The Burger Court Opinion Writing Database

First National Maintenance Corp. v. NLRB

452 U.S. 666 (1981)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 10, 1981

RE: 80-544 - First National Maintenance Corp. v. NLRB

Dear Harry:

I join.

Regards,

WEB

Justice Blackmun

Copies to the Conference

First National Maintenance Corp. v. NLRB

No. 80-544

JUSTICE BRENNAN, dissenting.

Section 8(d) of the National Labor Relations Act, as amended, requires employers and employee representatives "to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment." 29 U.S.C. § 158(d). The question in this case is whether First National Maintenance Corporation's decision to terminate its Greenpark Care Center operation and to discharge the workers employed in that operation was a decision with respect to "terms and conditions of employment" within the meaning of the Act, thus rendering its failure to negotiate with the Union unlawful.

As this Court has noted, the words "terms and conditions of employment" plainly cover termination of employment resulting from a management decision to close an operation. Fibreboard Corp. v. NLRB, 379 U.S. 203, 210 (1964). As the Court today admits, the decision to close an operation "touches on a matter of central and pressing concern to the union and its member employees." Ante, at 15. Moreover, as the Court today further concedes, Congress deliberately left the words "terms and conditions of employment" indefinite, so that the NLRB would be able to give content to those terms in light of changing industrial conditions. Id., at 12, 12-13, n. 14. In the exercise of its Congressionally-delegated authority and accumulated expertise, the Board has determined that an

1st PRINTED DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-544

First National Maintenance Corporation, Petitioner, *v.* National Labor Relations Board. | On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[June —, 1981]

JUSTICE BRENNAN, dissenting.

Section 8 (d) of the National Labor Relations Act, as amended, requires employers and employee representatives "to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment." 29 U. S. C. § 158 (d). The question in this case is whether First National Maintenance Corporation's decision to terminate its Greenpark Care Center operation and to discharge the workers employed in that operation was a decision with respect to "terms and conditions of employment" within the meaning of the Act, thus rendering its failure to negotiate with the Union unlawful.

As this Court has noted, the words "terms and conditions of employment" plainly cover termination of employment resulting from a management decision to close an operation. *Fibreboard Paper Products Corp.* v. *NLRB*, 379 U. S. 203, 210 (1964). As the Court today admits, the decision to close an operation "touches on a matter of central and pressing concern to the union and its member employees." *Ante*, at 11. Moreover, as the Court today further concedes, Congress deliberately left the words "terms and conditions of employment" indefinite, so that the NLRB would be able to give content to those terms in light of changing industrial conditions. *Id.*, at 9, 9–10, n. 14. In the exercise of its congressionally-delegated authority and accumulated expertise, the Board has determined that an employer's decision to close

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

June 3, 1981

Re: No. 80-544, First National Maintenance Corp. v. NLRB

Dear Harry,

My views closely parallel those that Lewis has expressed to you in his letter of June 2.

Sincerely yours,

P.S.

Justice Blackmun

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

June 9, 1981

No. 80-544, First National Maintenance Corp. v. NLRB

Dear Harry,

Thank you for your valiant efforts to satisfy the concerns of some of your colleagues in this case. I think you have succeeded admirably and would be glad to join the Court opinion that you now propose.

Sincerely yours,

P.S.

Justice Blackmun

Copies to the Court

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 9, 1981

Re: 80-544 - First National Maintenance Corporation v. NLRB

Dear Harry,

If your circulating draft is changed as proposed in your memorandum of June 9, I could join it.

Sincerely yours,

Byron

Justice Blackmun

Copies to the Conference

cpm

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 17, 1981

Re: No. 80-544 - First National Maintenance Corp. v. NLRB

Dear Bill:

Please join me in your dissent.

Sincerely,

T.M.

Justice Brennan

cc: The Conference

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Blackmun

Circulated: JUN 1 1981

Recirculated: _____

No. 80-544, First National Maintenance Corp. v. NLRB

JUSTICE BLACKMUN delivered the opinion of the Court.

Must an employer, under its duty to bargain in good faith "with respect to wages, hours, and other terms and conditions of employment," §§8(d) and 8(a)(5) of the National Labor Relations Act, as amended (the Act), 29 U.S.C. §§158(d) and 158(a)(5), negotiate with the certified representative of its employees over its decision to close a part of its business? In this case, the National Labor Relations Board (the Board) imposed such a duty on petitioner with respect to its decision to terminate a contract with a customer, and the United States Court of Appeals, although differing over the appropriate rationale, enforced its order.

I

Petitioner, First National Maintenance Corporation (FNM), is a New York corporation engaged in the business of providing housekeeping, cleaning, maintenance, and related services for commercial customers in the New York City area. It supplies each of its customers, at the customer's premises, contracted-for labor force and supervision in return for reimbursement of its labor costs (gross salaries, FICA and FUTA taxes, and insurance)

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 2, 1981

MEMORANDUM TO THE CONFERENCE

Re: No. 80-544 - First National Maintenance Corp. v. NLRB

Enclosed is a revision of the last four pages of this opinion, which was circulated June 1 in typed form. The last footnote (footnote 23) was inadvertently omitted from that circulation. Please also note other changes as marked.

Wanda Martinson

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 2, 1981

Re: No. 80-544 - First National Maintenance Corp.
v. NLRB

Dear John:

Thank you for your letter of today. There is force to your objection. In line with the communication between our chambers, the paragraph that troubles you will be omitted and the following paragraph will be added to footnote 22:

> "We also have no need to consider, under these facts, a situation in which labor costs are the primary motivating factor in an employer's decision to reduce operations."

Sincerely,

Harry

Mr. Justice Stevens

cc: The Conference

Work for

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 9, 1981

MEMORANDUM TO THE CONFERENCE

Re: No. 80-544 - First National Maintenance Corp. V. NLRB

I have considered Lewis' objections set forth in his letter of June 2 and joined by Potter and Bill Rehnquist. From my conference notes, I must assume that the Chief, when he is able to get to the case, will take the same position.

I am sympathetic to the need for certainty in this area, and, subject to John's approval (for he already has joined), I would not be uncomfortable in revising the writing to reflect a "bright line" as to partial closing decisions. In other words, rather than suggest the possibility that the facts in some case might justify the imposition of a duty to bargain over a decision to terminate a part of a business, we could conclude that bargaining is never mandated where a partial closing is motivated solely by economic considerations, where no anti-union animus is present, and where no intention to reopen elsewhere or to replace the eliminated workers with subcontracted-for employees appears. I also am not averse to moderating some of the language in the opinion as it was circulated.

Because Mr. Cornio has now sent up the print of the original, I am circulating that print, for what it may be worth, with corrections of what primarily are typographical errors.

I am also circulating herewith, however, a revised version of pages 10-30 of the xerox copy. The proposed changes are indicated, but I have not sent this to Mr. Cornio.

I am not persuaded that I should modify the opinion to eliminate or replace the analysis on which it is based: that deciding whether decisions of this type, i.e., decisions that have such a direct and immediate impact on jobs, should be mandatory subjects of bargaining depends on a consideration of the purposes behind the enactment of the NLRA and Taft-Hartley, which include principally the removal of industrial conflict from the sphere of overt clashes to the arena of collective bargaining supervised by the NLRB.

I readily concede that Congress did not intend to bring within the mandatory subjects of bargaining all employment decisions. I have found nothing, however, to suggest that Congress, in passing these two acts, had in mind a clear list of subjects, even as to management decisions, that were immune from bargaining. Surely, there is nothing in the statute itself to suggest that Congress contemplated a fixed set of "managerial prerogatives" that it intended to immunize, and I have seen nothing to this effect in the legislative history. Congress intended not to require bargaining over what fell outside "wages, hours, and terms and conditions of employment," but it left further definition of those terms to the parties, the NLRB, and the courts. A conclusion that Congress itself excluded specific subjects, among them these partial closing decisions, also would substantially undermine much precedent in the Board and the lower courts, which have approved, with this Court's acquiescence, a widening sphere of mandatory subjects of bargaining, whether we like to acknowledge it or not. Thus, I think we must look elsewhere for the limiting definition.

Although I agree with it, Lewis' statement that "[d]ecisions as to partial closings are solely managerial ... because they determine the basic scope of the enterprise" seems to me to be only a conclusion, which, if not supported by some more basic analysis, will provide no guidance to lower courts. Looking to whether a management decision involves a "basic" shift in operations or a "major" reallocation of capital, as most of the Courts of Appeals have done, results in essentially ad hoc distinctions. The line between "major" and "minor" and "basic" and "non-basic" becomes simply a matter of opinion, dependent on whether one favors management or labor interests. For instance, I do not perceive that the decision in this case was intrinsically any more "basic" than the subcontracting decision in Fibreboard. First National Maintenance apparently routinely entered into and terminated these maintenance agreements with its customers. This was its regular manner of conducting business, and it must have resulted in employees' routinely losing their jobs. Thus, the termination of the Greenpark contract did not involve a basic shift of direction or a fundamental alteration of the company's size or shape. If anything, the subcontracting decision in Fibreboard, which was unprecedented and a major alteration of the way the plant was run, was a more "fundamental" change in the way the company allocated capital and shaped the enterprise.

I think that the implicit basis for Lewis' conclusion is that requiring bargaining over this type of management decision would be just too burdensome for the employer. This in fact is the core of my analysis, and it contains nothing startling or even novel. The Court in Fibreboard explicitly considered the type of factors that I discussed in the opinion and concluded: "To hold, as the Board has done, that contracting out is a mandatory subject of collective bargaining would promote the fundamental purpose of the Act by bringing a problem of vital concern to labor and management within the framework established by Congress as most conducive to industrial peace." 379 U.S., at 211. I had not thought that the Court now wanted to overrule Fibreboard or to confine it to its facts, and I attempted merely to apply its analysis. My consideration of the factors present in partial closing decisions leads me to conclude that bargaining over these decisions will not incrementally improve the collective bargaining process, but in fact will have detrimental effects on the employer, thus weakening the likelihood that bargaining will reduce industrial tensions.

This is as far as I can go. I hope that it will prove to be acceptable; if not, perhaps the case should be reassigned or be put over for reargument in the Fall.

HAB.

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Blackmun

Circulated: _____

Recirculated: JUN 9 1981

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SUPREME COURT OF THE UNITED STATES

No. 80–544

First National Maintenance Corporation, Petitioner, *v.* National Labor Relations Board. | On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[June —, 1981]

JUSTICE BLACKMUN delivered the opinion of the Court.

Must an employer, under its duty to bargain in good faith "with respect to wages, hours, and other terms and conditions of employment," §§ 8 (d) and 8 (a)(5) of the National Labor Relations Act, as amended (the Act), 29 U. S. C. §§ 158 (d) and 158 (a)(5), negotiate with the certified representative of its employees over its decision to close a part of its business? In this case, the National Labor Relations Board (the Board) imposed such a duty on petitioner with respect to its decision to terminate a contract with a customer, and the United States Court of Appeals, although differing over the appropriate rationale, enforced its order.

I

Petitioner, First National Maintenance Corporation (FNM), is a New York corporation engaged in the business of providing housekeeping, cleaning, maintenance, and related services for commercial customers in the New York City area. It supplies each of its customers, at the customer's premises, contracted-for labor force and supervision in return for reimbursement of its labor costs (gross salaries, FICA and FUTA taxes, and insurance) and payment of a set fee. It contracts

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 10, 1981

Re: No. 80-544 - First National Maintenance Corporation v. NLRB

Dear Lewis:

This is in response to your letter of June 9. I shall be glad to change the sentence on page 18 of the xerox draft (the sentence that concerns you) to read as follows:

> "The Court also emphasized that a desire to reduce labor costs, which it considered a matter 'peculiarly suitable for resolution within the collective bargaining framework,' id, at 214, was at the base of the employer's decision to subcontract:"

I believe, and hope, that this will alleviate your concern. I suspect it will not disturb those who already have joined.

Sincerely,

Harry

Mr. Justice Powell

80-544 First Nat Maintenance v. NLRB

Because of the importance of the issue and the continuing disagreement between and among the Board and the Courts of Appeals, we granted certiorari. ___ U.S. ___ (1981).

A fundamental aim of the National Labor Relations Act is the establishment and maintenance of industrial peace to preserve the flow of interstate commerce. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).[11] Central to achievement of this purpose is the promotion of collective bargaining as a method of defusing and channeling conflict between labor and management. In Section

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Ozark Trailers, Inc., 161 N.L.R.B. 561, 567, 568 (1966) (employer's decision to shut down one of multiple plants was a mandatory subject because it was "a decision directly affecting terms and conditions of employment" and "interests of employees are of sufficient importance that their representatives ought to be consulted in matters affecting them"). See also Kingwood Mining Co., 210 N.L.R.B. 844 (1974), aff'd, sub nom. United Mine Workers v. NLRB, 169 U.S. App.D.C. 301, 551 F.2d 1018 (1975).

[11] "Experience has abundantly demonstrated that the recognition of the right of employees to self-organization and to have representatives of their own choosing for the purpose of collective bargaining is often an essential condition of industrial peace. Refusal to confer and negotiate has been one of the most prolific causes of strife. This is such an outstanding fact in the history of labor disturbances that it is a proper subject of judicial notice and requires no citation of instances." NLRB v. Jones & Laughlin Steel Corp., 301 U.S., at 42 (upholding the constitutionality of the Act).

pp. 13+22

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Blackmun

Circulated: _____

Recirculated: JUN 12 1981

1st PRINTED DRAFT of revised version

SUPREME COURT OF THE UNITED STATES

No. 80-544

First National Maintenance Corporation, Petitioner, *v.* National Labor Relations Board. | On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[June —, 1981]

JUSTICE BLACKMUN delivered the opinion of the Court.

Must an employer, under its duty to bargain in good faith "with respect to wages, hours, and other terms and conditions of employment," §§ 8 (d) and 8 (a)(5) of the National Labor Relations Act, as amended (the Act), 29 U. S. C. §§ 158 (d) and 158 (a)(5), negotiate with the certified representative of its employees over its decision to close a part of its business? In this case, the National Labor Relations Board (the Board) imposed such a duty on petitioner with respect to its decision to terminate a contract with a customer, and the United States Court of Appeals, although differing over the appropriate rationale, enforced its order.

I

Petitioner, First National Maintenance Corporation (FNM), is a New York corporation engaged in the business of providing housekeeping, cleaning, maintenance, and related services for commercial customers in the New York City area. It supplies each of its customers, at the customer's premises, contracted-for labor force and supervision in return for reimbursement of its labor costs (gross salaries, FICA and FUTA taxes, and insurance) and payment of a set fee. It contracts

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 2, 1981

No. 80-544, First National Maintenance Corp. v. NLRB

Dear Harry:

I fully agree with the result you reach in this case, but I do not subscribe to a balancing approach when the issue is the discontinuance of a losing portion of a business operation.

Your opinion suggests that the duty to bargain is a fluctuating concept that may vary with the times and with the extent of a labor union's interest in a particular question. You say that "issues that might be resolved through collective bargaining should not be excluded arbitrarily out of deference to a fixed concept of 'managerial prerogatives.'" Op. at 17. Specifically, you hold out the possibility that the result in this case might be different if "labor costs [were] the motivating factor in an employer's decision to reduce operations." Id. at 28.

I view the problem of partial closings somewhat differently. I share the view that Potter expressed in Fibreboard Paper Products Co. v. NLRB, 379 U.S. 203 (1964), that § 8(d) of the Act describes a "limited area subject to the duty of collective bargaining," and that excluded from this area are "managerial decisions which lie at the heart of entrepreneurial control." Id. at 223 (Stewart, J., concurring). This view has been reiterated in a number of cases, see, e.g., NLRB v. Burns Int'l Detective Services, Inc., 346 F.2d 897, 901-02 (CA8 1965), and also in the literature, see, e.g., R. Gorman, Labor Law 509-11, 518-19 (1977). Decisions as to partial closings are solely managerial, in my view, because they determine the basic scope of the enterprise. In this case, for example, petitioner was a service organization with no plant or equipment. The essential managerial decision for this kind of organization was "to contract or not to contract."

It seems to me that a balancing test is not appropriate in this context. If a partial closing is a mandatory subject of bargaining, I suppose the union could strike in support of its wishes at all the employer's plants. Companies thus may be forced to keep a losing plant open for fear of strikes at profitable plants elsewhere. I cannot ascribe to Congress an intention so severely to constrict managerial freedom--particularly since the employees' interests should be adequately protected by management's duty to bargain over the effects of the closing.

In sum, I cannot join your opinion as it is now written. Unless another Justice wishes to write, I probably will write an opinion concurring in the result.

Sincerely,

Lewis

Mr. Justice Blackmun

Copies to the Conference

June 9, 1981

80-544 First National Maintenance v. NLRB

Dear Harry:

My separate join note, circulated herewith, is unconditional. I do indeed appreciate your making the changes.

There is one sentence (on page 18) that I would appreciate your taking a second look at. It is the introductory sentence for the last block quotation from Fibreboard at the bottom of the page. The "desire to reduce labor costs" in some sitautions may be an element - quite legitimately - in management's decision to discontinue a hopelessly unprofitable branch or portions of a business. In other situations, as evidenced by Fibreboard itself, collective bargaining might very well resolve the labor cost problem and therefore be "peculiarly suitable" for negotiation. The sentence can be read as saying that in all situations labor costs are peculiarly within the bargaining framework. The introduction to the quotation could be made neutral by something along the following lines:

> "The Court also emphasized that the employer's decision to contract out work was motivated"

I am grateful to you for the changes that you have made quite skillfully. I therefore send this note with some hesitation - only to you.

Sincerely,

Mr. Justice Blackmun

lfp/ss

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 9, 1981

80-544 First National Maintenance v. NLRB

Dear Harry:

Thank you for considering the suggestions that I offered last week. I think you have a fine opinion, and I am happy to join your latest circulation.

Sincerely,

Lewis

Mr. Justice Blackmun

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 3, 1981

Re: No. 80-544 First National Maintenance Corp. v. NLRB

Dear Harry:

I am in substantial agreement with Lewis' letter to you of June 2nd; I agree with the result you reach in the case, but think that when an employer actually engages in a partial closing he is indulging in the type of "managerial decision" which is not a subject of mandatory bargaining (unlike the decision to simply contract out some work previously done by an existing plant which is not being closed, in which there is a petition for certiorari by the employer seeking review of a decision of the NLRB that this is the subject of mandatory bargaining that I believe was on this week's Conference List).

Sincerely,

Justice Blackmun

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 10, 1981

Re: No. 80-544 First National Maintenance Corp. v. NLRB

Dear Harry:

I appreciate your willingness to consider and partially meet Lewis' objections to the first circulation of your opinion, with which Potter and I expressed sympathy. I now feel I can, and do, join the draft you circulated yesterday.

Sincerely,

Justice Blackmun

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

June 2, 1981

Re: 80-544 - First National Maintenance Corp. v. NLRB

Dear Harry:

At the top of page 28 of your typewritten draft you state:

> "Only in the rare event that labor costs are the motivating factor behind a reduction in operations should an employer be required first to negotiate with the union over a decision to close part of its business. It then must bargain, however, in a complete and meaningful manner over the effects that decision would have on its employees."

This paragraph troubles me for three reasons.

First, I am not at all sure that reductions in operations that are motivated by high labor costs are a "rare event." I should think they are quite common; at least labor costs would be a significant factor in most such reductions.

Second, even if labor costs are a significant factor in the management decision, I am not sure that we should decide that there is necessarily an obligation to bargain over the management decision. If bargaining would be helpful, management is probably in a better position to recognize that fact than is the labor board.

Third, your second sentence indicates that management must bargain over "the effects" of the decision. But that is true, as I understand the

opinion, regardless of whether or not labor costs were a motivating factor.

If you could simply omit this paragraph, I would be happy to join your opinion.

Respectfully,

John

Justice Blackmun

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

June 2, 1981

Re: 80-544 - First National Maintenance Corp. v. NLRB

Dear Harry:

Please join me.

Respectfully,

John

Justice Blackmun

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

June 9, 1981

Re: 80-544 - First National Maintenance Corp. v. NLRB

Dear Harry:

Since my original letter suggesting the omission of a paragraph from your first draft was motivated by concerns much like those that Lewis subsequently expressed, I will have no problem accepting the additional revisions that you propose in your circulation this morning.

As a somewhat lonely dissenter in the Amax Coal case, I cannot help noting the ironic contrast between the Court's careful consideration of the question whether a partial closing decision is a subject of mandatory bargaining and the way it leaped to the conclusion that management's appointment of its representatives to administer joint pension funds is a mandatory subject of bargaining. I frankly think the Amax case is a stronger case for recognizing a management prerogative than this one, but I guess that's how things often look from the down side.

Respectfully,

John

Justice Blackmun

Copies to the Conference