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First National Maintenance Corp. V. Nlrb: The Supreme Court Narrows Employers' Section 8(A)(5) Duty To Bargain

FIRST NATIONAL MAINTENANCE CORP. V. NLRB: THE SUPREME COURT NARROWS EMPLOYERS' SECTION 8(a)(5) DUTY TO BARGAIN

The aim of the National Labor Relations Act (NLRA), as amended,[1] is to promote industrial peace by encouraging labor and management to resolve disputes through the process of collective bargaining.[2] Congress intended the bargaining requirements of the NLRA to allow meaningful discussion of issues vital to both labor and management by providing labor and management with comparable bargaining strength.[3] Section 8(a)(5) of the NLRA[4] requires employers to bargin in good faith over decisions concerning matters set out in section 8(d) of the NLRA.[5] The man-

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[1] 29 U.S.C. §§ 151-159 (1976). *See generally* Smith, *The Evolution of the "Duty to Bargain" Concept in American Law*, 39 MICH. L. REV. 1065 (1941) (discussion of historical background of the National Labor Relations Act (NLRA)).

[2] Boys Mkts., Inc. v. Retail Clerks Union, 398 U.S. 235, 251 (1970); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 45 (1937); Declaration of Policy, 29 U.S.C. § 151 (1976); Magruder, *A Half Century of Legal Influence Upon the Development of Collective Bargaining*, 50 HARV. L. REV. 1071, 1091 (1937) [hereinafter cited as Magruder]. Section 8(d) of the NLRA defines collective bargaining as "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 . . ." 29 U.S.C. § 158(d) (1976). Under § 8(d), therefore, collective bargaining occurs when an employer bargains with all of its employees by bargaining with the representative of the employees. *See* Cox, *The Duty to Bargain in Good Faith*, 71 HARV. L. REV. 1401, 1402-03 (1958) [hereinafter cited as Cox]. Congress enacted the NLRA's collective bargaining provisions in order to allow employee participation in decisions affecting the employment relationship. Cox, *supra*, at 1407. Employee participation through bargaining is necessary to give value to the right of employees to organize. Magruder, *supra*, at 1102. Once the duty to bargain collectively has attached under NLRA § 8(a)(5), an employer cannot bargain with employees individually. J.I. Case Co. v. NLRB, 321 U.S. 332, 335-39 (1944); *see* 29 U.S.C. § 158(a)(5) (1976).

[3] Declaration of Policy, 29 U.S.C. § 151 (1976). In furtherance of bargaining parity, the NLRA places reciprocal restrictions and obligations upon both labor and management. *Compare* 29 U.S.C. §§ 158(a)(1)-(a)(5) (1976) (placing bargaining duties on employers) *with* 29 U.S.C. §§ 158(b)(1)-(b)(7) (1976) (placing bargaining duties on unions).

[4] 29 U.S.C. § 158(a)(5) (1976). Section 8(a)(5) provides:

> (a) It shall be an unfair labor practice for an employer—
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> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section [9(a)] . . .

[5] 29 U.S.C. § 158(d) (1976). Section 8(d) provides:

> (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 compel either party to agree to a proposal or require the making of a concession . . . (emphasis added).

The Supreme Court has defined good faith in bargaining as requiring serious intent to reach

datory subjects of bargaining under section 8(d) are "wages, hours, and other terms and conditions of employment."[6] The broad language of section 8(d), however, does not clearly define the business decisions over which management must bargain as mandatory collective bargaining subjects.[7] In *First National Maintenance Corp. v. NLRB (FNM)*,[8] the Supreme Court addressed the issue of whether sections 8(a)(5) and 8(d) of the NLRA require management to bargain collectively with the union over the employer's decision to terminate a portion of its business.[9]

In *FNM*, First National Maintenance Corporation (FNM) provided cleaning and maintenance services for commercial customers in return for a set fee plus reimbursement of labor costs.[10] In early 1977, approximately thirty-five FNM employees were performing cleaning services at the Greenpark Care Center nursing home (Greenpark).[11] In March 1977, FNM's Greenpark employees selected as their bargaining agent

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a common ground. NLRB v. Insurance Agents' Int'l Union, 361 U.S. 477, 485 (1960); *see* NLRB v. Reed & Prince Mfg. Co., 205 F.2d 131, 139 (1st Cir. 1951), *cert. denied*, 346 U.S. 887 (1953) (good faith requires employer to make reasonable effort to resolve differences with union). *See generally* Cox, *supra* note 2.

[6] NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342, 349 (1958); 29 U.S.C. § 158(d) (1976); *see* note 5 *supra*.

[7] Brockway Motor Trucks v. NLRB, 582 F.2d 720, 725 (3d Cir. 1978). The courts and the National Labor Relations Board (the Board) have determined that mandatory subjects of bargaining under § 8(d) of the NLRA include employee benefits. *See, e.g.*, American Smelting & Ref. Co. v. NLRB, 406 F.2d 552, 554-55 (9th Cir.), *cert. denied*, 395 U.S. 935 (1969) (housing); Kroger Co. v. NLRB, 401 F.2d 682, 687 (6th Cir. 1968), *cert. denied*, 395 U.S. 904 (1969) (profit sharing plans), Richfield Oil Corp. v. NLRB, 231 F.2d 717, 724 (D.C. Cir.), *cert. denied*, 351 U.S. 909 (1956) (stock purchase plans); W.W. Cross & Co. v. NLRB, 174 F.2d 875, 878 (1st Cir. 1949) (insurance plans); Inland Steel Co. v. NLRB, 170 F.2d 247, 251 (7th Cir. 1948), *cert. denied*, 336 U.S. 960 (1949) (pensions); NLRB v. J.H. Allison & Co., 165 F.2d 766, 768-69 (6th Cir.), *cert. denied*, 335 U.S. 814 (1948) (merit wage increases); Singer Mfg. Co. v. NLRB, 119 F.2d 131, 136-37 (7th Cir.), *cert. denied*, 313 U.S. 595 (1941) (bonuses); Weyerhauser Timber Co., 87 N.L.R.B. 672, 673-77, 25 L.R.R.M. 1163, 1167 (1949) (meals). The courts and the Board further have determined that matters relating to employee security are mandatory bargaining subjects. *See, e.g.*, Fibreboard Paper Prod. Corp. v. NLRB, 379 U.S. 203, 210 (1964) (contracting out); NLRB v. Houston Chapter, Assoc'd Gen. Contractors of Am., Inc., 349 F.2d 449, 451 (5th Cir. 1965) (hiring practices); Industrial Union of Marine & Shipbuilding Wkrs. v. NLRB, 320 F.2d 615, 620 (3d Cir. 1963), *cert. denied*, 375 U.S. 984 (1964) (seniority program operation); NLRB v. Century Cement Mfg. Co., 208 F.2d 84, 85-86 (2d Cir. 1953) (promotion procedures); Inland Steel Co. v. NLRB, 170 F.2d 247, 251-52 (7th Cir. 1948), *cert. denied*, 336 U.S. 960 (1949) (compulsory retirement policies); Rapid Roller Co. v. NLRB, 126 F.2d 452, 459-60 (7th Cir.), *cert. denied*, 317 U.S. 650 (1942) (employee transfer procedures); NLRB v. Westinghouse Air Brake Co., 120 F.2d 1004, 1006 (3d Cir. 1941) (layoff selection methods); Perry Rubber Co., 133 N.L.R.B. 225, 228, 48 L.R.R.M. 1630, 1631-32 (1961) (job bidding procedures).

[8] 101 S. Ct. 2573 (1981).

[9] *Id.*

[10] 101 S. Ct. at 2575. FNM's labor costs at Greenpark included gross salaries, Federal Insurance Contributions Act (FICA) and Federal Unemployment Tax Act (FUTA) taxes, and insurance. *Id.* Under the terms of the original contract of April 28, 1976, the supervisory fee was $500 per week. *Id.* The weekly fee had been reduced to $250 by mid-1977. *Id.*

[11] *Id.*

the Union of Hospital and Health Care Employees, Retail, Wholesale and Department Store Union, AFL-CIO (the Union).[12] The National Labor Relations Board (the Board) certified the election of the Union as the bargaining agent for FNM's Greenpark employees in May 1977.[13]

Prior to engaging in collective bargaining with the Union,[14] FNM asked Greenpark for a fee increase because the operation had become unprofitable.[15] Greenpark, however, rejected FNM's fee increase request.[16] In response to the rejection, FNM informed Greenpark on July 25 that FNM would cease operation at Greenpark after July 31.[17] On July 28, FNM notified its Greenpark employees that FNM had terminated the contract with Greenpark and would discharge all Greenpark employees on July 31.[18] The Union's vice president immediately informed FNM of the Union's desire to bargain with FNM over the decision to close.[19] FNM refused the Union's bargaining request, stating that the closing decision was due solely to financial difficulties and that FNM would not reverse the closing decision.[20] FNM closed the Greenpark operation and discharged the employees on July 31, 1977.[21]

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[12] *Id.* at 2575-76. A majority of the Greenpark employees in *FNM* selected the Union of Hospital and Health Care Employees, Retail, Wholesale and Department Store Employees (the Union) as their representative at a Board-conducted election. *Id.; see* J. FEERICK, H. BAER & J. AFRA, NLRB REPRESENTATION ELECTIONS—LAW PRACTICE & PROCEDURE (1980) (discussion of representation election procedures).

[13] 101 S. Ct. 2576, n.3. Under § 9 of the NLRA, the Board certifies the election of a union once a majority of voting employees in an appropriate bargaining unit has selected a particular union as the employees' bargaining representative. 29 U.S.C. § 159(c)(1) (1976). Once the Board has certified the election of a union, that union becomes the exclusive representative of the employees in the bargaining unit. 29 U.S.C. § 159(a) (1976) (§ 9(a) of NLRA).

[14] 101 S. Ct. 2576. The Union in *FNM* notified FNM in writing on July 12 that the Board had certified the Union as the employees' bargaining agent and that the Union wanted to exercise the right to bargain with FNM. *Id.* FNM did not respond. *Id.*

[15] *Id.* at 2575. The employer in *FNM* asked Greenpark to reinstate the supervisory fee to the originally contracted for rate of $500 per week. *Id.*; *see* note 10 *supra.*

[16] *See* 101 S. Ct. at 2575.

[17] *Id.*

[18] *Id.* at 2576. The *FNM* facts show that FNM did not give adequate notice to the Union of the Greenpark closing decision. *Id.*; NLRB v. First Nat'l Maintenance Corp., 627 F.2d 596, 598 (2d Cir. 1980). The NLRA requires employers to give to representative unions timely notice of decisions that result in employee discharge. Rabin, *Limitations on Employer Independent Action*, 27 VAND. L. REV. 133, 150 (1974).

[19] 101 S. Ct. at 2576.

[20] *Id.* In *FNM*, the Union's vice president spoke with FNM's secretary-treasurer, and requested a delay in the closing for bargaining purposes. *Id.* FNM refused the delay request, stating that a notice provision in the Greenpark-FNM contract made prohibitively expensive any delay beyond August 1, 1977. *Id.* The Union's vice president unsuccessfully attempted to obtain Greenpark's waiver of the notice provision. *Id.*

[21] *Id.* The facts in *FNM* indicate that FNM's hiring policy was to hire on a job-by-job basis, and not to move employees from one operation to another. *Id.* at 2575. In addition, the contract between FNM and Greenpark prohibited Greenpark from hiring FNM's employees until 90 days after the termination of the contract. *Id.* Thus, the discharged employees were ineligible for employment at either Greenpark or another FNM operation.

The Union filed an unfair labor practice charge with the Regional Office of the Board,[22] alleging that FNM's refusal to bargain over the Greenpark closing decision violated sections 8(a)(1) and 8(a)(5) of the NLRA.[23] The Regional Director issued a complaint against FNM,[24] and an administrative law judge in a subsequent hearing found in favor of the Union.[25] The administrative law judge reasoned that since an employee's discharge is a change in his conditions of employment,[26] the NLRA per se required FNM to bargain collectively over the decision to close the Greenpark operation.[27] The Board adopted the administrative law judge's findings of fact and per se rule,[28] and ordered FNM to bargain

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[22] *Id.* at 2576. Unfair labor practices consist of violations of § 8 of the NLRA. 29 U.S.C. § 158 (1976). Under § 10 of the NLRA, 29 U.S.C. § 160 (1976), Congress empowered the Board to prevent unfair labor practices affecting commerce. 29 U.S.C. § 160(a) (1976) (§ 10(a) of NLRA). The Union in *FNM* filed the unfair labor practice charge under § 10(b) of the NLRA. 101 S.Ct. at 2576; *see* 29 U.S.C. § 160(b) (1976). Any person may file an unfair labor practice charge. 29 C.F.R. § 102.9 (1980). The filing must occur within six months of the alleged unfair labor practice. 29 U.S.C. § 160(b) (1976) (§ 10(b) of NLRA). The person alleging the unfair labor practice must file the charge with the Regional Director for the region in which the unfair labor practice takes place. 29 C.F.R. § 102.10 (1980). A Regional Director is the Board-designated agent for a particular region. 29 C.F.R. § 102.5 (1980).

[23] 101 S. Ct. at 2576. Section 8(a)(1) provides:

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

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

29 U.S.C. § 158(a)(1) (1976). Actions that violate §§ 8(a)(2)-(a)(5) can derivatively violate § 8(a)(1). A. COX, D. BOK & R. GORMAN, CASES ON LABOR LAW 114 (9th ed. 1981); *see* NLRB v. Bausch & Lomb, Inc., 526 F.2d 817, 823 (2d Cir. 1975) (violation of § 8(a)(3) constitutes interference with § 7 rights and thus violates § 8(a)(1)); Allied Indus. Workers v. NLRB, 476 F.2d 868, 882 (D.C. Cir. 1973) (employer's refusal to bargain violates both § 8(a)(5) and § 8(a)(1)); NLRB V. New England Tank Indus., Inc., 302 F.2d 273, 275, 277 (1st Cir.), *cert. denied*, 371 U.S. 875 (1962) (employer's refusal to hire because of union membership violates §§ 8(a)(1) & (a)(3)); Art Metals Constr. Co. v. NLRB, 110 F.2d 148, 150 (2d Cir. 1940) (violation of § 8(a)(5) is violation of § 8(a)(1), since House and Senate Committee Reports declare that §§ 8(a)(2)-(g) were species of generic unfair labor practice of § 8(a)(1)). *But see* Overnite Transp. Co. v. NLRB, 372 F.2d 765, 769 (4th Cir.), *cert. denied*, 389 U.S. 838 (1967) (violation of § 8(a)(5) not necessarily § 8(a)(1) violation).

[24] 101 S. Ct. at 2576. Under § 10(b) of the NLRA, the Regional Director has authority to issue complaints. 29 U.S.C. § 160(b) (1976); 29 C.F.R. § 102.15 (1981). For application of the NLRA to maintenance firms, see D.A. Schulte v. Gangi, 328 U.S. 109, 117-18 (1946) (commerce clause brings maintenance firms within coverage of Fair Labor Standards Act, 29 U.S.C. §§ 201-19 (1976)).

[25] 101 S. Ct. at 2576; First Nat'l Maintenance Corp., 242 N.L.R.B. 464, 466 (1979). The Board in *FNM* noted that the administrative law judge, without setting forth conclusions, had made the necessary factual findings to conclude that § 8(a)(1) and § 8(a)(5) violations had occurred. 242 N.L.R.B. at 462 n.1.

An administrative law judge is the agent of the Board who conducts the hearing in an unfair labor practice proceeding. 29 C.F.R. § 102.6 (1981). The duties and powers of the administrative law judge are set out in 29 C.F.R. § 102.5 (1981).

[26] 242 N.L.R.B. at 465; *see* 29 U.S.C. § 158(d) (1976) (§ 8(d) of NLRA); note 5 *supra*.

[27] 242 N.L.R.B. at 465.

[28] *Id.* at 462. After a hearing upon an unfair labor practice complaint, the administrative law judge must prepare and file with the Board a written decision containing findings

with the Union and to reinstate the Greenpark operation employees with backpay.[29] The Board petitioned for enforcement of the order.[30]

The Second Circuit Court of Appeals granted the Board's petition for enforcement.[31] The appeals court, however, applied an analysis different from that of the Board.[32] The Second Circuit rejected the Board's per se rule and held that section 8(d) of the NLRA created only a presumption that all partial closings are mandatory subjects of bargaining.[33]

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of fact, reasoning, conclusions, and recommendations for disposition of the case. 29 C.F.R. § 102.45 (1981). Unless the parties file timely exceptions under 29 C.F.R. § 102.46 (1981), the administrative law judge's findings, conclusions, and recommendations automatically become those of the Board. 29 C.F.R. § 102.48(a) (1981).

[29] 242 N.L.R.B. at 462-63. The Board in *FNM* ordered FNM to compensate the discharged employees with backpay for the period beginning at the date of discharge and ending when FNM and the employees bargained to agreement, or bargained to impasse, or when the Union failed to timely request bargaining, or when the Union failed to bargain in good faith. *Id.* at 462-63. The Board ordered FNM to determine the amount of backpay due by applying the formula set forth in F.W. Woolworth Co., 90 N.L.R.B. 289, 292-93, 26 L.R.R.M. 1185, 1185-86 (1950) (backpay amount to be computed, on quarter-by-quarter basis, by subtracting net amount earned elsewhere from amount discharged employee would have earned), and the amount of interest on the backpay by applying Florida Steel Corp., 231 N.L.R.B. 651 (1977) (interest on backpay accrues from last day of each calendar quarter of backpay period, on total amount then due and showing, at then current adjusted prime interest rate). 242 N.L.R.B. at 462-63. The Board further ordered FNM, if FNM resumed operations at Greenpark, to offer to reinstate the discharged employees to their former or similar positions. *Id.* If FNM did not resume operations, the Board directed FNM to place the discharged employees on a preferential hiring list for positions at other FNM locations that were equivalent to their former positions. *Id.*

[30] *See* 29 U.S.C. § 160(e) (1976); NLRB v. First Nat'l Maintenance Corp., 627 F.2d 596, 597 n.1 (2d Cir. 1980).

[31] NLRB v. First Nat'l Maintenance Corp., 627 F.2d 596, 603 (2d Cir. 1980). Under § 10(e) of the NLRA, the Board has the power to petition for enforcement of an order any Circuit Court of Appeals in any circuit where the alleged unfair labor practice occurred or where the alleged violator resides or transacts business. 29 U.S.C. § 160(e) (1976). The Board may petition the apropriate federal court for enforcement if the alleged violator does not comply with the Board's order, or if the Board chooses to implement the order with a court decree. 29 C.F.R. § 101.14 (1981). The court then reviews the record and the NLRB's findings and order, and may enforce, modify, or set aside in whole or in part the Board's findings and order. 29 U.S.C. § 160(e) (1976) (§ 10(e) of NLRA); 29 C.F.R. § 100.14 (1981). The court alternatively may remand the case to the Board for further proceedings. 29 C.F.R. § 101.14 (1981).

[32] 627 F.2d at 598-603; 101 S. Ct. at 2577. The Supreme Court in *FNM* noted that the Second Circuit erred in upholding the Board's order without remanding for further examination of the evidence since the Second Circuit used an analysis different from that of the NLRB. 101 S. Ct. at 2577. n.6. The Court cited NLRB v. Pipefitters, 429 U.S. 507 (1977), and SEC v. Chenery Corp., 318 U.S. 80 (1943). In *Pipefitters*, the Court followed the *Chenery Corp.* rule that a court cannot uphold an administrative order on grounds different from those upon which the administrative agency acted in issuing the order. 429 U.S. at 522 n.9; 318 U.S. at 95. If the court must correct an error of law that the administrative agency has made in issuing the order, the court must remand to the agency for further findings of fact necessary for application of the law. 429 U.S. at 522 n.9; ICC v. Clyde S.S. Co., 181 U.S. 29, 32-33 (1901).

[33] 627 F.2d at 601-02. Like the Second Circuit in *FNM*, the Third Circuit in Brockway Motor Trucks v. NLRB, 582 F.2d 720, 735 (3d Cir. 1978), rejected the per se approach. In

Under the Second Circuit's presumption approach, an employer can rebut the presumption that the NLRA requires bargaining over partial closing decisions by showing that imposition of a duty to bargain would not further the purposes of the NLRA.[34] The Second Circuit stated that a bargaining requirement would further the purposes of the NLRA if bargaining over the employer's decision could reasonably be expected to modify or reverse the decision.[35] Finding that FNM had failed to rebut the presumption that the decision to close the Greenpark operation was

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Brockway, the employer, Brockway Motor Trucks (Brockway), decided to close one of its plants for reasons that Brockway claimed were purely economic. *Id.* at 722. Brockway did not notify or bargain with the employees' union concerning the decision to close. *Id.* Applying a per se rule that § 8(a)(5) requires employers to bargain over partial closing decisions, the Board found that Brockway's refusal to bargain violated § 8(a)(5). *Id.* at 724. The Third Circuit refused to adopt the Board's per se rule, and instead took a presumption approach. *Id.* at 734-35. The Third Circuit's approach sets forth the presumption that § 8(a)(5) requires employers to bargain over partial closing decisions, and establishes a balancing test of employee interests against employer interests. *Id.* For thorough analyses of the Third Circuit's *Brockway* opinion, see 47 GEO. WASH. L. REV. 679 (1979); 92 HARV. L. REV. 768 (1979); 10 RUT.-CAM. L.J. 737 (1979); 28 U. KAN. L. REV. 157 (1979).

The Second Circuit in *FNM* agreed with the *Brockway* court's presumption approach, but did not adopt the *Brockway* court's focus on the respective interests of employers and employees in bargaining as determinative of whether bargaining should take place. 627 F.2d at 601; *see* text accompanying note 34 *infra*. In adopting the presumption, the Second Circuit reasoned that a partial closing decision affects terms and conditions of employment as much as does a decision to contract out, which the Supreme Court has found to fall within the literal meaning of § 8(d). 627 F.2d at 601; *see* Fibreboard Paper Prod. Corp. v. NLRB, 379 U.S 203, 210 (1964); text accompanying notes 77-84 *infra*. The Second Circuit rejected the *Brockway* balancing test that measured employer interests against employee interests on the grounds that the aims of the statute are a more important consideration than the relative injury to the parties. 627 F.2d at 601.

[34] 627 F.2d at 601. The Second Circuit in *FNM* suggested that an employer could rebut the Second Circuit's *FNM* duty-to-bargain presumption by showing that bargaining would be futile because bargaining over a decision that union concessions would not change could not further the NLRA's purpose, that emergency financial circumstances necessitated the closing decision, that absence of contractual obligations in most bargaining agreements indicates that the custom of the industry is not to bargain over such decisions, or that forced bargaining would endanger the existence of the entire business, to the detriment of the remaining employees. *Id.* at 601-02.

[35] *Id.* at 602. The Second Circuit in *FNM* found that FNM had asserted that it was losing money at Greenpark, but that FNM had failed to show that bargaining over the closing would have been "futile and therefore nonobligatory." *Id.*; *see* note 34 *supra*. The court should have remanded the cse to the Board for further findings of fact, however, because the Second Circuit applied different reasoning to uphold the Board's order. *See* note 32 *supra*. Since the Second Circuit did not allow further Board fact finding, FNM did not have an opportunity to show that bargaining would have been futile. Additionally, the Second Circuit characterized the central issue in *FNM* as whether bargaining could reasonably be expected to modify or reverse FNM's partial closing decision. 627 F.2d at 602. Despite failure to remand for further fact finding, the Second Circuit found sufficient evidence in the record to indicate that the Union possibly could have made wage or benefit concessions that would have enabled FNM to operate profitably at Greenpark. *Id.* The Second Circuit noted that neither party had claimed, and the court did not find, that the record was sufficient to allow the court to resolve the *FNM* issue. *Id.* at 603 n.9.

a mandatory subject of bargaining, the Second Circuit granted the petition for enforcement.[36]

The Supreme Court granted certiorari in recognition of the inconsistent results among and between the Courts of Appeals and the Board on the question of whether a partial closing decision is a mandatory collective bargaining subject.[37] Holding that the *FNM* employer's decision is not a section 8(d) matter over which Congress required bargaining,[38] the Supreme Court reversed the Second Circuit and remanded the case for further consideration.[39] In reversing the Second Circuit, the *FNM* Court rejected the Second Circuit's presumption approach and set forth a balancing test for determining when a partial closing decision is a mandatory collective bargaining subject.[40] The Court focused upon the NLRA's purpose of promoting industrial peace through the process of collective bargaining between labor and management as bargaining equals.[41] Although acknowledging that a management decision which results in employee discharge has a direct impact upon the employment relationship,[42] the Court maintained that an employer must be sufficiently free from bargaining constraints to make decisions essential to running a profitable business.[43] According to the *FNM* Court's balancing test, therefore, the NLRA requires bargaining over a partial closing decision

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[36] *Id.* at 603.

[37] First Nat'l Maintenance Corp. v. NLRB, 449 U.S. 1076 (1981); 101 S. Ct. 2575, 2578 (1981); *see* note 33 *supra*. The judgment of the Second Circuit Court of Appeals is subject to Supreme Court review under § 10(e) of the NLRA. 29 U.S.C. § 160(e) (1976).

[38] 101 S. Ct. at 2584.

[39] *Id.* at 2585.

[40] *Id.* at 2581.

[41] *Id.* at 2578; *see* text accompanying notes 1-3 *supra*. The *FNM* Court stated that the purpose of characterizing a matter as a mandatory bargaining subject is to promote bargaining equality between labor and management by ensuring labor-management discussion of issues of vital importance to both parties. 101 S. Ct. at 2580. The Court reasoned that a requirement that management bargain with the union gives the union added strength to bargain as an equal with management. *Id.* The Court maintained, however, that labeling a matter as a mandatory subject would accomplish nothing unless the parties could resolve the matter through the bargaining process. *Id.*

[42] 101 S. Ct. at 2579. The *FNM* Court enumerated three categories of management decisions that have an impact on the employment relationship. The Court mentioned decisions having only an attenuated impact on the employment relationship, such as product promotion, design, and financing; decisions, such as work requirements, that have a direct impact and focus on the employment relationship; and decisions that have a direct impact on the employment relationship while focusing on a concern apart from the employment relationship. *Id.* The Court found that FNM's decision to close the Greenpark operation was a decision of the third type. *Id.*; *see* text accompanying notes 85-86 *infra*.

[43] 101 S. Ct. at 2580. The *FNM* Court noted that the NLRA's bargaining requirement does not compel an employer to capitulate to union demands. *Id.* at 4772 n.17; *see* 29 U.S.C. § 158(d) (1976) (§ 8(d) of NLRA); note 5 *supra* (neither party compelled to agree to proposals or to make concessions). The Court's sole example of constraints of bargaining was the union's possible use of power to strike after the parties reach a bargaining impasse. 101 S. Ct. at 2580 n.17.

only if the bargaining requirement furthers the aims of the NLRA more than it restricts the employer's necessary freedom to run the business.[44]

In applying the balancing test, the *FNM* Court considered the respective interests of both management and labor in bargaining over decision-making to determine whether requiring bargaining would advance the neutral purposes of the NLRA.[45] In weighing union interests, the Court acknowledged that the union has an interest in bargaining over the decision to close, since closing decisions tend to result in job termination.[46] The Court maintained, however, that a union's interest in helping union members keep jobs would compel the union to use the bargaining opportunity to stall or delay a closing even when management had no alternative to the closing.[47] The Court further determined that alternatives to mandatory bargaining adequately protect labor interests.[48] Since the NLRA requires employers to bargain over the effects on employees of a closing decision,[49] the *FNM* Court stated that unions would have a sufficient opportunity to attempt to bargain over the closing decision when exercising the right to bargain over the effects of the closing.[50] Alternatively, the Court suggested that a union could protect its interests further by securing contractual rights to bargain over closing decisions.[51] In addition, the Court observed that section 8(a)(3) of the NLRA protects unions against a partial closing motivated by anti-union sentiment by allowing the Board to investigate employer reasons for partial closings.[52] The *FNM* Court thus found that the NLRA adequately

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[44] 101 S. Ct. at 2581. The *FNM* Court's balancing test by its language applies not only to partial closing decisions, but to decisions having a substantial impact on the continued availability of employment. *Id.* The Court based the balancing test on the Court's language in Fibreboard Paper Prod. Corp. v. NLRB, 379 U.S 203 (1964). *See* text accompanying notes 77-84 *infra.*

[45] 101 S. Ct. at 2581-83; *see* text accompanying note 41 *supra.*

[46] 101 S. Ct. at 2581-82. The *FNM* Court cited Fibreboard Paper Prod. Corp. v. NLRB, 379 U.S. 203, 210 (1964), in stating that termination of employment falls within the literal meaning of § 8(d) of the NLRA. 101 S.Ct. at 2581; *see* text accompanying notes 77-84 *infra.*

[47] 101 S. Ct. at 2582-83.

[48] *Id.*; *see* text accompanying notes 49-52 *infra.*

[49] 101 S. Ct. 2580 n.15. The issue of an employer's duty to bargain over a management decision is distinct from the issue of an employer's duty to bargain over the effects on employees of the employer's decision, which is mandatory. *Id.* at 2582; Royal Typewriter Co. v. NLRB, 533 F.2d 1030, 1039 (8th Cir. 1976); Morrison Cafet. Consol., Inc. v. NLRB, 431 F.2d 254, 257 (8th Cir. 1970); NLRB v. Transmarine Corp., 380 F.2d 933, 939 (9th Cir. 1967); NLRB v. Royal Plating & Polishing Co., 350 F.2d 191, 196 (3d Cir. 1965); NLRB v. Rapid Bindery, Inc., 293 F.2d 170, 176 (2d Cir. 1961). Effects of termination typically include, *inter alia*, severance pay, vacation pay and pensions. 380 F.2d at 939.

[50] 101 S. Ct. at 2582. The Court in *FNM* maintained that the union would attempt to offer concessions, information, and alternatives to management in order to delay or prevent the closing, regardless of whether bargaining over the decision would be unlikely to augment the flow of information and suggestions. *Id.*

[51] *Id.* The *FNM* Union, however, never had an opportunity to negotiate a collective bargaining agreement. *Id.* at 2576.

[52] *Id.* at 2582. Section 8(a)(3) of the NLRA provides:

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

protects union interests without mandating bargaining over economically motivated partial closing decisions under section 8(a)(5).[53] In contrast to union interests, the *FNM* Court maintained that management self-interest would serve to compel an employer to bargain over a partial closing decision if possible union concessions would make staying open a profitable alternative.[54] In addition, the Court reasoned that business necessity or lack of a feasible alternative to closing may make imposition of a bargaining requirement unreasonable.[55]

The *FNM* Court noted a significant difference between permitting bargaining and mandating bargaining.[56] The Court reasoned that characterizing a partial closing decision as a mandatory bargaining subject would tip the balance of negotiating strength in favor of the union by giving the union a powerful and potentially harmful tool that would frustrate the equalizing purposes of the NLRA.[57] Further, the relative paucity of labor contract provisions allowing union participation in the partial closing decision-making process indicated to the *FNM* Court that a partial closing decision might not be a suitable topic for mandatory bargaining.[58]

Finally, the *FNM* Court rejected the Second Circuit's presumption approach as difficult to apply and unsuited to attaining the objectives of the NLRA.[59] The Court stated that harsh Board-imposed remedies for failure to bargain might compel employers to bargain over every closing decision, simply because management could not be certain in advance whether the circumstances surrounding the decision could overcome the

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

29 U.S.C. § 158(a)(3) (1976); *see* Textile Workers Union v. Darlington Mfg. Co., 380 U.S. 263, 275 (1965) (partial closing motivated by anti-union animus violates § 8(a)(3)).

[53] 101 S. Ct. at 2582.

[54] *Id.* The *FNM* Court noted instances of labor concessions aiding failing businesses, but pointed out that the concessions were not the result of a statutory bargaining requirement. *Id.* at 2582 n.19.

[55] *Id.* at 2583. The Court in *FNM* maintained that management may have a business need for speed, flexibility and secrecy. *Id.* The Court suggested that timing and publicity of the closing may have varied and drastic consequences for the business. *Id.*

[56] *Id.*

[57] *Id.* The *FNM* Court was concerned that the union might use the right to bargain over the closing to stall or delay the closing without regard to the cost to management and without a good faith desire to present a feasible solution. *Id.*; *see* text accompanying note 47 *supra.*

[58] 101 S. Ct. at 2583. The *FNM* Court considered the prevalence of contract clauses providing for bargaining over partial closing decisions as indicative of bargaining suitability in reliance on the language in Fibreboard Paper Prod. Corp. v. NLRB, 379 U.S. 203, 211 (1964). *See* 101 S. Ct. at 2581; text accompanying notes 77-84 *infra.*

[59] 101 S. Ct. at 2583. The *FNM* Court stated that without explanation that the Second Circuit's presumption analysis did not seem suited to promoting harmonious relations between management and labor. *Id.; see* text accompanying notes 1-3 *supra.*

mandatory bargaining presumption.[60] In addition, the Court maintained that if an employer did decide to bargain, neither the employer nor the union could be certain at what stage in the decision-making process to bargain,[61] or to what extent the parties should bargain.[62]

The *FNM* Court held that under the facts in *FNM*, economically motivated partial closing decisions are not section 8(d) terms or conditions of employment over which Congress has mandated bargaining.[673] First, the Supreme Court noted that FNM had not closed the Greenpark operation merely to replace union employees with non-union employees.[64] The Court thus maintained that economic considerations, and not anti-union sentiment, had motivated the employer's partial closing decision.[65] Second, the *FNM* Court stated that the cost of union labor did not cause FNM's financial difficulties with Greenpark.[66] According to the Court, the employer's problems with the profitability of the Greenpark operation centered on the amount of the weekly management fee, over which the Union had no control.[67] Third, the Court observed that FNM had

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[60] 101 S. Ct. at 2583. The Court in *FNM* suggested that the Board might force the employer who refused to bargain to pay large sums in backpay to employees whom the employer might have discharged in any event, or that the Board might force the employer to consider reopening a failing operation. *Id.* Section 10(c) of the NLRA gives the Board the power to issue to employers found to have committed an unfair labor practice orders requiring such employers to cease and desist from the unfair labor practice. 29 U.S.C. § 160(c) (1976). In addition, the Board has the power to take affirmative action to effectuate the policies of the NLRA. 29 U.S.C. § 160(c) (1976) (§ 10(c) of NLRA). Affirmative action may include reinstatement of employees, with or without backpay. 29 U.S.C. § 160(c) (1976). A reviewing court must uphold a Board order unless the order is shown to be an attempt to achieve ends other than those that will further the objectives of the NLRA. Virginia Elec. & Power Co. v. NLRB, 319 U.S. 533, 540 (1943).

[61] 101 S. Ct. at 2584. The Board maintains that bargaining over a decision to close should take place when the employer has begun to seriously consider closing a portion of its business. Ozark Trailers, Inc., 161 N.L.R.B. 561, 569, 63 L.R.R.M. 1264, 1269 (1966).

[62] 101 S. Ct. at 2584.

[63] *Id.* Expressly limiting the holding to the facts of the case, *see id.* at 2585, the *FNM* Court did not exclude economically motivated partial closing decisions from the coverage of § 8(d) terms and conditions of employment, but instead held that such decisions are not terms and conditions over which an employer must bargain. *See id.* at 2584.

[64] *Id.* at 2585. The *FNM* Court noted that FNM did not discharge the Greenpark employees with the intention of replacing the employees or moving the operation elsewhere. *Id.* If FNM had replaced the employees with non-union employees or had moved to a new location to avoid unionized labor, FNM would have committed an unfair labor practice under § 8(a)(3) if the replacement or move had a chilling effect on unionization. *See* note 23 *supra.*

[65] 101 S. Ct. at 2585. An anti-union partial closing violates § 8(a)(3) of the NLRA. Textile Workers Union v. Darlington Mfg. Co., 380 U.S. 263, 275 (1965); *see* note 52 *supra.*

[66] 101 S. Ct. at 2585.

[67] *Id.*; *see* text accompanying notes 10 & 15 *supra.* The *FNM* Court indicated that bargaining over an economically motivated closing decision may be futile when the cost of labor is not a cause of the economic difficulty. 101 S. Ct. at 2584. The Court maintained that the Union's lack of control over FNM's financial difficulties distinguished the *FNM* situation from that in Fibreboard Paper Prod. Corp. v. NLRB, 379 U.S. 203 (1964). *See* text accompanying notes 77-84 *infra* (contracting out work previously performed by in-house union labor,

been losing money at Greenpark before the Union became the employees' bargaining agent.[68] The closing decision, therefore, did not indicate that FNM closed the operation to avoid negotiations or terms of a collective bargaining agreement.[69] Finally, the Court stated that the Greenpark closing was a significant change in FNM's business, comparable to a complete withdrawal from business, which is not a mandatory bargaining subject.[70]

Dissenting Justices Brennan and Marshall criticized the *FNM* majority's balancing test for failing to consider union interests in addition to the interests of management.[71] The dissent further attacked the majority's application of the balancing test as purely speculative.[72] In particular, the dissent pointed out that the majority cited no support for the assertions that requiring bargaining over partial closing decisions would provide minimal benefits and would unduly frustrate the needs of management.[73] The dissent, therefore, concluded that the Supreme

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motivated by high cost of union labor, is mandatory subject of bargaining under § 8(5) of NLRA). The *FNM* Court reasoned that the *FNM* Union, unlike the *Fibreboard* union, could not have offered any concessions to management because the cost of union labor was not the cause of FNM's financial problems. 101 S. Ct. at 2585. Although the Union possibly could have accepted a lower wage rate or could have agreed to do the Greenpark work in a more cost-efficient manner, thereby lowering the cost of labor, Greenpark was obligated to pay FNM the cost of labor plus a supervisory fee. *See id.* at 2575; text accompanying note 10 *supra*; NLRB v. First Nat'l Maintenance Corp., 627 F.2d 596, 602 (2d Cir. 1980). In order for the savings in labor costs to benefit the employer, therefore, Greenpark would have had to agree to pass on the savings to FNM by continuing to pay the same weekly total rather than reducing the payment by the amount of any labor cost reduction. *See* 101 S. Ct. at 2575.

[68] 101 S. Ct. at 2585; *see* text accompanying notes 14 & 15 *supra*.

[69] 101 S. Ct. at 2585. A closing made solely to avoid ongoing negotiations or terms of a current collective bargaining agreement violates § 8(a)(5) of the NLRA. 29 U.S.C. § 158(a)(5) (1976).

[70] 101 S.Ct. at 2585. A partial closing typically is defined as a closing of one plant of a business that consists of more than one plant. *See* Textile Workers Union v. Darlington Mfg. Co., 380 U.S. 263, 275 (1965). In *Darlington*, the Supreme Court addressed the issue of whether an employer violated § 8(a)(3) by closing one of its plants in response to unionization of the employees at the plant. *Id.* at 274. In dicta, the *Darlington* Court stated that an employer does not violate the NLRA by going out of business altogether, since the NLRA only applies to active businesses. *Id.* at 268-74. The Court's language in *FNM* thus lends approval to the *Darlington* notion that bargaining is not required when an employer completely withdraws from business. In addition, the *FNM* Court found that FNM's cancellation of the Greenpark contract, although not involving significant investment or withdrawal of capital, represented a change in FNM's business that compares with going out of business entirely. 101 S. Ct. at 2585; *see* text accompanying notes 92-98 *infra*.

[71] 101 S. Ct. at 2586 (Brennan, J., dissenting). The *FNM* dissent cited the Third Circuit's balancing test in *Brockway Motor Trucks v. NLRB* as an example of a balancing test that takes into account the interests in bargaining of both labor and management. *Id.*; *see* 582 F.2d at 734-40 (employers must bargain over economically motivated partial closing decision if union interests outweigh management interests); note 33 *supra*.

[72] 101 S. Ct. at 2586. (Brennan, J., dissenting).

[73] *Id.* The *FNM* dissent further stated that the Board should determine whether a partial closing decision is a mandatory subject of bargaining. *Id.* The dissent pointed out the majority's acknowledgement that Congress deliberately left open the meaning of terms and

Court should have upheld the Court of Appeals' presumption approach while vacating the judgment and remanding to the Board for further examination of the evidence.[74]

In determining whether a particular employer decision is a mandatory subject of bargaining, the Board and the courts typically have held that a management decision having a significant impact upon the employment relationship affects terms or conditions of employment under NLRA section 8(d).[75] Nonetheless, courts often have hesitated to impose a bargaining requirement over decisions that appear to be unsuitable for the collective bargaining process, even though the decisions affect terms or conditions of employment.[76] In finding no duty to bargain over management decisions that have a significant impact upon the employment relationship, courts rely upon the Supreme Court's decision in *Fibreboard Paper Prod. Corp. v. NLRB*.[77]

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conditions of employment, reserving for the Board the authority to interpret the phrase in light of changing industrial conditions. *Id.*; *see id.* at 2579 n.14. Since existing Board decisions support the Second Circuit's presumption approach, the dissent would have upheld the Second Circuit's reasoning. *Id.* at 2587; *See* text accompanying note 74 *infra.* The *FNM* dissent cited *Ozark Trailers, Inc.*, 161 N.L.R.B. 561 (1966), as a case in which the Board has determined that an employer's decision to close a portion of its operations is a mandatory subject of bargaining under the NLRA because the decision affects terms and conditions of employment. 101 S. Ct. at 2586; *see* Virginia Elec. & Power Co. v. NLRB, 319 U.S. 533, 540 (1943) (reviewing court may not reverse Board order unless order shown not to further purposes of NLRA); note 60 *supra. But see* Ford Motor Co. v. NLRB, 441 U.S. 488, 495 (1979) (judgment of Board regarding whether topic is subject of mandatory bargaining is judicially reviewable, but courts should defer to Board if Board's construction of NLRA reasonably defensible).

[74] 101 S. Ct. at 2587 (Brennan, J., dissenting).

[75] *See* NLRB v. Ladish Co., 538 F.2d 1267, 1270 (7th Cir. 1976) (to constitute mandatory subject, matter must affect signficantly terms or conditions of employment); Seattle First Nat'l Bank v. NLRB, 444 F.2d 30, 32-33 (9th Cir. 1971) (incidental, remote, or indirect impact on employment relationship not sufficient to make subject mandatory); American Smelting & Ref. Co. v. NLRB, 406 F.2d 552, 554 (9th Cir.), *cert. denied*, 395 U.S. 935 (1969) (subject must materially affect conditions of employment to be mandatory subject of bargaining); NLRB v. Lehigh Port. Cement Co., 205 F.2d 821, 823 (4th Cir. 1953) (same).

[76] *See, e.g.*, Ford Motor Co. v. NLRB, 441 U.S. 488, 498 (1978) (establishment of vending-machine prices not managerial decision lying at core of entrepreneurial control); Fibreboard Paper Prod. Corp. v. NLRB, 379 U.S. 203, 213 (1964) (requiring employer to bargain over decision to contract out work previously done by in-house employees would not abridge employer's freedom to manage business); 379 U.S. at 223 (Stewart, J., dissenting) (management decisions fundamental to basic direction of business should be excluded from § 8(d) coverage); Davis v. NLRB, 617 F.2d 1264, 1268 (7th Cir. 1980) (decision to change restaurant from full service to cafeteria-style not within managerial prerogative); NLRB v. Adams Dairy, Inc., 350 F.2d 108, 111 (8th Cir. 1965) (requiring bargaining over basic change in operations would abridge significantly management freedom to run business); NLRB v. Royal Plating & Polishing Co., 350 F.2d 191, 196 (3d Cir. 1965) (no duty to bargain because decision to close one plant involved major change in direction of business, thus at core of managerial control); NLRB v. Rapid Bindery, Inc., 293 F.2d 170, 176 (2d Cir. 1961) (decision to move business clearly within realm of managerial discretion and therefore not mandatory subject of collective bargaining).

[77] 379 U.S. 203 (1964); *see, e.g.*, Ford Motor Co. v. NLRB, 441 U.S. 488, 498 (1978) (establishment of vending-machine prices managerial decision lying at core of entrepre-

In *Fibreboard*, the Supreme Court held that an employer's decision to discharge its maintenance employees and contract out the work that the discharged employees previously had performed is a mandatory subject of collective bargaining under section 8(d) of the NLRA.[78] The *Fibreboard* Court acknowledged that the impact of the decision to contract out is termination of the employment relationship.[79] The Court thus stated that the decision to contract out fell clearly within the language of section 8(d).[80] Before finding that the employer had a duty to bargain, however, the *Fibreboard* Court observed that the employer's decision to contract out was a topic peculiarly suitable for collective bargaining.[81] The Court, therefore, concluded that a bargaining requirement would further the NLRA's purpose of promoting industrial peace through the collective bargaining process.[82] In particular, the *Fibreboard* Court determined that to require the employer to bargain over the decision to contract out would not significantly abridge the employer's freedom to manage the business,[83] since the decision did not alter the employer's basic operation or capital structure.[84]

The *FNM* Court acknowledged that the *FNM* employer's decision to terminate the Greenpark contract had a direct impact upon the employment relationship.[85] Nonetheless, the Court found that the focus of the employer's decision was purely economic and, therefore, possibly within the sole discretion of management.[86] The *FNM* Court's application of a managerial prerogative exception to the duty to bargain is an expansion

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neurial control); Davis v. NLRB, 617 F.2d 1264, 1268 (7th Cir. 1980) (decision to change restaurant from full service to cafeteria-style not within managerial prerogative); NLRB v. Adams Dairy, Inc., 350 F.2d 108, 111 (8th Cir. 1965) (requiring bargaining over basic change in operations would abridge significantly management's freedom to run business); NLRB v. Royal Plating & Polishing Co., 350 F.2d 191, 196 (3d Cir. 1965) (no duty to bargain because decision to close one plant involved major change in direction of business, thus at the core of entrepreneurial control).

[78] 379 U.S. at 215.

[79] *Id.* at 210.

[80] *Id.*; *see* note 5 *supra.*

[81] *Id.* at 213-14. The *Fibreboard* Court discussed the feasibility of discussions between management and labor when labor cost concessions could present an acceptable alternative to discharging the employees in favor of subcontract labor. *Id.* at 214. The Court pointed out the success that collective bargaining has had in resolving economic conflicts between labor and management. *Id.* at 214. The Court maintained that inclusion of contracting-out decisions within the coverage of § 8(d) would further the purposes of the NLRA, by ensuring labor-management communication about matters of vital concern to both parties. *Id.* at 214; *see* text accompanying notes 1-3 *supra.* The industrial practice of incorporating into labor contracts provisions that require bargaining over decisions to contract out further convinced the *Fibreboard* Court that such decisions are appropriate subjects of bargaining. 379 U.S. at 214.

[82] 379 U.S. at 214.

[83] *Id.* at 213. The *Fibreboard* Court noted that the decision to contract out did not involve a significant capital investment. *Id.*

[84] *Id.*

[85] 101 S. Ct. at 2579.

[86] *Id.* at 2579-80; *see* note 42 *supra.*

of the Supreme Court's language in *Fibreboard*.[87] Many courts have relied on *Fibreboard* in finding no duty to bargain over decisions that are fundamental to the employer's need for entrepreneurial freedom to manage the business.[88] The *FNM* Court, by establishing a balancing test to determine whether a decision should be completely within management's prerogative, solidified a court-made exception to the section 8(a)(5) duty to bargain over matters affecting terms or conditions of employment.

A literal reading of the NLRA reveals no exception to the duty to bargain over matters affecting terms or conditions of employment.[89] In light of the NLRA's aim of promoting harmonious relations between labor and management, however, the *FNM* Court's reluctance to adhere strictly to the bargaining requirement may be defensible. If a bargaining requirement would impose unfair hardship on an employer because discussion between labor and management could not possibly alter the employer's basis for a decision, the discord that could result from required bargaining would not contribute to industrial peace. The Second Circuit's holding in *FNM*, therefore, seems sound in emphasizing that bargaining would further the aims of the NLRA if discussion between labor and management could modify or reverse the employer's decision.[90] The *FNM* Court's analysis, however, while applying the *Fibreboard* consideration of whether a bargaining requirement will further the purposes of the NLRA,[91] places greater emphasis upon managerial prerogative than upon other considerations of appropriateness of bargaining, such as equalization of bargaining power. The *FNM* analysis, therefore, gives more weight to the concerns of management than to the impact on labor relations of a bargaining requirement.

Further, the *FNM* Court found FNM's interest in freedom to terminate the Greenpark contract sufficient to excuse FNM from bargaining, despite the lack of any major changes in capital structure or in the scope of the enterprise.[92] Courts generally have held that a change in

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[87] *See* text accompanying notes 77-84 *supra*.

[88] *See, e.g.*, Ford Motor Co. v. NLRB, 441 U.S. 488, 498 (1978) (establishment of vending-machine prices not managerial decision lying at core of entrepreneurial control); Davis v. NLRB, 617 F.2d 1264, 1268 (7th Cir. 1980) (decision to change restaurant from full service to cafeteria-style not within managerial prerogative); NLRB v. Adams Dairy, Inc., 350 F.2d 108, 111 (8th Cir. 1965) (requiring bargaining over basic change in operations would abridge significantly management freedom to run business); NLRB v. Royal Plating & Polishing Co., 350 F.2d 191, 196 (3d Cir. 1965) (no duty to bargain because decision to close one plant involved major change in direction of business, thus at core of managerial control).

[89] *See* notes 4 & 5 *supra*.

[90] *See* 627 F.2d 596, 602; text accompanying notes 31-36 *supra*.

[91] 101 S. Ct. at 2580.

[92] *Id.* at 2585. The Court in *FNM* found that FNM's business did not involve large amounts of capital in single locations. *Id.* Thus, the Greenpark closing did not require a great divestment of capital. In addition, the Court noted that the administrative law judge found FNM's usual method of operation to involve the continual taking on and discontin-

business operations that did not involve major capital expenditures but did result in termination of jobs constituted a mandatory bargaining subject.[93] The *FNM* decision, therefore, may have a profound impact on future cases involving an employer's duty to bargain over certain business decisions. FNM's decision to discontinue operations under the Greenpark contract is roughly analogous to various other managerial decisions that result in termination of employment.[94] Although the *FNM* Court expressly reserved for future consideration questions regarding the duty to bargain over analogous kinds of employer decisions,[95] application of the *FNM* Court's analysis appears to exempt these decisions from the duty to bargain, provided no anti-union animus exists.[96]

An alteration in a business' method of operation is one example of a management decision that potentially intrudes upon employment security and thus arguably constitutes a mandatory bargaining subject. In determining whether decisions regarding operational alterations fall within management's prerogative and do not constitute mandatory bargaining subjects, the courts and the Board prior to *FNM* have placed great emphasis on the level of capital investment or divestment involved in a particular conversion.[97] Under the *FNM* analysis, however, the level of change in capital structure resulting from a managerial decision is no

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uance of the various maintenance jobs, so that the termination of the Greenpark contract neither altered the nature of FNM's business nor substantially affected the size of FNM's business. *Id.* at 2576 n.5; *see* 242 N.L.R.B. at 466.

[93] *See, e.g.* Davis v. NLRB, 617 F.2d at 1269 (citing *Fibreboard*). In *Davis*, the Seventh Circuit upheld a Board decision that an employer had a duty to bargain over the decision to transform a full-service restaurant into a self-service cafeteria. *Id.* at 1269-70. In upholding the Board's finding, the *Davis* court stated that Davis did not make a substantial capital investment in order to change the restaurant into the cafeteria. *Id.* at 1270-71. The *Davis* court went on, however, to reverse the Board's enforcement order on other grounds. *Id.* at 1278. *See also* General Motors Corp., GMC Truck & Coach Div., 191 N.L.R.B. 951, 952 (1971) (decisions in which significant investment or withdrawal of capital will affect scope or direction of enterprise are at core of entrepreneurial control); note 97 *infra*.

In contrast to *Davis*, the Board in NLRB v. Vegas Vic. Inc., 213 N.L.R.B. 841 (1974), *aff'd*, 546 F.2d 828 (9th Cir. 1976), *cert. denied*, 434 U.S. 818 (1977), held that an alteration in a cocktail lounge's method of operations was not a mandatory subject because the conversions in question required a large capital outlay. 213 N.L.R.B. at 846.

[94] Management decisions analogous to the decision in *FNM* include partially closing or relocating firm facilities, selling segments of a business, and altering the business' method of operation. *See* note 97 *infra*.

[95] 101 S. Ct. at 2575 n.22.

[96] *See* text accompanying notes 96-98 *infra*.

[97] The Board and the courts rely on the Supreme Court's decision in *Fibreboard*. *See, e.g.*, NLRB v. Int'l Harvester Co., 618 F.2d 85, 88 (9th Cir. 1980) (reorganization of marketing structure involving significant changes in capital structure not mandatory bargaining subject); Davis v. NLRB, 617 F.2d 1264, 1268 (7th Cir. 1980) (change from full-service to cafeteria-style restaurant did not involve sufficient capital expenditure to bring conversion decision within managerial prerogative); NLRB v. Vegas Vic, Inc., 213 N.L.R.B. 841, 846, 87 L.R.R.M. 1269, 1270-71 (1974), *aff'd*, 546 F.2d 828 (9th Cir. 1976), *cert. denied*, 434 U.S. 818 (1977) (conversion of bar involving considerable capital expenditure not mandatory bargaining subject).

longer crucial in determining whether a management decision is a required bargaining subject.[98] The existence of any capital change or alteration in scope or direction of the business, no matter how slight, appears to be sufficient to invoke application of the managerial prerogative exception, if no anti-union animus exists. In cases involving management decisions that change methods of a business' operation and adversely affect employment, therefore, courts no longer may rely upon the absence of large capital changes to find that management decisions are mandatory subjects.

The *FNM* Court, by couching the managerial prerogative exception as applicable to economically motivated decisions,[99] implicitly excluded anti-union decisions from the managerial prerogative exception.[100] In thus implying that decisions resulting from anti-union considerations are mandatory bargaining subjects, the Court injected a motive element into section 8(a)(5) determinations. In determining whether an employer's failure to bargain literally violates section 8(a)(5), the sole issue should be whether the employer refused to bargain over a matter included in section 8(d) terms or conditions of employment.[101] Neither section 8(a)(5) nor section 8(d) contains language excepting economically motivated decisions from the duty to bargain over matters affecting terms or conditions of employment.[102] A literal reading of the NLRA indicates that an employer's economic or anti-union motivation is irrelevant under section 8(a)(5).[103] The employer's reason for deciding to close part of its operations, however, may be important insofar as a court may be reluctant to require bargaining when discussion between management and labor would be futile.[014] Nevertheless, the employer's economic motivation for a decision should not become the basis of an exception to the duty to bargain unless union input presents no possibility of altering the economic consideration.[105]

A union attempting to avoid application of the *FNM* exception to the bargaining duty might argue that the employer made a job-terminating decision in part because of anti-union sentiment.[106] Under the *FNM*

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[98] *See* 101 S. Ct. at 2585; text accompanying note 92 *supra.*

[99] *See* 101 S. Ct. at 2581.

[100] *See id.* The *FNM* Court recognized that a § 8(a)(3) violation might result from an anti-union closing. *See id.* at 2582; text accompanying note 52 *supra.* One possible interpretation of the Court's application of the balancing test is that a finding of a § 8(a)(3) violation necessitates a finding of a duty to bargain.

[101] Ozark Trailers, Inc. 161 N.L.R.B. 561, 566, 63 L.R.R.M. 1264, 1268 (1966); *see* 29 U.S.C. §§ 158(a)(5) & 158(d) (1976) (§§ 8(a)(5) & 8(d) of NLRA); Heinsz, *The Partial Closing Conundrum: The Duty of Employers and Unions to Bargain In Good Faith*, 1981 DUKE L.J. 71; notes 4 & 5 *supra.*

[102] *See* notes 4 & 5 *supra.*

[103] *Id.*

[104] *See* text accompanying notes 89-90 *supra.*

[105] *See* text accompanying note 90 *supra.*

[106] *See* text accompanying notes 65-66 *supra.*

holding, a mixed motivation argument might be particularly convincing if the union can show that labor cost considerations are the heart of the employer's economic difficulties.[107] An alternative available to unions attempting to secure in advance a duty to bargain rather than relying upon after-the-fact motive arguments is to incorporate a duty to bargain over the decision into the union contract.[108] As in the *FNM* case, however, a union may not have time to negotiate a bargaining agreement.[109] A union whose members have been discharged immediately following certification and prior to negotiation of a collective bargaining agreement could argue that the timing of the discharge evidences anti-union motivation for the management decision that resulted in the discharge.[110] A union thus may be able to avoid application of *FNM*'s managerial prerogative exception to the section 8(a)(5) duty to bargain by showing that anti-union sentiment to some extent motivated management's decision.

The *FNM* balancing test for determining whether a decision is a mandatory bargaining subject is impractical.[111] An employer will have difficulty determining in advance of implementing a decision whether the burden of bargaining is sufficient to dissipate the duty to bargain, since the determination of whether the duty to bargain exists depends on the facts of each case.[112] In addition, the *FNM* Court's criticism of the Second Circuit's presumption approach, that harsh remedies for failure to bargain may compel employers to bargain even when discussion would be futile,[113] may apply equally to *FNM*'s test.

The Supreme Court's decision in *FNM* indicates that employers possess increased freedom to make business decisions that impact directly upon the employment relationship, and thus resolves a difficult issue in favor of employers. The Court's managerial prerogative exception as applied in *FNM* weakens the effectiveness of Congress' section 8(a)(5) attempt to ensure bargaining equality between management and labor.[114] After *FNM*, employers may be more likely to make business

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[107] If labor costs are the main financial concern of the employer, a union might argue convincingly that the problem centers on labor. *See* Fibreboard Paper Prod. Corp. v. NLRB, 379 U.S. 203, 213-14 (1964). If union problems are the cause of the employer's decision to close or change operations and eliminate jobs, the union could argue that the managerial prerogative exception does not apply. *See* text accompanying note 92 *supra*.

[108] *See* 101 S. Ct. at 2582. A clause in a collective bargaining agreement requiring bargaining over decisions that potentially eliminate jobs has the same effect as a statutory bargaining mandate under § 8(a)(5).

[109] *See* 101 S. Ct. at 2576; text accompanying note 19 *supra*.

[110] Section 8(a)(3) of the NLRA prohibits an employer from discharging employees from union membership. 29 U.S.C. § 158(a)(3) (1976); *see* Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 183 (1940).

[111] *See* text accompanying notes 112-14 *infra*.

[112] *See* 101 S. Ct. at 2585; text accompanying notes 63-70 *supra*.

[113] *See* 101 S. Ct. at 2583; text accompanying note 60 *supra*.

[114] *See* text accompanying notes 1-3 *supra*.

changes without bargaining in the hope that the union will be unable to prove anti-union motivation or that the passage of time will cause courts finding a section 8(a)(5) violation to hesitate to grant harsh remedies.[115] Unions, on the other hand, are left without effective economic weapons with which to force employers to recognize employee interests, since strikes by non-employees cannot harm the employer.

The *FNM* Court's adoption of a motivation-based exception to the 8(a)(5) duty to bargain excuses employers from bargaining over decisions resulting in termination of employment, which have a severe impact on the employment relationship. A decision that affects terms or conditions of employment is a mandatory bargaining subject under the NLRA,[116] which contains no express exception for economically motivated decisions[117] or for decisions at the core of managerial prerogative.[118] Courts choosing to require bargaining only when the duty will promote the objectives of the NLRA should find exceptions to the bargaining requirement only when bargaining would be futile and would result in harm to the employer or to labor-management relations.[119] The *FNM* decision, by allowing employers more leeway in making business decisions,[120] greatly reduces the bargaining power of unions.[121] The *FNM* decision thus thwarts Congress' purpose of balancing bargaining power, and complicates application of the employer's section 8(a)(5) duty to bargain over terms and conditions of employment.

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[115] *See* note 60 *supra.*
[116] *See* text accompanying notes 4-6 *supra.*
[117] *See* text accompanying notes 101-03 *supra.*
[118] *See* text accompanying note 89 *supra.*
[119] *See* text accompanying notes 89-90 *supra.*
[120] *See* text accompanying notes 114-15 *supra.*
[121] *See* text accompanying notes 114-15 *supra.*