circuit courts.

In *Ozark Trailers*,\(^ {143} \) the Board held that a decision to close one plant in a three plant enterprise for economic reasons is a mandatory bargaining item. At the time of the closing there was a collective bargaining agreement in effect. The Board viewed the closing as partial, even though the products produced in the closed plant were replaced by those of an independent manufacturer. Arguably, this case should turn on a subcontracting issue as controlled by the *Fibreboard* decision. However, in the traditional subcontracting situation, the employer maintains some control over the performance of the operation, which is a component part of the manufacturing process. He is not merely a buyer of a finished good. This was not the case in *Ozark Trailers* as the manufacturing process was discontinued at the Ozark plant and replaced by the purchase of completed products. A more compelling argument could be made that this is a complete closing of an entire product line and thus “akin to a decision of whether to be in business at all.” However, the facts establish that Ozark continued to perform the manufacturing process at its other subsidiary plant.\(^ {144} \) If the Ozark manufacturing were transferred to the other plants in the enterprise it would be more accurately categorized as a plant relocation.

The Board found the decision to partially close the Ozark plant to be a mandatory bargaining item, and adopted a straight-forward analysis, effectuating the “terms and conditions of employment” language of section 8(d) under a two-part paradigm. First, the Board examined the decision in terms of its significant impact on the em-

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140. 582 F.2d 720 (3d Cir. 1978).
142. Id.
144. Id. at 562-63.
ployment relationship and the bargaining unit employees. Second, the Board considered whether a peaceful resolution of the issue could be amenable to the collective bargaining process. The term 'could be' is used since the Board specifically chose not to examine the particular factual pattern in depth and or to evaluate the success of negotiations. Instead, recognizing that “an employer’s obligation to bargain does not include the obligation to agree,” the Board correctly chose not to dictate, preemptorily, the substantive results of any negotiations.

The Board specifically recognized the interests of employees in a business operation and expressed the view the NLRA operates as a constraint upon the traditional exercise of employer prerogatives and not merely as a statute subject to the traditional employer prerogatives.

145. Id. at 566-67.
146. Id. at 568.
147. See supra note 96.
148. The argument has been made to compel an employer to bargain about a decision to relocate or terminate a portion of his business would significantly abridge his freedom to manage the business. In the first place, however, as we have pointed out time and time again, an employer's obligation to bargain does not include the obligation to agree, but solely to engage in a full and frank discussion with the collective-bargaining representative in which a bona fide effort will be made to explore possible alternatives, if any, that may achieve a mutually satisfactory accommodation of the interests of both the employer and the employees. If such efforts fail, the employer is wholly free to make and effectuate his decision. Hence to compel an employer to bargain is not to deprive him of the freedom to manage his business.

But, it has been argued, imposing the obligation to bargain, which includes a requirement that the bargaining be in good faith, and which precludes unilateral action absent sufficient bargaining, all subject to the surveillance of this Board, and ultimately of the courts, so impedes management flexibility in meeting business opportunities and exigencies that the statute ought not be interpreted to require such bargaining. As to this, however, the answers are plain. Initially, Congress made the basic policy determination, in enacting the National Labor Relations Act, that, despite management’s interests in absolute freedom to run the business as it sees fit, the interests of employees are of sufficient importance that their representatives ought to be consulted in matters affecting them, and that the public interest, which includes the interests of both employers and employees, is best served by subjecting problems between labor and management to the mediating influence of collective bargaining.

Ozark Trailers, 161 N.L.R.B. at 568, 63 L.R.R.M. (BNA) at 1268 (footnotes omitted).

[1] It is equally true, however, and ought not to be lost sight of, that an employer’s decision to make a “major” change in the nature of his business, such as the termination of a portion thereof, is also of significance for those employees whose jobs will be lost by the termination. For, just as the employer has invested capital in the business, so the employee has invested years of his working life, accumulating seniority, accruing pension rights, and developing skills that may or may not be saleable to another employer. And, just as the employer’s interest in the protection of his capital investment is entitled to consideration in our interpretation
The Board's approach to the duty to bargain over a decision to partially close a plant was not well received by the courts. Instead the courts imposed their own interpretation of the Fibreboard decision narrowly focusing upon Justice Stewart's concurrence, often finding no duty to bargain over any change in the scope and direction of the enterprise. Out of this dissension, the Second and Third Circuits carved out a middle ground with their presumption analyses.

The Third Circuit opinion in Brockway Motor Trucks v. NLRB struck a middle ground. After negotiations had reached impasse and an economic strike was in effect, Brockway decided to close one of its plants for "unspecified economic considerations." The dispute centered on the duty to bargain over the decision to close a part of an enterprise for economic reasons. The Third Circuit articulated the fundamental importance of the mandatory-permissive bargaining item dichotomy. "In practical terms, the elaboration of the identity of mandatory subjects of bargaining is crucial, for such matters must be discussed in the bargaining sessions before any unilateral action with respect to them is taken. The Third Circuit recognized the importance of the closure decision to the affected employees and its amenability to resolution through the collective bargaining process. The court, however, refused to adopt the Board's Ozark Trailer analysis and expressed the view that the policies of the NLRA require a balancing of interests. To facilitate the balancing of interests between the employees, traditional employer prerogatives and the policies of the Act, the court adopted a rebuttable

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150. 379 U.S. at 223 (Stewart, J., concurring).

151. 582 F.2d 720 (3d Cir. 1978).

152. Id. at 725.

153. Id.

154. Id. at 733.
presumption in favor of a duty to bargain. The interests articulated by the Third Circuit in Brockway were dismissed in cursory fashion by the Supreme Court in First National Maintenance.

The Second Circuit's decision in First National Maintenance v. NLRB recognized the importance of the mandatory-permissive bargaining item dichotomy to the collective bargaining process. They, too, rejected the Board's approach in Ozark Trailers and articulated a rebuttable presumption in favor of a duty to bargain followed by a balancing of interests. There is no fundamental difference between the Third and Second Circuits' presumption analyses, although there is a semantic variance in the articulation of the interests in the balance. While the Third Circuit in Brockway balances the amenability of the particular factual situation to resolution through the collective bargaining process against the traditional employer prerogatives, the Second Circuit's approach in First National Maintenance balances the employer's prerogatives against the pur-

155. To conclude that Brockway was not under an obligation to bargain solely because its decision was based on unspecified economic considerations might well disrupt the structure of collective bargaining contemplated by the NLRA. It would unduly diminish the scope of the employer's public duty by overly protecting the assertion of its private interests. And it would predictably chill future bargaining by the employees' representatives who would have reason to fear that, in response to aggressive negotiation, an employer could simply shut down one of its plants and be protected by an exclusion from the responsibility of bargaining about that decision. Id. at 739.

156. See 452 U.S. at 684-85. The Court's articulation of interests reads like a lobbyist's position against the statute focusing upon the inconvenience management will suffer if forced to bargain.

Further, the presumption analysis adopted by the Court of Appeals seems ill-suited to advance harmonious relations between employer and employee. An employer would have difficulty determining beforehand whether it was faced with a situation requiring bargaining or one that involved economic necessity sufficiently compelling to obviate the duty to bargain. . . . If the employer intended to try to fulfill a court's direction to bargain, it would have difficulty determining exactly at what stage of its deliberations the duty to bargain would arise and what amount of bargaining would suffice before it could implement its decision. If an employer engaged in some discussion, but did not yield to the union's demands, the Board might conclude that the employer had engaged in "surface bargaining," a violation of its good faith. Id. [emphasis added; citations omitted]

The Court based its argument on speculative inconveniences to the employer and intimated that the Board cannot be trusted to properly carry out its statutory duty. Cf. the interests articulated in Ozark Trailers, see supra note 148. Clearly the Court has given a short shrift to the policies of the NLRA as articulated in its legislative history and previous Court decisions. 242 N.L.R.B. 462, 101 L.R.R.M. (BNA) 1177 (1979), enforced, 627 F.2d 596 (2d Cir. 1980), rev'd, 452 U.S. 666 (1981).

158. 627 F.2d at 601-602.
poses of the statute. Arguably they would address the same factual patterns.\textsuperscript{159}

Although subject to criticism over procedural difficulties, the presumption analysis recognizes the NLRA as a constraint on the traditional employer prerogatives, provides for predictable application, and limits the Board’s intervention to situations where it is necessary to relieve an employer of the duty to bargain rather than to impose the duty to bargain. Although there is no firm data to support the view that in the “normal” situation, bargaining duty relief would be more frequent than bargaining duty imposition, this is, in fact, the judgment made by the Court. Such an assumption, without firm data support, should not take precedence over the mandates of the Act and the special status the collective bargaining process occupies in labor law, labor-management relations, and labor history.

The Court’s treatment of \textit{First National Maintenance} presents many practical and conceptual problems. First, the decision was limited to its unusual facts.\textsuperscript{160} Although the Greenpark facility was one of many locations served by First National Maintenance, custom servicing at a particular location can be viewed as a discrete product line. The Court may have categorized the Greenpark facility as a partial closing when it more closely fits the pattern of the complete termination of a product line. Second, there was no existing and enforceable collective bargaining agreement and no long term bargaining relationship. And third, the actions by First National Maintenance were prompted by the failure to achieve a satisfactory fee contract with a third party, the Greenpark Care Center, a matter over which the union had little direct negotiating power or influence. The union, however, was in a position to influence significantly the negotiating position of First National Maintenance in its dealings with Greenpark Center. These facts contribute to a limited use of \textit{First National Maintenance}.

\textsuperscript{159} [T]he presumption that the employer has an obligation to bargain over a decision partially to close the business may be rebutted by showing that the purposes of the statute would not be furthered by imposition of the duty to bargain. Without an attempt to enumerate all those instances in which the presumption may be rebutted, a few examples may be noted for purposes of illustration... [if] the decision would be futile... the closing was due to emergency financial circumstances, or that the custom of the industry... is not to bargain over such decisions. The presumption might also be rebutted if it could be demonstrated that forcing the employer to bargain would endanger the vitality of the entire business, so that the purposes of the statute would not be furthered by mandating bargaining to benefit some employees to the potential detriment of the remainder.

\textit{Id.} \textsuperscript{160} 452 U.S. at 687-88.
The fact pattern contained in Brockway is a more common situation. It addresses the duty to bargain over the decision to partially close an operation for economic considerations after impasse has been reached and a strike called, one of the most crucial times in collective bargaining negotiations. It addresses the decision to partially close an operation for economic reasons as the exercise of an economic weapon, rather than simply as an employer prerogative. The Supreme Court has failed to directly address the use of partial plant closures for economic reasons in this context.

The fact pattern of First National Maintenance is unique and may render inapplicable any universal view establishing that there is no duty to bargain over partial closures prompted by economic considerations. Therefore, each partial closure for economic reasons must be decided on its own particular fact pattern, applying the test articulated by the Court. Not every decision to partially close a plant for economic reasons is outside the scope of the mandatory bargaining duty of section 8(d).

4. The Status of the Collective Bargaining Agreement

The fourth key point in the analysis is the status of the collective bargaining agreement and the scope of remedies available to the union. This does not diminish the importance of the mandatory-permissive bargaining item dichotomy and the determination of the duty to bargain. If plant closure decisions are not mandatory bargaining items then the following practical effects become evident. First, in negotiating a new agreement, the union cannot insist to impasse that restrictive plant closure language be included in the contract.\textsuperscript{161} This issue is far from settled by the Board particularly in light of First National Maintenance's presumption against the finding of a duty to bargain. Notice and information access may be limited or nonexistent. Moreover, without restrictive language in the collective bargaining agreement, the union will be forced to rely entirely upon the NLRB to protect the viability of the contract through limited effects bargaining.

Second, assuming the contract includes restrictions upon an employer's decision to close the plant, if such restrictions are not mandatory bargaining items the employer can ignore such contract provisions without violating sections 8(d) and 8(a)(5).\textsuperscript{162} Although


\textsuperscript{162} See, e.g., Allied Chemical Workers Local 1 v. Pittsburgh Plate Glass Co., 404 U.S. 157 (1971).
the Board procedures are time-consuming, they are less costly than district court actions and therefore benefit a financially weak union. Moreover, the Board's statutory function is to settle such disputes. A section 301 action, although potentially expedient, is costly and may result in denial of access to a remedy simply due to lack of notice and financial inability to process the action.

The determination of whether a subject is a mandatory bargaining item directly controls the remedies available to the union. If there is no collective bargaining agreement in effect, the union will be limited to Board remedies through sections 8(d), 8(a)(3), and 8(a)(5). If there is a valid and enforceable collective bargaining agreement in effect, as in Ozark Trailers, the scope of remedies expands to include not only the applicable Board remedies but also the use of a section 301 action and the contract grievance and arbitration procedures.

C. Plant Relocations and Consolidations

The Supreme Court in First National Maintenance limited its holding to partial plant closures for economic reasons. After applying a balancing test and concluding that there was no duty to decision bargain, the Court added a footnote: "In this opinion we of course intimate no view as to other types of management decisions, such as plant relocations, sales, other kinds of subcontracting, automation, etc., which are to be considered on their particular facts." The Court then cited, with apparent approval, Sixth Circuit and D.C. Circuit decisions imposing a duty to decision bargain under sections 8(d) and 8(a)(5) in the plant relocation context.

When a plant is relocated, the work is not permanently terminated but moved or transferred to another location. Relocations and consolidations generally follow three fact patterns: (1) an employer abandons an existing plant and transfers the entire operation to a more "favorable" location; (2) a component part or product line of a plant is transferred to a new facility; and (3) production contracts and components are transferred to other existing loca-

163. 452 U.S. at 686, n. 22.
164. International Ladies' Garment Workers Union v. NLRB, 463 F.2d 907 (D.C. Cir. 1972); Weltronic Co. v. NLRB, 419 F.2d 1120 (6th Cir. 1969).
165. See supra note 115.
The focus, as with plant closures, is upon the employment relationship and bargaining unit work. Allowing employers to relocate and consolidate in order to avoid and frustrate the collective bargaining agreement and the duty to bargain undermines the contractual expectation of the parties and the entire collective bargaining process and violates their statutory duty under section 8(a)(5).\footnote{168}{See, e.g., Industrial Fabricating, Inc., 119 N.L.R.B. 162, 41 L.R.R.M. (BNA) 1038 (1957).}

The lower courts and the Board have begun to define the employer's duty to bargain over the decision to relocate or consolidate operations. They have apparently adopted the components of the paradigm delineated above, but, in application, they have taken a rather piecemeal and haphazard approach. The following discussion attempts to fit the Board's analysis into the paradigm. Such a systematic analysis is essential to properly assess the impact of plant relocations and consolidations on the continued viability of the collective bargaining process.

Plan relocations and consolidations, like the plant closure analysis, follows distinct fact patterns and key components can be readily identified. At the outset plant relocations and consolidations, by definition, involve the continuation of the employer's operation, albeit at a different location. Therefore, the issue of complete terminations as in \textit{Darlington Mills} does not enter the analysis. The key components in the analysis are (1) the employer's rationale for the relocation, and (2) the presence, or absence of a collective bargaining agreement. The following chart is offered as a conceptual aid:

\begin{itemize}
\item \textbf{Employer's Rationale for Relocation:}
\item \textbf{Presence, or Absence of Collective Bargaining Agreement:}
\end{itemize}

\footnote{169}{See supra note 76 and accompanying text.}

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1. The Rationale for the Relocation

A "runaway" shop is the relocation or consolidation of a plant prompted by an employer's antiunion animus. An employer commits a section 8(a)(3) violation if a plant is relocated or consolidated with the intent to chill unionism or obtain a future benefit at the remaining locations. In *Darlington Mills*, the Court noted little distinction between a anti-union partial plant closing and other similarly motivated forms of corporate transformations which fall short of the employer's complete termination of the enterprise.\textsuperscript{170} The Court included in its definition of corporate transformations discriminatory lockouts, runaway plants, and discriminatory subcontracting.\textsuperscript{171} Relocations and consolidations motivated by antiunion animus are

\textsuperscript{170} One of the purposes of the Labor Relations Act is to prohibit the discriminatory use of economic weapons in an effort to obtain future benefits. The discriminatory lockout designed to destroy a union, like a "runaway shop," is a lever which has been used to discourage collective employee activities in the future.

\textsuperscript{171} 380 U.S. at 271-72. See also supra note 80 and accompanying text.

380 U.S. at 272 n. 16.
thus controlled by the *Darlington Mills* decision.

The problems generated by an employer's discriminatory use of plant relocations and consolidations are similar to those involved in partial plant closings. First, the intent or purpose of the plant relocation must be to obtain a future benefit or advantage at the expense of the employees' section 7 rights. Whether intent must be proven by direct evidence or can be satisfied by demonstrating that the conduct has a foreseeable consequence of section 7 infringement is still in question. Second, the complex fact patterns in the area of mixed motive plant relocations are controlled by the *Wright Line*, analysis. And third, the viability of the *Great Dane* "inherently destructive" employer conduct is still an open question.

The "inherently destructive" doctrine was applied in *Illinois Coil Spring* to find an 8(a)(3) unfair labor practice following the determination that a plant relocation during the term of a collective bargaining agreement had violated sections 8(d) and 8(a)(5). The application of the "inherently destructive" doctrine follows logically because there is nothing more destructive to individual employee rights than the termination of the employment relationship. Additionally, such an obviously foreseeable consequence of the employer's actions warrants, at least a burden of production on the employer to counter the inference of discriminatory intent. A year later, however, in *Illinois Coil Spring II*, a rehearing of the previous decision, the section 8(a)(3) action was dismissed when the Board, composed of predominantly Reagan appointees, reversed the finding of an 8(d) and 8(a)(5) violation. The Board did not elaborate on the future treatment of 8(a)(3) violations predicated solely upon the concomitant finding of an 8(d) and 8(a)(5) violation.

Plant relocations and consolidations prompted by economic considerations have not been directly addressed by the Supreme Court. Prior to the *First National Maintenance* decision the lower courts and the Board sought to analogize the plant relocation issue with subcontracting and reassignment as discussed in the *Fibreboard* decision. As expected, the Board's and circuit courts' views differed in

172. In terms of the 8(a)(3) action, the discriminatory partial closing in *Darlington Mills* is analytically indistinguishable from a discriminatory plant relocation.

173. See supra notes 131-138 and accompanying text.

174. See supra notes 131-34 and accompanying text.

175. See supra notes 132-38 and accompanying text.


178. Id. at 601, 115 L.R.R.M. (BNA) at 1065.
regard to the policy of the NLRA but, interestingly, both forums often found a duty to bargain over these decisions. The Board, focusing on their policy statements in Ozark Trailers, held that plant relocations and consolidations for economic reasons fell within the literal language of section 8(d)’s “terms and conditions of employment” and therefore were mandatory bargaining items. The circuits, while not fully embracing the Board’s reasoning, also held that plant relocations for economic reasons are mandatory bargaining items as controlled by the Fibreboard decision.

The Board and the circuits were careful in incorporating Fibreboard’s two threshold questions in the analysis. Although factually difficult to distinguish, relocations and consolidations were held not to be mandatory bargaining items if the employer’s decision components were deemed not amenable to resolution through the collective bargaining process, or if the decision involved a significant alteration in the scope and direction of the enterprise.

Three policy statements in the First National Maintenance decision may influence decisions regarding plant relocation and consolidation. First, the Court did not define “economic considerations.” Arguably, the economic considerations used in determining the duty to bargain would be limited to those considerations which are “amenable to the collective bargaining process.” Second, the Court viewed with apparent approval two circuit court decisions finding a duty to bargain over economically motivated plant relocations. Third, the Court specifically stated that the degree of “investment or withdrawal of capital” does not determine whether the employer has altered the scope and direction of the enterprise.

If the employer’s decision is based on economic factors unrelated to labor costs (e.g., raise in rent), but union concessions in the area of labor costs could counterbalance these economic factors, the employer’s decision would be considered amenable to the collective bargaining process. On the other hand, there are cases in which the factors underlying the decision are such that it would be unreasonable to expect that collective bargaining could affect the decision.

Memorandum No. 81-57, n.13 (Nov. 30, 1981). See also 452 U.S. at 684-86.

181. See cases cited supra note 180.
182. This is the view held by the General Counsel in Memorandum No. 81-57, November 30, 1981.
183. See supra notes 159-60.
184. 452 U.S. at 688. Many lower court decisions have focused on the amount of investment or capital involved as tantamount to a finding of a change/no change in the scope and
change must be “akin to the decision whether to be in business at all.”\(^{185}\)

The Board made two significant decisions in 1984 addressing plant relocation and consolidation. Both decisions were docketed for appeal in the circuit courts. The Board, in a rare move, requested and was granted rehearings. There were no significant Supreme Court decisions related to this issue in the interim between the original Board decisions and the rehearings. In fact, the only change was in the composition of the Board to a Reagan-appointed majority. These two decisions not only illustrate the sensitive nature of the issues involved but also illustrate the division among the Reagan appointees to the Board, the lone Carter appointee, and the various interested parties. Moreover, they portend the pro-management policy direction of the Board.

In *Otis Elevator Company*\(^{186}\) the Board addressed the issue of whether a plant relocation and consolidation decision which was allegedly prompted solely by concerns over economies of scale and organizational efficiency is a mandatory bargaining item under sections 8(d) and 8(a)(5) requiring bargaining to impasse prior to decision implementation. A second and highly significant issue addressed the scope of information access necessary to facilitate the process of effects bargaining “in a meaningful manner and at a meaningful time.”\(^{187}\)

United Technologies, owner of Otis Elevator Company, relocated and consolidated several functional parts of its research and development activities from three locations into one new and larger research center.\(^{188}\) This move was purportedly based upon the recommendations of a management consultant report commissioned at the request of United Technologies. The employer’s stated rationale for the move was to facilitate economies of scale and increase efficiency in the research and development area. United Technologies refused to provide the union with the consultant’s report upon which the employer purportedly based its relocation decision. The relocation and consolidation of research and development operational components resulted in the termination of bargaining unit employees at two locations. United Technologies refused to bargain with the union

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185. *Id.* at 677.
over the decision to relocate and consolidate the facilities and refused to accede to the union's request for information they felt necessary to properly engage in effects bargaining. The union alleged violations of sections 8(d) and 8(a)(5).

Reversing its previous decision, the Board held, 4-0, that Otis Elevator Company did not have a duty to bargain over the decision to relocate and consolidate the operations. The Board opinion, however, splits in three directions. The majority opinion by Members Dotson and Hunter simply concludes that no duty to bargain exists. Member Zimmerman concurred only in the Board's result over the duty to bargain issue and dissented over the effects bargaining issue.189 Member Dennis joined in the Board's result and filed a lengthy concurring opinion in which she detailed her framework for determining the presence of a duty to bargain over corporate transformations.190

The majority opinion, citing Justice Stewart's concurrence in *Fibreboard* and the holding of *First National Maintenance*, without any objective verification or factual support, simply concludes that such a consolidation changes the scope and direction of the enterprise so that section 8(d) and the duty to bargain do not apply. Taking a rather cursory analytical path the majority concluded:

> We see no need to reexamine the full scope of the Court's analysis in *First National Maintenance*. The Court discussed at length the Board's extant decisions and the opinions of the Courts of Appeals in this difficult area. For all the reasons given by the Court, we find that the Respondent's decision here turned upon a fundamental change in the nature and direction of the business, and for that reason is excluded from the limited area of bargaining described by section 8(d).191

A significant change in the scope and direction of the enterprise would not be a mandatory bargaining item under *Fibreboard* and *First National Maintenance*. However, Otis Elevator did not change directions, they simply consolidated existing functions. The scope of their enterprise did not change; in fact it was the desire to remain in the elevator market that purportedly prompted the consolidation. Finally, not all functions related to research and development were relocated. Some functions continued to operate at the old facilities.

Members Zimmerman and Dennis, in their separate concurring

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189. *Id.* at 901, 115 L.R.R.M. (BNA) at 1285.
190. *Id.* at 897-900, 115 L.R.R.M. (BNA) at 1286-90.
191. *Id.* at 892-93, 115 L.R.R.M. (BNA) at 1283 (emphasis added).
opinions, focus on the amenability to resolution through the collective bargaining process. Both reason that issues relating to economies of scale and efficiency in product design, research, and development are decisions reserved to the employer and outside the control of the union. Thus, the First National Maintenance balancing test is not applied, because no duty to bargain is required in decisions which fail to satisfy either of the two threshold questions. In this fact situation, Members Dennis and Zimmerman reasoned, the threshold element of amenability to resolution through the collective bargaining process is not satisfied and therefore decision bargaining is not mandated. Although subject to the criticisms that the amenability question is premature and substantively dictates the terms of the agreement, at least the concurrence base their conclusion on facts. The majority does not.

The majority opinion is noteworthy, however, for its zealous attempts at changing and narrowing labor policy and direction. The majority and at least one concurrence, viewed plant relocation and consolidation decisions prompted by labor costs to be mandatory bargaining items within the ambit of section 8(d).

Included within section 8(d), however, in accordance with the teachings of Fibreboard, are all decisions which turn upon a reduction of labor costs. This is true whether the decision may be characterized as subcontracting, reorganization, consolidation, or relocation, 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.

This statement is unnecessary, if, as the majority concludes, Otis Elevator's decision did alter the scope and direction of the enterprise. Therefore, it may be inferred that Members Dotson and Hunter are defining any managerial decision which does not directly

192. See notes 187-188 supra. Member Dennis reasoned:
None of these factors [the rationale for the relocation] was within the Union's control. There were no labor-related considerations underlying the decision. There was nothing that the Union could have offered that reasonably could have affected management's decision. Even if the Union had offered pay or benefit cuts or proposed overtime work to increase productivity, such proposals would not have provided the respondent with the upgraded technology it sought. It is unrealistic to believe that the Union could have guaranteed that the unit employees would develop improved design concepts. It is also unlikely that the Union could have offered an alternative solution to the problems of diffuse and duplicative engineering activity and outmoded facilities.

269 N.L.R.B. at 899, 115 L.R.R.M. (BNA) at 1290.

193. Id. at 893, 115 L.R.R.M. (BNA) at 1283 (emphasis added).
affect labor costs as a change in the scope and direction of the enterprise. Such a limited view is clearly not warranted by *Fibreboard* and its progeny. Member Zimmerman, in his concurring opinion, did not view the duty to bargain as limited exclusively to decisions prompted by labor costs but chose to refocus on the threshold question of amenability to resolution through the collective bargaining process—a potentially broader category than simply labor costs. Member Dennis' concurrence suggests that she would also share this view. Since the collective bargaining process is not limited exclusively to economic considerations, this raises interesting questions on how the Board would decide, for example, a relocation decision prompted by the desire to avoid restrictive work rules.

The majority of plant relocation and consolidation decisions will probably be prompted by a desire to control labor costs in some degree and may, therefore, be considered mandatory bargaining items. A troublesome aspect of this analysis is the determination of the impact of labor costs. Furthermore, decisions purported to turn on efficiency, productivity, or improved production quality control may have a significant and derivative labor cost component. This may lead to a Board determination based on the employer's ability to disguise and control decision definition.

If plant relocation and consolidation decisions pass the two threshold question hurdles, they still must satisfy the *First National Maintenance* balancing test. Because no interests to labor-management relations were articulated, the Board must give substance to this side of the balance. Such cursory treatment as was demonstrated by the majority in *Otis Elevator* does not portend a favorable

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194. *Id.* at 900, 115 L.R.R.M. (BNA) at 1285. I find that a decision motivated by labor costs is a mandatory subject of bargaining. There will no doubt be other instances, however, in which the Act should be found to require decision bargaining where the reasons underlying the removal of work are not confined solely to labor costs. 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.

195. *Id.* at 897, 115 L.R.R.M. (BNA) at 1288. The key question to be answered is this: Is a factor over which the union has control (e.g., labor costs) a significant consideration in the employer's decision? A factor over which the union has control is a "significant consideration" if the union is in a position to lend assistance or offer concessions that reasonably could affect—i.e., make a difference in—the employer's decision.

196. This view logically follows the manner in which these factors are measured in the workplace. See *supra* notes 191-92.
articulation.

The second issue in *Otis Elevator* was the duty to bargain over the effects of the relocation and consolidation. Following *Fibreboard* and its progeny, it is clear that effects bargaining is mandated under the ambit of sections 8(d) and 8(a)(5). *Otis Elevator*, however, addresses the decision-effects dichotomy in a confusing and contradictory manner. Ignoring the separate and distinct findings of effects bargaining violations by the Board and judge who previously heard the case, the majority remanded the effects issue, reasoning that the effects bargaining violations were dependent upon the alleged decision bargaining violation. In the latter part of the opinion, the majority seemingly contradicts itself by using the effects-decision bargaining dichotomy to deny the union access to information. The union’s request for information, specifically the management consultant’s report, was denied without any substantive articulation of a rationale. The report was purportedly instrumental in the decision making process and could be used to verify the relocation of Otis and consolidation rationale. This, in itself, would insure that the analytical paradigm was properly applied.

It could be argued, however, that since the report referred to the decision process, which was not held to be a mandatory bargaining item, such information is irrelevant and access was properly denied. In *Otis Elevator*, however, the employer used the report to justify his position in effects bargaining and, therefore, such information would be relevant. The majority stated that because the information was not requested specifically for use in effects bargaining, the information access issue was not properly before the Board.

2. The Status of the Collective Bargaining Agreement

The collective bargaining agreement is far more significant in plant relocations and consolidations than in plant closings, primarily

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199. *See also id.* at 894 n.6, 115 L.R.R.M. (BNA) at 1284 n.6. *Cf. id.* at 901, 115 L.R.R.M. (BNA) at 1285 (Zimmerman, Mem., dissenting).
200. *Id.* at 901-902, 115 L.R.R.M. (BNA) at 1284-86 (Zimmerman, Mem., dissenting).
201. The Board simply exalts procedural form over substance. The result is further delay and an overburdening of the process by creating endless hearings. Moreover, the contradictory and confusing application of the procedural request components of effects bargaining raises concern over the Board’s commitment to insure that effects bargaining is conducted in a “meaningful manner and at a meaningful time.” *Id.* at 894, 115 L.R.R.M. (BNA) at 1283.
because in the former the bargaining unit work survives at a different location.

If there is no collective bargaining agreement, the employer can relocate or consolidate the operation after complying with section 8(d) and 8(a)(5). Otis Elevator states that a relocation prompted by the desire to control labor costs may be considered a mandatory bargaining item under section 8(d) because, at a minimum, it satisfies the two threshold questions. Assuming it satisfies the balancing test, and ignoring the procedural problems created by the presumption against a duty to bargain, an employer would be required to bargain to impasse prior to decision implementation, and to engage in meaningful effects bargaining. During the negotiation of a new collective bargaining agreement, a contract proposal to restrict management rights to relocate could be considered a mandatory bargaining item, as the benefits to labor-management relations outweigh the speculative burdens on managerial decision making. In both of the above situations, labor-management relations is served by channelling the use of the economic weapon through the collective bargaining process.

These approaches, however, ignore troublesome language in First National Maintenance. First National Maintenance rejected any rebuttable presumption in favor of a bargaining duty because of the employer's need for predictability and unfettered decision making. The phrasing of the balancing test creates a presumption against the duty to bargain over corporate transformation decisions. This results in confusion in the plant relocation area. The duty to bargain over plant relocations, will not arise unless and until the Board so holds. If there is a valid collective bargaining agreement in existence, the analysis addresses an additional question. Does an employer's decision to relocate and consolidate his operations constitute a modification of the terms and conditions of the collective bargain-

202. See supra notes 156-60 and accompanying text.

203. One could argue that First National Maintenance's presumption does not apply to prospective transformations and therefore has no application in the collective bargaining negotiations context. And, one could argue, Otis Elevator's language imposing a duty to bargain if the relocation is prompted by labor costs simply adds to the predictability element the Court sought. Such justification, however, cannot be easily reconciled with the broad presumption analysis and illustrates the short shrift the Court gave to the policies of the NLRA in First National Maintenance. Properly assuming there are some forms of corporate transformations within the ambit of section 8(d), the result of the presumption may, in fact, be predictability for management but results in labor being forced to process all corporate transformation decisions through the Board with the attendant delays and administrative inefficiencies. It surely cannot be seriously argued that such a presumption promotes voluntary compliance with the policies of the NLRA.
ing agreement in violation of sections 8(d) and 8(a)(5)?

At the outset, it should be noted that the mandatory permissive bargaining item determination is again crucial. If the subject is termed permissive, even if the parties have included a specific contract clause addressing the subject, the employer can unilaterally change the term without violating sections 8(d) and 8(a)(5). The union's redress is limited to the grievance/arbitration process or a section 301 action. If the subject is a mandatory item not directly or indirectly included in the agreement, section 8(d) requires that the parties bargain to impasse prior to decision implementation. If the decision modifies existing mandatory terms contained in the agreement, not only are the parties required to bargain to impasse but the terms cannot be altered during the contract period.

Prior to Illinois Coil Spring II the Board viewed plant relocations and consolidations during the term of a collective bargaining agreement as modifications within the ambit of section 8(d)'s prohibition. The Board held that unilateral decisions to relocate and consolidate frustrate the collective bargaining process. Such decisions are modifications of the agreement in violation of sections 8(d) and 8(a)(5). The Board's analytical approach was not well received by the courts. When the Board composition shifted to a majority of Reagan appointees, it requested that the Seventh Circuit return Illinois Coil Spring I for rehearing.

Illinois Coil Spring Company operated three divisions. Seeking relief from the higher labor costs at the unionized Milwaukee Spring division, the company relocated and consolidated the work performed at its Milwaukee division to the nonunionized McHenry division. At the time of the relocation, there was a collective bargaining agreement in existence at the Milwaukee Spring plant. The parties stipulated that the decision was economically motivated and was not prompted by antiunion animus. They further stipulated that the parties had bargained to impasse over the decision to relocate and

204. See supra notes 161-62.
205. Id.
had been willing to engage in effects bargaining. Thus, the issue in *Illinois Coil Spring II* was to determine if a relocation and consolidation implemented during the term of a collective bargaining agreement constituted a modification of that agreement in violation of section 8(d).

*Illinois Coil Spring*, in a 3-1 decision with Member Zimmerman dissenting, held that, absent express contract language to the contrary, an employer does not violate sections 8(d) and 8(a)(5) by relocating the plant during the term of the agreement. In a Ninth Circuit decision, *Los Angeles Marine Hardware,* factually similar to *Illinois Coil Spring*, the court, agreeing with the previous Board, held that an economically motivated plant relocation during the term of the agreement constituted an indirect modification of the wage clause and therefore was prohibited by section 8(d). Thus, the working policy positions were clearly defined. The majority on the Board, views contract language as narrowly construed, formalistic intrusions upon the traditional prerogatives or retained rights of employers rather than embracing the concept of a “generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate. . . . [and] an effort to erect a system of industrial self-government.” The Ninth Circuit and the Board's lone dissent view the collective bargaining agreement as a generalized code delineating contractual expectations entitled to protection from both direct and indirect employer controlled modifications under the ambit of section 8(d).

The employment conditions for one third of the bargaining unit employees at *Illinois Coil Spring* were modified substantively by the unilateral decision to relocate. They were in fact terminated. Yet, if rather than relocate, the employer had attempted to reduce labor costs by unilaterally reducing the wages of the unit employees, such direct modification of the wage clause would have been prohibited by section 8(d). Similarly, in *Los Angeles Marine Hardware* the Ninth Circuit reasoned that permitting a relocation in order to cut labor costs "would allow an employer to do indirectly what cannot be done

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211. *Id.*
212. See supra note 104.

The collective bargaining agreement . . . is more than a contract; it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate . . . A collective bargaining agreement is an effort to erect a system of industrial self-government.

*Id.*
directly under the Act” and amount to impermissible contract avoidance.214

The Board disagreed with the approach of the Ninth Circuit and with the prior Board’s decisions in this area and held that since there was no specific clause “contained in” the agreement prohibiting such a relocation the employer was “doing directly what lawfully can be done directly.” 215 The majority reasoned that to hold otherwise would amount to an implied work preservation clause in the agreement216 and would discourage “truthful midterm bargaining over decisions to transfer unit work.” 217

The Board’s approach is facially valid but problematic. First, the Board again exalts form over substance.218 Moreover, such an approach demonstrates a callous lack of appreciation for the integrity of the agreement. Basic contract law would not permit a party to avoid a contract simply because he later discovers a better price for the product elsewhere.219 Analogizing to commercial contracts, the agreement could be viewed as a classic requirements contract.220 Illinois Coil Spring has contracted to buy all the labor it requires at a given price. Unless the quality or productivity of the product falls below contract terms, Illinois Coil Spring is bound to buy its required labor at the agreed price. Any attempt to substitute suppliers (of labor) at lower prices would constitute a breach of good faith and

214. 602 F.2d at 1307. [W]e have held that a unilateral removal of bargaining unit work during a contract term is the type of contract modification proscribed by the Act, regardless of the economic justification. Further, under Section 8(d) of the Act, a party to the contract cannot be compelled to bargain about such a modification and, accordingly, any modification can be implemented only with the consent of the other party.

Id.

215. 268 N.L.R.B. at 604 n.13, 115 L.R.R.M. (BNA) at 1068 n.13. Member Zimmer-
man dissenting:

Such decision [midterm plant relocation], admittedly motivated solely to avoid the contractual wage rates, was simply an attempt to modify the wage rate provisions in the contract, albeit indirectly. . . . It is disingenuous to argue, as do my colleagues, that Respondent’s relocation did not disturb the contractual wages and benefits at the Milwaukee facility. If Respondent had implemented its decision, there would be no assembly employees at the Milwaukee facility to receive the contractual wages and benefits. Rather, all assembly work would be performed at McHenry where Respondent would pay its employees less for the same work. Under these circumstances, my colleagues’ conclusion that Respondent left the wage and benefit provisions “intact” at Milwaukee is illogical and without legal significance.

Id. at 611, 115 L.R.R.M. (BNA) at 1074.

216. Id.

217. Id.

218. See supra note 213 and accompanying text.


220. CORBIN, supra note 219, § 156.
amount to an impermissible modification of the contract.

The Board’s fear of an implied work preservation clause is unfounded. The focus is not on preserving work under the contract in any and all circumstances but in protecting the integrity of the collective bargaining agreement from modifications wholly within the control and discretion of one party to the agreement. Moreover, implied protections of the collective bargaining agreement are not without precedent. Furthermore, the Board’s argument that plant relocations should be allowed unless there is express contract language to the contrary in order to encourage truthful collective bargaining is absurd. In fact, the opposite is more likely to be true. The determination that a subject matter is mandatory and that notice and information access are required encourages truthful collective bargaining. Notice and information exchange will be facilitated by swift and efficient enforcement of Board remedies and will encourage truthful and meaningful collective bargaining. In fact, prohibiting the indirect modification of the collective bargaining agreement by plant relocations and consolidations will require the employer to produce supportive data and to persuade the union of its need for the necessary changes during decision bargaining. Underlying this process will be the parties’ mutual desire to avoid organizational dissolution, which is costly to both labor and management.

Finally, contract negotiation is bilateral. Even when there is no specific clause which prohibits an employer from relocating his plant “contained in” the agreement, it does not necessarily follow that the employer can relocate the plant and avoid the agreed-upon contract. The Board argued that if the parties had wanted a clause prohibiting plant relocations in the contract they could have included one. But the reverse is also true, if management had wished to retain the right to relocate the plant and avoid the contract terms it could have negotiated a term to that effect in the contract. The determination of which side will prevail turns on the role played by the NLRA in

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221. 268 N.L.R.B. at 606, 115 L.R.R.M. (BNA) at 1070 (Zimmerman, Mem., dissenting).

222. E.g., Local 174, Teamsters v. Lucas Flour Co., 369 U.S. 95 (1962) (the presence of an arbitration clause in a collective bargaining agreement constitutes a no strike clause). This implied protection of the collective bargaining agreement was limited to economic considerations and matters wholly within the control and discretion of the union. The union was not permitted to use economic weapons to frustrate and avoid the process. The same standard should apply to the employer. This would not necessarily replace the negotiation of a contract clause prohibiting work transfers since, arguably, a contract clause negotiated by the parties prohibiting work transfers would have a broader coverage including economic and noneconomic rationales. 268 N.L.R.B. at 603, 115 L.R.R.M. (BNA) at 1067.
protecting the integrity of the collective bargaining agreement and realigning the balance of power between the parties. The contractual expectation of the parties is entitled to protection. No party should be able to avoid the contractual terms simply because it is more profitable to the employer to move elsewhere.

The latest contribution to the volatile area of plant relocations during the term of the agreement came from the D.C. Circuit in the summer of 1985 with the review of the Board’s *Illinois Coil Spring II* decision. The D.C. Circuit, purported to be one of the more progressive circuits, took an analytical approach significantly different from that of the Ninth Circuit which decided *Los Angeles Marine Hardware* and from that of the Reagan appointees on the NLRB.

The D.C. Circuit held that Illinois Coil Spring’s decisions to relocate unit work did not violate section 8(d). Unlike the Board, the D.C. Circuit viewed the management rights and zipper clauses taken together, granted to management the right to move. The decision is problematic in terms of labor law policy as well as the substantive aspects of the court’s reasoning.

The court declined to decide if the decision to relocate a plant was in fact a mandatory or permissive bargaining item. Moreover, the court failed to adequately address the issues of the regulation of economic weapons, and relied instead on the broad contract language. Neither clause cited was unique or specific, and the

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224. 119 L.R.R.M. (BNA) at 2805.
225. *Id.*
226. *Id.* at 2807-08. The court’s narrow view failed to consider the contract as a whole but rather emphasized the general contract language. The author’s criticism of the Board’s *Illinois Coil Spring II* decision would suggest approval of the court’s reliance on contract language. *See supra* notes 218-222 and accompanying text. However, the court’s reliance on contract language which was not specific or unique to this contract was misplaced.
227. *Id.* at 2805-06. The management rights clause is rather standard, perhaps even less specific than most. It read:

Except as expressly limited by the other Articles of this Agreement, the Company shall have the exclusive right to manage the plant and business and direct the working forces.

These rights include, but are not limited to, the right to plan, direct and control operations, to determine the operations or services to be performed in or at the plant or by the employees of the Company, to establish and maintain production and quality standards, to schedule the working hours, to hire, promote, demote, and transfer, to suspend, discipline or discharge for just cause or to relieve employees because of lack of work or for other legitimate reasons, to introduce new and improved methods, materials or facilities or to change existing methods, materials or facilities.

*Id.* at 2806 n.24.
The management rights clause was generic, and the court may have interpreted the general boilerplate language as encompassing the relocation right. Management could derive this right from their right to "plan, direct and control operations" or from the right to "change existing methods, materials, or facilities." If management did not retain the specific contract language to relocate then perhaps the catch-all phrasing of the management rights clause plus the "implied or retained rights" of management allow the relocation right. The court expressly declined to endorse this theory. Is the D.C. Circuit relying on management’s retained rights as a source? The opinion offers no guidance. As stated previously the viability of the "implied or retained rights of management" or conversely the "implied obligations theory" significantly alter the bargaining posturing of the parties. Unfortunately, the D.C. Circuit opinion raises far more questions than it answers.

The issues related to contract interpretation and the "retained" rights of management must be clarified. Unless the policies and protections of the NLRA are broadly interpreted, the problem of the double standard of contract term application will become more acute and will threaten the utility of collective bargaining as a means of channelling disputes to a controlled forum. If labor must strive to negotiate specific clauses covering all foreseeable contingencies while the employer can rely on broad clauses or no clause at all under ‘retained’ management rights, the process becomes acutely imbalanced.

III. SUMMARY AND RECOMMENDATIONS

History, it has been said, repeats itself and that is the problem
with history. In the same context, time has removed from contemporary analysis the historical basis and industrial relations assumptions that predicated the policies of the Act. This has led to Board and court opinions giving a short shrift to the long range policies of the Act. Because law is dynamic, it is proper to question whether or not these underlying assumptions are still valid. But such an analysis should not be undertaken in only an economic context.

 Freedoms, including economic, political, social, and educational, derived in the workplace extend and enhance freedoms in all of society as well. Few would doubt the view that employer-employee conflict cannot be eradicated from the workplace but can only be channeled through dispute resolution forums. Nor would many take issue with the reality of freedom of contract without the corresponding freedom to contract. Fewer still would doubt that there is a pervasive inequality of bargaining power between employers and employees. Power will always be exercised to achieve one’s perceived goals. As a private entity, the employer can, and probably will, impose a cost of disagreement upon recalcitrant employees to induce

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230. Industrial relations in the industrial democracies is far from peaceful. The diversity of American labor and the violent attempts to quash the movement for short term political and economic gain are not far removed from contemporary managerial analysis. The recent coal miners strike in England demonstrates the undercurrent of unredressed inequities and their violent effects. See also ”Labor Should Return to Militancy,” NATION May 21, 1983, at 623. Facial placidity and the present economic recession have weakened unions; but history has documented the rise and fall of union strength with the booms and busts of the economy. The Act was designed to smooth out the roller coaster of economics and achieve the higher aspirations of increased long term economic, political, social, and educational growth for the public good as a whole. It’s far too easy for both labor and management to overlook the long term interrelationships and public purpose in favor of short term gains, but this is the perspective the Act requires. See Marshall, The Future of the American Labor Movement: The Role of Federal Labor Law, 57 CHI.-KENT L. REV. 521 (1981); see also R. FREEMAN & J. MEDOFF, WHAT DO UNIONS DO? (1984).

231. Conflict is inevitable and unions are a natural response to the needs of employees to counter the power response by the employer. Unions are not, as many conservative writers would like to believe, conspiracies of the left or extensions of organized crime. They are merely organizations arising from the course of events designed to serve a purpose or fill a need akin to other business, trade, fraternal, or educational organizations. Moreover, unions are dynamic and diversified. As Robert Hoxie stated they “are prone to act and to formulate theories afterward.” R. HOXIE, TRADE UNIONISM IN THE UNITED STATES at 34 (1928). Hoxie observed:

[The] union program, taken with it all its mutations and contradictions, comprehends nothing less than the various economic, political, ethical and social viewpoints and modes of action of a vast and heterogeneous complex of working class groups, molded by diverse motives; it expresses nothing less than ideals, aspirations, hopes and fears, modes of thinking and action of all these working groups. In short, if we can think of unionism as such, it must be one of the most complex, heterogeneous and protean of modern social phenomena.

Id. at 35. Given this nature it is also one of the most vulnerable to destabilization.
behaviors conforming not only to the employer's economic interests but to social, political and educational interests as well. Moreover, even a cursory examination of labor law reveals the hostility exhibited by employers to the rights of employees to organize and redress inequities, to secure safe working conditions, and even to acquire fundamental knowledge about the products and processes to which they are exposed. Thus the issues center on the scope of the legislative mandates, not necessarily on the validity of the underlying assumptions.

However, given the dynamic nature of social legislation, the validity of the assumptions and their scope in application are inseparable. The Reagan Board and the courts sacrificed the long term historically-mandated policies for the short term myopic interests of egocentric employers. This has resulted in a confused and unworkable state of the law. The Board is not perceived as an impartial forum created to enforce the policies of the Act. Moreover, instead of striving to approach a middle ground, the present Board has taken unprecedented steps to further politicize labor-management relations and has drawn sharp criticism from both Congress and labor.

The central thesis of this article is the use of the corporate transformation vehicle as a cost of disagreement, or the exercise of an economic weapon in enhancing the bargaining power of an employer. If collective bargaining is to be a viable forum for dispute resolution, all exercises of bargaining power, including corporate transformations, must be channeled through the mediating effects of the process. It does not serve the power balancing goal of the Act to channel union costs of disagreement through the collective bargaining process and yet leave the employer free access to unchecked power exercises. To view corporate transformation decisions as permissive bargaining items creates a structural imbalance of bargaining power directly contrary to the mandates of the Act. A situa-


234. Hearings before Congress in June and July 1984 drew sharp criticism from labor unions and legal scholars of the Board and the lack of effectiveness of the labor laws. In its final report at the closing of 1984, Congress filed a written report critical of the NLRB's perceived lack of impartiality in the discharge of its statutory obligations.

tion is created in which labor weapons, for example, the boycott, are channeled through the bargaining process or denied altogether, and any response by employees to unilateral power exercises by the employer could be considered an 8(b)(3) violation.

To have a viable collective bargaining forum and thereby achieve the policy goals of the Act, four operational areas should be addressed. First, the right to organize must be adequately protected. Second, the remedies for labor law violations must be adequate to induce the desired behaviors from both parties. Third, economic weapons, or costs of disagreement, and all issues of importance to the parties must be channeled through the collective bargaining process. And fourth, the agreement must be adequately protected from the unilateral evasion. The first two are beyond the scope of this article. The latter two address the negotiation and enforceability of the collective bargaining agreement and are the focus of the recommendations.

The mandatory-permissive bargaining item dichotomy should be overturned by Court decision or by legislation. As the legislative history and the logic of the Act demands, the language of section 8(d) should be read as words of description, not as words of limitation. Thus, there would be only legal and illegal bargaining items and all issues of importance and all exercises of bargaining power would be channeled through the collective bargaining process. The Act does not deny the use of economic weapons to a party but does require the prerequisite of bargaining to impasse. The Act and subsequent Court decisions recognized that the failure to communicate was a major source of industrial disputes and had an impact on interstate commerce. If the issue is of sufficient concern to the parties to be raised in negotiations it should be discussed in good faith. Moreover, if the employer wishes to retain certain rights, the process is better served if those rights are negotiated in the agreement. This would not create new burdens since most contracts contain rather detailed management rights clauses but would place the collective bargaining process in the forefront by denying the default position of re-

238. Further inquiry is required to fully operationalize the policies of the Act particularly in the areas of remedies and the conflict between traditional management prerogatives and the policies of the Act. See J. ATLESON, supra note 104.
tained management rights to the employer.

In dealing with midterm modifications, the contract would be the first point of analysis. If there were specific provisions restricting or granting the action at issue, the contract would govern and section 8(d)'s prohibition against midterm modifications would be fully applicable. If not specifically stated, section 8(d) would require the parties to bargain to impasse. Notice and information access would mitigate the conflict created by midterm modification. Moreover, if the employer wished to retain rights to midterm modification, the contract could be tailored to meet those needs. Here again, the management rights clause and zipper clauses, negotiated and agreed to by the parties, are significant. 241 Additionally, the parties could alter the scope of no strike/no lockout clauses and retain the use of economic weapons in the event of specifically delineated areas of controversy. This would allow them to impose a cost of disagreement for midterm violations. 242

In the corporate transformation context, the employee’s contractual expectations could be discussed at the bargaining table. Unless there have been prior discussions on the action at issue, the decision could not be unilaterally implemented without the requisite bargaining to impasse. This would allow the employees the opportunity to assess their options intelligently and would facilitate employer decision making through additional alternative generation. Moreover, it would not preclude the employer from exercising economically necessary decisions. It would, however, require the employer to adhere to the collective bargaining agreement or to bargain in good faith to impasse.

Such a clear distinction would add much needed consistency and predictability to corporate transformations. Removed from the analysis would be the unworkable First National Maintenance paradigm and the problems generated with the various attempts to operationalize such elusive terms as “significant alteration of the scope and direction of the enterprise,” “amenability to resolution through the collective bargaining process,” and the articulation of the benefits and burdens of the balancing test. Moreover, it would preclude the need to distinguish between the “effects” and “decision” bargaining with the attendant notice and information access distinctions. Finally, legally reasoned decisions would replace much of the political analysis now present in Board and court decisions.

241. See generally C. Loughran, supra note 240.
242. Id.
It is unlikely that the Court will overrule Borg-Warner. Therefore, legislative intervention is necessary. Several legislative proposals have been entertained. Many have centered on particular issues such as the classification as mandatory bargaining items of plant closure decisions or pension benefits for retirees. Such measures fail to consider the pervasive unworkability of the mandatory-permissive bargaining item dichotomy and simply shift the definition of the employer's decision to other permissive areas. Realigning section 8(d) to include only legal and illegal bargaining items would not end all of the problems faced by labor-management relations. Such a change in the Act would not provide communities with notice of and input into the corporate transformations decisions. Therefore, the legislative proposals providing for notice, severance pay, and the forfeiture of tax benefits in the event of corporate transformations are not precluded by the proposed change in bargaining item distinction. In fact, the two proposals are complements. One recognizes the impact upon employees and channels the dispute through the collective bargaining process; the other recognizes the devastating impact upon the communities and the ripple effects in the infrastructure support and services.

To prevent employers from evading the requirements of the collective bargaining agreement, four specific areas should be addressed. First, employees must have access to confidential information on intracorporate relationships and related bargaining unit work. The Board possesses the means to sanction inappropriate disclosure of employer information. Second, because the information


244. Unless the issue is completely closed the employer will simply define the issue as plant closure, plant relocation, or consolidation, whichever is deemed a permissive bargaining item by the Board and the courts. Given the similarity of the above, careful and controlled decision making can shift the issue definition.

necessary to establish relevance is often in the exclusive control of
the employer, the requirements to establish relevancy should be
 eased. Third, the requirement of a foreseeable economic benefit
should be eliminated. The parties should be required to bargain in
good faith upon the satisfaction of the four criteria previously articu-
lated by the courts.\textsuperscript{246} And fourth, balancing tests used by the Board
are subject to potential political and descriptive manipulation.\textsuperscript{247} As
such, they should be used sparingly, not simply as a convenient vehi-
cle to give credibility to political decisions. Moreover, the balancing
tests should take great pains to contain operationally defined vari-
ables to insure predictability and consistency of application.

Finally, to remove the incentive for unnecessary corporate trans-
formations, and to provide further viability and protection to the
contractual expectation of the employees, the successor employer
doctrine should be revised.\textsuperscript{248} Again, because court intervention is
unlikely, legislative action is required. Most states require surviving
corporations to assume the obligations of their predecessors in merg-
ers and consolidations.\textsuperscript{249} It is not unreasonable therefore to require
a successor employer to assume the predecessor's collective bargain-
ing agreement.\textsuperscript{250} If retooling or restructuring were desired, the suc-
cessor would be required to bargain to impasse prior to implementa-
tion. The employees would thereby be afforded continued employment and a return on their investment of skill, time, and la-
bor with the operation.\textsuperscript{251}

The above recommendations are offered to restore viability to
the collective bargaining process. However, bargaining relationships
and labor-management relations are dynamic and contoured by the
experience and personalities of the participants. The collective bar-
gaining agreement is a living document establishing the rules of the
game in industrial democracy. To insure and protect input in the

\textsuperscript{246} See Alkire v. NLRB, 716 F.2d 1014 (4th Cir. 1983).
\textsuperscript{247} See, e.g., Bohemia Inc., 272 N.L.R.B. No. 178, 117 L.R.R.M. (BNA) 1433
(1984); Creasey Co., 268 N.L.R.B. 1425, 115 L.R.R.M. (BNA) 1131 (1984); General Dy-
\textsuperscript{248} John Wiley & Sons v. Livingston, 376 U.S. 543 (1964); NLRB v. Burns Int'l Sec.
Serv., 406 U.S. 272 (1972); Howard Johnson Co. v. Detroit Local Joint Executive Bd., 417
\textsuperscript{249} See, e.g., ILL. REV. STAT. ch. 32, § 157.69(e) (1984).
\textsuperscript{250} Imposing the collective bargaining agreement upon the successor employer would
avoid disruptions in the contractual expectations of employees and minimize work stoppages
while new terms and conditions of employment are negotiated. See generally Silver, Reflections
\textsuperscript{251} See Ozark Trailers Inc., 161 N.L.R.B. 561, 566, 63 L.R.R.M. (BNA) 1264, 1267
(1966). See also supra notes 143-48 and accompanying text.
setting of these rules, the Act must be consistent and predictable. The above are process-oriented and designed to improve the pervasive imbalance of bargaining power between the parties. In reality, the employer will always be in a bargaining position superior to that of the union. In general, the employer’s concern is the short term rather than the long term impact upon society at large. Also, the employer who adopts the view that labor is a readily replaceable factor of production, will be unconcerned with the effect upon employees. Labor organizations also are guilty of short run myopic planning. Conflict between the parties can never be eliminated. It can, however, be channeled to minimize disruptive impact. The future of industrial democracy depends on the ability of both parties to restructure an environment conducive to peaceful compromise and cooperation. Unless the government establishes a viable forum for dispute resolution, employers and unions will react to the passions and politics of the moment. It is necessary for the government to intervene in order to foster the long term policies of the National Labor Relations Act.