

**CHANGES AND OPPORTUNITIES IN THE
ENVIRONMENT FOR TECHNOLOGY BARGAINING**

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Changes and Opportunities in the Environment for Technology Bargaining*

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Throughout the past decade the American economy has grown in the high technology industries and declined in the nation's basic manufacturing industries. Changes in production methods, which include increased automation in both plants and offices, the increased use of robotics, and the introduction of new materials and power sources have marked this trend.

These technological changes have significantly impacted the lives of American workers, and have led to reconsiderations of job content and conditions of employment. Workers are becoming increasingly concerned with job security. At times, the introduction of technological advances into the workplace has caused lay offs, reclassification of workers into less skilled positions with lower pay, problems of retraining workers, relocation of workers, transfers of operations, partial closings of plants and complete shutdowns of certain operations. Workers are also concerned with issues of health and safety in the workplace. They are being asked to work with toxic substances, the long-range effects of which are often unknown, or equipment such as video display terminals (VDTs), the hazards of which are just being recognized.

Because these technological changes affect the American work force, labor may be expected to assume a more active role in examining current technology and adopting new technology. The National Labor Relations Act (NLRA) guarantees employees the right to bargain collectively with management, and generally extends the duty to bargain to "wages, hours, and other terms and conditions of employment."¹ The NLRA does not specify with any more particularity the *subject matter* or the *timing* of the employer's duty to bargain. The National Labor Relations Board (the Board) and the federal courts have attempted to clarify the duty to bargain. This Article critically examines the law regarding the extent of management's obligation to bargain with labor over its decision to introduce technological change into the workplace.

The current state of the law, derived from decisions of the Board

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¹ 29 U.S.C. § 158(d) (1982).

and the courts, has been inconsistent and confused. Generally, early Board decisions evidenced a willingness to extend the duty to bargain over the introduction of technological change early in the decision making stage (decision bargaining), while the courts tended to restrict the duty to a later time, requiring that the employer bargain with labor over the effects of its unilateral decision prior to implementation (effects bargaining).

The U.S. Supreme Court has not explicitly addressed whether an employer has a mandatory duty to bargain over the decision to introduce technological change. Recent Supreme Court and Board decisions under the Reagan Administration, however, favor management's prerogative to unilaterally change the workplace. The 1981 Supreme Court decision in *First National Maintenance Corp. v. NLRB*² appears to have set the standard which determines the existence of a duty to decision bargain. In that case, the Supreme Court held that an employer does not have a duty to bargain over the decision to close a part of its operation, but the employer does have a duty to bargain over the effects of the decision. However, the Court limited the holding to the facts of the case, and stated specifically that it did not intend that its holding necessarily be extended to other types of management decisions. The Court suggested that subsequent cases be considered on their own facts.³

Since the *First National Maintenance* decision, the Board and court decisions that address the issue of decision bargaining have generally shown little sign of limiting the holding to the facts of that case. The Board has relied on *First National Maintenance* in developing a standard to determine when a duty to decision bargain arises. In recent decisions, the Board has found that a duty to decision bargain arises only when the decision turns *strictly* on labor costs.⁴ If labor costs are only one of the factors to be considered, or are not a factor at all, any decision that results in a change in the nature or direction of a business does not give rise to a duty to decision bargain.

The decision in *First National Maintenance* and subsequent Board decisions that rely on it have established a restrictive model of collective bargaining that is based on certain economic and political assumptions concerning the role of labor in the collective bargaining process and the role of the Board and courts in labor-management relations. The Supreme Court balanced the interests of labor and management in decision bargaining in *First National Maintenance*, and concluded that the burden that mandatory decision bargaining placed on the employer would exceed any benefit to labor-management relations.⁵ In doing so the Court analyzed the effectiveness of collective bargaining and determined that imposing a duty to bargain over a decision to partially close would probably not alter an employer's economic behavior. Furthermore, the Court objected to labor participation in the employer's decision on the

2 452 U.S. 666 (1981).

3 *Id.* at 687-88.

4 See *infra* text accompanying notes 103-42.

5 See *infra* text accompanying notes 76-87.

grounds that it would add costs, delay and uncertainty to the employer's decision making process.⁶ The Court concluded that effects bargaining would adequately protect the interests of labor.⁷

This Article critically evaluates the restrictive model of collective bargaining established by the Supreme Court in its *First National Maintenance* opinion and in recent Board decisions. Part I of this Article reviews the legislative history of the NLRA and argues that Congress envisioned collective bargaining as a positive, dynamic process, capable of evolving to meet new problems and situations in labor-management relations. Congress also envisioned a positive role for labor in the process, perceiving collective bargaining as a cooperative effort between labor and management.⁸ This Article examines the Supreme Court's departure from Congress' view of collective bargaining.

Part II of this Article examines collective bargaining over technological change. It discusses the interests involved in technological change and the development of the law regarding technology bargaining. The Article then critically evaluates the law bearing on technology bargaining. The labor law of duty to bargain over technological change appears to have developed in basically two directions. Health and safety issues have been accorded great importance under the law. Any change that affects health and safety is a mandatory subject of bargaining. Although the law is not entirely clear on whether the duty arises at the decision or effects stage, a careful reading of relevant cases suggests that decision bargaining is required. Threats to employment conditions and security, not involving health and safety, have not consistently been accorded the same degree of importance as health and safety. This Article examines this difference in order to determine whether the two positions are congruous.

Recent court and Board decisions have taken a prevalent position that management is more capable than labor of making certain decisions and that labor's participation would only be a hindrance. This Article provides some representative examples of labor participation in management decision making which indicate that labor participation in the decision making process is both feasible and desirable. The Board and courts may not be adequately considering current activities in the workplace when they decline to mandate decision bargaining on the grounds that labor is not capable of making any meaningful contributions.

I. The Legal Framework of the Collecting Bargaining Process

The duty to bargain collectively underlies the American labor relations system. Congress predicated the NLRA on the expectation that private negotiations will reconcile the divergent interests of management and labor while protecting the freedom of choice and efficiency of the marketplace. Nearly all of the substantive provisions of the NLRA were designed to effectuate collective bargaining.

⁶ See *infra* text accompanying notes 77-82.

⁷ 452 U.S. at 682.

⁸ See *infra* text accompanying notes 143-48.

A. *Statutory Foundation*

The statutory foundation for the duty to bargain is found in the National Labor Relations Act (NLRA). Section 7 of the NLRA reflects the Congressional commitment to collective bargaining by guaranteeing employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection."⁹ Section 8(d) defines collective bargaining as the following:

[T]he performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and *other terms and conditions of employment* . . . but such obligation does not compel either party to agree to a proposal or require the making of a concession.¹⁰

Section 8(a)(5) of the Act imposes a duty to bargain on the employer. That section provides in pertinent part: "[I]t shall be an unfair labor practice for an employer . . . to refuse to bargain collectively with the representatives of his employees."¹¹

Congress' description of collective bargaining is notably vague. The Act does not prescribe the subject matter of the duty beyond the general provision "wages, hours, and other terms and conditions of employment."¹² The legislative history provides evidence that Congress intended collective bargaining to have a dynamic and expansive scope designed to meet changing problems arising from labor-management relations. Senator Robert F. Wagner, the sponsor of the National Labor Relations Act of 1935 (the Wagner Act), strongly believed in the positive role of labor in the American labor relations system. The following statement made several years before the passage of the NLRA evidences this belief: "By permitting labor to organize freely and effectively we can convert the relation of master and servant into *an equal and cooperative partnership, shouldering alike the responsibilities of management* and sharing alike in the rewards of increasing production."¹³

Senator Wagner advocated early on that labor's participation through the collective bargaining process could ameliorate the adverse affect of technological change on the workforce and thereby positively affect the national economy. In an extensive exposition on the Senate floor on May 15, 1935, prior to passage of the NLRA, Senator Wagner reviewed the events that led to the Great Depression, recounting the devastating impact that technological change had exerted on the American workforce during that time.¹⁴ Senator Wagner viewed the collective bargaining process as a cooperative effort between management and labor, designed to contribute to economic progress and social justice and

9 29 U.S.C. § 157 (1982).

10 *Id.* § 158(d) (emphasis added).

11 *Id.* § 158(a)(5).

12 *Id.* § 158(d).

13 75 CONG. REC. 4918 (1932) (emphasis added).

14 79 CONG. REC. 7567 (1935).

thereby stave off such economic devastation.¹⁵

The preamble to the NLRA reflects Senator Wagner's optimistic assessment of bargaining's efficacy. It reads, in part:

Experience has proven that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.¹⁶

The legislative history surrounding the addition of section 8(d)'s "wages, hours, and other terms and conditions of employment" provides additional evidence of congressional approval of a dynamic, expansive model of collective bargaining. Section 8(d) was added to the NLRA through the Labor-Management Relations Act of 1947 (the Taft-Hartley Act). The original House bill proposed a narrow list of subjects over which an employer would be required to bargain:

(i) Wages, hours of employment, and work requirements; (ii) procedures and practices relating to discharge, suspension, lay-off, recall, seniority, and discipline, or to promotion, demotion, transfer and assignment within the bargaining unit; (iii) conditions, procedures, and practices governing safety, sanitation, and protection of health at the place of employment; (iv) vacations and leaves of absence; and (v) administrative and procedural provisions relating to the foregoing subjects.¹⁷

¹⁵ For an in-depth discussion of Senator Wagner's views on the collective bargaining process and the role of labor in the process, see Keyserling, *The Wagner Act: Its Origin and Current Significance*, 29 GEO. WASH. L. REV. 199 (1960).

In an article written to commemorate the 10th anniversary of the Wagner Act, Senator Wagner wrote:

Democracy must grow and adjust itself to the ever-increasing complexities of modern industrial life. We can avoid devastating depressions only by organized human effort, and organized human cooperation on a scale as vast as the problems with which we have to deal. . . . [A] substantial measure of this organizing effort and guidance in economic affairs must be provided by the Government. But the only escape from having the Government assume an ever-increasing portion of the task is to develop outside of the Government a concerted effort which will provide full cooperation and intelligent action on a large enough scale to be significant. In short, the more effectively industry, agriculture and labor can work together, and the more adequately they are organized to cope understandingly with the economic conditions which they face, the more realistic it becomes to expect that they rather than the Government will continue to occupy the largest areas in economic affairs.

Id. at 221 (quoting THE WAGNER ACT AFTER TEN YEARS 2-3 (Silverberg ed. 1945)).

¹⁶ 29 U.S.C. § 151 (1982).

¹⁷ H.R. 3020, 80th Cong., 1st Sess. § 2(11) (1947), reprinted in 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 158, 166-67 (1948) [hereinafter 1 LMRA HISTORY]. For a discussion of this list of subjects, see H.R. REP. NO. 245, 80th Cong., 1st Sess. 22-23 (1947) [hereinafter House Report], reprinted in 1 LMRA HISTORY, *supra*, at 292, 313-14. The House Minority Report commented:

This section attempts to limit narrowly the subject matters appropriate for collective bargaining. . . . The appropriate scope of collective bargaining cannot be determined by a formula; it will inevitably depend upon the traditions of an industry, the social and political climate at any given time, the needs of employers and employees, and many related factors.

H.R. REP. NO. 245, Minority Report, 80th Cong., 1st Sess. 71 (1947) [hereinafter House Minority Report], reprinted in 1 LMRA HISTORY, *supra*, at 362.

The House bill would have narrowed the scope of bargaining to the subjects listed. Congress ultimately rejected the narrow list and incorporated the flexible phrase "terms and conditions of employment."

It is important to note that the adoption of section 8(d) through the Taft-Hartley Amendments occurred during a period in which Congress was restricting other aspects of the collective bargaining framework. Between the passage of the Wagner Act in 1935 and the Taft-Hartley Amendments in 1947 the American labor system changed significantly. Unionism thrived, and the principal concern surrounding labor-management relations shifted from the right of unions to organize and bargain to the rights of individual employees, the public and management. The "Declaration of Policy," added by the Amendments, emphasized that management's rights were to be protected to the same degree as labor's rights.¹⁸ In addition, Congress extended section 8(5) (later changed it to section 8(a)(5)) imposing a duty to bargain on labor as well as management.¹⁹ The Taft-Hartley Amendments also attempted to limit the power of the Board to regulate bargaining behavior. Congress was particularly concerned about limiting the Board's involvement in the substance of bargaining.²⁰ Thus, in response to sharp criticism, the Taft-Hartley Amendments established bargaining requirements for unions comparable to those of management and attempted to limit the Board's intrusion on free collective bargaining. It also had the opportunity to restrict the scope of bargaining by adopting the narrow list of subjects proposed by the House. Instead, Congress reaffirmed its commitment to the dynamic, expansive view of collective bargaining established under the Wagner Act by adopting a flexible definition of bargaining in section 8(d).

B. *Administrative and Judicial Authority*

The language of the NLRA does not expressly authorize the Board or the courts to specify what subjects are to be mandatory subjects of bargaining. Shortly after passage of the NLRA, however, the Board began to make findings of unfair labor practices by employers who failed to bargain over a variety of topics.²¹ Although the Taft-Hartley Amend-

¹⁸ Text of Labor Management Relations Act, 1947, *reprinted in* 1 LMRA HISTORY, *supra* note 17, at 1.

¹⁹ Section 8(b)(3), added to the NLRA through the Taft-Hartley Amendments in 1947, provides that "it shall be an unfair labor practice for a labor organization or its agents to refuse to bargain collectively with an employer." 29 U.S.C. § 158(b)(3) (1982). For a discussion of the extension of section 8(5) to unions, see H.R. REP. No. 510, 80th Cong., 1st Sess. 30, at 40-46 (1947), *reprinted in* 1 LMRA HISTORY, *supra* note 17, at 544-50.

²⁰ When Congress considered section 8(d), it was primarily concerned with prohibiting the Board from regulating bargaining behavior, not the scope of bargaining. See House Report, *supra* note 17, at 19-23, *reprinted in* 1 LMRA HISTORY, *supra* note 17, at 310-24; House Minority Report, *supra* note 17, at 71, *reprinted in* 1 LMRA HISTORY, *supra* note 17, at 355 & 362; S. REP. No. 105, 80th Cong., 1st Sess. 24 (1947), *reprinted in* 1 LMRA HISTORY, *supra* note 17, at 430. The Board's alleged transgressions into the substance of bargaining were recounted in House Report, *supra* note 17, at 19-22, *reprinted in* 1 LMRA HISTORY, *supra* note 17, at 310-13.

²¹ See, e.g., NLRB v. Bachelder, 120 F.2d 574 (7th Cir. 1941) (discharge); Singer Mfg. Co., 24 N.L.R.B. 444 (1940), *enforced*, 119 F.2d 131 (7th Cir. 1941) (holiday and vacation pay); Woodside Cotton Mills Co., 21 N.L.R.B. 42 (1940) (workload and standards); Wilson & Co., 19 N.L.R.B. 990, *enforced*, 115 F.2d 759 (8th Cir. 1940) (work schedules).

ments attempted to limit the Board's authority to that of compelling discussion, the Board continued to make such determinations.²² The Supreme Court eventually upheld the authority of the Board to do so,²³ subject to review by the courts.²⁴

In the 1958 *Borg-Warner*²⁵ case, the Supreme Court termed any subject falling within the definition of section 8(d)'s "terms and conditions of employment" a mandatory subject of bargaining.²⁶ While the parties are not obligated to agree on mandatory subjects of bargaining, they are obligated to meet and confer in good faith and to seek to reach an agreement. Failure by either management or labor to bargain over a mandatory subject is an unfair labor practice under section 8(a)(5).²⁷ In *Borg-Warner* the Supreme Court also distinguished nonmandatory or "permissive" subjects of bargaining from mandatory subjects of bargaining. Management and labor may bargain over a permissive subject, but they are not obligated to do so.²⁸ If a subject is permissive, management is free to implement changes without first bargaining with the union. Generally, it is the union that challenges the exercise of management discretion by demanding that management bargain over its decision to act. The distinction between mandatory and permissive subjects of collective bargaining strongly determines the extent to which unions are able to influence changes in the workplace.

Since the *Borg-Warner* decision, the Board and the courts have been cataloging union demands to bargain as mandatory or nonmandatory on a subject-by-subject basis. The law in this area is far from clear, and a detailed review of cases which defines the parameters of management's duty to bargain is beyond the scope of this Article.²⁹ However, it is useful to consider general concepts and trends in those decisions.

The Board and the courts have focussed on two aspects of the duty to bargain in determining management's obligations within the collective bargaining process: (1) *subjects* over which management has a mandatory duty to bargain;³⁰ (2) the *timing* of management's obligation to bargain over those mandatory subjects.³¹

²² See ; NLRB v. Insurance Agents Union, 361 U.S. 477, 487 (1960); House Report, *supra* note 17, at 19-20, reprinted in 1 LMRA HISTORY, *supra* note 17, at 310-11. See also Inland Steel Co., 77 N.L.R.B. 1, enforced, 170 F.2d 247 (7th Cir. 1948), cert. denied, 336 U.S. 960 (1949) (pensions); Union Mfg. Co., 76 N.L.R.B. 322 (1948) (bonuses).

²³ Ford Motor Co. v. NLRB, 441 U.S. 488 (1979). See also Cox & Dunlop, *Regulation of Collective Bargaining by the National Labor Relations Board*, 63 HARV. L. REV. 389, 400 (1950).

²⁴ Ford Motor Co., 441 U.S. at 494-95.

²⁵ NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342 (1958).

²⁶ *Id.* at 349.

²⁷ *Id.* at 348.

²⁸ *Id.* at 349.

²⁹ For detailed discussions of the case law which sets forth the parameters of management's duty to bargain, see, e.g., George, *To Bargain or Not to Bargain: A New Chapter in Work Relocation Decisions*, 69 MINN. L. REV. 669 (1985); Gracek, *The Employer's Duty to Bargain on Termination of Unit Work* (pts. 1 & 2), 32 LAB. L.J. 659, 699 (1981); Platt, *The Duty to Bargain as Applied to Management Decisions*, 19 LAB. L.J. 143 (1968); Schneidman, *Industrial Decisions and Labor Law*, 16 LAB. L.J. 404 (1965); Note, *Partial Closings: The Scope of An Employer's Duty to Bargain*, 61 B.U.L. REV. 735 (1981).

³⁰ The list of mandatory subjects is extensive. See, e.g., *Scope of LRMA Duty to Bargain*, Labor Rel. Expediter (BNA) §§ 2-14, at 85-98 (Sept. 24, 1984).

³¹ See, e.g., First Nat'l Maintenance v. NLRB, 452 U.S. 666 (1981); NLRB v. Katz, 369 U.S. 736 (1962); Ozark Trailers, Inc., 161 N.L.R.B. 561 (1966); Harper, *Leveling the Road from Borg-Warner to*

As discussed above, section 8(d) of the NLRA does not specify with any particularity what subjects of collective bargaining are mandatory. Due to this legislative ambiguity, the Board and the courts have developed the scope of the duty to bargain by balancing the interests of labor and management on a case-by-case basis. Consequently, the law concerning the scope of management's duty to bargain has developed inconsistently.³²

The Board, until recently, has generally expanded the list of subjects over which management must bargain more often than the courts have done. However, both the Board and the courts have traditionally favored management's rights when they have balanced management's interests against those of labor.³³ The Board and courts can curb labor's participation in the decision making process and, in effect, restrict the subjects over which management has a mandatory duty to bargain by limiting the scope of management's obligation to bargain to the *effects* of the decision rather than to the actual *decision* itself.

In the collective bargaining process one can distinguish three periods in time at which bargaining could occur: The period before the decision is made, during which management is still deliberating; the period after the decision is made but prior to implementation; and, the period after implementation of the decision.³⁴ *Decision bargaining* requires management to bargain with labor during the decision making process. *Effects bargaining* requires that once management makes the decision, it must bargain with labor over the effects of the decision.³⁵ Both the Board and the courts have consistently interpreted effects bargaining as requiring bargaining *prior* to implementation.³⁶ As with the treatment of the subject matter of the duty to bargain, administrative and judicial authorities have decided whether subjects should be bargained at the "decision" stage or the "effects" stage on a case-by-case basis.

The Board explained the purpose of decision bargaining in *Brockway Motor Trucks*³⁷:

First National Maintenance: *The Scope of Mandatory Bargaining*, 68 VA. L. REV. 1447 (1982); Kohler, *Distinctions Without Differences: Effects Bargaining in Light of First National Maintenance*, 5 INDUS. REL. L.J. 402, 416 (1983); Litvin, *Fearful Asymmetry: Employee Free Choice and Employer Profitability in First National Maintenance*, 58 IND. L.J. 433 (1983); Susser, *NLRB Restricts Mandatory Bargaining Over Managerial Changes*, 35 LAB. L.J. 415 (1984); Note, *The Duty to Bargain Before Implementing Business Decisions*, 54 CALIF. L. REV. 1749 (1966); Comment, *Mandatory Bargaining: Partial Closing Decisions For Economic Reasons Under the NLRA—An Alternative to First National Maintenance v. NLRB*, 11 CAP. U.L. REV. 761 (1983); Comment, *Bargaining Over the Introduction of Robots into the Workplace*, 21 SAN DIEGO L. REV. 1135 (1984).

32 For a detailed discussion of the development of the scope of the duty to bargain, see Gracek, *supra* note 29, at 659. Mr. Gracek outlines an historical overview of NLRB and court decisions concerning the duty to bargain from 1935 to the present, dividing the development into 7 periods. Gracek suggests that each of the 7 periods represents a major doctrinal shift, each shift reflecting the political climate of its time.

33 *Id.*

34 See *Ozark Trailers, Inc.*, 161 N.L.R.B. at 561.

35 *Id.*

36 See, e.g., *NLRB v. National Car Rental Sys., Inc.*, 672 F.2d 1182 (3d Cir. 1982); *Soule Glass & Glazing Corp. v. NLRB*, 652 F.2d 1055 (1st Cir. 1981); *NLRB v. Royal Plating & Polishing Co.*, 350 F.2d 191 (3d Cir. 1965).

37 230 N.L.R.B. 1002 (1977), *enforcement denied and remanded*, 582 F.2d 720 (3d Cir. 1978), *supp.*, 250 N.L.R.B. 29 (1980), *consent decree denying enforcement denied*, 656 F.2d 32 (3d Cir. 1981).

The underlying rationale for requiring bargaining over such matters is that the union . . . should be accorded an opportunity to engage in a full and frank discussion regarding such decisions. In this way parties are presented with an opportunity to explore possible alternatives to accommodate their respective interests and thereby resolve whatever issue confronts them in a mutually acceptable way.³⁸

Imposing the duty to decision bargain on management affords certain other advantages to labor as well. The union's right to bargain over decisions strengthens its bargaining position concerning the effects of that decision since it receives information concerning the effects earlier in the bargaining process and is in a position to influence management sooner. In addition, decision bargaining can help the union ascertain the verity of management's position since it would be privy to information that it might not otherwise obtain. Decision bargaining obviously affords labor a more influential role in the American labor relations system than does effects bargaining.³⁹

II. Technology Bargaining

For the purposes of this Article, "technology bargaining" refers to collective bargaining over the introduction of technological change into the workplace. Technological change can take numerous forms, some of the most common forms are the following: Increased mechanization, the introduction of automation into the office or plant, the use of robotics, and the introduction of new raw materials or new power sources.⁴⁰ The introduction of technological change may or may not negatively impact the work environment.

A. *Interests Involved*

Predictably, management and labor hold divergent views regarding the introduction of technological change. Management typically favors technological change since management benefits from product and process improvements, increased productivity and reduced costs as a result of the change. Additionally, management favors the unilateral discretion to make decisions regarding the change, typically arguing that such discretion fosters unified decision making, reducing costs and delays, that it allocates resources flexibly, maximizing profit and economic efficiency, and that it is consistent with management's fiduciary responsibilities to the corporate ownership.

On the other hand, labor is typically ambivalent towards technological change, even where it could improve the work environment.⁴¹ Para-

³⁸ 230 N.L.R.B. at 1003.

³⁹ One commentator has suggested that the practical differences between decision bargaining and effects bargaining is one of degree. Kohler, *supra* note 31. For reasons discussed in the text, *infra* note 172, this Article does not agree with that position.

⁴⁰ For more specific definitions of these terms, see Leap & Pizzolatto, *Robotics Technology: The Implications for Collective Bargaining and Labor Law*, 34 LAB. L.J. 697 (1983); Note, *Automation and Collective Bargaining*, 84 HARV. L. REV. 1822 (1971).

⁴¹ Although labor is typically threatened by technological change, this observation does not suggest that labor unions uniformly oppose the introduction of technological change. Union views vary substantially over time, between and within unions, and according to the nature of the changes intro-

mount among labor's concerns are the issues surrounding health, safety and job security. Technological innovation in the workplace often results in the introduction of hazardous machinery and equipment, the introduction of toxic substances, job lay offs, transfers of operations, the reclassification of workers—frequently downward—which results in pay losses, and the like. Labor's position is that an employee has, in addition to health and safety considerations, a substantial personal investment in his or her job to protect, since an employee typically has developed a level of skill that may or may not be salable to another employer, accumulated seniority and pension rights. From that position, labor argues that because technological change affects conditions of employment so significantly, unions should have an extensive opportunity to influence decisions regarding technological change at the decision making stage rather than merely bargaining over the effects of such change.

B. *Development of the Law Regarding Technology Bargaining*

The labor law regarding the issues involved in introducing technological change has developed in basically two directions at the same time. The health and safety issues arising out of technological change have been accorded special importance so that any changes that threaten the health and safety of workers are clearly mandatory subjects of bargaining. However, the law is less clear regarding threats to employment conditions and security raised by technological change. The law is also unclear as to whether labor is entitled to bargain at the decision making stage or only at the effects stage.

1. Duty to Bargain over Health and Safety Issues

Considerations of health and safety long have been accorded high priority in the area of labor-management relations. Judicial authority clearly holds that employee health and safety are mandatory subjects of collective bargaining. The law, however, is unclear as to whether bargaining must take place at the time that the decision to change technology is made or after the decision is made but prior to implementation.

The Supreme Court addressed technology bargaining in *Fibreboard Paper Products Corp. v. NLRB*.⁴² While safety was not an issue in the case, Justice Stewart stated that "what *safety practices* are observed, would . . . seem conditions of one's employment."⁴³ Relying on that statement, the Fifth Circuit held in *NLRB v. Gulf Power Co.*⁴⁴ that safety rules and safe work practices fall within section 8(d)'s phrase "other terms and condi-

duced. Much technological change takes the form of incremental improvements and thus does not change the workplace abruptly or substantially. Incremental change is much less threatening than change which results in replacing an entire process at one time. In addition, many unions have supported technological change as a means of ensuring better working conditions and higher wages. For example, the United Mine Workers actively promoted mechanization to improve the working conditions of miners even at the risk of diminishing the number of jobs available to miners. Even the most positive technological change can have a negative impact on the lives of workers.

⁴² 379 U.S. 203 (1964).

⁴³ *Id.* at 222 (emphasis added).

⁴⁴ 384 F.2d 822 (5th Cir. 1967).

tions of employment," and are, therefore, mandatory subjects of collective bargaining.⁴⁵

Numerous decisions cite *Gulf Power* for its general holding;⁴⁶ however, to date, no NLRB or federal court decisions specifically have addressed the question of the timing of that duty to bargain. In *Gulf Power* the company unilaterally promulgated and implemented a set of safe practice rules without first bargaining with the union. The safety rules, rather than changes or conditions within the workplace which affected health and safety, themselves were the actual subject of bargaining. The company argued that it generally would discuss safety with the union, but that it would not bargain over the rules because, in its view, it had an exclusive, nondelegable duty to promulgate them. However, the court required the company to bargain with the union *prior to and over* promulgation of the safety rules. Arguably, *Gulf Power* proposes that anything affecting health and safety mandates bargaining at the decision making stage.

Although *Norfolk and Western Railway Co. v. Brotherhood of Locomotive Engineers*⁴⁷ involved the Railway Labor Act⁴⁸ rather than the NLRA, it relied on *Gulf Power* to suggest that *Gulf Power* mandates decision bargaining. In this case, a railroad filed an action against the union requesting declaratory and injunctive relief prohibiting the union from striking. The railroad alleged that it was not obligated to bargain with the union over proposed modifications of diesel units. The U.S. district court ruled in favor of the union, finding that the union's proposals for modifications of the units contained features to make the units safer and that issues bearing on safety were mandatory subjects of bargaining. In so finding, the court rejected the railroad's argument that the *design* of the diesel units fell within an area of managerial decision making or prerogative. It is noteworthy that the district court in this case required the railroad to decision bargain over proposed modifications which contained features to make the units *safer*, thereby not limiting the duty to bargain to proposals which might render the diesel units more hazardous.

No other *federal* cases address the question of whether the duty to bargain over health and safety issues extends to changes that benefit labor as well as harm it. However, in *Solano County Employees' Association v. County of Solano*,⁴⁹ the California Court of Appeals found that all safety issues are mandatory subjects of bargaining regardless of whether the change benefitted or harmed employees. In this case the employer argued that the safety rule which prohibited employees from riding motorcycles on county business benefitted employees and, therefore, was not subject to a duty to bargain. The court, citing *Gulf Power*, rejected the

45 *Id.* at 825.

46 *See, e.g.*, *Oil, Chem. & Atomic Workers v. NLRB*, 711 F.2d 348 (D.C. Cir. 1983); *United Steelworkers of Am. v. Marshall*, 647 F.2d 1189 (D.C. Cir. 1980), *cert. denied sub nom.*, *Lead Indus. Ass'n v. Donovan*, 453 U.S. 913 (1981); *Ford Motor Co. v. NLRB*, 571 F.2d 993 (7th Cir. 1978), *aff'd*, 441 U.S. 488 (1979).

47 459 F. Supp. 136 (W.D. Va. 1978).

48 45 U.S.C. §§ 151-188 (1982).

49 136 Cal. App. 3d 256, 186 Cal. Rptr. 147 (1982).

employer's argument and held that the employer was under a strict duty to bargain over safety issues. The determination of whether the change benefitted or threatened the employees' safety belonged to the employees as represented by their union.⁵⁰

2. Duty to Bargain Over Technological Change

The law regarding the duty to bargain over health and safety issues is more clear than the law surrounding the question of whether there is, in general, a mandatory duty to bargain over the introduction of technological change into the workplace. The reason for this uncertainty largely exists because technological change can take many different forms and thus impacts the workplace in many different ways. Technological change may involve merely changing the processes within a plant or office by introducing new production processes and methods. On the other hand, the change may involve restructuring the operation so that subcontracting, relocating the plant, transferring operations, or even partially closing the business become necessary.

The complexity of the effects of technological change coupled with the subject-by-subject, case-by-case basis of court and Board decisions in cases involving technological change have resulted in an inconsistent set of decisions. Nevertheless, it is useful to review some of the most significant cases in the area to attempt to understand the state of the law surrounding the question of technology bargaining.

In the 1960s, several Board decisions favored decision bargaining over technological change. In *Town & Country Manufacturing Co.*,⁵¹ the Board held that an employer must bargain with the union over the employer's decision to terminate a phase of its business operations, even if economic reasons impel the decision. *Town & Country* involved a decision to subcontract hauling operations. Although the decision did not involve a technological change, the Board relied heavily on *Town & Country* two weeks later when it decided *Renton News Record*.⁵² *Renton News Record* involved a publishing company's decision to automate its printing processes, which resulted in the discharge of composing room employees. The Board held that the employer's refusal to bargain over the *decision* to automate as well as the effects of that automation on composing room employees constituted an unfair labor practice. In so holding, the Board stated:

The change in the method of operations in this case is the result of technological improvements. . . . [T]he impact of automation on a specific category of employees is a matter of grave concern to them. It may involve not only their present but their future employment in the skills for which they have been trained. Accordingly, the effect of automation on employment is a joint responsibility of employers and the representatives of the employees involved. . . . Certainly, in some cases, the adverse effect of changes in operation brought about due to improved, and even radically changed, methods and equipment, could

50 *Id.* at 260, 186 Cal. Rptr. at 150.

51 136 N.L.R.B. 1022 (1962), *enforced*, 316 F.2d 846 (5th Cir. 1963).

52 136 N.L.R.B. 1294 (1962).

be at least partially dissipated by timely advance planning by the employer and the bargaining representative of its employees.⁵³

Although *Renton News* mandates decision bargaining on the introduction of technological improvements, it has not been followed widely for that proposition.

The Board reached a similar decision in a related case during that same time period, *Unit Drop Forge Division*.⁵⁴ In that case the employer unilaterally installed new equipment for handling and loading forges, thereby eliminating one job classification and reclassifying another. The Board held that the employer had a duty to bargain over that *decision* in spite of the fact that it represented a "radical change" in the operation. On appeal, the Seventh Circuit merely noted that "[i]t seems to be conceded that this is a type and degree of change about which there is a statutory duty to bargain collectively"⁵⁵

These decisions establish that during the 1960s, the Board held the position that an employer was obliged to bargain over both the decision and the effects of technological change, at least where jobs were eliminated in the process.

During the late 1960s and the 1970s, a number of circuit courts considered explicitly, in the context of innovations in the printing industry, the issue of whether an employer has a duty to bargain over technological change. Although the courts generally ascribed to the Board's position that technological change is a mandatory subject of bargaining, they were less clear regarding the timing of that duty.

Within four years, the Eighth Circuit decided several cases that generally relied on the Board's decision in *Renton News*. In the first of those decisions, *NLRB v. Columbia Tribune Publishing Co.*,⁵⁶ the Tribune Publishing Company decided to automate its printing processes by switching from the hot metal process to the cold type or photo composition process. The change caused the lay off of at least one-half of the composing room employees and the downward reclassification of most of the remaining employees. The employer failed to notify the union of the decision until after it was made, just prior to delivery of the new equipment. In finding the employer had committed an unfair labor practice by failing to bargain over the introduction of the automation, the court stated:

It would seem indisputable, therefore, that the technological change brought to the composing room operation was an issue requiring discussion between management and the union which had jurisdiction over the composing room Because the *effect* of automation on the bargaining unit was a mandatory subject of collective bargaining, the employer had a statutory duty to confer in good faith with the union over the issue.⁵⁷

The opinion contains no evidence that the union ever sought to partici-

⁵³ *Id.* at 1297.

⁵⁴ 171 N.L.R.B. 600, *enforced*, 412 F.2d 108 (7th Cir. 1969).

⁵⁵ 412 F.2d at 109.

⁵⁶ 495 F.2d 1384 (8th Cir. 1974).

⁵⁷ *Id.* at 1391 (emphasis added).

pate in the decision making process. The union merely sought, during negotiations over a new bargaining contract, to retain jurisdiction over the composing room work which the automation had substantially changed. Although the court in *Columbia Tribune* relied on the Board's decision in *Renton News*,⁵⁸ it did not go so far in its holding as to mandate decision bargaining over technological change. The opinion only stated that the "effect" of the automation on the bargaining unit is a mandatory subject of bargaining.

Similarly, in *Omaha Typographical Union v. NLRB*,⁵⁹ decided by the Eighth Circuit two years later, the court held specifically that the effect of automation on a bargaining unit was a mandatory subject of bargaining. That case involved the introduction of optical character readers, called scanners, into the composing room where the company previously had been using a combination of hot and cold type processes. As in *Columbia Tribune*, the opinion does not indicate that the union sought to bargain over the decision to purchase the scanners. The union claimed that the use of the scanner was work within its jurisdiction and sought to bargain over the effects of its use.

Four years after the *Columbia Tribune* decision, in *Metromedia, Inc. v. NLRB*,⁶⁰ the Eighth Circuit again relied on *Columbia Tribune* to hold that the effect of automation is a mandatory subject of bargaining. *Metromedia* involved the decision to acquire two "minicams," which are lightweight, portable television cameras, to cover news events and for commercial purposes. In addition to unilaterally deciding to acquire and use the minicams, Metromedia also unilaterally decided to freely assign employees from all departments and all bargaining units to use the cameras. The court found that Metromedia's actions constituted an unfair labor practice under section 8(a)(5) of the NLRA. In so finding, the court stated:

It is clear that minicams are a technological innovation with the potential to profoundly affect the work of the motion picture cameramen. In view of their many advantages, it is likely that they will increasingly be employed as substitutes for motion picture cameras. The company was, therefore, obligated to bargain in good faith with the IATSE over their introduction and use.⁶¹

Although this language would seem to suggest that the court was expanding the duty to bargain to the decision making stage ("the company was . . . obligated to bargain . . . over their introduction"⁶²), the court spoke of the duty in terms of effects bargaining:

Metromedia also argues that, under our *Columbia Tribune* decision, it was required only to bargain over the effect of the technological change upon unit operations, and that it met this requirement by offering special severance pay and employment guarantee proposals which the union rejected. We disagree. Metromedia did not attempt to bargain in good faith with IATSE regarding the changes the minicam

58 *Id.* at 1390.

59 545 F.2d 1138 (8th Cir. 1976).

60 586 F.2d 1182 (8th Cir. 1978).

61 *Id.* at 1187.

62 *Id.*

would make in IATSE unit work. Rather, it presented the IATSE representatives with a *fait accompli*. Metromedia's subsequent proposals were merely offers to bargain over the effect upon the cameramen of Metromedia's unilateral award of exclusive minicam jurisdiction to the IBEW. This is not the good faith bargaining about the *effect* of technological change upon unit work required by *Columbia Tribune*.⁶³

Other courts generally have not followed the *Columbia Tribune* line of cases. However, a 1980 Tenth Circuit case, *Newspaper Printing Corp. v. NLRB*,⁶⁴ cited *Columbia Tribune* in holding that the effect of automation on the bargaining unit was a mandatory subject of collective bargaining. In that case, again involving the printing industry, the publishing company unilaterally decided to replace hot type processing with cold type processing. The company informed the union that it intended to introduce the new technology during contract negotiations for a new contract. The union did not seek to bargain over the decision to automate but it did seek to bargain over the effects of the automation, specifically the effect on the bargaining unit, the extent of potential job displacement, and the right of unit employees to operate the new equipment.⁶⁵

The United States Supreme Court followed this trend of requiring only effects, not decision bargaining. In 1981 the Court issued its opinion in *First National Maintenance Corp. v. NLRB*,⁶⁶ which has raised many questions concerning the future of a mandatory duty to decision bargain. Although the case does not involve technological change, its interpretation of decision bargaining is especially important for future applications to management decisions affecting technology. The employer in *First National Maintenance*, a corporation in the business of providing cleaning and maintenance services, unilaterally terminated a contract with a nursing home and subsequently discharged its employees who had been assigned to work there. The union that had been certified as the bargaining representative of the corporation's employees at the nursing home requested a delay in the termination of the employees for the purpose of bargaining. The administrative law judge, the Board and the Second Circuit all found that the employer had committed an unfair labor practice by failing to bargain with the union over its *decision* to terminate the contract as well as the effect of that change on the bargaining unit employees. The Supreme Court reversed, holding that the employer had a mandatory duty to bargain only over the *effects* of the decision to stop work at the nursing home, but not the decision itself.

Justice Blackmun, writing for the majority, began his opinion by arguing that Congress adopted the general language, "wages, hours, and other terms and conditions," to give the Board the power to define those terms "in light of specific industrial practices."⁶⁷ Blackmun then went on to conclude that the Board must define those terms narrowly in determining which subjects constitute mandatory subjects of bargaining be-

63 *Id.* at 1188 (emphasis added).

64 625 F.2d 956 (10th Cir. 1980), *cert. denied*, 450 U.S. 911 (1981).

65 *Id.* at 959.

66 452 U.S. 666 (1981).

67 *Id.* at 675.

cause "Congress had no expectation that the elected union representative would become an equal partner in the running of the business enterprise"68

Blackmun characterized various management decisions according to their propriety as mandatory subjects of collective bargaining. According to Blackmun, decisions only indirectly affecting the employment relation (*e.g.*, "choice of advertising and promotion, product type and design, and financing arrangements"⁶⁹) were not mandatory subjects of bargaining. In contrast, decisions "almost exclusively"⁷⁰ part of the relationship between employer and employee (*e.g.*, "order of succession of lay-offs and recalls, production quotas, and work rules"⁷¹) could be categorized as mandatory subjects of bargaining. Blackmun then examined the facts of *First National Maintenance* and concluded that they constituted a special type of management decision, one that directly impacted employment (jobs were eliminated), but which focussed only on "economic profitability."⁷² He characterized that decision as "involving a change in the scope and direction of the enterprise . . . akin to the decision whether to be in business at all, 'not in [itself] primarily about conditions of employment, though the effect of the decision may be necessarily to terminate employment.'"⁷³

After characterizing the *First National Maintenance* decision as one that directly affected employment but which was based on economic profitability, Blackmun set forth a substantive value judgement which had no foundation in the NLRA nor its legislative history: "Management must be free from the constraints of the bargaining process to the extent essential for the running of a profitable business."⁷⁴ Thus, having hinted at the outcome in advance, Blackmun then proposed a balancing test to be used to weigh management's interests against those of labor in order to determine whether a subject should be a mandatory subject of bargaining:

[I]n view of an employer's need for unencumbered decisionmaking, bargaining over management decisions that have a substantial impact on the continued availability of employment should be required only if the benefit, for labor-management relations and the collective-bargaining process, outweighs the burden placed on the conduct of business.⁷⁵

Blackmun looked at the history of the NLRA to support his balancing test:

[T]he Act is not intended to serve either party's individual interest, but to foster in a neutral manner a system in which the conflict between

68 *Id.* at 676.

69 *Id.* at 676-77.

70 *Id.* at 677.

71 *Id.*

72 *Id.*

73 *Id.* (quoting *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 223 (1964) (Stewart, J., concurring)).

74 *Id.* at 678-79.

75 *Id.* at 679.

these interests may be resolved. It seems particularly important, therefore, to consider whether requiring bargaining over this sort of decision will advance the neutral purposes of the Act.⁷⁶

Blackmun failed to offer any references to the statute or the legislative history of the NLRA in support of that interpretation.

Blackmun's majority opinion then evaluated the interests of management and labor in decision bargaining. The opinion minimized labor's interest and potential contributions to the decision making process. Blackmun defined labor's interest as a concern over job security, and stated that labor's practical purpose and uniform goal in participating in the decision making process was to "seek to delay or halt the closing."⁷⁷ In further minimizing labor's contributions to the decision making process, Blackmun added:

No doubt it will be impelled, in seeking these ends, to offer concessions, information, and alternatives that might be helpful to management or forestall or prevent the termination of jobs. It is unlikely, however, that requiring bargaining over the decision itself, as well as its effects, will augment this flow of information and suggestions.⁷⁸

The majority feared that decision bargaining "could afford a union a powerful tool for achieving delay, a power that might be used to thwart management's intentions in a manner unrelated to any feasible solution the union might propose."⁷⁹ Blackmun suggested that by "prohibit[ing] partial closings motivated by antiunion animus, when done to gain an unfair advantage,"⁸⁰ section 8(a)(3) adequately protected labor's interests. This argument assumes that labor's interests in fair dealing with management are protected as long as management's decisions are not motivated by explicit hostility toward labor.

In contrast to the pessimistic assessment of labor's role in the collective bargaining process, the majority opinion described management's interests as more compelling and viewed management's role optimistically:

(M)anagement may have great need for speed, flexibility, and secrecy in meeting business opportunities and exigencies. It may face significant tax or securities consequences that hinge on confidentiality, the timing of a plant closing, or a reorganization of the corporate structure. The publicity incident to the normal process of bargaining may injure the possibility of a successful transition or increase the economic damage to the business.⁸¹

Blackmun then asserted that decision bargaining constituted an exercise in futility because an employer may have no feasible alternatives to its decision, in which case required good faith bargaining would cause only additional delay and loss. He also suggested that a duty to bargain did

⁷⁶ *Id.* at 680-81.

⁷⁷ *Id.* at 681.

⁷⁸ *Id.*

⁷⁹ *Id.* at 683.

⁸⁰ *Id.* at 682.

⁸¹ *Id.* at 682-83.

not have to be imposed on an employer because employers have an incentive to bargain voluntarily with labor whenever labor costs are a factor and concession by labor could contribute to business profitability.⁸²

In the process of balancing management and labor interests to determine whether the duty to bargain existed, the majority also considered evidence of current labor practice as an indication of what was feasible through collective bargaining. The Court found that the evidence weighed against decision bargaining. In support of that conclusion the Court cited evidence of the rarity of decision bargaining provisions, and in contrast, of the prevalence of notice and "effects" provisions in existing collective bargaining agreements.⁸³ However, notice provisions require that labor be supplied with information about technological change in advance to allow time to discuss with management any impact such change may have on labor *before* its implementation. These provisions may be accompanied by a specific time requirement within which management has to notify labor, such as six months to one year prior to the change. Therefore the Court's conclusion is not well-founded. Unions have exercised their decision bargaining rights where they did not have decision bargaining clauses in their contracts, but did have notice and effects clauses.⁸⁴ Notice provisions arguably are included in contracts to provide unions with an opportunity to decision bargain over the subject in question. In addition, the prevalence of notice and effects language does not prove that unions have waived their right to decision bargain. The Board has held that a contractual waiver of a union's right to bargain over mandatory subjects must be "clear and unmistakable."⁸⁵ The existence of notice and effects provisions in the absence of specific decision bargaining provisions does not constitute "clear and unmistakable" waivers of the right to decision bargain.

Finally, the Court argued that the presumption of a duty to decision bargain creates substantial uncertainty concerning the limits of prerogatives for both management and labor. The Court determined that the uncertainty surrounding the timing and extent of the duty weighed against the imposition of a duty.⁸⁶

After balancing the interests of management and labor and factoring in the evidence of current labor practice and the uncertainty that the Court perceived surrounding the duty to decision bargain, Blackmun's opinion concluded that:

the harm likely to be done to an employer's need to operate freely in deciding whether to shut down part of its business purely for economic reasons outweighs the incremental benefit that might be gained through the union's participation in making the decision, and we hold that the decision itself is not part of § 8(d)'s "terms and conditions,"

82 *Id.* at 682.

83 *Id.* at 684.

84 *See, e.g.,* *infra* text accompanying note 206.

85 *See, e.g.* NLRB v. Otis Elevator Co., 208 F.2d 176 (2d Cir. 1953); Allied Mills, Inc., 218 N.L.R.B. 281 (1975); New York Mirror, 151 N.L.R.B. 834 (1965).

86 For a critical discussion of the decisions on which the *First National Maintenance* majority relied in making this argument, see Gracek, *supra* note 29, at 715.

. . . over which Congress has mandated bargaining.⁸⁷

Blackmun attempted to limit the holding to the specific facts of the case. He emphasized that in *First National Maintenance* the employees were unable to influence the immediate cause of the closing because the closing resulted from a contract dispute between management and a *third party* over a management fee. An employer, however, could generally cite an external cause for most decisions, rendering that distinction an ineffective limitation. Although Blackmun appeared to limit the holding to the facts of the case, his concluding remarks appeared to broadly reject decision bargaining over decisions to close that were made for "economic reasons,"⁸⁸ thereby ruling out a mandatory duty to decision bargain in most partial closing cases. In a footnote, however, Blackmun stated: "In this opinion we of course intimate no view as to other types of management decisions, such as plant relocations, sales, other kinds of subcontracting, automation, etc., which are to be considered on their particular facts."⁸⁹ As discussed below, the Board and court decisions issued since the *First National Maintenance* decision have generally shown little sign of limiting that holding to partial closing decisions.

In the dissenting opinion, Justice Brennan, joined by Justice Marshall, wrote in support of decision bargaining and disagreed with the majority's pessimistic assessment of the role of labor in the collective bargaining process. Brennan argued that the majority's balancing test considered only the interests of management and completely failed to consider the "legitimate employment interests of the workers."⁹⁰ Brennan also criticized the majority for underestimating the positive role that labor could play in labor relations. In so doing, he cited the negotiations between the Chrysler Corporation and the United Auto Workers which resulted in significant adjustments that contributed to Chrysler's ability to remain in business.⁹¹

Brennan also criticized the Court's presumption that management needs "speed, flexibility, and secrecy" to make closing decisions. Admitting that in some cases business interests could be frustrated by having to bargain, he argued that most business decisions do not require "speed, flexibility, and secrecy." Citing the majority's holding that an employer has an unequivocal duty to bargain over the effects of its decisions, Brennan noted that "it is difficult to understand why additional bargaining over the closing itself would necessarily unduly delay or publicize the decision."⁹²

In his concluding remarks, Brennan avoided the question of the scope of the duty to bargain, arguing that the question is properly left to the Board to decide. Brennan, however, advocated a presumption in favor of a duty to bargain that could be rebutted by a showing of futility, exigent financial circumstances, or reasons for which bargaining would

87 *First Nat'l Maintenance*, 452 U.S. at 686.

88 *Id.*

89 *Id.* at n.22.

90 *Id.* at 689 (Brennan, J., dissenting).

91 *Id.* at 690.

92 *Id.* at 691.

not further the purposes of the NLRA.⁹³

Within three weeks of the Supreme Court's decision in *First National Maintenance*, NLRB General Counsel William Lubbers sent a memorandum to the Board's regional directors, officers-in-charge, and resident officers in which he narrowly construed the Court's holding.⁹⁴ The General Counsel emphasized that the court had limited its holding to *economically motivated decisions* to partially close. He stated that, under current Board law, decisions concerning automation, consolidation, plant relocation and subcontracting were considered mandatory subjects of decision bargaining, and that *First National Maintenance* did not contradict the Board's position on those subjects since they were not decisions about whether to remain in business. The General Counsel advised that decisions about whether to remain in business would be analyzed on a case-by-case basis to determine if they could be distinguished from *First National Maintenance* and if labor costs or other factors might render a case amenable to bargaining. He also stated that if an employer's decisions were based on economic factors not related to labor costs, but concessions by labor could offset the economic factors, those decisions would be considered mandatory subjects of decision bargaining.

Initially, the Board narrowly interpreted *First National Maintenance*. In an automation case decided the next year, *Plymouth Locomotive Works, Inc.*,⁹⁵ the Board found that an employer had committed an unfair labor practice by failing to bargain over a *decision* to automate. The employer determined that a computer could perform the duties of the timekeeper, and subsequently eliminated the position without first bargaining over the decision. In finding that the employer had violated section 8(a)(5), the Board stated: "[W]here the automation of bargaining unit work will result in the elimination of unit jobs, it is the duty of the employer to bargain with its employees' bargaining representative over the decision to install automated equipment as well as the effects of such decision."⁹⁶

In another 1982 decision, *Bob's Big Boy Family Restaurant*,⁹⁷ the Board again narrowly interpreted *First National Maintenance* and expansively interpreted subcontracting, yet consistent with the Supreme Court's *Fibreboard* decision. The Board found that the employer had a duty to bargain over its *decision* to discontinue its shrimp processing operations, which resulted in the termination of unit employees, and its decision to contract out the work so that shrimp was still supplied to its restaurants. The Board held that in order to determine whether an employer has a duty to decision bargain over its decision to modify its operation, the Board must first determine whether the decision concerns subcontracting unit work, which requires decision bargaining under *Fibreboard*, or whether it concerns a partial closure, which does not require decision bargaining under *First National Maintenance*. The Board reasoned that such an analysis first requires that the business be accurately character-

93 *Id.*

94 Op. Off. General Counsel 38 (July 27, 1981), DLR No. 143, F-1 72781.

95 261 N.L.R.B. 595 (1982).

96 *Id.* at 602.

97 264 N.L.R.B. 1369, 111 L.R.R.M. (BNA) 1354 (1982).

ized. Once the business is characterized, the Board would then determine whether the decision would substantially alter the direction of the business. If the direction of the business is substantially altered, then the decision is considered to be one to partially close the business. If the direction is not substantially altered, the decision is considered to be one to simply subcontract the operation. In this case, the Board characterized the employer's business as that of providing prepared foodstuffs to its individual restaurants. For a time, it processed shrimp itself to distribute to its restaurants. Later, it made the decision to subcontract that work to an outside processor, but the employer remained in the business of providing foodstuffs to its restaurants. Therefore, the direction of its business was not altered, and the law required decision bargaining.⁹⁸ The Board acknowledged that the distinction is not always clear, and that a case-by-case analysis would be required with several factors being considered: The nature of the employer's business before and after the action is taken; the extent of capital expenditures; the basis for the action; and the suitability for resolution of the situation within the collective bargaining process.⁹⁹

Instead of clarifying the issue and promoting consistency, however, the Board only casted further confusion on the issue of decision bargaining. The very same day *Bob's Big Boy* was decided, the Board decided *Liberal Market, Inc.*,¹⁰⁰ in which it came to the opposite conclusion over a set of facts nearly identical to those in *Bob's Big Boy*. In *Liberal Market, Inc.*, the employer operated a chain of retail grocery stores which it supplied through its warehouse and delivery operation. The employer decided to close its warehouse and garage operations, partially in response to labor costs, and to subcontract with an outside business to provide those services. The Board characterized the warehouse and garage operations as integral portions of the retail business, the closing of which constituted a partial closure, not requiring decision bargaining per the *First National Maintenance* decision. The employer had not supplied wholesale grocery items, warehouse space or delivery service to any other firms; it had simply provided those services to itself as incident to its retail business, much as the employer in *Bob's Big Boy* had discontinued its shrimp processing operation largely in response to escalating market prices of shrimp and problems encountered in maintaining the grading size of shrimp.¹⁰¹ However, although the two situations were virtually identical—in fact, the *Liberal Market* situation was perhaps more compelling since the decision there turned on labor costs—the Board found a duty to decision bargain in *Bob's Big Boy* but not in *Liberal Market*. The only significant difference between the two cases appears to lie in the composition of the Board hearing the two cases that day.¹⁰²

98 *Id.* at 1371, 111 L.R.R.M. (BNA), at 1356.

99 *Id.* at 1370, 111 L.R.R.M. (BNA), at 1355.

100 264 N.L.R.B. 807, 111 L.R.R.M. (BNA) 1326 (1982).

101 *Id.*, 111 L.R.R.M. (BNA), at 1327.

102 In *Bob's Big Boy*, the majority consisted of Fanning, Jenkins and Zimmerman with Van de Water and Hunter each concurring and dissenting. In *Liberal Market*, Zimmerman and Hunter constituted the majority with Jenkins dissenting.

Two other cases were decided by the Board during the year after *First National Maintenance*, both of which were to have far-reaching effects on later Board decisions concerning the future of decision bargaining: *Illinois Coil Spring Co. (Milwaukee Spring)*¹⁰³ and *United Technologies v. NLRB (Otis Elevator)*.¹⁰⁴ The Board initially decided both cases shortly after the *First National Maintenance* decision. Both cases were appealed to United States circuit courts and remanded for reconsideration in light of the *First National Maintenance* decision. In both cases the Board initially found a duty to decision bargain over operational changes. During the period between the initial decision and the remand, however, the Board's composition changed. Three of the four Board members were recent appointees of President Reagan and one seat had become vacant, subject to later appointment by Reagan.¹⁰⁵ Upon remand, the initial findings of a duty to decision bargain were reversed. These two decisions were among several decisions that signalled significant policy reversals by the reconstituted Board.¹⁰⁶

In the first decision, *Milwaukee Spring I*, the employer had transferred work from a union plant to a nonunion plant where labor costs would be lower. Consequently, employees at the union plant were laid off. The issue in the case was whether the employer's transfer of work constituted a modification of the bargaining agreement so as to require union consent for the transfer. The Board initially found that the employer had committed an unfair labor practice by deciding to transfer operations because of higher labor costs under the contract without the union's consent.¹⁰⁷ The employer appealed to the Seventh Circuit and the court remanded the case to the Board for reconsideration in light of *First National Maintenance*.¹⁰⁸ The Board in *Milwaukee Spring II* reversed the Board's prior holding in *Milwaukee Spring I* by finding that the transfer did not constitute a modification of the contract, and, therefore, did not require union consent. In its opinion, the Board acknowledged the *First National Maintenance* decision, but it noted:

The parties' stipulation and the manner in which they briefed this case treat Respondent's relocation decision as a mandatory subject of bargaining Based on the facts before us . . . [w]e do not find it necessary to decide whether the work relocation here was a mandatory subject of bargaining under the Supreme Court's decision in *First National Maintenance Corp. v. NLRB*.¹⁰⁹

103 268 N.L.R.B. 601, 115 L.R.R.M. (BNA) 1065 (1984), *aff'd*, 765 F.2d 175 (D.C. Cir. 1985) (*Milwaukee Spring II*), *rev'g* 265 N.L.R.B. 206, 111 L.R.R.M. (BNA) 1486 (1982) (*Milwaukee Spring I*).

104 269 N.L.R.B. 891, 115 L.R.R.M. (BNA) 1281 (1984) (*Otis Elevator II*), *rev'g and remanding* 255 N.L.R.B. 235 (1981) (*Otis Elevator I*).

105 At the time that these two cases were remanded, the Board was composed of three officials appointed by President Reagan, Chairman Dotson, Robert Hunter and Patricia Diaz Dennis, and one appointed by President Carter, Don Zimmerman. The seat vacated by Howard Jenkins, Jr. had not been filled at that time.

106 See *Our Way, Inc.*, 268 N.L.R.B. 394 (1983); *Olin Corp.*, 268 N.L.R.B. 473 (1984); *Meyers Indus., Inc.*, 268 N.L.R.B. 493 (1984). See also *Labor Board Stirs Up a Storm*, N.Y. Times, Jan. 5, 1984, at F-4.

107 *Milwaukee Spring I*, 265 N.L.R.B. 206, 111 L.R.R.M. (BNA) 1486 (1982).

108 See *Milwaukee Spring II*, 268 N.L.R.B. 601, 115 L.R.R.M. 1065 (BNA) (1984).

109 *Id.* at n.5, 115 L.R.R.M. (BNA), at 1066 n.5.

The Board reached the issue of a duty to decision bargain in *Otis Elevator*. United Technologies acquired Otis Elevator in 1975 and proceeded to analyze its operations and technological development. On the basis of its analysis, it decided to transfer work from two New Jersey plants to a newer, more technologically advanced plant in Connecticut. In doing so, it did not bargain over its decision nor the effects of the decision, and it refused to give the union any information regarding the decision. The Board in *Otis Elevator I* found that the employer engaged in an unfair labor practice by refusing to bargain over the decision and its effects and for refusing to provide the union with the requested information.¹¹⁰ Upon reconsideration in light of *First National Maintenance* all four Board members participating in the *Otis Elevator II* decision found that the employer's decision to transfer and consolidate work to a technologically more advanced plant was not a mandatory subject of decision bargaining.¹¹¹ Three analyses were set forth in support of the Board's decision.

The plurality opinion, written by Chairman Dotson and Member Hunter, argued that the employer's decision to discontinue its research and development activities in New Jersey and move them to its operation in Connecticut constituted "a change in the nature and direction of a significant facet of its business."¹¹² As such it was within the core of entrepreneurial prerogatives outside the scope of section 8(d) of the NLRA, and did not give rise to a duty to decision bargain.¹¹³ In reviewing the facts of the case, the Board pointed out that United Technologies had undertaken several formal studies of Otis' engineering organization and technological development. The studies had concluded that Otis' technological development was outdated, its products too expensive and thus not competitive, and that its share of the market had been steadily declining. In light of the evaluations of the state of Otis' technological development, the company decided to move the research and development work from Otis' outdated plants in New Jersey to its more technologically developed plant in Connecticut. At the same time, a new research and development center was also constructed in Connecticut.¹¹⁴ After reviewing these facts, the Board plurality opinion concluded that the company's action turned on a desire to improve research and development and marketability—issues relating to the nature and direction of its business—and did not turn on labor costs; therefore, no mandatory duty to decision bargain arose. In so finding, the Board stated:

Despite the evident effect on employees, the critical factor to a determination whether the decision is subject to mandatory bargaining is the essence of the decision itself, *i.e.*, whether it turns upon a change in the nature or direction of the business, or turns upon labor costs; *not* its effect on employees nor a union's ability to offer alternatives.¹¹⁵

110 *Otis Elevator I*, 255 N.L.R.B. 235 (1981).

111 *Otis Elevator II*, 269 N.L.R.B. 891, 115 L.R.R.M. (BNA) 1281 (1984).

112 *Id.*, 115 L.R.R.M. (BNA), at 1283.

113 *Id.*

114 *Id.*, 115 L.R.R.M. (BNA), at 1281-82.

115 *Id.* at 892, 115 L.R.R.M. (BNA), at 1282-83.

The opinion acknowledged that labor costs are frequently one of the considerations that result in a decision to change the nature or direction of a business. However, the opinion concluded that when labor costs are one of several factors influencing the decision, they are insufficient to put the decision within section 8(d)'s duty to bargain, citing *First National Maintenance's* proposition that management always has the incentive to confer voluntarily in that type of situation.¹¹⁶

Both Members Dennis and Zimmerman concurred in the result reached by the Board, but each wrote a separate opinion setting forth a second and third analysis in support of the result. Member Zimmerman agreed with the plurality opinion that a duty to decision bargain exists when the decision is based strictly on labor costs. Zimmerman, however, demonstrated a willingness to extend the duty further than the plurality opinion. Zimmerman advocated that a duty to bargain be extended to include decisions based on overall enterprise costs not limited strictly to labor costs, but which labor concessions could substantially mitigate, absent any showing by the employer of a need for speed, flexibility or secrecy.¹¹⁷ Zimmerman then applied that reasoning to the facts of the case and concluded that the employer's concerns in *Otis Elevator II* could not have been resolved through collective bargaining, arguing that the union could not have made any concessions that would have altered the employer's concerns.¹¹⁸

In her concurring opinion, Member Dennis focussed on management decisions such as plant relocations, consolidations, automation, and subcontracting—decisions that “have a direct impact on employment, but have as their focus only the economic profitability of the employer's operation.”¹¹⁹ Dennis proposed a two-step test to determine whether those types of decisions give rise to a duty to decision bargain. Dennis' first step was to determine whether the employer's action was “amenable to resolution through the bargaining process,”¹²⁰ *i.e.*, whether a factor within the union's control is a consideration in the employer's decision. If the union has no control over any factors on which the decision is based, or if the factors over which the union has control are only insignificant to the decision, the analysis ends, and no duty to bargain arises. If the union can make concessions or is in a position to lend assistance that could make a difference in the employer's decision, then the test moves into its second step, a balancing of that consideration (amenability to resolution through bargaining) against the burden placed on management by having to bargain. Dennis invoked the balancing test set forth in *First National Maintenance* and concluded that if it is determined that the decision is amenable to resolution by bargaining, bargaining is required “*only if* the benefit, for labor-management relations and the collective bargaining process, outweighs the burden placed on the

116 *Id.* at 893, 115 L.R.R.M. (BNA), at 1284.

117 *Id.*, 115 L.R.R.M. (BNA), at 1284-85 (Zimmerman, J., concurring and dissenting in part).

118 *Id.*

119 *Id.* at 897, 115 L.R.R.M. (BNA), at 1286-87 (Dennis, J., concurring).

120 *Id.*, 115 L.R.R.M. (BNA), at 1288 (quoting *First Nat'l Maintenance*, 452 U.S. at 678).

conduct of business."¹²¹ Dennis proposed that the factors to be considered in assessing the degree of burden to the employer should include the following: Extent of capital commitment; extent of changes in operations; need for speed; need for flexibility; and, need for confidentiality.¹²² Applying the test to the facts in *Otis Elevator II*, Dennis determined that considerations underlying the company's decision included: Outdated technology; noncompetitive product designs; duplicative engineering activity; outdated and inadequate facilities; and, a superior research facility in Connecticut. Dennis concluded that the union could not have made any concessions concerning those factors that could have affected the employer's decision to relocate and consolidate, and thus the decision failed to pass the first step in the test. She went on to state that even if the first step had been passed, the burden factors, *i.e.*, the company's substantial capital investment and its significant change in its operations, were too substantial for the decision to have passed the second step.¹²³

The Board has addressed the issue of decision bargaining in a number of cases since its *Otis Elevator* decision. In nearly every case, the Board applied the *Otis Elevator* plurality opinion to determine whether a duty to decision bargain existed, and consistently found that the decision in question involved a significant change in the nature and direction of the employer's business so that no duty to bargain arose.

In *Columbia City Freight Lines, Inc.*,¹²⁴ the Board found that an employer's decision to close two terminals, lay off unit employees, and transfer the work to its main terminal significantly changed the nature and direction of its business, and, therefore, was not a mandatory subject of decision bargaining. In so finding, the Board determined that the employer was reacting to the loss of a major customer. As a result of the loss, it sought to reduce all costs (including but not limited to labor costs), eliminate duplication in costs and services, and maximize its usage of equipment and fuel.¹²⁵

In *Fraser Shipyards, Inc.*,¹²⁶ an employer decided to close its machine shop and to subcontract machine work as a result of a general decline in shipping on the Great Lakes, a slim work schedule through the winter, and the prohibitive cost of modernizing its shop and repairing and replacing machinery. Again, the Board found that the decision fundamentally changed the nature and direction of the employer's business, and thus did not give rise to a duty to bargain.¹²⁷

The Board used the same reasoning over the next several months to find employers' decisions were not subject to a duty to decision bargain. In *Bostrom Division, UOP, Inc.*,¹²⁸ the employer, a manufacturer of seats for trucks and heavy equipment, decided to close two of its four plants,

121 *Id.* (quoting *First Nat'l Maintenance*, 452 U.S. at 679) (emphasis in original).

122 *Id.*

123 *Id.* at 900, 115 L.R.R.M. (BNA), at 1290.

124 271 N.L.R.B. 12, 116 L.R.R.M. (BNA) 1311 (1984).

125 *Id.* at 13, 116 L.R.R.M. (BNA), at 1312.

126 272 N.L.R.B. 496, 117 L.R.R.M. (BNA) 1328 (1984).

127 *Id.* at 497, 117 L.R.R.M. (BNA), at 1330.

128 272 N.L.R.B. 999, 117 L.R.R.M. (BNA) 1429 (1984).

consolidate operations at the two remaining plants and subcontract certain operations. The Board determined that the employer was responding to the deteriorating quality of its product caused by obsolete equipment, and was attempting to restore the economic viability of its business by reducing operating costs and eliminating duplication of cost, work, and service.¹²⁹ The Board came to a similar decision in *The Kroger Co.*,¹³⁰ where the employer determined that its "nest run" egg processing facility was outmoded, raw materials were scarce, and it was unable to compete with integrated egg producers, and subsequently decided to close its egg processing facility.¹³¹ Finally, in *Gar Wood-Detroit Truck Equipment, Inc.*,¹³² the employer decided to subcontract the work of mounting and servicing equipment on trucks, and limit its business to parts distribution. The Board determined that the employer's essential purpose in subcontracting was to reduce overhead costs across the board so that it could remain in business. The subcontracting resulted in payroll costs savings, but it also covered the gamut of overhead costs, thus affording the employer a wide range of financial relief.¹³³

There are two exceptions to the Board's trend of finding no duty to decision bargain. In *Mashkin Freight Lines, Inc.*,¹³⁴ the Board found that the employer committed an unfair labor practice by failing to bargain over its decision to lay off employees, shut down its truck terminal, and transfer its operations to New Jersey. In so finding, the Board determined, however, that *First National Maintenance* and *Otis Elevator* did not apply to this case, because the employer made the decisions due to anti-union animus.¹³⁵

Member Dennis wrote the Board's opinion in *Pennsylvania Energy Corp.*,¹³⁶ applying her two-step test to find that the employer had a duty to bargain over its decision to lay off all employees from its strip-mining operation and subcontract work of stripping and backfilling. Dennis first determined that the decision to subcontract was based in significant part on labor costs, a factor over which labor had control, and as such was amenable to resolution through the collective bargaining process. Dennis then determined that the subcontracting decision was amenable to resolution through bargaining without a significant burden being placed upon the employer, *i.e.*, the benefit for the collective bargaining process outweighed the burden placed on business.¹³⁷

The sweeping rule advanced through the *Otis Elevator* decision, *i.e.*, decisions turning on labor costs give rise to a duty to decision bargain while those turning on changes in the nature and scope of operations do not, has not been reviewed by the appellate courts. Only one appellate

129 *Id.* at 1000, 117 L.R.R.M. (BNA), at 1430.

130 273 N.L.R.B. 462, 118 L.R.R.M. (BNA) 1172 (1984).

131 *Id.* at 463, 118 L.R.R.M. (BNA), at 1173.

132 274 N.L.R.B. 23, 118 L.R.R.M. (BNA) 1417 (1985).

133 *Id.*, 118 L.R.R.M. (BNA), at 1419.

134 *Mashkin Freight Lines, Inc. and Bari Leasing, Inc.*, 272 N.L.R.B. 427, 117 L.R.R.M. (BNA) 1369 (1984).

135 *Id.*, 117 L.R.R.M. (BNA), at 1371.

136 274 N.L.R.B. 174, 119 L.R.R.M. (BNA) 1042 (1985).

137 *Id.*, 119 L.R.R.M. (BNA), at 1042.

case decided since *First National Maintenance* has addressed the issue of decision bargaining. In 1983, the Second Circuit, in *NLRB v. Island Typographers, Inc.*,¹³⁸ squarely raised the question of whether the introduction of technological change is a mandatory subject of decision bargaining in light of the *First National Maintenance* decision; however, although it raised the question, it failed to resolve it.

Island Typographers, another printing industry case, involved a decision to change from the hot type typesetting method to the more advanced cold type method. The Board had found that the employer had committed an unfair labor practice by unilaterally deciding to introduce the new technology and laying off union members as a result without giving the union notice and an opportunity to bargain.¹³⁹ Reversing the Board's decision, the Second Circuit Court of Appeals held that the union had notice of the employer's plans to change its methods and had waived its right to bargain over both the decision to introduce the technology and its resulting effects.¹⁴⁰ Since the court found that the union had waived its bargaining rights, it did not address the question of whether the decision in this case was a mandatory subject of bargaining. The court did note in a footnote, however, that:

The courts have drawn a distinction between the employer's duty to bargain over a particular business *decision* that affects unit employees and the duty to bargain over the *decision's effects* on unit employees Although the courts have generally held that the effect of technological innovation on employees is a mandatory subject of bargaining . . . they have not yet decided the appropriate treatment to accord the employer's decision to innovate.¹⁴¹

In that same footnote, the court posited that the Supreme Court's balancing test devised in *First National Maintenance* applies to decisions to update plant technology: "Thus, ordinarily this Court would rely on the balancing test to determine whether *Island* violated section 8(a)(5) of the Act. However, as we conclude that the union waived its right to bargain over the decision to update this plant, we need not engage in the *First National Maintenance* analysis."¹⁴²

If other appellate courts adopt the Second Circuit's position that *First National Maintenance* should be broadly construed, and if the courts adopt the application of the balancing test advanced in *Otis Elevator*, the duty to decision bargain will probably not fare any better in the courts than it has fared under the current Board.

C. *Critical Evaluation of the Law Bearing on Technology Bargaining*

The *First National Maintenance* decision, as applied so far by the Board, established a restrictive model of collective bargaining. As discussed in the previous section, the Board has broadly construed that

¹³⁸ 705 F.2d 44 (2d Cir. 1983).

¹³⁹ *Island Typographers, Inc.*, 252 N.L.R.B. 3, 105 L.R.R.M. (BNA) 1455 (1980), *rev'd*, 705 F.2d 44 (2d Cir. 1983).

¹⁴⁰ *NLRB v. Island Typographers, Inc.*, 705 F.2d 44, 50 (2d Cir. 1983).

¹⁴¹ *Id.* at n.8.

¹⁴² *Id.*

holding, and applied it to preclude mandatory bargaining over those decisions made by an employer that do not turn strictly on labor costs. The current trend in Board and court decisions to restrict the scope of mandatory decision bargaining is based upon several assumptions concerning the role of labor and the role of the Board and courts in the collective bargaining process. This section will critically examine this restrictive model of collective bargaining and the assumptions on which it is based.

In addition, this section will contrast the different positions that the Board and courts have taken regarding duty to bargain over decisions concerning employee health and safety as opposed to the duty to bargain over decisions concerning employment conditions and security, not involving health and safety. As discussed in the previous section, when an employer's decision involves employee health and safety, the Board and courts have found a mandatory duty to bargain over the decision itself. However, when an employer's decision concerns other employment conditions and security, not involving health and safety, but which may impact on the lives of employees just as significantly, the Board and courts have not found a mandatory duty to decision bargain. This section will compare those seemingly incongruous positions.

1. Evaluation of *First National Maintenance* Restrictive Bargaining Model

a. *The Restrictive Model of Bargaining and the NLRA*

The restrictive model of collective bargaining established by the Supreme Court in *First National Maintenance* precludes any participation by employees in vastly important decisions that concern their welfare in the workplace. The exemption of employee participation in management decision making fundamentally conflicts with Congressional intent regarding the role of labor and collective bargaining in labor-management relations.

As discussed above, the legislative history of the NLRA indicates that Congress intended that the collective bargaining process be dynamic and capable of changing to meet new problems that might arise in labor-management relations.¹⁴³ Congress envisioned a positive role for labor in the collective bargaining process, and saw collective bargaining as a cooperative effort between labor and management. Enforced bargaining lies at the heart of the NLRA. Section 7 of the NLRA established the employees' right to organize for collective bargaining.¹⁴⁴ Section 8 protected that right by establishing numerous employer unfair labor practices.¹⁴⁵ Section 8(a)(5), which makes it an unfair labor practice for an employer to refuse to bargain collectively, is perhaps the most significant protection afforded the employees' right to organize. The right to organize and its attendant protections would be form without substance if an employer were not required to make a genuine effort to meet and

143 See *supra* text accompanying notes 13-20.

144 29 U.S.C. § 157 (1982).

145 *Id.* § 158.

reach agreement with the representatives of the employees over matters that significantly affect employee welfare, and often concern the continued existence of employees in the workplace.

The legislative history concerning the adoption of the language in section 8(d), "wages, hours, and other terms and conditions of employment," also indicates that collective bargaining was intended to be expansive in scope. This provides further evidence that a restrictive model of bargaining is inappropriate. As noted previously in this Article, Congress deliberately rejected an attempt to restrict the scope of bargaining to a specific list of subjects.¹⁴⁶ Except for health and safety, the Supreme Court and the Board, however, have consistently restricted the scope of bargaining to those decisions over which labor could exert any influence.

First National Maintenance and recent Board decisions abandon the goal of industrial self-government set forth in the NLRA. Those opinions require the employer to bargain only over the details of implementing its decisions, and do not require the employer to consider, during its decision making process, any input from those most affected by its decisions. In his majority opinion in *First National Maintenance*, Blackmun acknowledged the NLRA goal of industrial self-government:

The aim of labeling a matter a mandatory subject of bargaining, rather than simply permitting, but not requiring, bargaining, is to "promote the fundamental purpose of the Act by bringing a *problem of vital concern to labor and management within the framework established by Congress* as most conducive to industrial peace."¹⁴⁷

Blackmun then formulated a "balancing test", whereby a duty to bargain over the decision will be said to exist if the "benefit for labor-management relations and the collective-bargaining process, outweighs the burden placed on the conduct of the business."¹⁴⁸ Although the balancing test per se is consistent with the goal of industrial self-government, the Court's application of the test in *First National Maintenance* and the test's subsequent interpretation by the Board does not promote industrial self-government. The Court substantially diminished the value of labor's interest in and potential contribution to the decision making process, while enhancing the value of management's interest. The overriding consideration when applying the balancing test became management's need to be as free as possible from the constraints of bargaining in order to run a profitable business. The language in section 8(a)(5), setting forth the duty to bargain, is unqualified. It does not restrict the duty to bargain to decisions that are of little consequence to employer nor to decisions that turn strictly on *labor costs*. The Supreme Court and the Board, however, have effectively qualified the meaning of section 8(a)(5) to mean just that. In order to meet the Congressional goal of industrial self-government, collective bargaining must effectively address the needs of both labor and

¹⁴⁶ See *supra* text accompanying note 17.

¹⁴⁷ 452 U.S. at 677-78 (quoting *Fibreboard Paper Prods.*, 379 U.S. 203, 211 (1964)) (emphasis added) (citations omitted).

¹⁴⁸ *Id.* at 679.

management by channelling all issues of major concern to both parties through the procedures of enforced negotiation.

b. *Evaluation of First National Maintenance Economic Analysis and Assumptions*

The Supreme Court and the Board justify their restriction of the scope of bargaining by speculating over the merits of collective bargaining. The Court and Board decisions assume that collective bargaining is unlikely to alter management's economic behavior, and that it is inefficient and necessarily a burden on the employer. Blackmun objected primarily to enforced bargaining at the decision making stage on the grounds that it would distort management's economically rational decision making process.¹⁴⁹ The majority believed that management had the incentive to bargain voluntarily with labor at the decision making stage when the decision turned on labor costs, and it is then in their best economic interest to bargain to obtain labor concessions. If the decision did not turn on labor costs, management had no incentive to bargain in which case enforced decision bargaining would be a futile exercise, resulting only in delay. The Court believed that labor's practical goal in decision bargaining was to pressure management by such a delay. Having eliminated any benefit from the decision bargaining process, the majority concluded that the costs to management of decision bargaining outweighed any benefit from the process, and that labor's interests would be adequately represented and protected through effects bargaining.

The Supreme Court's analysis concerning the effectiveness of collective bargaining is based on the majority opinion in *Fibreboard Paper Products Corp. v. NLRB*.¹⁵⁰ The company in *Fibreboard*, concerned about the cost of its maintenance operation, unilaterally decided to "contract out" maintenance work done by bargaining unit employees. As a result of the decision, the company terminated bargaining unit employees. The Supreme Court held that the economic decision to replace employees in the existing bargaining unit with employees of an independent contractor to do the same work under similar conditions of employment was a mandatory subject of bargaining.¹⁵¹ In reaching that decision, the Court had concluded that the phrase "terms and conditions of employment" covered termination of employment.¹⁵² The Court supported its decision in several ways. It first considered the legislative history of the NLRA, and observed:

The inclusion of "contracting out" within the statutory scope of collective bargaining also seems well designed to effectuate the purposes of the National Labor Relations Act. One of the primary purposes of the Act is to promote the peaceful settlement of industrial disputes by subjecting labor-management controversies to the mediatory influence of negotiation. The Act was framed with an awareness that refusals to confer and negotiate had been one of the most prolific causes of

149 *Id.* at 682-83.

150 379 U.S. 203 (1964).

151 *Id.* at 209.

152 *Id.* at 210.

industrial strife To hold, as the Board has done, that contracting out is a mandatory subject of collective bargaining would promote the fundamental purpose of the Act by bringing a problem of vital concern to labor and management within the framework established by Congress as most conducive to industrial peace.¹⁵³

The Court also considered current industrial practices:

Industrial experience is not only reflective of the interests of labor and management in the subject matter but is also indicative of the *amenability of such subjects to the collective bargaining process*. Experience illustrates that contracting out in one form or another has been brought, widely and successfully, within the collective bargaining framework.¹⁵⁴

Finally, the Court considered the interests of the parties in the case, and assessed whether that particular dispute was capable of being resolved through collective bargaining. In doing so, it found that mandatory decision bargaining would not have interfered with the employer's freedom to manage the business, noting that the decision neither involved an alteration of the employer's basic operation nor any capital investment. The Court also found that since the decision involved the high cost of labor in the maintenance operation, there was a good chance that a satisfactory solution to the problem could be reached through mandatory negotiation.¹⁵⁵ The Court concluded its analysis by limiting the decision explicitly to the facts of the case.¹⁵⁶ Although the *Fibreboard* majority appeared to favor a less restrictive model of collective bargaining than the *First National Maintenance* majority did, the *Fibreboard* opinion contributed to the adoption of a limited analysis by considering a relevant factor to be the amenability of the subcontracting issue to resolution through collective bargaining.

Justice Stewart, in a concurring opinion in *Fibreboard*, rejected an expansive interpretation of collective bargaining, and advanced a test to determine whether a decision should be a mandatory subject of bargaining. Stewart argued:

Nothing the Court holds today should be understood as imposing a duty to bargain collectively regarding such managerial decisions, which lie at the core of entrepreneurial control. Decisions concerning the commitment of investment capital and the basic scope of the enterprise are not in themselves primarily about conditions of employment, though the effect of the decision may be necessarily to terminate employment.¹⁵⁷

Stewart's concurrence has influenced restrictive interpretations of the scope of decision bargaining. The *First National Maintenance* majority adopted Stewart's "capital investment test" to support its position that every decision resulting in unemployment should not necessarily be a mandatory subject of bargaining.¹⁵⁸

153 *Id.* at 210-11.

154 *Id.* at 211 (emphasis added) (footnote omitted).

155 *Id.* at 213-14.

156 *Id.* at 215.

157 *Id.* at 223 (Stewart, J., concurring).

158 *First Nat'l Maintenance*, 452 U.S. at 677.

The *Fibreboard* Court legitimates an analysis that requires a showing of the effectiveness of bargaining before finding a duty to bargain. The requirement of a showing of effectiveness is incompatible with the notion of equality of bargaining power, a concept that is at the heart of the collective bargaining process. Collective bargaining presumes that both parties, labor and management, will meet as equals, and that employees through their representatives will have an opportunity to influence their employer's economic behavior.¹⁵⁹ The Supreme Court's analysis, which purports to prejudge the outcome of the bargaining process, denies employees that opportunity. Such judicial intervention into the outcome of the bargaining process is unwarranted in light of Congressional intent that the process be a cooperative effort between labor and management. If the duty to decision bargain is mandated only when the Board or courts determine first that labor is capable of influencing the employer's decision, and, secondly, that labor's participation will not affect the scope or direction of the employer's business, labor will be deprived of the opportunity to contribute to an employer's decisions to improve economic efficiency or business output and thus labor's interests will not be equally represented in the decision making process.

When the Supreme Court and Board have conducted analyses in recent decisions concerning the effectiveness of collective bargaining, they have attempted to prove that collective bargaining would be futile, or that costs of delay and uncertainty would endanger the employer's financial position. Implicit in the projections of futility and cost is a negative view of the value of collective bargaining. When Congress established the collective bargaining process, it relied on an optimistic assessment of the process, based on beneficial effects of mandatory negotiations. The Supreme Court and the Board have failed to consider adequately collective bargaining's beneficial effects. Bargaining results in a flow of information between the parties which clarifies issues and reduces any apparent arbitrariness on the employer's part. Affording labor the opportunity to participate in the decision making process thus diffuses blame for decisions that have an adverse effect on labor. In that sense, even bargaining that does not successfully resolve disputes is valuable (and not futile), because it contributes to the Congressional goal of industrial stability.¹⁶⁰ Successful resolution of disputes is particularly valuable for its potential to produce resolutions that neither party perceived prior to negotiation, or that the parties were not ready to meet prior to negotiation. Whatever the outcome of the negotiations, the societal benefit of collective bargaining is great, because institutionalized participation neutralizes labor relations.¹⁶¹

As discussed above, the Court in *First National Maintenance* believed that enforced negotiation would be futile unless the employer's decision turned solely on labor costs, and thus labor's sole motive in bargaining

¹⁵⁹ See *supra* text accompanying notes 13-16.

¹⁶⁰ See Walton, *From Control to Commitment in the Workplace*, HARV. BUS. REV., March-April 1985, at 77.

¹⁶¹ For a brief discussion of labor participation in management decision making and attendant costs and benefits, see *infra* text accompanying notes 191-215.

over a decision concerning external or third-party economic factors would be to delay the employer's decision.¹⁶² This belief is based upon an economic view of labor and capital that modern economists have largely abandoned. Early economists viewed labor and capital as two independent variables.¹⁶³ Early economic theory assumed that the return on fixed capital determined the economic efficiency of the enterprise, and that efficient management would strive to achieve a profit maximizing level of fixed capital. That theory viewed labor as a beneficiary of management's efforts since a greater return on fixed capital resulted in a greater demand for working capital (labor). Consequently, labor's role was limited to bargaining over decisions concerning working capital.¹⁶⁴

Economists today have adopted a more complex theory which views capital and labor as interdependent factors that must be considered simultaneously in order to determine the most profitable and viable combination of the two factors. One purpose of collective bargaining is to define the relationship between labor and capital, and, once defined, to determine the viability of changing the relationship. The futility of bargaining cannot be ascertained conclusively until the parties have met and attempted to negotiate their positions. Information transfer and an exchange of views can inform and persuade. Bargaining need not always require a trade-off among interests. Once the bargaining process has begun, labor's ability to contribute meaningfully to the decision making process should be readily apparent, as should any intransigence on labor's part, thereby dispelling the *First National Maintenance* Court's concern regarding labor's motive to delay the decision. Also, the more accustomed that management becomes to involving labor in early stages of its decision making process, the less likely it is to experience lengthy delays.

The Court in *First National Maintenance* expressed concern that certain aspects of mandatory decision bargaining would endanger the employer's financial position. The Court cited an employer's need for "speed, flexibility, and secrecy in meeting business opportunities and exigencies."¹⁶⁵ Most decisions concerning operational changes, such as the introduction of technological change, are not made in an emergency situation requiring "speed, flexibility, and secrecy."¹⁶⁶ The Court also cited the risk of economic damage to the business posed by publicity incident to the bargaining process.¹⁶⁷ Risks incident to publicity, however, already exist since labor must receive notice and an opportunity to bar-

162 See *supra* text accompanying notes 77-82.

163 See, e.g., J. MILL, *POLITICAL ECONOMY* 328-45 (1900) (1st ed. London 1848). Mill initially viewed capital and labor as distinctly separate classes, with wages paid from a fund determined by and in proportion to the level of capital. Mill eventually abandoned this view. See M. DOBB, *THEORIES OF VALUE AND DISTRIBUTION SINCE ADAM SMITH* 133-34 (1976).

164 See Comment, "Partial Terminations"—*A Choice Between Bargaining Equality and Economic Efficiency*, 14 U.C.L.A. L. REV. 1089, 1090-97 (1967), which was cited by the Supreme Court in *First Nat'l Maintenance* when it reasoned that an employer might have no alternative to closing. 452 U.S. at 683 n.21.

165 452 U.S. at 682. See *supra* text accompanying note 81.

166 See *supra* text accompanying notes 90-93 for Brennan's dissent. See also Ashford, Ayers & Stone, *Using Regulation to Change the Market for Innovation*, 9 HARV. ENVT'L. L. REV. 420-28 (1985).

167 452 U.S. at 682. See *supra* text accompanying note 81.

gain effectively prior to implementation of the decision. The employer can diminish costs if it plans ahead to incorporate labor's participation into its decision making process. The NLRA established a process of negotiation and agreement through which the relationship between labor and management could be developed. Under the collective bargaining process, the employer is relieved of direct regulation of labor-management relations, and is allowed to retain final control over economic decisions. There are costs to the employer as well as to labor that are incident to the bargaining process. Congress, however, determined that the societal benefits of mandatory negotiations outweigh those costs to individual parties.¹⁶⁸

The *First National Maintenance* majority believed that an employer always has an incentive to decision bargain voluntarily with labor if the employer perceives that concessions or contributions by labor may contribute to the profitability of the business.¹⁶⁹ The possibility of voluntary negotiations does not adequately substitute for mandatory bargaining. In *NLRB v. Wooster Division of Borg-Warner Corp.*,¹⁷⁰ the Supreme Court determined that mandatory collective bargaining, with all of its procedural indicia of good faith, is necessarily more effective than permissive collective bargaining. Unlike mandatory bargaining, permissive bargaining does not afford labor the right to insist on receiving the information, time and good faith consideration that it may require to contribute acceptable alternatives to the employer's decision. In a permissive bargaining situation, an employer is likely to be less receptive to labor input, and therefore less likely to change a decision that is already made. Not only is labor deprived of a meaningful opportunity to participate in the decision making process, but the employer may be deprived as well of meaningful contributions by labor.

In its economic analysis in *First National Maintenance*, the Supreme Court skewed the benefits and burdens inherent in the collective bargaining process in favor of management to find no duty to decision bargain. The Court's interpretation of the costs and benefits reflects a fear that imposing a duty to decision bargain will interject labor too extensively into corporate decision making. That fear also has driven the Supreme Court to distinguish rigidly between decision and effects bargaining, and thus depart from the earlier interpretation of effects bargaining.

The Supreme Court in *First National Maintenance* held that an employer's economically motivated *decision* to close a portion of its operation is not a mandatory subject of bargaining. The Court, however, also found that the employer does have a duty to bargain over the *effects* of the decision. In so holding, the Court stated: "There is no dispute that the union must be given a *significant opportunity* to bargain about these matters of job security as part of the 'effects' bargaining . . . [B]argaining over the effects of a decision must be conducted in a meaningful manner

168 See *supra* text accompanying notes 19-20.

169 See *supra* text accompanying note 82.

170 356 U.S. 342 (1957).

and at a *meaningful time . . .*”¹⁷¹ The Court did not specify what it considered to be a “significant opportunity” to bargain nor did it specify what constitutes a “meaningful manner” or a “meaningful time.”

As noted above, earlier court and Board decisions concerning the distinction between “decision” and “effects” bargaining interpreted effects bargaining as requiring bargaining during the period after the decision is made but *prior* to implementation of the decision, rather than after implementation of the decision. This would imply that effects bargaining should occur before the employer has committed himself to his decision to the extent that the decision is irrevocable, *i.e.*, effects bargaining should provide labor with an opportunity to *influence* an employer’s deliberations prior to his having arrived at the decision.¹⁷²

In *First National Maintenance*, the Supreme Court described effects bargaining in a way that rigidly distinguished it from decision bargaining, and thereby deprived management of any positive input by labor in its decision making process. That decision was based on an economic analysis that assumes that labor is incapable of influencing an employer’s decision unless the decision turns on labor costs, and that even if labor were capable of making positive contributions to the decision making process, such participation is undesirable because of management’s overriding need for “speed, flexibility, and secrecy.”¹⁷³ The Court did not explicitly deny labor an opportunity to influence management, nor did it interpret effects bargaining as attaching *after* implementation of the decision. However, because of this economic analysis the effective result of the *First National Maintenance* opinion appears to deny labor any opportunity

171 *First Nat’l Maintenance*, 452 U.S. at 681-82 (emphasis added).

172 One commentator has argued that when effects bargaining is interpreted as attaching before an employer commits irrevocably to a decision, there is virtually no practical difference between it and decision bargaining. The commentator argues that both decision and effects bargaining have essentially identical goals: To give labor notice sufficiently in advance of the implementation of a decision to provide it the opportunity, through bargaining, to protect the interests of employees. In addition, in both cases, the union has the right to information within the employer’s control which the union needs to bargain intelligently. Finally, both duties attach sufficiently in advance of implementation of the decision to provide labor with a meaningful opportunity to bargain. The commentator views the differences between the two duties as being differences of degree. In decision bargaining, labor has an opportunity to offer the employer alternatives during the deliberative stage and thereby attempt to influence the employer’s decision. Similarly, in effects bargaining, although labor’s focus is on ways to ameliorate the adverse impact of the employer’s decision on the employees, the duty attaches prior to the time when the decision becomes irrevocable so that labor may influence the decision even during effects bargaining. The commentator concludes that because the distinction that has been drawn by the courts between decision and effects bargaining is an illusory one, the impact of the *First National Maintenance* decision may not be substantial. Kohler, *supra* note 31, at 416-21. This Article suggests that Kohler is optimistic in his assessment of what impact the *First National Maintenance* decision might have.

In support of this interpretation, Kohler explains that early Board and court cases discussed the duty to bargain in general terms and assumed that the duty would attach before the decision became irrevocable, thereby affording labor an opportunity to suggest a concession, modification or alternative approach that might obviate the need or desire to make the planned change. Kohler continues to explain that the Board began to divide the employer’s duty to bargain into two distinct duties to decision- and effects-bargain in *Fibreboard I*, 130 N.L.R.B. 1558 (1961), apparently in an effort to shield employers from labor influence over decisions concerning the use and management of labor’s economic resources. Finally, Kohler maintains that although cases decided since *Fibreboard I* indicate that effects bargaining may occur after an employer is committed to the execution of its decision, in reality, there is no way to distinguish the timing. Kohler, *supra* note 31, at 407-10, 413-18.

173 See *supra* text accompanying notes 77-82.

to influence an employer's economically motivated decision and to attach the duty to effects bargain after implementation of the decision—or at least after the employer has committed himself to the decision.

Management stands to gain far more by labor's participation at a stage prior to its irrevocable commitment to the decision. Not only may labor more effectively protect the interests of employees by having a "meaningful opportunity" to influence an employer's decision either at the deliberative stage or prior to implementation, but the employer may also benefit from labor's input at an earlier time. A "meaningful opportunity" to bargain should be interpreted as an opportunity to bargain over the *decision and its anticipated attendant effects*. The distinctions which the courts have attempted to draw between decision and effects bargaining represent an attempt to separate the management prerogatives of the employer from the rights statutorily guaranteed to workers into isolated spheres. The distinctions also reflect fear that labor may intrude too extensively into corporate decision making. As the commentator discussed above points out, "decision bargaining is no more than an industrial version of due process."¹⁷⁴ The duty to bargain over a decision and its anticipated attendant effects requires only that an employer notify labor of its plan to institute some operational changes, and then entertain in good faith any alternatives that labor may formulate.

2. Evaluation of Position that Mandates Decision Bargaining Only Over Health and Safety Issues

It is apparent from the above discussion that few cases deal with the duty to bargain over technological change per se. The vast majority of cases stemming from the introduction of technological change focus on individual problems that arise from the impact of the change, *e.g.*, the various effects on the bargaining unit such as lay offs or reclassification, transfers of operations, partial closing, health and safety problems. As noted above, the complexity of the impact of technological change coupled with the piecemeal fashion in which the Board and courts have approached the problem has resulted in a confused set of decisions. Those decisions strongly favor management by limiting the duty to bargain to the *effects* of the technological change while according management unlimited discretion to make decisions regarding the introduction of the technology.

An important question is whether the presence of a health or safety issue should be treated any differently in the case of technological change. The impact of technological change on the health and safety of the work environment can generally take one of six basic forms:

- (1) More hazardous technology introduced with worker displacement;
- (2) More hazardous technology introduced with no worker displacement;
- (3) Safer technology introduced with worker displacement;
- (4) Safer technology introduced with no worker displacement;

¹⁷⁴ Kohler, *supra* note 31, at 414.

- (5) Technology introduced with worker displacement and no effect on health or safety of the worker;
- (6) Technology introduced with no worker displacement and no effect on health or safety of the worker.

Board and court decisions mandate that an employer has a duty to bargain over the effects of technological change on labor that result in any one of those situations; however, after *First National Maintenance* an employer would appear to have a duty to bargain over the *decision* to introduce that change only in those situations in which health and safety issues are raised. Furthermore, a strong argument can be made that *Gulf Power* mandates a duty to bargain over decisions concerning health and safety, although the case itself is not absolutely clear on that point.¹⁷⁵ However, reading *First National Maintenance* and *Gulf Power* together, decision bargaining over health and safety issues seems to be required, since most adverse effects on health and safety can only meaningfully be addressed and mitigated if the decision to adopt technology or change production process is reversed or altered. These scenarios will be evaluated in light of these decisions.

The first scenario of the six listed above is the most compelling, both from a legal and a policy point of view. The introduction of technology into the workplace that results both in job losses and in greater hazards to the remaining workers clearly exerts tremendous impact on the terms and conditions of employment for those workers involved. The holding in *Gulf Power* that health and safety issues are mandatory subjects of bargaining, coupled with the high priority accorded health and safety in the legislative history of the NLRA,¹⁷⁶ strongly supports the proposition that considerations of health and safety override management prerogatives, and, therefore, should be mandatory subjects of bargaining *at the decision making stage*. Board and court decisions, however, do not generally mandate a duty to decision bargain where issues concerning displacement are involved. Nevertheless, in this first situation, where the health and safety issues appear to give rise to a duty to decision bargain, the job displacement issues presumably would also be included as subjects of bargaining at the decision making stage.

Examples of the situation where new technology could result in both increased hazards *and* job displacement may help to clarify the point that this enormous impact on workers compels a duty to decision bargain. One example of this situation can occur in the chemical industry when a change is made from a batch process to a closed chemical process under extremely high pressure. This change in process not only results in a decreased need for workers, but it also may pose greater dangers in the workplace in the form of an increased potential for explosions and toxic leaks. This situation also can occur with the introduction of high-speed cutting machinery which is used in various industries. This machinery is not only more efficient and requires less labor, but it can be extremely

¹⁷⁵ See *supra* text accompanying notes 44-48.

¹⁷⁶ See 1 LMRA HISTORY, *supra* note 17, at 158, 166-67.

dangerous as well.¹⁷⁷

This first situation can arise in an office context as well as in the factory setting. The use of computers and word processors is a prime example. Computers and word processors are being used with ever increasing frequency in offices throughout the country. As a result, clerical workers are required to be better trained and more highly skilled, and certain lower-level clerical positions are being eliminated altogether.¹⁷⁸ As time goes on, increased automation in the office may result in nearly fully automated offices thereby eliminating the need for clerical staff.¹⁷⁹ In addition to the job displacement problems caused by the use of office automation, the video display terminals (VDTs) found on computers and word processors are proving to be health hazards as well.¹⁸⁰ Although some of the studies concerning the hazards of VDTs are as yet inconclusive, those studies do indicate that VDTs result in such problems as severe eye strain, back strain and exposure to low-level radiation emitted by VDTs, which some responsible scientists have postulated can produce birth defects and miscarriages in addition to cataracts and skin rashes.¹⁸¹ Although the studies may as yet be inconclusive and the injuries caused by VDTs may not be the same acute, immediate injuries often associated with hazards in the factory, they are of no less significance, and thus should be accorded a high degree of priority in the collective bargaining process.

The job displacement problems in the examples given above affect the lives of workers just as substantially as the health and safety problems. The issues surrounding job displacement, however, generally appear to be mandatory subjects of decision bargaining only where health and safety issues are also involved, assuming that one is able to successfully argue that precedent dictates that considerations of health and safety are mandatory subjects of decision bargaining.

If one is successful in making that argument, the outcome of the second situation, in which more hazardous technology is introduced with no displacement, will be the same as the outcome in the first situation since

177 Personal communication with Walter Haag, Director of the Division of Physical Sciences and Engineering, NIOSH-Cincinnati (March 10, 1986).

178 U.S. CONGRESS, OFFICE OF TECHNOLOGY ASSESSMENT, *AUTOMATION OF AMERICA'S OFFICES* 15-19, 33-68 (1985) [hereinafter *OTA REPORT ON OFFICE AUTOMATION*].

179 Not all commentators agree on this prediction. While some economists predict that office automation will drastically diminish the number of office jobs, other economists predict that the number of office jobs will continue to grow in spite of increased automation. See *OTA REPORT ON OFFICE AUTOMATION*, *supra* note 178, at 16-17, 37-45.

180 See J. STELLMAN & M. HENEFIN, *OFFICE WORK CAN BE DANGEROUS TO YOUR HEALTH* 41-70 (1983); *OTA REPORT ON OFFICE AUTOMATION*, *supra* note 178, at 137-51; U.S. CONGRESS, OFFICE OF TECHNOLOGY ASSESSMENT, *REPRODUCTIVE HEALTH HAZARDS IN THE WORKPLACE* 100-01 (1985) [hereinafter *OTA REPORT ON REPRODUCTIVE HAZARDS*].

181 See J. STELLMAN & M. HENEFIN, *supra* note 180. Authorities are in disagreement concerning the extent to which VDT usage adversely affects the health of employees. See *OTA REPORT ON OFFICE AUTOMATION*, *supra* note 178, at 137-51; *Angina Study Suggests Elevated Risk for VDT Users, Researcher Tells Meeting*, O.S.H. Rep. (BNA), at 624 (Jan. 24, 1985); *No Permanent Harm to Unborn Children Posed by VDT Use, Organization States*, O.S.H. Rep. (BNA), at 758 (Feb. 28, 1985); *Rhode Island Panel Sees No Danger, Need to Regulate, Video Display Terminals*, O.S.H. Rep. (BNA), at 773 (Mar. 7, 1985); *CH2 North Carolina Study Reports Link Between VDT Use, Angina; Urges More Research*, O.S.H. Rep. (BNA), at 828 (Mar. 28, 1985).

considerations of health and safety establish the duty to decision bargain in both situations. An example of the second situation in the factory setting would be the simple substitution of a more toxic substance in the manufacturing process for another substance. The union would have a substantial interest in protecting the health and safety of its members by participating in that decision. An example in the office context would again be the introduction of automation; however, the focus would be on the professional workforce rather than the clerical staff. The focus shifts in this second scenario because the introduction of automation frequently results in less job displacement among the professional staff than the clerical staff.¹⁸² Since the professional staff will be utilizing the automation, however, they will be exposed to the same hazards as members of the clerical staff who also use it.

In the third and fourth situations, in which safer technology is introduced rather than more hazardous technology, one cannot rely as clearly on the high priority accorded health and safety issues as one could in the first two situations. Nevertheless, even though safer technology is introduced, health and safety could well have been at issue during the decision making process, in which case management should be obligated to bargain with labor at the time. An example of a situation where safer technology is introduced with worker displacement and where health and safety are at issue in the decision is the introduction of robotics to perform hazardous work previously performed by human workers. Although the use of robots to do hazardous work is admittedly a benefit to workers in one respect, it can have a negative effect on their lives as well. The widespread use of robots can result in lay offs and seniority problems and changes in the composition of the bargaining unit by making certain blue-collar jobs obsolete and requiring increased technical expertise. Compensation issues would be raised where the use of robots cuts down on the need for overtime and thus directly affects wages. These are but a few of the myriad ways in which the use of robots can affect employees, positively and negatively.¹⁸³ One of the purposes of collective bargaining is to provide workers with an opportunity to participate in decisions which profoundly affect their lives by proposing alternative ideas to management. Certainly, this is a situation in which workers would wish to propose alternatives, and, perhaps, to make concessions to avoid complete automation of the process by using robots. Workers may often be even more concerned with job security than with the question of their own personal health and safety. Workers have had a long tradition of engaging in hazardous occupations (consider, *e.g.*, coal miners) in order to support their families at the risk of their own lives.¹⁸⁴ That is not

182 See OTA REPORT ON OFFICE AUTOMATION, *supra* note 178, at 15-19, 45-71.

183 Leap & Pizzolatto, *supra* note 40, at 697. See also *Robot Safety Report, Proposed Standard Now Available from Industry Association*, O.S.H. Rep. (BNA), at 693 (Jan. 31, 1985); *Steps to Prevent Injury of Workers by Industrial Robots Suggested by NIOSH*, O.S.H. Rep. (BNA), at 753 (Feb. 28, 1985); *Industrial Robot Safety Guidelines Seen Industry Standard Within Two Years*, O.S.H. Rep. (BNA), at 410 (Oct. 17, 1985).

184 See, *e.g.*, PRESIDENT'S COMM. ON COAL, THE AMERICAN COAL MINER: A REPORT ON COMMUNITY AND LIVING CONDITIONS IN THE COALFIELDS (1980); R. LINGENFELTER, THE HARDROCK MINERS: A

to say that management should not accord the highest priority to making the workplace as safe as possible for workers; rather, where various considerations surrounding health and safety must be weighed against those of job security, workers should be given a voice in those decisions. Certainly, if labor is to pay for safer working conditions by losing jobs, it ought to have any opportunity to suggest job savings *and* safer technological alternatives.

A question surrounding the introduction of "safer" technology, regardless of whether it results in worker displacement or not, is *whether the technology really is safer or whether the hazards are latent and as yet unknown*. Management does not always possess complete and perfect information. Today many labor unions have become very sophisticated in their efforts to protect the health and safety of workers from hazards inherent in many technological advances.¹⁸⁵ Often acting in concert with unions in other industrial markets abroad, American unions are expending substantial time, money and effort on researching and studying the effects on workers of exposure to various toxic substances, VDTs and the like.¹⁸⁶ To assume that management alone possesses all of the information necessary to make the most well-informed decisions concerning the health and safety of workers may be paternalistic and short-sighted. The use of personal protection equipment, such as hearing protectors or rubber suits, while ostensibly adopted to protect the worker, also can stress the worker. Unions consistently argue for engineering controls on technology rather than enclosing the worker in a hot suit or burdening the worker with devices which impair his movement.¹⁸⁷ Even where management intends in good faith to introduce safer technology, labor's participation in the decision making process contributes to a fully informed decision.

The discussion thus far has focused upon health and safety as a consideration in the decision making process. Even if health and safety issues are not involved in the decision to introduce technological change, consideration should be given to mandating a duty to bargain over the decision. Technological change can have an even larger effect on job security than health and safety. Health and safety affects individual workers, and can possibly affect their later offspring.¹⁸⁸ If new technology results in transfers of operations, partial plant closing or an entire plant

HISTORY OF THE MINING LABOR MOVEMENT IN THE AMERICAN WEST, 1863-1893 (1974); J. WILLIAMS, THE DERBYSHIRE MINERS (1962).

185 See, e.g., L. BACOW, BARGAINING FOR JOB SAFETY AND HEALTH (1980); *Angina Study Suggests Elevated Risk for VDT Users*, O.S.H. Rep. (BNA), at 624 (Jan. 24, 1985) (joint study conducted by the Public Health Service, the Communication Workers of American, and the North Carolina Occupational Safety and Health Project); *IUD Resolves to Press Congress for Laws Protecting Victims of Occupational Disease*, O.S.H. Rep. (BNA), at 688 (Jan. 31, 1985); *CUA North Carolina Study Reports Link Between VDT Use, Angina*, O.S.H. Rep. (BNA), at 828 (Mar. 28, 1985); *SEIU and 9 to 5 to Help Administer Study on VDTs and Pregnancy Hazards*, O.S.H. Rep. (BNA), at 21 (June 13, 1985).

186 *Id.* See also Chamot and Dymmel, *Cooperation or Conflict: European Experiences with Technological Change at the Workplace*, March, 1981 (publication of the Dept. for Professional Employees, AFL-CIO); *Int'l Forum Adopts VDT Bargaining Goals*, *The Guild Reporter*, Official Publication of the Newspaper Guild (AFL-CIO, CLC), Nov. 9, 1984, at 1, col. 1.

187 See Witt & Early, *The Worker as Safety Inspector*, WORKING PAPERS, Sept.-Oct. 1980, at 21, 24-25.

188 See OTA REPORT ON REPRODUCTIVE HAZARDS, *supra* note 180.

closing in a small community, those changes affect the lives of workers, their families and the entire community. The effect can be devastating in economic, social and personal terms.¹⁸⁹

Board and court decisions accord high priority to issues of health and safety; however, technology can affect workers just as significantly in many other ways. The union can represent the interests and concerns of the workers involved, and thereby mitigate the impact most effectively through participation at the decision making stage. As one commentator ably articulates:

Without full collective bargaining—no matter how enlightened or benevolent management may be—working men and women simply don't participate in the basic decisions which govern their jobs, their income, and their lives. Collective bargaining is essential to meet the challenge of technological change with a minimum of social and human dislocation; . . . to assure workers of dignity on the job and protection against arbitrary action by management; and to work for general economic, social and political conditions which enhance human welfare, human dignity and human freedom.¹⁹⁰

D. *Employee Participation in Management Decision Making*

Numerous Board and court decisions outlined above, particularly the *First National Maintenance* decision, and recent Board decisions since *First National Maintenance* deferred to management's perceived need for unfettered decision making. Implicit in the Court's arguments in *First National Maintenance* is the assumption that labor can generally only hinder rather than advance the decision making process. The introduction of technological change into the workplace, however, is rarely done under compelling conditions requiring speed, flexibility or secrecy. Diffusion of existing technologies (usually tried in other plants) into a particular workplace, rather than technological innovation, is the norm.¹⁹¹

¹⁸⁹ See B. BLUESTONE AND B. HARRISON, CAPITAL AND COMMUNITIES: THE CAUSES AND CONSEQUENCES OF PRIVATE DISINVESTMENT 84-103 (1980). The authors document the multiplier effect on jobs and income, the disruption of the local business climate, the reduction of the local tax base, and the destabilization of the community economy. See also Stillman, *The Devastating Impact of Plant Relocations*, in THE BIG BUSINESS READER 72 (Green & Massie eds. 1980). Stillman documents that when a local steel industry closed in Youngstown, Ohio, 5000 jobs were initially lost, and 11,199 jobs were subsequently lost in areas such as wholesaling and retailing, auto supplies, and office supplies businesses. *Id.* at 75. For a discussion of ethical considerations surrounding decisions to close factories, see Lichtenberg, *Workers, Owners, and Factory Closings*, 4 PHIL. & PUB. POL'Y 9 (1984).

Studies indicate that the physical and mental health of displaced workers often declines rapidly. One study undertaken over a 13-year period indicates that the suicide rate among displaced workers is nearly 30 times the national average. See, e.g., Stillman, *supra*, at 81. A series of studies indicates the presence of a higher incidence of hypertension, heart disease, peptic ulcer, diabetes, and other maladies among workers displaced due to plant shutdowns than among control groups of employed workers. Kasl & Cobb, *Blood Pressure Changes in Men Undergoing Job Loss*, 32 PSYCHOSOMATIC MEDICINE 19 (1970); Kasl, Cobb & Brooks, *Changes in Serum Uric Acid and Cholesterol Levels in Men Undergoing Job Loss*, 206 J. A.M.A. 1500 (1968); Kasl, Gore & Cobb, *Changes in Reported Illness and Illness Behavior Related to Termination of Employment: A Preliminary Report*, 1 INT'L J. EPIDEMIOLOGY 111 (1972).

¹⁹⁰ Roberts, *The Impact of Technology on Union Organizing and Collective Bargaining*, in LABOR AND TECHNOLOGY: UNION RESPONSE TO CHANGING ENVIRONMENTS 26 (1982).

¹⁹¹ Technological innovation is the first commercially successful application of a new technical idea. Innovation should be distinguished from invention, which is the development of a new technical idea, and from diffusion, which is the subsequent widespread adoption of an innovation by those

In addition, the employer does not always necessarily have complete and perfect information concerning alternatives so as to know whether bargaining would be futile. Although the Board and court decisions have attempted to diminish labor's potential contribution to the decision making process, discussed below are various experiences in employee participation in management which stand in stark contrast to advocates of management's rights who argue that labor's participation is unworkable, or at best a hindrance.¹⁹²

Some labor unions have increasingly assumed a more collaborative role with management in the decision making process. Unions have been participating in joint committees with management for some time.¹⁹³ Many of those joint committees still play only a consultative role with management, exercising no real control. However, some unions, departing from this consultative role, are assuming a more collaborative role in the introduction of technology into the workplace. Substantial participation in management decision making is occurring currently in both the United States and abroad.¹⁹⁴ In-depth documentation of the successes and failures of these activities may be desirable to undertake at a future time in order to fully explore the opportunities presented by technology bargaining. Extensive documentation of labor participation in management decision making is beyond the scope of this Article. However, this Article will discuss some representative examples of labor participation in the introduction of technological change.

The United Automobile Workers (UAW) is one union in particular which has taken great strides in acquiring some degree of participation in the decision making process surrounding the introduction of new technology. The president of the UAW currently sits on the Chrysler Corporation Board of Directors.¹⁹⁵ Certainly this is a striking, albeit atypical, example of a step toward labor participation in major decisions. The

who did not develop it. The distinction between innovation and diffusion is complicated by the fact that innovations can rarely be adopted by new users without modification. When modifications are extensive, the result may be a new innovation. These definitions are drawn from Ashford, Ayers, & Stone, *supra* note 166, at 419 n.1.

192 See also S. DEUTSCH, *TECHNOLOGICAL CHANGE AND LABOR MANAGEMENT RELATIONS* (1985) (report prepared for the Bureau of Labor-Management Relations and Cooperative Programs of the U.S. Department of Labor). Professor Deutsch has described the historical development of technological change in the workplace in the U.S. and abroad and has explored trends in labor-management cooperation to lessen the negative impact of changes, such as with health hazards or with job displacement. His findings suggest that positive approaches are being taken by both labor and management to introduce technology without compromising worker health, safety or job security.

193 See, e.g., L. BACOW, *supra* note 185; *Recent Initiatives in Labor-Management Cooperation*, Report No. CP76003, National Center for Productivity and Quality of Working Life (Feb. 1976); *More Awareness of Health, Safety Issues Comes from Joint Committees, Survey Finds*, O.S.H. Rep. (BNA), at 159 (July 12, 1984); *Auto Supplier Says Joint Committee Sharply Increases Productivity, Quality*, O.S.H. Rep. (BNA), at 450 (Nov. 8, 1984).

194 For discussions of employee participation activities abroad, see Chamot and Dymmel, *supra* note 186; Chamot, *Technological Change and Unions: An International Perspective*, a publication of the Dept. of Professional Employees, AFL-CIO, Aug. 1982; *Work and Health in the 1980's: Experiences of Direct Workers' Participation in Occupational Health* (Bagnara, Misiti, and Wintersberger eds. 1985) (proceedings of the Conference on Direct Workers' Participation in Matters of Work, Safety and Health, held in Nov. 1982 at the Institute of Psychology of the National Research Council of Italy in Rome).

195 Walton, *New Perspectives on the World of Work: Social Choice in the Development of Advanced Information Technology*, 35 HUM. REL. 1073, 1078 (1982).

UAW has taken an aggressive role in ameliorating the impact of technological change on the work force by promoting joint management-union efforts. Since 1979, as part of many UAW collective bargaining agreements, management has had a duty to notify and consult with the union over any decision to introduce new technology well in advance of implementation.¹⁹⁶ The agreements also provide that a National Joint Committee on New Technology, composed of five UAW members and five company members must be established to discuss at the corporate level any development of new technology, to discuss anticipated problems concerning the introduction of new technology, and to review and decide cases appealed from the plant level concerning disputes over the introduction of new technology.¹⁹⁷ In 1982, the UAW reached an agreement with both the General Motors Corporation and the Ford Motor Corporation to establish extensive training and retraining programs to mitigate the impact of technological change.¹⁹⁸ In 1984, the UAW reached agreement with General Motors concerning a notable job security feature, the Job Opportunity Bank-Security (JOB Security) Program. Under the JOB Security Program, jobs that become unnecessary because of the introduction of new technology are put into the bank and slowly phased out. The workers continue to be employed, but they are placed into other jobs as those jobs open up or new jobs are created. Eventually the bank shrinks as those workers are placed elsewhere.¹⁹⁹ Additionally, for more than a decade, the UAW along with both General Motors and Ford has jointly sponsored Quality of Work Life (QWL) activities which have been designed to ensure that new technology is introduced so as to enhance the quality of work life in a plant.²⁰⁰ The UAW's position is that technology that advances workers' skills and enhances job content should be selected over that which downgrades or eliminates job skills whenever possible.²⁰¹

The UAW is involved in several particularly noteworthy joint labor-management efforts with General Motors. The UAW is currently involved in a pilot project with General Motors called the "Saturn Project," a program to manufacture small cars in the United States. The Saturn Project is a management-labor project in which management and the union are jointly studying the feasibility of introducing a new small car. The union now continues to participate in the design, engineering and production of the project, which involves many innovative concepts.²⁰²

The second significant joint labor-management effort between the

196 *Guidelines for the Introduction and Use of New Technology*, UAW-Ford Presentation to Ford Motor Co., Aug. 6, 1979, at 4-5 [hereinafter UAW-Ford Guidelines]. See also Weekley and MacLeod, *Our Working Future: A Guide to New Technology*, publication of UAW Skilled Trades Dept., 1985, at 15. Both publications are available from UAW, Solidarity House, Detroit, MI.

197 UAW-Ford Guidelines, *supra* note 196, at 6-7; Weekley and MacLeod, *supra* note 196, at 21.

198 See Letter of Understanding from Ernest J. Savoie to Donald F. Ephlin re: Employee Development and Training Program, Feb. 13, 1982 (available from UAW, Solidarity House, Detroit, MI). See also Weekley and MacLeod, *supra* note 196, at 15-16.

199 *Contract Halls Layoffs Due to Outsourcing, Technology*, UAW-GM Report, Sept. 1984, at 205.

200 See Walton, *supra* note 195, at 1078.

201 See, e.g., UAW-Ford Guidelines, *supra* note 196, at 4.

202 *New Steps to Cut Outsourcing and Win Future Jobs Here*, UAW-GM Report, Sept. 1984, at 6.

UAW and General Motors is a \$100 million New Venture Fund. The program is an ongoing activity to develop and mutually direct ventures into new, non-traditional business areas in an effort to expand employment opportunities for UAW workers. The program is financed entirely by corporate funds, but provides for full input by the union. The program will be administered by a negotiated Growth and Opportunity Committee, made up of equal numbers of UAW and corporate representatives. The Committee will be assisted by a full-time staff assigned by General Motors and the UAW known as the New Business Venture Development Group. The Group will review and study the feasibility of proposals for entry into new business ventures, make recommendations to the Committee, and develop employee participation in the new ventures. The Committee will be required to report periodically to the International Union and to the General Motors Executive Committee concerning the identification of viable opportunities for employment growth. The negotiated agreement that established the program specified that the Committee should pay particular attention to developing new ventures in communities that have been affected by the loss of UAW-GM employment opportunities through plant closings.²⁰³

An additional UAW-GM cooperative effort is the launch of a comprehensive, five-year scientific study concerning the effects on workers of exposure to chemicals in machining. The jointly administered Occupational Health Advisory Board has commissioned the Harvard School of Public Health to conduct the study. The advisory board will work with the Harvard team during the period of the study, the board will advise the company and the union concerning appropriate measures or changes in technology.²⁰⁴

A second union that has become involved with management in the decision making process is the Communication Workers of America (CWA). In its collective bargaining agreements, CWA typically includes provisions that require management to notify the union at least six months prior to the introduction of technological change. These agreements also contain provisions for training and retraining programs.²⁰⁵ Although CWA has been active in QWL committees, CWA has not generally been as aggressively involved with management in the decision making process as the UAW has been successful in doing. CWA's involvement varies from case-to-case. One notable case involves the AT&T hotel billing and information systems (HOBIS) office in Tempe, Arizona, near Phoenix. The company wanted to redesign a new system in that office, its goal, being a successful, self-managed office. The company approached CWA about participating in the total system design. The joint management-labor effort resulted in an innovative autonomous work group where the workers police themselves without supervisors.

203 UAW, *GM to Decide Jointly on Investments for New Jobs*, UAW-GM Report, Sept. 1984, at 5.

204 UAW and GM *Launch Study on Effects of Exposure to Chemicals in Machining*, O.S.H. Rep. (BNA), at 158 (July 12, 1984).

205 *Productivity in the American Economy, 1982: Hearings Before the Subcomm. on Employment and Productivity of the Senate Labor and Human Resources Comm.*, 97th Cong., 2d Sess. (1982) (statement of Ronnie J. Straw, CWA Director of Development and Research). See also Walton, *supra* note 195, at 1080.

The Tempe office has proved to be the most profitable of all AT&T's HOBIS units throughout the country.²⁰⁶

A third union that has taken strides toward becoming involved in decisions to introduce technological change is the International Association of Machinists and Aerospace Workers (IAM). IAM has prepared model contract language calling for advance notification of technological change along with a meaningful opportunity to negotiate adjustments in the plan:

In the event of management's introducing new technology it is imperative that the union firmly establish the right to advance notice, the right to certain kinds of information and the obligation to bargain over necessary adjustments through clear and specific contract language. By being required to give advance notice of plans to introduce technological change, the Union will have time to negotiate all of the necessary adjustment program.²⁰⁷

In 1983 IAM negotiated a collective bargaining contract with the Boeing Company which provides that Boeing must notify the union at least one year in advance of any technological changes, such briefings to include any anticipated schedules of introduction of new technology. The union in turn is required to protect the confidentiality of any sensitive or proprietary information disclosed during the discussions.²⁰⁸ The IAM-Boeing contract also provides for an extensive training program to mitigate the effects of technological change.²⁰⁹

The advance notification provisions exemplified by UAW, CWA and IAM collective bargaining contracts are becoming increasingly common,²¹⁰ and represent a significant step toward a cooperative labor-management approach to the introduction of technological change. Although advance notification may take different forms in different contracts, it offers the potential for labor to influence design features and plans of proposed technological change when decisions are being made, thereby offering greater potential for solving problems and fulfilling needs of both management and labor.

Labor unions have become quite sophisticated in their efforts to make positive contributions to the direction of technological development, and, as a result, have become an information resource in matters concerning technological change and development. For example, during 1985 the Subcommittee on Employment and Housing of the House

206 See Miller, *The Bossless Office: Unique Arizona Experiment Proves Workers Can Run the Show* (available from CWA, AFL-CIO, Dev. and Research Dept., Wash., D.C.).

207 Nulty, *Case Studies of Local IAM Experience with the Introduction of New Technologies*, in LABOR AND TECHNOLOGY: UNION RESPONSE TO CHANGING ENVIRONMENTS 132 (1982).

208 Article 20, § 20.2, Labor Agreement of the Boeing Company and the International Association of Machinists and Aerospace Workers (1983) (available from IAM).

209 *Id.* § 20.3. S. DEUTSCH, *supra* note 192, describes workplaces where training programs have been instituted to facilitate employee adjustment to technological change. Cape Cod (Mass.) Hospital and the City of Eugene, Oregon are two such places where training programs resulted from successful negotiations at the bargaining table.

210 See BASIC PATTERNS IN UNION CONTRACTS 54-55 (BNA) (10th ed. 1983); *Joint Hearings before the Subcomm. on Science, Research and Technology of the House Comm. on Science and Technology and the Task Force on Education and Employment of the House Comm. on the Budget*, 98th Cong., 1st Sess. 1224-43 (1984) (statement of Elmer Chatak, Secretary-Treasurer, Industrial Union Dept., AFL-CIO).

Committee on Government Operations solicited the aid of several labor unions in developing legislation on employee protection at hazardous waste cleanup sites.²¹¹ Also during 1985, a job health research agency, the Workplace Health Fund, was instituted through the efforts of various labor unions with assistance from groups representing business, churches, the environment, and various communities. The Fund is designed to develop and mobilize support for occupational disease research and education programs to be conducted by the labor community. It is also designed to provide job health services to workers.²¹² These are only two examples of research efforts undertaken by labor unions through which organized labor is making positive contributions to the direction and implementation of technological development. Many more extensive research programs are currently being conducted by labor.²¹³ Deutsch suggests that research support is vitally important in order to identify creative approaches to the introduction of technology that benefit both management *and* labor.²¹⁴

The foregoing discussion concerning current involvement of organized labor in management decision making and in the development of technology should illustrate that the Board and some courts are not adequately considering current industrial activities when they argue that labor has nothing meaningful to offer to management in its decision making process. To requote the Supreme Court's majority opinion in *Fibreboard*: "Industrial experience is not only reflective of the interests of labor and management in the subject matter but is also indicative of the amenability of such subjects to the collective bargaining process."²¹⁵

III. Conclusion

One purpose of the NLRA is to extend negotiations between labor and management to areas of critical interest to each side. When Congress established the collective bargaining process, it acknowledged that an employer inherently possesses a power advantage over labor, and it attempted to overcome that power advantage by requiring the employer to meet with labor as an equal party to discuss issues of major concern to both parties. The legislative history of the NLRA indicates that Congress initially contemplated that the collective bargaining process be a dynamic process capable of meeting new problems as they arise in labor-management relations. Both management and labor have become very sophisticated both in terms of the scope of their concerns and the methods employed to advance their concerns, resulting in new issues being pressed to the forefront of collective bargaining. The collective bargain-

211 *Unions Asked to Help Develop Legislation on Hazardous Site Cleanup Protections*, O.S.H. Rep. (BNA), at 839 (Apr. 4, 1985).

212 *U'D Forms Job Health Research Agency Aimed at Providing Services to Workers*, O.S.H. Rep. (BNA), at 364 (Sept. 26, 1985).

213 See, e.g., *UAW and GM Launch Study on Effects of Exposure to Chemicals in Machining*, O.S.H. Rep. (BNA), at 158 (July 12, 1984); *Ford, UAW Initiate Training Program on Dealing with Hazardous Chemicals*, O.S.H. Rep. (BNA), at 83 (July 4, 1985).

214 See S. DUETSCH, *supra* note 192.

215 *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 211 (1964).

ing process should be extended to include those new issues so that the process can evolve with the changing industrial environment.

The language of the NLRA was written in language sufficiently flexible to permit the Board and courts to adapt it to the times. It does not appear, however, that the Board and courts are carrying out the purposes of the Act in light of modern industrial practices. Both the Board and the courts have traditionally interpreted the NLRA by balancing the respective interests of management and labor. In doing so, they have carved out an area of absolute management prerogatives that did not appear on either the face of the statute nor in its legislative history, and attempted to separate management rights from rights guaranteed to workers under the NLRA into two distinct, diametrically opposed spheres. This approach probably promotes more rather than less industrial strife, and treats the positions of management and labor as necessarily inconsistent; however, their positions are not necessarily at odds. Workers constitute an indispensable part of the American work environment. Hence, it is in management's best interest to promote the well-being of workers. Similarly, job security is dependent on the continued operation of the firm, and it is, therefore, in labor's best interest to contribute to the continued success of the firm. Both of these objectives can be fostered by according the impact of technological change on the workplace the utmost consideration at the earliest stages of the decision making process. Technological change can create both increased profits and employment if planned properly.

To repeat, although the Supreme Court has not specifically addressed the issue of technology bargaining, the Court's opinion in *First National Maintenance* strongly suggests that the Court would find a duty to *effects* bargain, but not a duty to *decision* bargain. The decisions of the current Board indicate that it also would not be inclined to find a duty to bargain over the decision to introduce technological change. *First National Maintenance* and decisions which rely on it presume that labor has no meaningful contribution to make to the employer's decision making process. The Board and courts, however, should recognize that more and more unions are becoming capable of making meaningful contributions. In applying *First National Maintenance*, the Board and reviewing courts should determine whether the value of labor's input has been adequately considered. Labor's potential participation should not be dismissed simply on the basis of whether management's decision turns on labor costs. The Board and courts should consider the question of labor's participation on a case-by-case basis, asking whether labor can contribute to that type of decision.

The failure of the current Board and the Supreme Court to encourage collective bargaining discourages cooperative efforts between management and labor, and may, in the long run, result in economic warfare. Requiring employers to bargain over the decision to introduce technological change would establish a *foundation* for a cooperative environment in which to introduce technology. It should be noted, however, that although decision bargaining may encourage a cooperative environ-

ment, a confrontational attitude often exists on both sides within the collective bargaining framework. The American labor relations system is based on an adversarial tradition.²¹⁶ Labor has traditionally sought greater rights and protections from arbitrary actions by an employer. Employers have traditionally regarded labor's requests as unwarranted invasions into management prerogatives. This adversarial stance is reflected in the collective bargaining process in the form of a "win-lose" mentality.

That tradition is changing. Gone are the days when management and labor relate strictly as adversaries. Although mandating a duty to decision bargain over the introduction of technology is important to ensure participation in those decisions, national policy should extend the introduction of technological change beyond an adversarial context by encouraging cooperative efforts between management and labor. As the evidence increasingly demonstrates, both management and labor benefit from successful joint efforts. Numerous commentators and scholars in the area of labor relations are calling for increased employee participation with management, citing numerous benefits to both parties.²¹⁷ As the level of cooperation between the parties rises, labor-management relations become less adversarial. The result is stronger labor-management relations and solutions to problems that are more inventive and adaptive.²¹⁸ By focusing on problem *solving*, economic and social effects receive more attention, and the technology is better utilized. When management and labor are committed to solutions, the overall value of work is improved from which all parties benefit.

The benefits of increased employee participation are not without some costs. Worker involvement requires extra effort on the part of both parties. New relationships and skills must be developed. Management, unions and workers must redefine their respective roles, and experience the growing pains and uncertainty associated with changing attitudes and habits. Both management and labor are subject to certain risks and responsibilities.²¹⁹ Indeed, many problems are inherent in developing a

216 See M. DERBER, *THE AMERICAN IDEA OF INDUSTRIAL DEMOCRACY 1865-1965* (1970); Summers, *Industrial Democracy: America's Unfulfilled Promise*, 28 CLEV. ST. L. REV. 29, 37 (1979).

217 Employees who are given broader responsibility and who are encouraged to contribute are found to take more pride and derive more satisfaction from their work. This, in turn, bolsters creativity and enthusiasm in the workplace, and generally enhances performance, which can be a great asset in terms of increased productivity, increased quality and reliability of products, and contributions to new products and production systems. See Bowles, Gordon & Weisskopf, *A Social Model for U.S. Productivity Growth*, 27 CHALLENGE 41 (1984); Reich, *A Fork in the Road for U.S. Labor*, N.Y. TIMES, Sept. 1, 1985, at E-13, col.2; Walton, *From Control to Commitment in the Workplace*, 63 HARV. BUS. REV. 76, 77 (1985). Employees also derive some assurance of security when management treats them as an integral part of the organization, which can also result in increased commitment to the continued success of the firm. See Walton, *supra*. See also Chamot, *Employees: Indispensable Elements*, 31 PROD. ENG'G. 106 (1984); Cyert, *The Plight of Manufacturing: What Can Be Done?*, 1 ISSUES IN SCIENCE AND TECH. 87 (1985); Nowak, *Workers' Participation and Its Potential Application in the United States*, 35 LAB. L.J. 148 (1984).

218 See Walton, *supra* note 217, at 78-80.

219 Management must assume some responsibility for increasing the value of work by giving priority to designing technology in a way that enables employees to work creatively with machines. A significant risk for management, therefore, is that the technological development process may become more complicated. Management must also demonstrate by policy and practice that it gives high priority to labor's concern for job security by establishing, for example, programs to retrain

cooperative model of labor-management relations for the design of technology policy. However, the long-term benefits to both management and labor of carefully designing technology policy so that overall labor quality is improved are vast, particularly for industries facing international competition.

Federal labor policy should encourage a change in attitude between labor and management. Both parties commonly share an assumption, which is reflected in Board and court decisions, that technological development involves certain adverse effects, and that those affected must simply cope. However, the adversarial stance of management and labor is inappropriate for the optimal development and implementation of technology. There is a great need to establish a cooperative attitude between the parties in order to develop integrative solutions to the complex problems posed by advancing technology that will address the needs of management *and* labor.

employees for more complex tasks. Unions and workers must take greater responsibility for the efficiency and continued success of the enterprise. Labor may have to agree to flexible job classifications and work rules and new compensation methods associated with productivity improvements. *Id.* at 80-83.