1986

An Economic Case for Mandatory Bargaining over Partial Termination Plant Relocation Decisions

Jeffrey D. Hedlund

Follow this and additional works at: http://digitalcommons.law.yale.edu/ylj

Recommended Citation

This Article is brought to you for free and open access by Yale Law School Legal Scholarship Repository. It has been accepted for inclusion in Yale Law Journal by an authorized editor of Yale Law School Legal Scholarship Repository. For more information, please contact julian.aiken@yale.edu.
An Economic Case for Mandatory Bargaining over Partial Termination and Plant Relocation Decisions

Jeffrey D. Hedlund

Section 8(d)⁴ of the National Labor Relations Act⁵ requires that employers and unions "meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment."⁶ Although a company's decision to relocate or terminate a portion of its operations would seem to fall within the language of section 8(d),⁷ and therefore be a mandatory subject of bargaining,⁸ both the Supreme  

2. 29 U.S.C. §§ 151-169 (1982) [hereinafter "the Act" or "the NLRA"].
3. Id. at § 158(d).
4. See First Nat'l Maintenance Corp. v. NLRB, 452 U.S. 666, 681 (1981) ("The words of [§ 8(d)] . . . plainly cover termination of employment which . . . necessarily results' from closing an operation.") (quoting Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203, 210 (1964)) (but holding to the contrary); Harper, Leveling the Road from Borg-Warner to First National Maintenance: The Scope of Mandatory Bargaining, 68 VA. L. REV. 1447, 1453 (1982) ("The most plausible reading of 'terms and conditions of employment' . . . would define the phrase to include . . . any aspect of the status quo upon which an employee's work will be or has been conditioned.") (footnote omitted).
But see Note, Mandatory Bargaining and the Disposition of Closed Plants, 95 HARV. L. REV. 1896, 1899 (1982) ("Courts have rejected literalism . . . when interpreting section 8(d)").
5. See NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342, 349 (1958) (subjects falling within language of § 8(d) are mandatory subjects of bargaining). The duty to bargain over a mandatory subject does not require that one party concede to the other's demands. 29 U.S.C. § 158(d). Rather, it requires that the parties confer in good faith with respect to any proposals until they reach impasse, at which time, absent contractual prohibition, unilateral action may be taken. The National Labor Relations Board has explained the duty to bargain:
   [A]n employer's obligation to bargain does not include the obligation to agree, but solely to engage in full and frank discussion with the collective-bargaining representative in which a bona fide effort will be made to explore possible alternatives, if any, that may achieve a mutually satisfactory accommodation of the interests of both the employer and the employees. If such efforts fail, the employer is wholly free to make and effectuate his decision.
   Ozark Trailers, Inc., 161 N.L.R.B. 561, 568 (1966). Failure by either party to bargain over a mandatory subject in good faith until impasse is an unfair labor practice. 29 U.S.C. §§ 158(a)(5),
Court\textsuperscript{6} and the National Labor Relations Board\textsuperscript{7} have recently concluded that such decisions are not mandatory subjects. In so holding, the Court and the Board implicitly adopted strict neoclassical economic assumptions about the operation of markets,\textsuperscript{8} and concluded that employers will voluntarily choose to bargain with employees when it is worthwhile to do so.\textsuperscript{9}

This Note argues that these decisions ignore important dynamics of the collective bargaining context, and consequently impede economic efficiency by failing to promote the maximization of mutually beneficial exchange. Part I describes the current state of the law concerning the good faith bargaining requirement as it applies to partial termination and relocation decisions by employers. Part II establishes that a transaction-cost economics approach is appropriate for analysis of collective bargaining dynamics. Using this method of analysis, Part III explores the information problems likely to develop in collective bargaining, and concludes that some mutually beneficial exchanges might go unrealized in the absence of a bargaining requirement. Finally, Part IV argues that the requirement of good faith bargaining until impasse will help remedy the information problems inherent in the collective bargaining context, and consequently will enhance economic efficiency by promoting mutually beneficial exchange.\textsuperscript{10}

I. THE CURRENT STATE OF THE LAW

Prior to the Supreme Court's decision in \textit{First National Maintenance Corp. v. NLRB}\textsuperscript{11} in 1981, the United States Courts of Appeals and the National Labor Relations Board had struggled for seventeen years in applying the Supreme Court's decision in \textit{Fibreboard Paper Products Corp. v. NLRB}\textsuperscript{12} to cases involving partial terminations or plant reloca-

---

\textsuperscript{6} Precise definitions of "good faith" and "impasse" do not exist. For a discussion of those issues, see \textit{Section of Labor and Employment Law, Am. Bar Ass'n, 1 The Developing Labor Law: The Board, the Courts, and the National Labor Relations Act 570-606, 634-39} (2d ed. 1983) [hereinafter cited as \textit{The Developing Labor Law}].

\textsuperscript{7} \textit{First Nat'l Maintenance Corp. v. NLRB}, 452 U.S. 666, 668 (1981) (company's decision to terminate part of its business is not mandatory subject of bargaining under \S 8(d)).

\textsuperscript{8} \textit{Otis Elevator Co.}, 269 N.L.R.B. 891, 893-94 (1984) (employer has no duty to bargain with union over relocation decision when decision is not based upon labor cost considerations).


\textsuperscript{11} 452 U.S. 666 (1981).

\textsuperscript{12} 379 U.S. 203 (1964). The company in \textit{Fibreboard} decided unilaterally to hire an independent contractor to perform the exact duties of the union employees at the plant. After concluding that the
Mandatory Bargaining

tions. A number of circuits, adhering to Justice Stewart's influential concurrence in *Fibreboard*, had not imposed bargaining over partial terminations or relocations. Several other circuits, as well as the Board, had held that there is a duty to bargain over such decisions. A third group of circuits charted a middle course by finding a rebuttable presumption that partial termination decisions are mandatory subjects of bargaining.

First National Maintenance clarified the law with respect to partial terminations by finding no duty to bargain over such a decision. The decision to subcontract came within § 8(d)'s "terms and conditions of employment," the Court held that the company violated § 8(a)(5) by refusing to bargain with the union over the decision. The Court emphasized that the issue was amenable to resolution at the bargaining table. 379 U.S. at 211. This finding led later courts to refuse to impose bargaining when the factor prompting the proposed change did not appear to be resolvable through bargaining. See infra notes 82-83 and accompanying text.

13. The terms "partial termination" and "plant relocation" are used interchangeably for purposes of analysis here. See Kohler, *Distinctions Without Differences: Effects Bargaining in Light of First National Maintenance*, 5 INDUS. REL. L.J. 402, 405 n.20 (1983) ("While capable of being distinguished conceptually, plant relocations and partial terminations raise virtually identical issues. Accordingly, the Board and the courts have treated the two situations analogously with regard to the duty to bargain."). The Third Circuit has defined the terms:

A "partial closing" is a closing of one facility by an employer having at least two plants. A variant on the situation of a partial closing is that of a plant relocation, in which one of two or more facilities is shut down and then relocated. Both a partial closing and a relocation decision should be distinguished, in the first instance, from a complete closing of an entire business enterprise. A "partial closing" distinguishes itself from a complete closing of an entire business enterprise because the latter does not normally move the plant or substantially alter the activities of the remaining facilities. A "plant relocation" involves moving an entire business enterprise, or a substantial portion of it, from one facility to another. See, e.g., *first Nat'l Maintenance Corp.* v. *NLRB*, 452 F.2d 720, 724 n.10 (3d Cir. 1978). There is no duty to bargain over an employer's decision to go completely out of business. See Textile Workers Union v. Darlington Mfg. Co., 380 U.S. 263, 273-74 (1965). See, e.g., *NLRB v. International Harvester Co.*, 618 F.2d 85, 87 (9th Cir. 1980); *NLRB v. Adams Dairy, Inc.*, 350 F.2d 108, 111 (8th Cir. 1965), cert. denied, 382 U.S. 1011 (1966). 379 U.S. at 217. Justice Stewart's concurrence would limit the Court's decision to its facts. He stressed that "[d]ecisions concerning the commitment of investment capital and the basic scope of the enterprise" should not be subject to mandatory bargaining even though "the effect of the decision may be necessarily to terminate employment." Id. at 223.

16. See, e.g., *International Ladies' Garment Workers Union v. NLRB*, 463 F.2d 907, 916-17 (D.C. Cir. 1972) (holding that relocation decision that does not alter scope of enterprise is mandatory subject); *NLRB v. Winn-Dixie Stores, Inc.*, 361 F.2d 512, 517 (5th Cir. 1966) (holding that partial termination decision is mandatory subject but refusing to order bargaining after termination occurred). 17. See, e.g., *Ozark Trailers, Inc.* v. *NLRB*, 161 N.L.R.B. 561, 567 (1966) (partial termination decision is mandatory subject); see also *George, To Bargain or Not to Bargain: A New Chapter in Work Relocation Decisions*, 69 MINN. L. REV. 667, 676 n.45 (1985) (citing additional Board cases).

18. See, e.g., *NLRB v. First Nat'l Maintenance Corp.*, 627 F.2d 596, 601 (2d Cir. 1980), rev'd, 452 U.S. 666 (1981); *Brockway Motor Trucks v. NLRB*, 582 F.2d 720, 735 (3d Cir. 1978), overruled, First Nat'l Maintenance Corp. v. NLRB, 452 U.S. 666 (1981). 19. 452 U.S. 666 (1981). The partial termination in *First Nat'l Maintenance* was allegedly prompted by a dispute that arose between First National Maintenance Corp. (FN) and one of its commercial customers concerning the size of its service fee. When the parties could not agree on the fee, FN informed its employees assigned to that site, who had recently selected a union as their bargaining agent, that they would be discharged three days later. After the union filed an unfair labor practice charge against FN, the Board found a violation of the duty to bargain under § 8(d) of the NLRA and ordered injunctive relief. First Nat'l Maintenance Corp., 242 N.L.R.B. 462, 462-63 & n.1 (1979). The Court of Appeals for the Second Circuit affirmed the order. NLRB v. First Nat'l Maintenance Corp., 627 F.2d 596, 603 (2d Cir. 1980).

20. The Court's holding is slightly more complex. Although not requiring the company to bargain over the decision itself, it requires that the company bargain over the effects of the decision "at a
Supreme Court assumed that the employer would have chosen voluntarily to bargain with the union had it been worthwhile to do so,21 accepted that the decision was motivated by economic factors and not by antiunion animus,22 and concluded that the costs of bargaining to the employer in question would outweigh any benefit to the collective bargaining process.23 In a dissenting opinion joined by Justice Marshall, Justice Brennan, stressing that employee concessions arrived at through bargaining may have enabled the company to continue operations, argued for the middle position of a rebuttable presumption in favor of mandatory bargaining over partial termination decisions.24 The Court expressed no opinion, however, about whether bargaining should be required over plant relocation decisions.25

In April 1984, the Board resolved the question left open by the Court concerning bargaining over relocation decisions. Applying the reasoning of

meaningful time.” 452 U.S. at 681–82. Effects bargaining is normally understood to encompass topics such as severance pay, seniority, and pensions. The Court suggested, however, that effects bargaining alone would be sufficient to convey any information that the union might have regarding its willingness to make concessions. Id. at 681. Indeed, one commentator has urged that there is, in fact, little difference between decision and effects bargaining. See Kohler, supra note 13, at 420–23.

From an economic point of view, however, there are relevant differences. Although the cases are not entirely clear, it appears that the duty to bargain over effects attaches somewhat later in the firm’s decisionmaking process than does the duty to bargain over a decision, thus making it more difficult for the firm to change plans. Id. at 416–18; see, e.g., NLRB v. National Car Rental Sys., 672 F.2d 1182, 1188 (3d Cir. 1982) (employer had no duty to bargain over effects of decision to close facility until “after the decision had already been made”). But see Gar Wood-Detroit Truck Equip., Inc., 274 N.L.R.B. No. 23, 118 L.R.R.M. (BNA) 1417, 1420 (1985) (apparently holding that duty to bargain over effects attached before decision to subcontract had been executed). In addition, effects bargaining will likely provide the union with less advance notice of the termination or relocation of operations; such notice would often impose some costs on firms, see infra note 57, yet also convey substantial benefits to workers, see infra text accompanying notes 90–92. Finally, because the union’s right to information from the employer, see infra note 74 and accompanying text, is limited to information relevant to the subject of bargaining, the union may obtain less complete information in bargaining over effects than over the decision itself. See NLRB v. Gibraltar Indus., Inc., 653 F.2d 1091, 1097 (6th Cir. 1981) (denying union access to company’s financial records in bargaining over effects of plant closing). Access to less information will make it less likely that the union will fully appreciate the employer’s situation and respond with concessions that would leave both parties better off.

21. 452 U.S. at 682. To support this conclusion, the Court noted that employers in the past had chosen to bargain with unions in order to obtain concessions without Board intervention occurring. Id. at 681 n.19. As one commentator astutely noted, however, this simply “begs the question” because, prior to the Court’s decision, many employers may have believed that they had a statutory duty to bargain with unions over partial termination and relocation decisions. George, supra note 17, at 708 n.199.

22. 452 U.S. at 687. By adopting the conventional distinction between decisions based upon “antiunion animus” and those based upon “economic” factors, the Court presumes that firms have an interest in “unionbusting” that exists independently of their interest in maximizing profits. This is a questionable empirical assumption. One suspects that firms would often prefer to have a nonunion workforce not because of a dislike for unions per se, but because the presence of a union can often lead to lower profits. See R. Freeman & J. Medoff, What Do Unions Do? 181 (1984) (“Though exceptions can be found, unionization is more often than not associated with lower profitability.”).

23. 452 U.S. at 679, 686.

24. Id. at 691; see supra text accompanying note 18.

25. 452 U.S. at 686 n.22.
Mandatory Bargaining

First National Maintenance, the Board concluded in Otis Elevator Co. (Otis II)\(^2\) that the employer has no duty to bargain with the union over a relocation decision when the decision "turns upon a change in the nature or direction of the business" rather than upon labor cost considerations.\(^2\) The Board found neither the decision's effect on the employees nor the union's ability to offer alternatives to be a "critical factor" in determining whether the decision should be subject to mandatory bargaining.\(^2\)

II. THE ANALYTICAL BACKGROUND

In enacting the NLRA, Congress's articulated purpose was to "eliminate the causes of certain substantial obstructions to the free flow of commerce . . . by encouraging the practice and procedure of collective bargaining."\(^2\) Unfortunately, the legislative history of the Act provides little guidance as to whether Congress intended to require bargaining over plant closing decisions.\(^3\) Given this lack of explicit congressional guidance, one might look to economic policy considerations to resolve the question.\(^3\) To do so, one must articulate a policy criterion, make suitable assumptions regarding the behavior of actors, and assess the potential results under each regime with respect to the criterion. This Part defines the policy criterion to be used—economic efficiency—and develops the assumptions necessary for the analysis.

A. Economic Efficiency as the Policy Criterion

By definition, economic efficiency is enhanced when parties make exchanges that leave one party better off without leaving the other worse


\(^{27}\) Id. at 892. This distinction has little conceptual basis. See infra note 84. For a thorough discussion of Otis II, see George, supra note 17, at 686-95.

\(^{28}\) 269 N.L.R.B. at 892.


\(^{30}\) See First Nat'l Maintenance Corp. v. NLRB, 452 U.S. 666, 676 n.14 (1981) ("Specific references in the legislative history to plant closings, however, are inconclusive."). The DEVELOPING LABOR LAW, supra note 5, at 760 (noting adoption of position that "the task of defining the subjects of bargaining be left exclusively to the Board and to the courts"); Harper, supra note 4, at 1454 ("The legislative history of section 8(d) is . . . unhelpful.") (footnote omitted).

Nonetheless, one should note that Congress, in adopting the broad language of § 8(d), rejected a provision of the House bill that would have limited the subjects of bargaining to five specific categories. H.R. 3020, 80th Cong., 1st Sess. § 2(11) (1947), reprinted in H.R. REP. No. 245, 80th Cong., 1st Sess. 48-49 (1947) [hereinafter cited as 1947 HOUSE BILL]. This rejection suggests that Congress envisioned requiring bargaining over a broader range of subjects. For a thorough discussion of § 8(d)’s legislative history, see Note, Enforcing the NLRA: The Need for a Duty to Bargain over Partial Plant Closings, 60 Tex. L. Rev. 279, 298-301 & nn.111-17 (1982).

\(^{31}\) This is not to deny that the NLRA was enacted with an intent to advance noneconomic goals, such as industrial democracy, as ends in themselves, perhaps even at the expense of efficiency. See H. WELLINGTON, LABOR AND THE LEGAL PROCESS 88 (1968) (Labor-Management Relations Act is "not concerned with efficiency and growth.").
off. All such possible exchanges can be expected to occur when all parties rationally maximize their self-interest, have perfect information concerning possible alternatives, and can effect exchanges without incurring transaction costs. If these conditions are not satisfied, however, voluntary exchange alone may be insufficient to maximize efficiency, and corrective action may be needed. To determine whether voluntary exchange alone will maximize the policy criterion of efficiency, one must examine the plausibility of these assumptions and their alternatives.

B. The Transaction-Cost Economics Approach

The First National Maintenance Court, in relying upon voluntary employer bargaining to bring about mutually beneficial exchanges, implicitly adopted the strict neoclassical economic assumptions of perfect rationality, perfect information, and costless exchange. By contrast, the transaction-cost economics framework developed by Oliver Williamson and others alters each of these assumptions; an application of this framework provides valuable insight into collective bargaining dynamics.

Put briefly in Williamson's terms, actors are likely to behave "opportunistically" and with "bounded rationality." Opportunistic behavior, a stronger form of self-interest seeking than that assumed in the neoclassical model, is "self-interest seeking with guile." Selective or distorted infor-

32. In the language of welfare economics, such exchanges are called Pareto-superior moves and the position in which no further Pareto-superior moves can be made is called a Pareto-optimal position. See W. Baumol, Economic Theory and Operations Analysis 400-02 (3d ed. 1972); Ackerman, Introduction: On the Role of Economic Analysis in Property Law, in Economic Foundations of Property Law xi-xvii (B. Ackerman ed. 1975). For a discussion of Kaldor-Hicks optimality, a criterion that evaluates moves that leave one party worse off, see infra note 94.


34. 452 U.S. at 682; see supra note 21 and accompanying text.

35. Its adoption of these assumptions is also demonstrated by its citation, 452 U.S. at 683, of a student comment which argues that economic efficiency will necessarily follow if we "protect capital investment decisions from the influence of labor." Comment, "Partial Terminations"—A Choice Between Bargaining Equality and Economic Efficiency, 14 UCLA L. Rev. 1089, 1091 (1967). Its adherence to these assumptions is inconsistent not only with the assumptions of the transaction-cost economics framework used in this Note, but also with developments in neoclassical theory. See, e.g., W. Baumol & A. Blinder, Economics: Principles and Policy 522-25 (1979) (discussion of monopoly power of unions and monopsony power of employers); P. Samuelson & W. Nordhaus, Economics 647 (12th ed. 1985) ("Labor markets are not perfectly competitive in real life.").

The Court's strict neoclassical approach also stands in contrast to that of Congress in enacting the NLRA because "[a] premise of [the NLRA] is that some employers, if not required to bargain, would refuse to do so, even when bargaining promised to be mutually beneficial." Note, supra note 4, at 1909 (footnote omitted).


37. Id. at 26. Williamson stresses that while self-interested actors in standard economic models
Mandatory Bargaining

information disclosure as well as the making of false promises regarding future conduct can be expected from an opportunistic actor. On the other hand, Williamson’s framework assumes a weaker form of rationality insofar as actors intend to be rational but are unable to be wholly rational. This bounded rationality, in an environment of uncertainty and complexity, limits an actor’s understanding of possible scenarios that could develop and precludes comprehensive contracting.

These behavioral assumptions take on special significance when transaction-specific assets exist. Transaction-specific assets are those “whose value is much greater in the given transaction than in their next-best use or by their next-best user.” Transaction-specific assets include both physical and human capital. The existence of transaction-specific assets, which will be less productive in alternative uses, suggests that there may be substantial advantage to parties in continuing contractual relationships.

Further, once the parties invest in transaction-specific assets, the market environment is transformed from a competitive market into a bilateral monopoly. Without competitive pressures, the parties will be in a position to haggle over the division of the surplus created by their exchange. When combined with Williamson’s behavioral assumptions, these asset characteristics may in fact inhibit mutually beneficial exchange.

obey fixed rules, generally acting with honesty and candor, opportunistic actors may indulge in deviant behavior by intentionally misleading others and actually breaking rules. See Williamson, Wachter & Harris, Understanding the Employment Relation: The Analysis of Idiosyncratic Exchange, 6 BELL J. ECON. 250, 258-59 & n.30 (1975).

38. This notion was originally developed in H. Simon, ADMINISTRATIVE BEHAVIOR: A STUDY OF DECISION-MAKING PROCESSES IN ADMINISTRATIVE ORGANIZATION 80-84 (1947).


41. Accordingly, the parties have an incentive to bargain voluntarily and realize the advantages of the continuing relationship. In a world of perfect information, this incentive would be sufficient to bring about the realization of all mutually beneficial exchange. See infra text accompanying note 54. Information in the collective bargaining context, however, is not likely to be perfect. See infra text accompanying notes 60-70.

42. A bilateral monopoly exists when a commodity has only one seller and one buyer. See W. Baumol & A. Blinder, supra note 35, at 525; see also Williamson, supra note 40, at 1202-03 (discussing role of transaction-specific assets in transformation from competitive environment to bilateral monopoly).

43. See Arrow, The Organization of Economic Activity: Issues Pertinent to the Choice of Market Versus Nonmarket Allocation, in JOINT ECONOMIC COMM., 91ST CONG., 1ST SESS., THE ANALYSIS AND EVALUATION OF PUBLIC EXPENDITURES: THE PPB SYSTEM 47, 58 (Joint Comm. Print 1969) (With only one buyer and one seller, there are “no competitive forces to drive the two into a competitive equilibrium.”).

44. See Williamson, supra note 40, at 1203. Williamson's theory illustrates that this combination creates certain contracting difficulties, in response to which the parties will devise complex contracting structures. For example, the parties may draft a contractual provision containing a termination penalty that becomes operative if either breaches the agreement. See Williamson, A Microanalytic Assessment of “The Share Economy” (Book Review), 95 YALE L.J. 627, 632 (1986). For a discussion of the problematic nature of reliance on private contractual solutions, see infra note 81.
C. The Collective Bargaining Context

In the context of collective bargaining, Williamson's behavioral assumptions of opportunism and bounded rationality are particularly plausible, and the existence of transaction-specific assets is very likely. Collective bargaining is characterized by strategic, game-playing activity in which the parties often manipulate information and attempt to "bluff" their opponents into making concessions.\(^4\) In addition, the issues involved in collective bargaining are usually complex and are accompanied by a great deal of uncertainty. Technological innovation, foreign competition, and changing government policies involve information sufficiently complex that the parties often are not capable of acquiring and processing this information fully. This context gives rise to both opportunism and bounded rationality.

The long-term relationships\(^4\) between companies and employees prompt both parties to invest substantially in physical and human capital specific to the production of a good or service in a given place.\(^4\) For example, buildings owned by a company may have little value to other potential owners should it terminate or relocate its operations. Similarly, employees may have a great deal invested in specific human capital; middle-aged or elderly workers who have developed a single set of skills in their lifetime may be far less productive in alternative occupations or may find no alternative employment at all.\(^4\)

Moreover, many ordinarily nonspecific assets can become transaction-specific in certain restricted environments,\(^4\) such as a "one-company

---


46. See Tobin, Inflation and Unemployment, 62 AM. ECON. REV. 1, 12 (1972) ("The market for labor services is not like a market for fresh produce where the entire current supply is auctioned daily. It is more like a rental housing market, in which most existing tenancies are the continuations of long-term relationships governed by contracts or less formal understandings.").

47. The Board recognized such transaction-specific assets in Ozark Trailers, Inc., 161 N.L.R.B. 561, 566 (1966) ("For, just as the employer has invested capital in the business, so the employee has invested years of his working life, accumulating seniority, accruing pension rights, and developing skills that may or may not be salable to another employer."). See also B. BLUESTONE & B. HARRISON, THE DEINDUSTRIALIZATION OF AMERICA 11 (1982) ("[F]or when a worker is forced out of a high productivity job into a low productivity job, all of society suffers. Real productivity goes down when the experienced, skilled autoworker in Flint, Michigan, ends up buffing cars in the local car wash."). The notion that labor cannot be transferred costlessly between uses is also found in Arthur Okun's "toll model" in which he assumes that each employer must pay a flat-rate toll when it "puts a particular worker on its payroll for the first time." A. OKUN, PRICES AND QUANTITIES: A MACROECONOMIC ANALYSIS 49 (1981).

48. Because older workers have shorter working lives remaining than do younger workers, firms are less likely to invest resources in training older workers given the shorter horizon over which they can recover the investment. See also Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 323 (1976) (Marshall, J., dissenting) (discussing impact of job loss on older persons). For a discussion of the difficulties facing workers permanently laid off as a result of a partial termination or relocation, see B. BLUESTONE & B. HARRISON, supra note 47, at 51-66.

49. In the most extreme case, ordinarily nonspecific assets may even be owned by the company.
Mandatory Bargaining

town." For example, a "support infrastructure" of family and friends is particular to jobs at that company, and a plant termination or relocation will reduce the value of this asset. Workers' investments in their homes, specific to the jobs in that area, will also depreciate should the termination or relocation of the company's operations create a depressed market for residential property.

These investments in transaction-specific assets can create a condition of bilateral monopoly. Workers are effectively left with one buyer for their labor and the employer is effectively limited to purchasing labor services from the union. In such a situation, strategic bargaining is likely to occur.

The plausibility of bounded rationality and opportunism and the likely existence of transaction-specific assets make transaction-cost economics analysis especially applicable to the bargaining context. This analysis, set forth in Part III, suggests that in the absence of a bargaining requirement, some mutually beneficial exchanges might go unrealized, and efficiency therefore might not be maximized.

III. THE FAILURE OF VOLUNTARY EXCHANGE

In a world of perfect rationality, perfect information, and no transaction costs, all mutually beneficial exchange would always occur. As a result, legal rules, such as a duty to bargain, would have no ultimate economic effect. When these strict assumptions are relaxed, however, actors must decide, on the basis of imperfect information, whether to incur the costs

See, e.g., Marsh v. Alabama, 326 U.S. 501, 502-03 (1946) (entire town, including its residential property, business district, streets, and police department, owned by private corporation). Companies owning all of the assets that would depreciate in the event of a termination or relocation would necessarily "internalize" all of the costs imposed by their decisions. Because such extensive ownership is not the usual practice, companies rarely consider the full social costs of their decisions.

A "one-company town" can develop in two ways. A firm may establish operations in an area and attract labor there with the result that the company employs virtually all of the residents. Alternatively, a "one-company town" may develop when other firms relocate or close their operations, leaving the company as the only remaining employer.

See Furubotn & Wiggins, Plant Closings, Worker Reallocation Costs and Efficiency Gains to Labor Representation on Boards of Directors, 140 ZEITSCHRIFT FÜR DIE GESAMTE STAATSWISSENSCHAFT 176, 183 (1984) (including "worker's valuation of forced separation from his original community" among costs to workers from plant closures).

See B. BLUESTONE & B. HARRISON, supra note 47, at 69-71 (closing of plant forced workers to sell "their $55,000 houses for $35,000 in order to take jobs elsewhere"). Although it is possible that the home's original purchase price reflected a discount for the risk that all of the industries in the area would close, this is not likely where the town once had many prosperous industries.

See Posner, supra note 10, at 997 (noting "bilateral-monopoly character of labor-management negotiations").

necessarily involved in exchange. In this context, legal rules can directly affect outcomes.

A. The Employer's Decision Whether to Bargain

In the absence of a bargaining requirement, one must necessarily focus on the employer's decision whether to bargain because the union cannot unilaterally insist upon bargaining over a nonmandatory subject and, more fundamentally, because the union may not be provided the notice necessary to request it. A company contemplating a termination or relocation could decide to bargain voluntarily with the union over labor-cost related matters that might make maintaining its current operations at least equally profitable.

In deciding whether to bargain, the firm would compare the expected benefit from bargaining with its expected cost. The expected cost is fairly certain—whether the union makes a concession or not, the bargaining process itself imposes certain costs on the firm. The perceived expected benefit, however, is less clear; it is equal to the probability that the union will make the necessary concessions multiplied by the benefit to the company should that occur, discounted by a factor to account for uncertainty. The firm is certain what the benefit would be—the avoidance of

55. See, e.g., Gulf States Mfg., Inc. v. NLRB, 704 F.2d 1390, 1397 (5th Cir. 1983) (union learned of layoffs "fifteen minutes or less before they took effect").

56. Labor costs are a function of both the level of total compensation paid to workers and productivity growth. Hence, labor cost related matters include wages and benefits as well as any work rules that have an impact on productivity.

57. In addition to the obvious expenditures of management and perhaps legal resources in bargaining, opening up discussions before a proposed move may also reduce the productivity of the employer's workforce simply by providing the workers with notice of a possible plant closing. The most productive workers may take quick advantage of their marketability and leave before the closing would occur, and all workers, fearing imminent job loss, may devote more attention to their possible forthcoming job search than to their current jobs. See BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, BULL. NO. 1425-20, MAJOR COLLECTIVE BARGAINING AGREEMENTS: PLANT MOVEMENT, INTERPLANT TRANSFER, AND RELOCATION ALLOWANCES 8 (1981) (noting that advance notice of plant closing may lead to decline in worker morale and in quality of goods or services produced) [hereinafter cited as MAJOR COLLECTIVE BARGAINING AGREEMENTS]. In Williamson's terms, there could be a shift from "consummate" to "perfunctory" cooperation—that is, from performance with an "affirmative job attitude" to "performance of a minimally acceptable sort." O. WILLIAMSON, supra note 36, at 69.

A decline in productivity results in higher labor costs and lower profits or bigger losses for the firm. Consequently, firms have an incentive to conceal plans for a plant closing to as close to its effective date as is possible.

58. Because the firm is likely to be risk averse, it will discount the expected benefit of any uncertain outcome to account for any risk that it cannot diversify away. See R. POSNER, supra note 33, at 75-76 (discussing risk aversion). If a firm is making a decision regarding only one plant, the risk will not be diversifiable, and it will therefore decide not to bargain in some cases where the expected benefit of bargaining exceeds its expected cost. From a societal perspective, such bargaining should take place and, therefore, the legal imposition of a bargaining requirement would diversify these risks at a "macro" level by requiring all firms to bargain. A bargaining requirement will leave some firms better off and some worse off but, on average, society will be better off than without a requirement.
Mandatory Bargaining

moving costs and other fixed costs of relocation or disinvestment. Consequently, the crucial variable with respect to making its decision is the probability, as estimated by the firm, that the union will make sufficient concessions.

B. Informational Asymmetry

The firm's estimate of the probability that the union will make sufficient concessions will be very uncertain, however, as a result of informational asymmetries created by the conjunction of opportunism and, where asset specificity exists, bilateral monopoly.

In past bargaining, both parties were aware that a joint surplus would be created by their exchange and that it would be in both parties' interest to reach agreement. They also knew that the division of the surplus may be a function of their bargaining strategies, and thus they probably adopted strategies intended to increase their portion of the surplus. These strategies likely involved a refusal to reveal the furthest extent to which the party would concede. As a result, the strategic bargaining process itself will leave both sides with an uncertain view of how much the other could concede and still be better off. Moreover, where asset specificity exists, the absence of a competitive environment will allow these opportunistic misrepresentations to persist. Consequently, by basing its estimate of the probability of concessions upon past union representa-

59. More precisely, the firm is aware that possible union concessions fall over a range of values and that the size of the benefit to the firm and the size of the union's concession will be positively correlated. Accordingly, the firm will estimate the probability of receiving each level of benefit in determining the aggregate expected benefit from bargaining.

60. Williamson describes this condition as "information impactedness." See O. Williamson, supra note 36, at 31 ("Information impactedness . . . exists when true underlying circumstances relevant to the transaction, or related set of transactions, are known to one or more parties but cannot be costlessly discerned by or displayed for others.").

61. See Williamson, supra note 40, at 1203 ("Although buyer and seller have a long-term interest in effecting adaptations that make both parties better off, each party also has an interest in appropriating as much of the gain as he can from each adaption.").

62. For example, the company probably came to the bargaining table at each renegotiation contending that the union's excessive wage demands or failure to make concessions would push the company beyond its financial limits. Similarly, it would have been in the union's interest to argue that it would not consider offers below a certain level in order to maintain traditional wage differentials with respect to other workers or to keep up with inflation. See L. Reynolds, supra note 45, at 442-43 (noting that both firm and union deliberately overstate their positions to conceal true demands and to keep other party "guessing").

63. Presumably there exists a lower limit to the wage that a worker would accept and still prefer not to change jobs or relocate to another area. This wage would be equal to the present discounted value of her expected income stream in another job minus the costs involved in searching for and changing to a new job. Similarly, there exists a return on investment below which the firm would find it more profitable to relocate the operations to a lower labor cost area or to terminate operations and invest the capital in an alternative asset. Neither side can be confident of where the threshold exists for the other party, and thus informational asymmetry develops.
tions, the firm will underestimate the union’s willingness to make wage concessions in a substantial number of cases, and thus incorrectly assume that negotiations would be futile.

A firm may conclude that its request for concessions is not likely to be successful for a second reason. Unless some mechanism exists to convey the sincerity of its plight, a company might conclude that bargaining is likely to be futile because the union will perceive its plea as part of the traditional bargaining game strategy and will be unwilling to concede enough to make continued operations profitable. If, on the other hand, both parties were to have complete and credible information regarding the other’s abilities and intentions, a mutually beneficial exchange would be possible.

Informational asymmetry has one final repercussion. An employer that considers bargaining with a union for concessions necessary to maintain operations knows that the union could respond in two ways. The union could negotiate in an honest effort to reach a mutually acceptable agreement or it could negotiate in an effort to forestall the threatened shutdown or relocation while its members, unwilling to concede, begin their job search. The employer cannot be certain which approach the union will take and cannot trust the union’s representation of its intent. Thus, an asymmetric distribution of information develops—the union knows its true intent and the company doesn’t. Because the company cannot decipher

64. See, e.g., Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203, 207 (1964) (because union had not “joined hands with management” to reduce costs in past bargaining, employer unilaterally decided to contract out its maintenance work).

65. In addition to underestimating the union’s willingness to make wage concessions, the firm may also underestimate the union’s ability to make productivity-enhancing suggestions about methods of production. This asymmetric distribution of information—management’s lack of information about potential improvements and the union’s ability to suggest them—may prompt a company to choose not to incur the costs of bargaining when, in fact, union suggestions in bargaining might leave both parties better off.

66. One commentator noted the similarity between this phenomenon and that of “crying wolf.” See Case Comment, Duty to Bargain About Termination of Operations: Brockway Motor Trucks v. NLRB, 92 HARV. L. REV. 768, 778 n.60 (1979). See also Furubotn & Wiggins, supra note 51, at 177 (without credible information about firm’s need to lower wages to continue operations, workers may reject wage reductions that would have left both parties better off).

67. The Supreme Court has noted the possibility that the union’s practical purpose in participating in bargaining over a decision to close a plant may be to delay the closing. First Nat’l Maintenance Corp. v. NLRB, 452 U.S. 666, 681 (1981).

68. To complicate matters, the union’s approach may be determined by its perception of management’s approach to bargaining.

69. This difficulty is analogous to Akerlof’s discussion of the difficulties created by asymmetric information distribution in the used car market. See Akerlof, The Market for “Lemons”: Quality Uncertainty and the Market Mechanism, 84 Q.J. ECON. 488 (1970). The seller knows the true quality of the car while the buyer does not and cannot fully trust the representations of the seller. Because buyers do not have information about quality, the market price of “good” cars and “lemons” will be the same. As a result, potential buyers and sellers of good used cars tend to be driven out of the market. Such “costs of dishonesty,” according to Akerlof, can only be alleviated by countering mechanisms such as guarantees. Id. at 495, 499. See also AM. LAW INST., PRINCIPLES OF CORPO-
Mandatory Bargaining

the "quality" of the union's intent, it will discount the expected benefit from bargaining to account for this uncertainty. Given this uncertainty and because bargaining under either scenario involves certain negotiating costs, it may be a rational decision for the employer to choose not to bargain, even though if it could be confident of the union's intent to reach a mutually beneficial agreement, it would choose to take its chances at bargaining.

In sum, the firm will form an uncertain estimate of the likelihood of union concessions, will be unable to convey the sincerity of its plight when concessions are truly needed, and will find it difficult to decipher the union's true intent regarding bargaining. As a result, it may decide not to incur the costs associated with bargaining, thus precluding the possibility of a mutually beneficial exchange when the potential for such an exchange may exist. This market failure points to the need for a countering device to correct this inefficient result while containing any increase in transaction costs. Mandatory bargaining is such a device.

IV. THE ECONOMIC CASE FOR MANDATORY BARGAINING

The bargaining requirement ensures that the union has an opportunity to correct any misperceptions held by the employer concerning the union's willingness to concede. In addition, it provides more credible information to both the employer and the union. As a result, it promotes mutually beneficial exchange and increases economic efficiency. From a societal perspective, the requirement produces the greatest gains when assets are

---

rate Governance: Analysis and Recommendations 12-13 (Discussion Draft No. 1, 1985) (applying Akerlof's analysis to corporate law context in examining economic function of derivative suits) [hereinafter cited as Principles of Corporate Governance].

The economic value of trust has been stressed by other writers as well. See, e.g., A. Okun, supra note 47, at 86-87 (noting that mechanisms to counter distrust involve large amounts of resources); Arrow, supra note 43, at 62 ("In the absence of trust, it would become very costly to arrange for alternative sanctions and guarantees, and many opportunities for mutually beneficial cooperation would have to be foregone.").

70. See supra note 58; see also Principles of Corporate Governance, supra note 69, at 12-13 (arguing that imperfect ability of shareholders to "differentiate among firms in terms of the relative likelihood that their managements will misbehave" will cause shareholders to discount value of shares of all firms).

71. This point can also be made in traditional "externality" or "spillover cost" terms. By allowing the union the opportunity to offer concessions that reflect the costs that its workers and their community would incur should the firm terminate or relocate operations, bargaining "internalizes" these costs. The bargaining requirement provides a forum for an efficiency-enhancing clash between competing interests and allows the party that values its interest most highly—either moving the plant or keeping the jobs—to prevail by expressing a greater willingness to pay or concede.

This is not, however, a conflict of equal powers, because the respective interests are protected differently. In the terms of Calabresi and Melamed, the employer's "entitlement" is protected by a "property rule"—the union must purchase it from him by making concessions. By contrast, the workers' "entitlement" is protected by a "liability rule"—the employer is free to eliminate their jobs if it incurs the costs of bargaining in good faith until impasse. See Calabresi & Melamed, Property Rules, Liability Rules, and Inalienability: One View of the Cathedral, 85 Harv. L. Rev. 1089 (1972).
highly transaction-specific, and may convey a net social benefit simply by providing workers with advance notice of the proposed plant closing.

A. Promotion of Mutually Beneficial Exchange

Defining partial termination and relocation decisions as mandatory subjects of bargaining would aid both parties in obtaining more complete and credible information about the other’s abilities and intentions. First, both parties would be required to listen to any proposals the other might make and to bargain over them in good faith. The union is allowed a clear opportunity to correct the firm’s misperception, if it exists, of the union’s willingness to make wage concessions or its ability to make productivity-enhancing suggestions before the firm commits itself to the plant closing.

Second, the duty to bargain in good faith over a mandatory subject pro-

---

72. By sitting down with the union and discussing, even briefly, the decision to close a plant, an employer would likely become more fully informed about the nature of such a decision. Thus, after bargaining with the union, it would seem as a general matter that an employer could make a more rational judgment about the wisdom of a partial closing. Brockway Motor Trucks v. NLRB, 582 F.2d 720, 734 n.83 (3d Cir. 1978), overruled, First Nat’l Maintenance Corp. v. NLRB, 452 U.S. 666 (1981).

Many authors have pointed to the important function that unions serve in conveying information from the employees to management and vice versa. See, e.g., R. Freeman & J. Medoff, supra note 22, at 7-11 (unions provide workers with collective voice to communicate concerns to management); Furubotn & Wiggins, supra note 51, at 185-91 (union representation on corporate board conveys credible information to employees).

73. Admittedly, the subjective standard of good faith is difficult to enforce. Indeed, some commentators have argued that the standard has little actual impact given that courts require very little effort by the parties to meet the standard. See, e.g., J. Getman & J. Blackburn, Labor Relations: Law, Practice and Policy 206 (2d ed. 1983) (commenting that good faith standard is “not a major factor in the negotiation process”). One can argue, however, that lax enforcement of the standard, rather than the standard’s subjective nature, is at fault.

The broad subjective standard has two significant advantages over alternatives. First, it is preferable to no standard at all because it attempts to contain opportunism without requiring the parties to undergo the costly process of drafting contractual rules to do the same thing. For a discussion of this point in the corporate law context, see Anderson, Conflicts of Interest: Efficiency, Fairness and Corporate Structure, 25 UCLA L. Rev. 738, 760 (1978) (arguing that broad, undefined fiduciary rules are efficient “since they restrict the fiduciary’s opportunity to cheat without the costly drafting of elaborate rules”).

Second, the subjective good faith standard is analytically superior to a more detailed objective standard such as the one rejected by Congress in 1947. See 1947 House Bill, supra note 30, § 2(11)(B)(i)–(iii) (specifies duty to bargain as making proposal or counterproposal, discussing proposal or counterproposal, and then holding four or more conferences within 30 days). Specific requirements, although reducing the costs of legal uncertainty, may be opportunistically manipulated by a party with subjective “bad faith” that just “goes through the motions of negotiating.” Cox, supra note 10, at 1413. Opportunism is inherently a subjective concept; behavior is strategic only because of strategic intent. Consequently, in order to combat opportunism, a subjective good faith standard is appropriate. See Muris, Opportunistic Behavior and the Law of Contracts, 65 Minn. L. Rev. 521, 553 (1981) (use of good faith concept in contract law is “response to opportunistic behavior”).

Finally, although ascertaining whether an institution such as a firm has acted in good faith is a difficult task, such a subjective inquiry is apparently not beyond the scope of judicial competence. Cf. Washington v. Davis, 426 U.S. 229, 240 (1976) (requiring showing of racially discriminatory purpose to establish equal protection clause violation).
Mandatory Bargaining

provides the firm with a mechanism to convey the sincerity of its plight by requiring that the parties provide each other with information relevant to the subject of bargaining. For example, a firm that "pleads poverty" would likely be required to provide the union with its financial records. In the absence of a bargaining requirement and its attendant duty to provide information, a firm might voluntarily provide such information. However, a union that suspects opportunistic behavior by the firm, such as bluffing a move in order to obtain wage concessions, might doubt the accuracy of the information and refuse to make what would have been a mutually beneficial exchange. When this information is provided under requirement of law with penalties for misrepresentation, however, the union may give it more credibility and be willing to make concessions. It is not enough for each side to be honest—they must also be perceived to be honest.

Finally, if the partial termination or relocation decision is a mandatory subject of bargaining, the union, as well as the employer, must comply with the subjective good faith standard imposed. Therefore, the company that might have chosen not to bargain with the union, because it could not be certain whether the union would negotiate in good faith, will now be required to bargain—but it will be bargaining with a union that is subject

74. See NLRB v. Truitt Mfg. Co., 351 U.S. 149, 152-53 (1956) ("Good-faith bargaining necessarily requires that claims made by either bargainer should be honest claims. . . . If . . . an argument is important enough to present in the give and take of bargaining, it is important enough to require some sort of proof of its accuracy."). The good faith standard requires that unions as well as employers make relevant information available. See, e.g., Local 13, Detroit Newspaper Printing & Graphic Communications Union v. NLRB, 598 F.2d 267, 273-74 (D.C. Cir. 1979) (union committed unfair labor practice by failing to provide employer with information regarding availability of union workers at straight-time rather than overtime wages).

75. In Truitt, when the union requested a wage increase of 10 cents per hour, the employer responded that "an increase of more than 2½ cents per hour would put it out of business," 351 U.S. at 150, but refused to provide the union with access to its financial records. The Court upheld the Board's order for the employer to supply the union with that information. Id. at 153-54.

76. Providing inaccurate information would violate the duty to bargain in good faith, and would therefore be an unfair labor practice. See Air Express Int'l Corp., 245 N.L.R.B. 478, 500-01 (1979) (employer violated duty to bargain in good faith by providing union with inaccurate or possibly misrepresented information), enforced in relevant part, 659 F.2d 610 (5th Cir. 1981), cert. denied, 459 U.S. 835 (1982). If a firm proceeds to shut down or relocate its operations, the Board could order a reopening of operations in the first location and the reinstatement of employees with backpay until the employer bargains in good faith until impasse. See 2 THE DEVELOPING LABOR LAW, supra note 5, at 1676-77.


78. The 1947 Taft-Hartley amendments to the NLRA added § 8(b)(3), which makes it an unfair labor practice for a union to fail to bargain in good faith with the employer. See NLRB v. Insurance Agents' Int'l Union, 361 U.S. 477, 487 (1960) ("[T]he legislative history makes it plain that Congress . . . wanted to ensure that [unions] would approach the bargaining table with the same attitude of willingness to reach an agreement as had been enjoined on management earlier."); Graphic Arts Int'l Union, Local 280 v. NLRB, 596 F.2d 904, 907 (9th Cir. 1979) (union that took "intransigent, insincere, and cavalier attitude toward the negotiations" found in violation of § 8(b)(3)).

963
to legal sanctions if it fails to bargain with a sincere desire to reach accommodation.\(^79\)

Thus, the mandatory bargaining requirement, while limiting transaction costs,\(^80\) allows the union to correct misperceptions that the firm may hold, adds credibility to the information supplied by the firm, and provides a legally enforceable guarantee of the union's intent to reach accommodation. Consequently, it promotes mutually beneficial exchange to an extent that private contractual provisions cannot.\(^81\)

---

\(^79\) Thus, like Akerlof's counteracting mechanism of the used car guarantee, see supra note 69, the mandatory bargaining requirement, with its good faith standard imposed upon the union, ensures the "quality" of the union's intent to some extent and promotes mutually beneficial exchange.

\(^80\) Although the bargaining requirement necessarily imposes some transaction costs on the parties by requiring good faith bargaining until impasse, see supra note 57, the good faith standard's requirement of information disclosure at the same time contains these transaction costs. Required information disclosure severely limits much opportunistic bargaining.

\(^81\) A number of reasons suggest that reliance upon private parties to place bargaining requirements in contracts is inadequate and inefficient. First, because actors operate with bounded rationality, they are unable to anticipate fully the future course of events, such as a foreign government's change in trade policy, that may spur the need for mid-term bargaining and make a bargaining or notice requirement relevant. See Goetz & Scott, Principles of Relational Contracts, 67 VA. L. REV. 1089, 1090 & n.4 (1981) (arguing that intricate or uncertain future contingencies impede optimal allocation of all risks at time of contracting); Summers, Collective Agreements and the Law of Contracts, 78 YALE L.J. 525, 529 (1969) ("Because of the diverse congeries of matters covered by a collective agreement and the practical need for a readable and reasonably concise document, a written agreement cannot possibly provide for the myriad of variant situations which might arise, even if they could be foreseen.").

Second, even if the parties could anticipate such exogenous factors, there are costs involved in negotiating the bargaining requirement contract clause, particularly in view of the difficulties imposed by opportunistic bargaining. See Polinsky, supra note 33, at 1672 n.90 ("The process of bargaining over the terms of the contract is itself costly."). Were the law universally to require bargaining over partial terminations and relocations, such negotiation would be unnecessary.

More fundamentally, it is not clear a priori which party should bear the burden of placing a clause in the contract. In Milwaukee Spring Div., 268 N.L.R.B. 601, 602 (1984), aff'd sub nom. International Union, UAW v. NLRB, 765 F.2d 175 (D.C. Cir. 1985), however, the Board held that silence in the collective bargaining agreement regarding the company's authority to relocate operations permitted the company to relocate. Alternatively, the Board could have held that, absent a positive contractual assertion of the company's right to relocate, relocation would not be permitted without the consent of, or at least advance notice to, the union while the agreement was in effect.

Both "management rights" and "shutdown restriction" clauses exist in practice. "Shutdown restriction" clauses, however, outnumbered "management rights" clauses in the period of legal uncertainty prior to First Nat'l Maintenance. A 1980-1981 Bureau of Labor Statistics study found that 36% of
Mandatory Bargaining

B. Preservation of Transaction-Specific Assets

By promoting mutually beneficial exchange, mandatory bargaining conveys a social benefit by preserving transaction-specific assets that would decline in value in the event of a partial termination or relocation. The recognition of these values in the transaction-cost economics framework stands in contrast to what might be called the “amenability to resolution” approach often applied by the courts and the Board. According to this popular approach, where the factor prompting the proposed change is not perceived to be “amenable to resolution through the bargaining process,” bargaining should not be mandatory. One apparent implication of this approach is a refusal to impose bargaining over plant closing decisions alleged to be based on a factor other than labor costs.

The narrow focus of the “amenability to resolution” approach fails to consider fully the social benefits of bargaining. The expected benefit to society from bargaining is the probability of a mutually beneficial agree-

major collective bargaining agreements included contractual restrictions on the movement or termination of operations while only 7% granted management an unrestricted right to take such action. MAJOR COLLECTIVE BARGAINING AGREEMENTS, supra note 57, at 3. Another survey found that such restrictive provisions exist in a majority of the agreements in certain industries. 2 COLLECTIVE BARGAINING NEGOTIATIONS AND CONTRACTS (BNA) § 65:3 (1983).

From an economic perspective, it is efficient to assign a property right to the party that values it most highly. See R. Posner, supra note 33, at 36. The relative prevalence of restrictive clauses in an era of legal uncertainty suggests that unions value the right more highly and thus should have the right assigned to them. In other words, the efficient solution would imply a restrictive term in the contract where collective bargaining agreements are silent on this subject.

At the very least, the change in legal rules brought about by the Board and the Court likely left many unions without protections for which they might have contracted had they known that they would be left without any legislative protection by these recent interpretations of the NLRA.

82. One commentator refers to this as the “management approach” because it protects the employer from the costs of bargaining when it is likely to be futile. See Note, supra note 4, at 1903-04.

83. First Nat’l Maintenance, 452 U.S. at 678. The dissent in First Nat’l Maintenance also endorsed this approach, id. at 691, although it would consider a showing of futility only as a rebuttal to the presumption of mandatory bargaining. The Board adopted this approach as well in Otis II, 269 N.L.R.B. at 892. The “amenability to resolution” approach was first suggested in Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203, 211 (1964). See supra note 12.

84. See, e.g., Otis II, 269 N.L.R.B. at 892. Despite the superficial appeal of the notion that only decisions based upon labor costs are amenable to resolution through bargaining, on a conceptual level no decision is based exclusively on a factor other than labor costs. Theoretically, some wage exists in all cases, although it would be negative in the most extreme case, that would make continued operations profitable. Of course, the likelihood of the union accepting the lower wage declines as the wage declines because, at some point, workers are better off seeking work elsewhere and incurring the costs that a job search may entail. But “[e]ven where labor costs are not the direct cause of a company’s financial difficulties, employee concessions can often enable the company to continue in operation . . . .” First Nat’l Maintenance, 452 U.S. at 690 (Brennan, J., dissenting). See also George, supra note 17, at 700 n.166 (noting that union concessions have assisted companies with marketing and product problems).

A firm would be indifferent between two scenarios with equal profits, even though the components of total costs differ between the two. Thus, by implicitly assuming that bargaining would be futile when the firm claims to base its decision on a non-labor factor, the Board’s decision in Otis II may prevent mutually beneficial employee concessions from taking place. Furthermore, given the Board’s rule, one would expect that employers will opportunistically misrepresent the reason for their deci-

965
ment being reached multiplied by the magnitude of the efficiency gain should it occur.\textsuperscript{85} Thus, it can be separated into its probability factor and its value factor. The "amenability to resolution" approach focuses exclusively on the probability factor. Any estimate of this probability, however, is inherently speculative given information imperfections.\textsuperscript{86} Accordingly, the courts and the Board should also look to the value factor in the expected benefit formula by considering the magnitude of the benefit conveyed should bargaining be successful in obtaining a mutually beneficial agreement.

Because the value factor would include the preservation of a transaction-specific asset, one should expect the most significant social gains from bargaining in those cases where the level of transaction-specific assets is high. Thus, the expected benefit of bargaining, assuming equal probabilities, will be greatest in disputes concerning, for example, one-company towns or uniquely skilled or more elderly workers.\textsuperscript{87} Moreover, requiring bargaining when transaction-specific assets exist will also help to preserve the incentives for parties to make worthwhile investments in such assets.\textsuperscript{88}

C. The Value of Notice

Finally, the requirement that the parties bargain in good faith until impasse may arguably bring about a net social gain even if a mutually acceptable agreement cannot be reached. Because of the costs incurred in bargaining, if no agreement is reached, the employer is made worse off than it would have been had there been no bargaining requirement.\textsuperscript{89} By

\textsuperscript{85} In the final calculation, one would examine the expected net benefit of bargaining, which would deduct the costs of bargaining, see infra note 89, from its benefits.

\textsuperscript{86} See Rabin, Fibreboard and the Termination of Bargaining Unit Work: The Search for Standards in Defining the Scope of the Duty to Bargain, 71 COLUM. L. REV. 803, 823 (1971) ("The second branch of the Fibreboard test—whether the issue is one likely to be resolved at the bargaining table—necessarily involves a speculative inquiry, since it is difficult to predict to what extent the union's and company's proposals will be accommodated in the bargaining process.").

\textsuperscript{87} See supra text accompanying notes 46-52.

\textsuperscript{88} See Alchian, Decision Sharing and Expropriable Specific Quasi-rents: A Theory of First National Maintenance Corporation v. NLRB, 1 Sup. Ct. Econ. Rev. 235, 241 (1982). Alchian, however, would allow "decision sharing" only if one party had induced the other to make such an investment. Id. at 243. Because he feels that there was no inducement to make a transaction-specific investment in First Nat'l Maintenance, he concludes that the case was rightly decided. Id. at 245.

\textsuperscript{89} The Supreme Court placed great emphasis on potential costs to the employer from a bargaining requirement in First Nat'l Maintenance Corp. v. NLRB, 452 U.S. 666, 682-86 (1981). The ambiguous nature of the "good faith" and "impasse" concepts, see supra note 5, introduces an element of uncertainty for the employer in that the union could later allege failure to bargain in good faith until impasse. This could entail lengthy litigation for the employer. Other potential costs include the possibility of industrial sabotage by disgruntled employees during the bargaining process and the inability to take quick advantage of changing market conditions with little advance publicity. See also supra note 57 (discussing cost to employer of bargaining). But see George, supra note 17, at 703 ("Except in unusual circumstances, ... bargaining will not impose substantial burdens on the em-
Mandatory Bargaining

contrast, the employees are made better off than they would have been in the absence of a requirement. Given the employer's incentive to conceal its plans for a shutdown or relocation for as long as possible, the employees are, in the absence of a requirement, likely to be surprised by the plant closing announcement and will suffer considerable losses without a transition period in which to obtain alternative employment if it exists. Advance notice is therefore a gain for employees. If the gains to the employees are greater than the losses to the company, then a net social efficiency gain will occur even when the parties do not reach mutually

employer.'). To minimize costs to the employer, a showing that the union is bargaining for dilatory purposes should release the employer to act unilaterally. Id. at 716.

On the other hand, Albert Hirschman has argued that there may be a positive value in imposing costly procedures on parties before they "exit" from an organization or a relationship. According to Hirschman, "[s]pecific institutional barriers to exit can often be justified on the ground that they serve to stimulate voice [i.e., communication, the alternative to "exit"] in deteriorating, yet recuperable organizations which would be prematurely destroyed through free exit." A. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES 79 (1970). From this perspective, one could view the legal rule imposing the costs of bargaining before exit as a complex contracting response to asset specificity on a "macro" level; that is, the legal rule would be an implicit termination penalty in all contracts and would protect investments in transaction-specific assets. See supra note 44.

90. See supra note 57.
92. A number of legislative efforts presumably reflect a desire to give the employees the benefits of advance notice. Maine and Wisconsin have each passed laws requiring that advance notice of 60 days be given to the employees and state authorities before any plant is closed or relocated. Me. REV. STAT. ANN. tit. 26, § 625-B (West Supp. 1985); Wisc. STAT. ANN. § 109.07 (West Supp. 1985). See also Md. ANN. CODE art. 41, §§ 206F-206-1 (Supp. 1985) (directs state agencies to develop voluntary guidelines for employers faced with reduction of operations, suggesting that at least 90 days notice be given); MASS. GEN. LAWS ANN. ch. 151A, §§ 71A-71G (West Supp. 1985) (directs state official to establish voluntary advance notice procedure). As of 1982, at least eight other state legislatures had introduced similar legislation. MAJOR COLLECTIVE BARGAINING AGREEMENTS, supra note 57, at 1.

Federal legislation that would require advance notice of six months to two years, depending on the number of workers employed, for plant closings or relocations has been introduced several times but has never been passed. See, e.g., H.R. 5040, 96th Cong., 1st Sess. § 4 (1979), reprinted in Hearings on Plant Closing Problems: Joint Hearing Before the Subcomm. on Labor-Management Relations and the Subcomm. on Employment Opportunities of the House Comm. on Education and Labor on H.R. 5040, 96th Cong., 2d Sess. 9-12 (1980). In 1985, the House of Representatives defeated a similar bill by a five-vote margin. 131 Cong. Rec. H10,487 (daily ed. Nov. 21, 1985). In addition to imposing a 90-day notification period for plant closings and permanent layoffs, the 1985 House bill, the Labor-Management Notification and Consultation Act of 1985, H.R. 1616, 99th Cong., 1st Sess., 131 Cong. Rec. H10,214-15 (daily ed. Nov. 14, 1985), would have made plant closing decisions subject to a mandatory good faith bargaining requirement, id. at § 4. The repeated failures of the attempts for legislative reform in this area point to the need for judicial action. Furthermore, statutes that merely require advance notice fail to capture the advantages of the good faith standard itself. See supra note 73.

93. The respective gains and losses will be larger if the bargaining process requires the firm to continue operations longer than it would have otherwise done.

94. This is not a Pareto-superior move because one party is made worse off. See supra note 32 and accompanying text. If the party made worse off could compensate the party made worse off so as to leave the latter no worse off, however, it would be what is called a Kaldor-Hicks-superior move and this criterion is generally accepted in policy analysis. See Haveman & Weisbrod, Defining Bene-
acceptable terms. And, if the losses to the firm from bargaining exceed the
gain to the employees, the requirement may still be desirable as a means
of spreading the costs of the plant closure over the firm’s customers and
shareholders.95

CONCLUSION

Recent Supreme Court and National Labor Relations Board decisions
have held that partial termination and plant relocation decisions are not
mandatory subjects of bargaining. By adhering to strict neoclassical eco-
nomic assumptions and relying entirely upon voluntary exchange, these
decisions fail to maximize economic efficiency. A transaction-cost econom-
ics approach suggests that the combination of the enormous investment in
transaction-specific assets made by employers and workers and the infor-
mation imperfections likely to be created by opportunistic actors creates
considerable potential for efficiency gains through imposition of a bargain-
ing requirement. Furthermore, the bargaining requirement’s provision of
advance notice of a possible plant closing to employees may, in itself, con-
voy a net social gain. Therefore, on economic grounds, partial termination
and relocation decisions should be mandatory subjects for good faith
bargaining.

fits of Public Programs: Some Guidance for Policy Analysts, in PUBLIC EXPENDITURE AND POLICY
95. See G. CALABRESI, THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS 40
(1970) (arguing that strong “basic justification for loss spreading” exists).