DUBUQUE PACKING CO.

DECISIONS OF THE NATIONAL LABOR RELATIONS BOARD

303 NLRB No. 66

Dubuque Packing Company, Inc. and United Food and Commercial Workers International Union, AFL-CIO, Local No. 150A. Cases 33-CA-5524 and 33-CA-5588

JUNE 14, 1991

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS CRACRAFT, DEVANEY, OVIATT, AND RAUDABAUGH

This case has been characterized as ``present[ing] hard questions--indeed, some of the most polarizing questions in contemporary labor law.'' Food & Commercial Workers Local 150-A v. NLRB, 880 F.2d 1422, 1439 (D.C. Cir. 1989). The most difficult issue before us is the general one of what standard to apply in determining whether an employer's decision to relocate bargaining unit work is a mandatory subject of bargaining. The more specific question presented is whether the Respondent violated Section 8(a)(5) and (1) of the Act by failing to bargain in good faith with the Union over the Respondent's decision to relocate its hog kill and cut operations from its home plant in Dubuque, Iowa, to a new plant in Rochelle, Illinois. For the reasons set forth below, we have decided to adopt a new test for determining whether bargaining is required over a relocation decision, to overrule our original Decision and Order in this case (287 NLRB 499 (1987)), and to find that the Respondent violated the Act.

I. PROCEDURAL HISTORY

On December 16, 1987, the Board issued its initial decision in this proceeding, adopting the judge's decision and finding that ``under any of the views expressed in Otis Elevator Co., 269 NLRB 891 (1984), the Respondent was not obligated to bargain with the Union over its decision to relocate unit work from its Dubuque plant to its Rochelle plant.'' 287 NLRB 499 fn. 1. Accordingly, the Board dismissed the complaint in its entirety.

The Union filed a petition for review with the United States Court of Appeals for the District of Columbia Circuit. On August 4, 1989, the court remanded the case to the Board for further consideration. 880 F.2d 1422.

The court stated that the judge's decision, which the Board adopted, did not provide sufficient reasoning linking the factual findings to the dispositive legal conclusions. In addition, the court found confusing the Board's statement that the judge's holding was correct ``under any of the views'' expressed in Otis Elevator. Most significantly, the court ``urge[d] the Board to look seriously at the present case on remand and to attempt to articulate a majority-supported statement of the rule that the Board will be applying now and in the future in determining whether a particular decision is subject to mandatory bargaining or not.'' 880 F.2d at 1436-1437. Finally, the court noted that certain similar cases reaching a different result had not been addressed, nor had the Board discussed the Union's argument that even if there was no duty to bargain about the relocation decision itself, a bargaining obligation did arise when the Respondent sought midterm modification of contractual provisions dealing with mandatory bargaining subjects. Accordingly, the court remanded the case to the Board.

On January 3, 1990, the Board advised the parties that it accepted the remand and that they might submit statements of position. On March

26, 1990, the Board scheduled oral argument in this case because the court's remand presented important issues in the administration of the Act. On September 6, 1990, the Respondent, the General Counsel, the Union, the American Federation of Labor and Congress of Industrial Organizations, the Chamber of Commerce of the United States of America, and the Council on Labor Law Equality presented oral argument before the Board. The parties and the amici curiae have filed statements of position and briefs.\1\

\1\The American Federation of Labor and Congress of Industrial Organizations, the Chamber of Commerce of the United States of America, and the Council on Labor Law Equality appeared as amici curiae.

II. FACTUAL BACKGROUND

The facts in this case have been exhaustively detailed by the administrative law judge in the underlying Board decision and are largely undisputed. 287 NLRB at 500-534. We continue to rely on the judge's factual findings and do not repeat here in great detail what has already been set forth in his decision. Further amplification of the facts will be saved for the analysis section of this decision. A brief overview follows.

The Respondent has been engaged in the business of meat slaughtering, processing, and packing at several facilities nationwide, including a facility in Dubuque, Iowa. Employees at the Dubuque facility were represented by the United Food and Commercial Workers International Union, AFL-CIO, Local No. 150A (the Union) for many years until October 15, l982, when the plant closed. Prior to the closing approximately 2000 employees worked at the Dubuque plant, 1900 of whom were represented by the Union. The Respondent and the Union were parties to numerous successive collective-bargaining agreements. The parties' last two collective-bargaining agreements, which were in effect during periods material herein, were effective from September 1, 1976, to September 1, 1979, and from September 1, 1979, to September 1, 1982. The latter agreement was extended to September 1, 1983.

Beginning in 1977, the Respondent's Dubuque plant began posting a loss. Losses at the plant became increasingly severe in the late 1970s and early 1980s. As a result of the waning profitability of its operations in Dubuque, the Respondent began encountering financial problems with its lenders and approached the Union about obtaining relief from its collective-bargaining agreements in order to continue operations. The events which gave rise to the instant proceeding occurred in the context of the Respondent's requests for midterm concessions and centered on the Respondent's actions with respect to the hog kill and cut departments.

In l978, the union membership voted to accept an increase in incentive standards in order to help alleviate the Respondent's financial situation. In 1979 and l980, the Respondent's financial problems continued to mount. In June 1980, the Respondent notified the Union of its decision to close the beef kill and related departments effective December 12, 1980.\2\

\2\Thereafter, in response to the Union's request for reconsideration and the employees' increased productivity, the Respondent announced that the beef kill department would remain open on a month-to-month basis. The beef kill actually continued at Dubuque until the plant itself closed in October 1982.

In 1980, the hog kill and cut departments also became the focus of discussions between the parties. The Respondent argued that in order to remain competitive, top productivity per man hour would have to be obtained. In August 1980, the parties agreed to modify the contract to eliminate all incentive pay and require that employees continue to meet the production standards they had been achieving. In return, the Respondent agreed that it would not seek further concessions for the remainder of the contract's term. This agreement saved the Respondent

approximately $5 million annually.

In December 1980, the Respondent's request for a $5 million loan for modernization of the Dubuque plant was rejected. In January 1981, the lead bank called the Respondent's $10 million loan and advised of its intention to terminate the Respondent's $45 million line of credit. In response, the Respondent instituted several cost-savings measures and sought alternative sources of credit. In March 1981, the Respondent successfully repaid the $10 million loan.

Also in March 1981, the Respondent pressed the Union for further concessions, specifically an increase in the hog kill ``chain speed'' (the number of animals slaughtered per hour). When the Union rejected this proposal, the Respondent announced on March 31, 1981, that the hog kill and cut departments would be closed in 6 months. The Union did not request bargaining over the partial closure decision.

In early June 1981, the Respondent proposed that if the employees agreed by July 1 to a wage freeze,\3\ the hog kill and cut operations would continue for the balance of the contract term. Later, the Respondent added that the employees could also participate in a profit-sharing plan if they would agree to a wage freeze. These proposals were rejected by the union membership on June 9, 1981.

\3\There were to be four wage increases prior to the September 1, 1982 contract expiration date.

On June 10, 1981, after learning of the union membership's rejection of the wage freeze/profit-sharing plan, the Respondent issued a press release confirming that the hog kill and cut departments would be discontinued and for the first time announcing that the Respondent had an alternate plan to relocate these operations. Until the time of this announcement, the Respondent had spoken only in terms of closing these operations, not relocating them.

On June 16, 1981, the Respondent successfully negotiated a new $50 million line of credit. However, the lenders could withdraw from this arrangement at will.

On June 23, 1981, in response to the Respondent's announcement that a decision to relocate had been made, the Union requested extensive corporatewide information substantiating the need for concessions. The Union also scheduled another vote on the wage freeze/profit-sharing plan on June 28, 1981.

On June 24, 1981, the Respondent advised the union membership that a vote for the Respondent's wage freeze/profit-sharing plan would save the hog kill and cut departments. Nevertheless, on June 28, 1981, the membership voted to reject the Respondent's proposals.

With respect to the Union's information request, the Respondent objected on the grounds of relevancy and confidentiality. The Respondent's letter in response to the Union's request stated: ``Your request for this information appears to be related to a desire to negotiate with the Company as to its decision to close part of its operations.'' The Respondent denied that it had any obligation to bargain over what it characterized as a decision to close part of its business.

On July 1, 1981, the Respondent notified the Union that the decision to close the hog kill and cut departments was irrevocable.

On July 10 and 11, 1981, the Respondent announced that it had purchased the Rochelle, Illinois plant as a replacement for the hog kill and cut departments in Dubuque. The Rochelle plant opened on October 1, 1981, and the hog kill and cut departments in Dubuque closed on October 3, 1981.

Negotiations over the potential relocation of processing operations were conducted from July through October l981. During these negotiations, when the Union requested bargaining over the hog kill and cut departments, the Respondent responded that the hog kill and cut departments were closed and there was no duty to bargain over the closure.

In early 1982, the Respondent lost its financing. On October 15, 1982, the Dubuque and Rochelle plants were closed and sold.

III. ANALYSIS

As the court of appeals properly reminded us, it is our responsibility to clarify and identify the standards that guide our decisions. The court urged us on remand to attempt to articulate a single majority-supported statement of the standard for determining whether a particular decision is a mandatory subject of bargaining. 880 F.2d at 1436-1437. In response to that direction on remand, we have formulated a new single standard with respect to decisions to relocate. In formulating that standard we have taken into account principles set out in the two most relevant Supreme Court decisions--First National Maintenance Corp. v. NLRB, 452 U.S. 666 (1981), and Fibreboard Corp. v. NLRB, 379 U.S. 203 (1964)--and criticisms of the three tests for certain management decisions (including relocations) which were embraced by different Board Members in Otis Elevator Co., 269 NLRB 891 (1984). As explained below, Otis Elevator was itself issued in response to First National Maintenance. Before setting forth our new standard, we will review the major Supreme Court and Board precedent in this area.

A. SUPREME COURT PRECEDENT

In First National Maintenance Corp. v. NLRB, supra, the issue was whether the employer's decision to close part of its business was a mandatory subject of bargaining.\4\ In addressing this question, the Supreme Court set forth several relevant principles.

\4\In First National Maintenance, the employer provided maintenance and housekeeping services for commercial establishments including a nursing home. Under the service contract, the home reimbursed the employer for its labor costs and paid it a fixed management fee. The employer became financially dissatisfied with the arrangement but was unable to secure an increase in the management fee. Consequently, the employer terminated its contract with the home and discharged its employees working there without bargaining with their union over the decision to close a part of the business.

Relying heavily on Justice Stewart's concurrence in Fibreboard Corp. v. NLRB, supra, the Court divided management decisions into three categories. First, the Court found that some management decisions, such as choice of advertising, product type and design, and financing arrangements, have only an indirect and attenuated impact on the employment relationship and thus there is no attendant obligation to bargain as to these decisions. 452 U.S. at 676-677. Second, the Court found that other management decisions, such as the order of succession of layoffs and recalls, production quotas, and work rules, are almost exclusively an aspect of the relationship between employer and employees and as to these there is an obligation to bargain. Id. at 677. Third, the Court found that the partial closure decision at issue in First National Maintenance presented a third type of management decision, one that had a direct impact on employment, because jobs were eliminated by the termination of the employer's contract with the nursing home, but which had as its focus only the economic profitability of the contract with the home, which the Court found, under the facts before it, to be a concern wholly apart from the employment relationship. The Court stated that the employer's decision to terminate its contract with the home involved a change in the scope and direction of the enterprise and was akin to a decision whether to be in business at all, ``not in [itself] primarily about conditions of employment, though the effect of the decision may be necessarily to terminate employment.''\5\ However, the Court acknowledged that the employer's decision to terminate its contract with the nursing home also touched on a matter of central and pressing concern to the union and its member employees: the possibility of continued employment and the retention of the employees' very jobs. Id.

\5\452 U.S. at 677, quoting from Fibreboard, 379 U.S. at 223 (Stewart, J., concurring).

The Court found the concept of mandatory bargaining premised on the belief that collective discussions backed by the parties' economic weapons would result in decisions that were better for both management and labor and for society as a whole. Id. at 678. However, the Court also stated that this would be true only if the subject proposed for discussion was amenable to resolution through the bargaining process. The Court continued as follows:

> Management must be free from the constraints of the bargaining process to the extent essential for the running of a profitable business. It also must have some degree of certainty beforehand as to when it may proceed to reach decisions without fear of later evaluations labeling its conduct an unfair labor practice.\6\

\6\Id. at 678-679 (footnote omitted).

Accordingly, the Court formulated the following balancing test to take account of both the subject matter's amenability to the bargaining

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process and the burdens that bargaining would place upon management:

> [I]n view of an employer's need for unencum- bered decisionmaking, bargaining over management decisions that have a substantial impact on the continued availability of employment should be required only if the benefit, for labor-management relations and the collective-bargaining process, outweighs the burden placed on the conduct of the business.\7\

\7\Id. at 679.

The Court found that it had implicitly engaged in such a balancing of benefits and burdens in Fibreboard, supra, when it held that an employer was required to bargain over a decision to subcontract maintenance work previously performed by unit employees. The Court noted that it had emphasized in Fibreboard that the basis for the subcontracting decision was a desire to reduce labor costs, a matter which the Court in Fibreboard found to be ``peculiarly suitable for resolution within the collective bargaining framework.'' 379 U.S. at 213-214. Requiring bargaining over the subcontracting decision would not place a significant burden on the business because that decision did not alter the employer's basic operation, no capital investment was contemplated, and the employer merely replaced current employees with those of an independent contractor to do the same work under similar conditions of employment. Id. at 213.

With that in mind, the Court in First National Maintenance turned to the specific issue before it--whether an employer's economically motivated decision to shut down part of its business was a mandatory subject of bargaining. The Court held that it was not. More specifically, the Court held that ``the harm likely to be done to an employer's need to operate freely in deciding whether to shut down part of its business purely for economic reasons outweighs the incremental benefit that might be gained through the union's participation in making the decision . . . .'' Id. at 686.

However, the Court qualified its holding in two important respects. First, in footnote 22 the Court stated: ``In this opinion we of course intimate no view as to other types of management decisions, such as plant relocations, sales, other kinds of subcontracting, automation, etc., which are to be considered on their particular facts.'' Id. (Emphasis added.) Second, in the final section of its opinion, the Court returned to the specific facts of the case ``[i]n order to illustrate the limits of our holding.'' Id. at 687. In this connection, the Court noted, inter alia, that the employer had no intention to replace the discharged employees or ``to move that operation elsewhere.'' Id. In addition, the employer's decision was based on a factor over which the union had ``no control or authority'' (the size of the management fee

the nursing home was willing to pay). Id. Further, the employer's decision to cease operations at the nursing home ``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. at 688.

B. BOARD PRECEDENT--THE OTIS ELEVATOR TESTS

In Otis Elevator Co., 269 NLRB 891 (1984), the Board applied First National Maintenance to an employer decision to discontinue portions of its research and development activities and consolidate the remainder in a new corporatewide facility. All four participating Board Members agreed that the employer's decision was not a mandatory subject of bargaining, but there was no majority rationale.

The Board plurality of Chairman Dotson and Member Hunter set forth the following test for determining whether a decision is a mandatory subject of bargaining:

> Despite the evident effect on employees, the critical factor to a determination whether the decision is subject to mandatory bargaining is the essence of the decision itself, i.e., whether it turns upon a change in the nature or direction of the business, or turns upon labor costs; not its effect on employees nor a union's ability to offer alternatives. The decision at issue here clearly turned upon a fundamental change in the nature and direction of the business, and thus was not amenable to bargaining.

269 NLRB at 892 (emphasis in original). According to the plurality, the characterization of the decision was not important. Thus, the plurality stated that management decisions would be included or excluded from the scope of mandatory bargaining depending on whether they turned on labor costs or on a fundamental change in the scope and direction of the enterprise, regardless of whether they are characterized as, for example, ``subcontracting,'' ``reorganization,'' ``consolidation,'' or ``relocation.'' Id. at 893.

In her concurring opinion, Member Dennis established a two-step test for use in determining whether a certain management decision is a mandatory subject of bargaining: ``[T]he General Counsel must prove (1) that a factor over which the union has control was a significant consideration in the employer's decision, and (2) that the benefit for the collective-bargaining process outweighs the burden on the business.'' Id. at 897. The burden elements to be considered in applying the second part of the test include: extent of capital commitment; extent of changes in operations; and the need for speed, flexibility, or confidentiality. Id.

In his separate opinion, Member Zimmerman found that bargaining should be required when the decision is ``amenable to resolution through collective bargaining.'' Id. at 900. Under Member Zimmerman's test, a duty to bargain could arise even if ``the employer's decision is related to overall enterprise costs not limited specifically to labor costs'' because his broad definition of ``amenability'' encompassed situations where ``union concessions may substantially mitigate the concerns underlying the employer's decision, thereby convincing the employer to rescind its decision.'' Id. at 901.

As the court of appeals correctly pointed out, each of these opinions ``retains vitality'' to the present day. 880 F.2d at 1432. In the 7 years since Otis Elevator issued, no single opinion has commanded the support of the majority of the Board. Instead, the Board has decided subsequent cases on the ground that the result reached would be the same ``under any of the views expressed in Otis Elevator.'' E.g., FMC Corp., 290 NLRB 483, 485 (1988).

C. DECISIONS TO RELOCATE UNIT WORK: THE NEW TEST

Although the court of appeals concluded that all three Otis Elevator tests are reasonable, the court was critical of the under-any-view

approach the Board has used in later cases. We agree with the court that the time has come to clarify this area of the law. Because the Otis Elevator opinions set forth ``divergent views,'' 880 F.2d at 1432, the fact that the Board has continued to rely on all three of them has no doubt led to uncertainty in the labor-management community as to how a specific decision will be analyzed and whether an obligation to bargain will be found. In accordance with the terms of the court's remand, we have exercised our discretion and, for the following reasons, have decided to reject each of the Otis Elevator tests in favor of the new standard described below.\8\

\8\Accordingly, to the extent Otis Elevator is inconsistent with this decision, it is overruled.

The standard we announce today addresses only decisions to relocate unit work. We express no view as to what standard will be used in analyzing the other management decisions referred to in fn. 22 of First National Maintenance.

In accordance with our usual practice, we shall apply our new standard not only ``to the case in which the issue arises,'' but also ``to all pending cases in whatever stage.'' Deluxe Metal Furniture Co., 121 NLRB 995, 1006-1007 (1958).

In addressing the question of whether a decision to relocate unit work is a mandatory subject of bargaining giving rise to an obligation to bargain, we are guided by the principles set forth in First National Maintenance. Initially, we note that the decision to relocate falls within the third category of management decisions described in First National Maintenance (decisions which have a direct impact on employment but have as their focus the economic profitability of the employing enterprise). Such decisions are neither clearly covered by nor clearly excluded from Section 8(d)'s ``terms and conditions of employment'' over which Congress has mandated bargaining. It is therefore the Board's task to determine whether a relocation decision is a mandatory subject of bargaining or whether it should be considered as within the ambit of an employer's ``retained freedom to manage its affairs unrelated to employment.'' First National Maintenance, 452 U.S. at 677.

In performing that task, we recognize that our discretion is considerable. Thus, the Supreme Court ``intimate[d] no view'' as to relocation decisions, 452 U.S. at 686 fn. 22, and the court of appeals stated that ``outside the context of partial closings the Supreme Court left the Board the discretion to strike a somewhat different balance . . . .'' 880 F.2d at 1432-1433 fn. 6.

In our experience, the circumstances surrounding decisions to relocate vary significantly. In some instances, a relocation decision would be a fruitful subject of labor-management negotiations,\9\ while in others it would not.\10\ For this reason, it is not feasible to categorize all decisions to relocate as mandatory or nonmandatory subjects of bargaining.

\9\See, e.g., Reece Corp., 294 NLRB 448 (1989) (decision to relocate unit work motivated by employer's failure to obtain economic relief from union in contract negotiations and by its failure to persuade the union to agree to labor cost reductions after the contract had gone into effect); Pertec Computer Corp., 284 NLRB 810 (1987), supplemental decision 298 NLRB 609 (1990) (decision to transfer work based on consultants' cost study which showed potential savings of $2.6 million, $2 million of which was attributed to labor costs); Dahl Fish Co., 279 NLRB 1084 fn. 3 (1986), enfd. 813 F.2d 1254 (D.C. Cir. 1987) (transfer of unit work to nonunit employees motivated by labor costs).

\10\See, e.g., Metropolitan Teletronics, 279 NLRB 957, 958 (1986), enfd. 819 F.2d 1130 (2d Cir. 1987) (decision to relocate motivated by foreclosure on former facility, the lower mortgage interest rate and more spacious quarters at the new facility, and the prospect of Government assistance through the issuance of tax exempt bonds); Inland Steel Container Co., 275 NLRB 929, 935-937 (1985), petition for review denied sub nom. Steelworkers Local 2179 v. NLRB, 822 F.2d 559 (5th Cir. 1987) (decision to relocate unit work motivated by outdated facility,

limited space for growth and flooding in facility); Hawthorn Mellody, Inc., 275 NLRB 339, 341 (1985) (loss of business at former location principal reason for decision to relocate).

In formulating a new analysis for relocation decisions, we are mindful of the court's concern in First National Maintenance that an employer ``must have some degree of certainty beforehand as to when it may proceed to reach decisions without fear of later evaluations labeling its conduct an unfair labor practice.'' 452 U.S. at 679. Accordingly, we have endeavored to develop a test that provides guidance and predictability to the parties.

In analyzing a decision to relocate unit work, we pay close attention to the crucial inquiry posed by the Court in First National Maintenance: Will requiring bargaining over the decision advance the neutral purposes of the Act? In First National Maintenance, the Court plainly believed that no such result would obtain, while in Fibreboard the Court reached the opposite conclusion. In harmonizing the different results reached in the two cases, there are at least three important points to consider.

First, in First National Maintenance, the employer ``had no intention to replace the discharged employees or to move that operation elsewhere.'' 452 U.S. at 687. In contrast, Fibreboard involved the ``replace[ment] [of] existing employees with those of an independent contractor.'' 379 U.S. at 213.

Second, in First National Maintenance, the Court was confronted with a decision changing the scope and direction of the enterprise ``akin to the decision whether to be in business at all.'' 452 U.S. at 677. In Fibreboard, the employer's decision ``did not alter the Company's basic operation.'' 379 U.S. at 213.

Third, in First National Maintenance, the employer's decision was based ``solely [on] the size of the management fee [the nursing home] was willing to pay.'' 452 U.S. at 687. In Fibreboard, ``a desire to reduce labor costs . . . was at the base of the employer's decision to subcontract.'' First National Maintenance, 452 U.S. at 680.

Measured by these three considerations, a decision to relocate unit work case is more closely analogous to the subcontracting decision found mandatory in Fibreboard than the partial closing decision found nonmandatory in First National Maintenance. We will examine each of these considerations in turn.

First, unlike the employer in First National Maintenance, an employer relocating unit work does intend ``to replace the discharged employees [and] to move th[e] operation elsewhere.'' 452 U.S. at 687. In this respect, a relocation decision is similar to the Fibreboard subcontracting decision described by Justice Stewart in his concurrence as ``the substitution of one group of workers for another to perform the same task . . . .'' 379 U.S. at 224.

Second, a relocation decision is not ``akin to the decision whether to be in business at all.'' 452 U.S. at 677. A decision to relocate presupposes that the employer intends to continue in business with the unanswered question being where the business entity will be in operation as opposed to whether it will be in operation. A decision to conduct business at one location rather than another, standing alone, does not generally involve a ``managerial decision [lying] at the core of entrepreneurial control . . . concerning . . . the basic scope of the enterprise.''\11\ Without more, the fact that an employer may relocate work does not alter the employer's basic operation: the employer is producing the same product for the same customers under essentially the same working conditions.

\11\Fibreboard, 379 U.S. at 223 (Stewart, J., concurring).

Third, as the facts of this case and others\12\ illustrate, and unlike the situation in First National Maintenance, a union may have substantial ``control or authority'' over the basis for the employer's decision to relocate. 452 U.S. at 687. Often this is due to the very nature of a relocation decision. Because a relocation decision, like the Fibreboard subcontracting decision, involves the replacement of one

group of employees with another, it logically follows that the differential in the labor costs of the two groups may be of considerable importance to the employer. The union representing the incumbent workers has the ability to vary that differential and thereby influence the employer's decision. Thus, the decision to relocate is susceptible to resolution through collective bargaining.

\12\See, e.g., Connecticut Color, 288 NLRB 699 (1988) (decision to transfer unit work from one location to another motivated by desire to cut labor costs); Arrow Automotive Industries, 284 NLRB 487 (1987), enf. denied 853 F.2d 223 (4th Cir. 1988) (decision to transfer bargaining unit work to another facility motivated by labor costs, particularly the costs of health insurance); Litton Systems, 283 NLRB 973, 974 (1987), enf. denied 868 F.2d 854 (6th Cir. 1989) (the most significant factor in relocation decision was the wage differential between the old location and the new one); Brown Co., 278 NLRB 783 (1986), enfd. 128 LRRM 2223 (9th Cir. 1987) (work transferred out of the unit in order to escape the wage obligations of the parties' contract); McLoughlin Mfg. Corp., 182 NLRB 958, 964-965 (1970), enfd. as modified sub nom. Garment Workers v. NLRB, 463 F.2d 907 (D.C. Cir. 1972) (decision to relocate based on labor survey which showed employer could hire employees in new locale at lower wage rates); and cases cited in fn. 9, supra. See also Hawthorn Mellody, supra (labor costs a factor but loss of business at former location principal reason for relocation decision).

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

The first prong of the employer's burden is self-explanatory: If the employer shows that labor costs were irrelevant to the decision to relocate unit work, bargaining over the decision will not be required because the decision would not be amenable to resolution through the bargaining process.

Under the second prong, an employer would have no bargaining obligation if it showed that, although labor costs were a consideration in the decision to relocate unit work, it would not remain at the present plant because, for example, the costs for modernization of equipment or environmental controls were greater than any labor cost concessions the union could offer. On the other hand, an employer would have a bargaining obligation if the union could and would offer concessions that approximate, meet, or exceed the anticipated costs or benefits that prompted the relocation decision, since the decision then would be amenable to resolution through the bargaining process.

As an evidentiary matter, an employer might establish that it has no decision bargaining obligation, even without discussing the union's position on concessions, if the wage and benefit costs of the unit employees were already so low that it was clear on the basis of those figures alone that the employees could not make up the difference.\13\ In any event, an employer would enhance its chances of establishing this defense by describing its reasons for relocating to the union, fully

explaining the underlying cost or benefit considerations, and asking whether the union could offer labor cost reductions that would enable the employer to meet its profit objectives.\14\

\13\For example, if a relocation of unit work would save an employer a projected $10.5 million in costs for equipment modernization and environmental controls (quite apart from any labor costs), and if the employer's present labor costs totaled $10 million, then even if the employees were willing to work for free, the union could not offer sufficient labor cost concessions to offset the equipment and environmental savings.

\14\Consistent with the cases decided under Otis Elevator, our test announced today will require us to evaluate the factors which actually motivated the employer's relocation decision rather than to engage in a postdecisional examination of potential justifications for the decision. In this regard, we agree with the court of appeals' proposition that under Otis Elevator and its progeny ``two basic ingredients emerge: the relevant factors must have been contemporaneous with or have pre-dated the decision itself, and the exercise must involve an effort to determine what was actually in the minds of those making the decision.'' 880 F.2d at 1434. These ``basic ingredients'' are implicit in the test we announce today. Thus, in order to successfully rebut the General Counsel's prima facie case, the Respondent must show that the factors it is raising in its defense were relied on at the time the relocation decision was made.

Perhaps the most significant differences between the analytical framework we adopt today and those set forth in Otis Elevator concern the definition and allocation of the parties' respective burdens. We believe our proposed analysis more clearly apprises the parties of their obligations at the bargaining table and in litigation.\15\ Further, we believe that we are warranted in placing on the employer the burden of adducing evidence as to its motivation for the relocation decision because it alone, more often than not, is the party in possession of the relevant information. Finally, we believe that our test is most responsive to the central purposes for which the Act was created: promoting labor peace through collective bargaining over those matters suitable for negotiation where there is a general duty to recognize and bargain with a labor organization.\16\

\15\All three of the Otis Elevator tests suffer from other serious flaws. As the court of appeals pointed out, the Dotson-Hunter test ``appears to be designed to favor and protect management prerogatives.'' 880 F.2d at 1431. The Zimmerman test goes too far in the opposite direction by requiring bargaining even when labor costs played no part in the employer's decision. As Member Dennis frankly acknowledged, her test is difficult to apply. 269 NLRB at 897.

\16\As a practical matter, the test announced today will encourage and require the employer to evaluate all the factors motivating its relocation decision when determining whether its course of action should include negotiations with the union.

If, under our analysis, the relocation decision is a mandatory subject of bargaining, the employer's obligation will be the usual one of negotiating to agreement or a bona fide impasse.\17\ However, we recognize that there may be circumstances under which a relocation decision must be made or implemented expeditiously.\18\ If such circumstances are established, the Board will take them into account in determining whether a bargaining impasse has been reached on the relocation question. Accordingly, the extent of the employer's obligation to notify the union and give it an opportunity to bargain will be governed by traditional 8(a)(5) criteria, taking into account any special or emergency circumstances as well as the exigencies of each case.

\17\Of course, it is well established that, under Sec. 8(d) of the Act, an employer's duty to bargain does not include the obligation to

agree to a union proposal. H. K. Porter Co. v. NLRB, 397 U.S. 99 (1970).

\18\See, e.g., NLRB v. Transmarine Navigation Corp., 380 F.2d 933 (9th Cir. 1967) (employer threatened with loss of principal customer due to inadequate facility); NLRB v. Rapid Bindery, 293 F.2d 170 (2d Cir. 1961) (same). We cite these cases only as examples of instances where prompt action was necessary. We do not address the question whether the particular relocation decisions at issue were, or were not, mandatory subjects of bargaining.

D. APPLICATION OF THE TEST

The basic decision at issue here is the decision to relocate the hog kill and cut department work (bargaining unit work) from the Respondent's unionized facility in Dubuque to its newly purchased facility in Rochelle.\19\ The Respondent points to a number of other cost-saving measures it instituted corporate wide during this period and argues that the decision to relocate was just one part of an overall restructuring plan necessitated by its increasingly severe financial problems. Although this may be true, the record establishes that the decision to relocate was a discrete decision which was considered and implemented independently from the other measures taken by the Respondent during this time. There is no evidence that the relocation decision was accompanied by a basic change in the nature of the employer's operation. The General Counsel has therefore established a prima facie case that the decision involved herein is a mandatory subject of bargaining giving rise to an obligation to bargain.

\19\In its statement of position, the Union contends that a second relocation decision is also at issue, namely, the proposed relocation of certain processing work. This decision was never implemented because on October 19, 1981, the Respondent and the Union signed a memorandum of agreement in which the Union agreed to contract concessions in return for retention of the processing work in Dubuque. The Union claims that this agreement was the product of bad-faith bargaining and requests that the employees be made whole for the lower wages and benefits they received under its terms. For the following reasons, we find that the Union's contention exceeds the scope of the remand.

First, the Union also argued to the court of appeals that two proposed relocation decisions were at issue, but the court's decision addresses only the decision to relocate the hog kill and cut work. In this connection, we particularly note that the court began the second paragraph of its opinion by stating that ``[t]his case focuses on events that transpired in the `hog kill and cut' operations of Dubuque Packing . . . .'' 880 F.2d at 1423. The court then proceeded to discuss the facts relevant to the relocation of the hog kill and cut work in substantial detail and relegated the proposed relocation of other work to a few brief sentences. Id. at 1423-1427. Thereafter, the court continued to describe the Respondent's decision as the relocation of the hog kill and cut work without any reference to an additional relocation decision involving processing work. Id. at 1427, 1428, 1434, 1436.

Second, the court's decision specifically lists the issues it expects the Board to address on remand, and this contention of the Union is not one of them. Id. at 1435-1439.

Finally, we note that, unlike the decision to relocate the hog kill and cut operations, the Respondent did not implement the decision to relocate the processing work and instead bargained to agreement with the Union over its proposed action. As a result, the Respondent's decision with respect to the processing work raises its own distinct issues. For example, even if we were to find that the decision to relocate the processing operations was a mandatory subject of bargaining, further analysis would be required to determine whether the Respondent engaged in lawful hard bargaining or unlawful surface bargaining. If bad-faith bargaining were found, the Union's request for make-whole relief would raise a difficult remedial issue in light of the Union's acceptance of the Respondent's proposed contract concessions. If the court intended the Board to address the validity of the October 1981 agreement, we

believe that the court would have mentioned these additional issues at some point in its opinion.

Under these circumstances, we decline to pass on the Union's claims on the ground that they go beyond the scope of the issues remanded to us by the court of appeals.

The burden now shifts to the Respondent to establish that labor costs were not a factor in the decision to relocate or that even if labor costs were a factor, the Union could not have offered labor cost concessions that could have changed the decision to relocate.\20\

\20\Although our test differs from the three set forth in Otis Elevator, all four tests focus on the factors which actually motivated the employer's decision. See fn. 14, supra. In the instant case, the record was fully developed on that question.

Addressing the first prong of the defense, we note that the administrative law judge found that labor costs ``clearly were a factor in the Respondent's decision to relocate the hog kill and cut work.'' 287 NLRB at 537. Although the Respondent argues that labor costs were not the determinative factor in motivating the decision to relocate, it concedes that it was pursuing midterm concessions from the Union to use as support for its request for further financing from its lenders and in its overall attempts to keep the plant afloat economically. On this record and as more amply described below, it is clear that labor costs were a factor in the Respondent's decision to relocate. Thus, the Respondent is not exempt from a bargaining obligation under the first prong of the defense.

Turning to the second prong, the Respondent argues that regardless of the fact that it sought concessions from the Union, the decision to relocate would have been made in any event due to the financial problems it had encountered with its lenders and the advantages of Rochelle's physical facility. Our review of the record evidence requires us to reject this defense. The repeated plea made by the Respondent to the Union, its employees and even the press was that if the Union would grant midterm wage and other concessions, the hog kill and cut work would continue to be available in Dubuque.

As amply detailed in the judge's decision and the court's decision, the Respondent began experiencing financial problems in 1977. From that time until the relocation was effectuated in 1981 and even until the complete plant closure took place in l982, the Respondent repeatedly sought union concessions to alleviate its economic crisis. The Respondent backed up its requests for assistance with the constant threat that the hog kill and cut departments would be closed and that eventually the entire plant would be closed in the absence of the grant of some economic relief from the Union.

The relevant collective-bargaining agreements covered the periods from September 1, 1976, to September 1, 1979, and from September 1, 1979, to September 1, 1982, extended to September 1, 1983. Most of the parties' discussions about the Respondent's financial status occurred in the context of the Respondent's requests for concessions during the terms of the contracts.

The parties' discussions in this vein began in 1978. In response to the Respondent's plea that it needed relief from the high cost of its wage incentive program, the parties agreed to a 15-percent increase in incentive standards in return for a one-time cash payment to employees. Id. at 502.

In June and July 1980 the Respondent informed the Union that the beef kill and processing departments would have to be shut down and that eventually the hog kill and cut departments and the entire operation would be closed because the Respondent was unable to remain competitive. The Respondent proposed that in order to continue the operation, production standards would have to be increased and incentive pay eliminated.\21\ Charles Stoltz, the Respondent's president, stated during negotiations that the future of the plant would be decided not by management alone but by the concerted action of management, the Union and the employees. In response to the Respondent's pleas and in return

for the Respondent's commitment not to seek further concessions during the term of the contract, in August 1980, the Union agreed to elimination of incentive pay. This saved the Respondent $5 million annually. Id. at 504-505.

\21\Under the applicable collective-bargaining agreement, unit employees were required to meet certain levels of production. Once those levels were met, the employees were eligible for incentive payments.

In September l980 the Union requested that the Respondent reconsider its previously announced decision to close the beef kill department. In response, Stoltz wrote the Union that the Respondent would be willing to consider keeping the beef kill department. Stoltz noted, however, that in order to obtain backing from the banks that provided the Respondent's financing, it would be necessary to convince them that the plant could be returned to profitability by increasing production. Stoltz suggested that the parties (and employees) consider the month of November as a trial period for making a concerted and cooperative effort to increase production. Id. at 505.

The Respondent's president emeritus, Robert Wahlert, wrote to employees on October 29, 1980, telling them that the Respondent's financial woes continued and appealing for increased productivity and a joint effort by management and workers to do what was necessary to keep the plant in business. Id. at 505-506.

On November 19, 1980, the Respondent's assistant director of labor relations, Ernest Myers, wrote the Union to inform it of the Respondent's decision to continue beef kill operations at the Dubuque plant on a month-to-month basis. Myers relied on the improved work performance of employees in beef operations as the basis for the more optimistic outlook and as the basis for approaching the banks for more assistance. Id. at 506.

In meetings beginning in December 1980 and continuing through March 1981, the Respondent attempted to obtain the Union's agreement to increase the chain speed on the hog kill in order to increase productivity.\22\ The Respondent told the Union its proposal was motivated by its desire to remain competitive and to convince the Mercantile Bank of St. Louis, its principal bank, to continue extending credit to the Respondent. The Union rejected this proposal based on the Respondent's earlier commitment not to request further midterm concessions, and based on its contention that the production lines would be undermanned at the increased chain speeds proposed.

\22\The chain speed dictates the number of hogs killed per hour. Any increase in the chain speed would increase productivity and would require the employees to work faster. As incentive pay had been eliminated by this time, the effect of an increase in the chain speed would be to require the employees to produce more for the same pay. Id. at 506.

On March 30, 1981, the Respondent gave 6 months' notice of its intention to close the hog kill and cut departments.\23\ The Respondent conceded that the March 30, 1981 letter giving notice of the closing was sent in response to the Union's rejection of the Respondent's efforts to increase chain speeds. Id. at 507.

\23\The parties' collective-bargaining agreement required that 6 months' notice be given prior to closing.

On April 3, 1981, the Respondent sent employees a magazine article which discussed problems confronting pork slaughterers. In its covering letter to the employees, the Respondent emphasized that the article pointed out that slaughterers paying $16 per hour were going out of business, while those paying $8 per hour were expanding operations. Id. at 508.

On April 8, 1981, the Respondent placed an advertisement in the local newspaper. In this ad, the Respondent noted that it had lost millions of dollars in the past several years but that after spending

$27 million in renovating the Dubuque plant, it did not want to leave Dubuque. The Respondent also asked and answered the question of whether the Company gave 6 months' notice of closing just to force further concessions from the Union. The Respondent stated that the answer to that question was no and that it intended to honor its commitment not to request further modifications during the remainder of the labor agreement (which was to expire in September 1982). Id. at 508.

On May 22, 1981, the local newspaper published a memorandum marked ``confidential'' from the Respondent's president, Stoltz, to Executive Vice President Strausse which indicated that if plantwide concessions were obtained, the closing could be averted.\24\ In the article, the Respondent's corporation counsel, Clifford Less, was quoted as saying that the Respondent would keep its plant open if plantwide wages were frozen during the remainder of the contract. Less was also quoted as saying that if the labor contract was not modified, it was possible that the Dubuque plant would be completely closed but that if the plant became more competitive in labor costs the plant could survive as a production facility. Id. at 508-509.

\24\The manner in which this memorandum came into the local newspaper's possession was not revealed. However, the authenticity of the confidential memorandum is not in dispute.

At the end of May 1981, the Chamber of Commerce offered to mediate differences between the parties in an attempt to keep the plant operational. In response, the Respondent wrote to the Chamber specifically linking the continued operation of the plant to its success in obtaining a wage freeze from the Union. If the Union would agree to a wage freeze for the remainder of the contract, the Respondent would revoke the announced closing of the hog kill and cut. The Respondent authorized the Chamber to present this proposal to the Union. The Union had knowledge of the Respondent's proposal and on June 1, 1981, rejected the Chamber's offer to mediate. Id. at 509 and fn. 32.

On June 8, 1981, at a meeting between the parties, the Respondent's president, Stoltz, again laid the continued viability of the hog kill and cut departments at the Union's door when he reiterated the Respondent's offer that if the Union would agree to a wage freeze, the Respondent would continue operations in the hog kill and cut departments at least through the termination date of the parties' collective-bargaining agreement. In return for the Union's agreement to a wage freeze, the Respondent proposed that the employees could participate in a profit-sharing plan. The Respondent gave the Union until July 1, 1981, to officially respond to this proposal but asked that the Union present the proposal to its membership at its meeting scheduled for June 9, 1981. On that day, the Union presented the proposal to its membership and it was rejected. Id. at 510.

On June 10, 1981, the Respondent issued a press release which announced that in light of the Union's rejection of the wage freeze/profit-sharing proposal, it no longer felt bound by the July 1 deadline and accordingly it would proceed with its plan to close the hog kill and cut departments. Again, the decision to close was specifically linked to the inability of the Respondent to obtain the Union's agreement to a wage freeze. In this announcement, the Respondent revealed for the first time an ``alternate plan'' to relocate the hog kill and cut departments. Id. at 510-511.

Without notifying the Union of its ``alternate plan,'' the Respondent had been investigating the possibility of relocating at least since May. At that time the Respondent had signed options to lease two plants, one in DuQuoin, Illinois, and the other in Des Moines, Iowa. On June 10, 1981, the Respondent made an appointment to visit the Rochelle, Illinois facility to which it eventually moved. A purchase agreement for the Rochelle plant was concluded on July 10, 1981. (The options to lease the other two plants were allowed to expire.) Id. at 511.

Meanwhile, the Union arranged to take the Respondent's wage freeze/profit-sharing proposal to the membership again, in accord with the earlier July 1, 1981 deadline set by the Respondent. The vote was scheduled for June 28. Despite its earlier assertion that the July 1

deadline was no longer binding, the Respondent continued to lobby the employees to accept a wage freeze. In correspondence, a press release, and a written memorandum to the employees prior to the June 28, 1981 vote, the Respondent continued to tie the feasibility of continuing operations at the Dubuque plant to the Union's acceptance of the wage freeze proposal. The membership rejected the proposal. Id. at 513-515.

Press releases issued by the Respondent on July 1, 10, and 11, 1981, announced that the Respondent would proceed with the closing of the hog kill and cut departments in Dubuque by October 3, 1981, and that those same operations would soon commence in Rochelle. The Respondent referred to the operations in Rochelle as a ``replacement for Dubuque plant operations.'' The Respondent noted that as products were processed or manufactured at Rochelle, there would be a corresponding decrease in production at Dubuque.\25\

\25\On January 21, 1982, in testimony in another unfair labor practice proceeding involving the same parties, the Respondent's vice president Naylor testified that the purchase agreement for the Rochelle plant was made once it was clear that there would be no modifications of the collective-bargaining agreement, and that the reason for the acquisition of Rochelle was directly related to the closing of the kill and cut in Dubuque. Id. at 529-530.

In further negotiations conducted after July 1981, the Respondent took the position that the decision to close the hog kill and cut operations was irrevocable and that there was no duty to bargain over the decision to partially close its operations. The Respondent was willing to bargain over the effects of its decision.

Throughout these later negotiations, the parties were embroiled in a controversy over an information request made by the Union related to the Respondent's assertions that it was in severe financial trouble.\26\ During these negotiations and particularly in a meeting on September 25, 1981, the Respondent told the Union that the Respondent had lost $6.5 million in 10 months, but that if the Respondent had the labor contract and labor costs of Iowa Beef Packers (a competitor), the Dubuque plant would be in the black. Id. at 523.

\26\In response to the Respondent's June 10, 1981 announcement of its decision to relocate, the Union requested extensive financial information to substantiate the Respondent's position that midterm concessions were required in order to continue the operations at Dubuque. The Respondent resisted the Union's request for information on the basis that it did not believe corporatewide records were relevant to the conditions at Dubuque and also because of confidentiality concerns. A continuing dialogue between the parties as to the acceptability of the Union's auditor and the conditions under which the auditor could reveal financial information to the Union continued from June through October 1981. The General Counsel alleged that the Respondent violated Sec. 8(a)(5) by refusing to provide the Union with requested financial information. The judge found no obligation to bargain over the decision to relocate and, accordingly, no obligation to provide the requested information. The judge stated, however, that if the Respondent had been obligated to furnish the Union the requested information, ``it would not have met that burden.'' Id. at 540 fn. 132.

Under the circumstances of this case, we believe it is unnecessary to pass on the issue of whether the Respondent unlawfully refused to provide the requested information to the Union. The information was alleged to have been necessary in order for the Union to be able to bargain intelligently about the Respondent's decision to transfer unit work to Rochelle. As set forth in the remedy section infra, in view of the closing of the Dubuque and Rochelle plants, we will not order the Respondent to restore the status quo ante and bargain about the relocation decision. Therefore, even if we were to find that the Respondent unlawfully withheld the requested information from the Union, we would not provide an affirmative order for that 8(a)(5) violation. See Reece Corp., 294 NLRB 448 (1989). Accordingly, as the information allegations raise complex issues that could serve only to further delay

the resolution of this protracted proceeding with no material effect on the remedy, we find it unnecessary to address them.

The Respondent argues that its financial difficulties were so severe that the decision to relocate would have been made regardless of success or failure in obtaining concessions at the bargaining table. In support thereof, the Respondent details a series of interactions it had with its longtime lender, the Mercantile Bank of St. Louis (Mercantile), which culminated in Mercantile withdrawing as the Respondent's primary lender in March 1981. There is no question that the Respondent's financial difficulties were mounting during the relevant period. In December 1980 the Respondent learned that its request for a $5 million loan for upgrading the Dubuque facility had been turned down. In January 1981 Mercantile advised the Respondent that it wanted to terminate the Respondent's $45 million revolving credit line and that Mercantile was calling a $10 million loan to be due in March 1981. The Respondent met the deadline for paying the $10 million loan but Mercantile terminated the $45 million revolving line of credit in March 1981. By June 1981 the Respondent had obtained financing with another group of lenders headed by Manufacturers Hanover Commercial Corporation (Manufacturers Hanover). This financing offered the Respondent a $50 million line of credit but also allowed lenders to withdraw at any time. In January and February 1982, subsequent to the events alleged in the complaint, some of the lending banks in the Manufacturers Hanover group withdrew their participation and in April 1982 the group terminated the financing arrangement. Id. at 533-534.

The Respondent also points to the advantages of the Rochelle plant over the Dubuque plant as another basis for the decision to relocate. The Rochelle plant was a newer facility with production all on one floor. The plant in Dubuque by contrast was an older five-story building with numerous cellars and additions. As noted, the Respondent believed further modernization of the Dubuque plant was required to get optimum production and had been unable to retain financing for that purpose.

Although the financial problems the Respondent was experiencing are not to be minimized, the Respondent has not established that the Union could not have offered labor cost concessions that could have changed the decision to relocate. First of all, the Respondent's actions during this period demonstrate that the Respondent's own view of the matter was that its financial situation could be alleviated if it could obtain relief from its labor agreements. As detailed above, for 3 years previous to the decision to relocate, the Respondent's constant refrain to the Union and its employees was that a reduction in labor costs and/ or an increase in production standards was the key to continuing operations at Dubuque. The Respondent linked its ability to secure further financing from its lenders to its ability to show them that the operation could be more productive. The Respondent's agents unequivocally and repeatedly told the press, the Union, its employees, and the Chamber of Commerce that if the Union would grant concessions, the Respondent would continue the Dubuque hog kill and cut operations at least through September 1, 1982, when its collective-bargaining agreement would expire. If, on the other hand, the Union rejected the Respondent's proposals, the record establishes that the Respondent would--and did--react accordingly. Thus, when the Union refused to agree to an increase in the chain speed, the Respondent announced on March 30, 1981, that the hog kill and cut departments would be closed. When the Union refused to agree to a wage freeze on June 9, 1981, the Respondent announced the next day the plan to relocate the hog kill and cut operations. When the Union again rejected a wage freeze on June 28, 1981, the Respondent announced on July 1, 1981, that the closing of the hog kill and cut departments would proceed. Even after the fact, in January 1982, the Respondent in testimony in an unrelated unfair labor practice proceeding, attributed the relocation to its inability to get the Union to agree to concessions.\27\

\27\Transcript excerpts from this proceeding were made a part of the record herein. Id. at 529-530.

Second, the judge's reliance on the fact that the Manufacturers Hanover financing package was terminated in April 1982 is misplaced. Id. at 537 fn. 115. This postdecisional event may be relevant to emphasize that the financing did not solve all the problems experienced by the Respondent, but, as the court noted, it simply cannot be relied on as evidence of what was driving the Respondent's decision to relocate some 10 months before. 880 F.2d at 1434.

Third, the Respondent's contentions that the Rochelle plant was a far superior facility to the Dubuque plant, which it argues had become cumbersome and in need of repair, are not persuasive. On June 10, 1981, when the Respondent first announced its decision to relocate, it had options to lease at two plants, one in DuQuoin, Illinois, and the other in Des Moines, Iowa. At the time of the announcement, the Respondent's officials had not yet even seen the Rochelle plant. Thus, if it was to relocate, at that point it appeared that DuQuoin and Des Moines were the options it was considering. Other than the testimony of President Stoltz that the reason for the July 1, 1981 deadline for the Union's answer to the Respondent's wage freeze proposal was to give the Des Moines plant time to get ``ready'' by October 3, the record is devoid of evidence as to the condition of either of those plants. Thus, although the Respondent now relies in part on the condition of the Dubuque plant as compared with the Rochelle plant, it appears clear that those differences were not considered at the time the decision was made. Neither does it appear that the Respondent relied on the superiority of the plants it had seen at the time it made its decision. The fact that the Respondent was apparently seriously considering relocation to DuQuoin or Des Moines, without ever positing that those plants were technologically superior to the Dubuque plant, militates against a finding that the alleged disadvantages of the Dubuque plant significantly influenced the decision to relocate. Further, as the judge pointed out, the Respondent had spent $27 million renovating the Dubuque plant in the late 1970s and the Respondent's president emeritus Wahlert had described the plant in October 1982 as virtually state of the art. Id. at 531.

Finally, we do not agree with the Respondent's reliance on several other cost-cutting measures unrelated to the bargaining unit as evidence that labor costs were not the key to its decision to relocate. In light of the overwhelming evidence that the Respondent repeatedly linked its future at Dubuque to its ability to reduce wages and increase production, the fact that the Respondent undertook other cost-savings measures does not establish that the Union could not have offered labor cost concessions that could have changed the decision to relocate.

For all of these reasons, we find that the General Counsel has established a prima facie case that the decision to relocate the hog kill and cut operations was a mandatory subject of bargaining and that the Respondent has failed to rebut it or proffer a defense supported by a preponderance of the evidence. Accordingly, we conclude that the Respondent's failure to bargain over that decision violated Section 8(a)(5) and (1) of the Act.\28\

\28\We overrule our original decision to the extent it is inconsistent with this supplemental decision. In so doing, we have reconciled the result reached in the instant case with that contained in certain other Board decisions the court cited and have thereby eliminated the apparent inconsistency in Board precedent that concerned the court. 880 F.2d at 1437-1438.

The court stated that if, on the one hand, we again concluded that no duty to bargain arose over the relocation decision, it expected us to address the following question: ``notwithstanding the company's freedom to bargain without any good faith obligations when only permissive subjects are brought to the negotiating table, do good faith obligations arise when it brings mandatory subjects to the table as well and seeks concessions on these matters in exchange for company accessions pertaining to permissive subjects?'' Id. at 1438. If, on the other hand, we were to find that the Respondent was under a duty to bargain over the relocation decision, the court stated that this question would be moot and drop out of the case. Id. In view of our finding above that the

Respondent violated Sec. 8(a)(5) by failing to bargain over the relocation decision, we conclude, consistent with the terms of the court's remand, that it is unnecessary for us to address the additional question the court discussed.

E. THE RESPONDENT'S DEFENSES LACK MERIT

For the reasons set forth in our original decision, we continue to find no merit in the Respondent's contentions that its contract with the Union gave it the right to relocate the hog kill and cut operations without bargaining with the Union, that the Union waived any bargaining right it might have had by failing to make a timely demand for negotiations, and that the Board is estopped from proceeding against the Respondent because of statements made by Board agents investigating the unfair labor practice charge. 287 NLRB at 538-539, 542. With regard to the Respondent's waiver defense, we additionally rely on the reasons set forth below.

1. CONTRACTUAL WAIVER

The Respondent argues that the management-rights clause in the parties' contract expressly reserves to the Respondent the right unilaterally to relocate unit work and that its interpretation of the clause is confirmed by the parties' bargaining history, the Respondent's past practice, and an arbitrator's decision.

The management-rights clause grants the Respondent the exclusive right ``to determine the products to be handled, produced or manufactured.''\29\ It is well settled that the waiver of a statutory right will not be inferred from general contractual provisions. Rather, such waivers must be clear and unmistakable.\30\ Generally worded management-rights clauses will not be construed as waivers of statutory bargaining rights.\31\ Here, the management-rights clause does not mention decisions to relocate operations. Instead, the language relied on by the Respondent addresses an entirely different matter (decisions as to what to produce). Accordingly, we find that the express language of the management-rights clause does not establish that the Union waived its right to bargain about the relocation decision.\32\

\29\The clause is set forth in full in our original decision. 287 NLRB at 500.

\30\Metropolitan Edison Co. v. NLRB, 460 U.S. 693, 708 (1983). See generally Johnson-Bateman Co., 295 NLRB 180, 184-188 (1989).

\31\Johnson-Bateman, supra at 184.

\32\The Respondent's reliance on American Stores Packing Co., 277 NLRB 1656, 1658 (1986), is misplaced. In that case, the management-rights clause gave the employer the right ``to determine whether and to what extent the work required in its business shall be performed by employees covered by this Agreement.'' The Board found that this language expressly allowed the employer unilaterally to remove all bargaining unit work. The management-rights clause here contains no such explicit language.

The history of bargaining about the management-rights clause fails to demonstrate that the Union waived its right to bargain about the relocation decision. During negotiations in 1976, the Union unsuccessfully sought to impose the same limitations on relocating unit work that were already contained in the management-rights clause for subcontracting (i.e., only in the event of ``absolute economic necessity'' established to the satisfaction of union officials). During negotiations in 1979, the Union unsuccessfully sought to prohibit the relocation of unit work altogether. Thus, these union proposals went far beyond requiring the Respondent merely to bargain about decisions to relocate unit work. Contrary to the Respondent's contention, the Union's failure to obtain such sweeping proposals does not establish that the parties ``fully discussed and consciously explored'' the Union's statutory bargaining rights with respect to work relocations or that the

Union ``consciously yielded or clearly and unmistakably waived its interest in the matter.''\33\

\33\Johnson-Bateman, supra at 185.

With respect to past practice, the Respondent claims that it unilaterally relocated unit work on a number of occasions and that the Union acknowledged that it had the right to do so. Even if the Union failed to challenge prior relocations affecting the bargaining unit, ``[a] union's acquiescence in previous unilateral changes does not operate as a waiver of its right to bargain over such changes for all time.''\34\ Moreover, to the extent that these relocations did not have an adverse effect on unit employees, the Union's alleged failure to request bargaining is of no moment. Park-Ohio Industries v. NLRB, 702 F.2d 624, 629 (6th Cir. 1983).

\34\Id. at 23 (citation omitted).

Furthermore, the record does not show that the Union clearly and unmistakably acknowledged a contract right on the part of the Respondent to relocate unit work. In 1974, the Union withdrew a grievance about subcontracting when the Respondent decided to discontinue the product in question. The Union's statement that it would reactivate the grievance if the Respondent attempted to ``produce this product in another plant other than one owned [solely] by Dubuque Packing Company'' merely shows the Union's understanding that the contract limited the Respondent's decision making only with respect to subcontracting. The statement is not a concession that the Union, by contract, relinquished its statutory right to bargain over relocation decisions. Similarly, in 1975, the Union withdrew another grievance over subcontracting because the plant performing the work was acquired by the Respondent. Here, too, the Union's withdrawal of the grievance indicates at most its belief that the subcontracting restrictions of the contract had not been violated.

Finally, the 1980 arbitrator's decision concerning a relocation of unit work does not establish a waiver. The arbitrator held only that a relocation of unit work from one companyowned plant to another did not constitute subcontracting and therefore was not subject to the limitations the contract imposed on subcontracting. Thus, the arbitrator merely decided that the relocation did not violate the subcontracting provisions of the contract. He did not address the separate issue before us of whether the management-rights clause waived the Union's bargaining rights with respect to relocations. See Dennison National Co., 296 NLRB 169 fn. 6 (1989) (an arbitrator's finding that an employer did not violate the contract is not the equivalent of a finding that the contract authorized the employer to act unilaterally).

Accordingly, for all of these reasons, we reject the Respondent's contention that the contract waived the Union's right to bargain over the decision to relocate the hog kill and cut operations.

2. FAILURE TO TIMELY REQUEST BARGAINING

The Respondent also contends that the Union failed to timely request bargaining over the relocation decision. On June 10, 1981, the Respondent advised the Union for the first time that it intended to relocate the hog kill and cut departments.\35\ On June 17, 1981, the Union informed the Respondent that a request for information would be forthcoming. On June 19, 1981, the Union confirmed in writing that a request for information was en route and stated that the receipt of the requested information would allow the Union to meaningfully evaluate the Respondent's proposed changes to the contract. 287 NLRB at 511. As discussed above, the Respondent's position was that its proposed contract changes were necessary in order to continue the hog kill and cut operations in Dubuque.

\35\Contrary to the Respondent's contention, the record will not support a finding that the Union knew before June 10, 1981, that the Respondent was planning a relocation rather than a closing. In this

regard, we note that it is well established that ``mere suspicion or conjecture'' is not a substitute for actual notice. Garment Workers v. NLRB, 463 F.2d 907, 918 (D.C. Cir. 1972).

On June 23, 1981, the Union requested extensive financial information from the Respondent. On June 25, 1981, the Union stated that it would agree to place the July 1, 1981 cost-of-living increase in escrow if the Respondent would agree to keep the plant open pending resolution of the contract modification issue. The Respondent rejected this proposal and repeated its demand that the Union respond to the wage freeze proposal by July 1, 1981. Also, on June 25, 1981, the Union again informed the Respondent that the information requested was necessary to enable the Union to determine whether to enter into negotiations over modifications to the contract. 287 NLRB at 512-513. The next day, the Respondent formally responded to the information request, stating in pertinent part as follows:

> Your request for this information appears to be related to a desire to negotiate with the Company as to its decision to close part of its operations. As you know, I am sure, the U.S. Supreme Court ruled just this week that an employer has no obligation to bargain with its employees over the decision to close part of a business. [287 NLRB at 514.]

It is well established that a request to bargain ``need take no special form, so long as there is a clear communication of meaning.'' Armour & Co., 280 NLRB 824, 828 (1986) (citation omitted). Here, there was undoubtedly such a communication. Shortly after the Union was notified of the relocation decision, it requested information the Union considered relevant to the decision and a delay in the implementation of the decision.\36\ The Respondent's own reply to the Union's request shows that the Respondent clearly understood that the information was requested for purposes of bargaining over the hog kill and cut work. Accordingly, we find no merit in the Respondent's claim now that the Union never made its bargaining desires plain.

\36\In other cases, the Board has found that a request for information is tantamount to a request for bargaining. E.g., Grand Islander Health Care Center, 256 NLRB 1255, 1256 (1981); Nappe-Babcock Co., 245 NLRB 20, 21 fn. 4 (1979). We find Kentron of Hawaii, 214 NLRB 834 (1974), relied on by the Respondent, to be distinguishable. In dismissing the unilateral change allegation in that case, the Board relied primarily on the union's delay in responding to the employer's offer to bargain in light of the time constraints present in that case. To the extent Kentron of Hawaii suggests that the union's request in that case for ``standard information'' did not constitute a proper request for bargaining over the specific change proposed by the employer, we note that the information requested by the Union here was far from ``standard.'' Moreover, any time constraints present in this case were due to the Respondent's failure timely to disclose its relocation plans.

CONCLUSION OF LAW

By failing and refusing to bargain collectively with the Union as the exclusive representative of its employees in the appropriate unit concerning the decision to relocate the hog kill and cut operations from its plant in Dubuque, Iowa to its plant in Rochelle, Illinois, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act by

failing and refusing to bargain with the Union about the Respondent's decision to relocate the hog kill and cut operations from its Dubuque plant to its Rochelle plant, we shall order the Respondent to cease and desist from engaging in such conduct and to take certain action to effectuate the policies of the Act.

The Respondent's breach of its obligation to bargain with the Union about its decision to relocate the hog kill and cut operations from the Dubuque plant ceased as of October 15, 1982, the day the Respondent closed and sold the Dubuque and Rochelle plants. Accordingly, we shall order the Respondent to make whole any employees who were terminated or laid off as a result of the Respondent's decision to relocate the hog kill and cut operations from the Dubuque plant by the payment of backpay, including fringe benefits but less interim earnings, from the date of their termination or layoff through October 15, 1982, the date of the closure of the Dubuque and Rochelle plants. Backpay is to be computed in the manner set forth in F. W. Woolworth Co., 90 NLRB 289 (1950), with interest to be computed in the manner prescribed in New Horizons for the Retarded, 283 NLRB 1173 (1987).

In addition, we shall order the Respondent to establish a preferential hiring list of all employees terminated or laid off as a result of the Respondent's decision to relocate the hog kill and cut operations from the Dubuque plant, and to offer reinstatement to those employees if the Respondent resumes hog kill and cut operations in the Dubuque, Iowa or Rochelle, Illinois areas.\37\

\37\See Eltec Corp., 286 NLRB 890, 898 (1987), enfd. 870 F.2d 1112 (6th Cir. 1989).

Finally, in view of the fact that the Respondent has closed its Dubuque plant, we shall require the Respondent to mail to each employee terminated or laid off as a result of its decision to relocate the hog kill and cut operations from the Dubuque plant a copy of the attached notice marked ``Appendix.''

ORDER

The National Labor Relations Board orders that the Respondent, Dubuque Packing Company, Inc., Dubuque, Iowa, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain collectively with United Food and Commercial Workers International Union, AFL-CIO, Local No. 150A, as the exclusive representative of its employees in the appropriate unit set forth below, about decisions entailing mandatory subjects of bargaining. The appropriate unit is:

> All production employees employed by the Respondent at its Dubuque, Iowa plant.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make whole any employees who were terminated or laid off as a result of the Respondent's decision to relocate the hog kill and cut operations from the Dubuque plant by payment of backpay, including fringe benefits but less interim earnings, from the date of their termination or layoff through October 15, 1982, the date of closure of the Dubuque and Rochelle plants. Backpay is to be computed in the manner set forth in the remedy section of this decision.

(b) Establish a preferential hiring list of all employees who were terminated or laid off as a result of the Respondent's decision to relocate the hog kill and cut operations from the Dubuque plant and, if the Respondent resumes hog kill and cut operations in the Dubuque, Iowa, or Rochelle, Illinois areas, offer reinstatement to those employees to their former or substantially equivalent positions.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Mail to each employee terminated or laid off as a result of the Respondent's decision to relocate its hog kill and cut operations from the Dubuque plant a copy of the attached notice marked ``Appendix.''\38\ Copies of the notice, on forms provided by the Regional Director for Region 33, after being signed by the Respondent's authorized representative, shall be mailed by the Respondent immediately upon receipt.

\38\If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ``Posted by Order of the National Labor Relations Board'' shall read ``Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX

Notice To Employees
Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to mail and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not To engage in any of these protected concerted activities.

We will not fail and refuse to bargain collectively with United Food and Commercial Workers International Union, AFL-CIO, Local No. 150A, as the exclusive representative of our employees in the appropriate unit set forth below, about decisions entailing mandatory subjects of bargaining. The appropriate unit is:

All production employees employed at our Dubuque, Iowa plant.

We will not in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

We will make whole any employees who were terminated or laid off as a result of our decision to relocate the hog kill and cut operations from our Dubuque, Iowa plant to our Rochelle, Illinois plant, by paying backpay plus interest, and including fringe benefits, but excluding interim earnings, from the date of their termination or layoff through October 15, 1982, the date of our closure and sale of the Dubuque and Rochelle plants.

We will establish a preferential hiring list of all employees terminated or laid off as a result of our decision to relocate the the hog kill and cut operations, and if we resume hog kill and cut operations in the Dubuque, Iowa, or Rochelle, Illinois areas, we will

offer reinstatement to those employees to their former or substantially equivalent positions.

Dubuque Packing Company, Inc.