

**Milwaukee Spring Division of Illinois Coil Spring Company and International Union, United Automobile, Aerospace & Agricultural Implement Workers of America (UAW), and its Local 547. Case 30-CA-7067**

23 January 1984

**SUPPLEMENTAL DECISION AND ORDER**

On 22 October 1982 the National Labor Relations Board issued its Decision and Order<sup>1</sup> in this proceeding, finding that Respondent had engaged in unfair labor practices in violation of Section 8(a)(1), (3), and (5) and Section 8(d) of the National Labor Relations Act, as amended. The Board held that Respondent violated the Act by deciding without the Union's consent to transfer its assembly operations from its unionized Milwaukee Spring facility to its unorganized McHenry Spring facility during the term of a collective-bargaining agreement because of the comparatively higher labor costs under the agreement, and to lay off unit employees as a consequence of that decision. Respondent filed a petition for review of the Board's Decision and Order with the United States Court of Appeals for the Seventh Circuit, and the Board filed a cross-application for enforcement of its Order. On 4 August 1983 the court granted the Board's motion to remand this case to the Board for additional consideration.

On 18 August 1983 the Board scheduled oral argument for 20 September 1983 because this and another case<sup>2</sup> presented important issues in the administration of the National Labor Relations Act. On the scheduled date, Respondent, the General Counsel, the Charging Party, the American Federation of Labor and Congress of Industrial Organizations, and the Chamber of Commerce of the United States of America presented oral argument before the Board.<sup>3</sup>

The Board has reconsidered its Decision and Order in light of the entire record and the oral arguments and has decided to reverse that decision and dismiss the complaint.

**I. FACTUAL BACKGROUND**

Illinois Coil Spring Company consists of three divisions—Holly Spring, McHenry Spring, and Respondent (Milwaukee Spring). The parties stipulated that, although collectively the four entities are a

single employer, each location constitutes a separate bargaining unit.

Respondent, at material times, employed about 99 bargaining unit employees. These employees worked in eight departments, including an assembly operations department and a molding operations department.

The Union has represented Respondent's bargaining unit employees for a number of years. The most recent contract became effective on 1 April 1980, and remained in effect until at least 31 March 1983. The contract contains specific wage and benefits provisions. The contract also provides that the Company "recognizes the Union as the sole and exclusive collective bargaining agent for all production and maintenance employees in the Company's plant at Milwaukee, Wisconsin."

On 26 January 1982<sup>4</sup> Respondent asked the Union to forgo a scheduled wage increase and to grant other contract concessions. In March, because Respondent lost a major customer, it proposed to the Union relocating its assembly operations to the nonunionized McHenry facility, located in McHenry, Illinois, to obtain relief from the comparatively higher assembly labor costs at Milwaukee Spring. Respondent also advised the Union that it needed wage and benefit concessions to keep its molding operations in Milwaukee viable. On 23 March the Union rejected the proposed reduction in wages and benefits. On 29 March Respondent submitted to the Union a document entitled "Terms Upon Which Milwaukee Assembly Operations Will Be Retained in Milwaukee." On 4 April the Union rejected the Company's proposal for alternatives to relocation and declined to bargain further over the Company's decision to transfer its assembly operations. The Company then announced its decision to relocate the Milwaukee assembly operations to the McHenry facility.

The parties stipulated that the relocation decision was economically motivated and was not the result of union animus. The parties also stipulated that Respondent has satisfied its obligation to bargain with the Union over the decision to relocate the assembly operations and has been willing to engage in effects bargaining with the Union.<sup>5</sup>

<sup>4</sup> All dates hereinafter refer to 1982, unless otherwise indicated.

<sup>5</sup> The parties' stipulation and the manner in which they briefed this case treat Respondent's relocation decision as a mandatory subject of bargaining. The dissent nevertheless insists on discussing at length what it terms the "threshold issue" of whether Respondent had a duty to bargain over its decision. Based on the facts before us, we find no reason to enter this discussion. We do not find it necessary to decide whether the work relocation here was a mandatory subject of bargaining under the Supreme Court's decision in *First National Corp. v. NLRB*, 452 U.S. 666 (1981).

<sup>1</sup> 265 NLRB 206 (*Milwaukee Spring I*).

<sup>2</sup> *Echlin, Inc.*, Case 7-CA-21616.

<sup>3</sup> The American Federation of Labor and Congress of Industrial Organizations and the Chamber of Commerce of the United States of America appeared as amici curiae.

II. MIDTERM MODIFICATION OF CONTRACTS UNDER  
SECTION 8(D)

A.

Sections 8(a)(5) and 8(d) establish an employer's obligation to bargain in good faith with respect to "wages, hours, and other terms and conditions of employment." Generally, an employer may not unilaterally institute changes regarding these mandatory subjects before reaching a good-faith impasse in bargaining.<sup>6</sup> Section 8(d) imposes an additional requirement when a collective-bargaining agreement is in effect and an employer seeks to "modif[y] . . . the terms and conditions contained in" the contract: the employer must obtain the union's consent before implementing the change.<sup>7</sup> If the employment conditions the employer seeks to change are not "contained in" the contract, however, the employer's obligation remains the general one of bargaining in good faith to impasse over the subject before instituting the proposed change.

Applying these principles to the instant case, before the Board may hold that Respondent violated Section 8(d), the Board first must identify a specific term "contained in" the contract that the Company's decision to relocate modified. In *Milwaukee Spring I*, the Board never specified the contract term that was modified by Respondent's decision to relocate the assembly operations. The Board's failure to do so is not surprising, for we have searched the contract in vain for a provision requiring bargaining unit work to remain in Milwaukee.

*Milwaukee Spring I* suggests, however, that the Board may have concluded that Respondent's relocation decision, because it was motivated by a desire to obtain relief from the Milwaukee contract's labor costs, modified that contract's wage and benefits provisions.<sup>8</sup> We believe this reasoning is flawed. While it is true that the Company proposed modifying the wage and benefits provisions of the contract, the Union rejected the proposals. Following its failure to obtain the Union's consent, Respondent, in accord with Section 8(d), abandoned the proposals to modify the contract's wage and benefits provisions. Instead, Respondent decided to transfer the assembly operations to a different plant where different workers (who were not subject to the contract) would perform the work. In short, Respondent did not disturb the wages and benefits at its Milwaukee facility, and consequently did not violate Section 8(d) by modifying, without

the Union's consent, the wage and benefits provisions contained in the contract.<sup>9</sup>

Nor do we find that Respondent's relocation decision modified the contract's recognition clause. In two previous cases, the Board construed recognition clauses to encompass the duties performed by bargaining unit employees and held that employers' reassignment of work modified those clauses. In both instances, reviewing courts found no basis for reading jurisdictional rights into standard clauses that merely recognized the contracts' coverage of specified employees. *Boeing Co.*, 230 NLRB 696 (1977), enf. denied 581 F.2d 793 (9th Cir. 1978); *University of Chicago*, 210 NLRB 190 (1974), enf. denied 514 F.2d 942 (7th Cir. 1975). We agree with the courts' reasoning.

Language recognizing the Union as the bargaining agent "for all production and maintenance employees in the Company's plant at Milwaukee, Wisconsin," does not state that the functions that the unit performs must remain in Milwaukee. No doubt parties could draft such a clause; indeed, work-preservation clauses are commonplace. It is not for the Board, however, to create an implied work-preservation clause in every American labor agreement based on wage and benefits or recognition provisions, and we expressly decline to do so.<sup>10</sup>

In sum, we find in the instant case that neither wage and benefits provisions nor the recognition clause contained in the collective-bargaining agreement preserves bargaining unit work at the Milwaukee facility for the duration of the contract, and that Respondent did not modify these contract terms when it decided to relocate its assembly operations. Further, we find that no other term contained in the contract restricts Respondent's decision-making regarding relocation.

<sup>9</sup> *Oak Cliff-Golman* illustrates a midterm modification of wage provisions. In that case, the contract contained wage rates that the respondent unilaterally reduced during the life of the contract. Respondent in the instant case, having unsuccessfully sought the Union's consent to modify the contractual wages and benefits, left those provisions intact.

*Oak Cliff-Golman* also discussed the appropriateness of deferral to contractual grievance and arbitration procedures. We need not make any finding in this case regarding deferral.

<sup>10</sup> In *Boeing*, the court stated:

Since the purpose of the Act is to encourage labor/management peace by resolving differences through collective-bargaining and to stabilize *agreed upon* conditions during the term of a [contract], *Steelworkers v. Warrior and Gulf Co.*, 363 U.S. 574, 578 . . . (1960), a rejection of the Board's position here would seem to further the purpose of the Act. Rather than stretching the meaning of a Recognition Clause "impliedly," "implicitly," or "in effect" to cover "functions" (as did the Board), a decision against the Board would encourage the parties affirmatively to negotiate an explicit "Jurisdictional Clause" to be included in the next [contract]. [581 F.2d at 798.]

<sup>6</sup> See *NLRB v. Katz*, 369 U.S. 736 (1962).

<sup>7</sup> *Oak Cliff-Golman Baking Co.*, 207 NLRB 1063 (1973), enf. 505 F.2d 1302 (5th Cir. 1974), cert. denied 423 U.S. 826 (1975).

<sup>8</sup> See 265 NLRB 206.

B.<sup>11</sup>

Our dissenting colleague and the decision in *Milwaukee Spring I* fail to recognize that decision's substantial departure from NLRB textbook law that an employer need not obtain a union's consent on a matter not contained in the body of a collective-bargaining agreement even though the subject is a mandatory subject of bargaining.<sup>12</sup> See, e.g., *Ozark Trailers*, 161 NLRB 561 (1966). Although the Board found a violation in *Ozark*, it did so grounded on the employer's failure to bargain over its decision to close a part of its operation during the collective-bargaining agreement, transfer equipment to another of its plants, and subcontract out work which had been performed at the Ozark plant. Even though the Board's ultimate conclusion in that case may not here survive the Supreme Court's analysis in *First National Corp.*, it is instructive to note the Board's recognition that the employer's obligation, absent a specific provision in the contract restricting its rights, was to *bargain* with the union over its decision:

In the first place, however, as we have pointed out time and time again, an employer's obligation to bargain does not include the obligation to agree, but solely to engage in a full and frank discussion with the collective-bargaining representative in which a bona fide effort will be made to explore possible alternatives, if any, that may achieve a mutually satisfactory accommodation of the interests of both the employer and the employees. If such efforts fail, the employer is wholly free to make and effectuate his decision. [161 NLRB at 568. Footnote omitted.]

In *Ozark* the company closed its plant midterm of the collective-bargaining agreement, transferred the equipment, and contracted out the manufacture of truck bodies formerly performed at the Ozark plant primarily for labor cost reasons. There was no contention that the employer's action in closing the plant violated any contractual provision since the contract itself did not prohibit the closing. It is not surprising to find the absence of any reference to *Ozark* in *Milwaukee Spring I* or in the dissent here. Under their erroneous analysis, the company in *Ozark*, even if it had bargained with the union over

the decision, still could not have closed its plant given their construction of Section 8(d) of the Act without the union's consent. Under their view, the Board's entire discussion and rationale in *Ozark* would be irrelevant.

In making its conclusion in *Ozark* the Board recognized that it was common practice for unions and employers to negotiate concerning work relocation, subcontracting, contracting out, etc., and that such negotiations had resulted in contractual language in some contracts which restricted the employer's right to contract out unit work. Consequently, the General Counsel's assertion at oral argument and the implication of our dissenting colleague that to reverse *Milwaukee Spring I* would change the whole course of collective bargaining set forth throughout the years of the National Labor Relations Act is not accurate. Rather, it was *Milwaukee Spring I* which was a radical departure, as a re-reading of *Ozark* demonstrates:

Thus, a Bureau of Labor Statistics study of 1,687 major collective-bargaining agreements in effect at the beginning of 1959 shows that there were 378 with express limitations on contracting out work that might otherwise be available to employees in the bargaining unit. Again, a study of bargaining in 74 plants relating to contracting out . . . showed that 32 percent had collective-bargaining contracts with clauses governing contracting out. Reflecting the growing number of cases in which mutual discussions have even succeeded in averting shutdowns is an article in the Wall Street Journal, June 10, 1964, describing a number of situations in which unions accepted cuts in wages and fringe benefits to save employee jobs threatened by proposed plant relocation or closure. [161 NLRB at 570. Footnotes omitted.]

The rationale of our dissenting colleague adds to the collective-bargaining agreement terms not agreed to by the parties and forecloses the exercise of rational economic discussion and decision-making which ultimately accrue to the benefit of all parties.

## C.

Accordingly, we conclude that Respondent's decision to relocate did not modify the collective-bargaining agreement in violation of Section 8(d). In view of the parties' stipulation that Respondent satisfied its obligation to bargain over the decision, we

<sup>11</sup> In agreeing with her colleagues that *Milwaukee Spring I* represented a substantial departure from well-established Board precedent, Member Dennis relies on part III of the decision, and finds it unnecessary to reach the matters discussed in part II.B.

<sup>12</sup> For a comprehensive review of prior decisions in this area, including cogent criticism of inconsistency and ambiguities, see Philip A. Miscimarra, *The NLRB and Managerial Discretion: Plant Closings, Relocations, Subcontracting, and Automation*. The Wharton School, University of Pennsylvania (1983) pp. 204-215.

also conclude that Respondent did not violate Section 8(a)(5).<sup>13</sup>

## II. THE LOS ANGELES MARINE CASE

In reaching a result contrary to that reached here, *Milwaukee Spring I* relied on *Los Angeles Marine Hardware Co.*, 235 NLRB 720 (1978), enf. 602 F.2d 1302 (9th Cir. 1979). *Los Angeles Marine*, however, misapplied then current Board law. In holding that, after bargaining to impasse, the respondent was not free to relocate work from one location to another location during the contract term without union consent, *Los Angeles* relied on *Boeing* which in turn cited *University of Chicago*.

In finding an unlawful midterm modification in *University of Chicago*, the Board relied on the fact that the reassigned work continued to be performed at the same location by another group of the respondent's employees. The Board stated:

It is well established that an employer may, after the necessary bargaining, terminate work done by the union's members at a particular location and . . . transfer it elsewhere . . . even though such action is taken during the contract term . . . [210 NLRB at 190. Footnotes omitted.]

Thus, the Board's *University of Chicago* decision did not support *Los Angeles Marine*, because it viewed *relocations* differently from *reassignments*, and treated only the latter as requiring the union's consent during the term of a contract. Even if we were merely to correct *Los Angeles Marine's* misapplication of then current Board law, we would find it "well established," in the words of the Board's *University of Chicago* decision, that a midterm relocation such as the one at issue is not a midterm modification within the meaning of Section 8(d).

<sup>13</sup> The dissent's references to "contract avoidance" and "do[ing] indirectly what cannot be done directly" are misleading and deflect the reader's attention from the language of Sec. 8(d). Respondent's action is branded unlawful, even though the dissent fails to identify any term or condition contained in the contract that Respondent modified.

As we stated in the body of this opinion, we believe that, under Sec. 8(d), an employer must obtain a union's consent before implementing a change during the life of a contract only if the change is in a mandatory term or condition "contained in" the contract. Contrary to the dissent, because we can identify no term or condition contained in the contract that Respondent modified, we characterize Respondent's conduct as doing directly what lawfully can be done directly, i.e., deciding to relocate unit work after bargaining with the Union in good faith to impasse.

The dissent claims that Respondent's work relocation decision would indirectly modify contractual wage rates. Thus, the dissent would imply a work-preservation clause from the mere fact that an employer and a union have agreed on a wage scale. This revolutionary concept, if adopted, would affect virtually every American collective-bargaining agreement and would undoubtedly come as a surprise to parties that have labored at the bargaining table over work-preservation proposals. An agreed-upon wage scale, standing by itself, means only that the employer will pay the stated wages to the extent that the employer assigns work to the covered employees.

As we stated in part II,A, of this decision, however, we agree with the appellate courts, and not the Board, in the *University of Chicago* and *Boeing* cases. We are also not persuaded that work reassignment decisions and relocation decisions should be treated differently for purposes of determining whether there has been a midcontract modification within the meaning of Section 8(d). Rather, we believe that the same standard applies in both instances, and that the Seventh Circuit correctly stated the governing principles in *University of Chicago*, as follows:

[U]nless transfers are specifically prohibited by the bargaining agreement, an employer is free to transfer work out of the bargaining unit if: (1) the employer complies with *Fibreboard Paper Products v. NLRB*, 379 U.S. 203 . . . (1964), by bargaining in good faith to impasse; and (2) the employer is not motivated by anti-union animus, *Textile Workers v. Darlington Mfg. Co.*, 380 U.S. 263 . . . (1965). [514 F.2d at 949.]<sup>14</sup>

Consistent with our decision today, we hereby overrule *University of Chicago*, *Boeing*, and the portion of *Los Angeles Marine* that held that the respondent's transfer of work from one location to another location violated Sections 8(a)(5) and 8(d).

## IV. THE 8(A)(3) ISSUE

In *Milwaukee Spring I*, the Board also found that Respondent's laying off employees as a consequence of its relocation decision violated Section 8(a)(3) notwithstanding that the parties stipulated that there was no union animus. Invoking the "inherently destructive" doctrine of *Great Dane Trailers*,<sup>15</sup> the Board apparently held that the 8(a)(3) violation flowed from the finding that the relocation decision violated Section 8(a)(5). Accepting this logic for the purposes of our decision only, we conclude that, having found that Respondent complied with its statutory obligation before deciding to relocate and did not violate Section 8(a)(5), there is no factual or legal basis for finding that the consequent layoff of employees violated Section 8(a)(3).

<sup>14</sup> The Seventh Circuit decided *University of Chicago* before the Supreme Court decided *First National Corp.* We do not here consider the effect of *First National* on *Fibreboard*. See fn. 5, above.

Member Hunter agrees to overrule the Board's 8(d) and 8(a)(5) holdings of *Los Angeles Marine*, *Boeing*, and *University of Chicago*, but does so for the reasons stated in part II, and finds it unnecessary to reach the matters discussed in part III.

<sup>15</sup> *NLRB v. Great Dane Trailers*, 388 U.S. 26 (1967).

#### V. REALISTIC AND MEANINGFUL COLLECTIVE BARGAINING

*Los Angeles Marine* and *Milwaukee Spring I* discourage truthful midterm bargaining over decisions to transfer unit work. Under those decisions, an employer contemplating a plant relocation for several reasons, one of which is labor costs, would be likely to admit only the reasons unrelated to labor costs in order to avoid granting the union veto power over the decision. The union, unaware that labor costs were a factor in the employer's decision, would be unlikely to volunteer wage or other appropriate concessions. Even if the union offered to consider wage concessions, the employer might hesitate to discuss such suggestions for fear that bargaining with the union over the union's proposals would be used as evidence that labor costs had motivated the relocation decision.

We believe our holding today avoids this dilemma and will encourage the realistic and meaningful collective bargaining that the Act contemplates. Under our decision, an employer does not risk giving a union veto power over its decision regarding relocation and should therefore be willing to disclose all factors affecting its decision. Consequently, the union will be in a better position to evaluate whether to make concessions. Because both parties will no longer have an incentive to refrain from frank bargaining, the likelihood that they will be able to resolve their differences is greatly enhanced.<sup>16</sup>

#### VI. CONCLUSION

Accordingly, for all the foregoing reasons, we reverse our original Decision and Order and dismiss the complaint.

#### ORDER

The complaint is dismissed.

MEMBER ZIMMERMAN, dissenting.

Contrary to my colleagues, I would find, in agreement with the result in the Board's initial decision, that under Section 8(d) of the Act Respondent is prohibited from transferring its assembly operations from its Milwaukee facility to its McHenry facility during the term of its collective-bargaining agreement in order to obtain relief from the labor

costs imposed by that agreement, unless it obtains the Union's assent.

There are two issues which must be decided in each plant relocation case. The first issue is whether an employer has a duty to bargain with a union over its relocation decision, or, in other words, whether the relocation decision is a mandatory subject of bargaining. As explained below, I would find such decision to be mandatory where the decision is amenable to resolution through collective bargaining. Here, I would find Respondent's decision to relocate its assembly work from Milwaukee to McHenry amenable to resolution through bargaining and thus a mandatory subject of bargaining. The second issue is whether under Section 8(d) an employer may implement its relocation decision after an impasse in bargaining during the term of the collective-bargaining agreement. As explained below, I would find that Section 8(d) prohibits such a relocation of bargaining unit work in the absence of an agreement with the union, but only where the employer's relocation decision is motivated solely or predominantly by a desire to avoid terms of the collective-bargaining agreement. My colleagues and I apparently agree that if a collective-bargaining agreement contains an applicable work-preservation clause, Section 8(d) requires the employer to obtain the union's consent prior to any transfer of work regardless of the reasons underlying the transfer. The difference, then, between my colleagues and myself is that I find Section 8(d) applicable to other contractual terms. Here, as Respondent's decision was motivated solely by its desire to avoid the wage provisions of the contract, I would find that Respondent is prohibited from implementing its decision without the Union's consent during the term of the collective-bargaining agreement.

The threshold issue which must be decided is whether Respondent's relocation decision was a mandatory subject of bargaining. There can be no logical or practical discussion of the obligations imposed by Section 8(d) without deciding this issue.

Section 8(d) of the Act<sup>2</sup> prohibits midterm unilateral modifications and terminations of collective-bargaining agreements, but only with regard to mandatory subjects of bargaining. *Chemical Workers v. Pittsburgh Glass*, 404 U.S. 157, 185 (1971). Thus, if Respondent's decision to relocate its as-

<sup>16</sup> The dissent misreads our decision. In part II we hold that the relevant portion of Sec. 8(d) mandates that we identify a term or condition contained in a contract before finding that an employer modified a contract without union consent. In this part, we point out that our interpretation of Sec. 8(d) is consistent with the Act's policy, set forth in Sec. 1, of "encouraging the practice and procedure of collective bargaining." We fail to discern how our decision undermines the statutory scheme or avoids the application of Sec. 8(d).

<sup>2</sup> Sec. 8(d) of the Act provides, in pertinent part, that "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 . . . . *Provided*, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract . . . ."

sembly operations were not a mandatory subject of bargaining, there would be no further obligations on Respondent under Section 8(d) and Respondent would be free to implement its decision even in the face of a collective-bargaining clause or agreement specifically prohibiting such a move, subject only to bargaining with the Union over the effects of its decision. In these circumstances any finding regarding whether Respondent's decision constituted a prohibited unilateral contract modification is meaningless without a finding regarding whether Respondent's decision was a mandatory subject of bargaining.<sup>2</sup> For the reasons below, I find that Respondent's decision to relocate assembly work from Milwaukee to McHenry was a mandatory subject of bargaining.

A.

The legal framework for determining bargaining obligations with regard to any employer decision to alter the method of its operation is necessarily grounded on the two Supreme Court decisions: *Fibreboard Corp. v. NLRB*<sup>3</sup> and *First National Corp. v. NLRB*.<sup>4</sup> In light of the controversy over what the Supreme Court said or did not say in those decisions, it is important first to examine those opinions.

*Fibreboard* presented the issue of whether an employer's decision to subcontract unit work was a mandatory subject of bargaining. The employer in *Fibreboard* decided, for economic reasons, that, after its contract with the union expired, it would contract out its maintenance work to an independent contractor and discharge its maintenance employees. The Supreme Court, adopting the rationale of the Board, held that a management decision to subcontract work out of an existing bargaining unit was a mandatory subject of bargaining, covered by the phrase "terms and conditions of employment" in Section 8(d) of the Act. The Court emphasized:

The subject matter of the present dispute is well within the literal meaning of the phrase "terms and conditions of employment." See *Order of Railroad Telegraphers v. Chicago & N.W.R. Co.*, 362 U.S. 330. A stipulation with respect to the contracting out of work performed by members of the bargaining unit might appropriately be called a "condition of

employment." The words even more plainly cover termination of employment which, as the facts of this case indicate, necessarily results from the contracting out of work performed by members of the established bargaining unit. [379 U.S. at 210.]

The Court added that to hold that "contracting out is a mandatory subject of collective bargaining would promote the fundamental purpose of the Act by bringing a problem of vital concern to labor and management within the framework established by Congress as most conducive to industrial peace." 379 U.S. at 211.

The Court noted two factors which illustrated the propriety of requiring bargaining over the subcontracting decision. First, the employer's decision to subcontract its maintenance work did not alter the employer's basic operation as maintenance work still had to be performed in the plant. Second, the employer's decision did not involve any capital investment but merely contemplated replacing existing employees with those of an independent contractor "to do the same work under similar conditions of employment." Thus, the Court concluded, "to require the employer to bargain about the matter would not significantly abridge his freedom to manage the business." Finally, the Court emphasized that the reasons for the employer's decision to subcontract, namely, "that economies could be derived by reducing the work force, decreasing fringe benefits, and eliminating overtime payments . . . have long been regarded as matters peculiarly suitable for resolution within the collective bargaining framework . . ." The Court, however, did explicitly refrain from passing on any other type of "contracting out" or "subcontracting" which might arise.

*First National* presented the issue of whether an employer's decision to close a portion of its operation was a mandatory subject of bargaining. The employer in *First National*, without notice to or bargaining with the union, which had recently become its employees' collective-bargaining representative, terminated its agreement to provide custodial service to one of its customers, Greenpark, which refused to agree to increase its fee paid to First National Maintenance, and laid off the employees who had been servicing Greenpark. The Court, reversing the Board, held that the employer had no duty to bargain over its decision, characterizing the decision as one "involving a change in the scope and direction of the enterprise, [which] is akin to the decision whether to be in business at all . . ." The Court held:

<sup>2</sup> My colleagues base their avoidance of this latter issue on the fact that the parties, by their stipulation and the manner in which they briefed this case, treat Respondent's relocation decision as a mandatory subject of bargaining. The Board, however, is not, and indeed should not, be bound by stipulations regarding legal conclusions nor by a party's failure to address a necessary issue.

<sup>3</sup> 379 U.S. 203 (1964).

<sup>4</sup> 452 U.S. 666 (1981).

The concept of mandatory bargaining is premised on the belief that collective discussions backed by the parties' economic weapons will result in decisions that are better for both management and labor and for society as a whole. This will be true, however, only if the subject proposed for discussion is amenable to resolution through the bargaining process. Management must be free from the constraints of the bargaining process to the extent essential for the running of a profitable business. It also must have some degree of certainty beforehand as to when it may proceed to reach decisions without fear of later evaluations labeling its conduct an unfair labor practice. Congress did not explicitly state what issues of mutual concern to union and management it intended to exclude from mandatory bargaining. Nonetheless, in view of an employer's need for unencumbered decisionmaking, bargaining over management decisions that have a substantial impact on the continued availability of employment should be required only if the benefit, for labor-management relations and the collective-bargaining process, outweighs the burden placed on the conduct of the business. [452 U.S. at 678-679. Citations and footnotes omitted.]

The Court reaffirmed its decision in *Fibreboard* and noted that, in that decision, it had engaged in this type of "benefit" and "burden" analysis. The Court concluded, however, that, unlike the subcontracting decision in *Fibreboard*, "the harm likely to be done to an employer's need to operate freely in deciding whether to shut down part of its business purely for economic reasons outweighs the incremental benefit that might be gained through the union's participation in making the decision, and we hold that the decision itself is *not* part of § 8(d)'s 'terms and conditions' . . . ." (452 U.S. at 686. Footnotes omitted.)

The Court, however, in both a footnote and in the text of its decision then explicitly limited its holding. In footnote 22 the Court stated:

In this opinion we of course intimate no view as to other types of management decisions, such as plant relocations, sales, other kinds of subcontracting, automation, etc., which are to be considered on their particular facts. See, e.g., *International Ladies' Garment Workers Union v. NLRB*, 150 U.S. App. D.C. 71, 463 F.2d 907 (1972) (plant relocation predominantly due to labor costs); *Weltronic Co. v. NLRB*, 419 F.2d 1120 (CA 6 1969) (decision to move plant three miles), cert. denied, 398 U.S. 938 (1970); *Dan Dee West Virginia Corp.*,

180 NLRB 534 (1970) (decision to change method of distribution, under which employee-drivers became independent contractors); *Young Motor Truck Service, Inc.*, 156 NLRB 661 (1966) (decision to sell major portion of business). See also Schwarz, *Plant Relocation or Partial Termination—The Duty to Decision-Bargain*, 39 Ford. L. Rev. 81, 100-102 (1970). [452 U.S. at 686.]

In the text of the decision the Court stated:

In order to illustrate the limits of our holding, we turn again to the specific facts of this case. First, we note that when petitioner decided to terminate its Greenpark contract, it had no intention to replace the discharged employees or to move that operation elsewhere. Petitioner's sole purpose was to reduce its economic loss, and the union made no claim of antiunion animus. In addition, petitioner's dispute with Greenpark was solely over the size of the management fee Greenpark was willing to pay. The union had no control or authority over that fee. The most that the union could have offered would have been advice and concessions that Greenpark, the third party upon whom rested the success or failure of the contract, had no duty even to consider. These facts in particular distinguish this case from the subcontracting issue presented in *Fibreboard*. Further, the union was not selected as the bargaining representative or certified until well after petitioner's economic difficulties at Greenpark had begun. We thus are not faced with an employer's abrogation of ongoing negotiations or an existing bargaining agreement. Finally, while petitioner's business enterprise did not involve the investment of large amounts of capital in single locations, we do not believe that the absence of "significant investment or withdrawal of capital," *General Motors Corp., GMC Truck & Coach Div.*, 191 NLRB at 952, is crucial. The decision to halt work at this specific location represented a significant change in petitioner's operations, a change not unlike opening a new line of business or going out of business entirely. [452 U.S. at 687-688.]

Although the Supreme Court in *Fibreboard* and *First National* did not deal directly with the issue presented here, that of whether an employer's decision to relocate work from one of its plants to another is a mandatory subject of bargaining, those decisions strongly suggest that, under the facts of this case, Respondent's decision to relocate its as-

sembly work from Milwaukee to McHenry was a mandatory subject of bargaining.

The common thread of both the *Fibreboard* and *First National* decisions is that bargaining is required where the subject matter is amenable to resolution through the bargaining process. Where, as in *First National*, the employer's decision to alter its operation is motivated by "a concern . . . wholly apart from the employment relationship," then bargaining is not required as the union has no control over or authority to affect the employer's concern. In short, as the Court pointed out in *First National*, all that a union can do in such cases is to offer advice. Under these circumstances, bargaining would be futile. But where, as in *Fibreboard*, the reasons for an employer's decision are "peculiarly suitable for resolution within the collective bargaining framework," bargaining is required. Thus, the Board in each case must analyze the employer's decision and the reasons underlying it to determine whether the decision is amenable to the resolution through collective bargaining or, in the words of the *First National* decision, whether "the benefit, for labor-management relations and the collective-bargaining process, outweighs the burden placed on the conduct of the business."

#### B.

I find the particular fact situation presented by the instant relocation of work more analogous to the subcontracting decision in *Fibreboard* than the partial closing decision in *First National*. That finding begins with an analysis of Respondent's decision in terms of the similarities between this case and *Fibreboard* and the dissimilarities between this case and *First National*.

The factors which led the Court in *Fibreboard* to conclude that a subcontracting decision was amenable to resolution through collective bargaining also are present here. First, as in *Fibreboard*, Respondent's decision to relocate the assembly work would not alter Respondent's basic operation. Respondent would still perform the same amount of assembly work in the same manner. The only change in Respondent's operation would be the location of the work being performed and the employees performing it. Rather than continuing to perform the work in Milwaukee by employees represented by the Union, Respondent would have the work performed in McHenry by nonunion employees. Indeed, Respondent's decision contemplated even less of an alteration of its operation than was present in *Fibreboard* since Respondent, after the relocation, would still retain complete control over the employees performing the assembly work as contrasted with a subcontracting situation where

the employees doing the work would be controlled by an altogether different employer. Second, relatively little capital investment was contemplated by Respondent in relocating the work. The only apparent expenditure of funds resulting from Respondent's relocation decision involved the relocation of some equipment from Milwaukee to McHenry, but the record contains no estimate of the cost involved.

Moreover, Respondent's decision to relocate the assembly work would not result in the shutting down of the Milwaukee plant or the sale of Respondent's assets at the Milwaukee plant. The assembly work represented only approximately one-third of the bargaining unit work performed at the Milwaukee plant, and Respondent intended to perform the remainder of the work at Milwaukee. Under these circumstances, I do not find that Respondent's decision to relocate the valve work involved "a significant investment or withdrawal of capital [which] will affect the scope and ultimate direction of an enterprise." *General Motors Corp.*, 191 NLRB 951, 952 (1971).

As in *Fibreboard*, Respondent's reasons for relocating the valve work are "peculiarly suitable for resolution within the collective-bargaining framework." The parties stipulated that Respondent's decision to relocate assembly work was motivated solely because of the comparatively higher labor costs at Milwaukee than McHenry. The Supreme Court in both *Fibreboard* and *First National* emphasized that a desire to reduce labor costs was amenable to resolution through bargaining. For in such a case, it is clear that the employer and the union may be able to reach a mutually acceptable solution through collective bargaining, and bargaining should therefore not be predetermined to be futile. Indeed, had the Union agreed to Respondent's proposal for reductions in wages and benefits, Respondent admittedly would not have relocated the assembly work to McHenry. Accordingly, I find that Respondent's reason for seeking to relocate its assembly operations was appropriate for resolution through collective bargaining.

Conversely, the factors which led the Supreme Court to conclude in *First National* that the employer's decision to close a part of its operation was not a mandatory subject of bargaining are not present in this case. As noted above, Respondent intended to continue assembling automobile parts at McHenry in the same quantity and in the same fashion as in Milwaukee but with different employees.<sup>5</sup> Respondent's decision to relocate the assem-

<sup>5</sup> The parties stipulated that Respondent lost a contract with Fisher Body resulting in a \$200,000-per-month decline in revenues. It is unclear

*Continued*

bly operation can in no way be deemed "akin to the decision whether to be in business at all," or to represent "a change not unlike opening a new line of business or going out of business entirely." Thus, the Supreme Court's emphasis in *First National* that the employer had no intention to replace the discharged employees or to move elsewhere the portion of its business that it closed is clearly not applicable in the instant case. Nor, is it true here, as in *First National*, that the Union had no control over the reasons behind Respondent's decision and could only have offered advice. As shown above, the reason behind Respondent's decision was to reduce labor costs which the Union could have met by contract concessions. Moreover, here, unlike *First National*, the Union was selected as the employees' bargaining representative long before Respondent's economic reasons surfaced for relocating the work. In fact, the Court emphasized in *First National* that it was not faced with an employer's abrogation of an existing bargaining agreement. There is such an abrogation here.

Finally, the *First National* decision also lends affirmative support to the proposition that Respondent's decision to relocate the assembly operation was a mandatory subject of bargaining. Although the Court stated in footnote 22 that it was not intimating a view as to other types of management decisions, it cited *Ladies Garment Workers v. NLRB (McLoughlin Mfg. Corp.)*, 463 F.2d 907 (D.C. Cir. 1972), in which the District of Columbia Court of Appeals enforced the Board's finding that the employer's decision to relocate its plant from Indiana to Alabama to reduce labor costs was a mandatory subject of bargaining. The Court also cited *Weltronic Co. v. NLRB*, 419 F.2d 1120 (6th Cir. 1969), in which the Sixth Circuit enforced the Board's finding that the employer had an obligation to bargain with the union over the decision to relocate its plant to a new plant 3 miles away to reduce labor costs, to obtain more space, and to have all its work performed in one building. Certainly, the Court's citation of these two cases, which were the only cases cited involving plant relocations, indicates, at the very least, that the Court expressed no disapproval of those court decisions.<sup>6</sup>

from the record whether this loss resulted in a decreased amount of assembly work, molding work, or other work. However, even if it resulted in less assembly work, the crucial point is that, if Respondent had implemented its relocation decision, it would have performed at McHenry whatever assembly work it had, which work had previously been performed at Milwaukee.

<sup>6</sup> This point is further bolstered by the additional citation in the footnote to the last two pages of a law review article written by Thomas J. Schwarz, who advocated on those pages that "[d]ecision-bargaining should be required in all cases where the employer plans to substitute non-unit workers for unit workers," including cases involving plant relocations. 39 Fordham L. Rev. 8-10, 100-102.

The application of *Fibreboard* principles to plant relocation situations in these cases underscores the logical connection between most instances of either subcontracting or relocation, as compared to a partial closing which is "akin to the decision whether to be in business at all." Subcontracting or relocation decisions typically are indistinct from the employees' standpoint: they have lost their jobs and others are now performing the work for the same employer either directly or indirectly. From the employer's viewpoint, there is also a strong common element: in either situation the employer has determined to continue the bargaining unit work by other employees, motivated in either case by a desire to increase its efficiency of operations.<sup>7</sup> My colleagues admit that the parties could have bargained for a work-preservation clause. Indeed, such clauses are mandatory subjects of bargaining. See *National Woodwork Manufacturers Assn.*, 386 U.S. 612 (1967). The fact that the parties did not bargain over such a clause does not transform what would have been a mandatory subject of bargaining into a nonmandatory subject of bargaining.

Where, as here, the factors predominantly involved are amenable to collective bargaining, requiring Respondent to bargain over its decision to relocate its valve operation provides benefits for labor-management relations and the collective-bargaining process which outweigh the burden placed on the conduct of its business. Accordingly, I find the decision to be a mandatory subject of bargaining.<sup>8</sup>

### C.

I turn now to the issue of whether Respondent is free unilaterally to implement its relocation decision during the term of the collective-bargaining agreement without the Union's consent after bargaining to impasse with the Union. Strong policy arguments lie on both sides of this issue. However, for the reasons discussed below, I am persuaded that Congress intended the Act to prohibit such midterm relocations where the employer's relocation decision was motivated solely or predominantly by a desire to avoid terms of a collective-bargaining agreement.

As noted above, Section 8(d) of the Act prohibits its midterm changes in any provision of a collective-bargaining agreement relating to mandatory subjects of bargaining without first obtaining the union's consent. It is well settled, and my colleagues agree, that an employer acts in derogation

<sup>7</sup> See Schwarz, 39 Fordham L. Rev. 8-10, 101-102.

<sup>8</sup> For the reasons stated in the Board's initial decision, I further find that the Union did not waive its statutory rights to bargain over Respondent's relocation decision.

of its bargaining obligations under Section 8(d), and thereby violates Section 8(a)(5), when it makes any midterm change in the contractual wage rate even though the employer's action is compelled by economic necessity<sup>9</sup> or the employer has offered to bargain with the union over the change and the union has refused.<sup>10</sup> Obviously then, my colleagues and I would agree that had Respondent in this case decided to reduce the wages paid to the assembly employees while continuing to perform the assembly work at Milwaukee, Respondent's decision would violate Section 8(a)(5). Respondent's decision to relocate the assembly work to McHenry would achieve the same result, albeit indirectly: its employees would continue to perform assembly work but at reduced wage rates. The issue then is whether the fact that Respondent decided to relocate the work takes Respondent's decision outside the proscriptions of Section 8(d), or in the words of the administrative law judge in *Los Angeles Marine Hardware Co.*,<sup>11</sup> whether the Act allows Respondent "to achieve by indirection that which [it could not] achieve by direct means under Section 8(d) of the Act."

Only in recent years has the issue of the effect of Section 8(d) on employer work transfer and relocation decisions<sup>12</sup> come before the Board. Prior to the initial decision in this case, the Board has addressed this issue in only four decisions.

In *University of Chicago*,<sup>13</sup> decided the year after *Oak Cliff-Golman*, the Board faced for the first time the issue of whether an employer's transfer of work was prohibited under Section 8(d). There, the university had two separate bargaining units of custodians, one represented by Service Employees' Union Local 321 and the other represented by AFSCME Local 1657. In the midterm of the contract with Local 321, the university unilaterally transferred the work of that unit to the other unit represented by Local 1657, where the employees received a lower wage rate, and abrogated the contract with Local 321. The administrative law judge found the university's action proscribed under Section 8(d) as its effect was to modify the wage provisions of the contract with Local 321. The Board affirmed the judge's decision but stressed that the university's action was a direct repudiation of the recognition clause in the Local 321 contract. The Seventh Circuit denied enforcement of the Board's decision, finding that the sole purpose behind the

university's transfer of the work was to obtain higher quality performance of the work, not to reduce the wage rate paid to the employees performing the work, and that the university was free to transfer the work after bargaining to impasse.

In *Boeing Co.*<sup>14</sup> the Board again found that the employer violated the recognition clause in the collective-bargaining agreement by transferring work from the bargaining unit to another unit without the union's consent. The Ninth Circuit, agreeing with the Seventh Circuit's *University of Chicago* decision, denied enforcement, stressing that the employer's action was admittedly motivated by the desire to increase efficiency in production. Thus, in neither case was contract avoidance the sole or controlling motive for transferring the unit work.

The next decision involving Section 8(d) and work relocation is *Los Angeles Marine Hardware Co.*,<sup>15</sup> a case factually similar to the instant case. In that case the employer, during the term of the contract, relocated a portion of its business from a unionized facility to nonunionized facilities without the union's consent. The employer, confronted with serious adverse economic prospects, based its relocation decision on the fact that its labor costs under the contract were significantly higher than those of its competitors. The administrative law judge, with the Board's adoption, found the employer's action proscribed under Section 8(d). As explained by the judge:

Under Section 8(d) of the Act, no party to a collective-bargaining agreement can be compelled to discuss or agree to a midterm modification of a collective-bargaining agreement, and, accordingly, a proposed modification can be implemented only if the other party's consent is first obtained. . . . This mandate is not excused either by subjective good faith or by the economic necessity of maintaining viability of an employer's operation and preserving the jobs of the employees in the bargaining unit. . . . Consequently, notwithstanding the persuasiveness and validity of an employer's economic straits, an employer is not free, without union consent, to make midterm modifications in wage rates. . . . In doing so [the respondent] did, of course, relocate the recreational sales facility. However, that fact alone does not serve to change the result. For, to permit relocation alone to vary this result would mean that employers would be permitted to achieve by indirection that which [they] were denied the opportunity to achieve by direct

<sup>9</sup> *Oak Cliff-Golman Baking Co.*, 207 NLRB 1063 (1973), enf. 505 F.2d 1302 (5th Cir. 1974), cert. denied 423 U.S. 826 (1975).

<sup>10</sup> *C & S Industries*, 158 NLRB 454 (1966).

<sup>11</sup> 235 NLRB 720, 735 (1978), enf. 602 F.2d 1302 (9th Cir. 1979).

<sup>12</sup> I agree with my colleagues that, for the purpose of deciding the effect of Sec. 8(d), there can be no logical distinction drawn between work transfer, reassignment, and relocation decisions.

<sup>13</sup> 210 NLRB 190 (1974), enf. denied 514 F.2d 942 (7th Cir. 1975).

<sup>14</sup> 230 NLRB 696 (1977), enf. denied 581 F.2d 793 (9th Cir. 1978).

<sup>15</sup> 235 NLRB 720, enf. 602 F.2d 1302.

means under Section 8(d) of the Act. [235 NLRB at 735. Case citations omitted.]

The Ninth Circuit enforced the Board's decision, agreeing with the Board that the employer's action constituted a midterm repudiation of the contract in violation of the Act. The court reiterated the judge's rationale that to permit such a relocation "would allow an employer to do indirectly what cannot be done directly under the Act."<sup>16</sup>

Adhering to the *Los Angeles Marine* decision, the Board in *Brown Co.*<sup>17</sup> found that the employer violated Section 8(a)(5) by unilaterally, without the union's consent, transferring bargaining unit work to one of its subsidiaries midterm in the contract for the sole purpose of escaping its contractual wage obligations.

I find that Respondent's midterm relocation decision was proscribed under Section 8(d) of the Act. Such decision, admittedly motivated solely to avoid the contractual wage rates, was simply an attempt to modify the wage rate provisions in the contract, albeit indirectly. Respondent voluntarily obligated itself to pay a certain amount of wages to employees performing assembly work during the term of the contract, and it cannot avoid this obligation merely by unilaterally relocating the work to another of its facilities, just as it could not by unilaterally reducing the wage rate. It is disingenuous to argue, as do my colleagues, that Respondent's relocation decision did not disturb the contractual wages and benefits at the Milwaukee facility. If Respondent had implemented its decision, there would be no assembly employees at the Milwaukee facility to receive the contractual wages and benefits. Rather, all assembly work would be performed at McHenry where Respondent would pay its employees less for the same work. Under these circumstances, my colleagues' conclusion that Respondent left the wage and benefit provisions "intact" at Milwaukee is illogical and without legal significance.

Similarly, their claim that my affirmation of the 8(d) mandate implies a work-preservation clause in virtually every labor contract is equally unfounded. Although a valid work-preservation clause could serve to bar a relocation of bargaining unit work motivated for reasons other than avoidance of contractual terms, that circumstance is unrelated to the instant case. Here, Respondent does seek to modify the contractual wage provision, a result that is prohibited by Section 8(d) itself and is not dependent on any work-preservation clause. It is hardly "revolutionary," as my colleagues assert, simply to

apply the contractual terms to which the parties voluntarily agreed.

At the same time, my views of the narrow reach of Section 8(d) brings me into partial agreement with my colleagues in this case. In agreement with them, I would not endorse the approach utilized by the Board in its *University of Chicago* and *Boeing* decisions that employer midterm transfers of work abrogate the contractual recognition clause. Such clauses are "merely the parties' descriptive recitation of the physical location of the facilities at the time of the negotiations,"<sup>18</sup> and do not create an implied prohibition against the transfer or relocation of work away from the bargaining unit regardless of the employer's motivation.

Neither do I endorse the Board's decisions in *University of Chicago* and *Boeing* to the extent that the Board found that an employer's midterm relocation decision motivated by reasons unrelated to a desire to avoid the contractual wage rates is proscribed by Section 8(d). As the motivation for the employers' action in those cases was a desire to increase productivity, I concur in the court opinions in those cases that the employers' actions did not violate Section 8(d).<sup>19</sup>

In my view the determinative factor in deciding whether an employer's midterm relocation decision is proscribed under Section 8(d) is the employer's motive.<sup>20</sup> Where, as here, the decision is controlled by a desire to avoid a contractual term with regard to a mandatory subject of bargaining, such as wages, then the decision is violative under Sections 8(d) and 8(a)(5), and the employer may not implement the decision during the term of the contract without the union's consent. But where the deci-

<sup>16</sup> *Los Angeles Marine Hardware Co.*, 602 F.2d at 1306.

<sup>19</sup> My colleagues' criticism that I have ignored the Board's decision in *Ozark Trailers*, 161 NLRB 561 (1966), reveals a misunderstanding of my position. In my view, even if the employer's proposed decision is amenable to resolution through collective bargaining and thus constitutes a subject of mandatory bargaining, an 8(d) violation is not established merely because the reasons underlying the employer's decision are economic; rather, the reasons must amount to the avoidance of a contractual term. Since *Ozark* was not litigated under an 8(d) theory, it is irrelevant to a discussion of the application of Sec. 8(d). In any event, it is difficult, if not impossible, to attempt to ascertain some 20 years later whether the employer's decision to close the *Ozark* plant and subcontract the work was motivated by a desire to avoid any contractual term. The employer's asserted reasons for its action were that "excessive man hours were required for the production of custom refrigerated truck bodies; the truck bodies produced and sold would not perform properly because of defective workmanship, necessitating a return of the bodies to the plant at disastrous expense to Respondents; and the plant facilities were not efficiently laid out." 161 NLRB at 567-568. Assuming none of these reasons related to a specific contractual term which the employer sought to avoid, the employer would be free to implement its decision after satisfying its bargaining obligations.

<sup>20</sup> See O'Keefe and Tuohey, *Economically Motivated Relocations of Work and an Employer's Duties under Section 8(d) of the National Labor Relations Act: A Three-Step Analysis*, *Fordham Urban Law Journal* 795, 842-843 (1982-83). As shown above, motive is also crucial in determining whether an employer's decision is a mandatory subject of bargaining.

<sup>16</sup> 602 F.2d at 1307.

<sup>17</sup> 243 NLRB 769 (1979), remanded mem. 663 F.2d 1078 (9th Cir. 1981).

sion is motivated by reasons unrelated to contract avoidance, then the employer may unilaterally implement its decision after bargaining to impasse with the union.<sup>21</sup>

My colleagues claim that this approach encourages employers to deny that a relocation decision is motivated by a desire to reduce labor costs. I disagree. An employer considering relocation to reduce labor costs has substantial incentive to tell the union why it needs relief and how much relief it needs: relocation will usually involve the transfer of equipment and management personnel, as well as the training of new employees to perform the relocated work. An employer who can avoid these kinds of disruption to production by bargaining with the union for contract concessions will likely do so. See *First National Corp. v. NLRB*, 452 U.S. at 682. Indeed, Respondent's actions illustrate this point. Respondent, whose relocation decision was admittedly motivated by its desire to reduce labor costs, informed the Union of its plan and its reasons, and engaged in concessions bargaining, which, if successful, would have resulted in the assembly operations remaining in Milwaukee.

Moreover, even assuming that my colleagues' prediction would prove to be accurate on some occasions under the limited application of Section 8(d) I find in this case, the Board cannot use this reasoning to avoid the application of that section.

<sup>21</sup> Where the employer's decision involves reasons both related to contract avoidance and unrelated to contract avoidance, I would find the decision proscribed by Sec. 8(d) only where the reasons related to contract avoidance are predominant.

Before the enactment of Section 8(d) in 1947, an employer was under a duty, upon request, to bargain with a union over terms and conditions of employment regardless of whether or not an existing collective-bargaining agreement bound the parties as to the terms and conditions to be discussed. See *NLRB v. Sands Mfg. Co.*, 306 U.S. 332, 342 (1938). However, Congress, desiring to end this continuous bargaining, enacted the 8(d) proscription against midterm contract modifications to achieve "peaceful industrial relations" through stable collective-bargaining agreements which guard "the right of either party to a contract to hold firm to the . . . terms or conditions of employment specifically provided for in writing." *Equitable Life Insurance Co.*, 133 NLRB 1675, 1689 (1961). See 2 Legislative History (LMRA 1947), at 1625; *Chemical Workers v. Pittsburgh Glass*, 404 U.S. at 186. Under these circumstances, the Board may not undermine the statutory scheme merely because some violators of the Act may not be brought to justice.

Accordingly, I would find that Respondent, by its midterm decision to relocate the assembly work from Milwaukee to McHenry without the Union's consent solely to avoid the contractual wage rates, acted in derogation of its bargaining obligation under Section 8(d), and thereby violated Section 8(a)(5) of the Act.<sup>22</sup>

<sup>22</sup> For the reasons given by the Board and the Ninth Circuit in *Los Angeles Marine*, I would further find that Respondent violated Sec. 8(a)(3) of the Act.