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# First National Maintenance v. NLRB: Limiting the Mandatory Duty to Bargain

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# *FIRST NATIONAL MAINTENANCE v. NLRB:* LIMITING THE MANDATORY DUTY TO BARGAIN

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## INTRODUCTION

In *First National Maintenance Corp. v. NLRB*[1] the United States Supreme Court further limited the subjects that require mandatory collective bargaining.[2] The Court overruled a long-standing National Labor Relations Board policy that required an employer to bargain about the decision to partially close its business.[3] The Court formulated a new balancing test that weighs the employer's need to maintain the freedom to manage its business against the benefit to labor-management relations and the collective bargaining process.[4]

First National Maintenance (hereinafter FNM) is a New York corporation which engages in housekeeping and cleaning services for commercial businesses. The corporation hires, trains, and supervises its employees for contracted services. All personnel are under separate contract for each customer, and they are not transferred from one location to another. During 1977, FNM had contracts with two to four nursing homes.[5] One of the contracts was with the Greenpark Care Center (hereinafter Greenpark), a nursing home in Brooklyn, which had been under contract with FNM since 1976. Under the contract Greenpark paid a weekly set fee to FNM and reimbursed it

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[1] 452 U.S. 666 (1981).

[2] The National Labor Relations Act, § 8(d) and 8(a)(5), as amended, 29 U.S.C. § 158(d) and 158(a)(5) (1981) limits mandatory bargaining to subjects that concern "wages, hours, and other terms and conditions of employment."

[3] *See* Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203 (1964). (Subcontracting which results in job termination due to the partial closing of operations, absent any showing of interference with an employer's freedom to manage its business, is a mandatory subject of collective bargaining under § 8(d) of the National Labor Relations Act.)

"Partial termination" has been the subject of interpretation by the National Labor Relations Board and the courts. It can refer to a "permanent contraction in the scope of the employers' operations. Thus, it refers to the following two situations: (1) where an employer permanently closes one of several plants; and (2) where an employer permanently closes down a department within a single plant." Comment, *"Partial Terminations," A Choice Between Bargaining Equality and Economic Efficiency*, 14 U.C.L.A. L. REV. 1089, 1092, n.19 (1967). *See also* Brockway Motor Trucks, Inc. v. NLRB, 230 NLRB 1002 (1977), *enf. denied*, 582 F.2d 720, 724 n.10. (3rd Cir. 1978).

[4] 452 U.S. 666, 679.

[5] The exact size of the business remains unclear. The record of the administrative law judge (ALJ) stated: "This is a large company. For all I know, the 35 men at this particular home were

for its labor costs. The set fee, originally $500 in May of 1976, was cut in half later that year. The contract also included a provision for termination upon 30 days written notice by either party. In the spring of 1977, Greenpark gave FNM written notice of cancellation. However, since FNM's work continued beyond the 30 day period the cancellation did not take immediate effect. Later that summer, FNM gave Greenpark a written notice demanding that Greenpark grant FNM an increase in the service fee to the original $500, or face a discontinuance of its operations. Thereafter, FNM terminated its agreement with Greenpark and all employees working at the home were discharged.

Prior to the termination of the agreement, District 1199, National Union of Hospital and Health Care Employees, Retail, Wholesale, and Department Store Union, AFL-CIO (hereinafter Union) heard about FNM's intent to discharge its employees and requested a meeting with management to bargain over its decision to close. FNM refused to respond to the Union's request and declined to delay the job termination. It stated that the decision was economic in nature and, as such, was final.[6] The Union then filed unfair labor practice charges against FNM claiming violations of sections 8(a)(1) and (5) of the National Labor Relations Act.[7]

The administrative law judge (hereinafter ALJ), relying on *Fibreboard Paper Products Corp. v. NLRB*[8] and *Ozark Trailers, Inc.*,[9] rejected FNM's contention that the decision to close did not come within the purview of mandatory collective bargaining. According to the ALJ, FNM had not sufficiently proven that the decision had involved a significant capital investment that affected the scope and direction of the enterprise.[10] The ALJ also concluded that bargaining

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only a small part of its total business in the New York area." First National Maintenance Corp., 242 NLRB 462, 465 (1979).

[6] "A 'partial termination' decision is economically motivated when an employer acts on a genuine belief that he can earn a higher return on invested capital with equivalent risk by liquidating a portion of his business and reinvesting the funds elsewhere." Comment, *supra*, note 3, at 1090 n.5.

[7] 29 U.S.C. § 151 *et seq.* § 8(a)(1) and (5) state in part respectively "(1) 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 . . . (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)."

[8] 379 U.S. 203 (1964). *See* note 3, *supra.*

[9] 161 NLRB 561, 566 (1966). The ALJ in *Ozark Trailers, Inc.* held that an employer's decision to close down one of its plants was an issue concerning a "term or condition of employment" and thus was subject to mandatory collective bargaining. Further, "just as the employer's interest in the protection of his capital investment is entitled to consideration in our interpretation of the Act, so too is the employee's interest in the protection of his livelihood."

[10] 242 NLRB 462, 466. The ALJ found that discontinuing jobs was an usual part of FNM's operations, and that the decision to terminate the Greenpark contract did not change the scope of the business nor involve a capital investment. Thus, the Board's ruling in *Brockway Motor*

between the parties might have led to a continuation of employment.[11] Therefore, the ALJ ordered FNM to bargain in good faith over the decision to close and the effects of the closing on the employees. In addition, the ALJ ordered the payment of back wages to all discharged employees.

The National Labor Relations Board (hereinafter Board) adopted the ALJ's findings and ordered FNM to bargain with the Union over the decision to terminate the Greenpark contract and the effects of the closing on the employees.[12] The Board further ordered FNM to hire the terminated employees if the nursing home resumed operations or, in the alternative, to reinstate the employees to qualified positions at other operations.[13] FNM was directed to disburse back pay to the terminated employees until they were either rehired at Greenpark or reinstated at other qualified positions.

The Court of Appeals for the Second Circuit enforced the Board's order. The court held that section 8(d) creates a "*presumption* that a duty to bargain exists" (emphasis added) which can be rebutted by showing that bargaining over the decision to close would not further the purpose of the Act.[14] The circuit court held that the facts of the present case not only brought it within the presumption, but that the decision was a condition of employment, and therefore the employer had a duty to bargain.[15]

In *First National Maintenance*, the Supreme Court held that an employer does not have a duty to bargain over its decision to close a part of its business when such closing is for economic purposes and there is no direct impact on the employment relationship. In its

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*Trucks, Inc., supra* note 3, was held to be inapplicable to the present case. In *Brockway Motor Trucks*, the Board ruled that an employer is not subject to mandatory bargaining if the decision to close involves a "significant investment or withdrawal of capital" which would "affect the scope and ultimate direction of the enterprise." *Id.*, 230 NLRB at 1003. However, the Board held that the obligation to bargain over "[u]nilateral changes in employment conditions . . . remains nonwithstanding an employer's contention that such a requirement significantly restricts its ability to manage the business." *Id.*

[11] 242 NRLB 462, 465.

[12] The issue concerning bargaining over the effects of closing on the employees was not presented on appeal to the Supreme Court. FNM consented to the Board's order regarding bargaining over the effects and filed a stipulation in the court of appeals (Pet. App. 5A; A.21-22). However, bargaining over the effects of a decision has long been upheld by the Board and the courts. *See, e.g.*, NLRB v. Royal Plating & Polishing Co., 350 F.2d 191, 196 (3d Cir. 1965); NLRB v. Lewis, 246 F.2d 886 (9th Cir. 1957).

[13] 242 NLRB 462, 463.

[14] NLRB v. First National Maintenance Corp., 627 F.2d 596, 601 (2d Cir. 1980). It has long been held that the purpose of the Act is to maintain industrial peace. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

[15] *Id.* at 602.

analysis, the Court considered whether bargaining would promote the purpose of the Act, and whether an employer's economic decision to close was a "condition of employment" within the meaning of section 8(d)'s "wages, hours, and other terms and conditions of employment."[16]

## Duty to Bargain

Originally, the National Labor Relations Act did not specify those subjects over which parties must bargain.[17] Section 8(d) of the Act, enacted by Congress in 1947, limited the *mandatory* duty to bargain to subjects concerning "wages, hours, and other terms and conditions of employment."[18] The Supreme Court has interpreted this statutory limitation to include "only issues that settle an aspect of the relationship between the employer and the employees."[19] The Court has also recognized the *legitimate* economic decision-making needs of the employer,[20] and has refused to require bargaining when there are compelling economic factors or when bargaining would impede the employer's right to manage its business.[21]

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[16] *See* note 2, *supra*.

[17] It has been argued that the intent of the NLRA, Section 8(a)(5) was not to determine the subjects of mandatory bargaining. *See* Cox and Dunlop, *Regulation of Collective Bargaining by the National Labor Relations Board*, 63 HARV. L. REV. 389, 394-93 (1950); Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203, 219 n.2 (1964) (Stewart, J., concurring).

[18] *See* note 2, *supra*.

[19] Chemical & Alkali Workers v. Pittsburgh Plate Glass Co., 404 U.S. 157, 178 (1971). *See also*, Ford Motor Co. v. NLRB, 441 U.S. 488 (1979); Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203 (1964); Local 24, International Brotherhood of Teamsters v. Oliver, 358 U.S. 283 (1959).

[20] However, an employer may not partially terminate its business for economic reasons motivated by anti-union animus. Textile Workers v. Darlington Co., 380 U.S. 263, 268, 275 (1965) held that while an employer has an "absolute right to terminate its entire business for any reason," a partial closing is an unfair labor practice under § 8(a)(3) if it is "motivated by a purpose to chill unionism in any of the remaining plants of the single employer."

[21] *See, e.g.*, NLRB v. International Harvester, 618 F.2d 85, 87 (9th Cir. 1980) ("Management decisions that fundamentally alter the direction of an enterprise, or involve significant reallocation of capital generally are not considered decisions concerning terms and conditions of employment and are not mandatory subjects of bargaining"); Brooks-Scanlon, Inc., 246 NLRB 476 (1979); Royal Typewriter Co. v. NLRB, 533 F.2d 1030 (8th Cir. 1976); General Motors Corp. v. NLRB, 191 NLRB 951 (1971); NLRB v. Thompson Transport Co., 406 F.2d 698 (10th Cir. 1969); NLRB v. Adams Dairy Inc., 350 F.2d 108 (8th Cir. 1965), *cert. den.*, 382 U.S. 1011 (1966); NLRB v. Royal Plating & Polishing Co., 350 F.2d 191 (3d Cir. 1965).

A few cases have held that there is an initial presumption to bargain over the economic decision to partially close a business. *See* ABC Trans-National Transport v. NLRB, 642 F.2d 675 (3d Cir. 1981); Electrical Products Div. of Midland-Ross Corp. v. NLRB, 617 F.2d 977 (3d Cir. 1980).

Justice Blackmun, writing for the majority in *First National Maintenance*, noted three categories of decision-making: (1) decisions having an "indirect and attenuated impact on the employment relationship;"[22] (2) decisions which are "almost exclusively" within the employment relationship;[23] and (3) decisions which involve a "change in the scope and direction of the enterprise," thus having no direct bearing on the employment relationship even though employment itself may be directly affected.[24] The statutory language of section 8(d) limits bargaining to those issues pertinent to the employment relationship and is a determining factor in the exclusiveness of management prerogative in its decision-making. In the first two categories of the decision-making process, the degree of freedom that the employer has depends on the nature of the decision's impact on the employment relationship. The third category involves management decisions which are distinct from the employment relationship but which necessarily affect it.

The Court observed that the present case fell within the third category. According to the Court, FNM was concerned solely with the economic profitability of maintaining its contract with Greenpark. FNM's decision to partially close its business did not involve the employment relationship although the effect of its decision eliminated many jobs.

The Court held that collective bargaining in the third category must not impede the employer's "economically motivated" decision to close a business. The Court sought to protect the employer's "freedom to manage its affairs [which are] unrelated to employment."[25] To insure unrestrained decision-making, it formulated a balancing test to determine whether collective bargaining was to be made mandatory for cases in the third category. The Court stated:

> [I]n view of an employer's need for unencumbered decision-making, bargaining over management decisions that have a substantial impact on the continued availability of employment should be required only if the benefit, for labor-management relations and the collective bargaining process, outweighs the burden placed on the conduct of the business.[26]

The Court developed this balancing test while paying particular attention to its prior decision in *Fibreboard*.[27] The *Fibreboard* Court

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[22] 452 U.S. at 677. (Decisions involving advertising or product design.)

[23] *Id.* (Rules pertaining to layoffs and recalls.)

[24] *Id.*

[25] *Id.*

[26] *Id.* at 679.

[27] 379 U.S. 203. *See* note 3, *supra*.

held that bargaining was mandatory when the subcontracting was replacing work performed by existing employees in order to reduce the cost of its maintenance operation.[28] The *Fibreboard* Court observed that the "*literal* meaning of the phrase 'terms and conditions of employment' . . . plainly cover[s] termination of employment."[29] However, the Court there stressed, and Justice Stewart reiterated in his concurring opinion,[30] that because "[t]he Company's decision to contract out the maintenance work did not alter the Company's basic operation . . . [and] [n]o capital investment was contemplated, . . . to require the employer to bargain about the matter would not significantly abridge his freedom to manage the business."[31]

The Court in *First National Maintenance,* while relying heavily on Stewart's concurring opinion in *Fibreboard,* observed that the initial dispute with the Greenpark nursing home concerned the size of the nursing home's management fee paid to FNM, a concern outside of the Union's control. Thus, the Court stated that Greenpark, as a "third party upon whom rested the success or failure of the contract,"[32] did not have a duty to consider the Union's advice. This differed from the situation in *Fibreboard,* where it was held there was a duty to bargain over a reduction in labor costs that would eliminate overtime, decrease fringe benefits, and reduce the number of employees.[33] Since economic profitability was the motivating factor for terminating the Greenpark operation by FNM, the Court found that the decision to close was "not unlike going out of business entirely."[34] Further, discharged employees were not replaced and the operations were not moved to another area.[35] The Court also noted that since FNM already had a mandatory duty to bargain over the effects of closing the business, bargaining over the decision itself would not provide additional information.[36]

Justice Brennan, with whom Justice Marshall joined, raised four objections in his dissenting opinion. First, the dissent noted that "terms and conditions of employment" were intended by Congress to be loosely construed.[37] In concluding that the present case required

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[28] *Id.* at 213.
[29] *Id.* at 210.
[30] *Id.* at 217.
[31] *Id.* at 213.
[32] 452 U.S. at 688.
[33] *Id.*
[34] *Id.* The Court held that this decision clearly involved a change in the scope and direction of the enterprise even though there was no "significant investment or withdrawal of capital."
[35] *Id.* at 687.
[36] *Id.* at 681.
[37] *Id.* at 689.

mandatory bargaining, the dissent referred to *Fibreboard* and *Ozark Trailers, Inc.*, for Board and court opinions holding that terms and conditions of employment "plainly cover termination of employment which . . . necessarily results from closing an operation."[38] Second, the balancing test was one-sided: "it takes into account only the interests of management; it fails to consider the legitimate employment interests of the workers and their Union."[39] Third, even if the test were to be applied, the benefit to the collective bargaining process outweighed any burden imposed upon the employer's decision-making. Not only might the Union provide the employer with valuable information and concessions, but bargaining over the decision to close would not create unnecessary delay when management already had a duty to bargain over the effects of the closing.[40] Finally, the dissenting opinion stated that the statutory responsibility of determining the duty to bargain was entrusted to the Board. Therefore, in view of the Board's "congressionally-delegated authority and accumulated expertise,"[41] its policies "should not be reversed by the courts merely because they might prefer another view of the statute."[42] However, the dissent argued that the rebuttable presumption of mandatory bargaining, as expressed by the court of appeals, should apply to the present case, and the case should be remanded to the Board for further examination.[43]

It has long been maintained, and the Court in the present case has reaffirmed,[44] that the purpose of the Act is to maintain industrial peace through collective bargaining.[45] A matter becomes a mandatory

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[38] *Id.*

[39] *Id.* Justice Brennan also noted that the "one sided approach" did not advance the neutral manner in which labor-management controversies were to be resolved.

[40] *Id.* at 691.

[41] *Id.* at 689.

[42] *Id.* at 691.

[43] *Id.*

[44] *Id.* at 674.

[45] NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937). The duty to bargain collectively was introduced during World War I as a governmental policy to cope with the economic pressures of the War. In 1926, when the government returned its management of the railroad industry to private control, the Railway Labor Act, 44 Stat., Part II, 577, as codified, 45 U.S.C. § 152, was passed to provide for the peaceful settlement of labor disputes in the transporation industry. In 1933, the National Industrial Recovery Act, 48 Stat. 198, was formed to establish fair labor standards during the depression. Section 7(a) of this Act affirmed the collective bargaining policy by stating "employees shall have the right to organize and bargain collectively through representatives of their own choosing." The National Labor Relations Board later determined that an employer had a duty to negotiate in *good faith* with its employees or their representative, and to make every reasonable effort to reach an agreement. The Wagner Act, 49 Stat. 449 (1935), predecessor to the NLRA, affirmed the right of employees to organize and bargain collectively. *See also* Smith, *The Evolution of the Duty to Bargain Concept in American Law*, 39 Mich. L. Rev. 1065 (1941).

subject of bargaining in order to "promote the fundamental purpose of the Act by bringing a problem of vital concern to labor and management within the framework established by Congress as most conducive to industrial peace."[46]

The aim of the Act, originally referred to as "[t]he bill to equalize the bargaining power of employers and employees . . . ,"[47] was to balance the "united strength" of modern industrialism with the bargaining power of employees. Not only would this effectuate change in the distribution of wealth, but it would promote a more efficient economy.[48] Sections 8(a)(5) and 8(d) imposed upon the employer an affirmative duty to bargain with the union. Section 8(d) further stressed the "*mutual obligation* of the employer and the representative of the employees to . . . confer in good faith with respect to wages, hours, and other terms and conditions of employment"[49] (emphasis added). Thus, industrial peace was to be maintained through the mutual responsibilities and duties owed between the parties.

The Supreme Court's balancing test will not, however, promote industrial peace and, in fact, may seriously impede the collective bargaining process. First, the test creates an inequality in the bargaining powers of the parties. By requiring a labor union to prove that "the benefit, for labor-management relations and the collective bargaining process, outweighs the burden placed on the conduct of the business,"[50] the Court weakens the union's bargaining status. The union must persuade the Board and the courts that its interests, and the interests of the employees it represents, as well as the benefits to the collective bargaining process, are greater than the possible harm done to the employer's business by collective bargaining. Second, the test substantially enlarges the employer's unlimited discretionary power in determining the need for bargaining.[51] The Court has determined that an employer's decision to partially terminate a business, when it involves a "change in the scope and direction of the enterprise,"[52] is not a condition of employment and thus does not mandate

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[46] *Fibreboard*, 379 U.S. at 211. See note 3, *supra*.

[47] 78 CONG. REC. S3443, 3444 (daily ed. Mar. 1, 1934) (remarks of the Vice President).

[48] *Id.* (remarks of Senator Wagner). *See also* Comment: *Duty to Bargain About Termination of Operations: Brockway Motor Trucks v. NLRB*, 92 HARV. L. REV. 768, 775 (1979).

[49] 29 U.S.C. § 158(d).

[50] 452 U.S. at 679.

[51] The Court has neither formulated guidelines nor imposed limits regarding the kind of economically motivated decisions it considers exempt from the duty to bargain. An employer may now partially close the business ostensibly due to economic necessity when the employer wants to avoid bargaining with the union.

[52] 452 U.S. at 677.

a good faith duty to bargain. This inequality in the bargaining powers creates tension between an employer and its employees. Thus, the test has the potential to create industrial strife rather than promote industrial peace. Furthermore, it should be noted that in these economic times, the acceleration of plant closings, and consequently, the total termination of employees, requires re-examination of this doctrine.