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THE SPRING HAS SPRUNG: THE FATE OF PLANT RELOCATION AS A MANDATORY SUBJECT OF BARGAINING

Many commentators had expected the Milwaukee Spring cases to resolve the issue of plant relocation in labor-management relations. However, the cases offered no definitive answer, taking divergent approaches and ultimately focusing on boilerplate contract clauses. This Comment contends that the NLRB and courts should refocus their analysis on whether plant relocation is a mandatory or permissive subject of bargaining and deemphasize boilerplate waivers. The Comment concludes that the balancing test set forth by the United States Supreme Court in First National Maintenance Corp. v. NLRB, should be applied to determine mandatoriness. This approach would achieve relative consistency, encourage bargaining, maintain flexibility and avoid instability due to changes in political and economic conditions.

INTRODUCTION

The labor-management relationship is of course affected by existing economic conditions; and economic conditions of the last decade have applied new pressures on this relationship. As the national economy has shifted from its former industrial base, employers are seeking new ways to remain economically viable. A great number of plant relocations have occurred causing visible economic and sociological ramifications.¹

The stakes are high on both sides of the employer-employee equation. Relocation and job security have become crucial issues for employees faced with the threat of a large-scale industry exodus to cheaper, nonunion foreign markets.² Alternatively, employers wish to

¹. Over 6500 plants closed in the period from 1969-1976. Fifteen million jobs were lost by American workers. Foreign investment increased from 11.8 billion dollars in 1950 to 150 billion dollars in 1979. A ripple effect often accompanies plant closure, leading to the bankruptcy of many secondary businesses. These facts lead not only to economic loss, but also to sociological harm. Job loss contributes to high depression, increased divorce, child and spousal abuse and alcoholism. The suicide rate among terminated employees is 30 times higher than the average. Kay & Griffin, Plant Closures: Assessing the Victim's Remedies, 19 WILAMETTE L. REV. 199, 201-04 (1983).
². The 1985 Chrysler strike involved the inability of the two sides to agree over job security provisions. The strike ended quickly, with the establishment of a 170 million
maximize managerial discretion, maintaining well-settled rights to close businesses and make inherently managerial decisions. The threat of relocation is responsible for an increasing number of disputes concerning mid-contract concessions, especially wage decreases, work subcontracting, and plant relocation.

Bargaining over plant relocation is a crucial issue for unions; the survival of the bargaining unit may depend upon whether the decision is shared by labor and management, or is held solely by management. Absent the ability to impose express language into a collective bargaining agreement, employees may have no meaningful way to stop relocation. A mandatory duty to bargain over plant relocation might retard the flight of industries. In First National Maintenance Corp. v. NLRB, the United States Supreme Court recognized that subcontracting is included within the range of mandatory bargaining subjects. Although the Court expressed no opinion regarding plant relocation, its approach breathed life into the concept that mandatory subjects of bargaining should be expanded to protect labor.

Courts have left open the issue of whether plant relocation is a mandatory subject. Judicial reluctance to resolve the issue may suggest more than conservatism. It may be a judicial acknowledgement that decisional bargaining will never be a mandatory subject of bargaining and that other avenues exist to resolve plant relocation disputes. Philosophically, this reflects a shift away from a traditional labor policy favoring intervention on behalf of the weaker party, and instead emphasizes deference to the relative strengths of the contracting parties.

dollar job security "bank," whose purpose was to protect workers from loss of work due to subcontracting or work relocation. However, it could be a Pyrrhic victory. Lee A. Iacocca, Chief Executive Officer of Chrysler, expressed disappointment with the contract and warned that despite record profits, the expensive new labor agreement might cause the company to buy even more cars and parts overseas. L.A. Times, Oct. 28, 1985, § 4, at 1, col. 5.

5. A bargaining unit is a group of employees with a sufficient communality of interests to constitute a unit appropriate for bargaining purposes. In general, the following criteria will be used in order to determine an appropriate unit: functional coherence, mutuality of interest, collective bargaining history, and employee desires. H. Robert, Robert's Dictionary of Industrial Relations 37-38 (1966).
8. See generally Irving, Plant Relocation and Transfers of Work: The NLRB's
After briefly examining the National Labor Relations Act (NLRA)\(^9\) and the impact of characterizing plant relocation decisions as a mandatory subject of bargaining, this Comment focuses upon the recent *Milwaukee Spring*\(^{10}\) line of cases and their lack of a definitive solution to the problem.\(^11\) Finally, the Comment will address the significance of the outcome of the plant relocation issue for future labor policy, and conclude that the NLRB and the courts should apply the *First National Maintenance* test to plant relocation disputes.

**BACKGROUND**

The labor-management relationship is a tumultuous one, much of which is statutorily enforced by the NLRA. The duty to bargain is specifically addressed in NLRA sections 8(a)(5) and 8(d).\(^12\) The legislative history of section 8(a)(5) evidences the importance of collective bargaining\(^13\) as a means to promote industrial peace by taking the conflict from the picket line to the bargaining table. The NLRA mandates that an employer bargain with a labor representative regarding wages, hours, and working conditions.\(^14\) It gives guidance about the *spirit* of bargaining, but provides little guidance as to the *scope* of the employer's obligation to bargain, particularly about working conditions.\(^15\) This vagueness gave rise to the 1947 amend-

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\(^{11}\) See infra notes 72-108 and accompanying text.

\(^{12}\) See infra notes 72-108 and accompanying text.

\(^{13}\) Glenn, *To Bargain or Not To Bargain: A New Chapter in Work Relations*, 69 MINN. L. REV. 668 (1985).


\(^{15}\) See Morris, *The NLRB in the Dog House — Can an Old Board Learn New Tricks?*, 24 SAN DIEGO L. REV. 9 (1987), in this issue. The definition of collective bargaining is covered by sections 9, 8(d), and 8(a)(5) of the NLRA. A collective bargaining agreement is a contract or mutual understanding between a union and an employer. The union is represented by its designated exclusive representative who represents the majority of the employees in respect to wage, hours, and other terms and conditions of employment. The parties must meet at reasonable times and confer in good faith. This obligation does not require either party to agree or concede. The agreement sets forth the terms and conditions of employment including wages, hours, seniority, vacation pay, bargaining units, grievance procedures, and other working conditions. See H. ROBERT, *supra* note 5, at 14.


\(^{15}\) The duty to bargain was "something more than the mere meeting of an employer with the representatives of his employees;" the employer must have "an open mind and sincere desire to reach an agreement" and "a sincere effort must be made to reach a common ground." Cox, *The Duty to Bargain in Good Faith*, 71 HARV. L. REV. 1401,
ments to the NLRA, better known as the Taft-Hartley Act, in which Congress attempted to define more clearly the obligations of bargaining. Nonetheless, Congress rejected a proposal to limit bargaining to five specified topics; instead, Congress chose broader and more flexible language.

The legislative history of section 8(a)(5) and 8(d) reflects a congressional desire to create a flexible standard capable of adjusting to future, unknown industrial requirements, and to accommodate industrial differences. This flexibility, however, has been used instead as an economic weapon for the dominant party. Indeed, Congress specifically left the interpretation of the NLRA to the National Labor Relations Board (NLRB). The NLRA intended that the Board give form to the Act and mold a national labor policy through careful attention to the controversies brought before them by the Board’s General Counsel. Nonetheless, like most administrative rulings, the Board’s rulings require judicial enforcement. Thus, the judiciary is provided with an important role in forming national labor policy.

The Nature of Bargaining Subjects

The crux of the controversy concerns identifying those issues about which the parties must bargain. That, in turn, depends upon whether a subject is designated as “mandatory” or “permissive.”

1414 (1958) (quoting in part from NLRB v. Reed & Prince Mfg. Co., 118 F.2d 874, 885 (1st Cir.), cert. denied, 313 U.S. 595 (1941)).
17. The House bill, as introduced, specified the five topics: (i) wages, rates, hours of employment and work requirements; (ii) procedures and practices relating to discharge, suspension, lay-off, recall, seniority, and discipline, or to promotion, demotion, transfer and assignment within the bargaining unit; (iii) conditions, procedures and practices governing safety, sanitation, and protection of health at the place of employment; (iv) vacations and leaves of absence; and (v) administrative and procedural provisions relating to the foregoing subjects. See Glenn, supra note 11, at 672.
The object of this Act was . . . to ensure that employers and their employees could work together to establish mutually satisfactory conditions. The basic theme of the Act was 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.
Id. at 103.
20. The NLRB, a tribunal provided for under the NLRA, is currently made up of five members, each appointed by the President and serving five year terms. The Board is responsible for the general administration of the Act and for policy regarding unfair labor policy, union certification and determination of appropriate bargaining units. H. ROBERT, supra note 5, at 274-75.
21. R. FELDAKER, LABOR GUIDE TO LABOR LAW 201 (2d ed. 1983).
The NLRA explicitly makes "wages, hours and other terms and conditions of employment" mandatory subjects of bargaining. A unilateral implementation of a new policy involving a mandatory subject, without bargaining or consent, violates the statutory duty to bargain under section 8(d) and 8(a)(5), and is subject to the Board's remedial order.

A mandatory subject requires that both parties bargain in good faith. For management to act, it must notify the union, bargain over the proposed change, and reach an impasse before it unilaterally may implement the change. Furthermore, if a mandatory term already is contained in the collective bargaining agreement, modification of the mandatory term cannot be accomplished even by bargaining to impasse. There is, however, no obligation to agree, only to bargain. If impasse occurs, both sides have their traditional remedies — strike or lock-out — to secure their respective aims.

Mandatory subjects of bargaining are fluid. The NLRA does not fix a list of subjects for mandatory bargaining; rather, it establishes guidelines by which topics must be measured. Generally, mandatory topics include only those issues which involve some aspect of the relationship between employer and employee. If a subject is merely permissive, neither party can insist on bargaining. Moreover, a unilateral modification of a permissive bargaining subject, even if contained in the contract, is not an unfair labor practice. Other reme-

24. Id.
25. Id.; see Oak Cliff-Golman Baking Co., 207 N.L.R.B. 1063 (1973), enforced, 505 F.2d 1302 (5th Cir. 1974).
26. The Court has analyzed section 8(a)(5) and 8(d) and has concluded: Read together, these provisions establish the obligation of 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.
Borg-Warner, 356 U.S. at 349.
dies exist for such a breach. The traditional economic weapons of the strike or lock-out are denied when the topic is merely permissive.

Labeling a subject as permissive rather than mandatory has serious ramifications. For example, in First National Maintenance Corp. v. NLRB, the Supreme Court noted that "[l]abeling [the partial closing of a plant as mandatory or permissive] could afford the union a powerful tool for achieving delay, a power that might be used to thwart management's intentions in a manner unrelated to any feasible solution the union might propose." The Court further noted the dilatory effect of alleging an unfair labor practice which may afford remedial relief apart from the parties' decisionmaking process. Since one may not insist upon bargaining over a permissive subject, a subject's characterization as mandatory or permissive can have far-reaching effects.

Plant Closings

Courts seldom have considered the mandatory nature of decisional bargaining in cases concerning plant closings. Several NLRB pronouncements, however, have discussed this issue, and in NLRB v.

defined the duty to bargain only in respect to mandatory terms, and also limited to mandatory terms the proscription against unilateral modification during the collective bargaining term. Thus, a unilateral modification of a permissive topic contained in the contract is not an 8(d) violation. The available remedy is a breach of contract action under section 301 of the Act.

32. The statutory remedy for the aggrieved party is to institute a breach of contract action under section 301 of the LMRA. Section 301 allows suits for the violation of contracts between an employer and a labor organization to be brought in any district court of the United States having jurisdiction, without regard to either the amount in controversy or the citizenship of the parties. LMRA § 301, 29 U.S.C. § 185 (1982).


35. Id. at 667.

36. Id. An employer commits an "unfair labor practice" by "refusing to bargain collectively with the representatives of his employees." This duty strengthens the much broader right of workers to bargain collectively through representatives of their own choosing. The 1935 Senate report insisted that an employee's right to bargain collectively would be "mere delusion" absent a correlative affirmative duty on the employer's part. S. REP. NO. 573, 74th Cong., 1st Sess. 12 (1935), reprinted in 2 NLRB, LEGISLATIVE HISTORY OF THE LABOR RELATIONS ACT, 1935, at 2300, 2312.

37. Often, the characterization of a subject as mandatory or permissive arises in the context of mid-contract relocation.


39. The cases are not entirely consistent. The NLRB and courts have often looked to employer motivation. Some results are due to detected anti-union animus. After Fibreboard, the Board usually required bargaining over plant relocation. See Otis Elevator (Otis Elevator I), 255 N.L.R.B. 235 (1981); Armour Oil Co., 253 N.L.R.B. 1104, 1121 (1981); Ohio Brake & Clutch Corp., 244 N.L.R.B. 35 (1979); see also Glenn, supra note 11, at 680-81.
Borg-Warner Corp.\textsuperscript{40} the Court affirmed the Board’s division of topics between mandatory and permissive but failed to suggest a methodology for determining which topics would be mandatory under the “terms and other conditions of employment” language. However, the Court maintains the position that an employer has the right to close a business completely, for any reason other than to chill unionization elsewhere, and that such closure is exempt from NLRB intervention so long as the closure is final.\textsuperscript{41}

In \textit{Fibreboard Paper Products Corp. v. NLRB},\textsuperscript{42} the Court addressed mandatory bargaining in the 8(d) context of “other conditions of employment,” and seemed to settle on a definitional approach. In \textit{Fibreboard}, the employer subcontracted out work previously done by bargaining unit employees. The employer anticipated “substantial savings” by using nonunion labor. The Court reasoned that “terms and conditions” covers subcontracting situations which lead to work termination; thus, this subcontracting situation was a mandatory subject of bargaining.\textsuperscript{43}

The key to \textit{Fibreboard} is that ongoing work was taken away from bargaining unit employees and given to cheaper nonunion workers. The \textit{Fibreboard} majority, as in \textit{Borg-Warner}, continued to utilize a definitional approach. This approach asserted that subcontracting was “plainly” a “condition of employment” because termination could result.\textsuperscript{44} The utility of the definitional approach is questionable since the vague phrase “condition of employment”\textsuperscript{45} eludes exact definition.

Justice Stewart concurred in \textit{Fibreboard} and drafted guidelines to

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{40} 356 U.S. 342 (1958).
\item \textsuperscript{41} See, e.g., Textile Workers Union v. Darlington Mfg. Co., 380 U.S. 263 (1965).
\item \textsuperscript{42} 379 U.S. 203 (1964).
\item \textsuperscript{43} \textit{Id.} at 215. The Court stressed that the holding was to be applied narrowly, that is, only to situations involving the subcontracting out of work previously done by bargaining unit employees.
\item \textsuperscript{44} \textit{Id.} at 210.
\item \textsuperscript{45} \textit{Id.} It is interesting to note the dynamic tension between preservation of bargaining unit work, clearly a mandatory subject of bargaining, and partial plant shutdown, apparently permissive. The basic premise is that subcontracting is to be resolved at the bargaining table. \textit{See} Gould, \textit{supra} note 6, at 62-63.
\end{itemize}
\end{footnotesize}
identify mandatory bargaining subjects under section 8(d) of the NLRA, suggesting a three-part categorization of management decisions which would trigger an obligation to bargain.\textsuperscript{46} In the first category, decisions mandate bargaining when they directly concern "physical dimensions of [the] working environment."\textsuperscript{47} The second category includes decisions with marginal or indirect impact on the employees. These do not mandate bargaining. The third category includes management decisions which directly affect employees by eliminating jobs but which also involve the "core of entrepreneurial control,"\textsuperscript{48} and therefore cannot be mandatory subjects of bargaining. Justice Stewart's \textit{Fibreboard} concurrence provides a standard by which the plant relocation issue can be analyzed.

\textbf{First National Maintenance Corp. v. NLRB}

Since \textit{Fibreboard}, courts have looked to Justice Stewart's proposed categorization for guidance. In \textit{First National Maintenance Corp. v. NLRB},\textsuperscript{49} the Court adopted Justice Stewart's three-part management decision scheme. \textit{First National Maintenance} involved an employer's duty to bargain over a decision to close part of his business. The Court placed this management decision in Justice Stewart's third category, concluding that it involved "the core of entrepreneurial control."\textsuperscript{50}

Nevertheless, the Court expanded Justice Stewart's guidelines by adding a balancing test to determine the extent of an employer's duty to bargain. According to this test, an employer is compelled to bargain over management decisions which have a substantial impact on continued availability of employment only if the benefit to labor-management relations outweighs the burden placed on business operations. Applying this balancing test, the Court determined that the employer's need to shut down part of a plant for economic reasons outweighed any benefit gained by union participation in the decision. Therefore, in this case, no bargaining was required regarding the partial closure decision.\textsuperscript{51}

\begin{itemize}
  \item \textsuperscript{46} Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203, 222 (1964) (Stewart, J., concurring); see also Gould, supra note 6, at 62.
  \item \textsuperscript{47} Fibreboard, 379 U.S. at 222.
  \item \textsuperscript{48} Id. at 223. Decisions in the last category include production decisions, capital investment decisions, and decisions regarding changes in the scope of the employer's operations. Id. at 225. Justice Stewart indicated that these decisions do not involve employment conditions even though they could result in the termination of an employee's job. Therefore, he concluded that decisions "fundamental to the basic direction of a corporate enterprise" are not mandatory subjects of bargaining under sections 8(a)(5) or 8(d). Id.
  \item \textsuperscript{49} 452 U.S. 666 (1981).
  \item \textsuperscript{50} Id. at 676.
  \item \textsuperscript{51} Id. at 686. The decision left undisturbed the long-settled obligation to bargain over the effects of a shutdown. E.g., Textile Workers Union v. Darlington Mfg. Co., 380 U.S. 263 (1965).
\end{itemize}
First National Maintenance reversed a lower court ruling which created a presumption that partial plant closings involved a mandatory duty to bargain decision. Several circuits had found that partial closures were within the exclusive realm of entrepreneurial decisionmaking, creating no bargaining obligation. The Second and Third Circuits, however, created managerial limitations on partial closings. These courts enforced a rebuttable presumption that such a closure demanded bargaining. The presumption that the plant closure decision was a mandatory subject of bargaining could be overcome by showing that the employer’s interests outweighed that of the union.

The Supreme Court rejected this analysis of favoring a presumptive mandatory bargaining obligation; expressing concern that the test was imprecise and would expose the employer unnecessarily to back pay liability. The Court asserted that the intent of the NLRA was not furthered by presuming mandatory bargaining. The First National Maintenance balancing test gives sufficient priority to the employer’s need to exercise unencumbered decisionmaking in the management of his business, while at the same time, affording worker protection.

The Court concluded that a decision to close down part of a business was not covered under the section 8(d) “other terms and conditions of employment phrase.” However, the Court restricted this holding to economically motivated partial closures and carefully expressed no view regarding application to plant relocations.

52. Id. at 687; see also R. Feldaker, supra note 21, at 190-91. It has long been settled that an employer must bargain with employees as to how closure will be effected and how benefits or severance will be handled. The controversy is over whether labor has a statutorily guaranteed right to bargain over the decision to relocate.


54. ABC Trans-National Transp., Inc. v. NLRB, 642 F.2d 675 (2d Cir. 1981); Equitable Gas v. NLRB, 637 F.2d 980 (3d Cir. 1981); Electrical Prod. Div. of Midland Ross Corp. v. NLRB, 617 F.2d 977 (3d Cir.), cert. denied, 449 U.S. 871 (1980); Brockway Motor Trucks, Div. of Mack Trucks, Inc. v. NLRB, 582 F.2d 720 (3d Cir. 1978).

55. See First Nat’l Maintenance, 452 U.S. at 671.

56. Id. at 684.

57. Id. at 686.

58. Id. at n.22. First National Maintenance defers greatly to management needs.

The Court noted:

[M]anagement may have great need for speed, flexibility, and secrecy in meeting business opportunities and exigencies. It may face significant tax or securi-
NLRB Response

The NLRB, relying on the narrowness of the First National Maintenance holding, tended to mandate bargaining of plant relocation decisions regardless of the employer's motivation. However, in Otis Elevator II, the NLRB attempted to apply the First National Maintenance balancing test. Otis Elevator II involved a management decision to consolidate facilities which were inefficient due to duplicative work and outmoded technology. On remand, the Board acknowledged that the First National Maintenance balancing test applied to facts such as those found in Otis. The Board simply reasoned that as long as management's decision did not consider labor costs, NLRA section 8(d) did not apply, and the decision did not require mandatory bargaining.

THE Milwaukee Spring DECISIONS

The principles relating to decision bargaining with respect to plant relocation were once again argued and reviewed in the Milwaukee Spring decisions. The case, reviewed twice by the NLRB and once by the District of Columbia Court of Appeals, scrutinized the issue from several perspectives. Each hearing emphasized different philosophies and approaches. All, however, preferred contract clause analysis, and in dealing with decision bargaining, avoided the more difficult and subjective test enunciated in First National Maintenance.

In January 1982, the Illinois Coil Spring Company asked the United Auto Workers to forego a scheduled pay raise for the Milwaukee Spring workers. Consequences that hinge on confidentiality, the timing of a plant closing, or a reorganization of the corporate structure. The publicity incident to the normal process of bargaining may injure the possibility of a successful transition or increase the economic damage to the business. The employer may also have no feasible alternative to the closing, and even good faith bargaining over it may be both futile and cause the employer additional loss.

Id. at 682-83.

59. Glenn, supra note 11, at 681-82.


61. Id. at 893. This seems to substitute an "either-or" approach not entirely consistent with the full balancing test seemingly required by First National Maintenance. Moreover, Board members did not attempt to define all the balancing elements and apply them to the facts of the case. Glenn, supra note 11, at 691.


63. The Illinois Coil Spring Company included three divisions: Holly Spring, McHenry Spring and Milwaukee Spring. The Milwaukee Spring workers were represented by the International Union, the United Automobile, Aerospace, and Agricultural Implement Workers of America (United Auto Workers) and its Local 524. The employer and the union had enjoyed a 20 year bargaining history; the most recent of several collective bargaining agreements was to cover April 1980 through March 1983. Milwaukee Spring I, 265 N.L.R.B. 206 (1982).
waukegan employees and grant other contract concessions. In March 1982, after the loss of a major contract and suffering from other economic setbacks, the company proposed relocating its assembly operation to the nonunionized McHenry Spring facility. The labor costs at McHenry were substantially lower. No dispute ever existed as to the employer’s motivation in considering relocation: the decision was due solely to the higher labor costs at the unionized facility. The decision was economically motivated and without anti-union animus. The employer did not contend that it was unable to pay the contractual wage rates; rather, it was concerned with an inadequate return on its investment. After discussion, the union membership rejected any further consideration of labor contract con-

Id. at 207.

65. Illinois Coil Spring had lost a major contract with Fisher Body which resulted in a $2000 per month revenue decline. An employer who thus urges economic necessity for midterm wage and benefit concessions may trigger a section 8(a)(5) duty to substantiate its claims by offering verifying records. See NLRB v. Truitt Manufacturing Co., 351 U.S. 149 (1956), in which the court held:

Good faith bargaining 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.

Id. at 152-53. In practice, knowledgeable negotiators avoid triggering the Truitt duty to disclose financial records.

66. Approximately 35 of the 95 unionized employees worked in the Milwaukee Spring assembly operation. The McHenry facility was not unionized, and the pay at that facility was substantially lower. The McHenry wage was $4.50; the fringe benefit was $1.35 ($5.85 total). The Milwaukee Spring wage was $8.00; the fringe benefit was $2.00 ($10.00 total). Milwaukee Spring I, 265 N.L.R.B. at 207.

67. It is well-settled that a decision motivated by anti-union animus violates NLRA section 8(a)(3). Anti-union animus is defined as anti-union interest. Only if an employer decides to close his entire business permanently will his anti-union motivation be irrelevant. See Textile Workers Union v. Darlington Mfg. Co., 380 U.S. 263 (1965).

68. Employers have always been held to have the right to make certain managerial decisions unilaterally. The decision to close a business belongs to the owner; the free-market system does not allow forcing a business person to remain open when the owner wishes, for whatever reason, to permanently close. Id.

69. The company informed the United Auto Workers that further concessions were needed to keep the molding operations economically viable. The employer expressed continued willingness to discuss assembly relocation alternatives. The union voted against accepting a revised wage scale which was identical to the much lower McHenry wage and benefit structure (a pay reduction of over 40 percent), but indicated a willingness to continue discussions.

Two days later, the company presented the union with a comprehensive proposal entitled “Terms Upon Which Milwaukee Assembly Operations Will be Retained In Milwaukee.” The union and the company discussed the proposal item-by-item. When the union asked if this was the employer’s final offer, the company replied that these proposals came close to the lowest levels that it would accept, but that this would not foreclose further bargaining with the union. Milwaukee Spring I, 265 N.L.R.B. at 206-07.
Milwaukee Spring I

_Milwaukee Spring I_ arose when the United Auto Workers filed an unfair labor practice charge against the Milwaukee Spring Division of the Illinois Coil Spring Company (Milwaukee Spring), charging them with violating sections 8(d) and 8(a)(1), (3) and (5). The case was submitted to the Board on stipulated facts, and the Board majority treated the parties' stipulation as proof that the plant relocation decision was a mandatory subject. The Board held that based upon the company's behavior, it had a duty to bargain. Such a duty could arise only if the subject was mandatory. Using this circular reasoning, the Board found the test enunciated in _First National Maintenance_ inapplicable, concluding that the issue of mandatory-ness had already been decided.\(^7\)

The NLRB in _Milwaukee Spring I_ focused instead on the requirements which attend midterm modifications. The collective bargaining agreement at issue in _Milwaukee Spring I_ contained both a recognition clause\(^3\) and a management rights clause.\(^4\) In construing these clauses, the Board followed the logic of the _Los Angeles Marine\(^5\) case, an earlier decision of the Board. In that case, an employer relocated a portion of its business during the pendency of a collective bargaining agreement. The Board found that despite legitimate employer financial problems, the relocation, absent union consent, was in violation of sections 8(d), and 8(a)(1) and (5). The desire to obtain economic relief from a collective bargaining agreement was not excused by either subjective good faith or by economic ne-

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\(^7\) Subsequently, the employer announced plans to relocate its assembly operation from Milwaukee Spring to the McHenry plant.\(^1\)

\(^1\) _Id. at 207._

\(^2\) _Id._

\(^3\) _Id._ at 210.

\(^4\) A recognition clause is a standard part of a formalized collective bargaining agreement and identifies the bargaining union, and the contract's coverage of specified employee jobs. Some Boards or courts have found this liberal reading "seriously impinges upon the fundamental rights of management and requires reversal." _See University of Chicago v. NLRB_, 514 F.2d 942, 944 (7th Cir. 1975). Disagreeing with the _Milwaukee Spring_ I Board, the Board in _Milwaukee Spring II_ declined to read jurisdictional rights into the clause.

\(^5\) An employer will bargain vigorously for a management rights clause. This clause, depending on its scope, may give the employer almost unlimited ability to make changes. Since it has been bargained for, a court which closely heeds its express language will determine the union has conceded employer authority to make decisions or changes. The management rights clause in the _Milwaukee Spring_ case was very extensive, as emphasized by the Court of Appeals for the District of Columbia Circuit.

\(^6\) _Los Angeles Marine Hardware Co._, 235 N.L.R.B. 720 (1978), enforced, 602 F.2d 1302 (9th Cir. 1979).
cessity.\textsuperscript{76} Thus, the \textit{Milwaukee Spring I} Board adopted the following \textit{Los Angeles Marine} standard. Even though there was: 1) a proven economic problem; 2) no anti-union animus; and 3) the company had bargained over the decision and stood willing to bargain over the effects, a move based solely on economic relief which modified an existing collective bargaining agreement would violate the Act unless the Union had waived its statutory right to object to the modification.\textsuperscript{77}

The Board then looked to the various clauses in the collective bargaining agreement to find the union consent or waiver necessary to justify their midterm relocation decision.\textsuperscript{78} Citing \textit{Los Angeles Marine}, the Board dismissed Milwaukee Spring's contention that the contract's preamble\textsuperscript{79} or anything else in the agreement constituted a clear and unequivocal union waiver of its right to object to a midterm contract modification.\textsuperscript{80} The Board next examined the management rights clause and determined that since it did not expressly grant the employer relocation rights, the clause did not adequately provide for union consent.\textsuperscript{81}

The Board was unable to find consent or union waiver based on the collective bargaining agreement or in the Union's agreement to meet with the employer over the relocation.\textsuperscript{82} The Board ordered the Illinois Spring Coil Company to rescind its relocation decision and to restore the \textit{status quo ante} by restoring any lost jobs to the Milwaukee facility. Further, the Board ordered the company to reinstate with back pay any employee laid off by reason of the proscribed

\begin{itemize}
\item \textsuperscript{76} Id. at 735.
\item \textsuperscript{77} \textit{Milwaukee Spring I}, 265 N.L.R.B. at 209; see also \textit{Los Angeles Marine}, 235 N.L.R.B. at 735.
\item \textsuperscript{78} \textit{Milwaukee Spring I}, 265 N.L.R.B. at 209; see also Irving, \textit{Plant Relocations and Transfers of Work: The NLRB's 'Inherently Destructive' Approach}, 34 \textit{LAB. L.J.} 549 (1983) (a pro-management discussion of the use of both the waiver and inherently destructive doctrines).
\item \textsuperscript{79} The company argued that the preamble of the collective bargaining agreement and the management rights clause waived any right the union had to object to the transfer. The Board disagreed, asserting that the collective bargaining agreement did not clearly and unequivocally waive the union's statutory right to object to the company's action. \textit{Milwaukee Spring I}, 265 N.L.R.B. at 209-10.
\item \textsuperscript{80} Id.
\item \textsuperscript{81} Id.
\item \textsuperscript{82} The Board was unwilling to read into the recognition clause anything other than an intent to describe the physical plant location at the time the agreement was negotiated. \textit{Id.; accord} NLRB v. Marine Optical Inc., 671 F.2d 11, 16 (1st Cir. 1982); see also University of Chicago v. NLRB, 514 F.2d 942, 944 (7th Cir. 1975). Nor did they interpret the recognition clause as limiting the application of the agreement to that location. \textit{Milwaukee Spring I}, 265 N.L.R.B. at 209 n.4.
\end{itemize}
Based on this ruling, it appeared that plant relocation would be a mandatory subject of bargaining in future disputes.

Milwaukee Spring II

In *Milwaukee Spring II*, the Board reversed itself and dismissed the complaint against the employer. As in *Milwaukee Spring I*, the Milwaukee Spring II Board did not apply the Supreme Court test enunciated in *First National Maintenance*. By avoiding the *First National Maintenance* test, the Board did not have to apply the various balancing factors to determine if the relocation decision required mandatory bargaining.

The Milwaukee Spring II Board dismissed any further inquiry into mandatory bargaining requirements, focusing instead on contract principles. It reasoned that the result in *Milwaukee Spring I* must have been due to a specific contractual provision which had been violated by the company relocation. Since the specific term was not identified in the earlier ruling, the Board undertook an independent review of the collective bargaining agreement to search for such a provision. The Board was unable to find a provision in the contract which it felt had been violated.

The Board noted that parties often negotiate for specific contractual language which will govern work relocation, subcontracting, and work preservation. Absent a finding that the parties negotiated

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83. *Milwaukee Spring I*, 265 N.L.R.B. at 210-11. The back pay remedy attempts to make employees whole for any loss subscribable to an employer's unfair labor practice by paying them an amount equal to the amount that they would have earned from the date of the layoff to the date of the employer's recall, less net earnings, but with interest. See *F.W. Woolworth Co.*, 90 N.L.R.B. 289 (1950); *Florida Steel Corp.*, 231 N.L.R.B. 651 (1977). See generally *ISIS Plumbing & Heating Co.*, 138 N.L.R.B. 716 (1962). As for reinstatement, if the former positions no longer exist, the employees are entitled to substantially equivalent positions, without prejudice to their seniority and other privileges. *Id.* at 211.


85. *Id.*

86. *See Milwaukee Spring II*, 268 N.L.R.B. at 601 n.5.


89. *Id.* The Milwaukee Spring II Board rejected the union argument that the wage and benefit provision had been modified, reasoning that the clause only represented an agreement to compensate the employees at a given rate. In his dissent, Member Zimmerman found this reasoning "disingenuous" since there would be no employees left to receive wages. *Milwaukee Spring II*, 268 N.L.R.B. at 611 (Zimmerman, dissenting). The Board also rejected any reading of either the recognition clause or the wage and benefit clause as guaranteeing work preservation.

The Board expressly recognized that parties could draft work preservation clauses and that such clauses were commonplace in collective bargaining agreements. *Id.* at 602. However, the Board contended that to imply such clauses would be "revolutionary" and would come as a surprise to those parties who had previously felt the need to bargain for or against their explicit inclusion. *Id.* at 604 n.13.

90. In so holding, the Board overruled its prior holdings in *Boeing Co.*, 230
those protections, the Board contended that Milwaukee Spring I was a radical departure from traditional collective bargaining and disagreed with General Counsel's oral argument that the previous result was consistent with the course and history of collective bargaining.\(^9\)

The Board cited the standard enunciated by the reviewing appeals court in University of Chicago,\(^9\) which permits an employer to transfer work out of a bargaining unit if the employer bargains in good faith to impasse and is not motivated by anti-union animus. The Board concluded that Milwaukee Spring I had the effect of adding terms to the collective bargaining agreement which the parties had never agreed upon, and believed its decision to reverse Milwaukee Spring I and to follow the University of Chicago standard fostered a more open and vigorous collective bargaining process.\(^9\)

The lone dissenter, former President Carter appointee Zimmerman, focused upon whether the relocation decision was a mandatory subject for bargaining. He concluded that absent consent, relocation during a collective bargaining term violated NLRA section 8(d).\(^9\)

Zimmerman utilized a two-step analysis which he concluded was necessary for the resolution of any plant relocation case. First, the threshold decision was whether relocation was a mandatory subject of bargaining.\(^9\) Second, it is necessary to decide if section 8(d) allowed an employer to relocate after a midterm bargaining impasse. Applying at least part of the First National Maintenance test eschewed by the majority, Zimmerman found relocation to be "amenable" to resolution through bargaining and thus mandatory.\(^9\)

Zimmerman stressed that he would restrict section 8(d) violations involving mandatory subjects to instances where evasion of a contract term is the sole or predominant employer motivation.\(^9\) The facts underlying the Milwaukee Spring dispute fit squarely within this prohibited category. Zimmerman found the employer's motivation due solely to a desire to acquire a better financial return by substituting cheaper nonunion labor for the higher union wage rates

\(^9\) N.L.R.B. 696 (1977), enforcement denied, 581 F.2d 793 (9th Cir. 1978); University of Chicago, 210 N.L.R.B. 190 (1974), enforcement denied, 514 F.2d 942 (7th Cir. 1975).

\(^9\) Milwaukee Spring II, 268 N.L.R.B. at 603.


\(^9\) Milwaukee Spring II, 268 N.L.R.B. at 604.

\(^9\) Id. at 612.

\(^9\) Id. at 605.

\(^9\) Id. at 608.

\(^9\) Id. at 605.

\(^9\) Id. at 605.
to which the employer was contractually bound.\textsuperscript{98} Zimmerman found the employer had derogated his bargaining obligation, thereby violating section 8(d) because the employer was economically motivated and had acted to avoid a contractual term.

Zimmerman concluded that the Milwaukee Spring I approach and his dissent were closer to NLRA intent, disagreeing that this result would encourage employer deception. Rather, he emphasized the strong incentive to avoid industrial disruption through meaningful bargaining.

Milwaukee Spring III

The approach of the Court of Appeals for the District of Columbia Circuit was markedly different from the two earlier decisions. In Milwaukee Spring III,\textsuperscript{99} Judge Harry T. Edwards, a recognized labor expert, employed a combination of strict contract construction and duty to bargain principles and concluded that Milwaukee Spring had a contractual right to relocate, either because of an extensive bargained for management rights clause or because such rights can be inferred from the management reserved rights theory.\textsuperscript{100} Therefore, he concluded Milwaukee Spring had not violated section 8(d).\textsuperscript{101}

Judge Edwards first surveyed general duty to bargain principles. Labor and management generally have a continuing duty to bargain over mandatory subjects even after reaching a collective bargaining agreement. However, the bargaining duty's scope varies depending on whether or not the subject is "contained in" the contract.\textsuperscript{102} If a mandatory subject is "contained in" the contract, either through express reference (for example, a wage provision) or a general waiver of the duty to bargain (for example, a zipper clause), the employer's actions are considerably restrained by section 8(d) requirements. Neither party can require the other to bargain and unilateral change

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\textsuperscript{98} Id. at 611.

\textsuperscript{99} United Auto Workers v. NLRB (Milwaukee Spring, intervenor), 765 F.2d 175 (D.C. Cir. 1985) [hereinafter Milwaukee Spring III]. Judge Edwards, author of the opinion has written a text and numerous articles concerning arbitration and its advantages over the NLRB and court proceedings. See, e.g., Edwards, Deferral to Arbitration and Waiver of Duty to Bargain: A Possible Way Out of Everlasting Confusion at the NLRB, 46 Ohio St. L.J. 23 (1985). Arbitration is the highly favored method of resolving industrial disputes. Among its praiseworthy attributes are relative speed, lack of expense and almost total freedom from judicial review.

\textsuperscript{100} The court identified the reserved management rights theory as the "commonly endorsed theory of labor relations [holding] that management retains all rights preexisting the contract that the union does not expressly extract from management in a specific clause." The court expressed no view as to the legitimacy of this theory. Milwaukee Spring III, 765 F.2d at 182 n.29.

\textsuperscript{101} Id. at 183.

\textsuperscript{102} Id. at 179.
is forbidden, even after impasse.\footnote{103} Because the Milwaukee Spring contract contained a zipper clause,\footnote{104} Edwards assumed all the subjects, even those never contemplated nor discussed, were “contained in” the contract and subject to the section 8(d) requirements. Thus, no bargaining was required and unilateral action would be prohibited, even after impasse.

However, the contract contained another clause which changed the outcome. The company bargained for an extensive management rights clause.\footnote{105} Milwaukee Spring contended that the union, in agreeing to the clause, “unequivocally waived” their bargaining right as to relocation.

The union did not contest this interpretation on appeal nor did they urge that the company violated the zipper clause by taking unilateral action. Therefore, the court concluded that the union had made a “tacit concession”\footnote{106} that the company had a contractual right to relocate.

Because no impermissible modification of a contract term had occurred and no anti-union animus existed, section 8(d) had not been violated. The court rejected any notion that an aggregate of complaints (midterm concessions and the relocation decision) are any more violative of section 8(d) than any one complaint alone.\footnote{107} Also, the court rejected the idea that “economic pressure” is violative of 8(d).

The court concluded with the idea that the common practice of offering to exchange an existing contract right for midterm modifica-\footnote{108} have not been given great effect in past NLRB decisions; however, the NLRB has announced that it does intend to give more weight to zipper clauses and to management rights clauses in the future.

\begin{enumerate}
\item The management rights clause reads as follows:
  \begin{quote}
  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.
  \end{quote}
\end{enumerate}

\footnote{103} Id. at 180.
\footnote{104} Id. at 182. Zipper clauses have not been given great effect in past NLRB decisions; however, the NLRB has announced that it does intend to give more weight to zipper clauses and to management rights clauses in the future.
\footnote{105} The management rights clause reads as follows:
\footnote{106} Milwaukee Spring III, 765 F.2d at 182 n.24.
\footnote{107} Id. at 182.
tion promotes freedom and flexibility in labor relations.  

PROSPECTS FOR THE FUTURE

The Milwaukee Spring cases simply do not resolve the plant relocation issue. Milwaukee Spring III specifically avoided the issue of whether plant relocation is a mandatory subject of bargaining. Because the parties had failed to avail themselves of their arbitration remedies, the court concluded its role was limited to a strict reading of the contract clauses as expressed in the collective bargaining agreement. The Milwaukee Spring III court did not imply rights into existing clauses, as had the Milwaukee Spring I Board, but it did give effect to management rights and zipper clauses which earlier rulings had ignored as boilerplate.

The court, besides relying heavily on these clauses, equated the union's silence about the employer's management rights clause as both a waiver of a “mandatory” bargaining subject and an acceptance of an implied right under the contract. It is unlikely that a labor decision not to respond to an opponent's “unequivocal waiver” argument means they have agreed that the company has a contractual right to relocate. In addition, zipper clauses might be said to operate against waiver since they mean the parties are under no further bargaining obligation. The court's approach can be seen as encouraging the constant flux rejected in Taft-Hartley. Giving so much effect to these types of contract clauses does not seem to effectuate the substantive heart of a collective bargaining agreement. Overemphasis on a management rights theory can be used to severely restrict labor's rights, particularly if tied to a zipper clause. Conversely, the labeling of a seemingly legal practice as “inherently destructive,” or a staunch unwillingness to find waiver, may place too onerous a burden on the employer.

Generally, the Board and courts should not interfere in the substance of collective bargaining agreements. Reviewing authorities may, however, intervene when the entire bargaining process is being undermined as it surely is in the case of plant relocations.

The analysis of the mandatory and permissive dichotomy entails a wide range of approaches, almost all of which were used or mentioned in the Milwaukee Spring cases. Although reaching different

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108. Id. at 184.
109. This contractual approach has been criticized as undermining the prong of the NLRA which seeks to halt continuous bargaining. The critics contend that an employer may not use work relocation as an economic weapon in mid-contract because it encourages the constant negotiations which so troubled the drafters of the 1947 Taft-Hartley Amendments. See, e.g., Glenn, supra note 11, at 668.
110. Milwaukee Spring III, 765 F.2d at 182.
111. See supra notes 11-17 and accompanying text.
112. See Milwaukee Spring I, 265 N.L.R.B. at 208.
conclusions, the hearing bodies had the same goals: to remain true to the intent of the NLRA and to stimulate a healthy and thriving labor policy. The oft repeated purpose of the NLRA is to promote industrial peace; negotiation of the collective bargaining agreement achieves this purpose.

Conceptually, plant relocation might certainly be a term or condition of employment “by virtue of its impact on employment.” The record proves otherwise. Scrutiny of legislative intent as well as recent NLRB and court rulings, particularly the recent Supreme Court First National Maintenance decision overturning a more inclusive approach, suggests that plant relocation will not be designated a per se mandatory bargaining subject. In fact, this rigid delineation is unnecessary in light of the First National Maintenance decision itself. The test adopted by the Court balances a number of factors even as the parties balance their own strengths and weaknesses. The test effectuates legislative intent because it attempts to preserve the essence of the parties’ own agreement.

When the Second and Third Circuits began to create managerial limitations, the Supreme Court rejected this approach, finding it did not further the intent of the NLRA, and reemphasized the importance of managerial autonomy. The Court emphasized management’s need for speed, flexibility, and secrecy. In First National Maintenance, the Court crafted a benefit-burden test which requires the weighing of various factors on a case-by-case basis. However, its stated scope was narrow, leaving open many other types of possible mandatory decisions, including plant relocation.

A logical approach in determining whether bargaining is mandated is to apply the First National Maintenance balancing test on a case-by-case basis. The Board has not been anxious to use this test and, in fact, ignored it until Otis Elevator II.

Criticism of the First National Maintenance test revolves around the mutability of the factors. A simple definitive test to identify mandatoriness is unlikely because the implicated disputes take place in such a fluid arena. In fact, the Court eschews rigid doctrine which mandates application across all industries, preferring that individual industry custom control. The test factors are grounded in the real-

113. See supra notes 13-19 and accompanying text.
114. Id.
115. Id.
116. Id.
118. First Nat'l Maintenance Corp. v. NLRB, 452 U.S. 666, 674-75 (1981). This
ity of the labor-employer relationship. The existence of multiple, mutable factors gives the Board or court a generous measure of flexibility.

The negotiation of a collective bargaining agreement is a tough process, reflecting the underlying labor-management relationship. Boards or courts intervene only when tactics and practices threaten to destroy the very fabric of the statutorily enforced procedures. "Fairness" is not measured against a result which might make both parties feel protected, but rather is achieved by allowing any result the parties can implement or impose within certain legal parameters. The NLRA foresees that parties will negotiate on any subject they wish to gain protection for, but is adamant that neither party must agree or concede.119 This negotiating process operates squarely within the context of economic realities.

The original approach taken by Congress was to recognize the dynamic tension and forego delineation of iron-clad rules.120 Apart from the basic structure, a per se approach to the plant relocation issue is inconsistent with the fluid, ever-changing collective bargaining process. The labor-management relationship reflects general economic trends. The "balance" has swung any number of times from management to labor and back again. Nonetheless, it has proven difficult for the various reviewing bodies to restrict their scrutiny to the procedure and refrain from influencing substantive matters, even though there is no dispute that statutorily these matters of substance belong exclusively to the bargaining parties.121

Current decisions and the makeup of the NLRB strongly suggest that it is unlikely that plant relocation will be assumed to require mandatory decisional bargaining. The stated philosophy will be to leave the greatest discretion to the parties, so long as no anti-union animus is apparent.122 However, courts should confront the plant relocation issue directly, and should apply the First National Maintenance balancing test. Outcomes will not be absolutely predictable. This very uncertainty may counsel against adjudication and force

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120. Recent efforts failed to pass an AFL-CIO backed bill which would have required employers to give workers a 90-day notice before relocating a plant. The bill, strongly opposed by business groups was defeated by the House of Representatives in a 208-203 vote. The San Diego Tribune, Nov. 22, 1985, § AA at 1, col. 4.
these issues into the preferred industrial courtroom of arbitration. The parties may find better incentives to clearly define their own bargaining topics. This result mirrors the intent of the NLRA, which encourages parties to arrive at their own agreements. The refusal to delineate rigid categories of topics, some as mandatory, some as permissive, furthers the statutory intent. The sometimes conflicting purposes of the NLRA coalesce, and the collective bargaining process is enhanced through an insistence that parties make their own agreements, influenced by the power and ability which each possesses at that moment.

CONCLUSION

The legislative history of mandatory bargaining subjects reflects that Congress always intended that, within each industry, the parties would create their own guidelines in determining which subjects mandated bargaining. The Supreme Court, in First National Maintenance, announced a test which the Board and courts should adopt to determine whether plant relocation is a mandatory subject of bargaining on a case-by-case basis. The Milwaukee Spring trilogy illustrates that the Board and the courts have been reluctant to use the First National Maintenance test, apparently believing that contract interpretation overrides the need to determine whether or not a plant relocation is a mandatory subject of bargaining. Nevertheless, the consistent use of the flexible First National Maintenance test as a threshold analysis would achieve consistency, avoid needless litigation, and more fully inform parties as to the extent of their bargaining obligations as case law develops. The benefits-burden test might also curb the tendency of Board rulings to reflect current political trends rather than stable labor principles. As long as the Board or courts apply any one of a number of approaches, which often start at different analytical levels and may be grounded on different assumptions, confusion will continue. The real loser in this dilemma is the continued vitality of the labor-management relationship. The relationship is constantly changing. The participants deserve a foundation of logical and consistent rulings so that they can predict and fulfill bargaining responsibilities.

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123. See generally Edwards, supra note 99.