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LEVELING THE ROAD FROM *BORG-WARNER* TO *FIRST NATIONAL MAINTENANCE*: THE SCOPE OF MANDATORY BARGAINING*

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IN 1958, the United States Supreme Court held in *NLRB v. Wooster Division of Borg-Warner Corp.*[1] that the duty to bargain in good faith, which the National Labor Relations Act[2] imposes on employers and employee collective bargaining representatives, prohibits the parties from insisting on contract provisions that do not involve "wages, hours, and other terms and conditions of employment."[3] The decision divided legal bargaining topics into two categories and made the National Labor Relations Board's interpretation of the vague distinguishing phrase, "terms and conditions of employment," critical to the development of American collective bargaining.[4] After *Borg-Warner*, employers and unions not only cannot utilize Board processes to compel bargaining on a proposal, but also may not resort to economic pressure to obtain agreement unless the proposal concerns "wages, hours, [or] other terms and conditions of employment." If the Board finds that a proposal is outside the statutory language, a party can suggest that

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[1] 356 U.S. 342 (1958).

[2] 29 U.S.C. §§ 151-169 (1976).

[3] Id. § 158(d).

[4] The Board initially determines whether an action constitutes an unfair labor practice, see id. § 160(a). The United States Courts of Appeals then review the Board's decisions. See id. §§ 160(e), (f). The Board's division of bargaining topics into two categories built on accepted law, see NLRB v. American Nat'l Ins. Co., 343 U.S. 395 (1952), and did not provoke a dissent at the Supreme Court.

the proposal be included in the contract, but the other party remains free to reject it without fear of legal or economic pressure.[5]

The Court's emphasis upon the "terms and conditions" phrase was certainly not inevitable. Justice Harlan, in his dissenting opinion,[6] and subsequent commentators have disputed both the substance and the effects of the Court's open-ended interpretation. Harlan argued that the phrase simply denominates those proposed clauses over which the receiving party would be obligated to bargain in good faith; it does not, he argued, distinguish clauses upon which the proposing party could not insist to impasse.[7] He feared that the Court's holding would expose the "substantive aspects" of the bargaining process to external influences, a result that Congress sought to avoid in the Taft-Hartley Act amendments.[8]

Within a year of the *Borg-Warner* decision, Professor Cox presented another strong critique. He stated that "it is both unsound and inconsistent with the basic philosophy of collective bargaining to license the NLRB and courts to determine the scope of effective contracts negotiations."[9] Cox argued that the "administrative and judicial processes are ill-suited to drawing a line between proper subjects for collective bargaining and management functions."[10] He feared that judges and Board members would develop restrictions upon the meaning of "terms and conditions of employment" based on their own values in much the same manner as equity courts formerly enjoined employee work actions that sought "inappropriate labor objectives."[11] Cox ended his critique of *Borg-Warner* with the hope that the Board and the courts would read "terms and conditions of employment" to cover all bargaining proposals "not inconsistent with a federal statute or declared public policy."[12]

A decade later, in his own analysis of *Borg-Warner* and the surrounding law, Professor Wellington was able to make a similar rec-

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[5] See *Borg-Warner*, 356 U.S. at 349.

[6] See id. at 351 (Harlan, J., dissenting).

[7] Id. at 353-54.

[8] See id. at 356.

[9] Cox, Labor Decisions of the Supreme Court at the October Term, 1957, 44 Va. L. Rev. 1057, 1083 (1958).

[10] Id.

[11] Id. at 1085-86.

[12] Id. at 1086.

ommendation.[13] Echoing Cox's concerns, Wellington stressed that the Board and the courts had not yet interpreted the "terms and conditions" phrase in any principled manner,[14] and that their attempts to define the phrase had channeled and obstructed collective bargaining without regard to the characteristics of variant industries.[15] Wellington concluded his analysis with the hope that "all subjects arguably within the statutory language" would be considered mandatory bargaining topics.[16]

Since Wellington wrote, the hope of limiting the impact of *Borg-Warner* and the mandatory-versus-nonmandatory distinction has further eroded, while the predicted judicial restraints on collective bargaining have slowly materialized. The courts of appeal and the Board, unable to articulate general principles that define the scope of mandatory bargaining, have often resorted to ad hoc weighings of employer and employee interests, the outcomes of which inevitably seem to express the tribunal's own values concerning appropriate labor objectives.[17] The Supreme Court, far from providing clear and workable restrictions on mandatory bargaining, has aggravated the definitional problem.[18]

The Supreme Court's most recent effort to distinguish nonmandatory bargaining topics, *First National Maintenance Corp. v. NLRB*,[19] illustrates the Court's lack of clarity in this area and vindicates Cox's and Wellington's criticisms of the Court's approach in *Borg-Warner*. In *First National Maintenance* (*F.N.M.*), the Court held that an employer's decision "to shut down part of its business purely for economic reasons" was outside the scope of mandatory bargaining.[20] The Court could cite no evidence that Congress intended to prevent employee representatives from obtaining full effective bargaining over such decisions, nor did it articulate any general principle to justify their removal from the scope of mandatory bargaining. Instead the Court asserted its

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[13] H. Wellington, Labor and the Legal Process 63-90 (1968).

[14] Id. at 78-79.

[15] Id. at 79.

[16] Id. at 81.

[17] See infra text accompanying notes 26-43 & 168-77.

[18] See, e.g., Allied Chem. Workers, Local 1 v. Pittsburgh Plate Glass Co., 404 U.S. 157 (1971), discussed at infra text accompanying notes 149-53; Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203 (1964), discussed at infra text accompanying notes 44-58.

[19] 452 U.S. 666 (1981).

[20] Id. at 686.

judgment that "an employer's need to operate freely" outweighs any gain to "labor-management relations" that could result from bargaining over partial closing decisions.[21]

The *F.N.M.* decision, however, need not signal the end of efforts to provide principled and relatively narrow restrictions on judicial and administrative authority to determine "appropriate" topics for collective bargaining between employers and employee representatives. The *F.N.M.* decision can be reconciled on its facts with a limited and economically meaningful principle that only minimally restricts the scope of mandatory bargaining. This principle would exclude from compulsory bargaining *all decisions that determine what products are created and sold, in what quantities, for which markets, and at what prices.* This principle, moreover, need be the only substantive limitation on legal mandatory bargaining topics. A few supplementary principles can express other appropriate restrictions framed primarily to advance the process of collective bargaining as contemplated by the Act. These principles are consistent with Supreme Court decisions concerning the scope of mandatory bargaining, as well as with many prominent Board and lower court decisions.

I. *First National Maintenance,* THE FAILURE OF INTEREST BALANCING AND THE SEARCH FOR A PRINCIPLED SOLUTION

A. Analysis of First National Maintenance

Analysis of the *F.N.M.* decision provides a valuable introduction to the principles discussed above for two reasons. First, the decision prominently illustrates the difficulties of defining the scope of mandatory bargaining through ad hoc balancing. Second, the decision provides an excellent factual background against which to test the critical restricting principle that this article proposes.

In *F.N.M.*, the Supreme Court considered a problem that had become increasingly vexing in a climate of economic stagnation and transformation: whether an employer is obliged to bargain about a decision to terminate a portion of its business.[22] First National Maintenance furnished maintenance and cleaning services to commercial entities in New York. In March 1977, the First Na-

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[21] Id.

[22] See cases cited infra note 47.

tional employees who serviced a Greenpark nursing home voted in a Board-sanctioned election to be represented hy an AFL-CIO union. In July, without responding to the newly certified union's request to meet and bargain, the company decided to terminate its service to the nursing home. On August 1, 1977, First National effected the termination and discharged all of its Greenpark employees without bargaining with the union.

The union responded by filing unfair labor practice charges with the Board. Despite the coincidence of First National's termination decision with the date of the union's certification, the Board found no anti-union animus. Instead, it found that First National based its decision to terminate its Greenpark contract on Greenpark's refusal to increase the company's administrative fee.[23] Nevertheless, the Board held that First National had failed to bargain in good faith. The Board concluded that both the decision to terminate service to Greenpark and the "effects" of that decision were topics of mandatory bargaining, and that the company had discussed neither topic fully with the union.[24] After making this determination, the Board simply applied the generally accepted doctrine that neither party can unilaterally make changes concerning mandatory topics without bargaining with the other party.[25] The company accepted the Board's finding that it should have bargained over the effects of its decision, but appealed the determination that the decision itself was within the scope of the "terms and conditions" phrase. The United States Court of Appeals for the Second Circuit upheld the Board's decision on appeal.[26] The Supreme Court reversed.

Justice Blackmun's opinion for the Court reflects an inability to find a firm footing on which to confront the evasive "terms and conditions" phrase. Blackmun clearly wished to recognize the interests of employers in escaping any obligation to bargain over decisions to close part of their businesses.[27] Yet he could not fail to recognize that the Labor Act was not passed simply to serve em-

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[23] First National Maintenance received complete labor cost reimbursement from its customers in addition to a set administrative fee. See 452 U.S. at 668.

[24] *First Nat'l Maintenance Corp.*, 242 N.L.R.B. 462 (1979).

[25] See NLRB v. Katz, 369 U.S. 736 (1962); International Woodworkers of America, Local 3-10 v. NLRB, 380 F.2d 628 (D.C. Cir. 1967).

[26] 627 F.2d 596 (2d Cir. 1980), rev'd, 452 U.S. 666 (1981).

[27] 452 U.S. at 682-83.

ployers' interests. Blackmun's effort to balance the rights of employers and employees in this context presented him with a dilemma.

Employers, on the one hand, can claim that making partial closing decisions a mandatory bargaining topic would cost them substantial profits. Unions could apply economic pressure during contract negotiations to coerce the employer's promise not to close even an unprofitable plant or office without the union's consent.[28] Moreover, even if the union did not bargain for such a promise in advance, it could use economic pressure during the term of the contract[29] to force the employer not to shut down.[30]

On the other hand, the interests of employees in bringing plant closing decisions within the scope of mandatory bargaining are at least as intense as those of employers in keeping them out. Indeed, few things can harm employees more than the unemployment re-

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[28] Any employer violation of such a promise would constitute an unfair labor practice if and only if a decision to shut down the plant were a mandatory topic of bargaining. See Allied Chem. Workers, Local 1 v. Pittsburgh Plate Glass Co., 404 U.S. 157, 183-88 (1971).

[29] Although § 8(d) of the Act, 29 U.S.C. § 158(d) (1976), restricts a union's ability to strike during the term of the contract, the section does not restrict a union's right to strike in order to resist an employer's mid-term modification of the terms and conditions of employment. See generally Mastro Plastics Corp. v. NLRB, 350 U.S. 270, 288-89 (1956); United Marine Div., Local 333, 228 N.L.R.B. 1107, 1108 n.3 (1977).

[30] Although an employer's decision to close a plant certainly reduces the bargaining impact of a union's strike threat, a union retains the ability to apply substantial pressure even after such a decision. Picketing, for example, might prevent the removal of machinery from the plant targeted for closing. Strikes could also spread to other plants.

Straughton Lynd argues that employers can enjoin strikes over plant closings under Boys Market, Inc. v. Retail Clerks Union, Local 770, 398 U.S. 235 (1970), whenever the collective bargaining agreement contains a no-strike clause. See Lynd, Investment Decisions and the Quid Pro Quo Myth, 29 Case W. Res. L. Rev. 396, 426-27 (1979). In light of Buffalo Forge Co. v. United Steelworkers, 428 U.S. 397 (1976), however, unions can argue that a strike to extract a new employer concession during a new round of bargaining is not a strike over an arbitrable issue and therefore cannot be enjoined. See id. at 407. See also 398 U.S. at 253-54. Moreover, a no-strike clause should not be read to sacrifice the Labor Act's protection of the concerted activities of sympathy strikers who help another bargaining unit. See Harper, Union Waiver of Employee Rights under the NLRA: Part I, 4 Indus. Rel. L.J. 335, 372-80 (1981).

In addition to the economic pressure exerted by a strike, a bargaining requirement may also interrupt the timing of employer investment decisions and cause employers to lose important business opportunities, see 452 U.S. at 682-83, and the publicity generated by collective bargaining may spoil business negotiations. See id. See also International Ass'n of Machinists & Aerospace Workers v. Northeast Airlines, Inc., 473 F.2d 549, 557 (1st Cir.), cert. denied, 409 U.S. 845 (1972); Goetz, The Duty to Bargain About Changes in Operations, 1964 Duke L.J. 1, 9.

sulting from the closing of plant doors. Making plant closings mandatory bargaining topics would assist employees in the same manner that it would restrict employers: it would enable the employees, by pressuring employers, to exercise some control over any decision to close. In addition, bringing such decisions within the scope of mandatory bargaining would enable employees "to offer concessions, information, and alternatives" that might help management "prevent the termination of jobs."[31]

Justice Blackmun tried to avoid weighing the competing interests of employer and employee in the *F.N.M.* decision. Instead, Blackmun balanced the "employer's need for unencumbered decision making" with the benefit of mandatory bargaining "for labor-management relations and the collective bargaining process."[32] Harmonious labor-management relations replaced employee interest in job protection as the counterweight to employer flexibility.[33] But this substitution cannot obscure the fact that *F.N.M.* coustitutes a rejection of coercive employee influence over employer decisions to terminate part of a business based on a subordination of employee to employer interests.

B. Criticism of the F.N.M. *Decision*

The "balancing" approach taken by the *F.N.M.* Court is not firmly supported by existing legal authority. Neither the language nor the legislative history of the Act compels such an interpretation, and the opinion itself provides no principled basis upon which to distinguish employee coercion of partial termination decisions from coercion of employer decisions concerning mandatory topics.

The most plausible reading of "terms and conditions of employment" that would include accepted mandatory bargaining topics would define the phrase to include any terms of a contract or any aspect of the status quo upon which an employee's work will be or has been conditioned.[34] This definition certainly is broad enough

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[31] 452 U.S. at 681.

[32] Id. at 679.

[33] Blackmun concluded that the employer's duty to bargain concerning the effects of a decision to close part of a business adequately ensured the opportunity to exchange the "concessions, information, and alternatives" which would assist the parties in reaching a harmonious resolution. Id. at 681.

[34] Terms and conditions of employment might be read to require bargaining only over the

to encompass employees' desires to condition their work on having some control over employer decisions affecting their job security. As Justice Blackmun admitted, however, this reading expresses a "deliberate open-endedness."[35] Therefore, if "terms and conditions of employment" is to be a limiting phrase, as Justice Stewart asserted in an earlier opinion,[36] the limits must be outside the words of the statute.

The legislative history of section 8(d) is also unhelpful.[37] The most a Court majority has claimed to glean from this history is a congressional intent to give the Board broad latitude in interpreting the phrase.[38] Justice Stewart read the development of the Taft-Hartley Act to indicate that Congress wanted some limits placed on "bargainable issues."[39] Yet even Justice Stewart could find no suggestion of what limits Congress intended, and other readers of the Senate's rejection of the House's attempt to detail a list of bargaining subjects[40] have concluded that Stewart was incorrect in perceiving a congressional intent to limit bargaining topics.[41]

Finally, the *F.N.M.* opinion itself provides no principled basis upon which to reject employee coercion of employer partial termination decisions, but to accept employee coercion of employer decisions concerning accepted mandatory topics. Because Justice Blackmun did not directly acknowledge the Court's rejection of co-

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physical and psychological conditions at work, such as the pollution at the plant or the lighting at the office. Such a reading might give employers unrestricted authority to control the existence of jobs and thus allow them to make all decisions that eliminate employment, such as partial closings. But this restrictive definition would exclude from the scope of mandatory bargaining a number of topics, such as lay-offs, some forms of subcontracting, and the effects of partial closing decisions, that are accepted mandatory bargaining topics. See Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203 (1964) (subcontracting); Awrey Bakeries, Inc. v. NLRB, 548 F.2d 138 (6th Cir. 1977) (layoffs). See also 452 U.S. at 677-80 & n.18.

[35] 452 U.S. at 676.

[36] See *Fibreboard*, 379 U.S. at 217, 220 (Stewart, J., concurring).

[37] The *F.N.M.* Court was forced to conclude that "references in the legislative history to plant closings . . . are inconclusive." 452 U.S. at 676 n.14.

[38] See Ford Motor Co. v. NLRB, 441 U.S. 488 (1979).

[39] *Fibreboard*, 379 U.S. at 220-21 (Stewart, J., concurring).

[40] H.R. 3020, 80th Cong., 1st Sess. § 2(11)(B), 93 Cong. Rec. 3548 (1947), reprinted in 1 Legislative History of the Labor-Management Relations Act of 1947, at 66-67 (1948).

[41] See, e.g., Oldham, Organized Labor, the Environment, and the Taft-Hartley Act, 71 Mich. L. Rev. 935, 984-85 (1973); Rabin, The Decline and Fall of Fibreboard, 24 N.Y.U. Ann. Conf. on Lab. 237, 243 (1972); Note, Automation and Collective Bargaining, 84 Harv. L. Rev. 1822, 1829 (1971).

ercive employee influences on certain employer decisions, he was never forced to distinguish decisions for which employee coercion is appropriate. Blackmun did assert that collective bargaining is appropriate only when it "will result in decisions that are better for both management and labor and for society as a whole. . . . Management must be free from the constraints of the bargaining process to the extent essential for the running of a profitable business."[42] Although this language suggests that the Court believes employees should not be able to prevent employers from making decisions necessary to ensure maximum, or at least adequate, investment returns, the Court surely recoguized that unions may successfully force employers to accept employee compensation packages that significantly erode the firm's profits. A union can divert as great a proportion of an employer's profits to cover wage increases or new fringe benefits as it can to finance the continuing operation of an unprofitable plant. In economic terms, the result is the same. The Court's opinion, nevertheless, does not explain why employees who may fight to extract more money in the form of wages and fringe benefits may not also fight to extract money in the form of employer subsidization of unprofitable plants.

In sum, a reader of the *F.N.M.* opinion may be excused for entertaining a "doubt whether judges with different economic sympathies might decide such a case differently when brought face to face with the issue."[43] The *Fibreboard* Court,[44] which found an employer's decision to subcontract bargaining unit work to be a mandatory topic of bargaining, might well have decided *F.N.M.* differently. The *Fibreboard* majority clearly viewed the definitional problem differently from the *F.N.M.* majority. After noting the broad literal meaning of the "terms and conditions" phrase, Chief Justice Warren's opinion in *Fibreboard* stressed that the purposes of the Act are generally served by bringing matters "of vital concern to labor and management" to the bargaining "framework established by Congress."[45]

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[42] 452 U.S. at 678-79.

[43] Holmes, Privilege, Malice and Intent, 8 Harv. L. Rev. 1, 8 (1894), quoted in H. Wellington, supra note 13, at 81.

[44] Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203 (1964). Only Justice White can claim membership in both the *Fibreboard* and *F.N.M.* majorities.

[45] Id. at 211. Chief Justice Warren also noted that the Court's conclusion that "contracting out" is a statutory subject of bargaining is further reinforced by industrial practices

The *Fibreboard* majority, however, failed to articulate any limiting principle in its analysis. As a result, lower court judges and Board members resorted to their own social-economic values when confronting professed employer prerogatives, such as employer decisions concerning automation, plant relocations, sales of businesses, and partial closings. The consequence has been a spate of conflicting opinions, resulting in the confusion of employers and unions over their bargaining rights and duties.[46] *F.N.M.* attempted to clarify at least one significant subset of cases that had generated a sharp conflict "between and among the Board and the Courts of Appeals."[47]

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that had "widely and successfully" brought contracting out "within the collective bargaining framework." Id. Justice Blackmun used this reference to help reconcile the *F.N.M.* Court's different treatment of partial termination decisions, which have not often been limited hy collective agreements. Both decisions, however, stressed that customary industrial practices should not ultimately determine the scope of mandatory bargaining. See *F.N.M.*, 452 U.S. at 684; *Fibreboard*, 379 U.S. at 211. See also Allied Chem. Workers, Local 1 v. Pittsburgh Plate Glass Co., 404 U.S. 157, 176 (1971).

Most industrial practices should not be considered in determining the scope of mandatory bargaining. One union's lack of success in extracting concessions from an employer should not restrict another union from trying. Presumably a union can best judge the importance of a particular employer concession to its members and the chances of successfully extracting such a concession. On the other hand, if there are good reasons why employers should not be forced to bargain over some particular union-proposed clause, the willingness of many employers to agree to the clause should not convert it into a mandatory bargaining topic for other employers. But see Summers, Labor Law in the Supreme Court: 1964 Term, 75 Yale L.J. 59 (1965) (praising *Fibreboard* for encouraging the evolution of a scope of bargaining commensurate with changing industrial experience).

[46] See Chamber of Commerce Amicus Brief on Petition for Cert. at 3, First Nat'l Maintenance Corp. v. NLRB, 452 U.S. 666 (1981).

[47] 452 U.S. at 674. As might be expected, until at least the last few years before the *F.N.M.* decision, the Board read *Fibreboard* to authorize a broader scope of bargaining than did most courts of appeal. Compare Metro Transp. Servs. Co., 218 N.L.R.B. 534 (1975) (employer has duty to bargain over partial plant closing and dues check-off provision) and Ozark Trailers, Inc., 161 N.L.R.B. 561 (1966) (employer has duty to bargain over partial plant closing) with Royal Typewriter Co. v. NLRB, 533 F.2d 1030 (8th Cir. 1976) (no duty to bargain over partial closing absent union animus), NLRB v. Thompson Transp. Co., 406 F.2d 698 (10th Cir. 1969) (no duty to bargain over partial closing decision where employer is motivated by sound economic reasons), and NLRB v. Transmarine Navigation Corp., 380 F.2d 933 (9th Cir. 1967) (no duty to bargain over decision to terminate business and reinvest capital in a different enterprise when decision based on changed economic conditions). But see NLRB v. Winn-Dixie Stores, Inc., 361 F.2d 512 (5th Cir.) (employer has duty to obey a bargaining order during pendency of proceedings over partial closing), cert. denied, 385 U.S. 935 (1966). More recently, other appellate opinions, in addition to the Second Circuit opinion reversed in *F.N.M.*, see 627 F.2d 596 (2d Cir. 1980), had begun to assert that employers have a duty to bargain over most partial closing decisions. See ABC Trans-Nat'l Transp., Inc. v. NLRB, 642 F.2d 675 (3d Cir. 1981); Electrical Prod. Div. of Midland-Ross Corp. v.

C. Possible Routes for the F.N.M. *Court*

Unfortunately there were no secure principles in either Board or court of appeals opinions to guide the Supreme Court in its resolution of *F.N.M.*[48] The opinions do stress considerations not highlighted by the *F.N.M.* Court, but none of these considerations is compelling or expressive of a clear principle applicable to all scope of bargaining cases.[49]

Perhaps the most important consideration that lower tribunals stressed when they denied a duty to bargain over partial closings was an asserted employer right to control capital investment.[50] Because the *Fibreboard* majority had noted that no "capital investment" was involved in the decision to contract out maintenance work in that case,[51] some courts had attempted to distinguish partial closings, which generally involve significant capital investment decisions, from subcontracting decisions, which generally do not.[52]

NLRB, 617 F.2d 977 (3d Cir.), cert. denied, 449 U.S. 871 (1980); NLRB v. Production Molded Plastics, Inc., 604 F.2d 451 (6th Cir. 1979); Brockway Motor Trucks v. NLRB, 582 F.2d 720 (3d Cir. 1978). See also Davis v. NLRB, 617 F.2d 1264 (7th Cir. 1980) (change of operation of restaurant to self-service cafeteria), discussed at infra text accompanying note 74.

[48] But see infra text accompanying note 98. Instead these opinions primarily halance employer and employee interests. Although courts sometimes expressly applied this balancing analysis on a case-by-case basis, see, e.g., ABC Trans-Nat'l Transp., Inc. v. NLRB, 642 F.2d 675 (3d Cir. 1981); Brockway Motor Trucks v. NLRB, 582 F.2d 720 (3d Cir. 1978), sometimes they obscured it, as in Justice Blackmun's *F.N.M.* opinion, and sometimes they generated a per se rule, see, e.g., NLRB v. Transmarine Navigation Corp., 380 F.2d 933, 937 (9th Cir. 1967); NLRB v. Adams Dairy, Inc., 350 F.2d 108 (8th Cir. 1965), cert. denied, 382 U.S. 1011 (1966). See also NLRB v. Royal Plating & Polishing Co., 350 F.2d 191, 195 (3d Cir. 1965).

[49] The commentary between the *Fibreboard* and *F.N.M.* decisions, although copious and thorough, also did not contribute such a principle. For perhaps the best attempt to do so, see Note, Partial Closings: The Scope of an Employer's Duty to Bargain, 61 B.U.L. Rev. 735 (1981).

[50] See, e.g., NLRB v. International Harvester, 618 F.2d 85, 87 (9th Cir. 1980); National Car Rental, 252 N.L.R.B. 159, 163 (1980), enforced in relevant part, 672 F.2d 1182 (3d Cir. 1982). See also General Motors Corp., 191 N.L.R.B. 951, 952 (1971), enforced sub nom. Local 864, UAW v. NLRB, 470 F.2d 422 (D.C. Cir. 1972) (no bargaining obligation when decision involves such "a significant investment or withdrawal of capital [as to] affect the scope and ultimate direction of the enterprise"); cases cited infra note 52.

[51] 379 U.S. at 213.

[52] See, e.g., NLRB v. Drapery Mfg. Co., 425 F.2d 1026, 1028 (8th Cir. 1970); NLRB v. Royal Plating & Polishing Co., 350 F.2d 191, 196 (3d Cir. 1965). Cf. *F.N.M.*, 452 U.S. at 688 ("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

The capital investment approach appears to offer an economically rational principle to exclude some, but not all, management decisions from the scope of mandatory bargaining. The principle is arguably based on a social policy to promote "economic efficiency," rather than simply on a policy favoring employer interests over those of employees.[53] According to the conventionally accepted economic model, allocating capital to those uses which will reap the greatest return will ensure production of the maximum aggregate resources for society.

The economic efficiency argument, however, proves too much. The allocation of funds to compensate or benefit employees, whether through wages, pensions, the purchase of safety equipment, or the maintenance of a relatively inefficient plant, diverts capital that the employer could have invested elsewhere. Any concerted employee pressure that extracts more compensation than an employer would decide to give absent collective bargaining reduces the amount of funding available for capital investment below the presumably "efficient" market level. Moreover, the fundamental policy of the Labor Act is to facilitate employees' efforts to extract as much compensation from their employer as their concerted economic power permits.[54] The Act must intend to sacrifice any "economic efficiency" that accrues from unencumbered employer decisions if it is to achieve its goal of balancing the generally superordinate position of employers in the labor market.[55]

Another consideration that can limit the scope of bargaining is the capacity of the union to satisfy the economic concerns that prompted the employer's unilateral decision.[56] Before *F.N.M.*, the

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withdrawal of capital' . . . is crucial").

[53] See Brockway Motor Trucks v. NLRB, 582 F.2d 720, 748-49 (3d Cir. 1978) (Rosenn, J., dissenting); Comment, "Partial Terminations"—A Choice Between Bargaining Equality and Economic Efficiency, 14 U.C.L.A. L. Rov. 1089, 1091 (1967).

[54] See infra note 65.

[55] Other commentators have criticized the economic efficiency rationale, claiming that it distorts the primary purposes of the Labor Act. See Heinsz, The Partial-Closing Conundrum: The Duty of Employers and Unions to Bargain in Good Faith, 1981 Duke L.J. 71, 102-103 (noting that employers must bargain about economically inefficient "work preservation" clauses); Comment, Duty to Bargain About Termination of Operations, 92 Harv. L. Rev. 768, 775 (1979). The latter commentator also casts doubt on the assumption that "economic efficiency," even as defined by conventional welfare economics, is served by unencumbered employer capital investment decisions that ignore the "external" social costs of nnemployment. See id. at 775-76.

[56] See ABC Trans-Nat'l Transp., Inc. v. NLRB, 642 F.2d 675, 683 (1981); NLRB v. First

Board had suggested a similar factor in holding that employers have no duty to bargain over partial closing decisions motivated by emergency economic conditions so dire that bargaining could not realistically convince the employer to remain open.[57] This exception derived support from *Fibreboard*. In that case, Chief Justice Warren noted that Fibreboard's decision to subcontract had been based on a wish to obtain cost reductions that might also be achieved through additional negotiations with its existing employees.[58] The exception has some appeal: why delay an employer's action with bargaining that cannot possibly change his decision?

Nevertheless, this exception is flawed for two reasons, both of which the *F.N.M.* decision illustrates. First, the economic-emergency or bargaining-futility exception does not give employers and unions a predictable rule. For instance, the court of appeals in *F.N.M.* concluded that had there been full bargaining the union might have made adequate concessions to the company and convinced it to continue its Greenpark operation. The court acknowledged, however, that Greenpark, which was clearly under no bargaining obligation, probably would have had to agree to pay an increased management fee even if the union agreed to a reduction in the wages.[59] Another tribunal might have reasonably concluded that there was an inadequate chance that the company could have achieved an attractive arrangement with both the union and Greenpark.[60]

Nat'l Maintenance Corp., 627 F.2d 596, 601 (2d Cir. 1980), rev'd, 452 U.S. 666 (1981). See also NLRB v. Royal Plating & Polishing Co., 350 F.2d 191, 196 (3d Cir. 1965) (employer has no duty to bargain over decision to move or consolidate operations of failing business).

[57] See, e.g., Brooks-Scanlon, Inc., 246 N.L.R.B. 476 (1979) (diminution in supply of raw materials); Raskin Packing Co., 246 N.L.R.B. 78 (1979) (rescission of line of credit). See also Sucesion Mario Mercado & Hijos, 161 N.L.R.B. 696 (1966) (employer could subcontract sugar cane grinding operation without bargaining because of severe mechanical difficulties).

[58] 379 U.S. at 213-14.

[59] 627 F.2d at 602. Because the company was compensated by Greenpark under a labor cost plus administrative fee contract, see supra note 23, Greenpark's agreement simultaneously to reduce wages and increase the administrative fee would have facilitated a settlement.

[60] The unpredictability of this exception is illustrated by the fact that Board members did not fully agree on how to apply it. In one prominent case applying the exception, a dissenting member noted that wage concessions might have opened several possible paths to the continuation of productive operations. See Brooks-Scanlon, Inc., 246 N.L.R.B. 476, 478 (1979) (Murphy, J., dissenting). Apparently, the majority of the panel did not find these possibilities sufficiently great to sacrifice the employer's probable interest in closing. See id. at 477.

Application of the economic-emergency or bargaining-futility exception would be even more uncertain for anticipatory bargaining during general contract negotiations. Could an employer have cited the exception and the *Borg-Warner* rule to prevent employees from insisting on a clause limiting the employer's authority to close a plant in the face of an economic emergency? If so, should the drafters of collective agreements that include anticipatory clauses on partial closings draft the contract with reference to whether some court or the Board would have required bargaining had the employer taken a unilateral act without a contract clause?

The second and more fundamental flaw in the economic-emergency or bargaining-futility exception is also illustrated by the *F.N.M.* case. The exception assumes that the purpose of bargaining over decisions like partial closings is only to give employees a chance to grant concessions to their employer, rather than also to give employees the chance to extract concessions. The Act, however, does not protect employers from the effects of bargaining; an employer generally must protect itself in bargaining. Proponents of the economic-emergency exception have never explained why an employer that fears an economic emergency should not be required to bargain for a clause giving it the unilateral right to shut down a plant,[61] or insure against the possibility that a plant may become unprofitable during a labor contract.[62]

The Board undoubtedly developed its bargaining-futility exception in part out of concern that a union with no chance of achieving a compromise would bargain over a decision to close an operation in order to maximize the number of days during which the operation must continue before the Board could declare a bargaining impasse. In such cases, the union would not be using bargaining to grant or to extract concessions, but rather as a delay tactic,

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[61] See NLRB v. American Nat'l Ins. Co., 343 U.S. 395 (1952).

[62] Board acceptance of the economic-emergency exception, and of the premise of noncoercive bargaining upon which it is based, probably made its partial-closing bargaining rule more vulnerable to reversal by the Supreme Court. The Board tried to justify mandatory bargaining over partial closings by citing instances when employees had made wage and other concessions to convince an employer to continue production. See Brief for NLRB at 9, 19-21, First Nat'l Maintenance Corp. v. NLRB, 452 U.S. 666 (1981). See also Brockway Motor Trucks v. NLRB, 582 F.2d at 742; Heinsz, supra note 55, at 103-04; Rabin, supra note 41, at 255-57. The *F.N.M.* majority successfully rebutted this argument by noting that management can decide to extract union concessions voluntarily, regardless of whether the decision to close is a mandatory topic of bargaining. 452 U.S. at 681 n.19.

and the Board could view such a tactic as inconsistent with the purposes of the Act. The *F.N.M.* Court similarly could have been legitimately concerned that unions could vitiate, through the use of delay and publicity, many partial closing decisions that they could not affect by concessions or economic pressure.[63] The Board and the courts, however, could control these tactics without restricting the scope of mandatory bargaining and thus without restricting general negotiations before an employer has decided to close a plant and before the union has lost its full bargaining leverage.[64]

In sum, the history of Board and lower court attempts to determine whether partial closing decisions are mandatory topics of bargaining generates no more confidence in dividing mandatory from permissive bargaining topics than does the Supreme Court's *F.N.M.* opinion. The *F.N.M.* opinion at least provides a clear rule for one class of employer decisions. That opinion, however, was based on little more than the relative values the Justices gave to employer and employee interests, and does not provide a workable

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[63] Cf. 452 U.S. at 682-83 (noting management's "great need for speed, flexibility, and secrecy"). As Justice Brennan pointed out in dissent, id. at 691 (Brennan, J., dissenting), unions might also vitiate partial closing decisions by the use of delay and publicity during effects bargaining. Employers, however, presumably could avoid this tactic by making their partial closing decisions final before beginning effects bargaining. See infra text accompanying note 132.

[64] For example, the Board could simply amend the rule that restricts employers from unilaterally changing any "term or condition" of employment within the mandatory scope. The Board could permit unilateral action in emergency situations as soon as an employer gave the union an opportunity both to offer concessions and to initiate coercive action; the employer could then show that the concessions or coercions could not reverse the decision. Courts have suggested that the demands of good faith bargaining over mandatory terms could be relaxed when immediate action is required during the term of the contract. See, e.g., District 50, UMW v. NLRB, 358 F.2d 234, 238 (4th Cir. 1966). Although equally difficult to apply in some situations, this rule would be preferable to a general restriction of the scope of mandatory bargaining, because it would not enable an employer to limit the anticipatory bargaining that is generally most meaningful to employees wishing to extract employer concessions on work transfer decisions. This amended unilateral change rule also would ensure that any compromise on free employee decisionmaking that a union did extract would be a condition of employment "contained in" a collective agreement; an employer could not change this during the term of the contract without breaching the contract and violating the Labor Act. See Allied Chem. Workers, Local 1 v. Pittsburgh Plate Glass Co., 404 U.S. 157, 183-88 (1971).

Arguably the Board also should not *remedy* § 8(a)(5) violations by ordering bargaining that it knows will be futile. One such example is where the employer is forced to make the particular unilateral change in order to stay in business. See Renton News Record, 136 N.L.R.B. 1294 (1962) (closing newspaper composing room because of technological change). See also New York Mirror, 151 N.L.R.B. 834 (1965).

principle for other types of employer decisions.

It is possible, however, to posit a compelling and limited principle that covers all cases in which the need for employer entrepreneurial control justifies limiting the Act's collective bargaining requirements. Such a principle maintains *Borg-Warner*'s distinction between mandatory and permissive bargaining topics, is consistent with the holding of *F.N.M.*, and need be the only substantive restriction on the scope of mandatory bargaining.

II. Protection of the Product Market from the Pressures of Collective Bargaining

A. The Product Market Principle

Any principled exclusion of a class of management decisions from the scope of mandatory bargaining must be consistent with the policies of the Act and must adequately distinguish decisions that do require bargaining. Such an exclusion must therefore accept the primary policy of the Labor Act—to facilitate employees engaging in certain legitimate concerted efforts, such as collective bargaining, in extracting from their employers more compensation for their work.[65]

The acceptance of this policy precludes suppressing full bargaining over certain forms of compensation simply because of the potential economic impact on employers. Two factors support this conclusion. First, topics that are clearly within the scope of

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[65] Section 1 of the Act states:

> [I]nequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

29 U.S.C. § 151 (1976). See also NLRB v. Burns Security Servs., 406 U.S. 272, 282-83 (1972); NLRB v. American Nat'l Ins. Co., 343 U.S. 395, 401-02 (1952); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 45 (1936). The legislative history of the Act also indicates that Congress intended the NLRA to continue the policy of the National Industrial Recovery Act to equalize the bargaining power of employees and employers. See, e.g., 79 Cong. Rec. 57,565-69 (1935) (statement of Sen. Wagner), reprinted in 2 NLRB, Legislative History of the National Labor Relations Act, 1935, at 2321-33 (1935).

Congress also intended to facilitate the achievement of industrial peace by encouraging the equalization of bargaining power. See, e.g., S. Rep. No. 573, 74th Cong., 1st Sess. (1935).

mandatory bargaining, such as wage levels, often represent the most substantial production cost of employers. Second, the Act is not concerned with the economic impact of collective bargaining on employers; it requires employers to rely on their own economic power to protect their interests in collective bargaining. Moreover, the economic benefit or motivation of an employer's decision not to bargain is irrelevant to the determination of whether an employer violated section 8(a)(5).[66] It would therefore be anomalous to focus on this factor in determining the scope of mandatory bargaining topics.

On the other hand, no principled exclusion of a class of management decisions from the scope of mandatory bargaining can turn on the absence of employee interests in those decisions. "There is literally no entrepreneurial activity in the production and sale of goods that cannot conceivably be influenced by union activities to the advantage of union members."[67] The more important a managerial activity is for the course of the enterprise, the more intense employee interests become in attaining some control over decisions affecting that activity.

It is possible nevertheless to carve out a set of management decisions that are inappropriate for compulsory bargaining, although potentially important to employees. This principle rests on a social policy allowing consumers, and only consumers, to influence management's product market decisions. This principle would exclude from compulsory bargaining *all decisions to determine what products are created and sold, in what quantities, for which markets, and at what prices.* These product market decisions are distinct

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[66] A violation of § 8(a)(5) does not turn on a finding of employer anti-union motivation or even on a finding that the anti-union effects of an action outweigh an employer's legitimate economic purposes. Compare Textile Workers Union v. Darlington Mfg. Co., 380 U.S. 263 (1965) (employer did not violate § 8(a)(3) when it closed shop because of anti-union motivation) with Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203 (1964) (employer can violate § 8(a)(5) although it based its decision to close plant on economic, not anti-union, reasons). See also NLRB v. Burnup & Sims, Inc., 379 U.S. 21 (1964) (§ 8(a)(1) case); NLRB v. Erie Resistor Corp., 373 U.S. 221 (1963) (§ 8(a)(3) case); Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945) (§§ 8(a)(1) & 8(a)(3) case). Rather, an employer's mere intention not to bargain concerning a topic appropriate for bargaining establishes a violation.

[67] E. Mason, Economic Concentration and the Monopoly Problem 199 (1957). See also Farmer, Bargaining Requirements in Connection with Subcontracting, Plant Removal, Sale of Businesses, Merger and Consolidation, 14 Lab. L.J. 957, 960 (1963) ("Logically and in fact actually every business decision of any substance will directly or indirectly affect employee welfare.").

from decisions concerning how employers are to compensate organized laborers from the wealth generated by their work. Employees can use economic pressure to direct to themselves as much of the economic resources of the employer as they can, as long as they do not attempt to coerce the employer's decisions concerning what goods will be produced and offered to which markets.[68]

The product market principle accords with a strong social policy that the Act does not subordinate. According to that social policy, consumers should decide which goods employers will produce by expressing their preferences in the marketplace,[69] unless our general democratic institutions restrict these preferences by legislation. The Labor Act does encourage restrictions on the "free" play of employers' labor market and production decisions; indeed, Congress designed the Act to help employees escape disadvantageous labor markets by allowing unions to extract greater compensation from employers. The Act therefore encourages employee efforts that might influence the product market indirectly by affecting the costs of producing goods. No language or policy of the Act, however, reveals an intention to facilitate employees' efforts to control product markets directly. It is consistent with the Act, therefore, to prohibit employees from coercing an employer with any demand that the employer could not satisfy, even with unlimited resources, without directly changing the product offered to the public.[70]

Excluding all product market decisions, but only product market

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[68] That this statement is comprehensible is significant because few economically meaningful divisions can be made between various sets of employer business decisions. One alternative would divide employer decisions into two groups: (1) those concerning the amount, type, and location of labor to be performed; and (2) those concerning the compensation of labor and the length of time each individual laborer is to work. This alternative would restrict collective bargaining more than the principle advanced in the text, however, and it is not supported by any strong social policy. It also would exclude from bargaining such topics as subcontracting, see Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203 (1964), and the provision of safety equipment, see infra note 114, which are now settled as desirable for bargaining.

[69] In the case of public goods, they should be made by voters expressing their preferences at the voting booth. See infra addendum.

[70] This limitation on the scope of mandatory bargaining turns on a desirable social policy, not on any weighing of employer interests, or on the assertion of any "inherent management" rights. The limitation is not even tied to the present American economic system. Worker bargaining units should not be able to compromise marketing decisions that society has determined should be made by managers of state-owned, privately-owned or worker-owned enterprises, whether managers base those decisions on market forces or central planning.

decisions, from the scope of mandatory bargaining would enable the Board and the courts to interpret the ambiguous "terms and conditions" phrase uniformly and in a principled manner. Because of this characteristic, the product market exclusionary principle is predictable for employers and unions. The predictability of the principle is best illustrated by considering a range of economic decisions over which employers have resisted compromising their unilateral control.

B. Product Market Decisions Excluded from Mandatory Bargaining

An employer's decisions to contribute to industry promotion funds are one example of union-contested employer decisions excluded from mandatory bargaining by the product market principle. Unions have claimed that the use of industry promotion funds could affect the "terms and conditions of employment" by ensuring work for union members. Although promotional expenditures may affect employment, employer advertising decisions are decisions about the type of product that the employer chooses to offer to the market. Advertising creates an image that becomes a subjective part of the product for consumers. Within legal limits, employers should decide whether consumers will be willing to pay for the enhancement of a product image by advertising.[71] The courts and the Board therefore have correctly held that contributions to industry promotion funds should not be subject to bargaining table pressures.[72]

The product market principle also frees employers from the obligation to bargain over any decisions to change the objective goods or services that they offer to consumers, even when the decisions affect the working environment of the employees. Product market decisions are most likely to affect the employees' working environment when the working environment is itself the product offered to the public. Performers, such as athletes, actors, or musicians,

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[71] One may support more stringent state regulation of manipulative advertising. Any effective and equitable advertising regulation, however, must be imposed democratically by the state; it cannot be imposed by collective bargaining.

[72] See, e.g., Sheet Metal Workers, Local 38, 231 N.L.R.B. 699 (1977), enforced, 575 F.2d 394 (2d Cir. 1978); Local 264, Laborers Int'l, 216 N.L.R.B. 40 (1975), enforced, 529 F.2d 778 (8th Cir. 1976).

provide clear examples. Thus, the Board should not require football franchise owners to bargain over player demands that penalties be changed to reduce violence in the game. Enhancing job safety should normally be a mandatory bargaining topic, but not when the risk is a part of the product sold to consumers. Similarly, a restaurant owner's decision to require his waitresses to wear scanty costumes in order to sell sexual flirtation with food and drink obviously affects the working environment of the waitresses. Yet any restrictions on such a decision to meet a real consumer demand should come from society expressing its values through normal legislative processes,[73] and not by the coercive action of any particular collectivity of employees, who are free after all to attempt to extract premium wages for their additional burdens.

Conversion of the nature of a product also should not be a mandatory topic, even when decisions to do so reduce the need for the employees' labor. A reduced need for workers may result from an employer's decision to change the type of service that it sells to consumers. For instance, in *Davis v. NLRB*[74] the employer converted a full-service restaurant to a self-service cafeteria, resulting in the layoff of several waitresses. The United States Court of Appeals for the Seventh Circuit, balancing such factors as the impact on employees and the lack of capital investment in the conversion, upheld a Board finding that the conversion should have been a topic of bargaining. Application of the product market principle would have yielded a different result. Based on its calculation of consumer demand, the employer determined that it could sell cafeteria service better than waitress service in its local market. The employees should not have had the opportunity to coerce the employer into abandoning its response to consumer demand.[75]

This analysis also challenges the Supreme Court's statement[76] that the hours in which butchers choose to sell meat is a

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[73] Courts have arguably imposed such restrictions under Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e(2) (1976 & Supp. IV 1980). See, e.g., Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385 (5th Cir.) (holding that employer cannot justify sex discrimination by product definitions that do not present the essence of its business), cert. denied, 404 U.S. 950 (1971).

[74] 617 F.2d 1264 (7th Cir. 1980).

[75] The employer, however, should have bargained over the effects of that decision including the layoff of the waitresses. See infra notes 129-36.

[76] Local Union No. 189, Amalgamated Meat Cutters v. Jewel Tea Co., 381 U.S. 676 (1965).

mandatory topic of bargaining.[77] This assumption helped the *Jewel Tea* Court conclude that collective agreements that restricted the sale of meat to daytime hours did not violate the antitrust laws. The *Jewel Tea* Court's antitrust holding may well have been correct,[78] but the mandatory scope dicta conflicts with the product market principle. Courts should not require an employer to bargain over the hours in which it chooses to sell its product. Unless statutes specifically limit marketing hours, consumer demand should control hours of operation for retail establishments. For salespersons and other dispensers of services, marketing hours effectively control working hours;[79] these employees, however, can insist on shorter worker hours, premium wages, or a seniority system to allocate undesirable work. Although these alternatives may not be as attractive, the product market principle is based on the desirability of insulating certain decisions from collective bargaining pressure, and not on the weighing of employee and employer interests.[80]

The product market principle further explains why certain employer decisions concerning the identity and behavior of personnel must remain outside the scope of mandatory bargaining. The identity and behavior of employees often define the product an employer offers to the market. This is most clearly true for employees such as athletes, actors, musicians, and teachers, whose work performance is itself the marketed product.[81] It may also be true for

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[77] Id. at 689-91. See also id. at 699-700 (Goldberg, J., concurring).

[78] The exclusion of a proposal from the scope of mandatory bargaining, of course, does not render a voluntary agreement on the proposal a violation of the antitrust laws. First National Maintenance, for instance, could have accepted the union's proposal to continue its Greenpark operation without even raising an antitrust issue.

[79] See Meltzer, Labor Unions, Collective Bargaining, and the Antitrust Law, 32 U. Chi. L. Rev. 659, 693-94 (1965).

[80] It is generally true that under the product market principle, the scope of bargaining for service employees is narrower than for nonservice employees. For service employees, such as waitresses, retail clerks, cabdrivers, and bank tellers, significant aspects of the work environment are also features of the product their employers offer the public. The product market principle, however, does not unreasonably restrict the bargaining rights of service employees. Although service employees cannot directly bargain over poor working conditions, they can demand wages that compensate them for these poor conditions. Moreover, they can insist on bargaining over the workload of individual employees. The workload of individual employees rarely affects the nature or quality of the product significantly, although the labor cost to the employer of providing the product might change. See the discussion of teacher bargaining over class size in infra text accompanying notes 189-90.

[81] The product market principle probably restricts the scope of bargaining for employees

customer service employees, such as waiters and salespersons, whose demeanor and style effectively become part of the product. It may even be true for artisans whose skills create a product that others cannot duplicate regardless of the length of their training or the care of their labor.

The image of some products may be affected by the income-producing or community activities of employees identified by the public with those products. For instance, a reporter's receipt of gifts or his participation in political activity could influence the public's view of the reporter's and the newspaper's objectivity.[82] An employer should not have to bargain about any product quality or public relations standard that may define the product that it sells. Mandatory bargaining concerning such standards should consider only the procedures, such as grievance arbitration, by which the standards are applied,[83] and any means, such as wage incentives or fines,[84] by which an employer adjusts the work environment to encourage achievement of the standards.[85]

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whose identities and behavior define the product more than for production employees or even other service employees.

[82] See Newspaper Guild v. NLRB, 636 F.2d 550 (D.C. Cir. 1980). The *Newspaper Guild* court considered whether a publisher could unilaterally institute an "ethics code" that, inter alia, restricted its employees from receiving gifts from protected news sources or from participating in certain community and political activities. The court's opinion is another typical example of employer-versus-employee interest balancing.

[83] An employer's unjust or arbitrary application of any standard creates working conditions about which employees should have the right to insist on bargaining, regardless of whether the standard itself is a mandatory topic. Satisfying the employees' demand for a system of industrial justice may make an employer's efforts to enforce the standard more expensive, but it need not challenge the substance of the standard any more than wage premiums for highly crafted work challenge an employer's right to produce and sell such work. The accepted law that grievance arbitration is a mandatory bargaining topic is therefore consistent with the product market principle. See infra note 168.

[84] An employer should be able to discharge any employee who is unable to meet a personnel standard that defines the product that the employer chooses to market. Disciplinary actions short of discharge, however, are part of the working conditions that employees confront and do not themselves define the employer's product. Therefore they should be mandatory topics of bargaining. The Board's decision in *Newspaper Guild* to make the ethics code a nonmandatory topic, while requiring mandatory hargaining over the penalties for nonconformance to the code, is consistent with this distinction. See Peerless Publications Inc., 231 N.L.R.B. 244, 245 (1977). The D.C. Circuit Court of Appeals rejected the distinction on review. See *Newspaper Guild*, 636 F.2d at 564.

[85] An employer clearly cannot invoke the product market principle to escape bargaining over quantity-related rather than quality-related production standards. Because production speed standards, unlike production quality standards, simply concern an employer's cost of production per unit, they should he mandatory topics of bargaining. See, e.g., Alfred M.

The product market principle also explains the result in *F.N.M.* The Court decided *F.N.M.* correctly because the company elected to terminate the sale of services to a particular customer, Greenpark. This termination constituted the withdrawal of a product from the market; the company did not merely decide to reduce or transfer the allocation of production resources in a manner that affected organized employees. Any bargaining pressure that First National Maintenance's Greenpark employees would have brought to bear against the company would have been intended to convince it to provide a product to a market that had in effect rejected it.[86] First National Maintenance had no duty to bargain over its decision to terminate its Greenpark operation, not because bargaining could not have produced a compromise, and not because any compromise could have hurt the company economically, but because the Act need not and should not require an employer to compromise its marketing decisions.[87]

The product market principle similarly accords with the suggestion in *Textile Workers' Union v. Darlington*[88] that the Act in no way constrains an employer from terminating its entire business.[89] The termination of an entire business, of course, must entail the removal of that business' products from the market. This decision therefore resembles the decision of First National Maintenance to

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Lewis, Inc., 229 N.L.R.B. 757, 757-58 (1977) (holding production quotas a mandatory bargaining topic), modified, 99 L.R.R.M 2841 (1978).

[86] Of course, if First National, contrary to the Board's finding of fact, see supra text accompanying note 23, had terminated its Greenpark contract in order to inhibit union activities at its other work sites, the termination would have violated § 8(a)(3). See Textile Workers Union v. Darlington Mfg. Co., 380 U.S. 263 (1965).

[87] The product market principle can also explain many lower court decisions not to compel bargaining over partial closing. See, e.g., NLRB v. Burns Int'l Detective Agency, 346 F.2d 897 (8th Cir. 1965) (holding that employer's termination of its contract at one branch operation is not an unfair labor practice absent anti-union motivation).

[88] 380 U.S. 263 (1965).

[89] The *Darlington* Court actually reviewed charges under §§ 8(a)(1) and 8(a)(3) that an employer could not terminate part of its business, even after bargaining, because of its discriminatory anti-union animus. Astute commentators therefore recognized that the *Darlington* decision did not control the § 8(a)(5) question of whether an employer, regardless of its motivation, must bargain before effecting a termination decision. See, e.g., Rabin, *Fibreboard* and the Termination of Bargaining Unit Work: The Search for Standards in Defining the Scope of the Duty to Bargain, 71 Colum. L. Rev. 803, 818-20 (1971); Schwarz, Plant Relocation or Partial Termination—The Duty to Decision-Bargain, 39 Fordham L. Rev. 81, 85-86 (1970). The *Darlington* Court, however, did state that "an employer has the absolute right to terminate his entire business for any reason he pleases." 380 U.S. at 268.

terminate its Greenpark operation. In neither instance should the court allow employees to substitute their preferences for those of consumers.

The decision to transfer ownership of the assets of a business, whether by simple sale of assets, by sale of stock, or by merger, should also not be a mandatory subject of bargaining if liquidation of those same assets would not be a mandatory bargaining topic. A sale of such assets simply reflects an employer's decision to shift its capital away from satisfaction of a particular consumer demand. Like the purchaser's decision to devote capital to satisfy this consumer demand, the seller's decision not to satisfy this demand because it is relatively unprofitable to do so should not be subject to mandatory bargaining.[90]

The Board's prominent *General Motors*[91] decision is consistent with this line of reasoning. There the Board held that General Motors did not have to bargain over a decision to sell a truck dealership to an independent dealer in Houston. General Motors' decision to withdraw from retail truck sales in the Houston market was a marketing decision that should not have been subjected to collective bargaining pressures. Although General Motors did not intend to withdraw trucks from the market by selling the dealership, it did intend to change the manner in which trucks would be marketed, and presumably to reallocate the risk of retail sales.[92]

By excluding some employer partial termination decisions from mandatory bargaining, the product market principle does prevent some workers from using their collective coercive power to protect their jobs from economic change. Yet it does so for a reason. A humane society concerned about worker dislocation can and should

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[90] See Bargaining About Business Changes, What Would Be Beneficial for Labor-Management Relations?, 4 Lab. L. Rep. (CCH) ¶ 9271 (Memorandum of the General Counsel, November 30, 1981) [hereinafter cited as General Counsel Memorandum]. The sale of any part of a business that could not be closed without bargaining, however, should be a mandatory topic of bargaining. See infra text accompanying note 95. The sale of business assets should be treated the same as their liquidation.

[91] 191 N.L.R.B. 951 (1971), enforced sub nom. International Union, UAW v. NLRB, 470 F.2d 422 (D.C. Cir. 1972).

[92] Using a similar analysis, the product market principle supports many decisions holding that mergers of one business into another are outside the scope of mandatory bargaining. See International Ass'n of Machinists v. Northeast Airlines, Inc., 473 F.2d 549 (1st Cir.), cert. denied, 409 U.S. 845 (1972); NLRB v. Transmarine Navigation Corp., 380 F.2d 933 (9th Cir. 1967).

address this problem, not by inhibiting product development, but rather by enacting social legislation to retrain, relocate, or give special retirement assistance to displaced workers. Such direct public solutions are likely to be both more efficient and more equitable[93] than subjecting termination decisions to the vagaries of the collective bargaining process.

C. *Effects of the Product Market Principle: A Broad Scope for Mandatory Bargaining*

Because the product market principle excludes only a clearly defined set of management decisions from mandatory bargaining, it restricts court and Board authority to limit the topics over which management and labor must bargain. The following section discusses the ways in which the rule limits this authority.

1. *Partial Closing Decisions*

The product market principle does not exclude from mandatory bargaining all partial closing decisions based on decisions to reduce marketing. Some partial termination decisions, such as the one in *F.N.M.*, are inseparable from the product market decisions on which they are based. Many partial termination decisions, however, are distinct from underlying product market decisions. *Ozark Trailers*[94] is such a decision. Ozark and associated companies manufactured refrigerated truck bodies in at least two plants. Presumably for economic reasons, Ozark closed one of these plants without bargaining with certified union representatives of the employees of the closed plant. The Board's decision indicates that Ozark may have transferred the work of the closed plant either to another plant or to another company on contract.[95] Yet even assuming that Ozark did decide to reduce the number of trucks that it marketed, its decision to close the plant represented by the union was not a product market decision. Ozark could have reduced production proportionately at all plants, or it could have curtailed operation of another plant. The decision to shut down

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[93] They would help all displaced employees and not only those with sufficient economic power to extract concessions from their employers.

[94] 161 N.L.R.B. 561 (1966).

[95] See id.

the union plant was simply a production decision. The company could have satisfied union demand to keep the plant open without changing any decision to reduce product sales. To be sure, keeping the plant open probably would have been more expensive for Ozark than closing it, but as noted previously, matters of production expense cannot be distinguished from mandatory topics such as wage or benefit levels. Therefore, the Board decided *Ozark* correctly,[96] and its decision can be reconciled with the result in *F.N.M.*[97]

Before *F.N.M.* the Board took the position that employers should not be forced to bargain over a partial termination decision that resulted from the discontinuation of a line of business.[98] Although ostensibly based on an attempt to reconcile the *Darlington* Court's dicta about an employer's absolute right to terminate a

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[96] The language of Justice Blackmun's *F.N.M.* opinion may itself permit the Board to require bargaining over some partial closing decisions. In the opinion, Justice Blackmun stressed the "specific facts of the case" "to illustrate the limits of our holding." 452 U.S. at 687. He ended by noting that the decision "represented a siguificant change in petitioner's operations, a change not unlike opening a new line of business or going out of business entirely." Id. at 688.

[97] Unfortunately, the product market principle does not reconcile the decision in Order of R.R. Telegraphers v. Chicago & North W. Ry., 362 U.S. 330 (1960) with that in *F.N.M.* any better than did the *F.N.M.* Court in its opinion. See 452 U.S. at 686 n.23. The Court in *Chicago & North W. Ry.* interpreted § 2 of the Railway Labor Act, 45 U.S.C. § 152 (1976), to require bargaining over the railroad's decision to close certain stations. Because this decision was designed to eliminate service to particular product markets, it should not have been bargainable.

The actual *Chicago & North W. Ry.* holding, however, only precluded a federal injunction of the union threat to strike over the station closings. Therefore the Court could support its holding under the Norris-LaGuardia Act's proscription of the injunction of strikes growing out of any "labor dispute," 29 U.S.C. § 104 (1976), regardless of whether the decision to close was a mandatory bargaining topic. See Norris-LaGuardia Act, 29 U.S.C. § 113(c) (1976) (defining "labor dispute" as "any controversy concerning terms and conditions of employment"). See also *F.N.M.*, 425 U.S. at 686 n.23 (noting that the "terms and conditions" phrase in the Norris-LaGuardia Act, or the "working conditions" phrase in the Railway Labor Act, need not be read coextensively with the "terms and conditions" phrase in the National Labor Relations Act).

[98] The leading case was Summit Tooling Co., 195 N.L.R.B. 479 (1972), enforced mem., 474 F.2d 1352 (7th Cir. 1973). See also Gray-Grimes Tool Co., 221 N.L.R.B. 736 (1975), modified on other grounds, 557 F.2d 1233 (6th Cir. 1977), cert. denied, 435 U.S. 907 (1978); Stanley Oil Co., 213 N.L.R.B. 219 (1974); Kingwood Mining Co., 210 N.L.R.B. 844 (1974), aff'd mem. sub nom. UMW v. NLRB, 515 F.2d 1018 (D.C. Cir. 1975). Since *F.N.M.*, the Board has permitted an employer, without bargaining, to eliminate custodial operations while continuing mechanical and maintenance work. U.S. Contractors, Inc., 257 N.L.R.B. No. 152 (Sept. 3, 1981).

business with the expansive scope of bargaining that *Fibreboard* required, this exemption roughly reflected the product market principle's division of partial closing decisions. When an employer stops manufacturing a product altogether, it must close all production facilities and need not decide which facilities to cut back to which degree.[99]

The Board's application of the "line of business discontinuation exemption," however, was not always consistent with the product market principle. Because the Board never related its exemption to the protection of product market decisions, it could not consistently articulate what constituted a "line of business" for purposes of the exemption. The Board should have viewed First National Maintenance's termination of its Greenpark operations as a discontinuation of a line of business because the company could not have preserved its marketing decision and maintained the Greenpark operation; First National's various operations did not and could not produce mutually fungible services. The Board should not have applied this exemption, however, in cases where an employer could have shifted production of other goods to the facilities that produced the discontinued line.[100]

2. *Plant Relocation, Subcontracting, and Automation*

The *F.N.M.* Court expressly refused to consider whether management must bargain over other decisions that could result in the layoff of large groups of employees,[101] such as "plant relocations," "subcontracting," and "automation." The product market principle provides a clear resolution in these cases and ensures that the differing values of judges and Board members will only minimally affect decisions concerning the scope of bargaining.

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[99] Because they did not appreciate the product market principle, commentators seldom noticed the wisdom of the Board's distinction. See, e.g., Heinsz, supra note 55, at 86-88; Comment, supra note 55, at 773-74.

[100] See, e.g., Summit Tooling Co., 195 N.L.R.B. 479 (1972), enforced, 474 F.2d 1352 (7th Cir. 1973) (Board did not establish that the employer did not manufacture other goods that could have been produced at the closed plant). But see Edward M. Rude Carrier Corp., 215 N.L.R.B. 883 (1974) (decision to discontinue sugar hauling operations held mandatory where employer did other hauling), enforced in part, 541 F.2d 277 (4th Cir. 1976).

[101] See 452 U.S. at 686 n.22. The Court deferred a decision on these topics until confronted with the "particular facts." The availability of these facts presumably would enable the Court to balance employer and employee interests in a given hargaining topic.

The analysis for plant relocations is similar to that applied in partial closing situations. Any employer decision to transfer production of a good without changing its target market should clearly be a mandatory topic of bargaining because no product market decision is involved. Such relocations simply represent bargainable production decisions. Similarly, an employer decision to transfer manufacturing facilities in order to be closer to a new market should also constitute a mandatory topic. In such a case the employer has based the transfer on a labor market production decision separable from its product market decision. The employer's shipping costs from the old plant may well make invasion of the new product market infeasible, but so might high pension benefits. The union representing employees in the old plant should have an opportunity to bargain for the allocation of resources to the employees' long-range security, whether those resources will go to increased shipping costs or to an enlarged pension plan.[102]

Only relocation decisions that are inseparable from employer decisions to change the product market should be excluded from mandatory bargaining. Such relocation decisions would include decisions to change the customers for whom on-sight services, such as maintenance or construction, are delivered, as well as decisions to shift service or sales outlets to locations to which different customers might come at different times.[103]

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[102] The Board has correctly required employers to bargain over a decision to relocate manufacturing operations to a new site either near the old site, e.g., NLRB v. Acme Indus. Prods. Inc., 180 N.L.R.B. 114 (1969), enforcement denied, 439 F.2d 40 (6th Cir. 1971); Weltronic Co., 173 N.L.R.B. 235 (1968), enforced, 419 F.2d 1120 (6th Cir. 1969), cert. denied, 398 U.S. 938 (1970), or far from the old site, e.g., McLoughlin Mfg. Corp., 182 N.L.R.B. 958 (1970), modified sub nom. ILGWU v. NLRB, 463 F.2d 907 (D.C. Cir. 1972). The Board continued after *F.N.M.* to require bargaining over decisions to relocate manufacturing facilities. See Park-Ohio Indus., 257 N.L.R.B. No. 44 (July 30, 1981). Moreover, the General Counsel has interpreted *F.N.M.* to control only partial terminations, not plant closings, that result from a transfer of production. See General Counsel Memorandum, supra note 90, at 16,242 n.11.

[103] Although these decisions might also include decisions to relocate manufacturing outlets for perishable goods, which cannot be shipped as fresh from any other facility at any cost, they would include few, if any, decisions to relocate a facility that manufactures nonperishable goods.

This distinction in text explains the result in National Car Rental Syst., Inc., 252 N.L.R.B. 159 (1980), modified, 672 F.2d 1182 (3d Cir. 1981), in which the Board found no duty to bargain over a decision to close a truck leasing outlet in New Jersey, notwithstanding the roughly coincident opening of another outlet in the same state. See also NLRB v. Transmarine Navigation Corp., 380 F.2d 933 (9th Cir. 1967) (Board did not require em-

The product market principle also provides an easier method by which to analyze subcontracting decisions than does ad hoc employer-versus-employee interest balancing. The product market principle does not exclude most subcontracting decisions from the scope of mandatory bargaining, because most subcontracting simply involves transferring the production of the same good or service from one employer to another. Such simple production transfers do not change the nature of the good that the contracting employer ultimately offers to the market. For instance, Fibreboard's decision to subcontract its production plant maintenance to another firm had no effect on the paper products that Fibreboard ultimately offered to the market. Subcontracting, like cutting employee wages or fringe benefits, might have reduced the cost of producing the paper products, but it could not have changed the products' nature. Any employer decision to transfer work that is necessary to provide some good changes the value-added production that the employer offers the market. Yet subjecting such decisions to bargaining need not restrict the employer's capacity to respond to consumer demand for the particular good; it need only restrain the employer's complete control over the production of the good.[104]

Nevertheless, there are two necessary qualifications to any rule subjecting all employer subcontracting decisions to mandatory bargaining. First, an employer willing and able to expend the resources necessary to duplicate production of an improved component part may not be able to do so in the short run. For example,

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ployer to bargain about decision to enlarge and relocate its shipyard facility to a new harbor in order to provide better and different services to its principal customer).

Indeed, the product market principle dictates that any employer decision to transform marketing operations by transferring its employees or their marketing responsibilities should not be a subject of mandatory bargaining because it concerns the manner in which the product is offered to the market. Cf. NLRB v. International Harvester Co., 618 F.2d 85 (9th Cir. 1980) (no duty to bargain over decision to transfer marketing responsibilities from particular branch offices and employees). For this reason, service employees would bo less able to require bargaining about the site of their employment than would production employees. See supra note 82. Yet relocated service employees would retain the ability to bargain over the effects of the move—enabling them, for example, to ensure employment for themselves in the new facility.

[104] The Board has generally interpreted *Fibreboard* to require bargaining over most subcontracting decisions that depart from an employer's past practices. See, e.g., Central Mo. Elec. Coop., 222 N.L.R.B. 1037 (1976); Johnson (Carmichael Floor Covering Co.), 155 N.L.R.B. 674 (1965), enforced, 368 F.2d 549 (9th Cir. 1966).

an employer might have to construct new production facilities and retrain its workers before it could produce a component that is already immediately available from an advanced supplier. In such cases employers should be able to subcontract production in the short-run free of collective pressures while they negotiate concerning long-run strategies to improve products or while they take steps to enhance their own production capabilities pursuant to an agreement.[105]

A second qualification to this general principle is also necessary. Employer decisions that alter the marketed product by terminating retailing or other sales operations might be considered decisions to subcontract marketing responsibilities. However denominated, these decisions, like that of General Motors to sell a truck franchise in Houston,[106] are decisions to change the product and thus are not bargainable.[107]

A similar analysis explains why the product market principle does not exclude most decisions to replace workers with machines

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[105] An employer could satisfy any union demand to continue manufacturing a component part in the long run by redirecting sufficient resources without altering the product that it wishes to offer the market. The product market principle also suggests that employees should be able to insist that an employer commence production of a component that has previously been produced by a subcontractor. The employer could purchase patterns or trade secrets or image-bearing brand names necessary for duplication of the component. The Supreme Court has held, however, that a union violates § 8(b)(4)(B) of the Act, 29 U.S.C. § 158(b)(4)(B) (1976), when it uses economic weapons to force an employer to acquire previously subcontracted work for unit employees, and § 8(e), 29 U.S.C. § 158(e) (1976), when it signs a collective bargaining agreement that requires an employer to cease dealing with another employer in order to acquire new work. See NLRB v. International Longshoremen's Ass'n, 447 U.S. 490 (1980); National Woodwork Mfrs. Ass'n v. NLRB, 386 U.S. 612 (1967). Employers should be able to resist bargaining over any illegal agreements, including "hot cargo" clauses violative of § 8(e). See infra note 138. See also Consolidated Express, Inc. v. New York Shipping Ass'n, 602 F.2d 494 (3d Cir. 1979) (holding "hot cargo" work acquisition clauses may also violate antitrust laws), vacated, 448 U.S. 902 (1980), stay granted, 641 F.2d 90 (3d Cir. 1981).

[106] See supra text accompanying notes 91-92.

[107] Compare NLRB v. Adams Dairy, Inc., 350 F.2d 108 (8th Cir. 1965) (refusing to require bargaining over decision to transfer marketing to independent contractors), cert. denied, 382 U.S. 1011 (1966) with Dan Dee W. Va. Corp., 180 N.L.R.B. 534 (1970) (finding a duty to bargain where employer attempted to change its driver-salesmen into independent contractors without sacrificing any control over marketing).

In Westinghouse Elec. Corp., 150 N.L.R.B. 1574 (1965), the Board held that *Fibreboard* did not require bargaining over unilateral employer decisions to subcontract work consistently with its past practices. The *Westinghouse* decision is correct because the employer did not change the status quo; the decision should not be read to limit further the principle that all subcontracting decisions are mandatory topics of bargaining.

from the scope of mandatory bargaining. The majority of automation decisions, like most subcontracting decisions, simply represent efforts to produce the same ultimate product at a lower cost by changing a factor of production. A union's resistance to such decisions does not obstruct the development or introduction of new products into the market place.[108]

Some automation decisions, however, represent attempts to change the product. Perhaps more often than with subcontracting decisions, a greater allocation of resources to nonautomated processes may not duplicate the product that employers hope to create by automated production.[109] When an employer cannot satisfy both the demands of the product market and the union demands for job security by spending more money, bargaining over automation decisions should not be mandatory.

D. Further Limitations on the Restrictive Force of the Product Market Principle

The broad scope of mandatory bargaining protected by the product market principle can be further highlighted by noting certain restrictions that it prevents courts and the Board from imposing. First, so long as a union does not attempt to influence the employer's product or its product market, tribunals may not restrict bargaining over proposed redirections of resources to benefit unit employees because of the form of the proposed redirection. Thus, the courts and the Board have correctly held within the scope of mandatory bargaining the allocation of funds to employees through stock purchase[110] and profit-sharing plans,[111] hous-

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[108] The Board thus has generally treated automation decisions as subcontracting decisions, subject to the general *Fibreboard* duty to bargain. See, e.g., Columbia Tribune Publishing Co., 201 N.L.R.B. 538 (1973), enforced in relevant part, 495 F.2d 1384 (8th Cir. 1974). See generally Note, Automation and Collective Bargaining, 84 Harv. L. Rev. 1822 (1971). Cf. *Fibreboard*, 379 U.S. at 223 (Stewart, J., concurring) (attempting to distinguish automation decisions from subcontracting decisions, perhaps because automation decisions generally require a greater commitment of capital resources).

[109] Introduction of x-ray inspection equipment is an example.

[110] E.g., Richfield Oil Corp. v. NLRB, 231 F.2d 717 (D.C. Cir.), cert. denied, 351 U.S. 909 (1956); B.F. Goodrich Co., 195 N.L.R.B. 914 (1972).

[111] E.g., Winn-Dixie Stores, Inc., 224 N.L.R.B. 1418 (1976), enforced in relevant part, 567 F.2d 1343 (5th Cir.), cert. denied, 439 U.S. 985 (1978).

ing[112] and meal subsidies,[113] and health and safety protection on the job.[114] All of these allocations of resources are forms of compensation that do not affect the employer's control over the product market. Courts also have correctly held that a union should be able to compel bargaining on proposals to support activities that ensure the operation of a process that benefits employees, such as employee participation in collective bargaining and grievance arbitration.[115] Similarly, a union proposal that an employer reduce pollution in the employees' community simply constitutes an effort to dedicate further resources to the employees' interest, and thus should be a subject of mandatory bargaining.[116]

Second, the product market principle does not authorize judges or Board members to remove a union proposal from the scope of mandatory bargaining because employees would not benefit "materially and significantly"[117] from the proposal or because the proposal is too trivial. The Supreme Court's decision in *Ford Motor Co. (Chicago Stamping Plant) v. NLRB*[118] is therefore consistent with the product market principle in this respect. The *Chicago Stamping* decision, which held that employers must bargain over changes in the prices of in-plant cafeteria and vending machine foods, rejects restrictions on the scope of bargaining based on a low estimation of the employee interest involved, just as the *F.N.M.* majority

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[112] E.g., American Smelting & Ref. Co., 167 N.L.R.B. 204 (1967), enforced, 406 F.2d 552 (9th Cir.), cert. denied, 395 U.S. 935 (1969); Lehigh Portland Cement Co., 101 N.L.R.B. 529 (1952), enforced, 205 F.2d 821 (4th Cir. 1953).

[113] E.g., Ford Motor Co. (Chicago Stamping Plant) v. NLRB, 441 U.S. 488 (1979); Chemtronics, Inc., 236 N.L.R.B. 178 (1978).

[114] E.g., J.P. Stevens & Co., 239 N.L.R.B. 738 (1978), enforced in relevant part, 623 F.2d 322 (4th Cir. 1980), cert. denied, 449 U.S. 1077 (1981); Gulf Power Co., 156 N.L.R.B. 622 (1966), enforced, 384 F.2d 822 (5th Cir. 1967).

[115] E.g., Axelson, Inc. v. NLRB, 599 F.2d 91 (5th Cir. 1979) (holding remuneration of employee time spent in bargaining a mandatory topic). See also cases cited infra note 168. Of course, for all such topics, including grievance arbitration, the employer can bargain to direct fewer resources than it has in the past. See A.W. Cullum & Co., 182 N.L.R.B. 16 (1970).

[116] See generally Oldham, supra note 41, at 981-1002. It is important to recognize that under the product market principle the determination of whether a topic is within the scope of mandatory bargaining may require the tribunal to define the topic with precision. For example, acceptance of a union proposal to *reduce* employer expenditures on pollution control may so adversely affect the public's image of the employer's product as to render the proposal a nonmandatory bargaining subject.

[117] Seattle First Nat'l Bank v. NLRB, 444 F.2d 30, 33 (9th Cir. 1971).

[118] 441 U.S. 488 (1979).

opinion seems to accept restrictions on the scope of bargaining based on a high estimation of employer interests.[119] In rejecting the company's argument that in-plant food prices are "too trivial" to be mandatory topics of bargaining, the *Chicago Stamping* Court ostensibly relied on the Board's consistent dismissal of similar arguments.[120] It also suggested, however, that an employer's assertion that an issue is trivial is inconsistent with the willingness of a bargaining unit to press that issue to impasse in collective bargaining.[121]

Employers might contend that because the product market principle rejects the triviality standard, it does not adequately accommodate employers' needs to make routine, recurrent business decisions, sucb as layoffs, work assignments, promotions, and disciplining of workers.[122] Delaying unilateral action that an employer wishes to take immediately is costly regardless of whetber the employer ultimately sacrifices any control over the action.

This concern may be unfounded, however, because routine, recurrent, and relatively minor employer decisions may sometimes

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[119] The *Chicago Stamping* Court suggested that the case would have heen different had Ford been "in the business of selling food to its employees," id. at 498, and tbus had changed its in-plant food price as a marketing, rather than a production decision.

[120] Id. at 501.

[121] Id. The Court thus appeared unsympathetic to those courts that have refused to recognize that employees can better judge what is important to them tban can employers or judges. See, e.g., Keystone Steel & Wire v. NLRB, 606 F.2d 171, 180 (7th Cir. 1979) (asserting that whether identity of employees' medical insurer is a mandatory bargaining topic should be decided on a case-by-case basis considering the importance to employees of any variation in coverage); NLRB v. Local 264, Laborers' Int'l Union, 529 F.2d 778, 786 (8th Cir. 1976) (holding outside the scope of mandatory bargaining an employer's contribution to an expense account that supported administration of employee pension and welfare funds because the benefit to employees was speculative and indirect); Seattle First Nat'l Bank v. NLRB, 444 F.2d 30, 33 (9th Cir. 1971) (holding that the employer could unilaterally terminate provision of free investment services to its employees because the services did not materially and significantly affect terms and conditions of employment); Westinghouse Elec. Corp. v. NLRB, 387 F.2d 542, 547 (4th Cir. 1967) (holding an employer did not have to bargain over increase in price of hot food entrees in client cafeteria because increase did not affect employees in a "material and significant" way).

[122] See Rabin, supra note 41, at 264. Rabin seems concerned tbat employees' interests could also be sacrificed if the collective bargaining process were "inundated" by a rush of routine bargaining decisions. Id. This view ignores the flexibility of the collective bargaining process and the capacity of parties to accommodate that process by permitting routine unilateral action. Union leaders, not judges, can best evaluate when bargaining does not benefit employees. But see infra notes 179-83 and accompanying text (noting that the Board should exclude "insignificant" topics in some cases).

be implemented without effecting unilateral changes requiring bargaining, even though the decisions involve mandatory bargaining topics. Except in cases where unions have negotiated restrictions on an employer's control over recurrent business decisions, an employer's routine rendering of such decisions is best viewed as a continuation of past practices or a dynamic status quo. Indeed, after considering an employer's past practices, the Board has permitted employer unilateral actions on matters such as wage levels, which are clearly topics of mandatory bargaining.[123]

Employers who desire freedom to act unilaterally on recurrent, routine matters in ways that do not accord with past practices can do so by negotiating management rights clauses that waive employee rights to require bargaining over specified matters during the term of the agreement. In addition, the Board should quickly find an impasse where a union delays a decision during the term of the contract simply for the purpose of extracting some concession on another matter.[124]

The product market principle creates a third important limitation on the authority of the courts and the Board to limit the scope of mandatory bargaining. The principle does not authorize these tribunals to limit the scope of bargaining in order to accommodate the interests of third parties other than customers. This limitation is significant because many union proposals would not only place additional economic burdens on employers, but also would affect employer relations with nonconsumer third parties.[125] For instance,

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[123] E.g., State Farm Mut. Auto. Ins. Co., 195 N.L.R.B. 871 (1972). The Act does not require an employer to bargain over third-party decisions that affect its employees if the employer has no control over the decisions. For instance, if Ford had hired an independent caterer to serve food in its Chicago Stamping plant and had given that caterer control over the prices that it charged, see Ford Motor Co. (Chicago Stamping Plant) v. NLRB, 441 U.S. at 504-05 (Blackmun, J., concurring), Ford would not have had to bargain over the caterer's decision to increase its prices. In such a case, Ford would have made no change in the status quo.

[124] See supra note 63.

[125] In order fully to protect product market decisions, however, product customers must be broadly defined to include everyone to whom the employer desires to sell a service. For instance, because banks sell services to both creditor-depositors and debtor-borrowers, bank employees should not be able to insist on bargaining concerning the hours banks are open to either. See supra text accompanying note 77. Even typical sellers of inputs may in effect purchase transaction services from producer-employers who send out purchasing agents to facilitate input sales. Although a purchaser's production employees should be able to insist on bargaining concerning an employer's decision to purchase inputs, the purchaser's buying

a restriction on subcontracting or automation could prevent an employer from doing business with third-party suppliers of inputs. Similarly, requiring an employer to maintain standard levels of compensation for independent contractors would interfere with an employer's relations with the third-party contractors.[126] In these examples,[127] the union proposals would restrict employer production or labor market decisions without interfering with an employer's control over its product.[128]

E. A Note on Effects Bargaining

The implementation of most of an employer's decisions requires the employer to make future decisions. It is important to realize that the status of the underlying decision as a mandatory or nonmandatory bargaining topic does not dictate the status of the employer's subsequent decisions. Although an employer's decision may not itself be subject to mandatory bargaining, the effects of

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agents should not be able to require bargaining over the hours in which the input-sellers could "purchase" their transaction services.

[126] See Local 24, Int'l Bhd. of Teamsters v. Oliver, 358 U.S. 283 (1959) (holding within the scope of mandatory bargaining a union-proposed restriction on the prices that employers could pay independent-contractor drivers for rental of their trucks).

[127] Recent sports pages provide another interesting example. Unions of professional athletes have insisted that their employers agree to limit the compensation that each employer may grant another employer for bidding away one of their represented employees. See Mackey v. NFL, 543 F.2d 606 (8th Cir. 1976) (holding football free agent compensation to be a mandatory topic of bargaining), cert. dismissed, 434 U.S. 801 (1977). Of course, such agreements affect relations between employers as well as employee compensation levels. They might also affect competitive balance, an important aspect of the sports product. Employers, however, could achieve the same level of competitive balance through a pooled compensation plan, similar to that adopted by major league baseball. See Memorandum of Agreement Between the Major League Clubs-Player Relations Committee in the Major League Baseball Players Ass'n (July 31, 1981). The sports industry obviously presents special problems for collective bargaining because only in sports is competition between employees the product offered to consumers. See generally Berry & Gould, A Long Deep Drive to Collective Bargaining: Of Players, Owners, Brawls and Strikes, 31 Case W. Res. L. Rev. 685 (1981).

[128] This limitation is also important because it would restrict the impact of a Supreme Court pronouncement that when employees wish to bargain over a matter that concerns the relationship between the employer and third parties, the matter is a mandatory topic only if it "vitally affects" the unit employees wishing to bargain. Allied Chem. Workers, Local 1 v. Pittsburgh Plate Glass Co., 404 U.S. 157 (1971). Because the meaning of "vital" is ambiguous, the statement allows the differing values of judges and Board members to determine the scope of mandatory bargaining. The Court, however, has employed this rule to restrict bargaining only in the *Pittsburgh Plate Glass* case, and the result there can be explained by one of the process-oriented principles discussed infra text accompanying notes 149-53.

that decision might well be. Thus, although an employer should not have to bargain over whether it will cease production of a particular product, employee representatives should be able to require that the employer bargain over which production facilities it will close.

This distinction between decisions and their effects is consistent with existing law. The courts and the Board have recognized that an employer's authority to decide unilaterally to take certain action does not entail authority to control the impacts and effects of that action.[129] Although they have upheld some unilateral employer actions, the Board and the courts have generally required the employer to bargain over the effects of that action on organized employees.

This article must therefore explore the relationship between the product market principle and the "effects" bargaining requirement. On the one hand, the product market principle and the effects requirement should enable employees, through sufficiently strong anticipatory bargaining, to obtain protection against the effects of even those actions the employer can take unilaterally. For instance, although a union may not demand a restriction on an employer's capacity to sell a line of its business, it may demand a commitment from the employer to require the purchasing employer to offer comparable employment to the old employees.[130] Similarly, although a union may not insist on having veto power over an employer's desire to terminate the production of a product manufactured at a plant, it may insist on a clause that would re-

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[129] *F.N.M.*, 452 U.S. at 681 (holding that although bargaining over decision to close plant is not mandatory, the union must have the chance to bargain over job security provisions at the "effects" bargaining stage).

[130] The Labor Act does not impose a statutory obligation on any successor employee to assume a predecessor employer's contractual obligation to its old employees. See Howard Johnson Co. v. Detroit Local Joint Exec. Bd., 417 U.S. 249 (1974); NLRB v. Burns Int'l Sec. Servs., Inc., 406 U.S. 272 (1972). Yet a union may obtain commitments from an employer with which it has a present bargaining relationship to condition the sale of the employer's property on the protection of its employees. See Lone Star Steel Co. v. NLRB, 639 F.2d 545 (10th Cir. 1980) (clause requiring an existing employer to secure the commitment of any successor employer to assume the existing employer's obligation to a union is a mandatory subject for bargaining), cert. denied, 450 U.S. 911 (1981). But see National Maritime Union, 196 N.L.R.B. 1100 (1972) (because the sale of ships is a part of "doing business" in the maritime industry, a clause restricting the sale of merchant ships to companies not signatory to a particular union's contracts violates § 8(e)), enforced, 486 F.2d 907 (2d Cir. 1973), cert. denied, 416 U.S. 970 (1974).

quire the employer to produce any new product at that plant. Unions should also be able to demand bargaining over any level or kind of severence pay, retraining, or reassignment.[131]

On the other hand, the product market principle does not magnify the limited economic leverage that effects bargaining provides unions at the time of authorized unilateral changes by the employer. For example, employees are not likely to have significant economic power when bargaining over the effects of imminent plant closings. For effects bargaining to be fully meaningful, employers should notify unions of a contemplated unilateral action at least as soon as serious planning begins.[132] This would give the union an opportunity to threaten or commence a strike before the employer unilaterally terminates the plant's operation. Sufficiently early effects bargaining might even convince an employer that the labor costs of shutting down a plant provide good reason to reconsider the decision. As long as the decision to close is itself outside the scope of bargaining, however, an employer has few incentives not to present the union with closed plant doors before it begins effects bargaining. Once the employer has implemented its decision to terminate operations, most of the union's economic leverage[133] will dissipate, and an effects bargaining order from the Board probably will not help the union to do much more than request special severance pay. The Board is unlikely to protect effects bargaining either by ordering the employer temporarily to undo a decision that it has the legal right to effect unilaterally[134] or

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[131] By making additional demands on topics over which an employer must bargain, a union can often obtain an employer's acceptance of demands that the employer is not required to bargain over. Once an employer has implemented a legal unilateral change, however, a union cannot often obtain a rescission of the decision by aggressive effects bargaining.

[132] Cf. *F.N.M.*, 452 U.S. at 682 (noting that effects bargaining should take place in a "meaningful manner and at a meaningful time").

[133] See supra note 30.

[134] Indeed the Board has hesitated to order employers to undo many unilateral decisions that the employers do *not* have the right to implement unilaterally. For instance, the Board generally has not required employers to reopen plants that the employers had closed without fulfilling a Board-affirmed duty to bargain. See, e.g., Van's Packing Plant, 211 N.L.R.B. 692 (1974); Sidele Fashions, Inc., 133 N.L.R.B. 547 (1961) (giving the employer the option of reopening old shop or offering employees a job at new plant), enforced per curiam, 305 F.2d 825 (3d Cir. 1962). But see Case, Inc., 237 N.L.R.B. 798, 819 (1978) (ordering the employer to return operation to a closed plant in Kentucky because the employer retained its lease in the old facility), modified sub nom. NLRB v. Gibraltar Indus., 653 F.2d 1091 (6th Cir.

by granting the employees benefits that the employer would have agreed to relinquish had it bargained earlier.[135] By clarifying the class of plant closings, relocations, and sales that are bargainable effects of nonbargainable product market decisions, the product market principle restricts the number of unilateral faits accomplis that employers can lawfully present to unions. Effects bargaining, however, is unlikely to soften appreciably the faits accomplis that remain.

Certain unilateral product market decisions, such as the pricing of goods sold to the market, do not in themselves require any further decisions that might affect employees. In such cases the product market principle does not necessarily require predecision "effects bargaining." The "meaningful" time to bargain over the effects of employer decisions is when the union can point to some effect on employees that can be averted without reversing the authorized employer unilateral change. For instance, if a price increase requires production cutbacks a year later, the union could presently insist on bargaining about any resulting layoffs, unless of course these layoffs were consistent with the employer's past practices or were authorized in an extant collective agreement.[136]

1981). The Board, of course, is also not likely to use its § 10(j) authority, 29 U.S.C. § 160(j) (1976), to enjoin temporarily a legal unilateral decision of an employer while the union has an opportunity to bargain over the effects of the decision. But see Local Lodge No. 1266, Int'l Ass'n of Machinists & Aerospace Workers v. Panoramic Corp., 688 F.2d 276 (7th Cir. 1981) (federal court may enjoin sale of part of business pending arbitration over contract allegedly requiring "successors" to assume contract obligations); Lever Bros. Co. v. International Chem. Workers, 554 F.2d 115 (4th Cir. 1976) (preliminary injunction of relocation necessary to preserve status quo pending arbitration).

[135] See Ex-Cell-O Corp., 185 N.L.R.B. 107 (1970) (refusing to set hypothetical contract terms in order to compensate employees, even for an employer's "manifestly unjustifiable refusal to bargain"), aff'd in relevant part, 449 F.2d 1058 (D.C. Cir. 1971).

[136] Because the product market principle allows employees to compel bargaining over the effects of a wide range of production decisions, it arguably could pose a dilemma for employers. If an employer operates three plants, each represented by a different union, it may face a strike by each union over the effects of production cutbacks. The goal of each union would be to convince the employer that it should cut production at one of the two other plants. In such a case, it is doubtful that the employer could escape all three strikes by fashioning a compromise satisfactory to all the parties.

The Labor Act itself, however, may provide relief for employers placed in such a dilemma. Section 8(b)(4)(D) of the Act declares it to be an unfair labor practice for any union to threaten or coerce "any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class." 29 U.S.C. § 158(b)(4)(D) (1976). Section 10(k) of the Act directs the Board to respond to charges of § 8(b)(4)(D) violatious

IV. Protecting the Collective Bargaining Process from the Pressures of Collective Bargaining

As this article has explained, the product market principle restricts the authority of the Board and the courts to define the scope of mandatory bargaining on an ad hoc basis. The principle therefore protects collective bargaining from the restrictions feared by Professors Wellington and Cox.[137] Moreover, the product market principle needs to be supplemented by only a few principles designed to protect the process of collective bargaining. The most important of these principles, that no party should be able to insist on an illegal proposal, requires no elaboration here.[138] The other

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by itself resolving the dispute that led to the proscribed union conduct. Id. § 160(k). The language of § 8(b)(4)(D) appears sufficiently broad to provide employers relief from conflicting union demands. Furthermore, applying § 8(b)(4)(D) to disputes over inter-plant word reductions is consistent with Congress' intent that the Board use § 8(b)(4)(D) to extricate employers from the conflicting demands of warring unions. See National Labor Relations Board, Legislative History of the Labor-Management Relations Act of 1947, at 615, 995-97, 1056 (1948). In order to preserve a broad scope of bargaining, however, the Board should limit the reach of § 8(b)(4)(D) in two ways.

First, the Board should not disrupt bargaining over the production effects of an employer's marketing decisions unless the employer can show that it actually faces the conflicting bargaining demands of two or more unions. Even when an employer confronts more than one unit of employees that could be affected by a production decision, it may not face conflicting demands. The affected unions may bo united in their bargaining demands or only one union may be sufficiently strong to make any demands on the employer. In such cases, the employer faces no dilemma, and the Board should require it to bargain. See, e.g., Teamsters, Warehousemen Local 839, 249 N.L.R.B. 176 (1980); Federation of Special Police & Law Enforcement Officers, 242 N.L.R.B. 1076 (1979); Local 55, Sheet Metal Workers, 213 N.L.R.B. 479 (1974); General Bldg. Laborers' Union No. 66, 209 N.L.R.B. 611 (1974); Highway Truckdrivers & Helpers, Local 107 (Safeway Stores, Inc.), 134 N.L.R.B. 1320 (1961).

Second, the equity of protecting employers from conflicting bargaining obligations vanishes when the employer causes the dilemma. The Board has found §§ 8(b)(4)(D) and 10(k) inapplicable to cases "where the employer by his unilateral action created the dispute, by transferring work away from the only group" that conld claim the work at the time of the transfer. Highway Truckdrivers & Helpers, Local 107 (Safeway Stores, Inc.), 134 N.L.R.B. 1320, 1323 (1961). In such a situation the employer has itself created a conflicting claim in another group. The Board has applied this exemption to work transfers at one situs, e.g., Seattle Bldg. & Const. Trades Council (Seattle Olympic Hotel Co.), 204 N.L.R.B. 1126 (1973), to the relocation of work to a new situs, e.g., Highway Truckdrivers, Local 107 (Safeway Stores, Inc.), 134 N.L.R.B. 1320 (1961), and to the subcontracting of work away from the employer's own employees, e.g., Chicago Web Printing Pressmen's Union No. 7, 209 N.L.R.B. 320 (1974).

[137] See supra notes 9-16 and accompanying text.

[138] Generally, a party may not insist on a proposal that would be illegal if adopted and implemented. See, e.g., Philip Carey Mfg. Co. v. NLRB, 331 F.2d 720 (6th Cir.) (insisting on a superseniority system violates § 8(a)(5)), cert. denied, 379 U.S. 888 (1964); Interstate Pa-

principles, discussed in this section, will assist the Board and the courts of appeal to define the scope of mandatory bargaining in a more consistent and principled manner.

A. The Acceptance of Defined Bargaining Responsibilities

Borg-Warner suggests the first process limitation on the scope of mandatory bargaining: A party should not be able to insist upon a proposal that would allow it to evade its bargaining obligations under the Act. One clause that the *Borg-Warner* Court held outside the scope of mandatory bargaining was a "recognition" clause that excluded the employees' exclusive bargaining agent as a party to the contract and substituted for it the agent's uncertified local affiliate.[139] Prohibiting the employer from insisting on the inclusion of the "recognition" clause in the collective agreement was appropriate because the employer's proposal was an attempt to evade its statutory bargaining responsibilities. The employer was attempting to circumvent its obligation to deal fully with a union certified by the Board as the majority representative of the employer's employees.[140] By preventing the employer from using coer-

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per Supply Co., 251 N.L.R.B. 1423 (1980) (insisting on depriving strikers of seniority accrued during strike violates § 8(a)(5)).

As a corollary to the above principle, an employer should not be able to insist that a union waive employee rights that the union does not have authority to waive, such as the right to solicit support for unionization protected in NLRB v. Magnavox Co., 415 U.S. 322 (1974). The implementation of such a waiver would violate the Act. For an exhaustive analysis of the rights that should be protected from union waiver, see Harper, Union Waiver of Employee Rights Under the NLRA (Pts. 1 & 2), 4 Indus. Rel. L.J. 335-89, 680-704 (1981).

[139] See NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342, 343-44 (1958).

[140] Justice Harlan stressed in his separate opinion in *Borg-Warner*, 356 U.S. at 351 (Harlan, J., dissenting), that § 8(d) of the Act requires the employer to agree to "the execution of a written contract incorporating any agreement reached if requested." 29 U.S.C. § 158(d) (1976). Harlan conceded that these words implied that the employer must bargain with the party with whom it has the duty to contract. 356 U.S. at 362 (Harlan, J., dissenting). See also Cox, supra note 9, at 1075. Even absent this phrase in § 8(d), however, there can be no doubt that exclusion of the certified representative from a collective agreement would enable an employer to evade its defined bargaining responsibilities, given the importance of continuing negotiations under a collective agreement.

Another source of this duty to accept bargaining responsibilities is the right of employees to select their own bargaining representatives, a right which neither employers nor unions may abrogate. See NLRB v. Borus Int'l Sec. Servs., Inc., 406 U.S. 272 (1972); NLRB v. Exchange Parts Co., 375 U.S. 405, 409 (1963); NLRB v. Electric Vacuum Cleaner Co., 315 U.S. 685 (1942); International Ass'n of Machinists, Lodge No. 35 v. NLRB, 311 U.S. 72 (1940); 29 U.S.C. § 157 (1976). Permitting an employer to use economic coercion to alter the representation decisions of a majority of employees clearly infringes on this right.

cion to evade this responsibility, the Court's limitation on the scope of mandatory bargaining protected, rather than restricted, the process of collective bargaining established under the Act.

Viewed as an application of a general principle that neither party can insist on a clause that would enable it to escape its defined bargaining obligations, the *Borg-Warner* holding supports a number of Board and lower court decisions. For instance, the Board has consistently stated that an employer cannot insist on negotiations over the identity of the union with which it must bargain; it must recognize and deal with whatever union has been selected by a majority of the employees in an appropriate bargaining unit.[141] The Board and the courts have also held that an employer cannot insist on a modification of the size of a bargaining unit towards which it has a bargaining obligation.[142] An employer's insistence on such proposals constitutes an effort to escape statutory bargaining responsibilities because the Act defines these responsibilities by reference to particular bargaining units as well as to particular bargaining representatives.

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[141] See Simplicity Pattern Co., 102 N.L.R.B. 1283 (1953). Cf. Newspaper Agency Corp., 201 N.L.R.B. 480, 493 (1973) (employer cannot insist that majority union accede to employer's recognition of union for new unit that it intends to create by changing production technology), aff'd, 505 F.2d 335 (D.C. Cir. 1974). The Board has also held that an employer cannot resist written recognition of a majority union in a collective agreement because such recognition is the first aspect of all employers' bargaining responsibilities. See Columbia Tribune Publishing Co., 201 N.L.R.B. 538, 557 (1973), modified, 495 F.2d 1384 (8th Cir. 1974); Montgomery Ward & Co., 37 N.L.R.B. 100 (1941), enforced, 133 F.2d 676 (9th Cir. 1943). Because employers must bargain *exclusively* with unions selected by a majority of employees, the Board has appropriately prohibited an employer from insisting on addition of a noncertified union as a party to a collective agreement. See Latrobe Steel Co., 244 N.L.R.B. 528, 532 (1979), enforced in part, 630 F.2d 171 (3d Cir. 1980), cert. denied, 454 U.S. 821 (1981).

[142] See, e.g., Newport News Shipbldg. & Dry Dock Co., 236 N.L.R.B. 1637 (1978) (employer cannot insist on contraction of bargaining unit from that previously accepted by the parties), enforced, 662 F.2d 73 (4th Cir. 1979); White-Westinghouse Corp., 229 N.L.R.B. 667 (1977) (employer cannot insist on division of an established multi-plant bargaining unit), enforced & aff'd, 604 F.2d 689 (D.C. Cir. 1979); National Fresh Fruit & Vegetable Co., 227 N.L.R.B. 2014 (1977) (employer cannot insist on contraction of established appropriate bargaining units), enforcement denied on other grounds, 565 F.2d 1331 (5th Cir. 1978); Steere Broadcasting Corp., 158 N.L.R.B. 487, 506-07 (1966) (employer cannot insist on exclusion of employees from bargaining unit certified by the Board). See also Newspaper Printing Corp., 232 N.L.R.B. 291 (1977) (employer cannot insist on receiving unilateral power to decide through work assignments which employees are in bargaining units), enforced, 625 F.2d 956 (10th Cir. 1980), cert. denied, 450 U.S. 911 (1981).

This principle should prevent an employer from insisting that a union bargain for individuals not in the union's defined unit. See infra note 144 and accompanying text.

The general principle expressed in the *Borg-Warner* recognition-clause holding also applies to union proposals. For instance, the Board and the courts have declared that a union demand for an increase in the size of its bargaining unit is outside the scope of mandatory bargaining.[143]

Tribunals, however, should take care not to misapply the rule requiring parties to accept their statutory bargaining responsibilities and should avoid unnecessarily restricting the means by which employers or unions can attempt to determine the compensation of labor. For instance, an employer's responsibility to bargain with the appropriate representative of a unit should not restrict its efforts to protect its competitive position by insisting that the union agree to give the employer contractual terms as favorable as any terms that the union grants to other employers. Such an agreement does not give the employer control over the wages of employees outside the unit with which it must bargain; the union may accept any contract it wishes for other employees, as long as it adjusts the first employer's contract.[144]

The courts and the Board have misapplied the "bargaining responsibility" rule and have unnecessarily restricted the ability of unions to work together when bargaining for their members. The Board and the courts have held that a union, or combination of unions, cannot insist on multi-unit bargaining even with one em-

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[143] See, e.g., International Union of Operating Eng'rs, Local 542, 216 N.L.R.B. 408 (1975), enforced, 532 F.2d 902 (3d Cir. 1976), cert. denied, 429 U.S. 1072 (1977); Local 164, Bhd. of Painters, 126 N.L.R.B. 997 (1960), enforced, 293 F.2d 133 (D.C. Cir.), cert. denied, 368 U.S. 824 (1961); Local 59, Int'l Bhd. of Elec. Workers (Textile Co.), 119 N.L.R.B. 1792 (1958), enforced, 266 F.2d 349 (5th Cir. 1959); International Longshoremen's Ass'n, 118 N.L.R.B. 1481 (1957), enforcement denied on other grounds, 277 F.2d 681 (D.C. Cir. 1960). Such union demands, like the employer's recognition-clause demand in *Borg-Warner*, infringe on the employees' right to select their own representatives. See NLRB v. International Union of Operating Eng'rs, 532 F.2d 902, 907-08 (3d Cir. 1976); International Longshoremen's Ass'n v. NLRB, 277 F.2d 681, 682-83 (D.C. Cir. 1960). See also infra text accompanying notes 149-53.

[144] On this issue, the Board has thus far earned high marks; it has held that employer-proposed "most favored nation" clauses are within the scope of mandatory bargaining. Dolly Madison Indus., 182 N.L.R.B. 1037 (1970).

The Board has distinguished "no conflicting agreement" clauses, which force the union to adopt identical contracts with all of the employers with which it bargains. See, e.g., Associated Gen. Contractors, 245 N.L.R.B. 328 (1979), enforced, 637 F.2d 556 (8th Cir. 1980). These agreements permit the employer to control wages of employees outside the unit and therefore should not be mandatory bargaining subjects.

ployer.[145] These tribunals appear to assume that because an employer cannot insist on bargaining that does not follow defined unit lines,[146] neither can a union. The Act, however, does not require such symmetry. The Act obligates employers to deal with unions as representatives of specified bargaining units rather than as representatives of other units that employers might prefer. Unions, on the other hand, simply have an obligation to represent members of their assigned bargaining units through legal means and without insisting on representing employees not assigned to them. Therefore, if the representatives of several units decide that they can best advance the interests of their employees by negotiating together,[147] they should be able to bargain to do so.[148]

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[145] See, e.g., General Drivers & Helpers Union, Local No. 554 v. Young & Hay Transp. Co., 522 F.2d 562, 566 (8th Cir. 1975) (dicta); Minnesota Mining & Mfg. Co. v. NLRB, 415 F.2d 174, 176-77 (8th Cir. 1969) (dicta); Utility Workers, Local 111, 203 N.L.R.B. 230 (1973), enforced, 490 F.2d 1383 (6th Cir. 1974); International Union of Operating Eng'rs, Local 428, 184 N.L.R.B. 976 (1970), enforcement denied on other grounds sub nom. AFL-CIO Joint Negotiating Comm. for Phelps Dodge v. NLRB, 470 F.2d 722 (3d Cir.), cert. denied, 409 U.S. 1059 (1972). See also Standard Oil Co., 137 N.L.R.B. 690 (1962) (holding that local union's refusal to sign a negotiated agreement until other locals agreed to terms was unfair practice), enforced, 322 F.2d 40 (6th Cir. 1963).

[146] See supra note 141 and accompanying text.

[147] The Board and the courts have sometimes recognized that coordinated multi-unit bargaining can benefit the represented employees. For example, these tribunals have permitted multiple unions to increase their leverage by insisting on a common expiration date for their individual contracts with one employer. See, e.g., United States Pipe & Foundry Co. v. NLRB, 298 F.2d 873 (5th Cir.) (denying petition for review of 129 N.L.R.B. 357 (1960)), cert. denied, 370 U.S. 919 (1962).

[148] Furthermore, a union should be able to attempt to augment its bargaining leverage by agreeing on a concerted bargaining or strike strategy with other unions, even though the Board would never find that the employees represented by the coalition comprise an appropriate unit. But cf. NLRB v. Industrial Union of Operating Eng'rs, Local 542, 532 F.2d 902, 910 (3d Cir. 1976) (Adams, J., dissenting) (suggesting that a union's right to insist on increasing the size of its bargaining unit should turn on whether the proposed unit would be appropriate), cert. denied, 429 U.S. 1072 (1977). The Board judges the appropriateness of a bargaining unit by considering whether employees have sufficiently common interests, see, e.g., Chin Indus., 232 N.L.R.B. 176 (1977); Ballentine Packing Co., 132 N.L.R.B. 923 (1961), not by judging whether the unit will be too strong for the employer. See 29 U.S.C. § 159(b) (1976).

The employer, however, should not have a greater legal obligation to bargain with the multi-unit aggregate than it does to pay a particular wage; it therefore can insist to impasse on unit-by-unit bargaining. See, e.g., General Drivers & Helpers Union, Local No. 554 v. Young & Hay Transp. Co., 522 F.2d 562 (8th Cir. 1975) (holding employer not required to bargain with larger unit than that certified by the Board); Oil, Chem. & Atomic Workers, Int'l Union v. NLRB, 486 F.2d 1266 (D.C. Cir. 1973) (rejecting union argument that an employer must engage in multi-unit bargaining where appropriate for meaningful negotia-

The Supreme Court's decision in *Allied Chemical Workers, Local 1 v. Pittsburgh Plate Glass Co.*[149] also represents an application of the principle that courts should exclude from the scope of mandatory bargaining proposals that attempt to evade a party's bargaining obligations. In that case, the Court stated that a concern of individuals outside the bargaining unit constitutes a mandatory topic of bargaining only if that concern "vitally affects" the interests of employees within the bargaining unit.[150] Although the Court's broad language arguably extends beyond the "bargaining obligation" principle and suggests substantive limitations on the scope of mandatory bargaining, the decision should be read narrowly. *Pittsburgh Plate Glass* merely holds that when a union is unquestionably bargaining on behalf of individuals outside the bargaining unit, its demands are mandatory topics of bargaining only if the outcome significantly affects unit employees.

The case arose when Pittsburgh Plate Glass decided unilaterally to offer retired employees supplemental Medicare premiums as an alternative to participation in the health plan negotiated by the company and the union. The union alleged that it had a right to bargain for the retirees and that the employer's unilateral action therefore concerned a mandatory topic of bargaining. The Board agreed, but the Supreme Court interpreted the statutory definition of "employee"[151] more narrowly, holding that retired workers are not employees and cannot be members of a bargaining unit represented by the union.[152] The Court then considered the union's further contention that, even if the retirees were not employees, it could bargain over the company's plan because the benefits of retirees could affect all workers. The Court held that in order to be a mandatory bargaining topic, the concerns of third parties must "vitally affect" active unit employees.[153] Because retiree benefits did not reach this threshold, the Court concluded that the subject of the retirees' health plan was excluded from the scope of

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tions). But see Anker, Pattern Bargaining, Antitrust Laws and the National Labor Relations Act, 19 N.Y.U. Ann. Conf. on Labor 81, 102-03 (1967) (arguing that if it is unreasonable to insist on separate bargaining, such insistence violates the employer's duty to bargain).

[149] 404 U.S. 157 (1971).

[150] Id. at 179.

[151] 29 U.S.C. § 152(3) (1976).

[152] 404 U.S. at 172.

[153] Id. at 182.

mandatory bargaining.[154]

The breadth of the Court's language suggests a substantive rather than process limitation on the scope of collective bargaining; this reading would exclude any topic that concerns third parties and does not vitally affect unit members. Such a construction would conflict with the approach of this article, which defines all substantive limitations on legal mandatory bargaining through the product market principle. Tribunals should view the rule of *Pittsburgh Plate Glass*, however, as only an effort to ensure that unions accept their defined bargaining responsibilities. The Act prohibits a union from insisting that an employer agree to enlarge the union's bargaining responsibility by recognizing the union as a representative of individuals outside the unit.[155] This prohibition must extend to union attempts to bargain on behalf of unit outsiders, even when the union does not explicitly demand recognition. The *Pittsburgh Plate Glass* Court attempted to prevent such a circumvention of bargaining responsibility by announcing essentially a two-step analysis. First, is the union attempting to bargain for individuals outside the unit that elected the union as its representative? Second, if so, does the issue over which the union attempts to bargain vitally affect members of the unit?

The "vitally affects" standard therefore does not constitute a general limitation on the scope of an employer's bargaining duty. The test becomes relevant only where it is clear that a union is attempting to enlarge its "constituency" by bargaining for individuals it is not certified to represent;[156] bargaining that merely affects the interests of third parties does not trigger the "vitally af-

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[154] The Court concluded that the inclusion of retirees in the plan would have a speculative impact on the plan's cost to unit members. Id. at 180. The Court also dismissed the argument that unilateral change in the plan for present pensioners would cause uncertainty among workers about their future benefits. Id. at 180-82. It noted that the company's proposal did not force retirees to accept the change but merely gave them the option to select an alternate plan. Id. at 184.

[155] See supra note 143 and accompanying text.

[156] Answering the first question posed by the Court's *Pittsburgh Plate Glass* analysis necessarily requires some inquiry into union motive, and the search for motive is always a difficult exercise. Consequently, in order to prevent *Pittsburgh Plate Glass* from becoming a tool for wholesale judicial encroachment on the collective bargaining process, courts should limit use of the "vitally affects" standard to cases where there is no doubt that the union is bargaining on behalf of nonmembers of the unit. Cases such as *Pittsburgh Plate Glass*, where the union demands direct bargaining over the benefits of unit outsiders, are primary examples.

fects" standard. Lower courts abuse the rule both when they ignore the limits of its application[157] and when they set an unreasonable standard to determine vital effects.[158]

Borg-Warner expressed an important supplementary principle to limit the scope of mandatory bargaining: In order that collective bargaining might operate more effectively, neither party can insist on modification of its own statutorily defined bargaining obligation. Courts must carefully apply this principle, however, so that parties are not restricted from pressing legal strategies to increase or decrease the compensation of employees simply because the strategies might enlist the help of individuals or institutions

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[157] See, e.g., Maas & Feduska, Inc. v. NLRB, 632 F.2d 714 (9th Cir. 1979) (although union motive was the protection of unit employees rather than an effort to enlarge its constituency, union's demand that employer increase contributions to fringe benefit trust fund for nonunit supervisors held outside scope of mandatory bargaining); NLRB v. Local 264, Laborers' Int'l Union, 529 F.2d 778, 786 (8th Cir. 1976) (employer contribution to expense account to defray costs of administration of fringe-benefit plans does not benefit union employees directly enough to be mandatory topic of bargaining).

[158] For example, some courts have not appreciated that a union can advance the vital interests of unit employees by negotiating agreements that facilitate bargaining in other units. See Lone Star Steel Co. v. NLRB, 639 F.2d 545, 556-59 (10th Cir. 1980), cert. denied, 450 U.S. 911 (1981); Amax Coal Co. v. NLRB, 614 F.2d 872, 883-84 (3d Cir. 1980), rev'd on other grounds, 453 U.S. 322 (1981). Both decisions excluded clanses that would have required the employers to agree to apply the same contract terms that the union had negotiated for one unit to all other units that were represented during the term of the agreement by the same union. Although they recognized that the clauses can sometimes protect unit employees from employer decisions to shift production to units with lower benefits, the courts found the proposed clauses overbroad to achieve this purpose. The courts failed to acknowledge that the clauses might benefit bargaining unit employees by facilitating organization of all of the employer's operations.

Similarly, unit employees may have vital interests in employer agreements to remain neutral toward union efforts to organize the employer's unorganized employees. Many of the large national unions have recognized that their historic failure to organize effectively in certain regions of the country has encouraged employers to attempt to relocate production. See Craft, The Employer Neutrality Pledge: Issues, Implications, and Prospects, 31 Lab. L.J. 753, 755-56 (1980). The unions have therefore attempted to protect established bargaining units by securing agreements that make unionization of new facilities more likely and thereby reduce the employer's incentive to transfer production. Such attempts are fully consistent with the unions' obligation to represent the members of their defined bargaining units, and thus should not be suspect under *Pittsburgh Plate Glass*. But see Kramer, Miller & Bierman, Neutrality Agreements: The New Frontier in Labor Relations—Fair Play or Foul?, 23 B.C.L. Rev. 39, 49-53 (1981) (arguing that neutrality agreements violate § 8(a)(2) of the Act, 29 U.S.C. § 158(a)(2) (1976), because an employer's pledge to remain neutral constitutes support for the union). Even accepting the odd logic of these comments, the argument is unpersuasive because the Act permits an employer to voice active, noncoercive support for a union attempting to organize. Stewart-Warner Corp., 102 N.L.R.B. 1153 (1953).

outside the union.

B. Acceptance of the Bargaining Adversary's Independent Control over its Bargaining Strategies

In *Borg-Warner* the Court also held that an employer cannot insist that a union agree to condition a strike on a secret employee vote.[159] This holding suggests another process limitation on the scope of mandatory bargaining: A proposal that compromises the independence of either party's bargaining strategy is not subject to mandatory bargaining. Because the ballot clause infringed on the union's independent representation in *Borg-Warner*, the Court held that it was not bargainable.[160] The Court stressed that the ballot clause "substantially modifies the collective-bargaining system provided for in the statute by weakening the independence of the 'representative' chosen by the employees. It enables the employer, in effect, to deal with its employees rather than with their statutory representative."[161] As the Court recognized, the Act's system of collective bargaining pits one exclusive and independent representative of one set of interests against the exclusive and independent representative of an often conflicting set of interests. To protect this system, neither party may force the other party to accept conditions on the process by which it independently decides and implements bargaining strategy.

The Act expressly protects employer control over the development of its bargaining strategy by proscribing union coercion of "an employer in the selection of his representatives for the purposes of collective bargaining."[162] By providing that majority employee representatives are to have "exclusive" authority "for the purposes of collective bargaining,"[163] the Act surely contemplates comparable union control. The Supreme Court has affirmed this

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[159] 356 U.S. at 349.

[160] Cf. Cox, supra note 12, at 1085 ("The ballot derogates from the representative's status because it is the essence of representation in labor relations to determine when to accept the employer's offer and when to strike.").

[161] 356 U.S. at 350.

[162] 9 U.S.C. § 158(b)(1)(B) (1976). This clause also proscribes union pressure on the selection of supervisors who participate in the adjustment of employee grievances, which is an aspect of collective bargaining. International Typographical Union, Local 38 v. NLRB, 278 F.2d 6, 11-12 (1st Cir. 1960), aff'd by an equally divided Court, 365 U.S. 705 (1961).

[163] 29 U.S.C. § 159(a) (1976).

control by holding that an employer cannot negotiate directly with employees, regardless of whether the employees initiate the independent bargaining.[164] Furthermore, the courts generally have not permitted employers to insist on a change in the negotiating team that the union sends to the table.[165]

Other decisions that find proposals outside the scope of mandatory bargaining appropriately protect each party's independent and exclusive control over its bargaining strategy. For instance, lower courts and the Board have declared nonmandatory various employer proposals that require any kind of direct employee referendum on either an employer proposal[166] or an agreement reached with the union.[167]

Some tribunals, however, have used the *Borg-Warner* holding to over-restrict free collective bargaining. Rather than merely restricting negotiations over the *process* by which a party decides to employ bargaining strategy, the Board and courts have sometimes restricted negotiations over the *strategies* that the parties may employ.

The Board and the courts generally permit the parties to discuss certain bargaining strategies as mandatory topics of bargaining. For instance, unions can insist that an employer agree to the establishment of a particular system for grievance arbitration to resolve disputes during the term of the contract,[168] and that an employer support the union's solidarity not only by instituting a union or

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[164] See Medo Photo Supply Corp. v. NLRB, 321 U.S. 678 (1944).

[165] See, e.g., General Elec. Co. v. NLRB, 412 F.2d 512, 516 (2d Cir. 1969) (right of employees "to choose whomever they wish to represent them in formal labor negotiations is fundamental to the statutory scheme"); Prudential Ins. Co. v. NLRB, 278 F.2d 181, 182-83 (3d Cir. 1960). But see, e.g., FitzSimmons Mfg. Co., 251 N.L.R.B. 375 (1980) (employer could lawfully refuse to meet with union representative who had made bargaining impossible by physically assaulting employer's personnel director), aff'd, 670 F.2d 663 (6th Cir. 1982).

[166] See, e.g., Movers & Warehousemen's Ass'n v. NLRB, 550 F.2d 962 (4th Cir.), cert. denied, 434 U.S. 826 (1977); NLRB v. Central Mach. & Tool Co., 429 F.2d 1127 (10th Cir. 1970), cert. denied, 401 U.S. 909 (1971).

[167] See, e.g., NLRB v. Cheese Barn, Inc., 558 F.2d 526 (9th Cir. 1977); NLRB v. C & W Lektra Bat Co., 513 F.2d 200 (6th Cir. 1975); Houchens Mkt. v. NLRB, 375 F.2d 208 (6th Cir. 1967); Southland Dodge, Inc., 205 N.L.R.B. 276 (1973), enforced, 75 Lab. Cas. ¶ 10568 (3d Cir. 1974). See also NLRB v. Darlington Veneer Co., 236 F.2d 85 (4th Cir. 1956) (decided before *Borg-Warner*).

[168] See, e.g., NLRB v. Independent Stave Co., 591 F.2d 443 (8th Cir.), cert. denied, 444 U.S. 829 (1979); NLRB v. Boss Mfg. Co., 118 F.2d 187 (7th Cir. 1941). See also Green River Rural Elec. Coop., 180 N.L.R.B. 897 (1970) (employer also can insist that grievance-arbitration system take particular form).

agency shop,[169] but also by facilitating dues collection through a payroll deduction system.[170] From the other side of the table, employers can insist that a union agree to sacrifice its right to strike, during the term of a collective agreement,[171] and its right to bargain over certain topics while the agreement is in force.[172]

These tribunals, however, have held other proposals concerning bargaining strategies to be outside the scope of mandatory bargaining. On the one hand, they have not permitted unions to insist that an employer agree not to purchase strike insurance,[173] or to demand that an employer ensure performance of its contractual obligations by posting a performance bond or by placing monies in an escrow account.[174] On the other hand, the Board has not permitted employers to insist that a union agree to indemnify them for possible losses during the term of a contract,[175] or to demand a union

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[169] See NLRB v. General Motors Corp., 373 U.S. 734 (1963); NLRB v. Andrew Jergens Co., 175 F.2d 130 (9th Cir.), cert. denied, 338 U.S. 827 (1949). The first proviso to § 8(a)(3) of the Act, 29 U.S.C. § 58(a)(3) (1976), permits certain union shop arrangements. Section 14(b) of the Act, 29 U.S.C. § 164(b) (1976), however, grants the states power to declare these arrangements illegal.

[170] See NLRB v. Reed & Prince Mfg. Co., 205 F.2d 131 (1st Cir.), cert. denied, 346 U.S. 887 (1953).

[171] See, e.g., NLRB v. Tomco Communications, Inc., 567 F.2d 871 (9th Cir. 1978); Allis-Chalmers Mfg. Co. v. NLRB, 213 F.2d 374 (7th Cir. 1954); Lloyd A. Fry Roofing Co., 123 N.L.R.B. 647 (1959).

[172] See, e.g., NLRB v. Tomco Communications, Inc., 567 F.2d 871 (9th Cir. 1978); International Woodworkers, Local 3-10 v. NLRB, 458 F.2d 852 (D.C. Cir. 1972).

[173] See International Union of Operating Eng'rs, Local Union No. 12, 187 N.L.R.B. 430 (1970).

[174] See, e.g., NLRB v. Local 264, Laborers' Int'l Union, 529 F.2d 778, 786 (8th Cir. 1976); NLRB v. International Hod Carriers, Local No. 1082, 384 F.2d 55, 56-57 (9th Cir. 1967), cert. denied, 390 U.S. 920 (1968); Carpenters' Dist. Council, 145 N.L.R.B. 663 (1963), enforced, 50 Lab. Cas. ¶ 19,112 (D.C. Cir. 1964); Local 164, Bhd. of Painters v. NLRB, 293 F.2d 133 (D.C. Cir.), cert. denied, 368 U.S. 824 (1961).

The *Brotherhood of Painters* court was concerned that the performance bond would have required a payment to the union, rather than directly to the employees, in the event of the employer's breach of the collective agreement. 293 F.2d at 135. The court therefore suggested that the union may have been bargaining for the union as an institution rather than for the unit employees. If the employer could have established this breach of the union's representation duty, the union's insistence on the performance bond would have violated § 8(b)(3), 29 U.S.C. § 158(b)(3) (1976), under the *Pittsburgh Plate Glass* rule discussed supra. See supra text accompanying notes 149-58. The court, however, should not have assumed that the union did not intend the proceeds of the bond to benefit employees. See also infra note 175.

[175] See, e.g., Beyerl Chevrolet, Inc., 221 N.L.R.B. 710, 721-22 (1975); Hall Tank Co., 214 N.L.R.B. 995 (1974); Cosco Prods. Co., 123 N.L.R.B. 766, 769 (1959), enforcement denied on other grounds, 280 F.2d 905, 910 (5th Cir. 1960).

pledge not to discipline employees who do not support the union.[176] Neither the courts nor the Board, however, have satisfactorily distinguished these proposals from bargaining strategy restrictions that they have held to be mandatory subjects.[177]

Unions and employers should be able to achieve and protect substantive bargaining table gains by insisting that their bargaining adversary compromise some of its power or authority.[178] A

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[176] See Fetzer Broadcasting Co., 227 N.L.R.B. 1377 (1977); Covington Furniture Mfg. Corp., 212 N.L.R.B. 214 (1974), enforced, 514 F.2d 995 (6th Cir. 1975). Courts have also held nonmandatory employer proposals that unions pledge not to discipline members who refuse to cross a picket line. See, e.g., NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175 (1967); U.O.P. Norplex, Div. of Universal Oil Prods. Co. v. NLRB, 445 F.2d 155 (7th Cir. 1971), overruling Allen Bradley Co. v. NLRB, 286 F.2d 442 (7th Cir. 1961); Camay Drilling Co., 254 N.L.R.B. 239 (1981) (dicta). See also infra note 178.

[177] The Board and the courts have attempted to justify some of the restrictions that they have imposed on bargaining strategies by focusing on the *Borg-Warner* Court's description of "no-strike" clauses as regulating "relations between the employer and the employees." 356 U.S. at 350. See, e.g., NLRB v. Davison, 318 F.2d 550, 555 (1963); Hall Tank Co., 214 N.L.R.B. 995, 1000 (1974); International Union of Operating Eng'rs, Local Union No. 12, 187 N.L.R.B. 430, 432 (1970). This distinction at least formally distinguishes topics such as "no-strike" clauses from the purchase of strike insurance or union discipline of members who refuse to observe a picket line. The distinction, however, does not make nonmandatory clauses requiring unions to compensate employers for a loss resulting from breach of an agreement, or clauses requiring employers to ensure the payment of wages or other benefits to employees. See NLRB v. International Hod Carriers, Local No. 1082, 384 F.2d 55, 61-62 (9th Cir. 1967) (Ely, J., dissenting) (suggesting that performance bonds intended to ensure the continued flow of wages should be as much within the scope of mandatory bargaining as are wage provisions), cert. denied, 390 U.S. 920 (1968). More important, the distinction is ultimately not meaningful; employers and employees can benefit as much from clauses that control bargaining strategy as they can from clauses that simply regulate employer-employee relations. Parties should not escape pressure to reach a compromise through the exchange of benefits that do not directly regulate the employer-employee relationship.

Some tribunals, focusing on the words of the Act, have read "other terms and conditions of employment" not to encompass all conditions precedent to the employment relationship, but to encompass only proposals that "relate to the actual performance of labor." Local 164, Bhd. of Painters v. NLRB, 293 F.2d 133, 135 (D.C. Cir.), cert. denied, 368 U.S. 824 (1961). Such a restrictive definition, however, would exclude union security and dues check-off clauses, if not grievance-arbitration and no-strike clauses, from mandatory bargaining. There is no reason to limit the currency of exchange between employer and employees so severely.

[178] Indeed, by bargaining to impasse on a proposed no-strike or management functions clause, an employer insists that a union sacrifice some of the statutory rights of the employees that it represents. As long as these statutory rights are within the authority of the union and thus waivable by the union, such employer insistence is not necessarily inappropriate. See Harper, supra note 138. A different situation arises, however, if the union cannot waive the employees' rights. Union leaders should not be able to waive either the right to engage in an unfair labor practice strike, see Harper, supra note 138, at 362-68, or the right to make that strike effective by disciplining fellow union members. Cf. *Norplex*, 445 F.2d 155 (em-

party simply should not be able to insist that its adversary sacrifice its independent and exclusive control over the process by which it decides to exercise the power that it retains.

C. *Acceptance of the Basic Format of Collective Bargaining*

Borg-Warner also suggests a third way for courts to protect the process of collective bargaining by limiting the scope of mandatory bargaining. The Court's conclusion that a party's insistence on nonmandatory topics is substantially similar to its refusal to bargain on mandatory topics rested on its determination that irreconcilable disagreement over relatively unimportant issues can impede constructive collective bargaining over important topics. This conclusion suggests that insignificant aspects of the form that negotiations will take should not be the subject of mandatory bargaining.[179]

It is of course true that disagreement over any issue can impede bargaining over other issues. This principle therefore presents the Board and the courts with an easy opportunity to exclude a topic from mandatory bargaining because debate on it might prevent agreement on issues that the particular tribunal feels are more important. Despite this potential for abuse and unprincipled application, however, there are certain cases in which the Board must restrict the scope of mandatory bargaining in order to facilitate the process of collective bargaining.

The Board must ensure that negotiations do not founder in a debate over relatively insignificant aspects of the form that the negotiations will take. Often when negotiations stall over such matters of form as the timing and frequency of bargaining sessions, one party may lack a good faith desire to reach an agreement.[180] In some cases, however, both parties may sincerely wish to reach an agreement and still disagree concerning the formal conditions under which they will negotiate the agreement.

To protect the collective bargaining process, the Board must simply declare that some proposals relating to the form of the negotiations are not mandatory bargaining topics. In enacting these

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ployer cannot insist that union withdraw fines assessed against members who crossed picket lines).

[179] See 356 U.S. at 349.

[180] See, e.g., Borg-Warner Controls, 198 N.L.R.B. 726, 728 (1972).

rules, the Board should consider the general history of successful collective bargaining and the type of proposals that are more likely to lead to further success. Because many threshold issues of form, such as the presence of stenographers,[181] are relatively insignificant, it may matter less which side the Board chooses than that it does choose a side.[182] As long as the Board applies a strict and neutral "insignificant aspect of form" test, [183] the risk that the

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[181] See Latrobe Steel Co., 244 N.L.R.B. 528 (1979) (holding that neither party can insist on the presence of a stenographer in collective bargaining sessions), enforced in relevant part, 630 F.2d 171 (3d Cir. 1980), cert. denied, 452 U.S. 461 (1981); Bartlett-Collins Co., 237 N.L.R.B. 770 (1978) (same), enforced, 639 F.2d 652 (10th Cir.), cert. denied, 452 U.S. 961 (1981). Before *Bartlett-Collins* and *Latrobe*, the Board found insistence on the presence of a stenographer to be an unfair labor practice only when the insistence evidenced bad faith. See, e.g., St. Louis Typographical Union No. 8, 149 N.L.R.B. 750 (1964). See also Stark, Preliminary Issues on Permissive Subjects of Bargaining: The Implications of *NLRB v. Bartlett-Collins Co.*, 16 Tulsa L.J. 691, 716-19 (1981) (arguing that when both parties are equally insistent on a preliminary issue, the Board must either dictate substantive agreements or return to the pre-*Bartlett-Collins* good faith standard).

[182] Instead of the *Bartlett-Collins* rule, see supra note 161, the Board might, for instance, pronounce that neither party can insist on the *exclusion* of a stenographer from collective bargaining sessions.

[183] The resolution of some issues concerning the form of negotiation may influence the substantive terms of collective agreements. Yet it is arguable that the Board should have discretion to choose sides on some of these issues in order to facilitate the negotiating process.

Such a rationale might justify the Board's and the courts' determination that proposals for "interest arbitration" on the terms of new contracts are not mandatory topics of bargaining. See Sheet Metal Workers Int'l Ass'n, Local Union No. 38, 231 N.L.R.B. 699 (1977), enforced, 575 F.2d 394 (2d Cir. 1978); Massachusetts Nurses Ass'n, 225 N.L.R.B. 678 (1976), enforced, 557 F.2d 894 (1st Cir. 1977); Greensboro Printing Pressmen & Assistants' Union No. 319, 222 N.L.R.B. 893 (1976), enforced, 549 F.2d 308 (4th Cir. 1977); Columbus Printing Pressmen & Assistants' Union No. 252, 219 N.L.R.B. 268 (1975), enforced, 543 F.2d 1161 (5th Cir. 1976). Interest arbitration clauses specify procedures by which neutral parties may resolve the parties' disputes concerning the terms of future agreements. Interest arbitration supplants, and generally renders illegal, either party's use of economic coercion to obtain its bargaining objectives. Although the parties should be able to agree on such a transformation, the Board arguably should have authority to prevent the debate on interest arbitration from obstructing negotiations over the substantive provisions of the contract. The issue is a close one, however, and the Board could reasonably find interest arbitration within the scope of mandatory bargaining.

Any authority that the Board does have to restrict mandatory bargaining must be sharply limited. The Board must not use the *Borg-Warner* rationale to restrict bargaining unless a party's efforts challenge the basic format of collective bargaining. For instance, the Board should not prevent unions from seeking coordinated bargaining units, see supra text accompanying note 145, or employers from insisting that unions sacrifice their authority to discipline employees for not maintaining solidarity. See supra text accompanying note 177. Although the distinction between these topics and interest arbitration is one of degree, any exclusion of the former topics would do more than simply maintain a traditional format for

Board will misapply the principle and overly restrict the scope of mandatory bargaining is minimal.

D. Acceptance of Board and Judicial Protection of Collective Bargaining

A final limitation on the scope of mandatory bargaining supplements the three principles suggested by *Borg-Warner*: No party should be able to insist that the other party sacrifice its statutory right to seek NLRB or judicial protection. Like the other limiting principles, this rule restricts free bargaining in order to protect the system of collective bargaining. Allowing a party to coerce its opponent into sacrificing the right to enlist the Board or the courts' assistance permits that party to evade the substantive obligations of the Act.[184] Thus, the Board has held that neither an employer nor a union can insist that its bargaining adversary withdraw an unfair labor practice charge from the Board[185] or withdraw an appeal of a Board determination.[186]

The Board has unfortunately applied this limitation too expansively, and has sometimes prevented a party from insisting on the settlement of a lawsuit that was not initiated to protect the collective bargaining process or any right guaranteed by the Labor Act. In one case, for example, the Board held that an employer could not demand that a union settle a lawsuit against the employer to secure payments to a trust fund for employees.[187] Demands to set-

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bargaining; such restrictions would also affect the capacity of one party to achieve its bargaining goals within the traditional format.

Many other proposals to transform the traditional format of collective bargaining evidence a lack of subjective good faith even though the proposals would be within the scope of mandatory bargaining. For example, an employer should not be able to propose elimination of its duty to disclose information the union needs to bargain effectively. See NLRB v. Truitt Mfg. Co., 351 U.S. 149 (1956). Proposals of unreasonable contract duration may also reflect a desire to avoid reaching any agreement and therefore a lack of good faith. See Solo Cup Co. v. NLRB, 332 F.2d 447, 449 (4th Cir. 1964).

[184] An employer also should not be able to insist that a union waive these rights because the Act does not delegate the rights to bargaining representatives. See Harper, supra note 138, at 700-01; supra note 138.

[185] See Patrick & Co., 248 N.L.R.B. 390, 393 (1980), petition for review denied, 108 L.R.R.M. 2175 (9th Cir. 1981). See also Royal Typewriter Co., 209 N.L.R.B. 1006, 1012, 1016, 1023-24 (1974), enforced, 533 F.2d 1030 (8th Cir. 1976).

[186] See International Union of Operating Eng'rs, Local Union No. 12, 246 N.L.R.B. 510 (1979), enforced, 673 F.2d 1094 (9th Cir. 1982).

[187] Peerless Food Prods., Inc., 231 N.L.R.B. 530 (1977).

tle such lawsuits are no different from other economic demands, and tribunals should not restrict the nature of the substantive economic demands made in the bargaining process.

V. Conclusion

This article has demonstrated that the development of principled and limited restrictions on mandatory bargaining is theoretically possible. Under the article's scheme, a union's bargaining is limited by only one major principle: a union may not interfere with an employer's product market decisions. This article also posits a few limiting supplementary principles that protect the values of collective bargaining expressed in the Act.

The problem with the sharp distinction drawn between mandatory and permissive terms by *Borg-Warner* is not that one cannot divide topics in a legally cogent manner, or that erosion of the scope of bargaining is logically necessary. Instead, the problem is that the division places too much authority in the hands of imperfect judges and Board members anxious to express their own views about the politically charged issues involved in collective bargaining. The product market principle elimmates this troublesome delegation and provides a more principled basis for decisionmaking.

Addendum

The Product Market Principle and the Public Sector

Although most commentators have assumed that private sector law does not help define the appropriate scope of bargaining for the public sector,[188] legislators could use the product market principle to outline the scope of mandatory bargaining for public employees. As this article has previously noted, consumers should determine what goods and services private employers will offer. Similarly, citizens voting in the polling booth should determine the nature of goods and services that government will offer. Inside these perimeters public employees, like their private sector counterparts, should be able to seek compensation from their employer

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[188] See, e.g., H. Wellington & R. Winter, The Unions and the Cities, Ch. 9 (1971); Summers, Public Employee Bargaining: A Political Perspective, 83 Yale L.J. 1156, 1192-97 (1969).

in any form and in any amount. The standard for judging whether a substantive bargaining proposal made by a public sector union is a mandatory bargaining topic should be whether additional commitment of resources can satisfy the public's demand without changing the nature of the public good or service.

To use education as an example, school boards should not have to bargain about union proposals concerning the subjects that schools teach, the manner in which instructors will teach these subjects, or the dates on which the schools will be open. No expenditure of funds could satisfy these demands without changing the educational services offered to the public.[189]

On the other hand, states should require school boards to bargain about the number or the size of classes and about additional duties, such as study hall or athletic chaperoning, which are imposed on all teachers. School boards can adopt union proposals concerning these topics, without detracting from the educational services they offer the public, by allocating funds to hire additional personnel. For example, hiring more teachers would enable the school board to meet teacher demands for smaller classes without in any way detracting from the educational services that the board might want to provide.

Dean Wellington is willing to allow a broad scope of mandatory bargaining in the private, but not the public sector[190] because of his concern that the public electoral market does not discipline public employers to the same extent that the economic market disciplines private employers.[191] Wellington and Professor (now Judge) Winter have argued that expansion of the public scope of bargaining unlike expansion of the scope of bargaining in the private sector increases unions' aggregate bargaining power because the taxpaying electorate is not as likely to resist certain public sector union demands as it is to resist others. They contend that although private sector employers can trade-off most union demands with money and therefore will resist the demands equally, taxpay-

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[189] The product market principle would not require bargaining over a union's proposal to give teachers transfer rights based on seniority. Teaching (and thus product quality) may improve with experience, and courts should not allow unions to coerce a school board into sacrificing its ability to distribute teaching excellence to the less attractive schools in its jurisdiction.

[190] See supra text accompanying notes 13-16.

[191] See H. Wellington & R. Winter, supra note 188.

ers cannot translate many public sector demands into demands on the public treasury and therefore will not resist the demands equally.[192]

Wellington and Winter do not relate their thesis to the definition of a scope of mandatory public bargaining, but their thesis supports application of the product market principle to the public sector. The product market principle excludes from mandatory bargaining precisely those proposals that cannot be translated into monetary demands on the taxpayer and against which one would not expect united taxpayer resistance. This should not seem incongruous: the Wellington and Winter thesis also supports application of the product market principle to the private sector, because most product changes sought by private sector unions would not confront the general consumer resistance that a price increase inevitably provokes. The likelihood that the product market principle would exclude more public than private sector union proposals from mandatory bargaining in part derives from the more extensive attempts of public sector unions to affect controversial, nonmonetary public issues. It also derives from the more restrictive impact of the principle on service industries, which predominate in the public sector.[193]

The product market principle also accords with Professor Summers' standard for defining mandatory public sector bargaining.[194] Summers suggests that public sector employee proposals are appropriate for collective bargaining when the proposals are likely to meet the combined resistance of both taxpayers and the users of the public services that the employees render.[195] He suggests that removing a public issue from the exclusive control of democratic officials is justified only where public employers confront such combined resistance. His rule would usually yield the same result as the product market principle. Union proposals that the government can satisfy by allocating additional funds are likely to arouse the opposition of taxpayers and patrons who fear a diversion of public resources.[196]

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[192] See id. at 21-24.

[193] See id. at 23-24. See also supra note 80.

[194] See Summers, supra note 188, at 1192-97.

[195] Id.

[196] It is interesting that for maximum school class size and minimum manning of police cars, where Summers' rule would appear to exclude bargaining, he appears dissatisfied with

A discussion of the public sector case law is beyond the scope of this addendum, as is examination of the implications of the product market principle for public sector bargaining units that can demand arbitration concerning their proposals. Nevertheless, the product market principle should influence the future development of public sector as well as private sector collective bargaining. Whatever the structure of a jurisdiction's labor management relations law, the state should not encourage public sector worker control over product definition any more than it should encourage such control by private sector workers.

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his rule's results and strains to achieve the results that application of the product market principle would achieve. Id at 1196. For an even closer approximation of an application of the product market principle to the public sector, see Sackman, Redefining the Scope of Bargaining in Public Employment, 19 B.C.L. Rev. 155, 198 (1977) ("The effect of hargaining should never be such as to require the establishment or continued existence of a service, but only the conditions of employment involved in performing the new or existing service.").