OPERATIONAL CHANGES:
The First National Maintenance/Fibreboard Dual

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When considering the obligation to bargain concerning operational changes, such as partial closings, work relocation and subcontracting, two Supreme Court decisions are at the starting place: *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203 (1964) and *First National Maintenance v. NLRB*, 452 U.S. 666 (1981).

The critical portion of *Fibreboard* is the Court's ultimate holding that the subcontracting there was a proper subject for decision-bargaining. However, Chief Justice Warren's decision included this limiting language:

> We are thus not expanding the scope of mandatory bargaining to hold, as we do now, that the type of 'contracting out' involved in this case -- the replacement of employees in the existing bargaining unit with those of an independent contractor to do the same work under similar conditions of employment -- is a statutory subject of collective bargaining under §8(d). Our decision need not and does not encompass other forms of 'contracting out' or 'subcontracting' which arise daily in our complex economy. [FN8]

390 U.S. at 215. Importantly, this limitation thought was stressed by Justice Stewart's concurring opinion in which Justices Douglas and Harlan joined:

> [T]here are other areas where decisions by management may quite clearly imperil job security, or indeed terminate employment entirely. An enterprise may decide to invest in labor-saving machinery. Another may resolve to liquidate its assets and go out of business. Nothing the Court holds today should be understood as imposing a duty to bargain collectively regarding such managerial decisions, which lie at the core of entrepreneurial control. Decisions concerning the commitment of investment capital and the basic scope of the enterprise are not in themselves primarily about conditions of employment, though the effect of the decision may be necessarily to terminate employment. If, as I think clear, the purpose of §8(d) is to describe a limited area subject to the duty of collective bargaining, those management decisions which are fundamental to the basic direction of a corporate enterprise or which impinge only indirectly upon employment security should be excluded from that area.
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> This kind of subcontracting falls short of such larger entrepreneurial questions as what shall be produced, how capital shall be invested in fixed assets, or what the basic scope of the enterprise shall be. In my view, the Court's decision in this case has nothing to do with whether any aspects of those larger issues could under any circumstances be considered subjects of compulsory collective bargaining under the present law.

379 U.S. at 225. Obviously, then, the Court was not saying that all subcontracting decisions are mandatory bargaining subjects.

Seventeen years later, the Court decided in *First National Maintenance* ("FNM") that an employer had no duty to bargain over the decision to close part of its business. The operative portion of Justice Blackman's majority opinion which, along with *Fibreboard*, remains at the center of the debate over bargaining, is as follows:

> Some management decisions, such as choice of advertising and promotion, product type and design, and financing arrangements, have only an indirect and attenuated impact on the employment relationship. *See Fibreboard*, 379 U.S. at 223 (Stewart) J., concurring). Other management decisions, such as the order of succession of layoffs and recalls, production quotas, and work rules, are almost exclusively "an aspect of the relationship" between employer and employee. *Chemical Workers*, 404 U.S., at 178. The present case concerns a third type of management decision, one that had a direct impact on employment, since jobs were inexorably eliminated by the termination, but had as its focus only the economic profitability of the contract with Greenpark, a concern under these facts wholly apart from the employment relationship. This decision, involving a change in the scope and direction of the enterprise, is akin to the decision whether to be in business at all, "not in [itself] primarily about conditions of employment, though the effect of the decision may be necessarily to terminate employment."

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452 U.S. at 676-677. At the same time, this decision touches on a matter of central and pressing concern to the union and its member employees: the possibility of continued employment and the retention of the employees' very jobs.

Any discussion of operational change bargaining requirements must focus on these two cases. More particularly, the broader the bargaining obligation, the more expansive the emphasis on *Fibreboard* and its conclusion that bargaining over subcontracting there was required. The narrower the bargaining obligation, the greater the reliance on the limitations of *Fibreboard*, particularly Justice Stewart's concurrence, and the limitations expressed by the Court in *FNM*.

In any event, since 1981, *FNM* and *Fibreboard* have been applied to one degree or another by the Board and the courts to operational changes of all sorts: closings, partial closings, work relocation, subcontracting, consolidation, automation, downsizing. Often there is disagreement between the Board and the courts.

The purpose of this paper is to review where matters stand on bargaining about operational changes. What is the Board's current position? Under what circumstances is there an obligation to bargain over work relocation, subcontracting, downsizing, consolidation, automation? What about effects bargaining? When do bargaining obligations arise? What information must be provided to the union concerning an operational change? These are all practical issues that we as labor lawyers confront repeatedly. How do we keep our clients out of trouble? How can the legal traps and opposing strategies be overcome or avoided?

I. The Starting Place: The Collective Bargaining Agreement

Before reviewing NLRA operational change bargaining requirements, the place to begin is the labor contract, assuming there is one. If the collective bargaining agreement forbids operational changes and if the union would oppose them, there is no need to further ponder the NLRA obligations, at least until the prohibitory contract expires. If, on the other hand, a contractual bargaining waiver is clear, the change is authorized by the contract.

What if the contract is less than clear? Here the Board and a number of courts, including the D.C. Circuit, part company. The Board applies a "clear and unmistakable waiver" test. Even the slightest ambiguity will cause the Board to reject an argument that the bargaining obligation has been waived. See *Blue Circle Cement,* 319 NLRB 661, n. 4 (1995); *Exxon Research & Engineering Co.,* 317 NLRB 675 (1995). A number of courts, however, notably the D.C., Sixth and Seventh circuits, reject the Board's clear and unmistakable waiver analysis, and there has been no ultimate Supreme Court test of this disagreement. *See NLRB v. U.S. Postal Service,* 8 F.3d 832 (D.C. Cir. 1993) (no obligation to bargain over unilateral change by employer where the CBA reflects that the parties had bargained over the issue) (same); *Conoco, Inc. v. NLRB,* 91 F.3d 1523 (D.C. Cir. 1996); *see also McDonnell Douglas v. NLRB,*, 59 F.3d 230 (D.C. Cir. 1995) (case remanded to Board for reconsideration of Board's decision not to defer contract interpretation to arbitration process, the process agreed upon by the parties for determining contract disputes); *"Automatic" Sprinkler v. NLRB,* 120 F.3d 612 (6th Cir. 1997), *cert. den.,* 523 U.S. 1106 (1998); *Chicago Tribune Co. v. NLRB,* 974 F.2d 933 (7th Cir. 1992).

The court view in opposition to the Board is, first, that courts need not defer to the NLRB with respect to interpreting contracts. Courts interpret contracts all the time and do not need assistance from the Board. Second, the courts try to ascertain the intent of the parties and the meaning of the contract when the subject is contained in the contract. The Board's overly simplistic "clear and unmistakable waiver" test is rejected. *See NLRB v. U.S. Postal Service, supra*.

My personal experience with this Board and court disagreement, aside from my representation of the Chamber of Commerce in *Dubuque*, was in the very interesting case of *Elliott Turbomachinery*, 320 NLRB 141 (1995) (vacated Sept. 30, 1996). In *Elliott*, the Board found that bargaining over a relocation decision was mandatory and issued a move-back order. Adhering to its "clear and unmistakable waiver" test, two members of the Board panel concluded that the management rights clause was ambiguous. The clause stated:

> Subject to the provisions of this Agreement, the Union hereby recognizes that the management of the plant and direction of the working forces, including the right to direct, plan, control plant operations, establish and change working schedules, the right to hire, transfer, suspend or discharge employees for cause, layoff employees because of lack of work or for other legitimate reasons, the right to introduce new or improved methods or facilities or to management the properties, is exclusively vested in the Company. *To decide location of its plant, and to relocate the same;* to permanently discontinue the conduct of its business and operations.

According to then-Members Browning and Truesdale:

> . . . [U]nder settled Board law, the critical question, however, is not "whether such a right might reasonably be *inferred* from the management rights clause; it is whether that interpretation is supported by 'clear and unmistakable language.'

A320 NLRB at 141-42. Member Cohen dissented, following the D.C. Circuit approach of interpreting the contract terms and parties' intent when the contract "covers" the subject.

Asked by *Elliott* to appeal the Board's decision, I filed for review in the D.C. Circuit and drew a panel which included Judge Harry Edwards, the author of *Postal Service*. To make a long story short, the Board's enforcement attorneys vigorously sought to settle the case. A final settlement dropped the Board's move-back remedy altogether, and called for the Board to vacate its order and its decision. The Board agreed to do so and approved the settlement on September 30, 1996, vacating not only its order in *Elliott* but also its decision.

Interestingly, *Elliott* continues to be cited. In *Dorsey Trailers*, the Board had to remind an administrative law judge that its *Elliott* decision had been vacated, but nevertheless confirmed the ALJ's reasoning. *Dorsey Trailers, Inc.*, 327 NLRB No. 155, slip op. at p. 2 n.5 (March 12, 1999). More recently, in *Eby-Brown*, the Board itself cites *Elliott*, but noting that *Elliott* was "vacated pursuant to a settlement by unpublished Executive Secretary Order dated September 30, 1996." *Eby-Brown Co.*, 328 NLRB No. 75, slip op. at p. 2 (May 26, 1999). The Board emphasis seems to be on the fact that the *Elliott* case settled, not that its decision was vacated altogether. Since 1996, two administrative law judges and two Board panels have cited *Elliott*.

As one who was directly involved in the case, it is apparent that the Board was anxious to settle *Elliott*, not just because the parties had settled their differences, but because the Board feared what would happen to its "clear and unmistakable" approach to contract interpretation should this issue be reviewed once again by Judge Edwards. The vacated *Elliott* decision simply should not be cited at all, and least of all by the Board.

What if the contract is *silent* with respect to an operational change? If the contract is silent, there is no "waiver" of the union's right to bargain over the operational change assuming, of course, that the change is not so fundamentally entrepreneurial that no bargaining obligation exists in the first place -- as, for instance, a product or design change, a withdrawal of investor capital, or a customer cancellation. Even here, however, as discussed further below, bargaining may be required over the adjustment needed to accommodate a purely entrepreneurial change, as for instance, whether there should be layoffs or some other means of work sharing or adjustment.

In any event, when there is no clear contractual waiver of the obligation to bargain, bargaining most often is the prudent course, after which, at impasse, the operational change may be implemented unilaterally. However, there may be other contractual obstacles, such as a "zipper" clause. A contractual "zipper" or "complete agreement" clause may excuse a union from negotiating over mandatory bargaining subjects during the life of the agreement, and may operate as a union veto over a proposed operational change. *See Auto Workers v. NLRB (Milwaukee Spring II)*, 765 F.2d 175 (D.C. Cir. 1985); *CBS Corp.*, 326 NLRB No. 73 (August 27, 1998); *Mead Corp.*, 318 NLRB 201 (1995). That is, a zipper clause may excuse the union from bargaining at all, thus avoiding any agreement or impasse after which a change may be implemented. The zipper clause, then, as well as certain other contractual provisions -- *e.g.*, work preservation or guarantees -- may also operate to thwart or postpone operational changes during the life of an agreement, just as if there were out-and-out prohibitions. (It is for these reasons that I recommend against zipper clauses in most situations. They are more trouble than they are worth).

II. The Statutory Obligation to Decision-Bargain

Assuming there is no contractual bar or clear waiver, what are the requirements for bargaining about operational changes? Where decision-bargaining is required, it must be good faith bargaining, of course, but union consent itself not required. *Taylor Warehouse*, 314 NLRB 516 (1994).

The law on closings is reasonably clear. An employer may decide to shut down and go out of business for any reason, even an anti-union reason. *Textile Workers v. Darlington*, 380 U.S. 263 (1965). Even a partial closing

for anti-union reasons does not violate the Act, unless the partial closing is intended to chill unionism at other employer facilities. *Id.* at 275. *See also First National Maintenance,* 452 U.S. at 682 ("the union's legitimate interest in fair dealing is protected by §8(a)(3), which prohibits partial closings motivated by anti-union animus, when done to gain an unfair advantage").

A. Work Relocation/Transfer

We hardly need to be reminded of the Board fits and starts over the past 20 years concerning the obligation to decision-bargain about the relocation of bargaining unit work. It was the case involving the Dubuque Packing Company that provided the vehicle for the evolution of the Board's current view. Thus, in 1987, the Board issued its first *Dubuque* decision on the obligation to bargain over the decision to relocate work. *Dubuque Packing,* 287 NLRB 499 (1987) *Dubuque I*. In 1989, the D.C. Circuit remanded *Dubuque* and instructed the Board to formulate an understandable and consistent position on work relocation bargaining requirements. *UFCW Local 150-A v. NLRB,* 880 F.2d 1422 (D.C. Cir. 1989). Two years later, and after oral argument, the Board issued *Dubuque II* on June 14, 1991 (303 NLRB 386). That Board decision was enforced by the D.C. Circuit on August 10, 1993. *UFCW,* 1 F.3d 24 (D.C. Cir. 1993).

> We are all familiar with the decision-bargaining requirements of *Dubuque II*:
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> > Initially, the burden is on the General Counsel to establish that the employer's decision involved a relocation of unit work unaccompanied by a basic change in the nature of the employer's operation. If the General Counsel successfully carries his burden in this regard, he will have established prima facie that the employer's relocation decision is a mandatory subject of bargaining. At this juncture, the employer may produce evidence rebutting the prima facie case by establishing that the work performed at the new location varies significantly from the work performed at the former plant, establishing that the work performed at the former plant is to be discontinued entirely and not moved to the new location, or establishing that the employer's decision involves a change in the scope and direction of the enterprise. Alternatively, the employer may proffer a defense to show by a preponderance of the evidence: (1) that labor costs (direct and/or indirect) were not a factor in the decision or (2) that even if labor costs were a factor in the decision, the union could not have offered labor cost concessions that could have changed the employer's decision to relocate.

303 NLRB at 391.

The evolution of the decision-bargaining obligation did not end with D.C. Circuit approval of *Dubuque II*. In *Dubuque II,* the Board relied heavily on its interpretations of *Fibreboard* and the Supreme Court's 1981 decision in *First National Maintenance*. As is often the case under the NLRA, it did not take long for judicial disagreements to develop over the Board's reading of *FNM* and the bargaining requirements set out by the Board in *Dubuque II*. In particular, the Fourth Circuit had differing views of *FNM*. In *Arrow Automotive,* the Fourth Circuit viewed work relocation in connection with a plant closing more as an *FNM* entrepreneurial "partial closing" about which *FNM* teaches there is no bargaining obligation. *Arrow Automotive Indus., Inc. v. NLRB,* 853 F.2d 223 (4th Cir. 1988). In 1994, the Supreme Court granted *certiorari* in *Dubuque II* to resolve the conflicts between the D.C. Circuit in *Dubuque* and the Fourth Circuit in *Arrow*. Apparently not anxious to have its *FNM* interpretation views tested, the Board settled *Dubuque*, thus mooting the case and heading off Supreme Court review.

To this day, tension remains between the Fourth Circuit on the one hand and the Board and the D.C. Circuit on the other, along with questions concerning the proper interpretation of *FNM*. Since 1994, the only major Board development on work relocation was former Chairman William Gould's preference for abandoning *Dubuque II*. Chairman Gould wished to renounce *Dubuque II* and simply require decision-bargaining over work relocation in all situations "where the reasons underlying the relocation of unit work are amenable to bargaining." *Q-1 Motor Express, Inc.*, 323 NLRB 767, 770 (1997); *see also Detroit Newspaper Agency I*, 326 NLRB No. 64, slip op. at p. 22 n.11 ("Gould Statement") (Aug. 27, 1998). It is fortunate that Chairman Gould was unable to persuade any other Board members to his view. That view, of course, would throw management back into the never-never land of never knowing for sure when it has a decision-bargaining obligation. Who is to know in hindsight whether bargaining might have done some good?

The Gould view was never openly adopted by a Board majority. However, there are recent indications that a Board majority now may be headed for the Gould result without adopting his view that *Dubuque II* should be abandoned. Thus, in *Eby-Brown* a Board majority (Truesdale and Fox) held that a trucking employer's work relocation decision required decision bargaining, even though the employer's credited reasons for relocating the work, as set forth in Member Hurtgen's dissent, involved (i) the employer's desire to be closer to its customers, (ii) reduced inventory expenses, (iii) reduced rent and utility expenses, (iv) lower taxes, (v) reduced costs of overnight delivery and lodging, (vi) reduced numbers of partial loads, and (vii) improved ability to provide next-day service to its customers. *Eby-Brown, supra*, 328 NLRB No. 75, slip op. at pp. 5-6. Even though these factors do not relate "directly" to wages, hours and working conditions, citing *Dubuque II*, the Board majority held that these were "indirect" labor costs, and that the employer had "failed to establish that the Union could not have offered sufficient concessions to affect the transfer decision." *Id.* at p. 2. In other words, almost any economic factor can be indirectly related to or offset by labor costs and, who knows, bargaining might have done some good -- the Gould approach. As Member Hurtgen stated in dissent:

> If such reasoning were used, virtually all decisions would be mandatory, for virtually all of them are driven by economics, and wages theoretically could offset the [union's] benefits. Clearly, the Supreme Court did not intend this result.

Id. at p. 5 n.2

The clearest Board case finding no decision bargaining obligations predates *Eby-Brown* by nearly four years. *See Nu-Skin International, Inc.*, 320 NLRB 385 (1995). In *Nu-Skin*, the factors leading to the relocation decision were so overwhelmingly business related that not even the *Eby-Brown* majority would be likely to find a bargaining obligation. There was simply no way that union bargaining could have overcome the employer's compelling core business reasons, which included a dramatic drop of more than 50% in the company's orders and net sales, labor cost savings from the relocation almost equal to the total bargaining unit payroll, and a reduction in jobs at the plant where the work was moved.

B. Subcontracting

The Board almost invariably applies *Fibreboard* broadly, and woodenly, when deciding 8(a)(5) subcontracting cases. Since its lead 1992 decision in *Torrington Industries*, 307 NLRB 809 (1992), the Board disregards its burden-shifting *Dubuque* test in subcontracting cases and requires decision-bargaining whenever it can find so-called "*Fibreboard*" subcontracting, i.e., when "all that is involved is the substitution of one group of workers for another to perform the same work at the same plant under the ultimate control of the same employer." *Torrington*, 307 NLRB at 810. *See, e.g., Dorsey Trailers, supra*, 321 NLRB at 616; *Rock-Tenn*, 319 NLRB 1139 (1995); *Geiger Ready-Mix*, 315 NLRB 1021 (1994); *Furniture Rentors*, 311 NLRB 749 (1993) *Furniture Rentors I*.

Thus, with rare exception,[1] the Board will ignore employer motives for deciding to subcontract even when the decision appears not to involve labor costs.

Courts, however, do not uniformly accept this approach. In refusing to enforce a Board order in *Furniture Rentors*, the Third Circuit found the Board's mechanical approach "simplistic and . . . potentially ham-handed." *Furniture Rentors v. NLRB*, 36 F.3d 1240, 1250 (3d Cir. 1994). The Board in *Furniture Rentors* had determined that employee theft, as well as customer service complaints concerning bargaining unit employees, were "indirect" labor cost problems that the employer was obliged to attempt to resolve through collective bargaining, rather than by unilaterally subcontracting out the bargaining unit work. *See supra, Furniture Rentors I*. The Court disagreed:

> We do not read *Fibreboard* and *First National [Maintenance]* as requiring employers to automatically bargain with employee representatives over the inviolability of their own property, without regard to the benefit likely to be obtained from the process. Nor are we able to perceive any likelihood of benefit to be derived from subjecting the problem of employee thievery to collective bargaining.

Furniture Rentors, 36 F.3d at 1250. While the Third Circuit continues to utilize this *Dubuque-like* analysis to look carefully behind subcontracting decisions, *see, e.g., Dorsey Trailers v. NLRB*, 134 F.3d 125, 133 (3d Cir. 1998) (no obligation to bargain over subcontracting decision that was implemented to "fill orders and maintain a healthy, viable business"), other circuits have not followed suit. *See, e.g., Rock-Tenn Co. v. NLRB*, 101 F.3d 1441, 1446 (D.C. Cir. 1996) (the Board "permissibly distinguishes what it calls a Fibreboard subcontract from a relocation decision").

Nor has the Board departed from its rigid application of *Torrington*. *See, e.g., Westchester Lace, Inc.*, 326 NLRB No. 119, slip op. at p. 17 (Board affirms ALJ conclusions that the Board's decision on remand in *Furniture Rentors* was merely "law of the case," and that subcontracting decisions based primarily on "productivity factors" and not labor costs are amenable to bargaining); *see also CBS Corporation*, 326 NLRB No. 73, slip op. at p. 12 n.7 (Aug. 27, 1998) (*Torrington* reaffirmed); *Rock-Tenn Co., supra*, 319 NLRB at 1139 n.1 (employer's subcontracting decision held a mandatory bargaining subject under both *Torrington* and the Third Circuit's approach in *Furniture Rentors*). However, recent NLRB General Counsel complaints have begun supporting alleged *Torrington* subcontracting violations with alternative *Dubuque* arguments. WPLT-TV, 12-CA-20022 (Complaint authorized December 13, 1999).

Finally, even bargaining does not excuse discriminatory subcontracting. See *Joy Recovery Technology Corp.*, 320 NLRB 356 (1995); *"Automatic" Sprinkler Corp. of America*, 319 NLRB 401 (1995); *Uforma/Shelby Business Forms, Inc. (Miami Systems Corp.)*; *Allegheny Ludlum Corp.*, 320 NLRB 484 (1995); *Gold Coast Produce*, 319 NLRB 202 (1995).

C. Downsizing

According to the Board, an economic decision to lay off bargaining unit employees normally is "amenable to resolution through the collective bargaining process" and constitutes a mandatory bargaining subject. *Lapeer Foundry and Machine, Inc.*, 289 NLRB 952 (1988). While *Lapeer's* reliance on *Otis Elevator* for some of its analysis has been disavowed by the Board following *Dubuque*, the essential conclusion of *Lapeer* about the broad

[1] *See, e.g., Oklahoma Fixture*, 314 NLRB 958, 960 (1995) (no bargaining obligation where employer's subcontracting decision was based on "core entrepreneurial" desire to avoid potential legal liability that could ruin the company).

duty to bargain over layoffs remains intact. *See, e.g., Executive Cleaning Services, Inc.*, 315 NLRB 227, 227 n.5 (1994).

Even when layoffs are an *effect* of an otherwise entrepreneurial "core" decision about which there is no decision-bargaining obligation, decision *and* effects bargaining are required with respect to such layoffs. In *Odebrecht Contractors of California, Inc.*, 324 NLRB 396 (1997), the Board avoided this decision-bargaining issue by concluding that the General Counsel had asserted only an effects bargaining violation. (The employer in *Odebrecht* unilaterally eliminated a rotating shift due to California wage & hour requirements, resulting in layoffs.) But then, in a very recent case, *Bridon Cordage, Inc.*, 329 NLRB No. 35 (Sept. 29, 1999), a Board panel of Chairman Truesdale and Members Fox and Liebman concluded that there is a decision-bargaining obligation with respect to layoffs even when they result from operational decisions that do not require bargaining. In *Bridon*, layoffs were prompted by the entrepreneurial decision to reduce inventory. According to the Board:

> . . . . [E]ven where the layoffs are the direct result of a decision that is not itself a mandatory subject of bargaining, there is still room for bargaining about the layoffs themselves. There are alternatives that an employer and a union can explore to avoid or reduce the scope of the layoff without calling into question the employer's underlying decision.

Id., slip op. at p. 2.

Notably, however, where an employer has violated this derivative obligation to bargain over a layoff decision, the Board applies a *Transmarine Navigation* effects- bargaining remedy, not the full back pay and reinstatement remedy applied in cases where there is an independent and separate obligation to bargain over layoffs. *Bridon Cordage*, 329 NLRB, slip op. at 2 n.11.

D. Work Reassignment/Transfer

The Board also applies *Fibreboard/Torrington* subcontracting analysis to unilateral work transfers or reassignments, unless the employer's actions can be categorized as representing a significant change in the scope or direction of the business. In *Geiger Ready-Mix*, the employer's transfer of unit work to its nearby facilities resulted in unit layoffs. *See Geiger Ready-Mix Co. of Kansas City*, 315 NLRB 1021 (1994), *enf'd. in rel. part*, 87 F.3d 1363 (D.C. Cir. 1996). The employer cited economic and other entrepreneurial reasons to justify its actions, arguing for application of *Dubuque* analysis. Rejecting this approach, the Board stated that the *Dubuque* test was "devised for plant relocations potentially involving complex decisions respecting both the allocation of capital and the replacement of one group of employees with another," and not for decisions of lesser scope, especially when unaccompanied by any permanent plant closure or relocation. 315 NLRB at 1022; *see also Wells Fargo Armored Service Corp.*, 322 NLRB 616 (1996) (work reassignment for economic reasons without anti-union animus, held a mandatory bargaining subject).

E. Automation/Technological Advances

Prior to *First National Maintenance*, the Board required employers to bargain over the decision to implement automation or other technological advances that reduced the size of the bargaining unit. *See Town & Country Mfg.*, 136 NLRB 1022 (1962) (holding that virtually any employer decision that results on the elimination of jobs is mandatory bargaining subject). In *FNM*, the Supreme Court specifically identified automation-related decisions as potentially falling outside the scope of the holding in that case. *FNM*, 452 U.S. at p. 686 n.22. In its *Dubuque* of work relocation, the Board indicated, too, that it was not discussing automation. *Dubuque II*, *supra*, 303 NLRB at 390 n.8. In 1991, the Office of the General Counsel issued a Guideline Memorandum advising Regional Directors

on how to apply *Dubuque* in relocation cases, instructing them to submit to the Division of Advice automation and other "category three" operational charges identified in *FNM*'s footnote 22. *See* General Counsel Memorandum GC 91-9 (Aug. 9, 1991); *see also* 1991 Daily Labor Report (BNA) No. 157, at F-1 (Aug. 14, 1991). No Board decision or GC Advice Memorandum released since then has squarely addressed the decision-bargaining test in automation cases. Some Board rulings suggest an *FNM* analysis, with the obligation to bargain over technology-driven decisions hinging on the degree of change caused by the new technology on the scope and direction of the employer's business. *See Noblit Brothers, Inc.*, 305 NLRB 329, 330 (1992) (no bargaining obligation over employer's creation of new telemarketing division and streamlining of operations with telephone and computer advancements, despite possible impact on bargaining unit jobs, where "change . . . clearly amounts to a decision basically concerned with 'the scope and direction of the enterprise' that the Court in *First National Maintenance* held was not a mandatory subject of bargaining [footnote omitted]"). *Compare The Winchell Co.*, 315 NLRB 526, 526 n.2 (1994) (bargaining obligation existed over introduction of desktop computers, resulting in layoffs, where "the technological advance . . . changed the Respondent's operation by degree not kind"); *see generally,* James L. Atkinson, *Automating the Workplace: Mandatory Bargaining Under Otis II*, 1989 U. ILL. L. REV. 435.

F. Consolidation

The Board analyzes work consolidations or mergers, which normally involve work relocation and the closing of plants, under *Dubuque II*. *See NLRB v. Owens-Brockway Plastic Products, Inc.*, 311 NLRB 519 (1993).

In *Owens-Brockway*, the Board determined that the employer failed to prove that its consolidation and plant closing was the result of an entrepreneurial reorganization involving a change in the scope and direction of the enterprise. Rather, the Board determined under *Dubuque II* analysis that the work reassignment involved decisions that resulted in relatively insignificant changes in the company's operations. The employer therefore had not satisfied its burden of showing that the union could not have offered labor cost concessions that could have changed the employer's decision to relocate the bargaining unit work. *See also Dorsey Trailers, supra,* 327 NLRB No. 155, slip op. at 24; *Nu-Skin, supra,* 320 NLRB at 387 n.5.

Of course, following the Fourth Circuit, the closing of a plant, even though work transfers are involved, is subject to a *First National Maintenance*, not a *Dubuque*, analysis. *Arrow Automotive Industrial v. NLRB,* 853 F.2d (4th Cir. 1988).

G. Change of Established Practice

The obligation to bargain over the decision to change an established practice seems to depend on whether the change is dictated by some "core" entrepreneurial or outside factor, or whether the change is prompted by economic considerations on which a union might consistently bargain. Thus, bargaining was not required over the decision to eliminate a rotating shift due to the impact of state overtime requirements. *Odebrecht Contractors of California, Inc., supra*. Similarly, in *Bridon Cordage, Inc., supra*, there was no obligation to bargain over a decision to reduce inventory by reducing production.

However, implementation of a new attendance policy without bargaining was simply a change in working conditions over which advance notice and decision bargaining were required. *Roll and Hold Warehouse & Distribution Corp.,* 325 NLRB No. 1 (Nov. 8, 1997), *enf'd* 162 F.3d 513 (7th Cir. 1998). *See also Blue Circle Cement Co.,* 319 NLRB 661 (1995) (change in rotating shift policy); *Burns International Security Services,* 324 NLRB 485 (1997) (change in holiday pay practice).

III. At What Point Must Decision-Bargaining Occur?

There are essentially two aspects to this timing question -- legal timing requirements and practical timing requirements.

Normally, required decision-bargaining must take place sufficiently in advance of the final decision to give the union a reasonable opportunity for meaningful input and to satisfy its representational obligations. *See, e.g., Associacion Hosp. del Maestro,* 317 NLRB 485, 523 (1995), *enf'd.* 77 F.3d 460 (1st Cir. 1996); *Paramount Liquor Co.,* 270 NLRB 339, 343 (1984); *Smyth Mfg. Co.*, 247 NLRB 1139, 1168 (1980). Timing will vary depending upon the circumstances. The Board has recognized, as in *Dubuque*, that exigencies may require swifter union reaction and permit compression of the bargaining. *See Dubuque II*, 386 NLRB at 392 n.18 The same general requirements prevail for decision bargaining over other operational changes. A union must have a reasonable opportunity for meaningful bargaining input. To simply present the union with a *fait accompli* does not satisfy the employer's bargaining obligation. *See Roll & Hold Warehouse & Distribution Corp., supra*; *Detroit Edison Co.*, 310 NLRB 564, 565-66 (1993); *Ciba-Geigy Pharmaceuticals Div.,* 264 NLRB 1013, 1016 (1982), *enf'd.*, 722 F.2d 1120, 1126-27 (3rd Cir. 1983).

However, practical considerations often control the timing of decision- bargaining. For instance, what will the union's reaction be? Will it seek to obstruct or delay the change?[2] Will it attempt to string out the bargaining with information or other demands? How long will it take to get a "legally cognizable" impasse after which the operational change may be implemented unilaterally?[3]

These are the practical considerations that most often influence employer decision-bargaining timetables. In order to convince the Board, if necessary, that there has been good faith bargaining and a "legally cognizable" impasse, an employer must leave ample time for bargaining and ample time to cope with opposing union tactics. Union information demands must be anticipated. *See, e.g., Lehigh Portland Cement*, 286 NLRB 1366 (1987); *International Paper Co.,* 319 NLRB 1253 (1995), *enf. den. on other grounds*, 115 F.3d 1045 (D.C. Cir. 1997). And time must be allowed for transitional impasses to come and go. *See Charles D. Bonanno Linen Service v. NLRB,* 454 U.S. 404 (1982).

From an employer viewpoint, the Board, or at least a Board majority, simply abhors an impasse. The best example of this abhorrence is the Board's recent decision in *Anderson Enterprises (Royal Motor Sales)*, 329 NLRB No. 71 (Sept. 30, 1999). In the lengthy *Royal* decision, a Board majority reversed an administrative law judge's 1989 determination that a valid good faith impasse existed in 1988 among car dealers in California that were bargaining with a number of unions. Ten years later, the Board majority's methodical dismantling of the ALJ's impasse findings represents a classic example of how far the Board will go to avert an impasse. The Board majority also unraveled the ALJ's findings that the employer's lockout and withdrawal of recognition were lawful. Dissents by Members

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[2] "Labeling this type of decision mandatory 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." *FNM, supra*, 452 U.S. at 683.

[3] "An employer would have difficulty determining beforehand whether it was faced with a situation requiring bargaining or one that involved economic necessity sufficiently compelling to obviate the duty to bargain. If it should decide to risk not bargaining, it might be faced ultimately with harsh remedies forcing it to pay large amounts of back pay to employees who likely would have been discharged regardless of bargaining, or even to consider reopening a failing operation. *FNM, supra*, 452 U.S. at 684-685.

Hurtgen and Brame place the weaknesses of the majority's reversal into sharp focus. The Board is headed for trouble if *Royal* finds its way to court.

To reiterate, though, the practical timetable for decision-bargaining most often controls, rather than the more theoretical timing placed on bargaining by the Board and courts. Ample time must be reserved to deal with union opposition and to later satisfy Board suspicion. Often it is difficult for management attorneys and client human resources personnel to convince operations officials of the need for ample time and patience.

IV. Effects Bargaining

Effects bargaining, unlike decision bargaining, is relatively uncomplicated: An obligation to bargain about effects almost always exists whether or not an operational change first requires decision-bargaining. And, under ¶8(2)(5), bargaining over the effects of a decision must be conducted in a meaningful manner and at a meaningful time, and the Board may impose sanctions to insure its adequacy." *FNM, supra*, 452 U.S. at 682-83. There can be exceptions where the collective bargaining agreement already contains clear effects language or clearly waives effects bargaining altogether, or where some entrepreneurial or financial reason makes effects bargaining futile. Normally, however, employers recognize that the duty to bargain over effects is broad. They understand, also, that there is no obligation to grant effects bargaining concessions. It simply is better, and more practical, to offer to bargain over effects and to avoid legal entanglements.

The trickiest effects issue relates to when the effects bargaining duty arises. At what point must a union be provided notice of an operational change in order to afford it the opportunity to engage in effects bargaining. The usual rule is that notice must be sufficiently in advance of the change so as to give the union a meaningful opportunity to bargain, *i.e.*, at a time when it maintains at least some remaining bargaining leverage.[4] Of course, as a practical matter, notice already exists where decision-bargaining over the operational change has occurred. In some cases, there are special notice rules, as with the sale of all or part of a business. *See, e.g., Riedel International (Willamette Tug and Barge),* 300 NLRB 282 91990) (notice required in advance of closing, not while sale is being negotiated).

In some cases, failure of advance notice may be excused, as when a sudden change is prompted by third parties (customers, parent companies, creditors). *See, e.g., Raskin Packing Co.,* 246 NLRB 78 (12979) (no "notice" violation where plant closure necessitated immediately by bank's refusal to extend line of credit"); *M&M Transportation Co.,* 239 NLRB 73 (1978) (notice obligation excused where employer ceased operations immediately upon learning that reasonably anticipated loan has fallen though. Here, however, the burden is on the employer to prove that its failure to provide advance notice is excusable. *Compact Video Services, Inc.,* 319 NLRB 131, 131 n.1 (1995), *enf'd.* 121 F.3d 478 (9th Cir. 1997); *Willamette Tug, supra*, 300 NLRB at 283 n.5; *see generally, FNM*, 452 U.S. at 683-86.

Finally, as discussed above, an effects bargaining obligation, *e.g.*, over an entrepreneurial operational change, can give rise to new decision *and* effects bargaining obligations. For instance, a production cutback can give rise to an obligation to bargain over the *decision* to layoff employees as well as the effects of the layoff. *See Bridon Cordage, Inc., supra*, 329 NLRB No. 35.

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[4] The normal "*Transmarine*," remedy for failure to bargain over effects seeks to restore bargaining leverage to the union by providing two weeks back pay and restarting the back pay clock while required effects bargaining takes place. *See, e.g., See Odebrecht Contractors, supra,* 324 NLRB No. 74, slip op. at 1 n.2 (1997) (citing *Transmarine Navigation,* 170 NLRB 389 (1968)).

Generally, however, it is not difficult to comply with effects bargaining obligations, and it is better to do so and avoid legal entanglements, hopefully to ensure a smooth transition with a satisfactory shutdown agreement being a prime example. Frequently, too, effects bargaining and WARN obligations overlap, with both requiring advance notice.

V. Information

How much information must be supplied about operational changes and when must it be supplied?

Everyone knows the general ground rules. Information concerning the bargaining unit which may be needed by the union for collective bargaining or contract administration purposes, is "presumptively relevant" and must be timely supplied.[5] *See NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (obligation to supply relevant information during bargaining) (1956); *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (obligation to supply relevant information during the term of the contract) (1967) Where information sought is "extra unit," *i.e.*, relates to matters outside the bargaining unit, there is no presumptive relevance, but the union may establish relevance. *See, e.g., Crowley Marine Services*, 329 NLRB No. 92 (Nov. 10, 1999). Positions taken by the employer during bargaining also may establish relevance, as with the need to conform pay and benefits to non-unit employee groups or pleas of inability to pay. *See Conagra*, 328 NLRB No. 24 (April 29, 1999). Confidential information, even if relevant, may be withheld if an employer can make a substantial case for confidentiality and offers to bargain in good faith over reasonable accommodations to satisfy the union's legitimate needs and the employer's legitimate confidentiality concerns. *Detroit Edison*, 440 U.S. 301 (1979); *see also Metropolitan Edison Co.*, 330 NLRB No. 21 (Nov. 25, 1999).

When a bargaining obligation does exist -- a decision *or* effects bargaining obligation -- there is an accompanying obligation to supply relevant information. What information and how much must be supplied varies in particular situations. Since the obligation is quite broad, the duty often becomes a trap for the unwary employer or the employer bent on testing the limits of the union's entitlement. There can be no good faith bargaining or lawful unilateral implementation where an employer has missed an information "stitch." There are many cases in which the failure of impasse has hung on the failure to comply with the obligation to supply information. *See, e.g., supra, Leigh Portland Cement and International Paper Co., see also U.S. Testing Co.*, 324 NLRB 854 (1997), *enf'd.*, 160 F.3d 14 (D.C. Cir. 1998).

Even where there may be no obligation to supply information about, for instance, an entrepreneurial decision, such as a decision to partially close, may be a duty to supply information based on a union's contract administration duties and needs, *e.g.*, as to whether to file and process grievances or proceed to arbitration. The contract administration obligation to furnish information is every bit as broad, and a failure to fulfill that obligation can needlessly complicate matters for the employer and taint its efforts to comply other bargaining requirements. *See supra*, *NLRB v. Acme Industrial*; *see also Metropolitan Edison Co.*, 330 NLRB No. 21 (and cases cited therein) (Nov. 26, 1999).

Typical union information requests include requests for copies of the purchase agreements. An entire purchase agreement including its financial provisions need not always be supplied, but provisions dealing with employees, their benefits, collective bargaining agreements, and respecting their employment, must be disclosed. *See, e.g., Southern Ohio Coal Co. v. NLRB*, 87 F.3d 1309 (Unpublished Decision) (4th Cir. 1996) (reversing NLRB order to disclose entire purchase agreement, and remanding for Board *in camera* determination of relevant purchase agreement information); *see also Knappton Maritime Corp.*, 292 NLRB 236 (1988) (entire agreement required to be supplied where employer makes agreement terms relevant); *Supervalue, Inc. v. NLRB*, 184 F.3d 949 (9th Cir. 1999 full agreement needed for WARN compliance). *RBH Dispersions*, 286 NLRB 1185 (1987) (employer permitted to

[5] A union owes a similar duty. *See California Nurses*, 326 NLRB No. 142 (Sept. 30, 1998) (union has duty to supply relevant grievance information).

redact confidential price information from sales agreement). A typical request would be for information concerning employer compliance with contractual successorship provisions. An employer would refuse such a request at its peril.

Other anticipated operational changes -- *e.g.*, work relocation, subcontracting, downsizing, automation -- typically raise contractual issues or suggest operational alternatives that a union might wish to propose in order to reduce the impact on bargaining unit employees. Information often must be supplied in such situations. *See, e.g., International Paper, supra*, 319 NLRB 1253 (internal cost analyses); *Wehr Constructors, Inc.*, 315 NLRB 867 (1994), *enf'd. in rel. part*, 159 F.3d 946 (8th Cir.) (subcontracts); *Facet Enterprises, Inc.*, 290 NLRB 152 (1988) *enf'd. in rel. part*, 907 F.2d 963 (10th Cir. 1990) (work relocation and downsizing); *Reece Corp.*, 294 NLRB 448 (1989) (management study); *Hofstra University*, 324 NLRB 557 (1997).

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There is every indication that bargaining requirements over operational changes, as they have for the last quarter century, will continue to evolve. Will *Dubuque II* be applied to other types of operational changes besides work relocation? Will *Dubuque II* itself be overruled or modified interpretively? Will the Board follow the General Counsel's lead and bring its bargaining requirements for subcontracting more in line with *Furniture Rentors*? When will the Supreme Court have an opportunity to further explain the meaning of *Fibreboard*? When will the Court have the opportunity to clarify its decision in *First National Maintenance* and to resolve the differences between the Fourth Circuit and the Board and D.C. Circuit over relocation bargaining requirements?

As labor lawyers, all of us would love to be paid by clients to help resolve these interesting legal issues. The problem is that clients are not interested in spending resources so that we can satisfy our intellectual curiosity. They would rather stay out of trouble in the first place. Which is why nearly all of us recommend that clients bargain when they can (sometimes with reservations about their obligation to do so) and set realistic time tables for the completion of bargaining.

It is better from a client's standpoint to satisfy potential bargaining obligations if there are ways of doing so without undermining the needed change or the timetable for accomplishing it. This is the real skill test for management lawyers -- how to satisfy bargaining requirements, if necessary, unilaterally implement an operational change, and be able to convince a reluctant Board, or better still the General Counsel, that the change was only made after a "legally cognizable" bargaining impasse.