In the

Supreme Court of the United States

FIRST NATIONAL MAINTENANCE CORPORATION,	)	
PETITIONER,	)	No. 80-544
V.	)	
NATIONAL LABOR RELATIONS BOARD	)	

Washington, D.C.
April 21, 1981

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ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

FIRST NATIONAL MAINTENANCE CORPORATION,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD

No. 80-544

Washington, D. C.

Tuesday, April 21, 1981

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:19 o'clock a.m.

APPEARANCES:

SANFORD E. POLLACK, ESQ., Milman, Naness & Pollack, 1175 West Broadway, Hewlett, New York 11557; on behalf of the Petitioner.

NORTON J. COME, ESQ., Deputy Associate General Counsel, National Labor Relations Board, Washington, D.C. 20570; on behalf of the Respondent.

C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in First National Maintenance Corporation v. the Labor Board. Mr. Pollack, I think you may proceed whenever you're ready.

ORAL ARGUMENT OF SANFORD E. POLLACK, ESQ.,

ON BEHALF OF THE PETITIONER

MR. POLLACK: Thank you, Your Honor. May it please the Court:

I have the privilege of representing First National Maintenance Corporation in an appeal which comes to you from the second circuit court. The question presented for your determination is whether an employer's unilateral decision to terminate a losing portion of its operation solely for legitimate business reasons breaches the duty to bargain under Section 8(a)(5) of the National Labor Relations Act.

In this case, Your Honors, we are not dealing with anti-union motivation. No animus is present. Nor are we dealing with what has been stipulated and accepted as the mandatory nature of effects bargaining. Nor are we dealing --

QUESTION: Mandatory nature of what?

MR. POLLACK: Effects bargaining, Your Honor. Nor are we dealing with subjects which may be unlawful under the Borg-Warner concept. Stated another way, therefore, Your Honor, we are here to determine whether or not terminating a losing portion of its business for a legitimate business reason is

either a mandatory subject of bargaining within the National Labor Relations Act or a permissive subject of bargaining within the National Labor Relations Act.

QUESTION: Mr. Pollack, was this a fairly large operation in New York?

MR. POLLACK: No, Your Honor. As the record indicates depending upon the time that you look at it, during the critical period the petitioner operated either two or four facilities. We had some 17 months covered by the entire period of operation in the particular facility which is affected. Thirty-five employees were employed in the Greenpark facility which is the particular facility in which operations were terminated.

QUESTION: Does the record show whether there is much turnover in this business as far as servicing customers is concerned?

MR. POLLACK: No, Your Honor, the record does not show that. The record does, however, show that there was no interchange between the various facilities serviced by First National. First National, as Your Honors, I'm sure, are aware, was a service corporation which did cleaning and maintenance work in nursing homes and old age homes within the City of New York. We have been fortunate in that we have had the benefit of two Supreme Court decisions in this area, one entitled Fibreboard, wherein the Supreme Court had the opportunity of affirming a decision of Mr. Chief Justice Burger who was then

sitting in the circuit court, and in which Mr. Justice Stevens wrote a concurring opinion. Thereafter, about one year later, this Court had an opportunity to examine the case in Darlington. Darlington concerned a partial secession of operations and it arose under Section 3 of the National Labor Relations Act and not under Section 12.

I think it can be fairly stated that as we view the decisions of this Court in Fibreboard through its rationale in Darlington as interpreted by the majority of the circuits, and even, I might suggest, by the two circuits who came to different conclusions and by the National Labor Relations Board, which comes to a different conclusion at face, what seems to me to be apparent, that there evolves a concept of law which is really what I would suggest is the status of the law today. And that is to require an employer to bargain about the matter which is within his entrepreneurial control would be in the permissive area as opposed to mandatory.

When there are replacements performing the affected work as part of an integrated work process who are still controlled by the original employer, then a change in that original work is a mandatory subject of bargaining. I believe that when Fibreboard talked about subcontracting and subcontracting in terms of the employer still exercising control, and all that the employer did in Fibreboard was to replace one group of employees with another group of employees, that's what was meant:

an employer replacing employees performing the affected work as part of the integrated work process, who are still controlled by the employer. And Fibreboard correctly stated that that subject would have been mandatory. However, if there is a secession of the work and there are no longer replacements performing that work, or if on the other hand as in Darlington the employer withdraws himself as an employer of the affected work, then in those instances I would submit the cases almost uniformly hold that the bargaining would then be permissive.

The hard cases, Your Honors, where the courts very often look to the possibility of taint of union animus, are really cases where the court is trying in my opinion to look to see whether there is a subterfuge, whether the employer is still becoming the employer, whether the work is really still being done by an ally or where there is really a continuation of the same employment relationship but with different employees. That is not the case which is before you.

As I stated, the petitioner services at best four facilities in the New York area. It goes into those facilities with its own employees, it cleans the facilities, it receives as compensation from the nursing home a weekly sum which is the equivalent of its out-of-pocket expenses for the payment of its own employees plus a management fee. In this case the management fee should have been $500 by agreement at the beginning of the arrangement with Greenpark. It was $250 when the

petitioner requested Greenpark to replace it to the $500. Greenpark refused and the petitioner ceased operations. It left, it terminated its relationship as an employer performing that service, or, in the case of General Motors, of producing the item. So I would suggest to you that when there is a true partial, or a true total closing -- I'm sorry?

QUESTION: What happened to the employees when the employer withdrew?

MR. POLLACK: Your Honor, as part of the effects bargaining, there were negotiations and the employees were ultimately granted severance pay. And although I don't know that it's part of this record, there was talk at least of preferential hire into the other facilities.

QUESTION: But they were not in fact hired in one of the other three facilities?

MR. POLLACK: Your Honor, it is not part of this record because the effects bargaining was stipulated to at the lower level and it was acceded by all parties that there should and is mandatory bargaining on the effects, clearly. And the reason for that is because we should be looking to the policy of the Act.

The policy of the Act, as you know, is set forth in the Act itself. It talks in terms of its policy. And it says, in effect, that there is a desire to have collective bargaining, and that the parties should recognize under law each of others,

one another's legitimate rights.

The legitimate right of an employee, I submit, is to look to the work which he has traditionally been doing for an employer and say, Mr. Employer, if you continue to do this work, if you continue to be an employer who has control of this work, then I have a legitimate right to want to continue to do it. If you want to take that legitimate right away from me, then at least talk to me about it. On the other hand, the legitimate right of an employer is to say, like an employee can say, I quit. I don't want to work anymore. An employee has a right to quit. An employer has a right to withdraw himself as an employer. Now that does not mean, Your Honors, that he has to withdraw himself as a total employer in every single facet of a multi-faceted operation. It's only as an employer who produces a particular affected item so that, as in First National --

QUESTION: Was there a successor employer here?

MR. POLLACK: Yes, there was, Your Honor.

QUESTION: Someone to do that job?

MR. POLLACK: Yes, sir, there --

QUESTION: Was there any claim of the employees that they were entitled to -- ?

MR. POLLACK: They did in fact, as the record shows, make a claim on the successor. The successor was the nursing home who took the operation over by itself and the employees did in fact make a claim on that nursing home.

QUESTION: Was there any privity between the new employer and the old?

MR. POLLACK: Well, in that, that they had a contract which put the old employer into the business as the nursing home subcontractor; there was that kind of privity, but there is no allegation that there is an alter ego concept as between First National and Greenpark or an unlawful successorship.

QUESTION: Let me get at it more directly.

MR. POLLACK: I'm sorry, Your Honor.

QUESTION: Did First National have anything to do with the nursing home after they terminated?

MR. POLLACK: Nothing, Your Honor; nothing.

QUESTION: Then there was no privity.

MR. POLLACK: That was the end of their relationship.

QUESTION: Then there is no privity?

MR. POLLACK: At this point there is no privity; that is certainly correct. It's been held by many, many of the circuits that employees have a right to quit a job even where an employee cannot strike. Employees en masse have a right to quit. So too does an employer in recognition of the entrepreneurial, core of entrepreneurial control doctrine, have a right to say he does not wish to make that kind of product. If he totally excludes himself from making the product, I suggest that the dangers inherent in calling this subject a mandatory subject of bargaining, would require that he not be forced into that

dilemma. Once a subject is called mandatory, it brings into play disclosure of all relevant facts during the bargaining process, it brings into fact disclosure of the fact that there is a desire to terminate to the world at large. That includes the employer's suppliers, the employer's creditors, key personnel of the employer, potential and possible purchasers of the business, all of which, Your Honors, works to the detriment of the employer's legitimate rights.

In a free enterprise society, as the majority, as the Fibreboard decision recognized, even in the majority opinion as compared to the concurring opinion, there is an inherent management freedom. The concurring opinion called it the core of entrepreneurial control. The National Labor Relations Board in the Ozark Trailers case, which really is probably the single most important case from the National Labor Relations Board, since it sets the framework within that Board's functions in this area, even there they recognized that to deal with the problem of partial closings they have to deal with the direct effects of the decision. I suggest that the direct effect is not an incidental effect of a decision to terminate the management's desire to stay in business. It is indirect to the determination made by management in the core of his entrepreneurial control, to terminate.

True, there is no doubt about it, that that decision does affect working conditions, but it affects them indirectly.

It affects them incidentally. The subject is not whether the employer should terminate, but what the effects of that termination should be. The desire of the respondent to deem all areas of partial closing almost on a per se basis as mandatory subjects of bargaining, really is a way of saying that they need to hold a plant hostage in order to have efficient, effective, effects bargaining.

QUESTION: Well, you're effectively arguing for the position that Judge Kearse took in her dissent in the 2nd Circuit.

MR. POLLACK: That's extremely true, Your Honor, very much so, and I think that's in line with Fibreboard and Darlington.

QUESTION: That you have to -- may have to bargain over the consequences of the closing but that you don't have to bargain over whether or not you'd close?

MR. POLLACK: Indeed, Mr. Justice Rehnquist. In fact, we admit we have to bargain over the consequences. There is no doubt about that.

QUESTION: Did you state a little while back that you have bargained over the consequences?

MR. POLLACK: Yes, Your Honor, that has been done. It is really not the issue which is before Your Honors, which --

QUESTION: No, but what was the result of that bargaining?

MR. POLLACK: There was severance pay paid to the

employees. There was some -- the employees had some 17 months, at most, of accumulated seniority, and so there was some severance pay and there was discussion -- although I don't believe it's in the record, because it happens after the record, Your Honor -- there was discussion about preferential hiring in the other facilities.

QUESTION: Well, now, wouldn't the new employer have to be a party to that bargaining?

MR. POLLACK: No, Your Honor, because the discussion concerned itself with preferential hiring in other facilities operated by the petitioner herein. And the other --

QUESTION: Oh. And often the successor employer would have to be a party to the effects bargaining, wouldn't he?

MR. POLLACK: Not necessarily. It's only if the effects bargaining was to go to the area of continued employment in the same relationship. The privity of contract --

QUESTION: Well, no, wouldn't it go beyond that? I mean, if there's a successor employer, don't the employees have a demand upon him under those particular facts?

MR. POLLACK: I think that other -- oh, indeed, Your Honor. There are other sections of the labor law which clearly show that in a true successorship there is an entitlement of employees to stay in employment. Certainly --

QUESTION: That's our Burns Detective and other cases.

MR. POLLACK: Oh, indeed, Your Honor. I was addressing

the mandatory nature of the bargaining as opposed to --

QUESTION: There's been much in the newspapers about Ford and Chrysler and others completely shutting down plants and letting go some several thousands of employees. In those instances, I suppose, there, there is bargaining on effects and consequences, but there hasn't been any that I've read about, over whether or not they could close down those plants, has there?

MR. POLLACK: Your Honor, there are -- if I may, we must be careful not to read into this problem a problem of normal layoffs. As you know --

QUESTION: No, no, I'm talking about -- what I've been reading is, in Mahwah, New Jersey, for example, Ford has completely cut out a plant, stopped operating it entirely. Laid off some four or five thousand workers. That's the sort of thing I'm talking about.

MR. POLLACK: Yes. I would suggest, Your Honor, that if Ford doesn't subcontract out that work to somebody else to do that Ford would have the right to unilaterally make that decision. That's necessary.

QUESTION: Are you saying that if Ford simultaneously opened a new plant in Hamburg, Germany, employing substantially the same number of people, that that would be a subject of mandatory bargaining?

MR. POLLACK: Yes, Your Honor. I believe that that is

correct. I believe that because of that set of circumstances the employer still remains the employer. The work is being done by a replacement group. Now, that's really what Fibreboard said.

QUESTION: And you think that situation as hypothesized by the Chief Justice is similar enough to Fibreboard to have the Fibreboard rule apply?

MR. POLLACK: Well, there is, of course, Your Honor, a very vast geographic difference.

QUESTION: I understand.

MR. POLLACK: Fibreboard was really a subcontractor suing --

QUESTION: But was that the basis of your answer to the Chief Justice?

MR. POLLACK: Yes, Your Honor. Yes, sir.

QUESTION: Now, they might be able to show in that bargaining valid reasons, and there'd be no problem; the problem would wash out.

MR. POLLACK: Yes, but the question, Your Honor, is whether or not it would be permissive bargaining or mandatory. Because once it becomes mandatory we now get into the whole concept of good faith bargaining and it is that, I suggest to you, that an employer who really is going to stop being an employer does not have to become involved in. Just as an employee has a right to quit without good-faith bargaining on that subject

matter, so --

QUESTION: Well, in a sense, the word "valid reasons" at the bargaining table doesn't have too much significance, does it? It's more arguments back and forth rather than saying one argument is valid and another isn't?

MR. POLLACK: No, Your Honor, because -- I appreciate that if you just accept what I say at its surface, it may appear that it's against my position, but it is not against my position. There can be situations where an employer decides that he wants to cut his labor costs as in Fibreboard, and brings the union in and says to the union, if you don't cut your costs, I am going to subcontract out that maintenance work or that work of making tops of convertible cars. At that point the union can validly in behalf of its members agree to increase productivity to reduce --

QUESTION: Well, when you say, validly, I mean, it can agree, period, can it not?

MR. POLLACK: Surely.

QUESTION: Why does the word "valid" creep in?

MR. POLLACK: I think, Your Honor, Mr. Justice Rehnquist, the word "valid" is whether there's a valid termination of employment, meaning the employer validly goes out of business. He doesn't run away and open up a plant in another state in order to avoid some sort of union problem, or he doesn't hire a subcontractor in his own plant.

QUESTION: So "valid" means without anti-union animus, or -- ?

MR. POLLACK: Well, it wouldn't even matter whether -- it would include anti-union animus, motive, but it would not only be limited to that. It could be a good business decision where he wants to save some money, and I suggest to you that if he wants to save some money and if he wants to stay an employer and he really just wants to replace his labor costs, that at that point of time he should be dealing with his employees.

Now, it's true he doesn't give up his rights to make the ultimate decision to close. He still reserves the prerogative to close. I agree that he has the right, however, if he is going to only do what was done in Fibreboard, subcontract the work to another labor force, and under those circumstances he should bargain. "Bargain," as has been said many, many times, does not give up the right to make the ultimate decision. It just means to listen. I believe he does not have the mandatory bargaining obligation if he genuinely intends or is forced to cease being an employer. Therefore, if his supply of raw materials ends, he has the right to do it unilaterally. If his major customer says, no more business and he's forced out of business, he has the right to do that. If he's just tired of shuttling back between two various places, plants, and he genuinely intends to close and does close one plant without surreptitiously moving the work to the other plant, he has the

right to do that. That right does not preclude permissive bargaining. Permissive bargaining says, I'll listen to what you have to say; maybe I don't even want to listen; if I don't want to listen, I don't have to listen. But I may want to talk to you.

QUESTION: Well, 8(a)(5) is involved only if there's mandatory bargaining.

MR. POLLACK: That is absolutely correct. Your Honor, I have reserved certain time for rebuttal. I'd like to continue that reservation.

MR. CHIEF JUSTICE BURGER: Very well. Mr. Come.

ORAL ARGUMENT OF NORTON J. COME, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. COME: Mr. Chief Justice, and may it please the Court:

First of all, I'd like to clear up a few things about the facts in this case. The petitioner had a maintenance contract with the Greenpark Nursing Home. Under that contract Greenpark paid the labor cost of the petitioner's employees plus a weekly management fee which was originally $500 and then was cut down to $250.

Petitioner experienced difficulties in making out with the reduced management fee and wanted Greenpark to increase it back to a $500 weekly fee. In the meantime, the union was certified by the Labor Board as the representative of

petitioner's employees. The union made a demand for bargaining which petitioner did not respond to. When it could not work out its monetary difficulties with Greenpark, it gave notice that it would terminate the contract, which was terminable on 30 days notice, and then two days before the end of the 30 days it told the employees that they were going to be terminated. And that was the first word that the union had that petitioner had a monetary problem.

QUESTION: Since you emphasize the two days, what if they had given them 30 days notice, as soon as they terminated with the nursing home? Would that make it different?

MR. COME: Well, had they given them 30 days, it is conceivable, given the type of monetary problem that petitioner had, that the union would have been able to bargain over ways of reducing the labor costs that would have enabled petitioner to remain with the contract. Because petitioner did not just go out of business. It remained in business at its other, at the other nursing homes that it was servicing. It was willing to remain in business here, according to the testimony of one of its top officials, if the union could work out the problem, but the point is that at that time there was no time left to negotiate, because the petitioner took the position that it was under no duty to bargain with the union about its decision to terminate its operation.

Now, as far as the effects bargaining is concerned,

it is true that two years after the contract was terminated and when the case was pending in the court of appeals, that the parties did engage in effects bargaining and according to the stipulation in the record some provision for severance pay to the employees was made.

I think the facts of this case illustrate why in the Board's view a blanket exemption from the statute for so-called partial closing decisions is not necessary to -- well, first of all, it does not effectuate the statutory purposes.

QUESTION: Mr. Come?

MR. COME: Yes?

QUESTION: Wouldn't that statement you just made require this Court to at least disapprove the 8th Circuit's decision in the Burns case, as to the Omaha operation?

MR. COME: I think that it depends upon the reasons for the decision. There are some partial closing decisions that turn upon financial or other investment decisions that bargaining, that there is little that a union could contribute through the give and take of the bargaining process. In those cases the Board has not required bargaining.

QUESTION: When you're talking about bargaining, you're talking about bargaining between the employer and the union, are you not?

MR. COME: Yes, Your Honor.

QUESTION: So when you say that there is little or

nothing that the union could contribute to the bargaining process, you're talking about a discussion between the employer and somebody else besides the union?

MR. COME: No, I'm talking about the type of considerations that go into a decision to terminate an operation, as we have here. In many cases the reason to terminate on economic grounds relates to considerations of labor costs, labor productivity. Or where concessions in those areas could alter the decision to close. Experience has, as shown, particularly in the corollary of Cohen, where as a result of give and take on these issues between management and labor, plant closings have been averted.

QUESTION: Tell me, Mr. Come, has the Board taken the position -- for example, it's a single plant, and it's organized, and the employer just has such a hassle constantly with the union that he says, it's not worth it, I'm going to give up and go move to Florida, and I'm going to get out of business. And I'm -- why? -- I'm getting out of business because this union is just giving me too much trouble. I want no part of them anymore and I'm just getting out of business. Does the Board think that's a situation in which the employer before he goes out of business must negotiate the closing with the union?

MR. COME: I don't know that the Board has had that case but I would point out that there are cases that suggest

that the Board would find that there might not be an obligation in that situation.

QUESTION: And it wouldn't be an unfair practice under (a)(3) or something?

MR. COME: No, because under --

QUESTION: Or (a)-something.

MR. COME: 8(a)(3). Ah --

QUESTION: Let me give you a slight variation of that. Suppose, on the first of that month, the proprietor of the establishment says to his wife, I am 80 years old this month and let's move to Florida, and just go out of business. Have you got to bargain that question with the union?

MR. COME: Well, as I've pointed out to Justice Brennan, I don't recall such a case, but I am confident, at least in my reading of the analogous situations, that the Board would be unlikely to find a bargaining obligation in that sort of a situation. But that is poles apart from the situation that we have here and the situation that we have in many of the termination cases.

QUESTION: Mr. Come, why is it poles apart? What is the difference between that case -- maybe the man is a little older, but still, on the economic decision, he'd rather spend his money in Florida than where he was. And here the man decides he doesn't want to spend his operation in this particular location.

MR. COME: Well, I think that Judge Adams in the Brockway case summed it up better than I can when he pointed out that a decision to close down can be motivated by a variety of considerations. On some considerations the union is not a very helpful interlocutor. On others, it may very well be, and what we're talking about here is that the end result is a termination of employment, a termination of the jobs of the employees which put --

QUESTION: Well, Mr. Come, what if a 40-year-old couple who are proprietors decide that they're sick and tired of shoveling snow up here in the north and want to move to Florida? Do you think the Board would say that was a subject of mandatory bargaining?

MR. COME: I don't think so. I don't think so, but on the other hand, if you have a situation such as you had here, where the only reasons that this employer wanted to close down were, as he put it, the money items, and the money items were such that it was not unreasonable to believe that the union could point out to him ways in which the money problem could be solved and the operation remain in operation, that is a situation where it furthers the statutory purpose to require bargaining first.

QUESTION: Well, the union could point it out to him by sending him a letter, couldn't it?

MR. COME: Well, sending a letter does not have the

same meaning or likelihood for persuasion that sitting down at the bargaining table --

QUESTION: Well, but you're suggesting that the union is kind of a management consultant that can help him save money.

MR. COME: No, it is not a management consultant but it certainly knows about what wages --

QUESTION: Do you mean something like this, Mr. Come? The union might come in and say, look, you need to net $500 a week. If the 35 of us took a $3 decrease in our weekly pay, that would give you enough, coupled with the $250 you've got, to give you the $500.

MR. COME: That is what I'm talking about, and that is exactly what has happened in many forms and is happening today --

QUESTION; But what about the situation --

MR. COME: -- in the rubber industry and in the auto industry.

QUESTION: Well, I was going to ask, what about the -- maybe I'm wrong about the facts, but didn't Ford cut, close down, permanently close down its Mahwah plant and let some 4,000 employees go?

MR. COME: It did.

QUESTION: Now, was there any negotiation with Ford about the closure of that plant?

MR. COME: I don't know about that plant, but there

are instances which we have set out in our brief where in the rubber industry and in other auto plants, UAW and Chrysler, for example, before the loan guarantee statute was enacted, did bargain about the decision in advance, and as a result of that bargaining the union did agree to take wage cuts, defer pension accruals, defer cost of living increases, with the result that the plant was able to continue operating.

QUESTION: Mr. Come, perhaps you can't answer this in just a word but are you defending the court of appeals opinion here or are you furthering the Board's view, or both? The court of appeals didn't sustain the Board's rule, did it?

MR. COME: Well, I think that the court did. It --

QUESTION: Well, it sustained on the judgment, maybe, but the Board's rule is more of a per se rule than the court of appeals would agree to, isn't it?

MR. COME: No, I don't think so. The Board's position, and I should point out that this is a position that has evolved over time and --

QUESTION: This is your so-called Ozark rule, is that it?

MR. COME: Well, it's the Ozark rule as modified in the light of cases subsequent to --

QUESTION: In the light of subsequent elections. I

QUESTION: I will put it to you this way. Does the court of appeals view of the law satisfy the Board completely?

MR. COME: I think it would; I think it would.

QUESTION: That's all I really --

MR. COME: I think there's really no difference other than perhaps a difference in formulation between the court of appeals position and that of the Court, which is that as a general principle, there is a duty to bargain about an economic decision to shut down a part of an operation, absent a showing that such bargaining would be futile or significantly interfere with the employer's right to manage his business. I don't think that there is, as I say, a difference between the Board and the --

QUESTION: Well, does the Board recognize any exception to its Ozark rule?

MR. COME: Yes, Your Honor. I think we've set those out in our brief, particularly in the pages 40 to 41. And -- or actually beginning on 38. I think one of the first exceptions that was recognized was General Motors, which is not a recent decision, where General Motors decided to sell --

MR. CHIEF JUSTICE BURGER: We'll resume there at 1 o'clock, counsel.

(Recess)

MR. CHIEF JUSTICE BURGER: Mr. Come, you may resume.

MR. COME: The heart of this case was illustrated by a question of Justice Brennan's before the example that he gave of the closing of the auto plants. You have here a situation

where labor cost is the major portion of this contract. As a matter of fact, there's no capital investment at all and that Greenpark, the nursing home, furnished even the mops and the pails and the materials. Petitioner furnished only labor.

In that sort of a situation the case is very close to Fibreboard because the chances of bargaining, being able to make a difference in the decision to terminate the operation, are sufficiently good to further the statutory purpose of bringing it under the scope of bargaining. In Fibreboard the Court pointed out that the reasons for the employer's decision to contract out, that economies could be derived by reducing the work force, decreasing fringe benefits, and eliminating overtime payments, involved matters peculiarly suitable for resolution within the collective bargaining framework. And the Court held that in those circumstances the chances were sufficiently good that bargaining would be able to work out a resolution of the problem, that the statutory purpose would be served by bringing it within the area of mandatory bargaining.

QUESTION: Mr. Come, does it make any difference that in this case the nursing home had agreed to pay all of the labor cost and was obligated to do so?

MR. COME: No, Your --

QUESTION: That was not the case, of course, in the examples you've cited.

MR. COME: That is correct. But insofar as the

nursing home was concerned, all it was concerned about was in paying no more than the total bill.

QUESTION: Is that demonstrated by the record in this case?

MR. COME: I believe that it is.

QUESTION: Would not the nursing home also have to participate in the bargaining? Wouldn't you have to have a three-way bargaining under those circumstances? Suppose the nursing home just said, we can't afford to pay more than $250 regardless of what the wages are?

MR. COME: Well, there was certainly no indication that that would be the problem. They never got to that --

QUESTION: Is there any evidence as to what the nursing home would be willing to do?

MR. COME: No, the only indication is that, when the union was told to go to the nursing home about keeping on the employees, the nursing home said that, we can't do it because there's a clause in the contract that precludes us from hiring any of the petitioner's employees for 90 days.

QUESTION: Anyway, Mr. Come, even if the nursing home took the position that $250 is our rock bottom dollar, we're not going to contribute any more, you wouldn't have to have them in the negotiation if you could get the union to agree to reduce their wages enough to make up the additional $250, would it?

MR. COME: That is correct. This is a situation where

the total price could be kept where it is if the union were willing to reduce wages or introduce some productivity changes that would make the operation more efficient. As a matter of fact, earlier in the year, before the union came into the picture, the nursing home had given petitioner a notice that it was going to terminate its contract because a state inspection had found that its employees were not being efficient enough and petitioner instituted some changes in procedures that improved efficiency and enabled them to continue the contract. It's not necessary to guarantee that something like this could have been achieved. All that is necessary in order to further the statutory purpose is to have a situation where, as in Fibreboard, it is reasonable to believe that something could be done.

QUESTION: Well, Mr. Come, what precisely was the factual sequence here? Did the company simply announce without any previous notice to the union at all that it was shutting down this operation?

MR. COME: Yes, Your Honor. Two days before. And it didn't even announce it to the union. It announced it to the employees who in turn notified the union. Now --

QUESTION: Did the contract contain any provision calling for consultation or notice, independent of any other factors here?

MR. COME: No, it did not, because at the time the

contract was negotiated the union had not been certified as the bargaining representative and the petitioner and the union never got to negotiating a contract.

Now, if there were a duty to bargain over partial closing situations, the parties can in their contract negotiations, as have many employers, worked out in advance of a termination the conditions for notice and the amount of bargaining --

QUESTION: But does a duty to bargain under the Act supply a contractual term that is nonexistent?

MR. COME: Well, the duty to bargain imposes a legal obligation that might -- there was no contract between the union and the employer. The contract was between --

QUESTION: But you're making the duty to bargain in effect a part of a contractual provision that was nonexistent.

MR. COME: No, I think you misunderstand me, Your Honor. What I'm saying is that without a contract there would be a duty to bargain. Nowever, in negotiating a collective bargaining agreement the parties can in their negotiations define the, or restrict the limits of the bargaining obligation, and there are contract provisions that provide for advance notice, what sort of bargaining if any has to occur in the event of a termination, what sort of severance pay and things of that sort would be provided? But we never got to first base on that here. But the logic of petitioner's position that there is no duty to bargain at all over the decision would remove

from the mandatory bargaining obligation even the situation at the stage of contract negotiations where the parties in advance of such a situation seek to make provision for it. The duty to bargain is a very, very flexible concept.

QUESTION: Where is the obligation to stay in business? Whence does that arise? In any business, whether it's Chrysler, or First National Maintenance?

MR. COME: I don't think that there is an obligation to stay in business if you want to go completely out of business. I think the Darlington case recognizes that. If an employer wants to pick up --

QUESTION: Isn't that what was done here?

MR. COME: No, Your Honor, it was not done here because this employer remained in business. He --

QUESTION: Not in this business. Not in the particular enterprise that we're concerned with on this record.

MR. COME: Well, he remains in business at his other nursing homes. He was perfectly willing to remain in business here if the money items could be worked out.

QUESTION: Well, but Chrysler is not only willing but anxious to remain in business, but they certainly can close some of their plants which are nonproductive in order to survive.

MR. COME: After bargaining, however. The duty to bargain does not mean the duty --

QUESTION:: Do you suggest that Chrysler had to bargain

with somebody before they closed a plant somewhere?

MR. COME: I am suggesting that. I am also suggesting that they and the UAW did.

QUESTION: Well, the fact that they did doesn't necessarily, they may have done that in terms of future relations with the United Automobile Workers because they've got to continue to work together, but are you saying there's an obligation if they decide that a losing plant must be closed, an obligation to negotiate?

MR. COME: Where the considerations are of the nature that we have here, if it is --

QUESTION: What you mean, Mr. Come, if the union can contribute anything which would lead the employer not to close the plant, then he ought to sit down with the union and negotiate.

QUESTION: Not that he ought to; that he must, under the law, it's mandatory.

MR. COME: That is correct.

QUESTION: Or you lose your case, don't you?

MR. COME: That is correct. I want to just make one point and that is that everybody concedes here that there is a duty to bargain about the effects of a closing. Now, the effects of a closing are often intertwined with the decision. Experience has shown, and the authorities that we have cited in our brief, that enlightened management have recognized that you can't meaningfully bargain about the effects if the

employees are going to have suspicions and recriminations about the decision. The only way you can get on to meaningful bargaining about the effects is to candidly discuss the reasons for the closings and --

QUESTION: Mr. Come, I was a little surprised to hear you say that you would accept the court of appeals' view that a presumption was enough to satisfy the Board. Now, suppose the employer comes back and says, look, I didn't want to bargain because economics didn't have anything to do with it, I just didn't like the union. Now, in this very case, a union gets certified, suppose the employer says, I decided to close down this branch because I just don't like unions?

MR. COME: I don't know that that would be a -- the court of appeals didn't say, just a presumption. It said --

QUESTION: It said that the employer -- that there was --

MR. COME: -- that the employer would have to show --

QUESTION: -- a presumption that he must bargain. Except that the -- it's rebuttable. If he's got the right reasons, he doesn't need to bargain.

MR. COME: Well, but the reason that the court of appeals gave was that bargaining would not effectuate the purposes of the statute.

MR. COME: I agree with you. And if he doesn't like unions, certainly bargaining isn't going to effectuate much.

MR. COME: Well, it may be that bargaining would not

be very meaningful. But on the other hand, petitioner's position --

QUESTION: I thought you told me earlier, Mr. Come, in precisely -- I gave you that hypothetical. And I thought you said to me in that circumstance you didn't think there was any duty to bargain.

QUESTION: Exactly. That's what I thought so, too.

MR. COME: Well, I'm talking about a situation where he goes completely out of business, which is the Darlington situation, for an anti-union reason. And the court there found that it is no 8(a)(3) unless you can show a purpose to chill. The Board in that sort of a situation has indicated that it would find no duty to bargain either. But the situation of a partial closing where he remains in business, which is what we have here, I submit, presents a different question. And that is what we have here. Thank you.

MR. CHIEF JUSTICE BURGER: Do you have anything further, Mr. Pollack?

MR. POLLACK: Yes. Mr. Chief Justice

ORAL ARGUMENT OF SANFORD E. POLLACK, ESQ.,

ON BEHALF OF THE PETITIONER -- REBUTTAL

MR. POLLACK: Mr. Chief Justice, and may it please the Court:

If I may just for the record possibly correct what may be some confusion concerning the costs which were applicable

under the contract between First National and the nursing home, as I said earlier, this was a cost-plus contract which meant any give-back of costs by way of the laborers, the union, the employee saying, I would be willing to take less pay, would in reality inure to the benefit of the nursing home. Now, it might be argued, and I suggest, Your Honors -- and forgive me, we're probably off the record, because the record didn't get into this, but in response to the question I would like to.

In the nursing home industry in the State of New York we are dealing with predominantly a reimbursement state statute concept under Medicare and Medicaid. The probability is that if there were a cost saving in labor, that the state reimbursement to the nursing home would be proportionately reduced and so the reason why, I might suggest, the respondent is willing to accept the 2nd Circuit's presumption that they labeled rebuttable, is because in reality it's not. In this very case it should have been rebutted. The dissent from it points that out admirably well.

QUESTION: I don't understand that argument. If the union were to agree to take a cut in wages in order to let your client realize $500 a week, why would that trigger the reimbursement, New York reimbursement statute?

MR. POLLACK: Because the contract between Greenpark, which was the nursing home, and First National, says that the nursing home repays the out-of-pocket expenses of First National

plus a management fee. So, if you lower the out-of-pocket expenses it doesn't help First National. And I believe that that is a critical point that the dissent in the circuit below makes and in reality is why the presumption is really not a rebuttable presumption. It's an irrebuttable presumption.

Because, what happened in this very case is the dilemma that the management community would be faced with. It would be faced with bargaining or making a decision to bargain or not. And then, with the benefit of hindsight, a court or a board would after the fact look at the case and say, oh, you should have bargained. And the record itself might not really be complete. And so I suggest to you that the Ozark rule, the presumption of the the 3rd Circuit in Brockway, the presumption of the 2nd Circuit in First National, all become unworkable. Better is it to apply the concurring opinion of Judge Stewart in Fibreboard.

QUESTION: Well, it's a court of appeals opinion --

MR. POLLACK: Or the court of appeals opinion in that very case. Yes, Your Honor.

QUESTION: But you're not going to apply my opinion?

MR. POLLACK: I have difficulty, Your Honors.

QUESTION: Mr. Pollack, may I ask you a question that Mr. Come's argument raised with me? If you're correct in your view that this is not a mandatory subject, the decision to close is not, what would your view be about a request by the

union, when you sit down to bargain out a new collective bargaining agreement, and they say, we would now like to bargain about the procedure to be put in the contract that shall be followed in the event that the employer faces up to a termination decision. Would that be mandatory or not?

MR. POLLACK: Your Honor, clearly that would be in my opinion permissive. However, if the procedure were a procedure which -- wide as it -- which kept at its core the effects aspect of bargaining, meaning we want to bargain with you concerning the effects of --

QUESTION: No, no, my question is, we want to bargain with you, we want to have notice of any intent to close and a time to try and tell you how we might help you make a different decision?

MR. POLLACK: Your Honor, I believe the notice requirement goes to effects as well as it does to decisional bargaining, and would be proper and mandatory. I submit that under the reasoning which I advance, the request in advance would be permissive or mandatory only if it were distinguished as between a termination and/or a continuation of the business in a different nature or subject.

QUESTION: No, let's say there's a fact situation just like this, where --

MR. POLLACK: It would be permissive, Your Honor, and would certainly be bargainable, but it's not the kind of subject

that parties can raise to the stature of impact.

QUESTION: Well, what do you do with the Telegraphers case in the railroad?

MR. POLLACK: Your Honor, the Railway Telegraphers case in my view really concerned the Norris-La Guardia Act and its application in labor disputes as --

QUESTION: Well, it may be, but the Court said it was a mandatory duty of bargaining.

MR. POLLACK: No, Your Honor, if I may, the Court said it was a legal subject for bargaining and therefore it was not enjoinable. I don't believe, and I must respectfully suggest, that that Court was aware or even dealt with -- this Court -- even dealt with the Borg-Warner tripartite approach to legal, mandatory and permissive. The Court in Telegraph dealt with legal and illegal.

QUESTION: So you think -- my real question was, do you think that the rule might be different in the railroad labor cases?

MR. POLLACK: Absolutely not, Your Honor.

QUESTION: So if we happen to disagree with you on how to read the Railway Telegraphers case, you may lose your case?

MR. POLLACK: If you disagree with me, that would be correct, Your Honor. But I believe that the way this Court treated Fibreboard and Darlington indicates very clearly that

they considered Telegraphers in line with what I have described, my belief of the case's holding. It seems to me incompatible to say, by the Labor Board, that the Labor Board would not require an employer to bargain about his decision to go totally out of business and move to Florida, but would require that employer to bargain about a decision to close his New York plant and continue in a Florida plant that he may have operated before that time. To me it is incongruous. It defies both the treatment that this Court has afforded to the doctrines of law and, I suggest, logic. Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

(Whereupon, at 1:21 o'clock p.m., the case in the above-entitled matter was submitted.)

CERTIFICATE

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No. 80-544

FIRST NATIONAL MAINTENANCE CORPORATION

V.

NATIONAL LABOR RELATIONS BOARD

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BY: Bill G. Gibson