Robotics in the Workplace: The Employer's Duty to Bargain over Its Implementation and Effect on the Worker

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I. INTRODUCTION

The National Labor Relations Act section 8, subdivision (d),¹ states that an employer and the representative of the employees have a mutual obligation... to confer in good faith with respect to wages, hours and other terms and conditions of employment..."² Those subjects deemed by the National Labor Relations Board³ and the courts to encompass "terms and conditions of employment" are commonly referred to as mandatory subjects of collective bargaining.⁴ An employer's failure to bargain concerning a mandatory subject is deemed an unfair labor practice by the NLRB and is a violation of section 8(a)(5)⁵ of the NLRA.

There is an inherent tension between labor unions and employers as to whether there is a need to bargain at all. The union prefers...
to discuss all topics requiring decisions that would directly or indirectly affect workers within its bargaining unit. Management, on the other hand, seeks to retain as much unilateral control of its decisions as possible in order to avoid costly delays and concessions and to maximize productivity. Reconciliation of these two opposing forces is necessary when robotics are introduced into the workplace. Since robotics are used to replace human workers performing specific tasks, the direct effect of the employer's decision to implement robotics would be lost jobs for those displaced within the bargaining unit—a topic of great concern to labor.

This comment analyzes and balances the competing interests of labor and management and determines whether the employer has a good faith duty to bargain with the union over the decision to implement robotics. No previous cases have dealt directly with this controversy. Therefore, analogous cases that have had an impact on job security—those concerning decisions to subcontract, relocate, automate or to partially terminate a business—will provide a legal framework in which to evaluate the amenability of the subject of robotics to mandatory collective bargaining. After applying the analysis utilized in the analogous cases to an employer's decision to implement a robotics system, this comment concludes that the employer does not have a mandatory duty to bargain with the union over this decision. Finally, this comment questions whether this is the correct result, and suggests that the employer should be required to bargain over the effects of this decision on the bargaining unit.

6. The congressionally-mandated process of collective bargaining may be viewed essentially as a compromise between two antithetical and immoderate approaches to the respective roles of public duty and private right. On the one hand, the bargaining process is designed not to interpose government as the central actor in labor relations, but rather to preserve intact the liberty of the parties to agree by themselves on the substantive terms governing their interaction. On the other hand, collective bargaining was seen by the Congress that enacted the NLRA as a rejection of an excess of private economic freedom, an excess which was considered to pose a substantial danger in the setting of our modern, highly independent economy.

Brockway Motor Trucks v. NLRB, 582 F.2d 720, 731 (3d Cir. 1978).


7. See infra notes 8-24 and accompanying text.
II. BACKGROUND

A. Robotics: Current Existence and Future Impact

One hundred and fifty years ago the human race began its love/hate relationship with the machine during the Industrial Revolution. This tenuous relationship dramatically altered the ways that people lived and worked. Overall, however, the positive aspects of this relationship eventually produced a so-called "second Industrial Revolution" with the development of the "microprocessor." The use of the microprocessor to automate production functions was epitomized by the development of the robot. This programmable automation improves profitability because it replaces an average of two to three humans per robot. A fully-equipped robot costs approximately $75,000, and performs at ninety-five percent efficiency for eight years (depreciation rate period); two workers for the same period would cost at least $250,000. Currently 22,000 robots are in use worldwide, with 5,000 of those being utilized in the United States. Sales are predicted to rise at a rate of thirty-five to fifty percent a year, and by 1990 the United States could have 100,000 to 150,000 robots with annual sales topping $2 billion. It is estimated that the use of robots in the United States will eliminate 100,000 to 200,000 jobs by 1980 and 30,000 to 50,000 (thirty to forty percent) of these

9. Id. at 10.
11. Id.
12. Id.
13. Id.

Another commentator noted:

A study conducted at Carnegie-Mellon University asserts that the current generation of robots has the technical capability to perform nearly seven million existing factory jobs—one-third of all manufacturing employment—and that sometime after 1990, it will become technically possible to replace all manufacturing operatives in the automotive, electrical-equipment, machinery, and fabricated-metals industries.

Levitan & Johnson, supra note 8, at 11.
jobs are expected to be in the auto industry alone. Therefore, the unemployment impact of industry implementation of robotics is most likely to be felt by those workers who are least skilled and who are most likely to be represented by trade unions.

There are two important reasons why robotics differ from other types of new and increasingly-available technology such as computers. The first is that computers do not replace workers, but rather do jobs that humans cannot. Secondly, the reproductive capacity of robots—the prospect of robots building robots—is a technological potential which would have a tremendous impact on the worker. Usually, when an industry mechanizes and displaces workers, new jobs are created in another area. This is initially what would happen in the case of robotics. New jobs would be created building and producing robots until robots could be programmed to perform this function themselves. Thus, the long-term effect of robotics would be the unemployment of a large number of unskilled or semi-skilled workers who literally could not be absorbed into the existing employment environment primarily because of their


16. There are, however, companies whose low-skilled workers are not unionized. Atari Corporation, a producer of electronics systems located in California's Silicon Valley, is an example of such a company. In 1983, its employees voted against union representation. Subsequently, Atari laid off 1,700 of its workers and transferred their jobs to Asia where labor is less expensive, thus reducing overall production costs. Presently, those employed in the "high tech" industries who possess greater technical skills are enjoying a job boom. See Karmin, High Tech: Blessing or Curse, U.S. NEWS & WORLD REPORT 38, 39-43 (Jan. 16, 1984). However, as robots become more sophisticated, even these more highly-skilled workers will eventually be replaced. Ironically, those individuals currently helping to produce the microprocessor and other related technology used in robotics can be seen as manufacturing the seeds of their own eventual job destruction.

17. Projections in Growth of Industrial Robot Use, 113 LAB. REL. REP. (BNA) 74, 75 (1983). There will, however, be an increased demand for more technically trained workers primarily in the areas of robot maintenance and repair. Id. Also, "[T]he Bureau of Labor Statistics says 800,000 jobs will be created in this decade to produce robots, and the National Bureau of Standards projects that every new robot will create from two to four man-years of work somewhere in the economy." Hearings on Robotics and Unemployment, 112 LAB. REL. REP. (BNA) 250, 251 (1983).


19. Levitan & Johnson, supra note 8, at 12.

20. For example, displaced workers ideally could find employment in a plant helping to produce the new types of machines which had initially displaced them. Thus one industry would, in effect, give rise to another thereby either maintaining or increasing the number of available jobs. See Albus, Robots in the Workplace, THE FUTURIST 22, 26-27 (Feb. 1983). See also Coates, The Potential Impact of Robotics, THE FUTURIST 28-31 (Feb. 1983).
In order for American employers to stay in business and perhaps even turn a profit, the increased productivity potential of robotics may provide the only means to remain competitive with rivals who use low cost foreign labor. Also involved in this issue are the labor unions who see the impact of robotics as a major source of worker displacement. Bringing these two opposing factions together is the purpose of collective bargaining under the National Labor Relations Act.

B. Legislative History and Purpose of the National Labor Relations Act Section 8(d)

The National Labor Relations Act was enacted in 1935 and has been amended several times. The second amendment, the Labor-
Management Relations Act of 1947, 26 states that the purpose of the Act is to promote the peaceful settlement of industrial disputes. 27 This is to be accomplished through the use of the collective bargaining process whereby negotiations take place between employers and employee representatives regarding the provisions of their contract. 28 When enacting this legislation, the House rejected a proposal to limit the mandatory bargaining subjects under section 8(d) to a specific statutory list. 29 Instead, Congress decided that the appropriate subjects for mandatory collective bargaining under this section should be determined in the first instance by employers and the union, and then by the NLRB and the courts. 30 The importance of classifying a subject as either mandatory or permissive is that mandatory subjects must be discussed in good faith by the employer and the union until an agreement is reached or an impasse occurs. 31 Failure to bargain over a mandatory subject, or lack of good faith by the employer is violative of the Act, and the employer is considered to have committed an unfair labor practice. 32 But an employer need not bargain forever. If an impasse occurs after good faith deliberations have taken place, the employer is free to make a unilateral decision that would not constitute an unfair labor practice. 33 Conversely, permissive subjects of bargaining need not be discussed at the bargaining table, and one party may not compel the other to address it as a condition of executing a collective bargaining agreement. 34 There-

28. Id.
31. An impasse is a deadlock between two parties to a negotiation where neither side is willing to compromise on an issue. R. GORMAN, supra note 4, at 498.
32. This would be a violation of § 8(a)(5) of the NLRA. See supra note 5. The usual remedy issued by the Board to rectify this unfair labor practice is an order to the wrong-doer (employer or union) to cease and desist from its illegal conduct and to begin to bargain in good faith. R. GORMAN, supra note 4, at 532.
33. R. GORMAN, supra note 4, at 522. See generally Fleming, The Obligation to Bargain in Good Faith, 47 VA. L. REV. 988 (1961) (examining the scope of mandatory bargaining subjects and the role of governmental intervention in the bargaining process, with respect to voluntary demands).
34. Brockway Motor Trucks v. NLRB, 582 F.2d 720, 726 (3d Cir. 1978). See also R. GORMAN, supra note 4, at 498. This case said: "Non-mandatory or 'permissive' provisions deal with subjects other than wages, hours and working conditions . . . either party may pro-
fore, categorizing a subject as mandatory benefits the union to the extent that no action in this area can be taken by the employer without first consulting the union. In essence, this increases the union’s power to influence those decisions. This categorization burdens the employer however, as it reduces his or her power to unilaterally make decisions regarding his or her business. In the past, the Board and the courts have included broad and diverse topics as mandatory subjects of bargaining.

The primary question for discussion is whether employee termination resulting from the implementation of robotics should be considered a mandatory subject of collective bargaining. As mentioned previously, because there have been no cases dealing with this topic, the starting point for resolving this complex and controversial issue is the examination of past cases which have also dealt with employee terminations and job displacement. These cases involve employer decisions to subcontract, relocate, automate, and partially terminate a business.

III. THE EXISTING LEGAL FRAMEWORK: PAST DECISIONS OF THE NLRB AND THE COURTS

A. Contracting Out and Subcontracting Existing Unit Work

When an employer decides to “contract out” or to subcontract work which is presently being performed by union employees, he or she is seeking to replace these union workers with employees of another company that can complete the work more cheaply in the hope of reducing labor costs. The NLRB and the federal courts have previously reviewed subcontracting cases to determine whether the decisions to contract out should be a mandatory topic of discussion during collective bargaining.

Early in the history of subcontracting cases, the landmark case of fibreboard Paper Products v. NLRB was decided by the
United States Supreme Court. *Fibreboard* concerned that company's decision to effect a cost savings by contracting out its maintenance work formerly done by union employees. The court of appeals affirmed the NLRB decision which held that the employer in this case had a mandatory duty both to bargain with the union over its decision to subcontract and over the effect of its decision on the bargaining unit. The Supreme Court agreed.

The employer company in *Fibreboard* had argued that because its decision to subcontract was economically motivated, the decision was excluded as a subject for mandatory bargaining. The Court in *Fibreboard* gave several reasons for rejecting the employer's argument. The first reason was that termination of employment would result from the contracting out of work performed by members of the established bargaining unit, and therefore this subject matter was well within the phrase "terms and conditions of employment." The second reason was that the inclusion of "contracting out" within the statutory scope of collective bargaining seems well designed to effectuate the purposes of the NLRA. As mentioned previously, one of the primary purposes of the Act is to promote the peaceful settlement of industrial disputes by subjecting them to the mediatory influence of negotiation. Thus, making subcontracting a mandatory subject of collective bargaining resolves labor-management disputes within the framework established by Congress as most conducive to industrial peace. The third reason was the fact that voluntary collective bargaining over subcontracting decisions is prevalent throughout industry and that bargaining in this area has been highly successful in achieving peaceful accommodations of the conflicting interests.

39. *Id.*
41. 379 U.S. 203.
42. If the decision to subcontract had been based on union animus; this would have been considered an unfair labor practice. National Labor Relations Act § 8(a)(3), 61 Stat. 140 (1947), 29 U.S.C. § 158(a) (1976) provides "It shall be an unfair labor practice for an employer . . . (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization."
43. 379 U.S. at 206.
44. *Id.* at 210.
45. *Id.* at 210 (quoting Order of Railroad Telegraphers v. Chicago & N.W.R. Co., 362 U.S. 330 (1960)).
46. 379 U.S. at 210-11.
47. *Id.* at 211 n.4.
48. *Id.* at 211.
49. See generally Lunden, Subcontract Clauses in Major Contracts, 84 MONTHLY LAB. REV. 579, 715 (1961).
50. 379 U.S. at 214.
The Court then articulated a three-part test to determine the propriety of submitting the present dispute to collective negotiation. A company must bargain with the union over subcontracting decisions if: (1) the decision to contract out does not alter the company's basic operation; (2) no capital investment is contemplated; and (3) the employees of the independent contractor are to do similar work under "similar conditions of employment" as the employees whom they replaced. Since all three criteria existed in the Fibreboard situation, the Court held the employer had a duty to bargain with the union over its decision to subcontract.

The Court nevertheless warned that its reasoning should not be used to expand the scope of mandatory bargaining to include all types of subcontracting decisions. This caveat was also discussed in the concurring opinion in Fibreboard, and becomes particularly important when considering the robotics job security issue. In his concurrence, Justice Stewart stated that in the past, the NLRB and the courts had recognized employment security in various circumstances as a "condition of employment" and therefore it is a subject of mandatory bargaining. Not every decision which affects job security, however, is one which requires bargaining. Justice Stewart noted that decisions concerning investment in labor-saving machinery and commitment of investment capital, are strictly entrepreneurial in nature—as opposed to terms and conditions of employment—and therefore are completely outside the scope of mandatory collective bargaining. Thus, he emphasized that Fibreboard should in no way be viewed as requiring an employer to bargain in these areas even though the effects on employment may be tremendous. The concurring Justice concluded, however, that the proper forum for resolution of disputes concerning technological change and its effect on the

51. Id. at 213.
52. Id.
53. Id. at 215. Justices Douglas and Harlan joined in the concurring opinion by Justice Stewart.
54. 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.

55. Id. at 233 (Stewart, J., concurring).
56. Id.
57. Id.
worker is the legislature and not the courts.58

1. The Fibreboard Implication: Robotics v. Subcontracting

Robotics is a type of "labor-saving machinery" involving the "commitment of investment capital." Therefore, following the concurring opinion in Fibreboard, an employer's decision to purchase robots would be strictly a managerial and entrepreneurial decision and would not require bargaining despite its effects on job security.

Under the three-part test established by the Fibreboard majority, however, the decision to use robotics comes closer to being a required collective bargaining subject. The third criterion would be satisfied because robots would engage in the same or similar work under similar "conditions of employment" as the employees whom they replaced. However, the remaining two criteria would arguably not be met. Under the first criterion, the decision to employ robots instead of workers would alter the company's basic operation or scope of enterprise. Although the nature of the employer's business would not change, its entire method of production would undergo a complete transformation, thus altering its operations to a great extent.59 Moreover, the second criterion of the Fibreboard test for decision-bargaining would not be satisfied because capital investment is contemplated by the decision to purchase and to implement robots.

Subcontracting decisions and decisions to implement robotics are intended to reduce labor costs—and bargaining collectively over re-

58. 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.

I am fully aware that in this era of automation and onrushing technological change, no problems in the domestic economy are of greater concern than those involving job security and employment stability. Because of the potentially cruel impact upon the lives and fortunes of the working men and women in the Nation, these problems have understandably engaged the solicitous attention of government, of responsible private business, and particularly of organized labor. It is possible that in meeting these problems Congress may eventually decide to give organized labor or government a far heavier hand in controlling what until now have been considered the prerogatives of private business management. That path would mark a sharp departure from the traditional principles of a free enterprise economy. Whether we should follow it is, within constitutional limitations, for Congress to choose. But it is a path which Congress certainly did not choose when it enacted the Taft-Hartley Act.

Id. at 225-26 (Stewart, J., concurring).

59. See infra note 136 and accompanying text.
ductions of labor costs has been successful in the past. However, under the criteria articulated in *Fibreboard*, the decision to implement robotics would not be a mandatory subject of collective bargaining because it necessarily involves a managerial decision concerning capital investment and because it alters the basic operation and scope of the employer’s enterprise.

2. *The Fibreboard Progeny*

NLRB decisions after *Fibreboard* have promulgated additional factors to be evaluated when considering the duty to bargain over decisions to subcontract. In *Westinghouse Electric Corporation*, the NLRB held that the employer did not have a duty to bargain over thousands of subcontracts relating to maintenance and production work that it had entered into even though these subcontracting decisions affected union workers. The facts in *Westinghouse* are somewhat reversed from those in *Fibreboard*. In *Fibreboard*, the company sought to replace existing union workers with nonunion workers. In *Westinghouse*, the union sought to replace existing nonunion subcontracted workers with union employees in an effort to prevent displacement and to promote job security for employees already engaged in some maintenance and production work for the company. The union felt that the employer had a duty to notify it and to discuss the feasibility of using these bargaining unit employees to perform additional work, before the employer could contract out for it. The employer, on the other hand, contended that it was not obligated to bargain with the union over this subject. The NLRB found merit in the employer’s position and held that there was no duty to bargain over subcontract decisions where the employer’s decisions satisfy five criteria: (1) they are motivated solely by economic considerations; (2) they comport with traditional methods by which the employer conducted his business operations; (3) they do not vary significantly in kind or degree from what is customary under past established practice; (4) they have no demonstrable adverse impact on the employees in the unit; and (5) the union has the opportunity to bargain about changes in existing subcontracting practices at the general negotiating meeting. Because the employer in *Westinghouse* satisfied these criteria, the Board dismissed the union’s

60. See supra note 46.
61. 150 N.L.R.B. 1574 (1965).
62. Id.
63. Id. at 1577.
On facts similar to *Fibreboard*, the NLRB in *Marriott Corporation*\(^{68}\) held that an employer had violated his duty to bargain concerning his decision to subcontract.\(^{66}\) The four factors the Board took into consideration in that case were: (1) the nature of the employer’s business before and after the decision to subcontract (change in operation); (2) the basis for the decision (motivation); (3) the ability of the union to engage in meaningful bargaining in view of the employer’s situation and objectives (past history of success in area); and (4) the extent of capital expenditures.\(^{67}\) The first three factors considered by the NLRB in *Marriott Corporation* resemble the test established in *Fibreboard*. However, the NLRB did not exempt the decision from bargaining simply because it involved capital investments in the form of capital assets. The NLRB set forth a fourth criterion which was to consider the *extent* of the capital expenditures.\(^{68}\) In *Marriott Corporation*, the capital transactions “while not de minimus, occurred at a leisurely pace . . . .”\(^{69}\) As a result of this “lack of immediacy” of the capital transactions, the NLRB required that the decision be a subject of bargaining. This “lack of immediacy” is similarly important to the dispute over decision-bargaining concerning robots. In *Marriott*, the employer was not seeking to implement new technology to increase productivity through the use of investment capital, but was attempting to sell the unwanted machinery.\(^{70}\) Unlike the decision to implement robotics, the immediate sale of a capital asset does not increase the productivity of the employer. The implementation of robotics, however, is a capital transaction involving the purchase of a capital asset that attempts to achieve management’s goal of increasing the productivity of the company and reducing overall costs as quickly as possible. Therefore, unlike the *Marriott* situation, delay of an employer’s decision to install robotics could have a profound negative effect on the employer’s business as a whole.\(^{71}\) The capital investment decision to purchase robotics re-

64. *Id.*
65. 264 N.L.R.B. 1369 (1982).
66. *Id.*
67. *Id.* at 1370.
68. *Id.*
69. *Id.* at 1371.
70. *Id.* at 1370-71.
71. Also, the sale of the machinery in *Marriott* was only an incidental effect of management’s decision to subcontract. The employers in *Marriott* could have decided not to sell their capital assets and still could have effectuated the decision to subcontract. But an employer’s decision to utilize robotics is not merely incidental to the goal of increased productivity and
ROBOTICS

quires immediacy of action to increase productivity and to decrease costs, and, consequently, would be implicitly immune from the mandatory bargaining requirement of section 8(d) of the Act under Marriott rationale.

The federal circuit courts have not been uniform in enforcing Board decisions in the subcontracting area. For example, in NLRB v. Adam's Dairy, the court reversed the Board by holding that the employer need not bargain with the union over subcontracting. The court distinguished Adam's Dairy from Fibreboard by concluding that the employer had made a basic operational change in his business and did not just replace workers as was the case in Fibreboard. A basic operational change was also found in Local 777, Democratic Union Organizing Committee v. NLRB. In that case, the employer's decision excluded the subcontract from mandatory bargaining. Moreover, courts have upheld Board determinations that employers need not bargain with the union over subcontracting decisions where those decisions do not divert or destroy jobs performed by bargaining unit employees.

B. Relocation of Work Premises

Three cases dealt directly with a situation in which the employer sought to close one facility that employed union labor and to transfer operations to a second facility that was nonunion, simply to decrease labor costs. In International Ladies Garment Workers Union, AFL-CIO v. NLRB, the court affirmed the Board's determination that relocation of a business to defray labor costs was a

reduced costs. To accomplish this goal, management must directly invest its capital funds in the purchase of robotics or other labor-saving machinery. Therefore, the purchase of robotics is directly related to the employer's aim.

72. 350 F.2d 108 (8th Cir. 1965).
73. Id.
74. Id.
76. Western Massachusetts Electric Co. v. NLRB, 573 F.2d 101 (1st Cir. 1978). See also Japan Air Lines v. IAM, 538 F.2d 46 (2nd Cir. 1978). This situation is analogous to the facts articulated in Westinghouse, supra notes 61-64 and accompanying text.
78. 463 F.2d 907 (D.C. Cir. 1972).
The court found that the scope of the business enterprise as a whole was not altered; no significant change in its capital structure was involved and the size of the work force was a matter "particularly suitable to the collective bargaining framework . . . ."  

In Los Angeles Marine Hardware, the employer moved a portion of its business from unionized to nonunionized facilities without union consent even though the union and the employer were parties to a collective bargaining agreement. Both the NLRB and the court held that the employer was bound by the terms of the existing contract, and could not relocate despite its need to obtain economic relief from the terms of the agreement. The Board reasoned that "the mandate of section 8(d) (that one party's proposed modification of a contract can be implemented only if the other party consents) is not excused by either subjective good faith or by . . . . economic necessity."  

In a third case, Milwaukee Spring I, the NLRB relied on Los Angeles Marine Hardware and ordered the employer to rescind his mid-contract decision to transfer his assembly operations to a nonunion facility, even though the union had previously refused to make concessions to reduce labor costs. Two years later, however, a newly-composed Board granted rehearing and reversed its decision. The current Board declared in Milwaukee Spring II, that its ruling would ease the unforeseen economic strains which could burden employers during the course of a collective bargaining agreement. In addition, the Board concluded that its holding would "encourage the realistic and meaningful collective bargaining that the

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79. Id.
80. Id. The company continued to lease the premises, to manufacture similar products using the same machinery, and to sell products to the same customers, etc. Id. at 619.
81. 235 N.L.R.B. 720 (1978), enforced, 602 F.2d 1302 (9th Cir. 1979).
82. Id. at 735, 602 F.2d at 1307.
83. Id.
84. 265 N.L.R.B. 206 (1982).
85. Id. at 210.
86. Chairman of the NLRB, Donald Dotson, expressed regret that when the Milwaukee Spring issue first arose, the Board did not grant the kind of consideration to the matter that it deserved. He acknowledged that it is not often that the agency asks that a case be sent back from an appeals court for further consideration. 114 Lab. Rel. Rep. (BNA) 61, 62 (Sept. 26, 1983).
88. The Board members who provided the majority in this 3-1 decision were all appointees of President Reagan.
There are similarities between employers' decisions to relocate and decisions to implement robotics. Similarities can be found between the effect on the employee through job termination and the employer's motivation for these layoffs. In relocation cases, the employer seeks ways to reduce his labor costs. One way to achieve this result is to relocate from a union to a nonunion facility since union benefits and wages are considerably more expensive. Another method to reduce labor costs would be the implementation of robotics to replace more costly and less efficient human workers.

The reversal of Milwaukee Spring I is extremely important because it is indicative of a possible pro-management trend in future Board decisions. It is noteworthy that there has been a shift away from the pro-union rationale espoused by the NLRB in Los Angeles Marine Hardware and Milwaukee Spring I, to one that is pro-management. The decisions of the Board on employer relocation situations, and those of the courts in the partial termination cases which follow, indicate an anti-union atmosphere that management and labor will likely encounter in future legal controversies concerning "robotization."

C. Partial Termination of a Portion of a Business

Partial closure of an employer's business can range from discontinuing part of an operation within a plant to a full-size shut down of one of the company's locations. The effect of any type of partial closure on employment, however, is usually the same—large-scale job termination. Decisions to partially terminate an existing business, unlike the subcontracting decisions discussed above, have an impact not only on employees, but on the company's capital assets and investments as well. This is because the old capital assets will

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


91. Capital assets or "fixed capital" are funds invested in relatively fixed long-term assets like the plant building itself and equipment. "Working capital" refers to cash and short-term cash investments which provide funds for purchase of inventory and payment of wages.

For a comprehensive analysis of the fixed/working capital distinction in the context of a
be sold off and the funds will be re-invested in other areas in order
to decrease costs and to increase company productivity overall.\textsuperscript{92}

Partial termination decisions, as mentioned previously, more
closely concern the employer’s choice of where and how to reallocate
his or her capital investments in order to reduce labor costs. This
reallocation usually represents a “significant change in operations,”\textsuperscript{98}
and thus these partial termination/capital investment decisions are
considered to be strictly within the employer’s entrepreneurial con-
trol.\textsuperscript{94} The decision to implement robotics is also one which involves
the investment of capital. Since these two situations are similar, the
holdings of the Board and the courts regarding bargaining over a
decision to partially terminate a business can be used as precedent to
determine whether the employer who implements robotics has a
mandatory duty to bargain with the union over this decision.

1. Confusion in the Courts: The Early Cases

Courts of appeal are divided on the issue of an employer’s duty
to bargain over a decision to partially terminate its business. Cases
from the Third Circuit Court of Appeals illustrate the factors the
courts weigh when considering the issue, as well as the chronic dis-
parity in the amount of weight accorded to each. In \textit{NLRB v. Royal
Plating and Polishing},\textsuperscript{95} the court held that the employer had no
duty to bargain with the union over its decision to close down one of
its locations, although it did have to bargain over the effect of that
decision.\textsuperscript{96} The court distinguished the case before it from \textit{Fibreboard}
by emphasizing that the instant decision involved man-
agement prerogative predicated on strictly economic justifications,\textsuperscript{97}

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\textsuperscript{92} In \textit{Marriott}, the Board reversed the Administrative Law Judge’s determination that
the discontinuance of the employer’s shrimp processing operation constituted a partial termina-
tion of the business because it involved the sale of capital assets. Instead, the Board held that
this was a subcontracting decision. This is because both before and after the employer’s deci-
sion to contract out its shrimp processing, the employer was still engaged in its primary busi-
ness of providing prepared foods (including shrimp) to its customers. This fact, combined with
the lack of an immediate necessity to reallocate its capital funds, indicated to the Board that
the situation was more properly analogized to subcontracting decisions than to classic partial
termination situations. \textit{See supra} notes 65-71 and accompanying text.

\textsuperscript{93} \textit{Fibreboard}, 379 U.S. at 213-14.

\textsuperscript{94} \textit{See infra} notes 98-99 and accompanying text.

\textsuperscript{95} 350 F.2d 191 (3rd Cir. 1965).

\textsuperscript{96} \textit{Id.} at 196.

\textsuperscript{97} “The decision . . . involved a management decision to recommit and reinvest funds
in the business . . . [ii] involved a major change in the economic direction of the Company.”
and concluded that under those circumstances, the employer was not required to bargain with the union over its decision to partially close down.\textsuperscript{98} Further, the court in \textit{Royal Plating} articulated three distinguishable factors which did not mandate labor-management bargaining: (1) the involvement of capital reinvestment; (2) the contemplation of a major change in the economic direction of the company; and (3) the high degree of economic necessity of the employer.\textsuperscript{99}

The Third Circuit reversed its position\textsuperscript{100} thirteen years later in \textit{Brockway Motor Trucks v. NLRB}.\textsuperscript{101} The court began its analysis in that case by explicitly rejecting what it called the "per se" rule articulated in \textit{Royal Plating}—"that an employer need never bargain about an economically-based decision to close one of its facilities."\textsuperscript{102} Instead, the court espoused five reasons why an employer should bargain with the union over its decision to partially close its business.\textsuperscript{103} First, it would further the aims of collective bargaining as contemplated by the NLRA by promoting discussion and compromise between the parties. Second, termination of employment is a "condition of employment" and is therefore mandatory by the terms of the Act. Third, the union may be able to avert the closing through concessions as to wages, benefits, etc. Fourth, because about one-fourth of all agreements contain references to bargaining with regard to plant closings and removals, this is indicative of the type of subject which is amenable to collective bargaining. And fifth, it is not necessarily shown without evidence to the contrary that imposing a duty

\textit{Id.}

\textsuperscript{98} "[A]n employer faced with the economic necessity of either moving or consolidating the operations of a failing business has no duty to bargain with the union respecting its decision to shut down." \textit{Id. Cf.} Textile Workers Union v. Darlington Mfg. Co., 380 U.S. 263 (1965) (employer's refusal to bargain over termination and liquidation of entire business, even if motivated by union animus, is not an unfair labor practice under NLRA § 8(a)(5)).

\textsuperscript{99} Other courts of appeal followed the \textit{Royal Plating} holding that an employer had no duty to bargain regarding the decision to partially terminate a business. \textit{See} NLRB v. Adam's Dairy, 350 F.2d 108 (8th Cir. 1965), \textit{cert. denied}, 382 U.S. 1011 (1966) (change in operations); Royal Typewriter Co. v. NLRB, 533 F.2d 1030 (8th Cir. 1976) (economic reasons); NLRB v. Thompson Transport Co., 406 F.2d 698 (10th Cir. 1969) (economic reasons); NLRB v. Transmarine Navigation Corp., 380 F.2d 933 (9th Cir. 1967) (greatly changed economic conditions); NLRB v. Int'l Harvester, 618 F.2d 85 (9th Cir. 1980) (economic reasons).

\textsuperscript{100} Courts of appeal in other circuits had refused to follow the \textit{Royal Plating} rationale. \textit{See} NLRB v. Winn-Dixie Stores, Inc., 361 F.2d 512 (5th Cir. 1966), \textit{cert. denied}, 385 U.S. 935 (1966) (employer must bargain even though decision based on economic reasons); Weltronc Co. v. NLRB, 419 F.2d 1120 (6th Cir. 1969), \textit{cert. denied}, 398 U.S. 938 (1970) (employer has duty to bargain).

\textsuperscript{101} 582 F.2d 720 (1978).

\textsuperscript{102} \textit{Id.} at 732.

\textsuperscript{103} \textit{Id.} at 734-38.
to bargain on the employer would "necessarily strip [him or her] of management prerogative . . . or impinge on the employer's freedom ultimately to determine whether to close the facility." Thus, Brockway created an initial presumption that a partial closing was a mandatory subject of collective bargaining which could be overcome only if it appeared that the employer's interests outweighed those of the union.

2. Resolution of the Controversy: The First National Maintenance Case

The controversy over the issue of whether the decision to partially terminate a business is a mandatory bargaining subject, finally attracted the attention of the United States Supreme Court in First National Maintenance Corp. v. NLRB. In a 7-2 decision, the Court held that "although the employer, who was engaged in the business of providing housekeeping, cleaning, maintenance and related services for commercial customers, was required to bargain about the effect of its decision to terminate a contract for economic reasons with one of its commercial customers; the employer had no duty to bargain with the union as to the decision itself." The Court rejected the first element of the Brockway analysis concerning the initial presumption of an employer's duty to bargain, but nevertheless essentially adopted the balancing approach of the second part of the Brockway test. The Court reasoned that the benefits of collective bargaining over the decision to partially terminate a business must be weighed against the burdens that bargaining imposes on the employer. The Court concluded that the employer's burden in

104. Id.
105. ABC Trans-National Transport v. NLRB, 642 F.2d 675 (3rd Cir. 1981). See also Midland-Ross Co. v. NLRB, 617 F.2d 977 (3rd Cir. 1980); Equitable Gas Co. v. NLRB, 637 F.2d 980 (3rd Cir. 1981). Like the courts of appeal, the NLRB itself has not been consistent in its rulings on this subject. Compare National Car Rental System, Inc., 252 N.L.R.B. 159 (1980) (no employer duty to bargain) and Summit Tooling Co., 195 N.L.R.B. 479 (1972) (no employer duty to bargain) with Ozark Trailers, Inc., 161 N.L.R.B. 561 (1966) (employer has duty to bargain).
107. 452 U.S. 666 (emphasis added).
108. See supra notes 104-05 and accompanying text.
109. In view of an employer's need for unencumbered decision-making in the conduct of its business, bargaining over management decisions that have a substantial impact on the continued availability of employment should be required only if the benefit, for labor-management relations and the collective-bargaining process, outweighs the burden placed on the conduct of the business.

452 U.S. 666.
these cases is too great and thus employers do not have a mandatory duty to bargain over these decisions, but only over their effects on the bargaining unit.\textsuperscript{110}

3. \textbf{The Rationale of First National Maintenance}

There are six reasons why the Supreme Court rejected mandatory bargaining over partial closing situations. First, because the union’s objective in bargaining is to delay or to halt the closing to prevent lost jobs, this interferes with the speed and flexibility required for management to effect its business decisions.\textsuperscript{111} Second, the publicity which is incidental to the bargaining process undermines the need for secrecy required in some business decisions.\textsuperscript{112} Third, unions could use this delay tactic as a powerful economic weapon to achieve other goals unrelated to the closing situation.\textsuperscript{113} Fourth, current labor practices indicate that bargaining over decisions of this kind are not the norm.\textsuperscript{114} Fifth, labor costs may not be the primary motivation for the economic decision, and it would be difficult for the employer to know in advance how much economic necessity he was experiencing and in what areas. As a result, the employer would be uncertain whether his economic needs were compelling enough to avoid both decision-bargaining with the union and possible unfair labor practice violations.\textsuperscript{115} Lastly, the Court distinguished the case from other partial termination cases in two respects: (1) the employer did not seek to modify an existing collective bargaining agreement,\textsuperscript{116} and (2) the employer’s decision did not involve large amounts of investment capital.\textsuperscript{117}

\textsuperscript{110} Id. at 688. Justice Brennan’s dissent, joined by Justice Marshall, rejected as unsubstantiated the Majority’s assertion that bargaining over the decision to partially close a business would overburden the employer. In contrast, the dissent pointed to the recent experience of Chrysler Corp. In that situation, the collective bargaining process was successful in bringing about concessions in compensation and benefits which contributed to prevent Chrysler’s partial closing.
\textsuperscript{111} Id. at 682-83.
\textsuperscript{112} Id. at 678-79.
\textsuperscript{113} “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.” Id.
\textsuperscript{114} Id. at 684.
\textsuperscript{115} Id.
\textsuperscript{116} Id. at 688. See supra notes 81-90 and accompanying text.
\textsuperscript{117} Id. at 688. The Court believed that the absence of “significant investment or withdrawal of capital [was] not crucial.” However, “[T]he decision to halt work at this specific location represented a significant change in petitioner’s operations, a change not unlike opening a new line of business or going out of business entirely.” Id.
In addition, the holding of First National Maintenance may be indicative of a trend toward favoring management interests because the Court rejected the pro-union stance of Brockway which required the employer to bargain with the union over the managerial decision to partially shut down.\textsuperscript{118} This pro-management trend, if continued, may permit an employer to make a managerial decision such as robotization without bargaining over it with the union.

D. Automation in the Workplace

Since robotics is a form of automation, a discussion of cases dealing with this subject is useful in analyzing the employer’s duty to bargain in robotics situations. Unfortunately, there have been relatively few cases dealing with the employer’s duty to bargain over decisions to introduce new technology or automation in the workplace.\textsuperscript{119} Five cases which do address the issue involve a technological change in the process of printing newspapers.\textsuperscript{120}

In Renton News Record,\textsuperscript{121} the Board noted that the employers were faced with a choice between economic destruction and changing their method of operation.\textsuperscript{122} The Board concluded that because implementing the technological change was economically necessary, the employers should only be required to bargain with the union over the effects\textsuperscript{123} of their implementation decision.\textsuperscript{124} The federal courts have also upheld Board determinations requiring effects-only bar-


\textsuperscript{119} The Court in First National Maintenance specifically refused to address this issue. “We of course intimate no view as to other types of management decisions, such as plant relocation, sales, and other kinds of subcontracting, automation, etc. which are to be considered on their particular facts.” 452 U.S. at 686 n.22 (emphasis added).

\textsuperscript{120} Renton News Record, 136 N.L.R.B. 1294 (1962); NLRB v. Columbia Tribune Publishing Co., 495 F.2d 1384 (1974); Omaha Typographical Union v. NLRB, 545 F.2d 1138 (1976); Newspaper Printing Corp. v. NLRB, 625 F.2d 956 (1980); Island Typographers, 252 N.L.R.B. 9 (1980).

\textsuperscript{121} 136 N.L.R.B. 1294 (1962).

\textsuperscript{122} “Respondents were faced with the choice of either changing their method of operations to one at least equal to that of their competitors, or being forced to go out of business. They selected the former alternative.” Id. at 1297-98.

\textsuperscript{123} Bargaining over the effects of a decision requires management and labor to come to some agreement regarding what will happen to those individuals affected by the implemented decision. In the case of workers who were laid off due to the implementation of automated equipment, bargaining topics may include such items as termination pay, retraining programs, seniority status, etc.

\textsuperscript{124} Id. at 1298. See also Island Typographers, 252 N.L.R.B. 9 (1980) (employer did not violate NLRA when it introduced new technological process—but violation found when worker layoffs occurred as a result of implementation).
gaining in similar cases. 125

Like the decision to automate, the decision to implement robotics is one that directly affects the employer’s productivity and his ability to remain in business. 126 Therefore, because mandatory bargaining with the union is required only over the effects of automation on the bargaining unit, and not over the decision itself, the logical conclusion is that bargaining should only be required over the effects of decisions to implement robotics. 127

IV. REJECTION OF ROBOTICS AS A MANDATORY SUBJECT OF COLLECTIVE BARGAINING

A. Balancing the Interests at Stake

Recurring factors considered in the previous cases aid the analysis of whether mandatory bargaining over the decision to implement robotics is necessary. These major factors are: (1) the involvement and extent of any capital investments; (2) any alteration or change in an employer’s operation and scope of enterprise; (3) the amenability of the subject to the collective bargaining process; (4) the custom and practice within the industry with regard to bargaining on the particular subject; and (5) the economic necessity and motivation of the employer. By weighing each of these factors, a determination may be made as to whether an employer’s decision to implement robotics should be considered a mandatory subject of collective bargaining between management and labor.

B. Analysis of Factors Applicable to Robotics Implementation Situations

1. Involvement and Extent of Capital Investments

The involvement and extent of capital investments/assets in an employer’s business decision has always been perceived by the Board and the courts as within the realm of strict managerial control. Capital investments involve ownership/property rights of the employer regarding how and when to expend corporate funds. Conversely, employees do not have any property rights in their jobs. Therefore,


126. See supra note 23 and accompanying text.

these employees should not participate in the decision-making process of how, when and on what the employer's corporate funds should be spent. Decisions such as *Fibreboard*,128 *Marriott*,129 *Royal Plating*130 and *First National Maintenance*131 have held that the presence and extent of an employer's capital investments is an important factor in evaluating whether the employer had a mandatory duty to bargain over decisions to subcontract or to close an operation, even though those decisions would affect employment. Logically, then, had capital investment expenditures been found in *Fibreboard*, the Court might have reached the opposite conclusion than it did, and held that the duty to bargain over subcontracting decisions was permissive—not mandatory.132

Furthermore, *First National Maintenance* held that the employer did not have a duty to decision-bargain with the union even though no capital assets were involved.133 Because the Court held that the employer had no duty to decision-bargain without the presence of capital investment expenditures, a decision to implement robotics, which *does* involve the expenditure of capital investments, would most certainly be held to be outside the scope of mandatory collective bargaining under an extension of the *First National Maintenance* rationale. In addition, the immediacy factor, previously articulated in *Marriott*,134 would support the implementation of robotics without mandatory collective bargaining, because increased productivity is necessary in our sagging American economy.

2. Alteration or Change in Employer's Operation and Scope of Enterprise

The alteration of a business through the implementation of robotics is analogous to those alterations that courts have recently

129. 264 N.L.R.B. 1369 (1982).
130. 350 F.2d 191 (3rd Cir. 1965).
132. 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.
379 U.S. at 223 (Stewart, J., concurring) (emphasis added).
133. 452 U.S. at 688.
134. See supra notes 65-71 and accompanying text.
held do not trigger the employer’s duty to decision-bargain with the union. The Court in *Fibreboard* held that the employer had a duty to bargain because the decision to subcontract by replacing one set of workers with another did not involve a major change in the employer’s mode of operation.\(^\text{135}\) In contrast, implementing robotics necessitates a complete restructuring of an employer’s operation\(^\text{136}\) because it literally revolutionizes all aspects of a business. This weighs against union intervention in the decision-bargaining process.

*First National Maintenance* also gave great weight to the fact that the employer’s decision to close a portion of his business brought about a significant change in its operations.\(^\text{137}\) The implementation of a robotics system, like a partial shut down, would represent a drastic change in the employer’s operations.\(^\text{138}\) Therefore, since partial closure situations are analogous to robotization, the rationale in *First National Maintenance* indicates that there should be no requirement of mandatory bargaining over a robotics-type decision—only over its effects.

3. **Amenability of Subject to Collective Bargaining**

At first glance, it seems logical that management’s duty to bargain collectively with the union should increase as the amount of anticipated change in an employer’s business increases. However, management should actually have a greater duty to bargain with the union as the degree of anticipated economic change in the workplace decreases. This is because the smaller the economic change or problem in the workplace, the greater the ability of the parties will be to effectuate concessions and to reach agreements. This is because there is less distance between the employer and the unions and thus economic concessions have less financial impact on either side. Conversely, the larger the problem, the more difficult it is for labor and management to agree because the economic impact of concessions is greater to both parties. Robotics is the type of large-scale change that would not be amenable to the collective bargaining process. Because

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\(^\text{135}\) 379 U.S. at 213.

\(^\text{136}\) Automation may involve drastic alterations of production methods, thus affecting the entire physical operation far more than subcontracting existing jobs. A decision to automate may involve greater input of managerial effort in planning and execution than would a decision to subcontract; it may also cause an initial period of under-production until the new methods are adequately integrated.


\(^\text{137}\) 452 U.S. at 688.

\(^\text{138}\) Note, *supra* note 127.
the impact of robotics on reducing labor costs and increasing productivity is so great, unions would be financially unable to make counter-proposals that would effectively deter management's decision. Programmable automation is simply more cost-efficient than union labor even with union concessions in wages, hours and benefits. Therefore, the only foreseeable effect that bargaining over the issue will have is increased delay in robotics implementation. This delay can be translated into an employer's lost revenues or, at an extreme, loss of business. These burdens are too great to impose on the employer.

In this respect, the rationale of the Court in *First National Maintenance* with regard to partial closure cases applies with even greater force to a robotics case. The majority in *First National Maintenance* concluded that the benefits of decision-bargaining simply did not outweigh the burden placed on the employer.139 From an economic standpoint, the parties in a partial termination situation are often closer than those in a robotics situation.140

Arguably, a small-scale robotization, in which huge numbers of workers are not affected, may prove amenable to the collective bargaining process. However, imposing this rationale would be unfair because it would impose a greater burden on smaller companies than larger corporations. The implementation of a robotics system in a small company would proceed slowly because smaller companies can generally only afford small capital expenditures. Thus the foreseeable effects of robotics on the displaced employees of a small company may be small. But requiring the employer of a small company to bargain with the union over this decision, simply because his or her situation is more amenable to collective bargaining since the parties' bargaining positions are closer, would penalize the employer for having a small business. This is because large corporations that are financially capable of implementing robotics on a large scale and thus creating a greater job displacement, would be excluded from mandatory decision-bargaining because the financial gap between management and the union would be too enormous to effectuate meaningful concessions. Moreover, in order to decide whether an employer is required to decision-bargain, the employer must determine the extent of capital investments, the impact on employees, and the economic gap between himself and the union. These calculations would be virtually impossible as well as overly burdensome. Im-

139. 452 U.S. at 679.
140. This belief is evidenced by the Chrysler success story. See *supra* note 110.
proper categorization of the employer's business may result in the employer committing an unfair labor practice. Consequently, the equitable alternative would be to exclude all robotics decisions from the statutory duty to bargain and thus allow the employer the managerial discretion necessary to achieve a successful and profitable business through robotization.

4. Custom and Practice Within the Industry

As stated previously, there have been no cases directly dealing with the issue of whether robotics should be considered a mandatory subject of collective bargaining. However, the few cases which concern the implementation of automation hold that the effects of the decision to automate on the bargaining unit is a mandatory subject of collective bargaining. Thus, the company had a statutory duty to confer in good faith with the union over the ramifications of this issue, but not over the decision itself. These case precedents, combined with the holding in First National Maintenance, compel the conclusion that management's mandatory duty to bargain over robotics implementation should be confined to bargaining over its effects on the employees in the bargaining unit. To do otherwise would place an excessive burden on the employer.

5. Economic Necessity and Motivation of the Employer

As stated in Royal Plating, an employer company does not have to bargain with the union concerning its decisions to shut down its business and thus terminate employees when it is faced with economic necessity. In the future, the implementation of programmable automation, such as robots, may become an economic necessity for the employer if he or she wishes to remain competitive and continue in business. It can be argued that the employer's motivation for the installation of robotics may be to "bust" the union. However, the union's legitimate interest in fair dealing is protected by section 8(a)(3) which prohibits the employer from terminating any employees if motivated by union animus. Therefore, if it can be shown that the objective of purchasing robots is specifically to undermine

141. See supra notes 121-27 and accompanying text.
142. Id.
143. 452 U.S. at 682-83, 686-87.
144. 350 F.2d 191, 196 (3rd Cir. 1965).
145. See supra note 23 and accompanying text.
146. See supra note 42.
the union, the action would be an unfair labor practice under the Act and the decision to implement the robots would be void. 147

Furthermore, the Board's recent reversal of its decision in Milwaukee Spring I recognizes the argument that the employer's need to reduce labor costs is a legitimate one. 148 In fact, the Board finds this need so compelling that it permits the employer to relocate without union consent from a union facility to a nonunion facility mid-contract in order to effectuate these cost savings. 149 Like relocation, robotics is another means of reducing labor costs. Therefore, under the rationale of Milwaukee Spring II, the employer's decision to implement robotics should also be classified as compelling, thereby eliminating it as a subject for mandatory decision-bargaining.

C. Mandatory Bargaining over Effect of Decision to Implement Robotics

All agree that the robot revolution will adversely affect employment. The robotization controversy involves the degree or amount of job displacement that will occur. Because the amount of robotics implementation in different industries and companies will differ, so too will the impact of automation. It is over this area of the impact or effect of management's decision to use robots that meaningful collective bargaining should take place. Once the decision to invest in robotics has been made, it should be mandatory that management negotiate with labor as to the best method to deal with the displacement of the company's workers. Both the NLRB and the courts have held in automation implementation cases that management has a mandatory duty to bargain only over the effects of its decisions to introduce new technology. 150 The Supreme Court's ruling in First National Maintenance indicates a trend toward mandatory effects-only bargaining in situations where labor is displaced due to management decisions. 151 The issue of whether or not to implement a robotics system of production is analogous to a decision to partially terminate a business because both decisions involve capital investment and/or reallocations and the result of each situation is unem-

148. See supra notes 84-90 and accompanying text.
149. Id.
150. See supra note 123.
151. 452 U.S. at 688.
employment. Thus, the rationale and holding of *First National Maintenance* can be logically extended to apply to robotics implementation situations also. Because the employer in a partial termination case is required to bargain with the union solely concerning the effects of the closure, an employer in a robotics implementation situation should only be required to bargain regarding the effects of the implementation.

Like the Supreme Court, the NLRB’s apparent trend as evidenced by its reversal of its original pro-union stand in *Milwaukee Spring I*, indicates that employers will be allowed more deference in management decisions in cases involving economic factors and considerations. Because the decision to implement robotics is a managerial decision predicated on economic considerations, any future robotics cases which come before the NLRB and the present Court will likely be accorded pro-management treatment similar to that in *Milwaukee Spring II* and *First National Maintenance*. Therefore, by extending the pro-management rationale in these two cases to a robotics implementation case, it appears that management will not be required to bargain over this decision, but only over its effects on the bargaining unit.

Mandatory bargaining over the effects of introducing robots to business will be the keystone for achieving good industrial relations between management and labor. Timely notice to the union of the determination to implement robotics is essential to promote an efficient and smooth transition from human to automated labor. Pre-implementation notification will insure minimal union resentment by opening channels of communication and providing an atmosphere conducive to meaningful collective bargaining. This was the goal Congress had in mind when it enacted the National Labor Relations Act. This type of communication cannot be fostered if the union receives notice of an employer’s decision one hour before the robots march in. A signed contract to purchase robotics would be evidence of the employer’s binding decision to implement robotics. It should be at this time, or within a reasonable time thereafter, that the employer should have a mandatory obligation to notify the union of its decision and to begin effects-bargaining. Because the time between the ordering of the machinery and its actual introduction in the workplace is considerable, this is a reasonable notice period that would not be overly burdensome to the union or to the employer in their negotiations. Moreover, contract provisions concerning the im-

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pact and effects of technological change have already surfaced in collective bargaining agreements. These provisions provide for such things as employee retraining, interplant transfers, severance pay and supplementary unemployment benefits.

In the case of robotics, employee retraining programs are the most beneficial to the worker. This is because robots will eventually replace most semi- and nonskilled workers in manufacturing, thereby creating a class of individuals with negligible re-employment prospects. Retraining these workers in areas not likely to be negatively affected by robotics will assist them in becoming functioning members of the labor force. Thus, retraining is a long-term solution, unlike interplant transfers, severance pay, and supplemental unemployment benefits which only assist the terminated worker for a relatively short period of time. However, the brunt of employee retraining should not necessarily fall exclusively on the shoulders of the employer. Congress should begin to address the need for viable alternatives to unemployment resulting from robotization.

V. CONCLUSION

The era of programmable automation has already arrived, bringing with it a myriad of social, economic and political questions and problems. The implementation of robots into the workplace poses a legal question as to the scope of mandatory collective bargaining between labor and management under NLRA section 8(d). The hybrid nature of robotics makes it analogous to those decisions involving subcontracting, relocation, partial termination, and automation, because all of these situations involve employee displacement. Requiring an employer to bargain with the union over the decision to implement robotics would not only place a heavy burden on the employer, but would be inconsistent with the current pro-management trend of the NLRB and the courts. However, mandatory collective bargaining over the effects of this type of deter-

153. "[S]uch provisions make up the bulk of current agreements which deal with automation." Note, supra note 127, at 1854.
154. Id.
155. Because the employer is reducing labor costs by implementing robotics and he is able to depreciate his machinery at the same time, perhaps requiring the employer to retrain displaced employees might not be an undue burden in some cases. (If you re-tool, you retrain).
156. One possible solution might be a robotics tax whereby the employer would be assessed a tax amount per implemented robot or number of employees it displaced. Total collected funds could then be matched by the federal government for use in setting up and maintaining retraining programs. Still another idea might be a tax write-off for the employer in the amount spent in retraining displaced employees due to robotization.
mination should be advocated by both of these judicial bodies in the future. Bargaining over the effects of robotics is an area amenable to collective bargaining and as such would effectuate the purpose of the NLRA.

This comment has addressed the legal implications of the robot revolution on the collective bargaining process. But as the social, economic and political impact of robotics begins to be felt throughout society, Congress needs to provide some assistance to buffer the future repercussions that robotics will definitely thrust upon the already strained relationship between management and labor.

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