

**Otis Elevator Company, a wholly owned subsidiary of United Technologies and Local 989, International Union, United Automobile, Aerospace & Agricultural Implement Workers of America.**  
Case 22-CA-8507

6 April 1984

**SUPPLEMENTAL DECISION AND ORDER**

BY CHAIRMAN DOTSON AND MEMBERS  
ZIMMERMAN, HUNTER, AND DENNIS

On 25 March 1981 the National Labor Relations Board issued a Decision and Order<sup>1</sup> in this proceeding, finding that the Respondent had engaged in unfair labor practices in violation of Section 8(a)(5) and (1) of the National Labor Relations Act. The Board held that the Respondent had violated the Act by: (1) refusing to bargain with the Union over its decision to transfer and consolidate certain unit work from its Mahwah, New Jersey facility to other facilities in East Hartford, Connecticut; (2) refusing to provide the Union with information relevant to the Respondent's decision; and (3) refusing to bargain with the Union over the effects of the Respondent's decision.

The Union and the Respondent filed petitions for review of the Board's Decision and Order with the United States Court of Appeals for the District of Columbia Circuit, and the Board filed a cross-application for enforcement of its Order. On 12 August 1981 the court granted the Board's motion to remand this case to the Board for reconsideration in light of the Supreme Court's decision in *First National Maintenance v. NLRB*, 452 U.S. 666 (1981).

On 11 September 1981 the Board informed the parties that it intended to reconsider this case and invited them to submit statements of position. All parties filed statements of position.

I

The Board has reconsidered its Decision and Order in this case in light of the Supreme Court's opinion in *First National Maintenance*. We conclude that the Respondent was free to decide to discontinue its research and development activities in Mahwah, New Jersey, and to consolidate them with its operation in East Hartford, Connecticut, unrestrained by Sections 8(a)(5) and 8(d) of the Act. Acknowledging that this decision touched on a matter of central concern to the Union and to the employees it represented, we nevertheless find under the guidance of *First National Maintenance*

that the decision turned not upon labor costs, but instead turned upon a change in the nature and direction of a significant facet of its business. Thus it constituted a managerial decision of the sort which is at the core of entrepreneurial control outside the limited scope of Section 8(d).

Our understanding of the Court's construction of Section 8(d) is best explicated by Mr. Justice Stewart's concurring opinion in *Fibreboard Corp. v. NLRB*, 379 U.S. 203, 217 (1964), explicitly relied on by the Court in *First National Maintenance*: "If, as I think clear, the purpose of Section 8(d) is to describe a limited area subject to the duty of collective bargaining, those management decisions which are fundamental to the basic direction of a corporate enterprise or which impinge only indirectly upon employment security should be excluded from the area." 379 U.S. at 223.

II

United Technologies acquired Otis Elevator Company in 1975. A review was then made of Otis' engineering organization and the state of Otis' technological development. Based on that review, a formal evaluation of Otis' operations was undertaken by Booz-Allen & Hamilton and by the President of Otis, Robert Cole. In addition, Otis' vice president Dr. William M. Foley independently studied the Company's existing technology. All three studies showed that Otis' technology was outdated, having resulted in product designs that were too expensive and not competitive. Otis' share of the world elevator market was steadily declining, and the Company was selling its products at less than cost in order to remain in the market. Otis' engineering activity was scattered throughout North America, and work performed in one location was being duplicated elsewhere. In particular, the Respondent did research and development work in Parsippany, New Jersey, and did similar work at its outdated and inadequate engineering center in Mahwah, New Jersey.<sup>2</sup> By contrast, United Technologies had a major research and development center in East Hartford, Connecticut, employing approximately 1000 employees, some of whom were working on elevator-related research projects for Otis.

<sup>1</sup> 255 NLRB 235 (1981) (*Otis Elevator I*).  
<sup>2</sup> Professional and technical employees employed at the Mahwah engineering center have been represented by the Union for a number of years. The unit consists of employees employed in the Respondent's engineering division, which is headquartered in the Mahwah engineering center, and includes a small number of employees working at the Respondent's Harrison, New Jersey, and Yonkers, New York, facilities. In December 1977 there were approximately 274 employees in the unit. The most recent collective-bargaining agreement was effective by its terms from 1 April 1977 to 31 March 1980.

The Parsippany employees are not represented by the Union.

<sup>1</sup> 255 NLRB 235 (1981) (*Otis Elevator I*).

Based on its review of Otis' problems, the Respondent decided to terminate Otis research and development operations in Parsippany and Mahwah and to consolidate them at its facility in East Hartford, Connecticut. The Respondent's management believed that consolidation of research and development functions in close proximity to United Technologies would strengthen the overall engineering effort and enable Otis to redesign its product to reduce its production costs. In July 1977, Otis closed its Parsippany facility, transferred its research and development operations to East Hartford, and relocated there approximately 30 Parsippany employees. In the fall of 1977, Vice President Foley recommended a merger of the Mahwah product improvement effort (part of the Otis engineering division) with the overlapping Otis research and development function now located in East Hartford. In October 1977 President Cole approved Dr. Foley's recommendation to transfer the Mahwah product improvement group to East Hartford.

As part of the research and development consolidation, Otis began construction of a research center, including an elevator test tower, adjacent to Otis' North American Operations headquarters in East Hartford, with which it would share computer facilities. The new research center represented a capital investment of between \$2 and \$3.5 million.

On 2 December 1977 Dr. Foley informed the Mahwah employees of Otis' plans: by July 1979 there would be a research and development center in East Hartford housing research, development, product engineering, product improvement, testing, and cost reduction operations. The Mahwah facility would continue to house contract engineering, final drafting, data handling, data release, and worldwide data distribution. As part of its plan, Otis transferred 17 unit employees from Mahwah to East Hartford.

We conclude that the Respondent's decision to discontinue its research and development functions in Mahwah, New Jersey, and to transfer those functions to its facility in East Hartford, Connecticut, was not subject to mandatory bargaining. In the language of the Court in *First National Maintenance*:

Management must be free from 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.]

In this case the Respondent decided to discontinue its research and development operations in Parsippany and Mahwah, New Jersey, and to consolidate them in East Hartford, Connecticut, to improve its research and development and hopefully the marketability of its product. Good or bad, this type of decision is beyond the reach of Section 8(d). The Respondent made its decision because of its opinion that its technology was dated, its product was not competitive, its Mahwah research and development operation duplicated other operations, and because a newer and larger research and development center was available in East Hartford.<sup>3</sup> These facts establish that the Respondent's decision did not turn upon labor costs<sup>4</sup> even though that factor may have been one of the circumstances which stimulated the evaluation process which generated the decision. Despite the evident effect on employees, the critical factor to a determination whether the decision is subject to mandatory bargaining is the essence of the decision itself, i.e., whether it turns upon a change in the nature or direction of the business, or turns upon labor costs; *not* its effect on employees nor a union's ability to offer alternatives. The decision at issue here clearly turned upon a fundamental change in the nature and direction of the business, and thus was not amenable to bargaining.

We see no need to reexamine the full scope of the Court's analysis in *First National Maintenance*. The Court discussed at length the Board's extant decisions and the opinions of the Courts of Appeals

<sup>3</sup> In any particular case, although perhaps not here, either the soundness of the judgment or the value of these concerns might be debatable. We see no value in such a debate. Whatever the merits of the decision, so long as it does not turn upon labor costs, Sec. 8(d) of the Act does not apply.

<sup>4</sup> We note there is no allegation present that the Respondent acted for antiunion reasons, or from a desire to modify or lower labor costs. As the Court stated:

Moreover, the union's legitimate interest in fair dealing is protected in § 8(a)(3), which prohibits partial closings motivated by antiunion animus, when done to gain an unfair advantage. *Textile Workers v. Darlington Co.*, 380 U.S. 263 (1965). Under § 8(a)(3) the Board may inquire into the motivations behind a partial closing. An employer may not simply shut down part of its business and mask its desire to weaken and circumvent the union by labeling its decision "purely economic." [452 U.S. at 682.]

in this difficult area. For all the reasons given by the Court, we find that the Respondent's decision here turned upon a fundamental change in the nature and direction of the business, and for that reason is excluded from the limited area of bargaining described by Section 8(d).

### III

The Board, before the Supreme Court decided *First National Maintenance*, had applied its approach to plant closure to other managerial decisions which affected both the direction of the business and employees. The Court's opinion rejected that approach. The Court's view that predictability in this area is necessary for both labor and management leads us to elaborate on our present view of Section 8(d) as it impacts upon management decisions, other than partial closings, to change the nature of the enterprise.

In footnote 22 of its opinion the Supreme Court excluded from its ruling questions whether other types of management decisions, such as plant relocations, sales, various kinds of subcontracting, automation, etc., are excluded from mandatory bargaining. In view of the Court's rejection of the Board's approach we have decided to follow the Court's lead and to rely on the analysis of Justice Stewart's opinion in *Fibreboard*:

Yet there are other areas where decisions by management may quite clearly imperil job security, or indeed terminate employment entirely. An enterprise may decide to invest in labor-saving machinery. Another may resolve to liquidate its assets and go out of business. Nothing the Court holds today should be understood as imposing a duty to bargain collectively regarding such managerial decisions, which lie at the core of entrepreneurial control. Decisions concerning the commitment of investment capital and the basic scope of the enterprise are not in themselves primarily about conditions of employment, though the effect of the decision may be necessarily to terminate employment. If, as I think clear, the purpose of Section 8(d) is to describe a limited area subject to the duty of collective bargaining, those management decisions which are fundamental to the basic direction of the corporate enterprise or which impinge only indirectly upon employment security should be excluded from that area. [379 U.S. at 223.]

Thus, for the reasons the Court gave in *First National Maintenance* (inter alia, management's need for predictability, flexibility, speed, secrecy, and to operate profitably), we hold that excluded from

Section 8(d) of the Act are decisions which affect the scope, direction, or nature of the business.<sup>5</sup> For example, we are aware that in the past the Board's decisions reflected an almost reflexive response to "subcontracting" decisions as requiring bargaining. We emphasize, again, that the appellation of the decision is not important. *Fibreboard* "subcontracting" must be bargained not because the decision turns upon the label, but because in fact the decision turns upon a reduction of labor costs. In *First National Maintenance* the Court explained that its holding in *Fibreboard* derived from the fact that the employer's decision to subcontract did not turn upon a change in the basic operation, but rather turned upon a reduction of labor costs.

In contrast, if *Adams Dairy*, 137 NLRB 815 (1962), enf. denied in relevant part 350 F.2d 108 (9th Cir. 1965), cert. denied 382 U.S. 1011 (1966), were before us today, we would hold that decision to "subcontract" is *not* subject to Section 8(d), because the employer's decision there to discontinue its own distribution operation and to contract out that function turned upon a fundamental change in the scope and direction of the enterprise. The employer retained no control over the equipment or the employees in the subcontractors' distribution system. Further, no alter ego or other sham devices were employed to disguise a unilateral reduction in labor costs in an operation over which the employer maintained surreptitious control. As the court of appeals said: "[T]here is a change in basic operating procedure in that the dairy liquidated that part of its business handling distribution of milk product. . . ." 350 F.2d at 111. Included within Section 8(d), however, in accordance with the teachings of *Fibreboard*, are all decisions which turn upon a reduction of labor costs. This is true whether the decision may be characterized as subcontracting, reorganization, consolidation, or relocation, if the decision in fact turns on direct modification of labor costs and not on a change in the basic direction or nature of the enterprise. We note in this regard our recent decision in *Milwaukee Spring II*, 268 NLRB 601 (1984). In *Milwaukee*

<sup>5</sup> Such decisions include, inter alia, decisions to sell a business or a part thereof, to dispose of its assets, to restructure or to consolidate operations, to subcontract, to invest in labor-saving machinery, to change the methods of finance or of sales, advertising, product design, and all other decisions akin to the foregoing. See generally *Machinists v. Northeast Airlines*, 473 F.2d 549 (1st Cir. 1972), cert. denied 409 U.S. 845 (1972), arising under the Federal Aviation Act of 1958, Sec. 408, 49 U.S.C.A. Sec. 1378, and Railway Labor Act, Sec. 2, subd. 1, 45 U.S.C.A. Sec. 152, subd. 1, where the court held that Northeast Airlines had no duty to bargain over its decision to merge into Delta Air Lines. The court held that *Fibreboard* did not guarantee union participation in a decision to merge. "[M]erger negotiations require a secrecy, flexibility and quickness antithetical to collective bargaining." 473 F.2d at 557, cited with approval in *First National Maintenance*, 452 U.S. at 683 fn. 20.

*Spring II* the parties stipulated that the employer's decision to relocate work from its unionized plant to a nonunion plant turned upon a reduction of its labor costs, and that the decision thus was a mandatory subject of bargaining. Had the parties not stipulated, we would have so held. Indeed, in *Milwaukee Spring II*, the Respondent recognized the decision as such, and did in fact bargain in good faith to impasse with the Union concerning wages.

We also recognize that these decisions do not fit neatly into categories. Such decisions often involve elements of one or more types of decisions, such as the termination, relocation, and consolidation of the research and development operations in this case. As we noted before, it is also evident that labor costs often are among the considerations which cause management to decide to alter the scope or direction of its business. The Court in *First National Maintenance* stated with respect to partial closings that: "If labor costs are an important factor in a failing operation and the decision to close, management will have an incentive to confer voluntarily with the Union to seek concessions that may make continuing the business profitable." 452 U.S. at 682. The Court nevertheless found that this factor was insufficient to put the decision within Section 8(d), despite its acknowledgement that in the past unions had aided employers by various devices to save faltering businesses. The Court reasoned that if labor costs were a factor, that element of the decision could be adequately dealt with in effects bargaining. We discern no substantial reason why this analysis is not equally applicable to other decisions which turn upon a significant change in the nature or direction of a business.

#### IV

In *Otis Elevator I*, the Board affirmed the administrative law judge's findings that the Union was entitled to the Booz-Allen and Cole reports in order to bargain over the Respondent's decision. Based on our holding that the Respondent was not required to bargain over its decision, we conclude that it was not obligated to provide the requested information. We shall dismiss this allegation of the complaint.<sup>6</sup>

#### V

The complaint alleges that the Respondent unilaterally determined the transfer criteria, as well as the individuals selected for transfer; that the Re-

spondent unilaterally refused to allow union representatives to attend the transfer interviews; and that the Respondent failed and refused to bargain over the effects of the research and development consolidation on the unit employees transferred and on the unit employees remaining at Mahwah. In *Otis Elevator I*, the Board found that the Respondent committed these effects-related violations. In so finding, the Board relied substantially on its holdings that the Respondent unlawfully refused to bargain over its consolidation decision and unlawfully withheld information from the Union.

In view of our conclusions here, we shall remand the effects-bargaining allegations of the complaint to the administrative law judge for further consideration. In order to assure that the parties' rights to litigate these issues are not abridged, any party shall have the opportunity to adduce further evidence bearing on these outstanding complaint allegations. Thereafter, or in the event no party seeks a further hearing, the administrative law judge shall reconsider these complaint allegations in light of our decision today and shall issue a Supplemental Decision.

#### AMENDED CONCLUSIONS OF LAW

1. The Respondent, Otis Elevator Company, a wholly owned subsidiary of United Technologies, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Local 989, International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, is a labor organization within the meaning of Section 2(5) of the Act.

3. All classifications of employees employed in the Respondent's Engineering Division located in Mahwah and Harrison, New Jersey, and Yonkers, New York, in the classifications described in Appendix A of the collective-bargaining agreement effective 1 April 1977 to 31 March 1980, but excluding nontechnical, secretarial, clerical employees not described in Appendix A, maintenance employees, guards and all supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since some time prior to 1 June 1950, the Union has been and is now the exclusive representative of all employees in the appropriate unit described above for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. The Respondent has not violated the Act by failing and refusing to bargain with the Union over its decision to terminate its research and development functions in Mahwah, New Jersey, and to re-

<sup>6</sup> In *Otis Elevator I*, the Board concluded that the information was also relevant to bargaining over the effects of the Respondent's decision. 255 NLRB 235 fn. 3. This conclusion was in error because the complaint alleges only that the information was relevant to the Respondent's decision; the issue whether the information was also relevant to effects bargaining was neither alleged nor litigated.

locate and consolidate those functions in East Hartford, Connecticut.

6. The Respondent has not violated the Act by failing and refusing to provide the Union with requested information about its decision.

#### ORDER

This proceeding is remanded to Administrative Law Judge Irwin Kaplan, who shall take the action required by our Supplemental Decision and Order.

IT IS FURTHER ORDERED that the administrative law judge prepare and serve on the parties a Supplemental Decision containing credibility resolutions, findings of fact, conclusions of law, and recommendations, and that, following service of the Supplemental Decision on the parties, the provisions of Section 102.46 of the Board's Rules and Regulations shall be applicable.

IT IS FURTHER ORDERED that the complaint allegations that the Respondent violated the Act by refusing to bargain over its decision to terminate its research and development functions in Mahwah, New Jersey, and to relocate and to consolidate those functions in East Hartford, Connecticut, and by its refusal to provide information relevant to its decision, are dismissed.

MEMBER DENNIS, concurring.

I join my colleagues in reversing the Board's original Decision and Order<sup>1</sup> to the extent it held that the Respondent violated the Act by: (1) refusing to bargain with the Union over its decision to consolidate and transfer certain unit work from its Mahwah, New Jersey facility to other facilities in East Hartford, Connecticut; and (2) refusing to provide the Union with information relevant to the Respondent's decision. I also agree with my colleagues that the remaining aspect, the Respondent's alleged refusal to bargain over the effects of its decision, should be remanded to the judge for further consideration.

Although I join Chairman Dotson and Member Hunter in the result they reach, I do not rely on their rationale for dismissing the complaint allegation that the Respondent unlawfully refused to bargain over its decision. I rely instead on my analysis of the Supreme Court's decision in *First National Maintenance v. NLRB*, 452 U.S. 666 (1981).

#### I. THE SUPREME COURT'S FIRST NATIONAL MAINTENANCE DECISION

First National Maintenance Corporation (FNM) provided cleaning and maintenance services for

commercial establishments, including Greenpark Care Center (Greenpark), a nursing home. FNM supplied the labor force, including supervision, at Greenpark's premises. Under the service contract, Greenpark reimbursed FNM for labor costs and paid a fixed management fee. FNM was losing money at Greenpark, but was unable to secure an increase in its management fee. As a result, FNM decided to discontinue operations at Greenpark. FNM discharged its employees working at Greenpark without bargaining with their union over the decision to close a part of its business.

An administrative law judge, citing Board precedent and the Supreme Court's *Fibreboard* decision,<sup>2</sup> found that the decision to terminate operations at Greenpark was a mandatory subject of bargaining because it did not involve a significant withdrawal of capital or affect the scope and direction of the enterprise. Therefore, the administrative law judge concluded that FNM's refusal to bargain over the decision violated Section 8(a)(5) and (1). The Board affirmed.<sup>3</sup>

The Second Circuit enforced the Board's Order, but adopted a different rationale.<sup>4</sup> The court stated that an employer's decision to close a part of its business is presumptively a mandatory subject of bargaining. The presumption could be rebutted by showing that the purposes of the statute would not be furthered by imposing a duty to bargain, for example, by demonstrating that bargaining would be futile.<sup>5</sup>

The Supreme Court reversed. *First National Maintenance v. NLRB*, 452 U.S. 666 (1981). The Court's decision is broadly worded, no doubt because the Court recognized the need to provide guidance to the Board and the courts of appeals in an area of national importance.<sup>6</sup>

Referring to Justice Stewart's influential concurring opinion in *Fibreboard*,<sup>7</sup> the Court divided management decisions into three categories. Category I "decisions, such as choice of advertising and promotion, product type and design, and financing arrangements, have only an indirect and attenuated impact on the employment relationship." Category II "decisions, such as the order of succession of layoffs and recalls, production quotas, and work rules, are almost exclusively" an aspect of the em-

<sup>2</sup> *Fibreboard Corp. v. NLRB*, 379 U.S. 203 (1964).

<sup>3</sup> *First National Maintenance*, 242 NLRB 462 (1979).

<sup>4</sup> *NLRB v. First National Maintenance*, 627 F.2d 596 (2d Cir. 1980).

<sup>5</sup> *Id.* at 601-602.

<sup>6</sup> 452 U.S. at 674.

Indeed the particular facts of the case played no part in the Court's analysis until the penultimate paragraph of the opinion. Only then did the Court return to the facts "to illustrate the limits of [the] holding." 452 U.S. at 687. No limitation was placed on the breadth of the Court's rationale.

<sup>7</sup> 379 U.S. at 217-226.

<sup>1</sup> 255 NLRB 235 (1981).

ployment relationship. Category III decisions have "a direct impact on employment," but have as their "focus" only the economic profitability of the employer's operation, a concern wholly apart from the employment relationship. 452 U.S. at 676-677. The Court placed FNM's partial closing decision in Category III. "This decision," the Court said, "involving a change in the scope and direction of the enterprise, is akin to the decision whether to be in business at all, 'not in [itself] primarily about conditions of employment, though the effect of the decision may be necessarily to terminate employment.'" 452 U.S. at 677 (quoting *Fibreboard*, 379 U.S. at 223 (Stewart, J., concurring)).

While Category I decisions are clearly nonmandatory subjects of bargaining, and Category II decisions are just as clearly mandatory, Category III decisions cannot be so neatly classified. Further analysis is necessary before deciding whether a Category III decision is subject to mandatory bargaining or whether it is "part of [an employer's] retained freedom to manage its affairs unrelated to employment." 452 U.S. at 677.

"[L]abeling a matter a mandatory subject of bargaining," the Court reasoned, will benefit labor, management, and the society at large "only if the subject proposed for discussion is amenable to resolution through the bargaining process." 452 U.S. at 678 (emphasis added). In addition, competing interests must be considered before concluding that bargaining over the decision is mandatory: "Management must be free from the constraints of the bargaining process to the extent essential for the running of a profitable business. It also must have some degree of certainty beforehand as to when it may proceed to reach decisions without fear of later evaluations labeling its conduct an unfair labor practice." 452 U.S. at 678-679 (footnote omitted). Accordingly, the Court formulated the following balancing test to take account of both the subject matter's amenability to the bargaining process and the burdens that bargaining would place upon management:

[I]n 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. [Emphasis added. 452 U.S. at 679.]

Turning to its prior precedent, the Court stated that in *Fibreboard* it "implicitly" applied this analysis. The employer's decision in *Fibreboard* to subcontract maintenance work previously performed

by unit employees was amenable to the bargaining process because it was based on a desire to reduce labor costs. Requiring bargaining about the subcontracting decision did not place a significant burden on the conduct of the business because the decision did not alter the company's basic operation, no capital investment was contemplated, and the decision involved only the replacement of the company's employees by the employees of an independent contractor to do the same work under similar employment conditions. Thus, the *First National Maintenance* Court cited *Fibreboard* as an example of a Category III decision in which the "benefit" outweighed the "burden" and bargaining was therefore required.

The Court reached a contrary result when it applied the test to economically motivated partial closings. The Court began its analysis by acknowledging that in a partial closing situation a union typically is in a position "to offer concessions, information, and alternatives that might be helpful to management or forestall or prevent the termination of jobs." 452 U.S. at 681. The Court explicitly stated that it was "aware of past instances where unions have aided employers in saving failing businesses by lending technical assistance, reducing wages and benefits or increasing production, and even loaning part of earned wages to forestall closures." *Id.* at fn. 19. Such factors tend to show the decisions' amenability to resolution through the bargaining process. The Court, however, did not end its analysis at that point and simply conclude that bargaining over partial closing decisions would be required.

Instead, the Court looked to the other side of the scale and found that labeling such decisions mandatory would place significant burdens on an employer. "If labor costs are an important factor in . . . the decision to close," the Court said, "management will have an incentive to confer *voluntarily* with the union to seek concessions that may make continuing the business profitable." 452 U.S. at 682 (emphasis added). In other instances, "management may have great need for speed, flexibility, and secrecy in meeting business opportunities and exigencies." 452 U.S. at 682-683. The Court especially criticized the Second Circuit's presumption analysis because an employer would have difficulty determining beforehand whether its decision was subject to a duty to bargain.

On the basis of the foregoing, the Court "conclude[d] that 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 . . . [held] that the decision itself is *not* part of § 8(d)'s 'terms and conditions' . . . over which Congress has mandated bargaining." 452 U.S. at 686 (emphasis in original; footnote omitted). In footnote 22 the Court added: "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." (Citations omitted.) The Court thus left these matters for the Board to consider in light of the Court's analysis.

## II. A FRAMEWORK FOR ANALYZING CATEGORY III DECISIONS

### A. Statement of the Framework

Based on the foregoing examination of the *First National Maintenance* opinion, I shall apply the following analysis in cases raising the issue of whether bargaining should be required over Category III management decisions (i.e., decisions that have a direct impact on employment, but have as their focus only the economic profitability of the employer's operation). These decisions include, without limitation, the following: plant relocations, consolidations, automation, and subcontracting.<sup>8</sup>

The first step is to determine whether "the subject proposed for discussion"—the employer's decision—is "amenable to resolution through the bargaining process." 452 U.S. at 678. This determination requires examining the factors underlying the decision. The key question to be answered is this: Is a factor over which the union has control (e.g., labor costs) a significant consideration in the employer's decision? A factor over which the union has control is a "significant consideration" if the union is in a position to lend assistance or offer concessions that reasonably could affect—i.e., make a difference in—the employer's decision. If the decision is not based on a factor over which the union has control, or if such a factor is at best an insignificant consideration in the employer's decision, the analysis ends, and bargaining is not required.

<sup>8</sup> Of course, if the matter presented is an economically motivated partial closing or a sale, no decision bargaining is required. *First National Maintenance* and prior Board precedent strike the balance in favor of no duty to bargain about such decisions. *U.S. Contractors*, 257 NLRB 1180 (1981), petition for review denied 697 F.2d 692 (5th Cir. 1983) (partial closing); *General Motors Corp.*, 191 NLRB 951 (1971), petition for review denied sub nom. *Auto Workers Local 864 v. NLRB*, 470 F.2d 422 (D.C. Cir. 1972) (sale). Partial closing and sale decisions necessarily involve management's "retained freedom to manage its affairs unrelated to employment." *First National Maintenance*, 452 U.S. at 677.

I do not agree with the analysis of the Supreme Court's *First National Maintenance* decision set forth in *Bob's Big Boy Restaurants*, 264 NLRB 1369 (1982).

If it is determined that the employer's decision is "amenable to resolution through the bargaining process," bargaining is 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 679 (emphasis added). The second step in the analysis, therefore, involves weighing the fact that the decision is amenable to resolution through the bargaining process ("the benefit") against the constraints that process places on management ("the burden"). As outlined in *First National Maintenance*, the burden elements to be examined include, without limitation, the following:

- (a) extent of capital commitment (452 U.S. at 680, 688);
- (b) extent of changes in operations (id. at 679, 688);
- (c) need for speed (id. at 682-683);
- (d) need for flexibility (id.);
- (e) need for confidentiality (id.).

There is no presumption in favor of mandatory bargaining over Category III decisions. To the contrary, before a Category III decision can be found to be a mandatory subject of bargaining the General Counsel must prove (1) that a factor over which the union has control was a significant consideration in the employer's decision, and (2) that the benefit for the collective-bargaining process outweighs the burden on the business.

### B. Practical Application of the Framework

I readily acknowledge that applying the foregoing analytical framework to a wide-ranging category of management decisions is not an easy matter. Nevertheless, *First National Maintenance* mandates this approach,<sup>9</sup> and the Board has no discretion to ignore the Supreme Court's statutory interpretation. To paraphrase the Court's decision in *Electrical Workers IUE Local 761 v. NLRB*, 366 U.S. 667, 674 (1961), "However difficult [the application may be], the statute compels the task."

In accord with the *First National Maintenance* Court's admonition that an employer "must have some degree of certainty beforehand as to when it may proceed to reach decisions without fear of later evaluations labeling its conduct an unfair labor practice" (452 U.S. at 679), I believe that the Board should try to provide the maximum possible practical guidance to both management and labor in this troublesome area. Some guidance is presently available to the labor-management community in

<sup>9</sup> See *NLRB v. Island Typographers*, 705 F.2d 44, 50 fn. 8 (2d Cir. 1983) (balancing test applies to management decision to update plant technology).

circuit court decisions that have foreshadowed an important aspect of the balancing test. At the second or balancing step of the analysis, the critical question is the weight of "the burden placed on the conduct of the business," because the decision has already been determined to be amenable to resolution through the bargaining process ("the benefit"), and the task that remains is the weighing of the one against the other. In the decisions discussed below, courts of appeals rejected the Board's reliance upon *Fibreboard* and identified circumstances where mandatory bargaining would have placed substantial burdens on the conduct of the business.<sup>10</sup>

*Transmarine Navigation*<sup>11</sup> highlights the following burden elements: extent of changes in operations, extent of capital commitment, need for flexibility, and need for speed. The employer in that case operated a terminal in the Los Angeles harbor. During the summer of 1963, the Japanese Government consolidated its shipping lines, creating a need for larger port facilities in the United States. The employer's facilities did not meet the new requirements and, facing the resultant loss of its principal customer, the company executed a joint venture agreement with two other terminal operators. The agreement provided that the company would terminate its Los Angeles operations and relocate in Long Beach as a minority partner in the joint venture to be known as Sierra Terminals. The company completed its relocation within 2 months of the agreement's execution.

The Ninth Circuit pointed out that in deciding to join Sierra Terminals the company "made fundamental changes in the direction and operation of the corporate enterprise, which greatly affected its capital, assets, and personnel."<sup>12</sup> In addition, the certain loss of its principal customer required that the company take a flexible approach regarding possible solutions to its facilities problem, and that it act quickly.<sup>13</sup>

<sup>10</sup> I caution that the circuit court decisions are discussed only to illustrate appellate court analysis of burden elements before *First National Maintenance*; I do not mean to suggest that the first step amenability test would, or would not, have been met in any particular case.

<sup>11</sup> *NLRB v. Transmarine Navigation Corp.*, 380 F.2d 933 (9th Cir. 1967), remanding 152 NLRB 998 (1965).

<sup>12</sup> 380 F.2d at 937. The court continued: "The Company became a minority partner in Sierra. Sierra has three times the former employees of the Company, some who work in capacities which did not exist in the Company, such as longshoring. The Company had \$40,000 of working capital at the Los Angeles facility, whereas Sierra has two and one-half times that amount. Sierra has far larger and more modern terminal facilities which service a larger shipping line of approximately ten times the size of the Company's former customers." *Id.*

<sup>13</sup> See also *NLRB v. Rapid Bindery*, 293 F.2d 170 (2d Cir. 1961), modifying 127 NLRB 212 (1960), which illustrates the burden elements of need for speed, need for flexibility, and the extent of capital commitment. The employer in that case also faced the immediate loss of its principal customer because its facilities were unable to accommodate a sudden increase in business. The employer then transferred its operations to an-

*Royal Plating & Polishing*<sup>14</sup> illustrates the burden elements of need for speed, extent of capital commitment, and extent of changes in operations. A company that had been suffering severe economic losses over a 7-year period decided to close one plant located in an urban renewal area. The company granted the Housing Authority a 90-day option to purchase. The Authority excised the option, tendered its final offer, and gave the company 6 months to vacate.

The Third Circuit recognized that the company was forced to close the plant swiftly or litigate the question of market value in a condemnation proceeding. 350 F.2d at 195. The court also found that the decision to close the plant rather than relocate "involved a management decision to recommit and reinvest funds in the business . . . [and was] a major change in the economic direction of the Company." 350 F.2d at 196.

*Adams Dairy*<sup>15</sup> illustrates the burden elements of extent of changes in operations and extent of capital commitment. A dairy decided to change its existing distribution system by replacing its driver-salesmen with independent contractors. The independent distributors took title to the products at dockside and were solely responsible for selling them. Trucks used previously by driver-salesmen were sold to the independent distributors.

The *Adams* court said that the case did not involve "just the substitution of one set of employees for another. . . . [T]here is a change in basic operating procedure in that the dairy liquidated that part of its business handling distribution of milk products. . . . [T]here was a change in the capital structure of Adams Dairy which resulted in a partial liquidation and a recoup of capital investment." 350 F.2d at 111.

I stress that these burden elements cut across all types of Category III decisions. Where the burden elements in a particular case are weighty, as illus-

other plant. The *Transmarine* court cited *Rapid Bindery* as being "closest in point analytically with the case at bar . . . . While . . . *Rapid Bindery* . . . predates *Fibreboard* . . . its reasoning and conclusions are sound and consistent with the principles of *Fibreboard*." 380 F.2d at 939.

See generally *Machinists v. Northeast Airlines*, 473 F.2d 549 (1st Cir. 1972), cert. denied 409 U.S. 845 (1972), arising under the Federal Aviation Act of 1958, Sec. 408, 49 U.S.C.A. Sec. 1378, and Railway Labor Act, Sec. 2, subd. 1, 45 U.S.C.A. Sec. 152, subd. 1. The court held that Northeast Airlines had no duty to bargain over its decision to merge into Delta Air Lines, stating that *Fibreboard* should not be extended to guarantee union participation in a decision to merge. "[M]erger negotiations require a secrecy, flexibility and quickness antithetical to collective bargaining." 473 F.2d at 557. The Supreme Court cited *Northeast Airlines* with approval in *First National Maintenance*. 452 U.S. at 683 fn. 20.

<sup>14</sup> *NLRB v. Royal Plating & Polishing Co.*, 350 F.2d 191 (3d Cir. 1965), denying enf. in relevant part to 148 NLRB 545 (1964).

<sup>15</sup> *NLRB v. Adams Dairy*, 350 F.2d 108 (8th Cir. 1965) (denying enf. in relevant part to 137 NLRB 815 (1962)), cert. denied 382 U.S. 1011 (1966).

trated above, it is likely that the decision at issue will not be a mandatory subject of bargaining.<sup>16</sup>

### III. APPLICATION OF THE ANALYTICAL FRAMEWORK TO THE INSTANT CASE

#### A. *Identifying the Decision in Question*

The facts are not in substantial dispute and are set forth in the plurality opinion. There is disagreement, however, concerning the identity of the decision allegedly subject to a duty to bargain. The Respondent contends that the transfer of the 17 bargaining unit employees from Mahwah, New Jersey, to East Hartford, Connecticut, was but one part of a corporatewide decision to consolidate research and development functions. The General Counsel takes a narrower view and argues that the only decision at issue is the transfer of the Mahwah employees and operations.

I conclude that the Respondent's decision was to consolidate its research and development functions in East Hartford, Connecticut. The transfer of the 17 Mahwah employees was only one component of the decision. Operations beyond Mahwah's boundaries were also involved. Thus, the Parsippany, New Jersey research and development center was closed and its operations and employees transferred to East Hartford. In addition, the reason underlying the selection of the East Hartford site is significant in demonstrating the extra-unit scope of the Respondent's decision: The parent company had a research and development center there and employed persons already working on research projects for Otis. Further, there is no indication that the new multimillion dollar research facility would be used solely by the 17 Mahwah employees. Indeed, the consolidation concept was based on the Respondent's expectations that a centralized facility and increased interaction among *all* its research and development personnel would aid in formulating new ideas, enabling Otis to regain its former position in the world elevator market.

#### B. *Whether Bargaining Over the Decision Is Mandatory*

The Respondent's decision to consolidate research and development functions in East Hartford,

Connecticut, is clearly one that falls within Category III of *First National Maintenance*. The decision had as its focus only the economic profitability of Otis' operations, but it also had a direct impact on the employment of unit employees. Under the framework for analyzing Category III decisions set forth in part II,A above, the first step is to examine the factors underlying the Respondent's decision and determine whether a factor within the Union's control was a significant consideration in the Respondent's decision. The factors underlying the Respondent's decision were as follows: (1) company technology was no longer current; (2) product designs were too expensive and not competitive; (3) engineering activity was diffuse and duplicative; (4) the Mahwah facilities were outdated and inadequate; (5) the parent company had a research and development center in East Hartford, Connecticut.

None of these factors was within the Union's control. There were no labor-related considerations underlying the decision. There was nothing that the Union could have offered that reasonably could have affected management's decision. Even if the Union had offered pay or benefit cuts or proposed overtime work to increase productivity, such proposals would not have provided the Respondent with the upgraded technology it sought. It is unrealistic to believe that the Union could have guaranteed that the unit employees would develop improved design concepts. It is also unlikely that the Union could have offered an alternative solution to the problems of diffuse and duplicative engineering activity and outmoded facilities. Certainly the Union was unable to alter the fact that the parent company was located in Connecticut, not New Jersey. I therefore find that the Respondent's decision to consolidate its research and development functions in East Hartford was not amenable to resolution through collective bargaining, and on that basis join my colleagues in dismissing the complaint allegation that the Respondent unlawfully refused to bargain with the Union over that decision.

My finding that the Respondent's decision was not amenable to resolution through the bargaining process concludes my analysis of the question whether bargaining over the decision is required. I hasten to point out, however, that in the context of my analytical framework a finding that a decision *is* amenable to resolution through collective bargaining will not automatically result in a determination that bargaining over the decision is mandatory. For, in that situation, bargaining will 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 679 (emphasis added).

<sup>16</sup> During contract negotiations, a proposed work-preservation clause is a mandatory subject of bargaining. At that stage, any burden element is necessarily speculative and "the benefit, for labor-management relations and the collective-bargaining process," outweighs any hypothetical "burden placed on the conduct of the business." This is to be contrasted with a situation where, during contract negotiations for a work-preservation clause, the employer contemporaneously informs the union of a specific nonconjectural economically motivated decision to remove unit work. Such a decision would have to be analyzed under the framework set forth in part II,A in order to determine whether it was a mandatory subject of bargaining.

For example, even if labor costs had been a significant consideration in the Respondent's decision, I would not necessarily conclude that the decision was a mandatory subject of bargaining. Even when labor costs are a significant consideration the analytical framework mandates balancing the "benefit" against the "burden," obligating the General Counsel to prove that the amenability of the decision to resolution through the bargaining process outweighs the constraints bargaining places on management. Such a showing would be difficult here because the burden elements are substantial. The Respondent's decision involved the investment of a sizable amount of capital. Compare *First National Maintenance*, 452 U.S. at 688 (absence of significant investment or withdrawal of capital not crucial). In addition, the decision to consolidate research and development functions in East Hartford "represented a significant change in [Respondent's] operations, a change not unlike opening a new line of business or going out of business entirely." *Id.*

#### IV. CONCLUSION

Accordingly, for all the foregoing reasons, I concur in my colleagues' reversal of the Board's prior holding that the Respondent violated Section 8(a)(5) by refusing to bargain over its decision. In addition, I agree with my colleagues, for the reasons they state, that the Respondent's failure to provide the requested information did not violate the Act. Finally, I join my colleagues in remanding the effects-bargaining allegations of the complaint to the judge for further consideration, including affording any party the opportunity to adduce further evidence bearing on the outstanding allegations.

MEMBER ZIMMERMAN, concurring in part and dissenting in part.

I agree with my colleagues that the Respondent did not violate Section 8(a)(5) by refusing to bargain with the Union over its decision to transfer the product improvement group from Mahwah, New Jersey, to East Hartford, Connecticut. However, contrary to my colleagues, I find that the Respondent did violate Section 8(a)(5) and (1) by failing to bargain in good faith with the Union over the effects of its transfer decision, by dealing directly with the unit employees over the transfers, and by refusing to furnish to the Union requested information.

Under the analytical framework outlined in my dissent in *Milwaukee Spring*,<sup>1</sup> I find that the Re-

spondent's transfer decision was not a mandatory subject of bargaining.<sup>2</sup> As I stated in that case, I will find bargaining over an employer's decision to relocate work to be mandatory when the decision is amenable to resolution through collective bargaining.

The amenability determination depends in large part on an analysis of the employer's reasons underlying its decision. When the employer's decision to remove bargaining unit work is motivated by reasons "peculiarly suitable for resolution within the collective-bargaining framework,"<sup>3</sup> then bargaining may lead to a mutually acceptable solution and in such circumstances cannot be predetermined to be ineffectual. But when, as in *First National Maintenance*,<sup>4</sup> the union has no control over or ability to affect the reasons underlying an employer's decision, the union is relegated to a position of merely offering advice with no corresponding ability to affect the decision through concessions.

In agreement with my colleagues, therefore, I find that a decision motivated by labor costs is a mandatory subject of bargaining. There will no doubt be other instances, however, in which the Act should be found to require decision bargaining where the reasons underlying the removal of work are not confined solely to labor costs. A decision may be amenable to resolution through bargaining

<sup>2</sup> Unlike my colleagues, I agree with the General Counsel that the decision at issue in this case is the Respondent's decision in October 1977 to transfer the Mahwah unit employees to East Hartford and not the Respondent's decision in July 1977 to consolidate its research and development functions in East Hartford. While the two decisions are related, the record reveals that they were separate decisions made by the Respondent at different times under different circumstances.

At some unspecified time in the first half of 1977 the board of directors of United Technologies, Respondent's parent company, decided to consolidate the Respondent's research and development operations with those of United in East Hartford. Pursuant to this decision, the Respondent, in July 1977, closed its principal research and development operation in Parsippany, New Jersey, and transferred the employees in that facility to United's East Hartford research facility. No further consolidation was apparently contemplated or envisioned by the Respondent or by United's board of directors at that time.

However, in mid-September 1977, Dr. William Foley, who had been deputy director of research for United, became the Respondent's vice president of engineering in charge of the Respondent's engineering activities in its North American operations, including the Mahwah facility. After examination of the Respondent's engineering organizational structure, Foley recommended to Robert Cole, the Respondent's president of the North American operations, at the end of October 1977 that the Respondent further consolidate its research functions in East Hartford by transferring the Mahwah product improvement group there. Cole immediately approved Foley's recommendation. Foley began working out the details of the transfer and on 2 December 1977 Foley announced the transfer decision to the Mahwah employees.

Under these circumstances, I find that the transfer decision constituted a separate and distinct decision from the prior consolidation decision by the board of directors which resulted in only the relocation of the Parsippany employees to East Hartford. However, as discussed below, my analysis of the Respondent's reasons for its transfer decision leads me to reach the same result as my colleagues.

<sup>3</sup> *Fibreboard Corp. v. NLRB*, 379 U.S. 203 (1964).

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

<sup>1</sup> 268 NLRB 601, 605-608.

where the employer's decision is related to overall enterprise costs not limited specifically to labor costs.

Amenability to resolution through the bargaining process necessarily encompasses situations where union concessions may substantially mitigate the concerns underlying the employer's decision, thereby convincing the employer to rescind its decision. The union's capacity to affect the employer's decision in such situations places the decision within the employer's bargaining obligation absent any showing of the employer's urgent need for the kind of speed, flexibility, or secrecy as referred to by the Court in *First National Maintenance*.

Here the Union had no ability to affect the Respondent's decision. It is undisputed that the Respondent's decision to transfer the Mahwah product improvement group to East Hartford was motivated by its determination that the functions performed by the Mahwah group overlapped and in some instances duplicated the work performed by the Parsippany group which had been relocated to East Hartford. In addition, the Respondent determined that the Mahwah facility was outdated and not suitable for its research and development needs.<sup>5</sup> By transferring the Mahwah group to East Hartford, the Respondent hoped to improve its ability to make needed technological advances and to develop new, less costly products which could better compete on the open market.<sup>6</sup>

These concerns are not amenable to resolution through bargaining. No concession proposed by the Union could reasonably be expected to alter the Respondent's concerns. The Respondent's reasons, all of which were entrepreneurial in scope and not directly translatable into dollar figures, were thus outside the scope of the bargaining relationship. Accordingly, I join my colleagues in dismissing that portion of the complaint alleging that the Respondent unlawfully refused to bargain with the Union over its decision to transfer the Mahwah group to East Hartford.<sup>7</sup>

However, unlike my colleagues, I adhere to the Board's findings in its initial decision in this case that the Respondent violated Section 8(a)(5) of the Act by failing to bargain in good faith with the Union over the effects of its transfer decision, by

refusing to provide the Union with requested relevant information, and by dealing directly with unit employees. For the reasons set forth by the Board and the judge, I find that a preponderance of the evidence supports these findings and that they are legally sound.<sup>8</sup>

My colleagues, in deciding to remand the effects-bargaining allegations to the judge, do not dispute the factual or legal underpinnings of these findings. Indeed, the principle that an employer must bargain with the union over the effects of a work relocation decision even though the decision itself may be a nonmandatory subject of bargaining is beyond question. *First National Maintenance*, 452 U.S. at 677 fn. 15. Rather, they base the remand on the cryptic statement that the Board, in finding the effects-related violations, "relied substantially on its holdings that Respondent unlawfully refused to bargain over its consolidation decision and unlawfully withheld information from the Union." As both the Board and the judge set forth a factual and legal analysis for the effects-related violations separate and distinct from their analysis of the decision-related violations, a remand is wholly inappropriate in my view. A reversal by the Board of one finding of a judge, or a reversal by a court of one finding of the Board, does not invalidate or necessitate a reexamination of the other independent findings. Moreover, to remand this case for a further hearing approximately 6-1/2 years after the transfer decision was made is lamentable. The events in question must now be but dim recollections to the witnesses and the judge. Accordingly, I dissent from my colleagues' remand of the effects-bargaining allegations for further hearing.

I further dissent from my colleagues' reversal of the Board's finding that the withheld information, i.e., the Booz-Allen and Cole reports, was relevant to effects bargaining and their apparent intention to foreclose the General Counsel and the Union from asserting on remand that the information was relevant to effects bargaining. My colleagues do not find these reports irrelevant to effects bargaining. Indeed, such a finding would be at odds with the record which reveals that the Respondent admittedly referred to and discussed the reports, and even read from the Booz-Allen report, in its meetings with the Union over the effects of its transfer decision. My colleagues' position, which was not advanced by the Respondent, is that since the complaint did not allege a separate allegation that the information was relevant to effects bargaining as

<sup>5</sup> The Respondent also decided to build and began construction on a new multimillion dollar research and development center in Farmington, Connecticut, to house both the Parsippany and the Mahwah groups.

<sup>6</sup> Although the Respondent expected to reduce its production costs, it expected this reduction to be realized through a redesign of the product, not through a reduction in labor costs.

<sup>7</sup> I therefore also join my colleagues in dismissing the complaint allegation that the Respondent unlawfully withheld requested information relevant to the transfer decision. As explained below, however, I find that the Union was entitled to this information because it was also relevant to effects bargaining.

<sup>8</sup> For purposes of this decision and in light of my finding that the Respondent had no bargaining obligation over the transfer decision, I do not rely on the discussion by the Board and the judge of *Ozark Trailers*, 161 NLRB 561 (1966).

well as to decision bargaining, no violation can lie. Given the fact that the record fully supports this finding of both the judge and the Board, and that

the finding is sufficiently related to the complaint allegations, I find my colleagues' position without merit. See *Baytown Sun*, 255 NLRB 154 (1981).