

# LEVELS OF ABSTRACTION IN LEGAL THINKING

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## I. INTRODUCTION

[Socrates:] Tell me, then . . . what it is that you affirm that Simonides says, and rightly says, about justice.

[Polemarchus:] That it is just, he replied, to render to each his due. In saying this, I think he speaks well.

I must admit, said I, that it is not easy to disbelieve Simonides. For he is a wise and inspired man. But just what he may mean by this, you, Polemarchus, doubtless know, but I do not. Obviously, he does not mean what we were just speaking of [namely, the return to a friend of a weapon that he deposited with us when he was in his right mind] even if he asks it back when not in his right mind. And yet what the man deposited is due to him in a sense, is it not?

Yes.

. . .

It is, then, something other than this that Simonides must, as it seems, mean by saying that it is just to render back what is due.

Something else in very deed, he replied, for he believes that friends owe it to friends to do them some good and no evil.

I see, said I. You mean that he does not render what is due or owing who returns a deposit of gold if this return and the acceptance prove harmful and the returner and the recipient are friends. Isn't that what you say Simonides means?

Quite so.

. . .

It was a riddling definition of justice, then, that Simonides gave after the manner of poets . . .

What else do you suppose? said he.

. . .

To do good to friends and evil to enemies, then, is justice in his meaning?

I think so.

. . .

. . . But let us consider this point. Is not the man who is most skillful to strike or inflict a blow in a fight, whether as a boxer or elsewhere, also the most wary to guard against a blow?

Assuredly.

Is it not also true that he who best knows how to guard against disease is also most cunning to [infect others with] it and escape detection?

I think so.

...

Of whatsoever, then, anyone is a skillful guardian, of that he is also a skillful thief?

It seems so.

If, then, the just man is an expert in guarding money, he is an expert in stealing.

The argument certainly points that way.

A kind of thief, then, the just man, it seems, has turned out to be, and it is likely that you acquired this idea from Homer. For he regards with complacency Autolycus, the maternal uncle of Odysseus, and says, "he was gifted beyond all men in thievery and perjury." So justice, according to you and Homer and Simonides, seems to be a kind of stealing, with the qualification that it is for the benefit of friends and the harm of enemies. Isn't that what you meant?

No, by Zeus, he replied. I no longer know what I did mean. Yet this I still believe, that justice benefits friends and harms enemies.

May I ask whether by friends you mean those who seem to a man to be worthy, or those who really are so, even if they do not seem, and similarly of enemies?

It is likely, he said, that men will love those whom they suppose to be good and dislike those whom they deem bad.

...

For those, then, who thus err [thinking the good are bad and the bad are good, they believe that] the good are their enemies and the bad, their friends?

Certainly.

But all the same, it is then just for them to benefit the bad and injure the good?

It would seem so.

But again, the good are just and incapable of injustice.

True.

On your reasoning, then, it is just to wrong those who do no injustice.

Nay, nay, Socrates, he said, the reasoning can't be right.

Then, said I, it is just to harm the unjust and benefit the just.

That seems a better conclusion than the other.

It will work out, then, for many, Polemarchus, who have misjudged men, that it is just to harm their friends, for they have got bad ones, and to benefit their enemies, for they are good. And so we shall find ourselves saying the very opposite of what we affirmed Simonides to mean.

Most certainly, he said, it does work out so. But let us change our ground, for it looks as if we were wrong in the notion we took up about the friend and the enemy.

What notion, Polemarchus?

That the man who seems to us good is the friend.

And to what shall we change it now? said I.

That the man who both seems and is good is the friend, but that he who seems but is not really so, seems, but is not really, the friend. And there will be the same assumption about the enemy.

Then, on this view, it appears the friend will be the good man and the bad, the enemy.

Yes.

So you would have us qualify our former notion of the just man by an addition. We then said it was just to do good to a friend and evil to an enemy, but now we are to add that it is just to benefit the friend if he is good and harm the enemy if he is bad?

By all means, he said, that, I think, would be the right way to put it.<sup>1</sup>

This article applies the concept of levels of abstraction to legal thinking. Perhaps the most important use of the concept is to constrain judicial lawmaking in a principled way.<sup>2</sup>

Level of abstraction refers to:

- the numbers of persons and transactions that generate an issue,
- the numbers of persons and transactions of which a piece of evidence is true,
- the numbers of persons and transactions to which an argument applies, and
- the numbers of persons and transactions that are affected by the resolution of an issue.

In general, the more persons and transactions to which an issue and its resolution apply, the higher the level of abstraction of the issue and resolution; and the more persons and transactions of which a piece of evidence is true, or to which an argument applies, the higher the level of abstraction of the evidence.

Levels of abstraction are illustrated in the passage above from the beginning of Plato's *Republic*. The topic is justice. Socrates objects to each definition of justice that appeals to Polemarchus by demonstrating that it is too broad—it includes too many cases, that is, operates at too high a level of abstraction—and Polemarchus responds by proposing a new definition that

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1. Plato, the *Republic* 580–585 (331e–335b) (Paul Shorey trans. in the *Collected Dialogues of Plato*, Edith Hamilton and Huntington Cairns eds., Princeton U. Press 1961) (punctuation added; footnote omitted).

2. See text following n. 185 (beginning, “We subscribe to the elementary tenant ...”) and following n. 277 (beginning, “The third argument examined industrial experience ...”).

adds a significant fact, thereby applying to fewer cases and operating at a lower level of abstraction. Thus, when Socrates shows that Simonides's definition (justice as giving each one's due) includes a case of injustice (returning a weapon to a crazed friend), Polemarchus narrows Simonides's definition by adding a significant fact, namely, whether the object of one's act is a friend or an enemy. Polemarchus's definition applies to fewer persons and transactions and, accordingly, operates on a lower level of abstraction than Simonides's definition. And when Socrates demonstrates that Polemarchus's definition also includes cases of injustice (calling for one to help one's enemies and hurt one's friends), Polemarchus accepts Socrates's suggestion to narrow the definition still further by adding another significant fact (whether the object of one's act is a true friend or enemy), thereby applying to still fewer cases and, thus, moving down yet another rung on the abstraction ladder.

The concept of levels of abstraction was not used only in ancient philosophy: the concept is used in many disciplines today, for example, modern philosophy,<sup>3</sup> history,<sup>4</sup> economics,<sup>5</sup> and fiction.<sup>6</sup> Academic lawyers

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3. JOHN RAWLS, A THEORY OF JUSTICE 16 (1971).

Many words have misleading connotations which at first are likely to confuse. The terms "utility" and "utilitarianism" are surely no exception. They too have unfortunate suggestions which hostile critics have been willing to exploit; yet they are clear enough for those prepared to study utilitarian doctrine. The same should be true of the term "contract" applied to moral theories. As I have mentioned, to understand it one has to keep in mind that it implies a certain level of abstraction. In particular, the content of the relevant agreement is not to enter a given society or to adopt a given form of government, but to accept certain moral principles.

4. ANTHONY T. EDWARDS, HESIOD'S *ASCRA* 10 (2004) (reference omitted). In the introduction to a book about the social structure of Ascra, which was the community in and about which Hesiod wrote *Works and Days*, Professor Edwards stated:

This formulation, if applied to evolutionism generally, allows for the unique eccentricities and anomalies of specific societies while at the same time preserving the possibility of comparison on the basis of larger-scale features. In a discussion of criticisms of the concept of directionality, Sanderson, relying upon the work of Marvin Harris, presents a continuum of degrees of abstraction. At the lowest level of abstraction it is easy to identify unique and unparalleled features of specific societies. At the highest level are found universal features, such as the taboo against nuclear family incest. In between these extremes occurs a middle ground where a few significant similarities can be emphasized at the expense of myriad insignificant differences.

5. BENJAMIN M. FRIEDMAN, THE JOYS OF INNOVATION: FOR PROFIT ONLY, THE NEW YORK REVIEW OF BOOKS, vol. 62, No. 18 (Nov. 19, 2015) (reviewing EDMUND PHELPS, MASS FLOURISHING: HOW GRASSROOTS INNOVATION CREATED JOBS, CHALLENGE, AND CHANGE (2013)); (All of these proposed changes are worthwhile, at least at the level of abstraction at which Phelps, in this book writing as much as a philosopher as an economist, offers them.)

6. VALOM, IRVIN D., WHEN NIETZSCHE WEPT 209 (1992) ("... I asked you to look at yourself from a great distance.... A cosmic perspective always attenuates tragedy. If we climb high enough, we will reach a height from which tragedy ceases to look tragic.").

may understand the concept,<sup>7</sup> but practicing lawyers and judges seem unaware of it. Yet, by providing a vocabulary for discussing a number of aspects of legal argumentation, the concept indicates ways to improve the arguments of advocates. The concept also indicates ways to improve the decisions of adjudicatory bodies, which we will call “tribunals,” such as courts, arbitrators, and administrative agencies in adjudicative mode (as distinguished from rule-making mode).

This article focuses on relative levels of abstraction, that is, the level of abstraction of an issue and its resolution as compared to other possible levels in the case at hand. When the issue in a case can be framed at various levels of abstraction, framing the issue at a particular level can affect the outcome of the issue or its effect on other parties. But for several purposes, even the relative level of abstraction of an issue within a case is not important; rather, the advocates and the tribunal need only take the level of the issue into account as they present evidence and arguments on it.

We divide the principles of levels of abstraction into three categories. In the first category are observations about practices; these principles are empirical. In the second category are principles of sound argument; these principles are normative. In the third category are principles of good judgment; these principles are hortatory.

Here follows a list of the principles of levels of abstraction that are illustrated in the cases discussed in this article and the pages on which the principles are discussed. This list is organized according to the foregoing categories. In the following discussion, however, the principles are considered in the order in which they apply to the cases that we examine.

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7. FREDERICK SCHAUER, THINKING LIKE A LAWYER 51. (Apr. 27, 2009).

If the facts are that Mr. MacPherson [the plaintiff in *MacPherson v. Buick Motor Co.*, 217 N.Y. 382 (1916)], bought a Buick from a dealer who had bought it from the Buick Motor Company and the wheel of the Buick broke, causing an injury to Mr. MacPherson, and the outcome is that Mr. McPherson [sic] prevailed against the Buick Motor Company, we still do not know the *level of abstraction*, or *level of generality*, at which to understand these facts. . . . If in such cases the bare statement of the facts and the outcome cannot tell us what the precedent case fully “stands for,” then it is tempting to say that the question of legal similarity is itself determined by the law. This is why discussions of precedent, including Goodhart’s [see Arthur L. Goodhart, *Determining the Ratio Decidendi of a Case*, 20 Yale L. Rev. 161 (1930)], commonly talk not about facts but about *material* facts. In concluding that the *holding* of the case . . . is a combination of the material facts and the outcome, Goodhart and others solved the level of generality problem, but at the cost of undermining the core of their view.

### **Empirical Principles**

1. The same set of facts can generate issues that operate on different levels of abstraction, and the rules of law that resolve those issues also operate on different levels, p. 131.
2. A case can be distinguished from an authority by identifying an additional legally significant fact in either of them, thereby changing the level of abstraction at which the case or the authority is understood, p. 155.
3. The level of abstraction of the backing for a proposition indicates the level at which the proposition was intended to operate, p. 141.
4. The level of abstraction of an issue can affect its outcome, p. 178.

### **Normative Principles**

5. In a sound argument, evidence and consequential (or “policy”) arguments on a lower level of abstraction may not establish facts or propositions on a higher level of abstraction. However, evidence on a lower level may illustrate a proposition on a higher level, and evidence on a higher level is some proof of a fact on a lower level, p. 136.
6. An authority may support a proposition that operates on the same level of abstraction as the level on which authority operated, or may support a proposition on a lower level by force of logic, p. 143.
7. An authority may not support a proposition that operates on a level of abstraction higher than the level on which the authority operated (“abstraction shift”) unless a justification is provided, p. 143.
8. When a case is distinguished from an authority by identifying an additional legally significant fact in one of them, the reason that the additional fact is significant should be explained, p. 156.
9. A reply to an argument (including criticism of the argument, a counter-argument, and so forth) should operate on the same level of abstraction as the argument, or an explanation should be provided, p. 210.
10. Legislative facts must be proved by evidence in the record, p. 164.

### **Hortatory Principles**

11. An advocate should frame the issue in a case at the level of abstraction that is most likely to produce a favorable outcome for one’s client, p. 179.
12. An advocate should normally address, at a single level of abstraction, only one of the possible issues which a set of facts can generate. If an advocate chooses to address alternative issues which grow out of the same facts and which operate on different levels of abstraction, the

advocate should make clear which issue a particular argument addresses, p. 179.

13. A tribunal should not frame and resolve an issue at more than one level of abstraction, p. 173.
14. An issue or a case should be decided at the lowest reasonable level of abstraction, p. 217.

The cases which we use to illustrate levels of abstraction are drawn from the field of labor law. We have chosen this field because we are familiar with it, but we have no reason to think that legal reasoning in other fields differs from the reasoning in this field. We will begin by briefly stating the definitions, rules, and procedures of labor law which one needs to know in order to understand the following discussion; a reader who knows labor law may skip this section.

## II. ANALYSIS

### A. A Little Labor Law

The principal statute in labor law is the Labor Management Relations Act of 1947 (“Labor Act” or “Act”).<sup>8</sup> It governs the relations of employers, labor unions, and employees who support or oppose unions, or are represented by them, in the private sector of the economy. For the convenience of the reader, we quote in one place all the sections of the Labor Act which are relevant to this article.<sup>9</sup>

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8. Labor Management Relations Act, 29 U.S.C. ch. 7 (1947). This statute, inter alia, amended and re-enacted the National Labor Relations Act of 1935, 49 Stat. 449. It is customary in the field to speak of the “National Labor Relations Act” when referring to the portion of the Labor Management Relations Act that amended and re-enacted the earlier statute.

9.

#### Section 1

The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce. . . .

. . .

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining. . . .

#### Section 2(3)

The term “employee” shall include any employee. . . .

#### Section 7

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own

The heart of the Labor Act is section 7. It guarantees to employees the right to concerted activity, which includes organizing into unions, bargaining collectively with employers, and striking.

Section 9(a) of the Act establishes the principle of majority rule. The majority of employees in an appropriate bargaining unit decide whether to be represented by a union.<sup>10</sup> Probably the most frequently used means of determining the will of the majority is an election conducted by the National Labor Relations Board. If the majority chooses union representation, the Board certifies the union as the employees' agent for dealing with their employer regarding the terms and conditions of their employment. In the argot of labor law, an "organized" employer is one whose employees are represented by a union.

Section 8(a)(5) establishes for organized employers and section 8(b)(3) establishes for their unions the duty to bargain with one another. Section 8(d) defines the duty as the "mutual obligation [of the parties] to meet at reasonable times and confer in good faith . . . ." Today it is clear that the

choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection. . . .

Section 8(a)(1)

It shall be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of their rights guaranteed in section 7.

Section 8(a)(3)

It shall be an unfair labor practice for an employer by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . .

Section 8(a)(5)

It shall be an unfair labor practice for an employer to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

Section 8(b)(3)

It shall be an unfair labor practice for a labor organization or its agents to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 9(a).

Section 8(d)

[T]o bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder . . . but such obligation does not compel either party to agree to a proposal or require the making of a concession . . . .

Section 9(a)

Representatives designated or selected for the purpose of collective bargaining by the majority of employees in a unit appropriate for such purposes shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment . . . .

10. ROBERT A. GORMAN, *BASIC TEXT ON LABOR LAW* 69 (1976). An appropriate bargaining unit is composed of jobs that share a community of interest. Community of interest includes factors such as similarity of tasks, training and skills, supervision, scale and manner of determining compensation, geographic proximity, and interchange of duties.

duty has subjective and objective aspects. The subjective aspect is that to confer in good faith means to bargain with a “sincere desire to reach an agreement.”<sup>11</sup> The objective aspect is that some behaviors violate the duty regardless of the party’s state of mind, such as refusing to meet at reasonable times.<sup>12</sup> However, prior to 1962—and thus during the period in which were written all of the opinions discussed below, except the Supreme Court’s—tribunals disagreed over whether objective violations of the duty to bargain could occur, that is, whether a finding of bad faith was a necessary element of a violation of the duty.

The duty to bargain does not require that a party bargain over every subject that the counterparty might wish to incorporate into a collective agreement. Rather, an organized employer or its union is required to bargain only over mandatory subjects of bargaining,<sup>13</sup> which section 8(d) defines as “wages, hours, and other terms and conditions of employment.” Other subjects, over which parties may bargain if both choose to do so, are known as “permissive” (or, as we prefer, “permissible”) subjects.<sup>14</sup> A major class of permissible subjects is known as “management prerogatives,” which comprise subjects that are thought to fall within the discretion of management, for example, design of products and financing.<sup>15</sup>

The duty to bargain does not require the parties to reach agreement on mandatory subjects. Section 8(d) states that the duty “does not compel either party to agree to a proposal or require the making of a concession.”<sup>16</sup>

An organized employer or its union normally may not change a condition of employment that is a mandatory subject, such as wages or hours of work, without offering to bargain over the change with the counterparty.<sup>17</sup> A change not preceded by an offer to bargain is known as “unilateral action.”<sup>18</sup> An obvious example is an employer who cancels employees’ medical and life insurance without consulting the union.<sup>19</sup> But the Act does

11. GORMAN, *supra* n. 10, at 482 (citing *NLRB v. Reed & Prince Mfg. Co.*, 205 F.2d 131, 134 (1st Cir. 1953), cert. den. 346 U.S. 887 (1953)).

12. *NLRB v. Katz*, 369 U.S. 736, 743 (1962) (“Clearly, the duty . . . may be violated without a general failure of subjective good faith; for there is no occasion to consider the issue of good faith if a party has refused even to negotiate *in fact* ‘to meet . . . and confer’ . . .”) (italics in the original).

13. See *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342, 348–49 (1958).

14. GORMAN, *supra* n. 10, at 523. A third category exists, illegal subjects, which neither party may propose or agree to, for example, a clause that would require an act that would violate the Labor Act or another statute. See also PATRICK HARDIN, *THE DEVELOPING LABOR LAW* 948–54. (3d ed. 1992).

15. *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203 (1964) (Stewart, J., concurring).

16. *NLRB v. Am. Nat. Ins. Co.*, 343 U.S. 395, 404 (1952).

17. GORMAN, *supra* n. 10, at 429–32.

18. The term “unilateral action” may also be applied to any decision that an employer makes without the union’s agreement, even if the employer has bargained, or offered to bargain, with the union about the change. For the sake of economy of expression, however, in this article we will use “unilateral action” and its verb forms only in the sense mentioned in the text.

19. GORMAN, *supra* n. 10, at 441.

not prevent an employer or a union from effecting a change in a mandatory subject if the parties cannot reach a settlement after bargaining. For example, if they bargain to the point of impasse over a pay raise, an employer may implement a raise that was proposed to the union prior to impasse.<sup>20</sup>

A party may bring negotiations to impasse only over mandatory subjects. Likewise, a party may use economic force (such as a strike or a lockout) to secure agreement only on mandatory subjects.<sup>21</sup>

Section 8(a)(1) makes it an unfair labor practice for any employer covered by the Act “to interfere with, restrain, or coerce employees in their exercise of the rights” to concerted activity. For example, an employer who threatens to retaliate against employees if they vote for a union violates section 8(a)(1).<sup>22</sup> Section 8(a)(3) makes it an unfair labor practice for any covered employer to discriminate against an employee because of concerted activity. The idea of discrimination is that an employer acts to disadvantage an employee out of the motive called “anti-union animus,” which is defined as hostility towards the employee’s concerted activity. For example, an employer who discharges an employee for agitating for a union violates section 8(a)(3).<sup>23</sup>

Enforcement of the Labor Act begins when someone (the “charging party”) goes to a regional office of the National Labor Relations Board (the “Labor Board” or the “Board”) and files a charge alleging that a respondent (an employer or a union) has committed an unfair labor practice. The General Counsel of the Board, acting through the regional office, investigates the charge and, if the charge appears meritorious, files a complaint against the respondent. If the case is not settled, the General Counsel prosecutes the respondent at a hearing before an official now known as an “administrative law judge,” but known as a “trial examiner” at the time the cases discussed in this article were decided. The charging party may also participate as a party in the hearing. The judge writes findings and recommendations in an intermediate report that is filed with the Labor Board in Washington, D.C.; the intermediate report is akin to an opinion of a trial court. The findings and recommendations of the judge become the order of the Board unless a party aggrieved by the report files exceptions with (appeals to) the Board. When exceptions are filed, as they usually are, the Board receives briefs, reviews the intermediate report, occasionally hears oral arguments, and issues a decision. If the Board finds that an unfair labor practice has occurred, it must order the respondent to cease and desist from the practice, and may also order other affirmative relief such as back pay or restoration of the status quo ante. The Board’s order is not self-executing. Rather, it is enforced (or not) by a

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20. *Id.* at 445–46.

21. *See* HARDIN, *supra* n. 14, at 856.

22. *See id.* at 108.

23. *See id.* at 215.

United States Court of Appeals, which has jurisdiction to review the findings of fact and conclusions of law of the Board. The United States Supreme Court may review the judgment of a Court of Appeals by writ of certiorari.<sup>24</sup>

#### B. Legislative and Adjudicative Facts

Throughout this article we will use the distinction which Professor Kenneth Culp Davis drew between legislative and adjudicative facts.<sup>25</sup> The following definitions and examples are our own, however.

A legislative fact is a fact that is generally true of many persons and transactions.<sup>26</sup> We say “generally true” because not many facts are true of all persons or transactions, yet a few exceptions do not render a legislative fact false. For example, it is a legislative fact that employers have economic power over employees, and use it with some frequency to intimidate employees before they vote in an election on whether to be represented by a union. Not all employers have such power over their employees or use it in this way, but the fact is true often enough that it could properly be used as the basis for creating a program to educate employers about their legal duties. A prediction may be a legislative fact; for example, one might predict that an educational program will reduce the number of employers who use their economic power illegally and the number of employees who are coerced into voting against unions. And a counterfactual statement, either past or present, may be a legislative fact. The ubiquitous but-for test is an example: but for employers’ unlawful conduct during election campaigns, unions would win more representation elections.

In contrast, an adjudicative fact is a fact that need be true only of specific persons and transactions; whether it is true of any other persons or transactions is irrelevant.<sup>27</sup> For example, suppose a union is trying to organize the employees of employer *ER*. *UL* is the union leader among the employees. *ER* fabricates charges against and then discharges *UL*. Two days later, the union loses a representation election by a close vote. The union petitions the Labor Board to re-run the election on the ground that the unlawful discharge of *UL* affected the outcome of the election. *ER*’s motive for discharging *UL* would be a relevant adjudicative fact. A prediction may be an adjudicative fact; for example, suppose a supervisor says to the

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24. See PATRICK HARDIN and JOHN E. HIGGINS, JR., *THE DEVELOPING LABOR LAW* (4th ed.) 2464–77, 2569–71. The enforcement procedures under the Labor Act today are substantially the same as they were when the cases discussed in this article were contested.

25. KENNETH CULP DAVIS, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364, 402–410 (1942) (hereinafter Davis, *An Approach*), and ADMINISTRATIVE LAW AND GOVERNMENT 149–51, 283–88 (1960).

26. See DAVIS, *An Approach*, *supra* n. 25, at 403–10.

27. *Id.* at 402.

employees, “*ER* will close this business before he will deal with a union.”<sup>28</sup> And a counterfactual statement, either past or present, may be an adjudicative fact: a tribunal might find as fact that, but for anti-union animus, *ER* would not have discharged *UL*.

### C. *Fibreboard-I*

#### 1. *The Trial Examiner’s Opinion and the Issue in the Case*

We will focus on the decisions of the Labor Board and courts in the *Fibreboard* case,<sup>29</sup> including cases cited in those decisions and in the briefs of the parties in the Supreme Court. The legal proceedings began when a union filed an unfair labor practice charge against the Fibreboard Corporation.<sup>30</sup> The General Counsel investigated the charge and issued a complaint. A trial examiner heard the case and filed an intermediate report which recommended that the complaint be dismissed.<sup>31</sup> The Labor Board initially agreed<sup>32</sup> but, upon motion for reconsideration, reversed itself and found the company guilty.<sup>33</sup> The Court of Appeals enforced the Board’s order.<sup>34</sup> The Supreme Court affirmed the judgment of the Court of Appeals.<sup>35</sup> In this article, when we refer to the Board’s initial decision, we will speak of “*Fibreboard-I*.” When we refer to the Board’s decision upon reconsideration, we will speak of “*Fibreboard-II*.” When we refer to the case as a whole, to the facts of the case, to the trial examiner’s intermediate report, or to the decisions of the Court of Appeals or the Supreme Court, we will speak simply of “*Fibreboard*.”

The principles of levels of abstraction can be illuminated by examining the opinions and briefs in *Fibreboard*. Some of the attorneys and authors of the opinions in these cases respected the principles; but some did not, and ambiguity or outright confusion resulted.

The facts were that Local 1304 of the United Steelworkers of America began representing fifty of the seventy-three maintenance employees of the

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28. Such predictions are illegal threats. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969) (employer may inform employees of a decision that has already been made to close the business if the union wins the election, but any implication that the employer may or may not close is an illegal threat).

29. *Fibreboard Paper Prods. Corp.*, 130 NLRB 1558, 1565 (1961) (intermediate report); *Fibreboard Paper Prods. Corp.*, 130 NLRB 1558 (1961); *Fibreboard Paper Prods. Corp.*, 138 NLRB 550 (1962); *East Bay Union of Machinists, Local 1304 v. NLRB*, 322 F.2d 411 (1963); *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203 (1964).

30. *Fibreboard Paper Prods. Corp.*, 379 U.S. at 207.

31. *Fibreboard Paper Prods. Corp.*, 130 NLRB at 1565 (intermediate report).

32. *Id.* at 1558.

33. *Fibreboard Paper Prods. Corp.*, 138 NLRB 550.

34. *East Bay Union of Machinists, Local 1304*, 322 F.2d at 415.

35. *Fibreboard Paper Prods. Corp.*, 379 U.S. at 217.

Fibreboard Corporation in the company's plant in Emeryville, California in 1937.<sup>36</sup> As the bargaining agent for these employees, the Steelworkers negotiated a series of labor contracts with the company over the next two decades.<sup>37</sup> In 1954 the company became concerned about the rising cost of its maintenance operations, and dealt with this concern in two ways.<sup>38</sup> The company raised the issue of maintenance costs with the union during collective bargaining, but made no progress. The company also began to study the possibility of contracting out the maintenance work, that is, discharging its maintenance employees and engaging an independent contractor to perform maintenance.<sup>39</sup> The study revealed that contracting out could reduce maintenance costs in the plant by as much as thirty percent.<sup>40</sup> The savings would result from reduction of the work force, reduction or elimination of fringe benefits and overtime payments, stricter work quotas, and closer supervision.<sup>41</sup> Based on this study, the company discharged its maintenance employees and engaged Fluor Maintenance, an independent contractor, to perform maintenance in the plant.<sup>42</sup> Fibreboard implemented this decision without bargaining over it with the union.<sup>43</sup>

The Steelworkers filed a charge in the Labor Board's regional office in San Francisco, California.<sup>44</sup> The General Counsel found the charge meritorious and accused Fibreboard of violating sections 8(a)(1), 8(a)(3), 8(a)(5), and 8(d) of the Labor Act.<sup>45</sup> Trial Examiner Howard Myers heard

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36. See *Fibreboard Paper Prods. Corp.*, 130 NLRB at 1559.

37. *Id.*

38. *Id.*

39. At the time of the *Fibreboard* decisions, according to the General Counsel of the Board, the terms "contracting out" and "subcontracting" and their verb forms were often used as synonyms, although they had distinguishable meanings. (1) "Subcontracting" could refer to the practice in the construction industry in which a general contractor let portions of a job to sub-contractors, e.g., plumbing, or to the similar practice in the defense industry in which a prime contractor arranged for sub-contractors to produce parts, e.g., a guidance system for a missile. (Unions did not seek to bargain over this practice.) (2) Both "subcontracting" and "contracting out" could refer to an employer's letting to an independent contractor work that formerly had been performed with the employer's equipment in the employer's plant by the employer's employees. The independent contractor could perform the contracted work either in the employer's plant or in the contractor's plant. (Unions did seek to bargain over these practices.) See Brief of the National Labor Relations Board on writ of certiorari in *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203 (1964), at 13–17. In this article we use "contracting out" to refer to the practices described in meaning (2). However, we preserve the original text when a source we quote uses "subcontracting" or one of its verb forms to refer to the practices described in meaning (2).

40. *Fibreboard Paper Prods. Corp.*, 130 NLRB. at 1572 (intermediate report) (estimated savings of \$225,000 per year divided by total maintenance cost of \$750,000 per year).

41. *Fibreboard Paper Prods. Corp.*, 379 U.S. at 206.

42. *Fibreboard Paper Prods. Corp.*, 130 NLRB at 1565 (intermediate report).

43. *Id.* We omit issues, and facts relevant to issues, that did not pertain to the duty to bargain over contracting out bargaining unit work. We do the same for most of the other cases discussed in this article.

44. *Id.*

45. *Id.*

the case.<sup>46</sup> He believed that the central issue was Fibreboard's motivation: did the company contract out the maintenance work and discharge the maintenance employees out of anti-union animus?<sup>47</sup> Although the General Counsel and the Steelworkers argued that the company's "real motive was . . . to oust the Steelworkers from its plant," the trial examiner found that the company's motive was purely economic and, therefore, the contracting out and the discharges were not discriminatory.<sup>48</sup> The company's witnesses "testified directly and positively that the contract [with Fluor Maintenance] was made solely for economic reasons."<sup>49</sup> The company had been considering the feasibility of contracting out for several years, and contracting out would save the company 225,000 dollars per year.<sup>50</sup> Therefore, "the credible evidence clearly establishes that the Fluor contract was entered into for bona fide business reasons and not as a part of any scheme for evading any statutory obligation."<sup>51</sup> Accordingly, the trial examiner concluded that the allegations in the complaint had not been proved, and he recommended that the complaint be dismissed.<sup>52</sup>

The intermediate report did not address the issue of interest to us, namely, whether Fibreboard had a duty to bargain with the union over the decision to contract out the maintenance work. The trial examiner's finding that the company had acted for legitimate reasons did not dispose of this issue. To understand this point, consider a slight variation of the facts. Suppose the company, without bargaining with the union, had reduced wages in order to economize. The reason for the reduction would have been legitimate, but the company would have unquestionably violated the duty to bargain. Therefore, even though Fibreboard had contracted out the maintenance work for business reasons, the company might have had a duty to bargain with the Steelworkers over the contracting out.

We will use the term "decision bargaining" to refer to collective bargaining over an employer's desire, for lawful business reasons, to contract out bargaining unit work. Thus, a second way to express the issue in *Fibreboard* is whether the duty to bargain requires decision bargaining.<sup>53</sup>

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46. *Id.* at 1558.

47. *Id.* at 1571 ("The primary and principal question presented is whether substantial evidence on the record considered as a whole supports the allegations of the complaint, as amended, that [Fibreboard's] change of operations and the discharge of about 50 maintenance employees because of such change were illegally motivated.").

48. *Id.* at 1572-73.

49. *Id.* at 1571.

50. *Id.* at 1559.

51. *Id.* at 1573.

52. *Id.* at 1574.

53. Although the ordinary English meaning of the words in the term "decision bargaining" permits it to be applied to many other situations (indeed, to any decision an employer might make), in this article we will use the term as indicated in the text. The requirement of decision bargaining is twofold: the duty to offer to bargain with the union over contracting out, and the duty to engage in

The duty to bargain attaches only to mandatory subjects. Consequently, a third way to express this issue is whether contracting out is a mandatory subject of bargaining. These versions of the issue differ only semantically. All three are encountered in the literature, and we will follow suit.

The issue of decision bargaining in *Fibreboard* illustrates the most basic principle of levels of abstraction.

*Principle 1*

The same set of facts can generate issues that operate on different levels of abstraction, and the rules of law that resolve those issues also operate on different levels.

This is an empirical principle, which is justified by observations, one of which follows.

The question in *Fibreboard* was whether the company had a duty to engage in decision bargaining with the union. The advocates and tribunals in *Fibreboard* took two approaches to this question, one via the common law, the other via statement and application of a standard,<sup>54</sup> and thereby generated the following issues and possible rules.

On the approach of stating and applying a standard, the issues and possible rules were:

*Issue A*

Is collective bargaining required over any lawful topic which either party raises?

*Rule A(1)*

Collective bargaining is required only over some lawful topics.

*Rule A(2)*

Collective bargaining is required over any lawful topic.

Rule A(2) operated at the highest possible level of abstraction regarding the duty to bargain, for the rule would apply to all organized employers and their unions, all of the transactions between these parties, and even to transactions not involving the party wishing to bargain (e.g., the union wishes to bargain over the employer's financing arrangements). As we mentioned

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bargaining with the union if it accepts the offer to bargain. Because unions rarely if ever decline the offer, the two requirements merge for practical purposes. For convenience, therefore, we will speak of the duty in terms of the second requirement.

54. Which of these approaches a tribunal should take is implicitly an issue in many cases, but is rarely discussed. (Sometimes an advocate or member of a tribunal adopts a common law approach and another advocate or member of a tribunal adopts a standard, but nearly never do they debate the merits of the two approaches.) We omit discussion of this issue because it was not discussed by any of the advocates or tribunals in *Fibreboard*.

above, the Supreme Court had previously rejected this rule and had limited the duty to bargain to mandatory subjects,<sup>55</sup> but we present the rule here because in the Supreme Court the General Counsel of the Labor Board alluded to it, as did the concurring opinion in the Supreme Court.

Assuming Rule A(1), Issue B arises.

*Issue B*

When is decision bargaining required?

*Rule B(1)*

Decision bargaining is required in no cases.

*Rule B(2)*

Decision bargaining is required in all cases.

*Rule B(3)*

Decision bargaining is required in some cases but not in others.

Issue and Rules B operated at a lower level of abstraction than Issue and Rules A because the latter applied to all collective bargaining whereas the former applied only to decision bargaining. Nonetheless, Issue and Rules B operated on a fairly high level because they applied to any employer who wished to contract out bargaining unit work.

Under Rules B(1) and B(2), application of law to fact was mechanical: decision bargaining was never required or was always required. Under Rule B(3), when a standard was used, the advocates and tribunals in *Fibreboard* used various standards. Thus, the issue arose:

*Issue C*

What is the appropriate standard (or combination of standards) in decision bargaining cases?

This issue operated at a high level of abstraction within this set of issues because the resulting rule would apply to every organized employer that wished to contract out bargaining unit work. The various standards that were proposed, however, operated on different levels according to the number of transactions in which the standard required decision bargaining. In approximately ascending order of their level of abstraction, the following standards (as well as combinations of them) were used in *Fibreboard*.

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55. See *supra* text accompanying nn. 13–15 (beginning, “The duty to bargain does not require ...”).

*Rule C(1)*

Decision bargaining is required when an employer wishes to replace bargaining unit employees with contracted workers who would perform the same tasks in the same workplace at a lower cost.

Rule C(1) was so tailored to the facts of *Fibreboard* that the case would have been effectively limited to its facts. Few similar cases were likely to arise in the future, with the result that Rule C(1) operated at a very low level of abstraction.

*Rule C(2)*

Decision bargaining is required when the contracting out is motivated by labor costs.

*Rule C(3)*

Decision bargaining is required when the contracting out would jeopardize jobs in the bargaining unit, either at once or in the foreseeable future.

Both of these rules operated at a higher level of abstraction than Rule C(1) because putting contracted workers into the shoes of displaced employees is infrequent. Rule C(3) operated at a higher level than Rule C(2) because most contracting out reduces jobs in the bargaining unit whereas several reasons besides labor costs motivate contracting out (e.g., a desire not to replace obsolescent machinery).

*Rule C(4)*

Decision bargaining is required when negotiations over contracting out might succeed.

Success in bargaining could mean that the parties agree on an alternative to contracting out, that the employer convinces the union that contracting out is necessary, or that some other accommodation of interests is reached. Perhaps the keys to determining whether negotiations might succeed are, first, the employer's reasons for desiring to contract out and, second, the proposals the union has made or might reasonably make. It is not clear whether Rule C(4) applied to more transactions than Rule C(3) did. On the one hand, probably most cases of contracting out reduce the number of jobs in the bargaining unit. On the other hand, the range of proposals a union might make is broad; for example, it would include proposals which other unions have advanced, or at least proposals to which other unions and employers have agreed.

*Rule C(5)*

Decision bargaining is required when all or part of a business operation is closed or relocated.

Rule C(5) operated at a high level of abstraction because it applied not only to contracting out bargaining unit work, but also to other forms of discontinuing an operation (such as moving a business, selling it, or closing it down altogether).

*Rule C(6)*

Decision bargaining is required unless it would infringe on management prerogatives.

Rule C(6) sat at the top of the abstraction ladder that pertained exclusively to decision bargaining. Management prerogatives are, by definition, non-mandatory subjects of bargaining. Thus, Rule C(6) held that decision bargaining is required over any mandatory subject.

*Rule C(7)*

Collective bargaining is required on all issues that affect employees' vital interests, including contracting out.

Rule C(7) operated at the highest level of abstraction of these standards. It captured all of the preceding standards: employees have a vital interest in their compensation, in keeping their jobs, and in management's considering their proposals. In addition, Rule C(7) required collective bargaining in many cases besides contracting out, for example, an employer's advertising policy.

After the appropriate standard was chosen, it had to be applied to the facts of the case. Thus, Issue D arose:

*Issue D*

Under the appropriate standard, is decision bargaining a mandatory subject of bargaining (did the employer in the case at bar have a duty to engage in decision bargaining with the union)?

*Rule D(1)*

Under the appropriate standard, decision bargaining is not a mandatory subject of bargaining (the employer had no duty to engage in decision bargaining with the union in the case at bar).

*Rule D(2)*

Under the appropriate standard, decision bargaining is a mandatory subject of bargaining (the employer had a duty to engage in decision bargaining with the union in the case at bar).

Issue and Rules D called for application of law to fact and, therefore, they operated at a low level of abstraction: they applied only to the parties to the case at bar and to only one transaction between them.

On the common law approach, the issue and possible rules were:

*Issue E*

Did the employer have a duty to bargain because the case at bar is analogous to a precedent in which decision bargaining was required?

*Rule E(1)*

The employer in the case at bar did not have a duty to bargain because (i) this case was analogous to a precedent in which decision bargaining was not required or (ii) this case was not analogous to any precedent in which decision bargaining was required.

*Rule E(2)*

The employer in the case at bar had a duty to bargain because this case was analogous to a precedent in which decision bargaining was required.

The level of abstraction of an analogy depends on the number of facts in the comparison. For example, if one argued that contracting out is a mandatory subject of bargaining because contracting out is like wages, the level of abstraction of the analogy would be high: wages are always a mandatory subject, and contracting out would be as well.<sup>56</sup> But if one argued that the contracting out in *Fibreboard* was a mandatory subject because it was analogous to discharging employees and hiring new ones to perform the same work in the same workplace at lower pay, the level of abstraction of the analogy would be low.<sup>57</sup>

A precedent may be cited as the source of a standard for use in the case at bar and, if a party invokes a precedent for its standard, the opposing party may seek to distinguish the precedent for the purpose of demonstrating that the standard does not apply to the case at bar. Nonetheless, we do not

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56. The General Counsel drew such an analogy in his brief in the Supreme Court. See *infra* text accompanying n. 248 (beginning, “He analogized contracting out to . . .”).

57. Justice Stewart drew such an analogy in his concurring opinion in *Fibreboard*. See *infra* text following n. 335 (beginning, “all that is involved is the substitution . . .”).

consider drawing and applying a standard from a precedent as an instance of the common law approach to resolving an issue. Rather, the precedent is simply the source of the standard, much as a statute might be a source. In the common law approach, the outcome of the case at bar must be the same as the outcome of an analogous precedent. In contrast, in the approach of stating and applying a standard that is drawn from a precedent, the outcome of the case at bar depends on how the standard is applied, not on the outcome of the case in which the standard was announced. For example, suppose employer Voldemort has raised pay shortly before a representation election. The appropriate standard to apply to this case comes from *National Labor Relations Board v. Exchange Parts* because the employer in that case announced overtime and vacation benefits shortly before a representation election;<sup>58</sup> thus, at a certain level of abstraction, the facts of *Exchange Parts* and of Voldemort's case are analogous. That the employer lost in *Exchange Parts*, however, does not dictate that Voldemort will lose. Rather, the standard from *Exchange Parts* will be applied to Voldemort's case. That standard is that an employer may not increase benefits before a representation election for the purpose of inducing employees to vote against the union.<sup>59</sup> This standard includes more facts and operates at a lower level of abstraction than the level on which the appropriate standard was identified. Voldemort will win his case if the facts show that he raised pay, not to influence the election, but to meet competitors' raises.

Advocates and tribunals in *Fibreboard* and associated cases addressed all of the foregoing issues and used all of the standards as well as some combinations of them. Within the same tribunal, one member may have addressed one issue, and another member may have addressed another issue. In a few instances, the same member switched between issues, apparently not realizing the difference between them. To judge from their briefs in the Supreme Court, much the same was true of the advocates.

## 2. *The Opinion of the Labor Board in Fibreboard-I*

The General Counsel filed exceptions with the Labor Board to the trial examiner's intermediate report. As we examine the opinions of the majority and the dissent in the case, another principle of levels of abstraction will be relevant:

### *Principle 5*

In a sound argument, evidence and consequential (or "policy") arguments on a lower level of abstraction may not

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58. NLRB v. Exch. Parts, Co., 375 U.S. 405 (1964).

59. See GORMAN, *supra* n. 10, at 167.

establish facts or propositions on a higher level of abstraction. However, evidence on a lower level may illustrate a proposition on a higher level, and evidence on a higher level is some proof of a fact on a lower level.

The resolution of an issue must be based on evidence, and on arguments that contain evidence, that applies to the persons and transactions to which the resolution will apply. Thus, when deliberating policies and rules of law, a tribunal (or a legislature) may properly take into consideration legislative facts, and arguments built on legislative facts, but not adjudicative facts or arguments built on adjudicative facts. The reason is that the result of the deliberation will apply to many persons and transactions. For example, suppose Congress is debating whether to establish, or a court is deciding whether it was constitutional for Congress to establish, a program to educate employers about their duties and employees about their rights during union organizing campaigns. Congress or the court could properly consider the legislative fact that employers have economic power over employees and sometimes use it to influence the outcome of representation elections. Congress or a court should not be affected by the adjudicative fact that *ER* discharged *UL* in order to win an election. One swallow does not a summer make.<sup>60</sup> (Of course, evidence that thousands of employers have done what *ER* did would be a legislative fact.) In contrast, a tribunal that is resolving issues of fact or of application of law to fact between particular parties should usually restrict itself to the adjudicative facts of the case and arguments built on those facts. The reason is that the judgment will apply only to these parties and their transactions. For example, whether the election in *ER*'s case should be re-run ought to be decided on the basis of what *ER* thought and did and how it affected *ER*'s employees, not on the basis of what other employers have thought or done or the effects on their employees.

Two qualifications to this principle are in order. The first qualification is that sometimes a legislative fact can help in finding an adjudicative fact. The reason is that what is true in general is usually true in a given case. For example, it is a legislative fact that the discharge of a prominent union supporter shortly before a representation election often influences employees to vote against unionization. This fact is some evidence that the employees in *ER*'s case were illegally influenced.<sup>61</sup>

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60. ARISTOTLE, *NICOMACHEAN ETHICS* bk. I (G.P. Goold ed., H. Rackham trans., Harvard Univ. Press rev. ed. 1934) (c. 384 B.C.E.).

61. To be sure, this legislative fact could be outweighed by the adjudicative facts of the case. In *ER*'s case, suppose that in the days before the election the union's president was convicted of embezzling money from the union's treasury and the union's organizer resigned to become a supervisor for the employer. These facts might be a better explanation of the outcome of the election than *ER*'s behavior is.

The second qualification is that the adjudicative facts of an individual case may properly be used as an illustration of a legislative fact on which a rule is grounded. To illustrate a fact, however, is not to prove it, but only to make it clear. We will present instances of such illustrations below.<sup>62</sup>

Let us turn now to the majority and dissenting opinions in *Fibreboard-I*. We will find that the majority honored Principle 5, but the dissent did not.

Since 1947, the Labor Board has comprised five members. It normally decides cases in panels of three members, but occasionally sits en banc.<sup>63</sup> It decided *Fibreboard-I* en banc.<sup>64</sup> Members Philip Ray Rodgers, Boyd Stewart Leedom, Joseph Alton Jenkins, and John Harold Fanning<sup>65</sup> agreed with the finding that Fibreboard had acted for a legitimate reason.<sup>66</sup> They disagreed among themselves over whether an employer has a duty to engage in decision bargaining.

The General Counsel contended that an employer who contemplates contracting out bargaining unit work must negotiate with the union over the decision.<sup>67</sup> It appears, therefore, that the General Counsel presented Issue B to the Board. The majority of the Board, composed of Members J. Jenkins, Leedom, and Rogers, rejected the General Counsel's contention. The majority held that the duty to bargain pertains to matters "presently affecting employees within an existing bargaining unit,"<sup>68</sup> but after the work had been contracted out "no employees remained in the unit to be represented by the Union."<sup>69</sup> The majority held that the duty to bargain does not pertain to the question of whether the employment relationship will persist. "Although the determination of that question obviously affects employees, that determination does not relate to a condition of employment, but to a precondition necessary to the establishment and continuance of the relationship from which conditions of employment arise."<sup>70</sup> Also, argued the majority, the text of the statute cannot be interpreted to mean that Congress

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62. See *infra* text accompanying n. 219 (beginning, "The good consequences of a rule . . ."), n. 254 (beginning, "Principle 5 holds that . . ."), n. 285 (beginning, "At this point in section I . . ."), and n. 288 (beginning, "We will call this the 'Labor Costs Passage'").

63. See HARDIN et al., *supra* n. 24, at 2443-44.

64. Chairman Frank W. McCulloch did not participate; he had joined the Board only two weeks before the decision was issued. The official report of the Board's decision is unsigned, *Fibreboard Paper Products Corp.*, 130 NLRB 1558 (1961), but does state that Chairman McCulloch did not participate, *id.* at 1565.

65. The Bureau of National Affairs report of the decision states that Members Rodgers, Leedom, Jenkins, and Fanning heard the case, 47 L.R.R.M. 1547, 1547 (1961), and this report is consistent with the terms of office of Board members as listed on the Board's web site, <https://www.nlr.gov/who-we-are/board/members-nlr-1935>. Joseph Jenkins should not be confused with Howard Jenkins, Jr., who served on the Board from 1963 to 1983. *Ibid.*

66. *Fibreboard Paper Prods. Corp.*, 130 NLRB 1558, 1558 (1961).

67. *Id.* at 1560.

68. *Id.* at 1559-60.

69. *Id.* at 1561.

70. *Id.* at 1561.

intended to compel bargaining over basic managerial decisions. Although the majority did not use the terms “mandatory subject of bargaining” or “management prerogatives,” it effectively held that the decision to contract out bargaining unit work is not a mandatory subject, but instead falls within the scope of management prerogatives, regarding which an employer has no duty to bargain.

The opinion of the majority addressed Issue B. The opinion did not comment on the scope of the issue which the General Counsel had presented, but we have no doubt that Members J. Jenkins, Leedom, and Rogers, as experts in the law of labor relations and as experienced practitioners in the field, fully appreciated the scope of the issue. The majority wrote:

It is the position of the General Counsel that the Respondent was under a statutory duty to bargain with the Steelworkers about its *decision* to contract out the maintenance work. . . . [He argues] that the duty to bargain “includes the obligation to notify the collective-bargaining representative and to give such representative a chance to negotiate with respect to a contemplated change concerning the tenure of the employees. . . .”<sup>71</sup>

Although the first sentence applied only to Fibreboard and the Steelworkers, the second sentence plainly applied to all employers: for the parties in the second sentence were all employers subject to the duty to bargain and all representatives of employees, and the act was any contracting out, not merely contracting out maintenance work. Such breadth of application is a hallmark of a high level of abstraction. Similarly, the members in the majority must have appreciated the scope of their resolution of the issue: “the establishment by the Board of an appropriate bargaining unit does not preclude an employer acting in good faith from making changes in his business structure, such as entering into subcontracting arrangements, without first consulting the representative of the affected employees.”<sup>72</sup> The determiner “an” in the term “an employer” shows that the sentence applied to all employers; the determiner “any” could have replaced “an” without changing the meaning of the passage. And the majority appreciated the scope of its interpretation of the intent of Congress: “although the statutory language is broad, we do not believe it is so broad and all inclusive as to warrant an inference that the Congress intended to compel bargaining concerning basic management decisions, such as whether and to what extent to risk capital and managerial effort.”<sup>73</sup> If Congress did not intend “to compel bargaining concerning basic management decisions,” that intent must have applied to all employers.

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71. *Id.* at 1559–60 (italics in the original; internal quotation marks and citation omitted).

72. *Id.* at 1560.

73. *Id.* at 1561.

Thus, the majority meant its ruling to exempt from the duty to bargain the decision of any employer to contract out bargaining unit work. The majority adopted Rule B(1).

The majority's opinion presented evidence and arguments on the level of abstraction appropriate to Issue B. Thus, the majority consistently observed Principle 5.<sup>74</sup> Member Fanning's dissent did so only in part.

Member Fanning argued that an employer has a duty to bargain over the decision to contract out bargaining unit work. Although it appears that he intended, as did the majority, to address Issue B, some of the arguments which he advanced and some of the authorities on which he relied were inappropriate to his purpose.

Member Fanning framed the issue at a high level of abstraction: "Simply stated, the issue here is whether an employer, absent any discriminatory motivation, violates Section 8(a)(5) of the Act when he refuses to discuss with the union his decision to subcontract the work previously done by union-member employees and unilaterally subcontracts that work."<sup>75</sup> He stated the resolution of the issue which he desired at the same high level: "In my opinion, Section 8(d) . . . imposes on an employer the duty to bargain about its decision to subcontract work performed by employees represented in a collective-bargaining unit."<sup>76</sup> The term "an employer" in these passages meant "any employer" and thus applied to all employers. Nothing in these passages suggested that Member Fanning believed that bargaining should be required in some cases but not in others. In addition, Member Fanning was as expert in the law and as experienced in

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74. To say that the majority's rule of law and arguments operated on the same level of abstraction is not to say that the arguments were sound. We are troubled by the argument that the union had no right to demand decision bargaining because "no employees remained in the unit to be represented by the Union." This argument suffered from the logical fallacy of begging the question. The argument assumed that the decision had already been made and the contracting out had already occurred, at which time it would have been true that the employees had been discharged and no employees remained whom the union represented. But this assumption relied on the implicit assumption that the employer had the right in the first place to discharge the employees without bargaining with the union. The fallacy of the argument was that the implicit assumption was the very proposition which the argument was intended to prove. Any correct argument would have focused on the state of affairs before the contracting out had occurred, indeed, before the final decision had been made. At this time, no employees would have been discharged and the union would have had an interest in bargaining about their future. We are also troubled by the majority's argument that the decision to contract out bargaining unit work is not a mandatory subject of bargaining because the decision "does not relate to a condition of employment, but to a precondition . . . of the relationship from which conditions of employment arise." Other preconditions of the employment relationship are mandatory subjects, for example, hiring and recall and (on the argument that whether employment will continue is a precondition to, and not an aspect of, the conditions of employment) layoff, discharge, and retirement. See HARDIN, *supra* n. 14 at 891. No member of the Board nor any judge mentioned either of these arguments in the record of the subsequent progress of the case.

75. *Fibreboard Paper Prods. Corp.*, 130 NLRB at 1562 (Member Fanning, dissenting).

76. *Id.* at 1564-65.

the field as were his colleagues on the Board, which facts suggest that he too appreciated the breadth of the issue that he addressed and of the resolution that he favored. These facts show that Member Fanning intended to address and resolve Issue B.

Member Fanning advanced two consequential arguments. The first operated on the correct level of abstraction. The argument assured that the duty he advocated would do no harm because, if bargaining led to impasse, an employer could contract out the work without the union's consent: "Clearly, this duty to bargain is not an order restraining the employer from subcontracting such work. The duty to bargain does not include an obligation to yield."<sup>77</sup> This argument operated at a high level of abstraction because every employer has the right to contract out following impasse;<sup>78</sup> thus, the argument, which was offered in support of a rule requiring decision bargaining in all cases, was appropriate to Issue B.

Member Fanning's second consequential argument presents an opportunity to consider another principle of levels of abstraction:

*Principle 3*

The level of abstraction for the backing of a proposition indicates the level at which the proposition was intended to operate.

Sometimes it is difficult to determine whether a rationale in the opinion of a tribunal is a standard intended for use in future cases, or is simply a statement of the tribunal's reasons for its decision. Whether a rationale is a reason or a standard affects how it will be used in subsequent cases. When a rationale is a standard, the tribunal intends that the standard will be applied to determine the outcome of relevant subsequent cases. When a rationale is a reason for decision, if that reason does not apply to a subsequent case, the force of the decision as a precedent is diminished if not vitiated altogether.

The concept of levels of abstraction can help to distinguish between reasons and standards. If the level of the rationale is low (the facts in it are adjudicative), the rationale is probably a standard that was applied in the case at bar and was meant for use in subsequent cases. Suppose a tribunal wrote, "Decision bargaining is required in the case at bar because (a) contracting out would eliminate jobs from the bargaining unit and (b) the desire to contract out is motivated by labor costs." We may infer that the tribunal intended to articulate the standard that decision bargaining is required when (a) and (b) occur. In contrast, if the level of the rationale is high (the facts in

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77. *Id.* at 1565.

78. *In Re Calmat Co.*, 331 NLRB 1084, 1097 (2000) ("after bargaining to an impasse an employer does not violate the Act by making unilateral changes that are reasonably comprehended within his pre-impasse proposals.").

it are legislative), the passage is probably a statement of the tribunal's reasons for a rule that operates at a high level. Suppose a tribunal wrote, "Decision bargaining is required because a union has a strong interest in protecting jobs in a bargaining unit. In the case at bar, however, no jobs were lost or even threatened. Rather, the company, a grocery store, decided to add a cafeteria to the operation and, instead of cooking all of the food in the store, contracted out the cooking. As compared to protecting existing jobs, a union has a lesser interest in representing employees in future jobs." The reason for the general rule does not apply, and neither does the rule.

This reasoning assumes that authors usually honor the principles of levels of abstraction, though the authors may not be able to articulate those principles. Applying this assumption to a particular argument, we may infer the level at which an author intends the proposition or argument to operate from the level at which operate the evidence and arguments which the author advances in support of the proposition. When the levels of abstraction of a proposition and its backing do not coincide, doubt arises as to the level at which the author intended the proposition to operate and, sometimes, as to whether the rationale is a reason or a standard. Member Fanning's second consequential argument created such doubt.

The argument was a prediction (correctly based on the facts at the time that Fibreboard decided to contract out the work) that the duty to bargain over contracting out might have done some good: "Had the employer bargained about its decision to subcontract the maintenance work in the instant case, it is entirely possible that the parties could have arrived at a solution to the problem short of subcontracting the entire maintenance operation."<sup>79</sup> The reference to "the maintenance work in the instant case" makes plain that the prediction referred only to Fibreboard and the Steelworkers. Nonetheless, two readings of the prediction are plausible.

The first reading is that Member Fanning used the prediction as evidence in support of Rule B(2) (decision bargaining is required in all cases), which operated on a high level of abstraction. On this reading, the prediction was a reason for the rule: decision bargaining is required because it can avert contracting out. If this reading is correct, the reason operated on an inappropriate level because the facts of this case could not justify a rule requiring decision bargaining in all cases. Evidence on a lower level of abstraction cannot justify a principle of a higher level. To justify Rule B(2), Member Fanning needed a legislative fact, not an adjudicative fact.

The second reading is that Member Fanning used the prediction to argue that decision bargaining was appropriate in the case at bar: these parties in these circumstances might have averted the contracting out. On this reading, the prediction was a standard: decision bargaining is required in cases in

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79. *Fibreboard Paper Products, Corp.*, 130 NLRB at 1565 (Member Fanning, dissenting).

which it can avert contracting out. Two problems beset this reading. The first problem pertains to how Member Fanning knew the prediction was true. It was an adjudicative fact, yet he did not cite a finding (or even evidence) in the record that the parties might have bargained to a solution short of contracting out.<sup>80</sup> Perhaps, however, he believed, based on his experience, that any parties in this position might bargain to a solution (a legislative fact) and, therefore, the Steelworkers and Fibreboard might.<sup>81</sup> If so, the second problem arises. If decision bargaining was required in this case because the bargaining might have succeeded, Member Fanning changed the issue he was addressing from Issue B (is decision bargaining required in all cases) to Issue C (what is the standard for determining whether decision bargaining is appropriate in a given case) and resolved the new issue with Rule C(4) (decision bargaining is required when it might succeed).

We have belabored Member Fanning's second consequential argument because a lawyer often uses the reasons for a rule of law to interpret the rule, and thus ambiguity in the reasons fosters confusion about the rule. Member Fanning's second consequential argument was ambiguous as to its level of abstraction and purpose.<sup>82</sup> If he had been writing for the majority of the Board, needless litigation would have ensued because in subsequent cases opposing parties could have argued, the one that the case requires decision bargaining of all employers, the other that the case requires decision bargaining only when it might succeed in the case at bar.

Member Fanning also cited precedents in support of Rule B(2).<sup>83</sup> His use of those precedents, as well as the reasoning in one of them, allow us to illustrate two further principles of levels of abstraction:

#### *Principle 6*

An authority may support a proposition that operates on the same level of abstraction as the level on which authority operated, or may support a proposition on a lower level by force of logic.

#### *Principle 7*

An authority may not support a proposition that operates on a higher level of abstraction than the level on which the authority operated ("abstraction shift") unless a justification is provided.

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80. *See id.* at 1562.

81. We will argue below that a member of a tribunal should not base a finding of a legislative fact on the member's experience, but that evidence of the fact must appear in the record of the case. *See infra* text accompanying n. 186 (beginning, "We subscribe to the elementary tenant . . .").

82. *Fibreboard Paper Prods. Corp.*, 130 NLRB at 1564–65 (Member Fanning, dissenting).

83. *See id.*

These are normative principles and require justification.

As an advocate can, from the same set of facts, frame the issue in a case at various levels of abstraction, so an advocate can characterize or interpret the holding of a precedent at various levels of abstraction. Such interpretation is routine in legal arguments and is not improper. Thus, an advocate may use an authority, the result of which was justified on its adjudicative facts, as precedent in a subsequent case with analogous adjudicative facts. The cases operate on the same level of abstraction, and like cases should be treated alike. An advocate may use an authority which announced a rule of law as the basis for deciding subsequent cases. The rule operated on a high level of abstraction in that case, and the tribunal that announced the rule (and presumably justified it) intended that it would be applied to many cases. And an advocate may examine a group of authorities, each decided on its adjudicative facts; abstract a rule of law that explains all the cases in the group; and use that rule to decide a subsequent case. “The life of the law . . . has been experience,” wrote Oliver Wendell Holmes, Jr.,<sup>84</sup> and the genius of the common law has been its use of experience to generate and revise rules of law.

But an advocate may not, without justification, use an authority, the result of which was justified on its adjudicative facts—and therefore operated on a low level of abstraction—as precedent for a general rule of law at a higher level of abstraction that will decide many subsequent cases. One reason for this principle is that the tribunal that decided the authority had no such use in mind. The tribunal found certain facts were legally significant and understood that certain persons and transactions would be affected. If other facts had been significant, and other persons and transactions had been affected, the advocates in the case might have proved other facts and presented different arguments; other parties might have participated; and the tribunal might have ruled differently. A second reason is that a single case rarely provides sufficient experience on which to base a rule of wide application. A third reason is that, absent justification, a mismatch between the level of abstraction of a proposition and of a precedent cited in support of the proposition opens the proposition to attack (“*Right v. Wrong* should be overruled because its outcome was not supported by the precedents it cited”) and sows confusion as to the interpretation of the law (“*Here v. There* seems to hold  $\lambda \omega \lambda$ ; but, in light of the precedents on which it relied, which held  $\omega \mu \lambda$ , *Here v. There* must be understood to hold  $\omega \mu \lambda$ ”).<sup>85</sup>

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84. Oliver Wendell Holmes, Jr., *The Common Law*, 1, lecture 1 (1881).

85. An example of the third reason occurred in *Fibreboard-I*. See *infra* text accompanying n. 135 (beginning, “The majority argued that Shamrock Dairy . . .”).

Therefore, if an advocate shifts the level of abstraction of an authority, the advocate must justify the shift. Such justification varies across cases, but typically requires an argument that the outcome of the authority would have been the same at the new level of abstraction and that the rationale presented by the tribunal that decided the authority is consistent with the shift.

Member Fanning relied on two Labor Board cases which, he said, had found employers guilty of refusing to bargain over the decision to contract out, and on a Supreme Court case that arose under the Railway Labor Act.<sup>86</sup> As we discuss his use of these precedents, we will find that two of them served his purpose well, but one did not.

The first Board case on which Member Fanning relied was *Timken Roller Bearing Company*.<sup>87</sup> The Timken Company and the Steelworkers Union initially signed a collective bargaining agreement covering production and maintenance employees in Timken's plants in Ohio in 1937, and one or more collective agreements ensued.<sup>88</sup> Timken had been contracting out certain production and maintenance jobs since at least 1920.<sup>89</sup> At the time of the hearing before the trial examiner in 1946, approximately 200 employees of at least six independent contractors were working inside Timken's plants, and the value of the contracted work appeared to be increasing.<sup>90</sup> A substantial number of the contracted jobs required skills that were similar to the skills of employees who were represented by the Steelworkers.<sup>91</sup> The contracting out, however, had not reduced the work of the bargaining unit or cost any member of the unit his job.<sup>92</sup> In 1945 the union requested to bargain about contracting out; Timken denied the request on the ground that (in today's terms) contracting out falls within the scope of management prerogatives and is not a mandatory subject of bargaining.<sup>93</sup>

The Steelworkers filed a charge of refusal to bargain in the regional office of the Labor Board in Cleveland, Ohio.<sup>94</sup> The General Counsel issued a complaint, which Timken answered, and the case was tried in Canton, Ohio before Trial Examiner Horace Ruckel.<sup>95</sup> He recommended that the Board sustain the General Counsel's allegation regarding contracting out,<sup>96</sup> and the Board adopted his recommendation "[f]or the reasons stated in the

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86. *Fibreboard Paper Prods. Corp.*, 130 NLRB at 1561.

87. *Timken Roller Bearing Co.*, 70 NLRB 500 (1946).

88. *Timken Roller Bearing Co. v. NLRB*, 161 F.2d 949, 951 (6th Cir. 1947).

89. *Timken*, 70 NLRB at 515, n. 10 (intermediate report).

90. *Id.*

91. *See id.*

92. *Id.*

93. *Id.*

94. *Id.* at 509.

95. *Id.*

96. *Id.* at 523.

Intermediate Report.”<sup>97</sup> Therefore, the trial examiner’s opinion in *Timken Roller Bearing* became the opinion of the Board.

Trial Examiner Ruckel identified factors that influenced many subsequent discussions of contracting out:

[I]t seems apparent that the respondent’s system of subcontracting work may vitally affect its employees by progressively undermining their tenure of employment in removing or withdrawing more and more work, and hence more and more jobs, from the unit. . . . It is the respondent’s duty to sit down and discuss these matters with the Union when requested to do so. During such discussion it may develop, for example, that the Union will engage to supply sufficient skilled labor in the crafts in question, so that more work may be done by the respondent’s employees and less by employees outside the unit; it might be that the respondent will convince the bargaining representative that there is no reasonable alternative to a continuation of the respondent’s present practice in this respect; or some other and presently unthought of solution agreeable to both parties may suggest itself.<sup>98</sup>

For three reasons, we believe that the trial examiner did not hold that decision bargaining is required in all cases of contracting out, but dealt with the case at a low level of abstraction. First, he spoke of “the respondent’s [Timken’s] system of subcontracting work,” not of contracting out in general.<sup>99</sup> Second, he referred twice to the “Union.”<sup>100</sup> In opinions of the Labor Board, capitalization of this word indicates a reference to the party in the case at bar, not to every union in the nation. Third, his suggestion that the Steelworkers might guarantee Timken a supply of skilled labor pertained only to this company’s reason for contracting out.<sup>101</sup> Had he intended a rule that applied to all contracting out, he would also have discussed other, more typical causes of contracting out, such as the cost of labor (saying, for example, that the union might offer wage concessions). Thus, Trial Examiner Ruckel understood the facts he stated to be adjudicative facts, not legislative facts or examples of legislative facts, and he implicitly adopted Rules B(3) (decision bargaining is required in some cases) and C(7) (bargaining is required on issues that affect employees’ vital interests).

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97. *Id.* at 504.

98. *Id.* at 518.

99. *Id.* (stating, “the respondent’s system of sub-contracting work may vitally affect its employees...”).

100. *Id.*

101. *Id.* (stating that when bargaining, “it may develop . . . that the Union will engage to supply sufficient skilled labor in the crafts in question, so that more work may be done by the respondent’s employees and less by workers outside the unit.”).

Let us turn now to the role that *Timken Roller Bearing* played in Member Fanning's opinion in *Fibreboard-I*. Member Fanning wrote:

In the *Timken Roller Bearing* case . . . the Board specifically adopted the Trial Examiner's conclusion that ". . . the Respondent's system of subtracting work may vitally affect its employees by progressively undermining their tenure of employment in removing or withdrawing more and more work and hence more and more jobs from the unit." This reasoning applies with considerably more vigor where, as in the instant case, the entire complement of employees were rendered jobless in a single transaction."<sup>102</sup>

Member Fanning committed an abstraction shift in this passage. He argued that if Timken had a duty to engage in decision bargaining, a fortiori so did Fibreboard. The argument depended on the adjudicative facts of the two cases and, therefore, operated on a low level of abstraction. The argument would have been successful if it had been offered in support of a rule at the same level, that is, Rule E(2) (the case at bar is analogous to a precedent). If Member Fanning had been arguing that decision bargaining should be required in some cases but not in others, a case-by-case approach would have been appropriate: for if decision bargaining were required on the adjudicative facts of one case, it should be required on the adjudicative facts of another case in which the argument for decision bargaining was even stronger. The problem was that Member Fanning advanced this argument in support of a proposition at a higher level of abstraction, Rule B(2). For this purpose, a comparison of the adjudicative facts of two cases was irrelevant. One might agree that contracting out had a greater effect on the employees of Fibreboard than on the employees of Timken, but a comparison of the adjudicative facts of two cases cannot justify a rule of law that would apply to all cases. An authority at a lower level of abstraction does not justify a rule of law at a higher level of abstraction.

The second precedent on which Member Fanning relied was *Shamrock Dairy*.<sup>103</sup> The International Brotherhood of Teamsters represented a unit of drivers and other employees of Shamrock Dairy, and the Teamsters and Shamrock entered into a two-year labor contract scheduled to expire in October of 1955.<sup>104</sup> Shamrock decided for business reasons to convert its drivers from employees into independent distributors (who would buy their

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102. *Fibreboard Paper Prods. Corp.*, 130 NLRB 1558, 1562 (1961) (Member Fanning, dissenting) (footnote omitted).

103. *Id.* at 1563. The Board had previously decided *Shamrock Dairy, Inc.*, 119 NLRB 998 (1957), but the Court of Appeals refused to enforce the Board's order and remanded the case. *See Shamrock Dairy, Inc.*, 124 NLRB 494, 494 (1959). On remand, the Board heard the case de novo, *id.* at 495.

104. *Shamrock Dairy*, 124 NLRB at 504.

trucks and their routes from Shamrock, be compensated by the difference between the prices Shamrock charged them and the prices they charged their customers, and so forth).<sup>105</sup> Shamrock did not bargain over this decision with the Teamsters before implementing it,<sup>106</sup> and the Teamsters charged Shamrock with refusing to bargain.<sup>107</sup> After the General Counsel issued a complaint, the case went to trial before Trial Examiner Wallace Royster in Tucson, Arizona.<sup>108</sup> He did not discuss the law as to whether Shamrock had a duty to bargain about the decision, but he recommended that Shamrock be held guilty of violating section 8(a)(5) for having converted its drivers into independent contractors without bargaining with the union.<sup>109</sup> This conversion was tantamount to contracting out bargaining unit work.

The Labor Board accepted Trial Examiner Royster's recommendation.<sup>110</sup> The Board's discussion of decision bargaining plainly stated a rule of law at a high level of abstraction:

The Respondent [Shamrock] adopted the so-called independent distributorship plan without notice to the Union and entered into individual contracts with the drivers without giving the Union, the exclusive bargaining representative, a chance to negotiate with regard to the tenure of the employees to be affected by the alleged independent distributorship plan. . . . By this course of conduct, the Respondent failed to perform fully its duty to bargain collectively. This duty includes the obligation to notify the collective-bargaining representative and to give such representative a chance to negotiate with respect to a contemplated change concerning the tenure of the employees and their conditions of employment. *Brown Truck and Trailer Manufacturing Company, Inc.*, 106 NLRB 999.<sup>111</sup>

The last sentence of this passage stated a rule of general application: an employer must give a union "a chance to negotiate with respect to the contemplated change concerning the tenure of the employees and their conditions of employment,"<sup>112</sup> that is, a chance to engage in decision bargaining. As stated, the rule applied to all employers who contemplated contracting out or closing part of a business and, therefore, was Rule B(2). Accordingly, Member Fanning in *Fibreboard-I* appropriately relied on

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105. *Id.* at 509 (intermediate Report).

106. *See id.*

107. *Shamrock Dairy*, 119 NLRB 998, 1019 (1957) (intermediate report).

108. *Id.*

109. *Id.* at 1024.

110. *Shamrock Dairy*, 124 NLRB at 498.

111. *Id.* (minor typographical error corrected). *See also infra* text accompanying n. 138 (beginning, "Let us evaluate this argument")(providing a discussion of *Brown Truck and Trailer Mfg. Co., Inc.*).

112. *Shamrock Dairy*, 124 NLRB at 498 (citing *Brown Truck & Trailer Mfg. Co., Inc.*, 106 NLRB 999 (1953)).

*Shamrock Dairy* to support his proposed resolution of the issue at a high level of abstraction.<sup>113</sup>

The case on which Member Fanning mainly relied was *Order of Railroad Telegraphers v. Chicago & North Western Railway Company*.<sup>114</sup> Although the case arose under the Railway Labor Act, this statute and the National Labor Relations Act are similar enough that precedents under the one sometimes provide guidance for issues under the other. In particular, as Member Fanning noted, the definitions of the duty to bargain in the two statutes are highly similar.<sup>115</sup>

In *Railroad Telegraphers*, the Chicago & North Western railroad wished to reduce the number of stations on its lines. Fewer stations would have led to layoffs of employees who were represented by the Telegraphers Union.<sup>116</sup> When the Telegraphers learned of the plan, they notified the railroad that they desired to amend the existing labor contract with a clause that would prevent the abolition of jobs (and, as a practical matter, the closing of stations) unless both parties agreed to it.<sup>117</sup> The railroad replied that its plan did not create a “bargainable issue” under the Railway Labor Act (in the parlance of the National Labor Relations Act, that the plan was not a mandatory subject of bargaining) because the plan did not concern rates of pay, rules, or working conditions.<sup>118</sup> Nonetheless, without waiving its position, the railroad did discuss the plan with the union, but no agreement was reached.<sup>119</sup> Mediation was unsuccessful, and both parties declined to submit the controversy to arbitration: whereupon the union announced its intention to strike.<sup>120</sup> The day before the strike was scheduled to begin, the railroad petitioned the United States District Court for the Northern District of Illinois for an injunction to stop the strike. The union opposed the injunction on the ground that the court lacked jurisdiction due to section 4 of the Norris-LaGuardia Act of 1932,<sup>121</sup> which read, “No court of the United States shall have jurisdiction to issue any . . . injunction in any case involving or growing out of any labor dispute to prohibit any person or persons . . . from . . . (a) Ceasing or refusing to perform any work [i.e., striking] . . . .”<sup>122</sup>

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113. The Board in *Shamrock Dairy* cited only *Brown Truck* for Rule B(2), and offered no other reasons for the rule, thereby committing an abstraction shift. See *infra* text following n. 143 (beginning, “Nonetheless, the majority in *Fibreboard-I* . . .”).

114. See *Fireboard Paper Prods. Corp.*, 130 NLRB 1558, 1563 (1961) (Member Fanning, dissenting) (citing *Order of Railroad Telegraphers v. Chicago & N. W. Railway Co.*, 362 U.S. 330 (1960)).

115. *Id.* at 1564 (“Section 2, First of the Railway Labor Act is substantially identical in its pertinent provisions to Section 8(d) of the National Labor Relations Act. . .”).

116. *Order of Railroad Telegraphers v. Chi. & N. W. Railway Co.*, 362 U.S. 330, 332 (1960).

117. *Id.*

118. *Id.* at 333.

119. *Id.* at 349 (Whittaker, J., dissenting).

120. *Id.*

121. See *id.* at 350–51.

122. *Id.* at 331 (citing 47 Stat. 70, 29 U.S.C. § 104).

The railroad replied that the court had jurisdiction because the plan to close stations was not a bargainable issue and that, in consequence, no labor dispute existed and the Norris-LaGuardia Act did not apply.<sup>123</sup>

The District Court agreed with the union; the Court of Appeals for the Seventh Circuit agreed with the railroad; and the Supreme Court took the case.<sup>124</sup> The Supreme Court found:

the controversy here relates to an effort on the part of the union to change the "terms" of an existing collective bargaining agreement. The change desired just as plainly referred to "conditions of employment" of the railroad's employees who are represented by the union. The employment of many of these station agents inescapably hangs on the number of railroad stations that will be either completely abandoned or consolidated with other stations. And, in the collective bargaining world today, there is nothing strange about agreements that affect the permanency of employment. . . .

We cannot agree with the Court of Appeals that the union's effort to negotiate about the job security of its members "represents an attempt to usurp legitimate managerial prerogative in the exercise of business judgment with respect to the most economical and efficient conduct of its operations." The Railway Labor Act and the Interstate Commerce Act recognize that stable and fair terms and conditions of railroad employment are essential to a well-functioning national transportation system. . . .

. . . Furthermore, the whole idea of what is bargainable has been greatly affected by the practices and customs of the railroads and their employees themselves. It is too late now to argue that employees can have no collective voice to influence railroads to act in a way that will preserve the interests of the employees. . . .<sup>125</sup>

Accordingly, the Court held "that this case involves or grows out of a labor dispute within the meaning of the Norris-LaGuardia Act and [therefore] the District Court was without jurisdiction permanently to enjoin the strike."<sup>126</sup>

Only three facts constituted the issue: a railroad wanted to close parts of its operation; the closures would have jeopardized jobs in the craft or class

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123. *Id.* at 345.

124. *Id.* at 333-35.

125. *Id.* at 336-38 (citations omitted). Note that the Court, as it interpreted the duty to bargain, took into account the practice in the industry, *id.* at 338. See *infra* the text following n. 277 for the view expressed by the majority of the Supreme Court in *Fibreboard* regarding the proper role of industrial practices in defining the duty to bargain (beginning, "The third argument examined industrial experience . . .") and accompanying n. 310 for the view expressed by Justice Stewart (beginning, "Justice Stewart's first criticism . . .").

126. *Id.* at 335.

(the equivalent under the Railway Labor Act of a bargaining unit under the National Labor Relations Act); and the union wanted to bargain. These facts could have been true of any other railroad and union.<sup>127</sup> In arguing how the issue should be resolved, the Court did not rely on adjudicative facts that were peculiar to the Chicago & North Western, the Telegraphers, or this transaction; instead, the Court relied upon the intent of Congress for the industry and upon a legislative fact, namely, the practices of railroads and unions across the country.<sup>128</sup> And the Court did not state or imply a standard that would require bargaining in this case but not in other cases.<sup>129</sup> The Court, therefore, framed and resolved the issue at a high level of abstraction.<sup>130</sup> The holding that the railroad's plan, and the union's proposed amendment to the labor contract, created a bargainable issue, was a square ruling that closing part of a business is a mandatory subject of bargaining under the Railway Labor Act.<sup>131</sup> It follows that Member Fanning used *Railroad Telegraphers* correctly because it operated on the same level of abstraction as the level on which Rule B(2) would have operated.<sup>132</sup>

What can we conclude about Member Fanning's dissent in *Fibreboard-I*? Some of his reasoning was sound, and some was not. Perhaps he intended to discuss the issue at a single level of abstraction, but lost sight of his purpose. Perhaps he kept the level of abstraction in mind, but did not write with sufficient care. Perhaps he did not appreciate the difference between the levels of abstraction at which he wrote and, therefore, moved indifferently between them. Whatever the explanation, his opinion exemplifies a pitfall of failing to keep in the front of one's mind the level of abstraction of the issue one intends to address. If his opinion had been the opinion of the Board, it would have sown confusion in the field and spawned unnecessary litigation.

Let us recur to the majority's opinion in *Fibreboard-I*. It reported that the General Counsel relied on *Shamrock Dairy* for the proposition that the Labor Act requires decision bargaining.<sup>133</sup> As we have seen above, Member Fanning also relied on *Shamrock Dairy*. This case was plainly troublesome for the majority and for good reason, as it seemed to hold squarely that the

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127. *Id.* at 331–33.

128. *Id.* at 336–42.

129. *Id.* at 338–42.

130. *Id.*

131. *Id.* at 336–37.

132. Of course, whether one case is an apt precedent for a subsequent case depends on more than whether the cases operate on the same level of abstraction. For example, Member Fanning added that if closing part of a business was a bargainable subject in *Railroad Telegraphers*, a fortiori continuing part of a business through contracting out was a mandatory subject of bargaining in *Fibreboard-I*. See *Fibreboard Paper Prods. Corp.*, 130 NLRB 1558, 1564 (1961) (Member Fanning, dissenting). This proposition is debatable; at a minimum, steps in the argument were omitted.

133. *Id.* at 1560.

Labor Act requires decision bargaining. The majority dealt with this problem in two ways.

The first way was to accuse the General Counsel and, by implication, Member Fanning, of urging a proposition without supporting precedent.<sup>134</sup> The majority argued that *Shamrock Dairy* did not require decision bargaining, but required only “effects bargaining.”<sup>135</sup> In the present context, the subjects of effects bargaining are the effects on employees of a decision to contract out bargaining unit work, such as order of layoffs, severance pay, and transfer and recall rights. Effects bargaining presupposes that the decision, based on lawful reasons, has already been made to contract out bargaining unit work (or to eliminate it or close the business). The majority argued that *Shamrock Dairy* had relied on *Brown Truck and Trailer Manufacturing Company, Inc.* as a precedent; that *Brown Truck* had held only that the Act requires effects bargaining; and, therefore, that *Shamrock Dairy* also required only effects bargaining.<sup>136</sup>

The majority effectively accused the General Counsel and Member Fanning of an abstraction shift.<sup>137</sup> A rule requiring decision bargaining in all cases operated on a higher level of abstraction than a rule requiring effects bargaining. The former rule applied to every case in which an employer wished to contract out bargaining unit work. If the bargaining succeeded and contracting out were averted, effects bargaining would be unnecessary. Therefore, a rule requiring effects bargaining would apply to only some of the parties to whom and the transactions to which a rule requiring decision bargaining would apply. Also, in decision bargaining one of the union’s principal means to avert contracting out would be concessions regarding the terms and conditions of employment, for example, reduced compensation and more stringent work rules. Thus, the issues in decision bargaining could include many of the usual subjects of collective bargaining. The issues in effects bargaining would be considerably narrower. The decision to contract out having already been made, the only issues in effects bargaining would pertain to what the employer might do for the employees who would be displaced, touching subjects such as severance pay and transfer rights, but not other subjects. Thus, the number of parties and the number of transactions (topics of bargaining) that would be affected by decision bargaining in this case would be substantially greater than the numbers of parties and transactions that would be affected by effects bargaining and, therefore, a rule requiring decision bargaining would operate on a higher level of abstraction than a rule requiring effects bargaining. The majority of

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134. *Id.*

135. *Shamrock Dairy, Inc.*, 124 NLRB 494, 498 (1959) (citing *Brown Truck and Trailer Mfg. Co., Inc.*, 106 NLRB 999 (1953)).

136. *Id.*

137. *Fibreboard Paper Prods. Corp.*, 130 NLRB at 1561.

the Labor Board accused the General Counsel and Member Fanning of violating Principle 7 by using an authority at a lower level of abstraction as a precedent for a proposition at a higher level of abstraction.

Let us evaluate this argument. In *Brown Truck*, the Brown Company closed its plant in Charlotte, North Carolina and moved its work to a new plant not far away in Monroe. The Labor Board wrote:

the good-faith discharge of the Brown Company's obligation to the employees' statutory bargaining representative required the former, at least, to advise the Union of the contemplated move and to give the Union the opportunity to bargain with respect to the contemplated move as it affected the employees, such as the placement of the Charlotte employees in positions at Monroe<sup>138</sup>

and

We have found that the Brown Company unlawfully deprived the Union of any opportunity to bargain respecting the relocation of the Charlotte plant employees at the Monroe plant. We shall therefore order the Respondents to bargain with the Union for the purpose of reaching an agreement as to the method, terms, and conditions by which the employees employed in the following unit, on or after July 3, 1952, may, if they desire, obtain employment at the Monroe plant.<sup>139</sup>

Thus, the majority of the Board in *Fibreboard-I* was correct that *Brown Truck* had held that the employer had a duty to engage in effects bargaining, not decision bargaining.<sup>140</sup> The majority in *Fibreboard-I* argued that *Shamrock Dairy's* reliance on *Brown Truck* as a precedent meant that the issue in the two cases was the same, that is, that Shamrock's violation, like Brown's, lay in Shamrock's refusal to bargain over the effect of contracting out on its drivers and not in its refusal to bargain over the decision to convert them into independent contractors. The majority's argument, then, was that the General Counsel was distorting *Shamrock Dairy*: whereas the Board had meant the holding to apply only to effects bargaining (the Board's intention being proved by the citation to *Brown Truck*), the General Counsel was trying to raise the level of abstraction of the holding to apply to decision bargaining as well.

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138. *Brown Truck and Trailer Mfg. Co., Inc.*, 106 NLRB at 1000 (footnote omitted).

139. *Id.* at 1003.

140. *Id.* at 1000, 1003, 1004.

The majority was mistaken. It was true that *Brown Truck* had held only that the employer had failed to engage in effects bargaining. It was false, however, that the Labor Board had intended *Shamrock Dairy* to apply only to effects bargaining. In characterizing *Shamrock Dairy* in this way, the majority ignored the passage from the case which stated unequivocally that the duty to bargain “includes the obligation to notify the collective-bargaining representative and to give such representative a chance to negotiate with respect to a contemplated change concerning the tenure of the employees and their conditions of employment.”<sup>141</sup> The majority also ignored an earlier passage in the opinion which stated that Chairman Leedom found that Shamrock had “violated section 8(a)(5) and (1) of the Act in that it failed to bargain with the Union as to whether the independent contractor system of distribution should be adopted.”<sup>142</sup> And, perhaps most telling of all, the majority ignored the Board’s order in the case: the Board ordered Shamrock to bargain with the Teamsters “with respect to adoption or continuance of a system of product distribution known as the independent distributorship plan insofar as it affects the tenure of its employees.”<sup>143</sup> Thus, the General Counsel and Member Fanning were justified in relying on *Shamrock Dairy* as a precedent that the Labor Act requires decision bargaining.

Nonetheless, the majority in *Fibreboard-I* was not far from the truth. The majority simply chose the wrong target. The General Counsel and Member Fanning in *Fibreboard-I* had not committed an abstraction shift in their use of *Shamrock Dairy*; rather, the Labor Board in *Shamrock Dairy* had committed an abstraction shift in its use of *Brown Truck*.

The Labor Board in *Shamrock Dairy* shifted the level of abstraction of an authority without providing a justification. By means of an equivocation, the Board interpreted *Brown Truck* to hold that the Labor Act requires decision bargaining (a rule that operates on a high level of abstraction) whereas *Brown Truck* held only that the Act requires effects bargaining (a rule that operates on a lower level of abstraction). The equivocation occurred in the words which the Board used in *Shamrock Dairy* to characterize the holding of *Brown Truck*:

. . . Respondent failed to perform its duty to bargain collectively. This duty includes the obligation to notify the collective-bargaining representative and to give such representative a chance to negotiate with respect to a contemplated change concerning the tenure of the employees and their conditions of employment. . . .

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141. *Shamrock Dairy*, 124 NLRB at 498. The passage is quoted more fully *supra* at n. 111 (beginning, “The Respondent [Shamrock] adopted . . .”).

142. *Id.* at 496.

143. *Id.* at 503.

Here, as in *Brown Truck*, the employer did not give the Union an opportunity to bargain with respect to the contemplated change as it affected the tenure of the employees. The Union was entitled to such an opportunity. . . .<sup>144</sup>

Neither this passage nor anything like it appeared in *Brown Truck*.<sup>145</sup> In particular, the phrase “tenure of the employees” appeared only in *Shamrock Dairy*’s characterization of *Brown Truck*.<sup>146</sup> Our point is not that the characterization was inaccurate, but that it was equivocal. The characterization was accurate because the phrase “the tenure of the employees” did capture the effects bargaining that was required of the Brown Company: effects bargaining would affect the tenure of the employees by addressing whether the affected employees would be transferred, given recall rights, and so forth. The characterization was equivocal because the phrase also captured the decision bargaining that was required of Shamrock Dairy: decision bargaining would affect the tenure of the employees by addressing whether the employer would contract out the employees’ work and eliminate their jobs. Thus, the term which the Board used in *Shamrock Dairy* to characterize *Brown Truck* had two meanings. This equivocation allowed the Board in *Shamrock Dairy* to interpret *Brown Truck* to hold bargaining was required whenever “the tenure of the employees” was affected, whether the bargaining would pertain to a decision or to the effects of a decision.

We stated above that the majority dealt with *Shamrock Dairy* in two ways. The first way was to argue (mistakenly, as we have just demonstrated) that the case required only effects bargaining. The second way was to distinguish the case. Member Fanning’s dissent having also relied on *Timken Roller Bearing* and *Railroad Telegraphers*, the majority of the Board in *Fibreboard-I* distinguished those cases as well. As we discuss the majority’s distinctions, an empirical and a related normative principle of levels of abstraction come to the fore:

#### *Principle 2*

A case can be distinguished from an authority by identifying an additional legally significant fact in either of them, thereby changing the level of abstraction at which the case or the authority is understood.

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144. *Id.* at 498 (italics added).

145. The entire discussion of the refusal-to-bargain issue in *Brown Truck* is quoted in the text *supra* at nn. 138-39 (beginning, “the good-faith discharge . . .”).

146. *Shamrock Dairy*, 124 NLRB at 498.

*Principle 8*

When a case is distinguished from an authority by identifying an additional legally significant fact in one of them, the reason that the additional fact is significant should be explained.

Any given case comprises many facts. Most are immaterial; it is usually insignificant who the plaintiff's relatives are or what color the defendant's hair is. The facts that are significant—the facts that can affect the outcome of the case—are called the “material facts” or, as we prefer, the “legally significant facts.” To say the same thing, the facts of a claim (the *prima facie* case) and the facts of an affirmative defense are the legally significant facts. Because the following principles are the same for both claims and affirmative defenses, we need refer only to claims.

Either party to a case may seek to raise or lower the level of abstraction of the case at bar or of an authority by adding or subtracting a legally significant fact. Without exploring all the possibilities, we offer two common examples in abstract form. Suppose the plaintiff in case 1 proves facts *A*, *B*, *C*, and the court grants relief. The plaintiff in case 2 proves facts *A*, *B*, and *C* and, based on the precedent of case 1, argues that she should win case 2. The defendant, however, proves fact *D*, argues that *D* is legally significant and, therefore, case 1 does not control case 2. In conventional parlance, the defendant seeks to distinguish case 2 from case 1 on the basis of fact *D*. If successful, our defendant lowers the level of abstraction of case 2. It comprises more legally significant facts than case 1 did. Cases 1 and 2 are no longer analogous, and the additional fact reduces the numbers of persons and transactions to which case 2 will apply as a precedent.

Now suppose the plaintiff in case 3 proves facts *E*, *F*, *G*, and *H* and wins the case. The plaintiff in case 4 proves facts *E*, *F*, and *G* and invokes case 3 as a precedent. The defendant contends that the absence of fact *H* distinguishes case 3 and nullifies its force as a precedent in the case at bar. The plaintiff argues that fact *H* is not legally significant, that is, that case 3 would have been decided the same way without fact *H*. If successful, the plaintiff raises the level of abstraction of case 3 because, with fewer legally significant facts, it applies to more persons and transactions (including his case).

By citing *Shamrock Dairy*, *Timken Roller Bearing*, and *Railroad Telegraphers* as precedents, Member Fanning implied that the legally significant facts of these precedents and of *Fibreboard* were the same, namely, a union represented a bargaining unit of employees and the employer contracted out their work without bargaining with the union. At this level of abstraction, the cases were analogous. The majority of the Labor Board in *Fibreboard-I*, however, sought to show that these authorities and *Fibreboard*

operated on different levels of abstraction and were distinguishable. The majority wrote:

We do not agree with our dissenting colleague that the *Timken*, *Shamrock*, and *Railroad Telegraphers* cases compel a contrary conclusion. In each of those cases, the union continued and would continue to be the representative of employees in the preexisting unit, and the decisions which the employers might make, in *Timken* and *Shamrock* with respect to subcontracting and in *Railroad Telegraphers* with respect to abolition of positions, had or might have an impact on the conditions of employment of employees remaining in the unit. For that reason the employees' representative was entitled to bargain with respect to such decisions. Here, however . . . no employees remained in the unit to be represented by the Union, and thus there necessarily could be no impact on the employment conditions of employees remaining in the unit. Those cases, therefore, do not support the proposition which our colleague urges that a union which will not represent any of the employer's employees is entitled to compel the employer to bargain about matters which will have an impact only when it ceases to be a representative.<sup>147</sup>

The majority distinguished all three of Member Fanning's precedents in the same way—by identifying an additional legally significant fact in them that justified treating them differently from *Fibreboard*. The additional fact was that some employees in each of the bargaining units of the precedents had not been displaced, whereas in *Fibreboard* all of the employees in the bargaining unit had been displaced.<sup>148</sup>

An advocate who seeks to distinguish a precedent by adding or subtracting a fact must explain why that fact is or is not legally significant. Therefore, the majority needed to explain the significance of the fact that some employees in the bargaining units in the precedents had not been displaced. To this end, the majority argued that the contracting out in the precedents “had or might have an impact on the conditions of employment of employees remaining in the unit” and, because the union continued to represent the remaining employees, the union had the right to bargain “with respect to such decisions.” In contrast, no one remained in the bargaining unit after *Fibreboard* contracted out the maintenance work to Fluor, and thus the

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147. *Fibreboard Paper Prods. Corp.*, 130 NLRB 1558, 1561 (1961) (footnotes omitted).

148. The contracting out in *Timken Roller Bearing* would bring non-union employees into the plant, but the Steelworkers continued to represent employees who were already employed there. All the drivers in *Shamrock Dairy* lost their jobs (became independent contractors), but the bargaining unit included other jobs and the Teamsters continued to represent the employees in those jobs. The union in *Railroad Telegraphers* would have continued to represent the employees in the stations which the railroad did not close.

union represented no one whose conditions of employment were affected by the decision.<sup>149</sup>

By adding a legally significant fact to the precedents, the majority moved the holdings of these cases to a lower level of abstraction than the level of *Fibreboard-I*. They no longer served as precedents because a case at a lower level of abstraction may not serve as precedent for a case at a higher level. This move illustrates Principle 2: a case can be distinguished from an authority by identifying an additional legally significant fact in either of them. By providing an explanation of why the additional fact mattered, the majority honored Principle 8.<sup>150</sup>

#### D. *Town & Country*

After deciding (but before reconsidering) *Fibreboard-I*, the Labor Board heard *Town & Country Manufacturing Company*,<sup>151</sup> a case that raised the same issue as *Fibreboard*. In *Town & Country* the company manufactured mobile home trailers that needed to be hauled to customers from its plant in Lawton, Oklahoma.<sup>152</sup> The mode of hauling had varied over time.<sup>153</sup> *Town & Country* used an independent contractor until 1956.<sup>154</sup> Then the company purchased its own trucks and hired drivers.<sup>155</sup> It thereby stumbled into the domain of the Interstate Commerce Act, and the Interstate Commerce Commission soon determined that *Town & Country* had fallen out of compliance with the Commission's regulations.<sup>156</sup> The company tried to escape the clutches of the Commission by changing its mode of hauling

149. *Fibreboard Paper Prods. Corp.*, 130 NLRB at 1565.

150. Of course, a distinction may be proper in form but unsound in substance. The factual predicate of the majority's distinction was that the union in each of the precedents continued to represent employees who remained in the shop after the contracting out. This fact would have provided full justification for effects bargaining, as the contracting out was likely to affect the remaining employees; but the fact provided no justification for decision bargaining over the contracting out. The majority's reasoning was tantamount to the proposition that the right to effects bargaining entailed the right to decision bargaining, obliterating the distinction between effects and decision bargaining.

The distinction was part and parcel of the earlier argument that the employer had no duty to bargain because no employees were left in the bargaining unit. The argument was erroneous because it determined whether the duty to bargain arose according to the facts after the decision to contract out had been made, whereas the judgment should have been made according to the facts before the decision was made.

In the printed record of the subsequent progress of the case, no member of the Board, no judge, and no advocate in the Supreme Court mentioned this distinction.

151. *Town & Country Mfg Co.*, 136 NLRB 1022 (1962), *enforced*, 316 F.2d 846 (5th Cir. 1963).

152. *Id.* at 1036.

153. *Id.* at 1036–37.

154. *Id.*

155. *Id.*

156. *Id.* at 1023.

once again: it sold its trucks to the drivers.<sup>157</sup> But federal regulations required the company to retain title to the trucks, and the Commission again found the company out of compliance.<sup>158</sup> The company repurchased the trucks and rehired the drivers.<sup>159</sup> Understandably, the drivers turned to a union, in particular, Local 886 of the General Drivers, Chauffeurs and Helpers Union, which was certified as bargaining agent on October 1, 1957. Collective bargaining began and ended on October 19th. The Drivers Union made an offer.<sup>160</sup> Town & Country requested a recess to prepare a counteroffer.<sup>161</sup> Two weeks later, without notifying the union, the company discontinued its trucking operation, discharged the drivers, and engaged a common carrier to haul the trailers.<sup>162</sup> The union asked to bargain over the decision, but the company refused.<sup>163</sup>

The Drivers Union brought charges against Town & Country. Like the Steelworkers in *Fibreboard*, the Drivers Union charged that the company had been motivated by anti-union animus because the company had terminated the hauling operation and discharged the drivers in order to retaliate against the drivers for unionizing. Unlawful motivation would have tainted both the discharges, violating section 8(a)(3), and the termination of hauling, violating sections 8(a)(3) and 8(a)(5). Also like the Steelworkers in *Fibreboard*, the Drivers Union charged that the decision to contract out the hauling of trailers was unilateral action in violation of section 8(a)(5), even if the motive for the change had been lawful, because Town & Country had refused to bargain with the union over the decision. It is unclear whether the Drivers Union intended the second charge to raise Issue B or Issues B and C.

The General Counsel found the charges meritorious and issued a complaint. Town & Country answered the complaint; the case was not settled, and it went to trial in Lawton before Trial Examiner Paul Bisgyer.<sup>164</sup> He treated the issue raised by the first charge as arising at a low level of abstraction. He was correct because adjudicative facts determined whether Town & Country had contracted out the hauling and discharged its drivers because of anti-union animus or because of troubles with the Interstate Commerce Commission, and the resolution of this issue applied only to this company, these drivers, and this transaction. He ruled for the company on

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157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.* at 1024.

161. *Id.*

162. *Id.*

163. The facts are drawn from the opinion of the Labor Board in *Town & Country Mfg. Co.*, 136 NLRB 1022 (1962), and from the intermediate report of the trial examiner in that case, *id.* at 1036 (intermediate report).

164. *Id.* at 1022.

this charge, finding that the company had terminated the hauling operation because of problems with the government.<sup>165</sup>

The second charge raised the issue of contracting out. Trial Examiner Bisgyer did not rule explicitly on whether the Labor Act requires decision bargaining, but in the following passage from his intermediate report he treated decision bargaining as a term or condition of employment, that is, a mandatory subject of bargaining.

It is settled law that an employer's obligation to bargain in good faith encompasses the duty to afford his employees' bargaining agent an opportunity to negotiate about any contemplated change in any term or condition of employment. Plainly, the Respondent has not done so here; instead, under the guise of management prerogative, it presented the Union with a *fait accompli*, leaving nothing over which the Union could bargain. Such action was a clear rejection of the collective-bargaining principle and constituted conduct in derogation of the Union's status as the majority representative of the Respondent's truck drivers.<sup>166</sup>

Trial Examiner Bisgyer assumed Rule B(2). The facts that constituted the rule were the same as the facts that mattered to the trial examiner, namely, an employer had decided to contract out bargaining unit work without affording the union an opportunity to bargain about the decision. We know that he did not intend to resolve Issues C, D, or E because he did not state or imply that decision bargaining was required in some cases but not necessarily in others; did not state a standard for determining whether decision bargaining was required; did not suggest that Town & Country would have had a duty to bargain if the facts of the case had been different; and did not compare the case at bar to precedents.

The General Counsel filed with the Labor Board an exception to the finding that Town & Country had been lawfully motivated by trouble with the Interstate Commerce Commission. The Board heard the case en banc.<sup>167</sup> The majority (Chairone McCulloch and Members Fanning and Gerald A. Brown) found merit in the exception because Town & Country had acted out of anti-union animus: "we are convinced that the Respondent seized upon a pretext when it assigned its I.C.C. difficulties as the reason for subcontracting

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165. *Id.* at 1041-42 (intermediate report).

166. *Id.* at 1040 (intermediate report) (italics in the original) (footnote omitted) (minor typographical errors corrected).

167. The official report does not list the members of the Board who heard the case. The report by the Bureau of National Affairs states that Chairone McCulloch and Members Rodgers, Leedom, Fanning, and Brown heard the case. 49 L.R.R.M. 1918, 1918 (1962). The BNA report is confirmed by the dissent of Members Leedom and Rogers, who argued that contracting out is not a mandatory subject of bargaining, *Town & Country Mfg. Co.*, 136 NLRB at 1022 n. 1, and it follows that the majority on this issue must have been composed of the other members of the Board.

and discharging its drivers, and that its true motive for doing so was because the men had joined and selected the Union as their bargaining representative.”<sup>168</sup> The Board’s finding of fact (Town & Country’s motive) occurred at a low level of abstraction, which was appropriate for an issue turning on a party’s state of mind.

Town & Country also filed an exception with the Labor Board. The company excepted to the finding that it had violated the duty to bargain by refusing to negotiate over the decision to discontinue the hauling.<sup>169</sup> The company might have been ambivalent about its chance of success. The reason for optimism was that Trial Examiner Bisgyer’s ruling was inconsistent with the Board’s holding in *Fibreboard-I*.<sup>170</sup> The reason for pessimism was that the Board that had issued *Fibreboard-I* had been dominated by Republicans, who tend to favor the interests of employers, whereas the majority of the Board that would hear *Town & Country* would be Democrats, who tend to favor the interests of unions.<sup>171</sup> Pessimism would have been more prescient: the Board overruled *Fibreboard-I* on April 13, 1962.<sup>172</sup>

The opinion of the majority in *Town & Country* adopted the doctrinal analysis of Member Fanning’s dissent in *Fibreboard-I*:

In our opinion the precedents cited and discussed by the majority and minority decisions in [*Fibreboard-I*] support the conclusion that the elimination of unit jobs, albeit for economic reasons, is a matter within the statutory phrase “other terms and conditions of employment” and is a mandatory subject of collective bargaining within the meaning of section 8(a)(5) of the Act.<sup>173</sup>

The Labor Board addressed Issue B and provided the same assurance and prediction as had Member Fanning in *Fibreboard-I*; unlike him, however, the Board in *Town & Country* was univocal as to the level of abstraction:

Moreover, the duty to bargain about a decision to subcontract work does not impose an undue or unfair burden upon the employer involved. This obligation to bargain in nowise restrains an

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168. *Town & Country Mfg. Co.*, 136 NLRB at 1026.

169. *Id.* at 1022 n. 1.

170. Trial Examiner Bisgyer had not disregarded a precedent of the Board. He had issued his intermediate report on May 3, 1960, *Town & Country Mfg. Co.*, 136 NLRB at 1022 (1962), which was ten months before the Board announced its decision in *Fibreboard-I*. See *Fibreboard Paper Prods. Corp.*, 130 NLRB 1558, 1558 (1961).

171. It is no accident that the list on the Board’s web site of its past and present members identifies the political party in control of the Board. See <http://www.nlr.gov/members-nlr-1935>.

172. *Town & Country Mfg. Co.*, 136 NLRB at 1028.

173. *Id.* at 1027.

employer from formulating or effectuating an economic decision to terminate a phase of his business operations. Nor does it obligate him to yield to a union's demand that a subcontract not be let, or that it be let on terms inconsistent with management's business judgment. Experience has shown, however, that candid discussion of mutual problems by labor and management frequently results in their resolution with attendant benefit to both sides. Business operations may profitably continue and jobs may be preserved. Such prior discussion with a duly designated bargaining representative is all that the Act contemplates. . . .<sup>174</sup>

In this passage, the Board discussed decision bargaining at a high level of abstraction, not in any particular context. Also, the terms "an employer," "a union," "labor," "management" and "a duly designated bargaining representative" made the assurance and prediction applicable to all employers, not merely the employer in the case at bar. Thus, the Board resolved Issue B with Rule B(2).

A statement of the relief that the Labor Board ordered in *Town & Country* will be helpful in understanding the concurring and dissenting opinions, the decision of the Court of Appeals in the case, and the subsequent progress of the *Fibreboard* case, all of which we discuss below. First, the Board ordered *Town & Country* to reestablish its hauling department, make the drivers whole for their lost pay, and offer them reinstatement to their jobs.<sup>175</sup> Second, the Board ordered the company to bargain with the union upon request and to refrain from changing any conditions of employment without consulting the union.<sup>176</sup> The Board's opinion having made clear that closing the hauling department was a condition of employment, the order effectively required the company to engage in decision bargaining before closing the department. Each of the Board's findings—that the company had violated section 8(a)(3) by closing its hauling operation and engaging a common carrier out of anti-union animus, and that the company had violated section 8(a)(5) by refusing to engage in decision bargaining—was a sufficient predicate for both of these orders.

Member Rogers dissented on both issues before the Labor Board. He found that *Town & Country* was not guilty of discrimination because he believed the company had closed the hauling operation for business reasons. Also, he adhered to his view in *Fibreboard-I* that an employer has no duty to engage in decision bargaining.<sup>177</sup>

Member Leedom concurred and dissented. He concurred in the result of the case because he agreed that *Town & Country* had closed the hauling

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174. *Id.*

175. *Id.* at 1032.

176. *Id.* at 1031–32.

177. *Id.* at 1033–34 (Member Rogers, dissenting).

operation out of anti-union animus; thus he agreed that the Labor Board's orders, including the order to engage in decision bargaining, were justified. This ruling having disposed of the case, he thought the Board had no need to address the issue of whether the company would have had a duty to engage in decision bargaining if it had terminated the hauling for legitimate reasons. However, because the majority had addressed this issue, he added that he dissented from the overruling of *Fibreboard-I*.<sup>178</sup>

Principle 14, which is discussed below,<sup>179</sup> holds that an issue or a case should be decided at the lowest reasonable level of abstraction. The issue of whether Town & Country had acted out of anti-union animus operated at a low level of abstraction because it affected only the parties to the case and only one transaction. The issue of whether contracting out is a mandatory subject of bargaining operated at a high level of abstraction because it affected many employers and unions and every decision to contract out bargaining unit work. Member Leedom's preference to decide *Town & Country* on the basis of the former issue honored Principle 14.

Town & Country petitioned the Court of Appeals for the Fifth Circuit to set aside the Labor Board's orders, and the General Counsel cross-petitioned to enforce the orders.<sup>180</sup> As we have noted, the order that *Town & Country* engage in decision bargaining stood on two bases: the Board's ruling that the Labor Act requires decision bargaining, and the Board's finding that the company had closed the hauling operation out of anti-union animus. It appears from the opinion of the Court of Appeals, written by Judge Joseph Chappell Hutcheson and joined by Judges Walter Pettus Gewin and Richard Taylor Rives, that the company contested the legitimacy of the former basis. Judge Hutcheson wrote that Town & Country "insists that the dissenting member of the Board [Member Rogers] was right in his view that the order was beyond the power of the Board to make. . . ."<sup>181</sup> We cannot determine from the opinion whether the General Counsel argued for the former basis, but we know that he defended the order on the latter basis: "The Board, earnestly insisting: that, whatever might be said with respect to [the company's] contention that this part of the order intruded upon its unquestioned right of management . . . urges upon us that the evidence is so overwhelming that [the company's] action was motivated by anti-union sentiment and a desire to rid itself of the union, that it is quite clear in the

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178. *Id.* at 1028 n. 10. Member Leedom's position makes clear that the Board's order had two independent bases. He concurred in the order on the basis of the finding of anti-union animus, a violation of § 8(a)(3), even though he would have dissented from the order were it grounded only on a duty under § 8(a)(5) to engage in decision bargaining.

179. See *infra* text following n. 343 (beginning, "Principle 14").

180. *Town & Country Mfg. Co. v. NLRB*, 316 F.2d 846, 846-47 (5th Cir. 1963).

181. *Id.* at 847.

state of the record that the Board's order, is unimpeachable. . . ."<sup>182</sup> The court enforced the order upon the latter basis:

we think it is clear that the evidence permits no other reasonable conclusion than that the determination to subcontract its work and to discharge its drivers from employment was the result in part at least of the company's determination to rid itself of the union, and that the order of the Board should, therefore, be enforced throughout.<sup>183</sup>

By holding that the Town & Country's anti-union animus justified the order, the court, as Member Leedom would have done, disposed of the case at a low level of abstraction, honoring Principle 14.

#### *E. Fibreboard-II*

Let us recur to *Fibreboard*. The Labor Board issued its decision in *Fibreboard-I* on March 27, 1961.<sup>184</sup> Shortly thereafter, the Steelworkers petitioned the Board to reconsider the decision. Surely they were counting on the recently inaugurated President, John Fitzgerald Kennedy, who was a Democrat, to appoint new members to the Board who would be more sympathetic to organized labor. The General Counsel also filed a motion for reconsideration and clarification of the decision. Fibreboard replied to the petition and the motion by June 15, 1961: whereupon the Board held the case in abeyance for fifteen months, during which the political balance of the Board did indeed shift from Republican to Democratic and the Board decided *Town & Country*. When it returned to *Fibreboard-I*, the Board denied the General Counsel's motion, granted the Steelworkers' petition, and delegated the case to a panel composed of Chairone McCulloch and Members Fanning and Rodgers.<sup>185</sup> The first two of these men were Democrats, the third, a Republican. The outcome was predictable.

Our consideration of the Labor Board's decision in *Fibreboard-II* provides an opportunity to state and apply a hortatory principle of levels of abstraction:

#### *Principle 10*

Legislative facts must be proved by evidence in the record.

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182. *Id.*

183. *Id.*

184. *Fibreboard Paper Prods. Corp.*, 130 NLRB 1558, 1558 (1961).

185. *Fibreboard Paper Prods. Corp.*, 138 NLRB 550, 550 (1962).

We subscribe to the elementary tenet that a court should be constrained by the record in the case. Thus, a court should resolve an issue only if the argument supporting the resolution is based on facts that have been found by the trier of fact or are subject to judicial notice.<sup>186</sup> We believe that responsible courts rarely err in this regard with respect to issues at a low level of abstraction. The pertinent facts are the adjudicative facts that are necessary for application of the relevant rule of law. If a pertinent adjudicative fact is not proved, a prima facie case or affirmative defense fails according to the burden of proof. But tribunals do err with respect to issues at high levels of abstraction. The pertinent facts are the legislative facts that justify the rule that resolves the issue. Except in the rare event that a legislative fact is subject to judicial notice, a tribunal should base a rule of law only on legislative facts that are proved by credible evidence that appears in the record and was open to the adversarial process. (Also permissible are legislative facts found by the legislature or properly found in a previous case.) Otherwise, the tribunal will be legislating. A judge's notions of legislative facts are not a proper basis for a rule of law. Unconstrained by evidence and argument, a judge is too likely to be influenced by one's social, economic, or political beliefs, or to make a mistake. If a court is urged to adopt, or sua sponte contemplates adopting, a rule of law that would rest on a legislative fact which is not proved in the record, the court should forgo adopting either the rule or its opposite. If the need for a decision on the issue is pressing, a trial court should instruct the parties to present evidence on the appropriate legislative fact and an appellate court should remand the case for this purpose.<sup>187</sup> Similarly, a tribunal should accept as true a legislature's findings

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186. We include within the scope of judicial notice the results of using the traditional tools of statutory construction, such as the meaning of the text, the purpose of the act, and its legislative history. We exclude predictions that a given interpretation will serve or disserve the purpose of the act; such predictions are legislative facts over which reasonable persons can differ and, therefore, such facts must be proved.

187. This article is not the occasion to elaborate procedural rules regarding the finding of legislative facts by tribunals, but we can offer some thoughts with which a discussion might begin. The first pertains to witnesses to legislative facts. We do not think it necessary that every author upon whose research a party or a tribunal relies must be called as a witness. We do think, however, that a party must be notified by another party or by the tribunal that a study may be used as the basis for the finding of a legislative fact in sufficient time that the former party has an opportunity to do appropriate research and call as a witness the author of the study or other experts.

Our second thought pertains to the burden of proving legislative facts. When an adjudicative fact is material to the resolution of a dispute between the parties to a case, a standard for proving that fact exists. The party who carries the burden of proving such a fact must establish it by preponderance of the evidence, clear and convincing evidence, or evidence beyond reasonable doubt. How odd it is that when a legislative fact is material to a rule of law, which will govern not merely the parties to the case at bar, but many other persons and perhaps other transactions, no standard for proving such a fact exists. We wish to offer two preliminary comments on this anomaly.

The first comment is elaborated in the text: legislative facts should be proved with evidence in the record, whether placed there by a party or by the tribunal. Our second comment is that proof

of legislative facts as long as they are supported by substantial evidence in the records of the legislature.

We hold the same views regarding specialized agencies like the Labor Board.<sup>188</sup> Although one of the criteria for appointment to such an agency is

by preponderance of the evidence may be a sufficient basis for a tribunal to resolve a dispute between two parties, but does not seem to be a sufficient basis for a tribunal to create a rule of law that applies to all persons in the jurisdiction. The resources which a legislature can commit to finding a legislative fact are substantial. The ability of competing interests to present their evidence and points of view provides a meaningful check on findings of legislative facts by a legislature. And a legislature is composed of many persons of diverse experience who can evaluate facts from different perspectives. The same is largely true of an administrative agency in rule making mode.

In contrast, the resources which a court, or an administrative agency in adjudicative mode, may commit to finding a legislative fact are insubstantial. The ability of the parties to a case to gather and present evidence on legislative facts is limited by the finances of the parties (and perhaps their allies) and by the resourcefulness of a few lawyers; it is no match for the ability of lobbyists to present evidence to a legislature or administrative agency. And an appellate court or an agency such as the Labor Board comprises only a handful of persons, usually of similar backgrounds. A legislature finds a legislative fact based on volumes of testimony, documents, and scholarship. All too often, a tribunal finds a legislative fact based on the members' experience alone or on one or two sources. For an example, *see infra* the text following n. 192 (beginning, "The second variety was industrial experience"). These facts suggest that a tribunal's finding of a legislative fact should meet the standard of clear and convincing evidence in the record.

188. The Supreme Court adopted a different approach in *Republic Aviation v. NLRB*, 324 U.S. 793 (1945). The employer prohibited workers from soliciting on company property at all times, including their break times, and discharged a worker for distributing union applications on company property during his lunch break. The Board held the rule interfered with the worker's right to engage in concerted activity. The company objected on the ground that no evidence showed that the no-solicitation rule interfered with or discouraged union organization in the employer's plant. The Court rejected this argument. Although an order of the Board must be based upon evidence which is placed before the Board by witnesses who are subject to cross-examination by opposing parties . . . [s]uch a requirement does not go beyond the necessity for the production of evidential facts . . . and compel evidence as to the results which may flow from such facts. An administrative agency . . . may infer within the limits of the inquiry from the proven facts such conclusions as reasonably may be based upon the facts proven."

*Id.* at 800 (citations omitted). The Labor Board's argument that the no-solicitation rule interfered with concerted activity, which the Court quoted in n. 10, *id.* at 803, appeared in *Peyton Packing Co.*, 49 NLRB 828, 844 (1943):

The Act, of course, does not prevent an employer from making and enforcing reasonable rules covering the conduct of employees on company time. Working time is for work. It is therefore within the province of an employer to promulgate and enforce a rule prohibiting union solicitation during working hours. Such a rule must be presumed to be valid . . . It is no less true that time outside working hours, whether before or after work, or during luncheon or rest periods, is an employee's time to use as he wishes without unreasonable restraint, although the employee is on company property. Such a rule must be presumed to be an unreasonable impediment to self-organization . . .

This argument can be analyzed into a quasi syllogism:

MAJOR PREMISE

No-solicitation rules that are applied to conduct occurring outside of working hours interfere with concerted activity.

MINOR PREMISE

*Republic Aviation* applied a no-solicitation rule to conduct that occurred outside of working

a person's expertise in the field, the use of that expertise must be carefully circumscribed. A member should not find a legislative fact based solely on one's expertise, for a member is at least as likely as a judge to be influenced by one's beliefs; and in the polarized state of today's politics, partisanship is not a small risk. The proper role of expertise lies in contributing to an informed judgment regarding conflicting evidence pertaining to adjudicative and legislative facts. Therefore, like a court, a specialized agency should promulgate a rule of law at a high level of abstraction only if the rule is grounded on appropriate legislative facts that have been proved in the adversarial process.<sup>189</sup>

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hours.

CONCLUSION

Republic Aviation's no-solicitation rule interfered with workers' concerted activity. The Court held that the major premise, which was a legislative fact, did not need to be proved by evidence in the record because "[o]ne of the purposes which lead to the creation of . . . [agencies such as the Labor Board] is to have decisions based upon evidential facts under the particular statute made by experienced officials with an adequate appreciation of the complexities of the subject which is entrusted to their administration." *Id.* at 800.

189. Professor Davis held a different view. He mentioned with approval the famous "Brandeis brief," which contained legislative facts upon which the Supreme Court relied in *Muller v. Oregon*, 208 U.S. 412 (1908), and added:

After Brandeis became a justice [of the Supreme Court] he continued his extensive factual studies and wrote many opinions saturated with facts brought to light through his own researches. In his celebrated opinion in *Jay Burns Baking Co. v. Bryan* [264 U.S. 504 (1924)] he went outside the record to acquaint himself with "the art of bread-making and the usages of the trade; with the devices by which buyers of bread are imposed upon and honest bakers or dealers are subjected by their dishonest fellows to unfair competition; with the problems which have confronted public officials charged with the enforcement of the laws prohibiting short weights, and with their experience in administering those laws."

KENNETH CULP DAVIS, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364, 403-04 (1942) (footnote omitted). Professor Davis's view of the finding of legislative facts by administrative agencies was similar: "the agency must be free to go outside the record and beyond the limits of judicial notice in informing itself of facts which enter into its judgment in molding law and formulating policy. . . . Briefs and oral arguments are often (though not always) better vehicles for presentation of legislative facts than testimony and documents." *id.* at 408-10 (footnote omitted). Professor Davis recognized that tribunals might err in their findings of legislative facts, but thought that errors could be corrected: "And when a court or administrative tribunal makes its own investigation, the safeguard usually lies in the petition for re-argument (new briefs and oral arguments) rather than in the petition for a rehearing (new evidence)." *id.* at 410, n. 95.

Professor Davis had more confidence than we have in the neutrality of judges and members of administrative agencies. Also, his recommendation that a tribunal entertain a petition for re-argument does not take into account the reluctance of a tribunal to retreat from a decision that has already been announced (unless the membership has changed, a fact that reinforces our fear of partisanship).

We hasten to add that we do not disapprove of a Brandeis *brief*. A brief may certainly contain legislative facts. But we do disapprove of any legal document, be it a decision or a brief, that relies on legislative facts that are not tested by the adversarial process and found as fact in the record of the case.

In *Fibreboard-II*, the Labor Board, as it had done in *Fibreboard-I* and in *Town & Country*, framed the issue at a high level of abstraction:

In its original Decision and Order, a majority of the Board concluded that the Respondent did not violate Section 8(a)(5) when it unilaterally subcontracted its maintenance work for economic reasons without first negotiating with the duly designated bargaining agent over its decision to do so. In their view, Respondent's decision to subcontract was a management prerogative having no impact on the conditions of employment within the existing maintenance unit. . . .

In the recent *Town & Country Manufacturing Company, Inc.*, the Board had occasion to reexamine this issue. A majority of the Board in that case concluded that a management decision to subcontract work out of an existing unit, albeit for economic reasons, was a mandatory subject of bargaining. To the extent that the majority opinion in *Fibreboard[-I]* held otherwise, that holding was overruled. Accordingly, for the reasons and considerations expressed in *Town & Country*, and in the dissenting opinion in the original *Fibreboard* case, we find that Respondent's failure to negotiate with the [Steelworkers] concerning its decision to subcontract its maintenance work constituted a violation of Section 8(a)(5) of the Act.<sup>190</sup>

The opinion then gave two varieties of reasons for its conclusion. The first variety was precedent. The Board cited its own decision in *Town & Country*<sup>191</sup> and the Supreme Court's in *Railroad Telegraphers*.<sup>192</sup> The second variety was industrial experience, evidence of which the Board found in cases and articles:

[I]n the *Warrior & Gulf* case<sup>14</sup> . . . the Supreme Court held that a union complaint against an employer's contracting out of work was subject to the contract grievance procedure, including arbitration . . . . The Court pointed out that "Contracting out work is the basis of many grievances; and that type of claim is grist in the mills of the arbitrators."<sup>15</sup>

. . . As the Supreme Court has noted, subcontracting or contracting out is a subject extensively dealt with in today's collective bargaining.<sup>16</sup> The present decision does not innovate; it merely

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190. *Fibreboard Paper Prods. Corp.*, 138 NLRB 550, 550-51 (1962) (citation omitted).

191. *Id.* at 551.

192. *Id.* at 552-53. The Board's opinion also relied on *Local 24, Int'l Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America v. Oliver*, 358 U.S. 283 (1959), which we discuss below at n. 280 (beginning, "The issue in *Oliver* was . . .") and n. 285 (beginning, "The Board also relied . . .").

recognizes the facts of life created by the customs and practices of employers and unions.<sup>17</sup> Contrary to our dissenting colleague, we are confident that those employers and unions who are bargaining in good faith will find it neither difficult nor inconsistent with sound business practices to include questions relating to subcontracting in their bargaining conferences.

<sup>14</sup> *United Steelworkers of America v. Warrior & Gulf Navigation Company*, 363 U.S. 574 [1960].

<sup>15</sup> 363 U.S. at 584.

<sup>16</sup> See Lunden, "Subcontracting Clauses in Major Contracts," 85 Monthly Labor Rev. 579-584, 715-723; note, "Arbitration of Subcontracting Disputes: Management Discretion vs. Job Security," 37 New York University Law Rev. 523.

<sup>17</sup> See *International Union, United Automobile, Aircraft & Agricultural Implement Workers, Local 391 v. Webster Electric Co.*, 299 F.2d 195 (C.A. 7), where a court held that an employer violated its collective-bargaining contract by subcontracting janitorial work and laying off its janitorial employees even though the contract contained no prohibition against subcontracting. The court implied such an agreement from the union shop clause in the contract [sic] is applicable to janitors.<sup>193</sup>

The Board's reasons in *Fibreboard-II*, like the holding of the case, applied to employers and unions generally and were cast at a high level of abstraction. All signs indicate that the Board meant to adopt Rule B(2).

To the extent that the Labor Board based its decision on its own precedent in *Town & Country*, the holding of *Fibreboard-II* was justified. To the extent that the Board based its decision on industrial experience, the holding was unjustified. The Board asserted contracting out is "extensively dealt with in today's collective bargaining." This assertion was a legislative fact, but the Board cited no evidence in the record to support this fact. Instead, the Board cited decisions of the Supreme Court and the Seventh Circuit Court of Appeals, a study in a journal, and a note in a law review. Let us examine those citations.

The case in the Supreme Court was *Warrior & Gulf*, in which a union had demanded arbitration of a grievance over the company's contracting out of bargaining unit work. The company refused to submit the grievance to arbitration on the ground that the grievance procedure in the labor contract excluded "matters which are strictly a function of management."<sup>194</sup> The Court took the union's side based on two adjudicative facts: the exclusion applied only to matters over which the agreement gave the company unfettered control, and the contract did not give unfettered control over contracting out to the company.<sup>195</sup> These facts were meaningful in light of a legislative fact: "[c]ontracting out work is the basis of many grievances; and

193. *Id.* at 554 (footnotes and citation omitted).

194. *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 575 (1960).

195. *Id.* at 584.

that type of claim is grist in the mills of the arbitrators.”<sup>196</sup> Because bargaining over contracting out was so widespread, only strong evidence (*i.e.*, adjudicative facts such as specific words in the agreement or other forceful proof of the parties’ intent) could demonstrate that the grievance procedure did not include contracting out.

The important point for our purpose was the backing for the legislative fact on which the Court’s argument depended. As proof that contracting out was the subject of many grievances, the Court cited *Celanese Corporation of America*, an arbitration decision in which the arbitrator, G. Allan Dash, had asserted that he had found sixty-four published arbitrators’ decisions dealing with contracting out.<sup>197</sup> The Supreme Court was apprised of Arbitrator Dash’s assertion in the brief of the petitioner in *Warrior & Gulf*.<sup>198</sup> However, Arbitrator Dash had not testified, and *Celanese Corporation* had not been introduced as evidence in the hearing before the District Court, nor had any other witness or attorney mentioned the decision.<sup>199</sup> The opinion of the District Court had not referred to the decision,<sup>200</sup> and neither had the opinions of the majority or the dissent in the Court of Appeals.<sup>201</sup> In short, the evidence for a crucial legislative fact was not part of the record of the case and had not been tested in the crucible of the adversarial process. For all the respect we have for the opinions of arbitrators, we believe that Arbitrator Dash’s assertion should have played no role in the reasoning of the Supreme Court in *Warrior & Gulf*; and for all the respect we have for the opinions of the Supreme Court, we believe the Court’s “finding” of legislative fact should have played no role in the reasoning of the Labor Board in *Fibreboard-II*.

As further “proof” that contracting out was a widespread topic of collective bargaining, the Labor Board cited an article by Leon E. Lunden of the Division of Wages and Industrial Relations, Bureau of Labor Statistics, and a student note in a law review. But, as far as we can determine, neither Mr. Lunden’s article nor the student’s note had been introduced as evidence or mentioned by a witness or an attorney in the hearing before the trial examiner.<sup>202</sup> Certainly, the trial examiner’s opinion in *Fibreboard* had not mentioned the article or the note. Even competent researchers at respected institutions can make mistakes. Accordingly, we believe that the article and

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196. *Id.* (footnote omitted).

197. *Id.* at 584, n. 8 (citing *Celanese Corporation of America*, 33 Lab. Arb. Rep. 925, 941 (1959)).

198. Brief of for Petitioner at 58–9, *Warrior & Gulf*, 363 U.S. 574 (1960) (No. 443).

199. Transcript of Recording 31-101, *Warrior & Gulf*, 363 U.S. 574 (1960) (No. 443).

200. *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 168 F. Supp. 702 (S.D. Ala. 1968).

201. *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 269 F.2d 633, 637 (5th Cir. 1959).

202. Transcript of Testimony Before the National Labor Relations Board in Transcript of Record at 63-166, *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203 (1964).

the note should have played no role in the reasoning of the Board in *Fibreboard-II*.<sup>203</sup>

Finally, the Labor Board asserted its holding “merely recognize[d] the facts of life created by the customs and practices of employers and unions,” and in support of this assertion cited the decision of the Court of Appeals for the Seventh Circuit in *International Union, United Automobile, Aircraft & Agricultural Implement Workers, Local 391 v. Webster Electric Company*.<sup>204</sup> In that case, the company unilaterally contracted out bargaining unit work. The union exhausted the grievance procedure in the labor contract, which did not provide for arbitration as the culmination of the procedure, and the union sued the company for breach of contract.<sup>205</sup> The union argued that the case was controlled by *Warrior & Gulf*, which had held, according to the union, that an employer may not unilaterally contract out bargaining unit work absent an express provision in the contract. The Court of Appeals disagreed. It reasoned, correctly, that *Warrior & Gulf* had held only that, where a labor contract provides for arbitration, the issue of whether contracting out is prohibited by the contract is a question for the arbitrator, not the court.<sup>206</sup> There being no arbitration clause in the case at bar, the court found it was not bound by *Warrior & Gulf*, and proceeded to interpret the contract. The court held, questionably, that the union shop clause in the contract implied an intent to prohibit contracting out.<sup>207</sup>

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203. The import of Mr. Lunden’s study would have been questionable even if it could properly have established legislative facts. First, the study excluded the railroad and airline industries. Leon Lunden, *Subcontracting Clauses in Major Contracts*, MONTHLY LABOR REVIEW, 581 (June 1961). Second, the study examined only collective bargaining agreements that covered 1,000 or more workers, thus excluding approximately half of organized workers outside of railroads and airlines. *Id.* Third, the study found that “fewer than one out of four” of the agreements covered by the study “made any reference to subcontracting.” *Id.* at 579. Thus, the Board had no information about two major industries, had no information about half of the remaining workers in the labor force, and (taking Mr. Lunden’s study to be reliable) knew only that ( $\frac{1}{2}$  of all organized workers  $\times$   $\frac{1}{4}$  of those workers =) one-eighth of non-railroad, non-airline workers were covered by collective agreements that addressed contracting out. Was this a sufficient number to prove that bargaining over contracting out was widespread and successful? The prevalence of bargaining over contracting out might better be determined, for example, by considering, not the number of *workers* whose agreements had a clause on contracting out, but the number of *agreements* that had such clauses. It is certain that the number of agreements covering fewer than 1,000 workers each exceeded 1,671, and it seems likely that few of those agreements, many of which covered small numbers of workers, addressed contracting out. Was not the prevalence of bargaining over contracting out a question of fact that should have been resolved through the adversarial process?

The student’s note, Asher Rabinowitz, *Arbitration of Subcontracting Disputes: Management Discretion vs. Job Security*, 37 NYU Law. Rev. 523 (1962), which relied on Mr. Lunden’s data, perceived this problem: “The real difficulties stem from the fact that most collective bargaining agreements are silent on this subject.”

204. *Int’l Union v. Webster Elec. Co.*, 299 F.2d 195 (7th Cir. 1962).

205. *Id.* at 196–97.

206. *Id.*

207. *Id.* at 197. The court did not quote the union shop clause. Such clauses typically provide that, upon demand by the union, the employer will discharge a worker who has not paid the initiation fee and

*Webster Electric* held that a single labor contract prohibited contracting out, an adjudicative fact. We do not accuse the Labor Board of an abstraction shift; the Board did not use *Webster Electric* as a precedent for the rule that the Labor Act requires decision bargaining. We do accuse the Board of violating Principle 5, that evidence should operate on the same level of abstraction as the issue to which the evidence applies. *Webster Electric* did not support the assertion that contracting out is a custom or practice of employers or unions across the country. The best that can be said for the Board is that, if the Seventh Circuit's reasoning were applied generally, contracting out would be barred by every labor contract with a union shop clause; and many contracts have such clauses. But the Board did not articulate this doubtful theory, and we will not speculate as to the Board's thinking.

The Labor Board ordered Fibreboard to engage in decision bargaining and to offer the discharged employees reinstatement to their maintenance jobs (or to substantially equivalent jobs). As for back pay, the Board held that, because it had held in *Fibreboard-I* that the company had no duty to engage in decision bargaining, applying the usual remedy (back pay from the date of the discharges to the date of an offer of reemployment) would be inequitable; accordingly, the Board ordered back pay only from the date of its order in *Fibreboard-II* to the date of an offer of reemployment.<sup>208</sup>

The reader will not be surprised to learn that Member Rogers, who had voted with the majority in *Fibreboard-I* and had dissented in *Town & Country*, dissented in *Fibreboard-II*. He distinguished *Railroad Telegraphers* (though not in the way the majority had attempted in *Fibreboard-I*):

Unlike my colleagues, I can find no authority for such a ruling as this in the statute which guides our labors. Reliance on *Order of Railroad Telegraphers v. Chicago & Northwestern Railway Co.*, which turned on the construction of the Railway Labor Act and the Interstate Commerce Act, is, I believe, completely misplaced. By the statutes there involved, Congress sought to, and did, place certain monopolistic industries in a status of being "impressed with a public interest." No such concepts were embodied in, or even seriously suggested for embodiment in, either the Wagner Act or the Taft-Hartley Act. Nor, in my opinion, does this Board have the power, as a matter of policy, to place such a "public interest"

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joined the union within thirty days of hire or who, after joining, fails to pay regular dues. The Supreme Court has held that the worker need not actually join the union, but may instead pay initiation fees and dues. See GORMAN, *supra* n. 10, at 644-53.

208. *Fibreboard Paper Prods. Corp.*, 138 NLRB 550, 555-56, 555 n. 21 (1962).

imprimatur on every business enterprise in the United States, without the prior approval of Congress and the courts.<sup>209</sup>

Member Rogers distinguished *Railroad Telegraphers* by interpreting it at a lower level of abstraction than *Fibreboard*. He added to the precedent the fact that railroads were monopolies that were “impressed with the public interest.” At best, however, this fact only began to explain why decision bargaining should be required for railroads but not for other businesses. Principle 8 requires that a distinction explain why the additional fact is legally significant, that is, why the fact justifies treating the precedent and the case at bar differently. Member Rogers did not honor this principle.

#### F. *Fibreboard* in the Court of Appeals

All of the parties marched to the Court of Appeals.<sup>210</sup> The General Counsel wanted the court to enforce the Labor Board’s order. *Fibreboard* wanted the court to refuse to enforce the Board’s order. The union wanted more back pay.<sup>211</sup> The opinion of the court provides us an opportunity to state another principle of levels of abstraction:

#### *Principle 13*

A tribunal should not frame and resolve an issue at more than one level of abstraction.

This principle needs little justification. An issue, the rule of law that resolves the issue, and the evidence in the arguments that support the rule, should all operate on the same level of abstraction. (Principle 5 is closely related: evidence and consequential arguments must operate on the same level of abstraction as the issue to which the evidence and arguments are directed.) If the levels of these elements in an opinion are disharmonious, confusion must follow.

Warren Earl Burger, then a judge of the Court of Appeals for the District of Columbia, writing on behalf of himself and Judges John Anthony

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209. *Id.* at 555–56.

210. *East Bay Union of Machinists, Local 304 v. NLRB*, 322 F.2d 411 (D.C. Cir. 1963).

211. The Board in *Fibreboard-II* found that the company had refused to bargain in good faith. As a result, as we mentioned in the text above, *see supra* text preceding n. 208, the Board in *Fibreboard-II* awarded back pay to the displaced workers commencing on the date of its decision in the case, which was September 13, 1962. The Board did not find that the company had contracted out for discriminatory reasons; but if the Board had made such a finding, the workers would have been entitled to considerably more back pay because it would have commenced (as it did for the workers in *Town & Country*, 136 NLRB 1022, 1029–30 (1962)) on the date the workers were displaced, which was July 30, 1959. *See Fibreboard Paper Prods. Corp.*, 130 NLRB at 1565 (intermediate report). Of course, the union also wanted to defend the Board’s holding on decision bargaining.

Danaher and Walter Maximilian Bastian, summarily upheld the Labor Board's finding that Fibreboard had acted from a legitimate motive.<sup>212</sup> "The evaluation of . . . evidence is a process peculiarly within the seasoned experience of the Board . . ." <sup>213</sup> As a result, the issue became whether the Labor Act requires decision bargaining. Unfortunately, Judge Burger's opinion was ambiguous regarding the level of abstraction of the issue and, therefore, ambiguous as to the holding of the case. For the most part, the opinion addressed Issue B; Judge Berger provided institutional and doctrinal arguments for adopting Rule B(2), and these arguments operated appropriately at a high level of abstraction. But the opinion also proffered a consequential argument that operated inappropriately at a low level, and the conclusion of the opinion was ambiguous as to its level.

The institutional argument was, "Congress left it to the Board, in the first instance, to give content to the statutory language . . ." <sup>214</sup> Congress gave the Labor Board "broad powers" and the courts a "limited scope of review," <sup>215</sup> and the Board had taken the position that contracting out was a mandatory subject of bargaining. The doctrinal argument was, "the statutory definition [in Section 8(d)] of those subjects about which the parties were required to bargain was of necessity framed in the broadest terms possible: wages, hours, terms and conditions of employment." <sup>216</sup> Congress knew that "the act [sic] covered a wide variety of industrial and commercial activity" and recognized "that collective bargaining must be kept flexible" so that "the Act [sic] could be administered to meet changing conditions." <sup>217</sup> These arguments operated on a high level of abstraction. They applied to all employers that might wish to contract out and to all unions that represented the employees whose jobs would be affected and, therefore, supported Rule B(2).

Then, as though Trial Examiner Ruckel of *Timken Roller Bearing* were whispering in his ear, Judge Berger stated a consequential argument:

It is enough [to find a violation of the duty to bargain] that management's reasons for its proposal might have been deemed satisfactory by and have been acceptable to the Union. It is not necessary that it be likely or probable that the union will yield or supply a feasible solution but rather that the union be afforded an opportunity to meet management's legitimate complaints that its

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212. *East Bay Union of Machinists, Local 1394*, 322 F.2d at 412 (D.C. Cir. 1963).

213. *Id.* at 414. That the court addressed this issue at all, rather than simply noting Fibreboard's motive as a fact, suggests that the Steelworkers' brief, which we have not had the opportunity to read, argued that the company had acted out of anti-union animus.

214. *Id.*

215. *Id.* at 415.

216. *Id.* at 414.

217. *Id.*

maintenance was unduly costly. By way of illustration, the union, after hearing management's side of the problem, might concede the justice of the claims and agree to invoke union discipline to increase productivity and reduce costs. Specifically it might proffer a six months trial period in which either productivity would be increased with the existing force of 73 men or maintained with a reduced force to effect the economies desired by management.<sup>218</sup>

Given the high level of abstraction of the preceding arguments, we would expect that this passage would also have operated on a high level. Instead, we find that the level of abstraction of the passage was open to two different interpretations, and thus its meaning and the holding of the case were ambiguous.

The first interpretation of the passage requires us to resolve an apparent contradiction between the first two sentences. The first sentence stated that the duty to bargain was violated because the union might have found management's proposal satisfactory and accepted it, but the second sentence stated that the duty was violated regardless of whether the union was likely to have found the proposal satisfactory and accepted ("yield[ed]" to) it or to have offered a feasible alternative. The contradiction can be resolved as follows. Judge Burger meant that decision bargaining is a mandatory subject of bargaining because a union might find an employer's proposal satisfactory or offer a feasible alternative and (we complete the argument) thus the union's role as representative of the employees is respected and industrial warfare may be averted. This rule applies to all cases; a case-by-case approach in which the issue would be the likelihood that the union will yield or supply an alternative is inappropriate because the governing policy is the need for all employers to respect their workers' unions as the workers' bargaining agents.

On this interpretation, the first two sentences of the passage adopted Rule B(2), which operated at a high level of abstraction. Decision bargaining is required in all cases. This interpretation is strengthened by two other considerations. First, the Labor Board had adopted Rule B(2), and the court enforced the Board's order. Second, nowhere in Judge Burger's opinion, in the opinion of the Board, or in the trial examiner's intermediate report, was there a finding that the Steelworkers might have found Fibreboard's reasons for contracting out satisfactory or might have proposed a feasible alternative. Indeed, the evidence pointed in the opposite direction, for previous rounds of bargaining between the company and the union over labor costs had been fruitless. Thus, the rule that Judge Burger stated did not depend on the facts

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218. *Id.* at 414–15 (footnote omitted). Judge Burger referred to "73 men" because that number of employees performed maintenance work. The union represented only 50 of them.

of the case at bar. The judge was thinking of employers and unions across the nation. He believed that some unions might accept proposals to contract out, and some unions might offer feasible alternatives. Holding this belief, he endorsed a rule for all employers and unions.

The good consequences of a rule at a high level of abstraction may be illustrated at a low level, typically with the facts of the case at bar (Principle 5). The first interpretation continues that the third and fourth sentences of the passage were such an illustration. Judge Burger began the third sentence with the phrase “By way of illustration” and then suggested a proposal which the Steelworkers might offer during decision bargaining, namely, a six-month trial in which the union would promise to increase productivity via union discipline. This proposal illustrated the possible fruits of decision bargaining.<sup>219</sup>

The first interpretation holds that the passage operated on a high level of abstraction and promulgated a rule at the same level, namely Rule B(2). The second interpretation of the passage is that it operated on a low level of abstraction, adopting Rule C(4) (decision bargaining is required when negotiations over contracting out might succeed). Support for the second interpretation begins with three arguments based on form. First, the word “Union” in the initial sentence was capitalized, a plain reference to the union in the case at bar. To be sure, Judge Burger was not consistent in the capitalization of words. He wrote “union” without capitalizing it three additional times in the passage,<sup>220</sup> and in a single sentence elsewhere in the opinion, from which we quoted above,<sup>221</sup> he referred to the Labor Act as both the “act” and the “Act.” Nonetheless, the rest of the passage consistently referred to “the union.” The passage did not refer to “a union,” “any union,” or “unions,” which would have been references at a high level of abstraction. Second, the word “management” and the pronouns for which it is the antecedent are singular and plainly referred to Fibreboard alone. If Judge Burger had been writing at a high level of abstraction, he would have used words that referred to employers across the country, for example, “an employer” or “employers.” Third, the second clause of the initial sentence was cast in the past perfect tense, subjunctive mood (“management’s reasons for its proposal might have been deemed satisfactory by and have been acceptable to the Union”), thereby alluding to events involving Fibreboard and the Steelworkers that might have transpired in the past; such facts are adjudicative facts of the case at bar (albeit hypothetical) and do not support

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219. Chief Justice Warren probably interpreted this passage similarly. *See* Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203, 214 (1964), *infra* the text following n. 267 (beginning, “Chief Justice Warren stated . . .”), and n. 293 (beginning, “The third possibility . . .”).

220. He also wrote “union discipline,” but we do not count this instance because in it “union” functions as an adjective.

221. *See supra* text at n. 217 (beginning, “Congress knew . . .”).

a rule of law at a high level of abstraction. If the aim of the sentence had been to state legislative facts applicable to all unions and employers, the clause would have been cast in the present tense, subjunctive mood (managements' reasons for their proposals may sometimes be deemed satisfactory by and acceptable to unions).

The second interpretation continues with arguments based on content. The second sentence referred specifically to the adjudicative facts of the case at bar: "the union [must] be afforded an opportunity to meet management's legitimate complaints *that its maintenance was unduly costly*" (our italics). The excessive cost of labor in maintenance was an adjudicative fact, true of the case at bar but not necessarily of other cases. The terms of a rule that applied to all unions and employers would have taken into account the legislative facts that employers across the country are motivated by many reasons to contract out, not merely by labor costs; and that, even when labor costs are the reason, they can be excessive in any phase of the business, not merely in maintenance. If Judge Burger had intended to state a rule at a high level of abstraction, he need only have omitted the words that we italicized. Also, he would have needed to support the rule with legislative facts about the benefits of decision bargaining, but he mentioned none.

Another argument based on content for the second interpretation is that the first interpretation harmonizes the first and second sentences incorrectly. A better reading is that they stated a refinement of Rule C(4): decision bargaining is required in the case at hand if it is possible that the union would accept the company's need to contract out, or that the union would offer a feasible alternative, but the standard does not require that either possibility rise to the level of likelihood or probability. Such a standard would usually be satisfied. In unusual cases, however, the union might be so recalcitrant that it would never accept contracting out or offer an alternative, in which event decision bargaining would be futile. In addition, the spirit of the case-by-case approach of this version of Rule C(4) would allow it to except cases in which management's need to contract out is so strong or so immediate that decision bargaining would be futile or even harmful to the business. Applying this standard to the facts, the third and fourth sentences of the passage held that the case at bar satisfied Rule C(4) because the union in this case might recognize the need to reduce labor costs in maintenance and propose a trial of six months in which in which the union would promise to increase productivity via union discipline.

Which interpretation of the passage is more plausible? Our view is that the first interpretation is correct. If Judge Burger had intended the second interpretation, he should have ruled against the union because its recalcitrance in previous years indicated that another round of bargaining was unlikely to succeed. But the answer does not matter. Both interpretations

are plausible enough that an advocate could use either, depending on the interest of one's client.

Then Judge Berger stated the conclusion of the court: "we conclude on this record that the Board was warranted in its determination that the employer violated Section 8(a)(5) by refusing to bargain before terminating the employment of all the members of its maintenance force."<sup>222</sup> This conclusion was as ambiguous as the preceding passage. The Labor Board's decision and order had framed the issue at a high level of abstraction: contracting out is always a mandatory subject of bargaining. The court found that the Board's order "was warranted," implying that the court endorsed the Board's approach. Yet the court based its judgment "on this record" and mentioned that Fibreboard had refused to bargain "before terminating the employment of all the members of its maintenance force." Did these words mean that the court found, at a low level of abstraction, only that this company violated the duty to bargain given the facts of this particular case?

Our analysis of Judge Berger's opinion reveals that it paid insufficient heed to the principles of levels of abstraction. The statement of the issue and institutional and doctrinal arguments operated on a high level, but the rule that resolved the issue, a consequential argument, and the conclusion of the opinion were ambiguous as to their level. This sort of opinion generates confusion and additional litigation.

#### G. *Fibreboard* in the Supreme Court

##### 1. *The Petition for Certiorari*

Fibreboard petitioned the Court of Appeals for rehearing before the panel and for rehearing en banc; the petitions were denied.<sup>223</sup> Fibreboard then petitioned the Supreme Court for a writ of certiorari; the writ was granted.<sup>224</sup> Examination of the briefs of the parties will reveal examples of principles we have discussed above as well as examples of three further principles of levels of abstraction.

#### *Principle 4*

The level of abstraction of an issue can affect its outcome.

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222. *East Bay Union of Machinists, Local 1394*, 322 F.2d at 415 (D.C. Cir. 1963).

223. *See id.* at 411.

224. *See id.*

*Principle 11*

An advocate should frame the issue in a case at the level of abstraction that is most likely to produce a favorable outcome for one's client.

*Principle 12*

An advocate should normally address, at a single level of abstraction, only one of the possible issues which a set of facts can generate. If an advocate chooses to address alternative issues which grow out of the same facts and which operate on different levels of abstraction, the advocate should make clear which issue a particular argument addresses.

The level of abstraction of an issue can affect its outcome, indeed, the outcome of the case. A party may be able to present a more appealing argument at one level of abstraction than at another level. For example, imagine a debate over whether use of performance-enhancing drugs by professional athletes should be outlawed. A proponent of such a ban will have a poor chance of success if the issue is cast as, should the government interfere with private behavior? The proponent will have a much better chance of success if the issue is cast as, should professional athletes be banned from using drugs A, B, and C, which are harmful to young persons? Accordingly, an advocate should normally frame an issue at the single most appealing level of abstraction. But sometimes an advocate wants to offer alternative arguments that operate on different levels of abstraction; for example, the advocate frames the issue at one level, then one's opponent frames the issue at a different level, and the advocate needs to address both issues. In this event, the advocate must take special care to keep each argument, and the evidence supporting the argument, at the appropriate level of abstraction.

Like any other losing party in the Court of Appeals, Fibreboard must have had two purposes in mind as it wrote its petition for certiorari: persuade the Supreme Court to accept the case, and frame the issue at the level of abstraction at which the company had the best chance of winning the case. Fortunately for Fibreboard, these purposes coincided. In regard to persuading the Court to accept the case, the Labor Board and (perhaps) the Court of Appeals had adopted Rule B(2), which operated at a high level of abstraction. Surely it is easier to persuade the Supreme Court to grant certiorari on an issue at the level of abstraction decided below than on an issue at another level of abstraction. Also, a decision at a high level of abstraction has a broad effect on society. The Court may be particularly interested in reviewing such decisions.

In regard to winning the case, the deck was stacked against Fibreboard at a low level of abstraction because the facts of the case satisfied the rules that operated at that level. Perhaps the company had a fifty-fifty chance under Rule C(4): bargaining might have failed because the union had not yielded in previous bargaining over labor costs, yet might have succeeded if the union had been confronted with the risk that the maintenance work would be contracted out. Fibreboard had little chance to win under Rule C(2) because the company's motivation was labor costs, or under Rule C(3) because maintenance jobs were in the bargaining unit were lost. The company had no chance whatsoever at the lowest level of all, Rule C(1), under which decision bargaining is required when an employer wishes to replace bargaining unit employees with contracted employees who would perform the same tasks in the same workplace at a lower cost. (We must admit that this last judgment of ours may be influenced by hindsight; *see* the discussion of Justice Stewart's concurring opinion in the Supreme Court, discussed *infra* beginning at n. 299.) As for a common law approach, although the Labor Board's views had varied over time, its present position was clear, and this position was consistent with the purpose of the Labor Act, which is to "encourage[] the practice and procedure of collective bargaining."<sup>225</sup> Also, the decision of the Court of Appeals was a precedent (though of course not binding on the Supreme Court). These considerations should have influenced Fibreboard not to frame the issue at a low level of abstraction but, instead, to frame the issue at a high level.

Additional reasons might have influenced Fibreboard to frame the issue at a high level of abstraction. Issues framed at the higher levels favored Fibreboard's appeal. Rule B(2) was a major inroad on management prerogatives, and would affect many employers and unions. The Court might balk at such a great change in the law. Also, if Court decided not to adopt the one-size-fits-all approach of Rule B(2), but instead to identify and apply a standard, the standards that operated on the highest levels had frightening implications. Rule C(5) mandated decision bargaining about closure of all or part of a business. Should an employer be required to bargain with a union about whether to stay in business?<sup>226</sup> Rule C(7) mandated bargaining about any issue that vitally affected employees. Should an employer be required to

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225. National Labor Relations Act, Pub L. No. 74-198, 49 Stat. 449 (1935).

226. It must have seemed unlikely that the federal courts would require bargaining over the decision to close a business. The Court of Appeals for the Fourth Circuit had held squarely that, under the Labor Act, an employer may close a business for any reason, including hostility to labor unions. *See Darlington Mfg. Co. v. NLRB*, 325 F.2d 682, 685 (4th Cir. 1963). The court cited several decisions of other Courts of Appeals and a passage in a decision of the Supreme Court that expressed the same view, *id.* at 686. In the term following the Supreme Court's decision in *Fibreboard*, the Court held that, absent a desire to gain an advantage in labor relations elsewhere, an employer may close a business even out of anti-union animus. *See Textile Workers Union v. Darlington Mfg. Co.*, 380 U.S. 263, 268 (1965).

bargain about the design of a product or its marketing because, if poorly designed or marketed, a product will not sell and employees who made it could be laid off?

Fibreboard's petition for a writ of certiorari stated the question presented as, "Was Petitioner required by the National Labor Relations Act to bargain with a union representing some of its employees about whether to let to an independent contractor for legitimate business reasons the performance of certain operations in which those employees had been engaged?"<sup>227</sup> This question was ambiguous because it could have been resolved by any of the rules we have discussed. The Court granted certiorari on exactly the question which the company had presented. The parties, then, were free to choose the level of abstraction at which they would answer the question.

## 2. *The Parties' Briefs on the Merits*

In its own interest, Fibreboard should have kept its arguments and its answer to the question presented at a high level of abstraction, but in fact the arguments and the answer wandered among rules at different levels. At the outset, the company's brief stated, "The Act does not by its terms require bargaining about whether an employer shall carry on particular business operations, but requires only that he bargain about the 'wages, hours, and other terms and conditions' upon which men are to be employed in the operation upon which he decides."<sup>228</sup> This sentence was artfully composed. The first clause suggested Rule C(5) (an employer must bargain over the decision to discontinue any operation). This rule operated at a considerably higher level of abstraction than Rule B(2) because a duty to bargain at the level of Rule C(5) would encompass not only contracting out work, but also other forms of discontinuing an operation (for example, ceasing to produce a product). Although no party or tribunal in the case had suggested Rule C(5), nor was it encompassed by the writ of certiorari, invoking this rule worked powerfully for Fibreboard: what could be more a function of management than the decision of whether to maintain or close an operation?<sup>229</sup>

Apparently confident in scare tactics, Fibreboard then nudged the issue to an even higher level of abstraction. The company argued that, until *Town*

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227. *Fibreboard Paper Prods. Corp. v. NLRB*, cert. granted 375 U.S. 963 (1964); 379 U.S. 203, 209 (1964) (also stating another issue, not discussed in this article, pertaining to the Labor Board's remedial power).

228. Brief of Fibreboard at 10, *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203 (1964) (No. 14).

229. See *Textile Workers Union v. Darlington Mfg. Co.*, 380 U.S. 263 (1965) (ruling an employer may close a business even out of anti-union animus) and *First Nat'l Maint. Corp. v. NLRB*, 452 U.S. 666 (1981) (ruling an employer has no duty to bargain over partial closing of a business), but cf. *Order of R.R. Telegraphers v. Chicago & N.W. Ry. Co.*, 362 U.S. 330 (1960) (holding a railroad had a duty to bargain over closing stations).

& Country, “it was settled Board doctrine . . . that an employer is not required to bargain about a decision, motivated by legitimate business considerations, to contract out work or close or move his plant.”<sup>230</sup> Now the issue embraced not only discontinuing an operation, but also moving a business or restructuring it.

The brief then switched to a common law approach, discussing a number of cases.<sup>231</sup> Ignoring the ones that were irrelevant,<sup>232</sup> we find that the cases operated at different levels of abstraction. For example, Fibreboard cited *Brown-McLaren Manufacturing Company*,<sup>233</sup> in which the Labor Board held that an employer had no duty to bargain over the decision to move an operation to another location for legitimate business reasons, and *National Labor Relations Board v. Rapid Bindery*,<sup>234</sup> in which the Second Circuit reached the same conclusion. Moving an operation is contracting out writ large. Other cases operated at the level of Issue B. In *Adams Dairy*, the employer discharged its drivers and engaged them as independent contractors without bargaining with the union.<sup>235</sup> Although the Board had held the dairy had violated the duty to bargain, the Eighth Circuit refused to enforce the Board’s order because the dairy had acted in good faith.<sup>236</sup> Of course, the brief also discussed *Fibreboard-I*.

Fibreboard was wise to avoid the lower levels of abstraction. The company would have been wiser still to have focused on an issue at a single level of abstraction and to have stated that issue clearly. The company’s brief does not appear to have had any effect on the majority or concurring opinions of the Court.

The General Counsel of the Labor Board<sup>237</sup> could also choose the level of abstraction of the issue he would address; but (the reverse of Fibreboard) his chance of victory decreased as the level of the issue rose: for the higher the level, the greater the potential expansion of the duty to bargain. If the Court were willing to expand the duty at all, the justices were most likely to

230. Brief of Fibreboard at 30, *Fibreboard*, 379 U.S. 203 (1964) (No. 14).

231. Brief of Fibreboard at 9-10, 13-16, *Fibreboard*, 379 U.S. 203 (1964) (No. 14).

232. See, e.g., *Jay Foods, Inc. v. NLRB*, 292 F.2d 317 (7th Cir. 1961), in which the Board had found that an employer had closed its repair and maintenance operation out of anti-union animus, but the Seventh Circuit found no substantial evidence in the record to support this finding.

233. *Brown-McLaren Manufacturing Company*, 34 NLRB 984 (1941).

234. *NLRB v. Rapid Bindery, Inc.*, 293 F.2d 170 (2d Cir. 1961).

235. *NLRB v. Adams Dairy, Inc.*, 322 F.2d 553 (8th Cir. 1963); *vacated*, 379 U.S. 644 (1965), *aff’d on reh’g*, 350 F.2d 108 (8th Cir. 1965).

236. The Board petitioned the Supreme Court for a writ of certiorari. After deciding *Fibreboard*, the Court granted the writ, *vacated*, and remanded *Adams Dairy* for reconsideration in light of *Fibreboard*, 379 U.S. 644 (1965). The Eighth Circuit then distinguished *Fibreboard* and again refused to enforce the Board’s order. *Adams Dairy, Inc.*, 350 F.2d 108 (8th Cir. 1965).

237. The brief was signed not only by the General Counsel of the Labor Board, but also by the Solicitor General of the United States. In the belief that the General Counsel probably took the lead in writing the brief, we refer to all the signatories to this brief as the “General Counsel.”

adopt a version of Rules C, either stating a standard for determining in which cases decision bargaining would be required or comparing the case at bar to precedents. The Board, however, had promulgated a rule at a higher level, Rule B(2), and so the General Counsel would have felt obliged to defend this rule. Perhaps his best strategy was to address Issue B and Issue C in the alternative, making clear the difference between them. We can think of no reason why the General Counsel should have addressed any of the issues at higher levels of abstraction. Yet he did and, as he did, he wandered from one level to another.

The General Counsel stated the “question presented” as “[w]hether an employer’s ‘contracting out’ of maintenance work being done by employees in the bargaining unit is a statutory subject of collective bargaining under section 8(d) and 9(a) of the National Labor Relations Act.”<sup>238</sup> This statement of the issue specified the work as maintenance. The word “maintenance” functioned as an adjective that modified or limited the noun “work.” If the General Counsel had meant to limit the issue to whether decision bargaining was required over maintenance (but not other kinds of) work, he would have been addressing Issues C and D (what is the standard, and does it require bargaining in the case at bar, but not necessarily in other cases?). Was the General Counsel trying to frame the issue strategically? Maintenance work usually involves less investment than production, delivery, and so on. Decision bargaining over maintenance, therefore, would likely center, not on the commitment of capital, which is at the core of management prerogative, but on the cost of labor, which is a traditional subject of collective bargaining. Also, maintenance work is normally performed where the equipment is located. Therefore, when maintenance is contracted out, the contractor’s employees perform the maintenance in the very plant in which the discharged employees formerly worked. A plant is always destabilized when union members see their fellow union members lose their jobs; a plant becomes explosive when union members are forced to work alongside of non-union employees who have replaced union members. For these reasons, the General Counsel might have believed that he had a better chance to win a case about decision bargaining over the contracting out of maintenance work in particular than over the contracting out of work in general.

Nonetheless, for four reasons we believe that the General Counsel did not intend his statement of the issue to limit it to decision bargaining over maintenance work alone. First, he had argued for Rule B(2) without this limitation before the Labor Board. Also, the Board had not limited the issue in this way; for example, the contracted work in *Town & Country* was transporting mobile homes, and this work involved capital (the ownership of trucks) and could not have been performed in the employer’s plant. Second,

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238. Brief of the National Labor Relations Board at 2, *Fibreboard*, 379 U.S. 203 (1964) (No. 14).

nowhere in the brief did the General Counsel's argument focus on the specific characteristics of maintenance work. Third, changing the issue in a case would have been a heavy burden to place on a single word in a sentence, especially an adjective; the change could easily have gone unnoticed. And finally, although Fibreboard's brief addressed issues at various levels of abstraction, those levels were generally high, and the General Counsel probably intended his statement of the question to operate on a similar level. Accordingly, the General Counsel probably intended the word "maintenance," not to lower the level of abstraction of the issue, but merely to describe the work that was lost in the case at bar.

The General Counsel would have been wiser to prevent confusion by not referring to the specific type of work in the case at bar, and this lapse of judgment prefigured more serious lapses later in the brief. Nonetheless, we conclude that he represented to the Court that he would address Issue B. Accordingly, his evidence and arguments should have been at the same level of abstraction as Issue B. They were not.

In his first argument following his statement of the question presented, the General Counsel flirted with an issue at a vastly higher level of abstraction than Issue B, namely, whether the duty to bargain requires a party to negotiate over *any* subject which the counterparty lays on the table. The flirtation occurred as follows. The General Counsel argued that Congress used the phrase "terms and conditions of employment" in its broadest sense. As proof, he pointed out that the definitions of "terms" and "conditions" in the dictionary were broad. Further, he reminded the Court that in the Taft-Hartley amendments of 1947 Congress enshrined the duty to bargain in section 8(d) of the Act. During the debates, proposals were advanced that would have narrowed the breadth of the section by making "nonmandatory a number of subjects, including subcontracting, which were 'traditionally the subject matter of collective bargaining in some industries or in certain regions of the country; but Congress rejected these proposals.'"<sup>239</sup> "Thus," he concluded, "the 'terms and conditions of employment' to which sections 8(d) and 9(a) refer are *any* stipulations under which employees agree to be employed. . . . [T]hey verbally embrace *any* provisions which either party wishes to put in the agreement" (our italics).<sup>240</sup>

This legislative history supported Rule A(2) (the duty to bargain requires a party to negotiate over any issue that the counterparty wishes to discuss), but the General Counsel immediately repudiated such a rule. He wrote that, although a literal reading of the statute would give unions a right to bargain over a host of subjects that are generally regarded as management

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239. Brief of the National Labor Relations Board at 21, *see id.*

240. Brief of the National Labor Relations Board at 21-22, *see id.* (citation omitted). Justice Stewart argued that the same text and legislative history pointed to the opposite conclusion. *See infra* text following n. 318 (beginning, "The central point was . . .").

prerogatives, the Labor Board had confined mandatory subjects to employees' "vital interests."<sup>241</sup> Contracting out touches such an interest and is of "intense concern"<sup>242</sup> to employees: "Every time management arranges to buy parts or otherwise subcontracts work of the kind usually done by the company's own employees, fear among the employees for their income and employment security is generated by the danger that the subcontracting will reduce the amount of work available to them."<sup>243</sup> Thus did the General Counsel move down a rung or two on the abstraction ladder to the level of Rule C(7). Not any conceivable subject on which unions might wish to bargain, but only subjects that affect employees' vital interests, such as contracting out, are mandatory subjects of bargaining. The standard for identifying mandatory subjects (whether employees' vital interests are affected) applied to all parties in all cases, and the reason that contracting out satisfied the standard (namely, that contracting out generated fear among employees for their income and employment security) was a legislative fact of which he believed (but we do not<sup>244</sup>) a court could properly take judicial notice.

So far, the General Counsel had mentioned, but eschewed a standard at one level of abstraction (Rule A(2)) and had advanced another standard at a somewhat lower level (Rule C(7)). In the very next sentence he presented an argument at the very lowest level, Rule C(1): "The threat is the greater and the more immediate when the contract brings men from another firm into the plant to take over the jobs of the employer's own employees."<sup>245</sup> In this sentence, the General Counsel no longer referred to the variety of contracting out in which employees' vital interests are affected, but only to the variety in which bargaining unit employees are replaced by contracted workers in the employer's shop. Although contracting out nearly always removes jobs from a bargaining unit, much less commonly is the contracted work performed in the same shop by employees of the independent contractor. Principle 5 reminds us that a fact which is true only of a subset of cases should usually have little or no influence on whether to make a law that will apply to all of the cases in the set. Thus, the greater threat that arose in atypical cases like the one at bar was largely irrelevant to whether the duty to bargain applied to contracting out of all varieties or of the variety that affects employees' vital interests. The argument in the quoted sentence, therefore, pertained only to the subset of the cases covered by Rule C(1). This argument operated on a

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241. Brief of the National Labor Relations Board at 23, *see id.*

242. *Id.*

243. *Id.* (minor typographical error corrected).

244. Principle 10, *supra*, discussed following n. 185.

245. Brief of the National Labor Relations Board at 23, *Fibreboard*, 379 U.S. 203 (1964) (No. 14). This legislative fact should have been based on evidence in the record. Although it seems intuitively true, other consequences are possible; for example, workers in the plant might consider contracted workers as new recruits for the union.

lower level of abstraction than was appropriate for Issue B, which the General Counsel purported to address.

The General Counsel's descent to the lowest level of abstraction was only temporary. His next argument was a warning based on legislative facts that he believed (but did not prove) were true across the country:

“The fear [of the threat to job security] is reflected in collective bargaining practice and arbitration. . . . The only question, therefore, is whether the problems shall be resolved within the framework of collective bargaining established by national policy or left outside to fester without negotiations and then to break out in economic warfare. . . .”<sup>246</sup>

We will refer to this passage as the General Counsel's “Warning Argument.” It applied to employees and employers across the country and, therefore, operated on the appropriate level of abstraction for Issue B.

Then the General Counsel used points already made to distinguish contracting out from genuine management prerogatives; in the process, he descended the ladder of abstraction from Issue B. The distinction was that contracting out affected employees' jobs and, unlike management prerogatives, was widely accepted as a topic of collective bargaining.<sup>247</sup> This distinction suggested Rules C(3) and C(4) (decision bargaining is required when the contracting out would affect employees' jobs and might be successful).

The General Counsel's next argument took a common law approach and climbed back up the ladder to Issue B. He analogized contracting out to “other matters directly involving tenure of employment [which] have long been held within sections 8(d) and 9(a),”<sup>248</sup> including layoffs, recalls, compulsory retirement, disciplinary discharges, hiring halls, and automation.<sup>249</sup> If contracting out is the equivalent of layoffs, decision bargaining is a mandatory subject of bargaining. But then the General Counsel slid down the ladder.

The General Counsel had only toyed with a low level of abstraction so far. Here he turned in earnest to a level even lower than Rule C(7) by combining standards:

Nor can the “contracting out” involved in this case be excluded from section 8(d) and 9(a) upon the ground that the step dealt with matters often left to managerial determination . . . . The plant maintenance would have to be done in any event. It would be done

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246. *Id.*

247. *Id.* at 24–25.

248. *Id.* at 25.

249. *Id.* at 25–26.

in the plant. It would be directed, even scheduled, by petitioner. No capital investment was at stake, nor anything that could be said to affect the scope or character of the petitioner's business. With this kind of contracting out the whole weight of the problem, from the standpoint of management as well as labor, is on the questions, who will work and who will determine wages, hours, and working conditions? Nothing of practical importance is involved in the area conventionally left to management decisions.<sup>20a</sup>

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<sup>20a</sup> . . . [I]t is not unlikely that the present employees and their representative would be able, if the subject were placed on the bargaining table, to work out an arrangement under which those employees could continue to perform the maintenance services.<sup>250</sup>

In this passage, the General Counsel implicitly addressed Issue C, implying that the standard for determining whether decision bargaining is required has three, or perhaps four, elements: the contracted work would continue to be performed in the plant; decision bargaining would not affect investment of capital or the scope of the business; the focus of bargaining would be the usual subjects of collective bargaining (who will work, for how much money, and under what conditions); and, perhaps, collective bargaining would have a reasonable chance of success.

After which, the General Counsel climbed back up the ladder to Issue B by elaborating arguments previously stated: mandatory subjects of bargaining should be defined by "industrial experience [because it] is the best test both of the depth of the employees' interest in managerial practices affecting them and also of their amenability to labor-management relations."<sup>251</sup> Such experience reveals that bargaining over contracting out has been widespread and successful, he concluded, and courts and arbitrators have upheld labor contracts that limit an employer's right to contract out.<sup>252</sup>

And then the General Counsel reached for the stars. He repeated his Warning Argument about the risk to industrial peace. In the process, he stated a rationale of decision that would justify Rule C(3) and more:

The Issue before the Court, therefore, is not whether contracting out and other measures reducing the volume of work available to employees will be an issue between labor and management, nor whether unions may make such subcontracting the subject of collective action. The affirmative answers to those questions are established facts. . . . What the Court's interpretation of sections 8(d) and 9(a) will determine, is whether the problems will be resolved within or without the statutory framework.<sup>253</sup>

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250. *Id.* at 27.

251. *Id.* at 28.

252. *Id.* at 29–32.

253. *Id.* at 37–38.

“[R]esolved within or without the statutory framework” meant resolved within the framework by collective bargaining or without the framework by strikes, lockouts, or worse. The warning applied not only to contracting out, but also to “*other measures* reducing the volume of work available to employees” (our italics). Thus, the General Counsel argued that the Court should require decision bargaining because sections 8(d) and 9 of the Labor Act require bargaining over any act of an employer that might reduce jobs in a bargaining unit including, we suppose, closing the plant, investing (or not investing) in it, dropping or modifying a product, and so on. Although the facts of the case at bar concerned only contracting out, a rationale for mandatory subjects of bargaining that was aimed at resolving disputes over any loss of jobs would operate on a level of abstraction well above contracting out.

Principle 5 holds that the adjudicative facts of a case may be used as an illustration of a legislative fact that is part of an argument at a high level of abstraction. Even though he wandered across levels of abstraction, the General Counsel knew how to use the facts of the case at bar to illustrate legislative facts:

There are many solutions to the question whether particular work shall be contracted out, as in the present case. . . . Confronted with a choice between losing their jobs and increasing their productivity, the employees might have agreed to cooperate in finding ways of meeting the problem of costs. . . . No one can say whether a mutually satisfactory solution would have been found in this case or will be found in any other, but the national labor policy is founded upon the Congressional conclusion that the chances are good enough to warrant subjecting such issues to the process of collective negotiation.<sup>254</sup>

Overall, however, the General Counsel seems to have been unable to decide whether the facts of the case at bar simply served as one instance of many similar cases, or were crucial to the outcome of the case. He asserted that the issue in the case was Issue B, but the bulk of his argument pertained to issues higher and lower on the abstraction ladder.

The Steelworkers’ interest in the case was to enforce the Labor Board’s order, but their choice of strategy was difficult. They had argued in the Court of Appeals for more back pay on the ground that Fibreboard had acted out of anti-union animus.<sup>255</sup> They could not make this argument in the Supreme Court because the writ of certiorari specified that Fibreboard had acted for

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254. *Id.* at 41–42.

255. *East Bay Union of Machinists, Local 1304 v. NLRB*, 322 F.2d 411 at 414 (D.C. Cir. 1963), *aff’d*, 379 U.S. 203 (1964).

legitimate business reasons.<sup>256</sup> Thus, the company's motive was no longer an issue,<sup>257</sup> and so the question presented in the writ gave the Steelworkers the same choice as the other parties had about the level of abstraction at which to cast their arguments. But the Steelworkers' choice was the most difficult because they served three masters.

Fibreboard's attorneys had a single interest: win this case. The General Counsel had two interests: win this case and make good law for future cases. Although the Labor Board's best chance of winning this case may have been at the level of Rule B(3) (decision bargaining is required in some cases but not in others), the Board wanted the Court to endorse Rule B(2) for the future. But the Steelworkers' attorneys had to cater to three interests. They answered to the employees whom Local Union 1304 represented at Fibreboard, to the hundreds of thousands of employees whom the national union represented across the country, and, in a significant way, to the entire American labor movement. Accordingly, the Steelworkers may have been influenced partly by a desire to win this case and partly by broader considerations, and these influences could have led to arguments on various levels of abstraction.

Rule A(2) probably did not tempt the Steelworkers. Although any union would have relished being able to demand that an employer bargain over any topic that employees might wish to discuss, and to use economic force to secure concessions on any topic, the Steelworkers surely knew that Rule A(2) would be a two-way street: employers would have the same rights; and because employers typically have more economic power than unions, the net of such a rule might well favor employers. Also, the Steelworkers surely foresaw that the Court would not reverse its own precedent and abandon the distinction between mandatory and permissible subjects of bargaining.

Rule C(7) might have tempted the Steelworkers. The labor movement would have been well satisfied with the right to bargain over any topic that vitally affects the interests of employees. Such a right would include most of the topics that employees might want to discuss, and would allow unions to use economic force to secure concessions. Employers' reciprocal right to bargain over union actions that affected employers' vital interests would be meaningless: employers would never exercise it, preferring to act unilaterally behind the shield of management prerogatives as much as possible; but if employers did exercise the right, unions would be delighted to bargain about things like investment and new products. Also, Rule C(7) would not disturb the distinction between mandatory subjects and permissible subjects, though the rule would considerably expand the former and contract the latter. But it was unlikely that the Court would adopt a rule that went so far beyond the Labor Board's holding.

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256. See *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203 (1964).

257. See *supra* n. 211.

The Steelworkers may have believed that Issue C(3) was a better possibility. The inequity of employees' losing their jobs and being denied the right even to discuss the matter with their employer was obvious to unions, probably obvious to ordinary citizens as well, and perhaps obvious even to judges. The Steelworkers could remind the Court that the duty to bargain is not a duty to agree and, if bargaining were unsuccessful, the employer could proceed without the union's consent. If this strategy succeeded, the Steelworkers would win a major victory for the labor movement: employers would have to bargain not only over contracting out, but also over topics such as automation, scaling back production, and perhaps closing the business. Attractive as such an outcome may have been to them, however, the Steelworkers would have realized that this strategy was risky. The Court might well recoil from such a liberal rule and hold that decision bargaining is never required.

The Steelworkers must have known that they had the best chance to win the case for the workers who were laid off at the lower levels of abstraction. The union could try to persuade the Court to adopt Rule B(2) and, if this strategy succeeded, it would result in a significant right for unions across the country. Yet the Steelworkers might reasonably have feared that the Court would hesitate to subject every employer to the obligation to engage in decision bargaining.

In a realistic moment, the Steelworkers may have thought that the Court was most likely to take the moderate approach of ordering decision bargaining on a case-by-case basis. Accordingly, their safest route to victory was to advocate Rule C(2) because labor costs had motivated the contracting out. (The brief could have dealt with Local 1304's recalcitrance in previous bargaining by stressing the difference between ordinary bargaining over labor costs, the downside of which is a strike or a lockout, and extraordinary bargaining over contracting out bargaining unit work, the downside of which is permanent loss of jobs.)

Advocating Rule C(4) was also a safe bet because everyone wants collective bargaining to be successful, and no one wants to waste time on futile bargaining; but it was uncertain how well success on this strategy would serve the labor movement. On the one hand, employers who wished to contract out might well engage in decision bargaining in order to avoid a serious risk: for the small cost of a few bargaining sessions, in which nothing need be conceded, an employer could avoid the risk of an onerous remedy (reestablishment of the operation and back pay for the employees, as the Labor Board ordered in *Shamrock Dairy*<sup>258</sup>) should the Board and courts find that bargaining was required. On the other hand, employers might run that risk if they felt that decision bargaining would compromise a good business

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258. *See supra* n. 99.

opportunity; indeed, the better the opportunity, the less the chance the Board or a court would hold that bargaining was required, particularly if speed or secrecy were important.<sup>259</sup>

Perhaps all these considerations overwhelmed the Steelworkers' advocates for, in the event, their brief moved up and down the abstraction ladder with abandon. The facts stated in the brief pertained to the issue at lowest level of abstraction:

The work which the company "contracted out" was the maintenance of its production equipment and the operation of its power plant. This work, of course, had to be performed as long as the company continued its manufacturing operations. And it had to be performed at the plant site; it could not be sent out for performance at another location. Nor did Fluor have any advanced equipment with which to perform the work more efficiently than Fibreboard. Indeed, the work was to be performed with Fibreboard's tools and equipment, and under Fibreboard's general supervision.

In short, the sole effect of the contracting out arrangement was that Fibreboard's work was to be performed on Fibreboard's premises in the same way, and with the same equipment, as before but by Fluor's employees instead of Fibreboard's employees.

. . . Fluor's role was essentially that of a labor broker

. . . .

Fibreboard agreed to reimburse all of Fluor's costs, including wages, fringe benefits, payroll taxes, travel and subsistence expense, utilities, telephone, telegraph, stationery, Workmen's Compensation insurance, permits, licenses, fees, and such tools and equipment as Fibreboard did not furnish. . . .

Fluor made clear in its proposal that its personnel would work entirely under the direction of Fibreboard's management. . . .

The question naturally arises, if Fluor was to do the same work with the same equipment as Fibreboard's employees, what was the source of the saving which Fibreboard hoped to gain from this arrangement? The answer is that Fluor's employees were willing to work at less costly terms and conditions of employment than had been negotiated between Fibreboard and its employees.<sup>260</sup>

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259. See *First Nat'l Maint. Corp. v. NLRB*, 452 U.S. 666, 682–83 (1981) (footnote omitted) ("management may have great need for speed, flexibility, and secrecy in meeting business opportunities and exigencies").

260. Brief for the United Steelworkers of American and its Affiliated Local Union 1304, East Bay Union of Machinists at 5–7, *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203 (1964) (No. 14).

The facts mentioned by the Steelworkers showed that the employees of Fluor had essentially stepped into the shoes of the employees of Fibreboard who had been discharged from the bargaining unit. The facts pertained to Rule C(1) as the General Counsel had expressed it, for they showed that the contracted work would continue to be performed in the plant, that decision bargaining would not affect investment of capital or the scope of the business, that the focus of bargaining would be the usual subjects of collective bargaining, and, the issue being labor costs, that collective bargaining would have a reasonable chance of success.

Then the Steelworkers stated what they asserted was their view of the issue in the case. In truth, it was only one of their views. It led to Rule C(2), which existed at a considerably higher level of abstraction than the issue to which the preceding facts applied:

Reduced to its bare essentials, the question in this case is whether an employer who believes that the labor costs under his collective bargaining agreement are too high is required to try to solve his problem by bargaining with his employees' union or whether he may solve it unilaterally by . . . simply terminating the employees and engaging a contractor whose employees are willing to do the same work under less costly terms and conditions of employment.<sup>261</sup>

Virtually all of the facts which the Steelworkers had just emphasized were irrelevant to this statement of the issue: it did not matter that the work could only be performed in Fibreboard's plant; that Fluor did not have more advanced equipment than Fibreboard had; that the work would be performed with Fibreboard's tools; that Fibreboard's managers would supervise the work of Fluor's employees; or that Fluor would pass virtually all of its costs through to Fibreboard. All that mattered in this statement of the issue was that the contracting out was motivated by labor costs.

Whereupon the Steelworkers presented an argument that pertained to Rule B(2), well above the level of abstraction of the issue they had just stated: "It is at least possible that collective bargaining might have provided a mutually satisfactory solution that would have spared the employees their jobs. At the very least, the Act requires that an effort be made to find such a solution before the employer may take unilateral action."<sup>262</sup> The Steelworkers were not arguing that decision bargaining is appropriate in

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261. *Id.* at 10.

262. *Id.* at 11 (The brief did not at this point state a reason why bargaining might succeed, but subsequently did provide a reason. See the quotation in the text below at n. 264 (beginning, "The likelihood that bargaining . . .").

those cases in which it might succeed (Rule C(4)); rather, they were arguing that decision bargaining is always appropriate because it might succeed.

Successful bargaining was a good rationale, but not good enough for the Steelworkers. What they really cared about was jobs:

[I]n the last analysis, the chief reason why contracting out is a matter about which bargaining is required is that when the employer contracts out work, he thereby reduces the number of jobs or the amount of work available to employees in the bargaining unit. And the matter of what work, or what jobs, will be available to employees is plainly one of the “terms and conditions of employment” within the meaning of the Act.<sup>263</sup>

The facts of this case no longer mattered; they were only illustrative. Decision bargaining is required because the bargaining unit stands to lose jobs. If the Court adopted this rationale, which was the akin to one that the General Counsel proposed in his Warning Argument, the law would require bargaining not only in cases of contracting out, but in a great number of other cases as well (closing a plant, dropping a product, and so on).

Rule C(3) was close to the Steelworkers’ heart—the foremost task of unions is to protect employees’ jobs— and so the Steelworkers would soon repeat the foregoing argument. Before that, however, they returned to Rules C(2) and (4), making explicit the connection previously implied between labor costs and the possibility of successful collective bargaining:

The likelihood that bargaining would have produced a solution is particularly great in this case, since the sole reason for the contracting out was the company’s view that the existing terms and conditions of employment were too costly. This is precisely the kind of problem which can be resolved through collective bargaining.<sup>264</sup>

And then the brief returned to Rule C(3):

The main reason why employers are required to bargain about contracting out is quite simply, that whenever bargaining unit work is contracted out, the number of jobs which would otherwise be available to employees in the bargaining unit is reduced. And the matter of what jobs or what work will be available to employees is plainly a matter within the area of “terms and

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263. *Id.*

264. *Id.* at 16.

conditions of employment” about which the Act requires bargaining.”<sup>265</sup>

The Steelworkers’ brief moved carelessly among issues and levels of abstraction, thereby failing to present a clear and consistent view of the case. The brief, however, may have affected the Court, particularly Justice Stewart’s concurring opinion. Of all the briefs in the case, the Steelworkers’ provided the most detailed and gripping description of what the company had done (see the quotation at n. 260 *supra*). That description operated at the lowest level of abstraction, as did Justice Stewart’s opinion (which is discussed in detail *infra*). Yet, given the narrow scope of that opinion, one may wonder whether it was a victory for the labor movement.

### 3. Chief Justice Warren’s Opinion for the Supreme Court

We have mentioned that the question on which the Supreme Court granted certiorari was ambiguous as to its level of abstraction; the question could have raised any of the issues we have discussed. The opinion of the majority of the Court, written by Chief Justice Earl Warren and joined by Justices Hugo Lafayette Black, Byron Raymond White, William Joseph Brennan, Jr., and Thomas Campbell Clark, was also ambiguous, for it addressed, and did not distinguish between, Issues B(2) and versions of Rule C.

In what we will call the introduction to the Court’s opinion (specifically, the paragraphs preceding section I), Chief Justice Warren began with a statement of the issue:

This case involves the obligation of an employer and the representative of his employees under §§ 8(a)(5), 8(d), and 9(a) of the National Labor Relations Act to “confer in good faith with respect to wages, hours, and other terms and conditions of employment.” The primary issue is whether the “contracting out” of work being performed by employees in the bargaining unit is a statutory subject of collective bargaining under these sections.”<sup>266</sup>

The first sentence referred to “an employer,” rather than “the employer” or “the petitioner,” and to “the representative of his employees,” not “the respondent,” thereby suggesting that the Court had in mind all employers and their unions, not merely the parties to the case at bar. This suggestion was confirmed by the second sentence, which was a straightforward

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265. *Id.* at 19.

266. *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 204–05 (1964).

statement of Issue B(2), and a reader would naturally have assumed that Court intended to decide this issue.

But then the introduction presented the facts of the case and the decisions of the lower tribunals.<sup>267</sup> Chief Justice Warren stated that Fibreboard had been concerned about the high cost of maintenance and had determined that substantial savings could be realized by contracting out the work. He added that Fluor had assured Fibreboard “that maintenance costs could be curtailed by reducing the work force, decreasing fringe benefits and overtime payments, and by preplanning and scheduling the services to be performed.”<sup>268</sup> Then he quoted from a portion of the contract between Fibreboard and Fluor that indicated that the former would ordinarily furnish the equipment and supplies for the maintenance work and that the latter would be compensated on the basis of its costs plus a fixed fee.<sup>269</sup> That the Chief Justice chose to state these facts indicated that he thought they were important to the case. They were not important to Issue B(2), to which mattered only that the company had contracted out bargaining unit work without bargaining over the decision. The facts were important to the issues at a lower level of abstraction, Issue and Rules C. The ways to save money which Fluor had identified (for example, using fewer employees, which is analogous to laying off employees, and decreasing fringe benefits and overtime) were traditional subjects of collective bargaining. At this point, therefore, a reader of the opinion might have changed one’s mind and believed that, if the Court required decision bargaining at all, it would be required only when labor costs were the employer’s motive for contracting out (or perhaps when collective bargaining might reasonably succeed in resolving the dispute).

Yet the Chief Justice also mentioned that the Labor Board had twice adopted Rule B(2). In *Fibreboard-II* the Board had held that the company’s failure to engage in decision bargaining violated the Labor Act, and in *Town & Country* the Board had held that contracting out is a mandatory subject of bargaining.<sup>270</sup> Now the reader had reason to change one’s mind again and guess that the Court intended to address Issue B.

A court’s statement of facts often includes background and other information that is not strictly relevant to the issue sub judice, and so we should not infer that a court intends to address the issue in the case at a low level of abstraction from a detailed statement of facts (though a statement with few facts foreshadows an issue at a high level in which only those facts are pertinent). Nonetheless, the discrepancy in the introduction between the levels of abstraction of the issue and of the facts reflected the pattern of the

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267. *Id.* at 205–08.

268. *Id.* at 206.

269. *Id.* at 206–07.

270. *Id.* at 208.

rest of the opinion. Indeed, another discrepancy in levels of abstraction occurred in the introduction itself, this time between the statement of the issue that opened the introduction (quoted above at n. 267) and the statement that closed the introduction:

We agree with the Court of Appeals that, on the facts of this case, the “contracting out” of the work previously performed by members of an existing bargaining unit is a subject about which the National Labor Relations Act requires employers and the representatives of their employees to bargain collectively.<sup>271</sup>

Without the words “on the facts of this case,” this sentence would have announced Rule B(2) (contracting out of bargaining unit work is a mandatory subject of bargaining). But with those words, the sentence seemed to state Rule B(3) (contracting out is a mandatory subject in some cases, including this one) and implied that contracting out might not be a mandatory subject in other cases.

Section I of the opinion dealt with decision bargaining.<sup>272</sup> Chief Justice Warren began the section by summarizing the existing law: an employer has a duty under section 8(a)(5) of the Labor Act to bargain with the employees’ union, and the duty as defined in section 8(d) applies only to mandatory subjects of bargaining, as to which neither party is obligated to yield.<sup>273</sup> Then he restated the issue in the case:

we are concerned here only with whether the subject upon which the employer allegedly refused to bargain—contracting out of plant maintenance work previously performed by employees in the bargaining unit, which the employees were capable of continuing to perform—is covered by the phrase “terms and conditions of employment” within the meaning of § 8(d).<sup>274</sup>

This passage, like the introduction, is difficult to interpret. One interpretation is that the passage raised Issue C, foreshadowing its resolution with Rule C(1). This rule had two elements: decision bargaining is required when the contracted workers would perform the same tasks as the bargaining unit employees were performing, and those tasks would be performed in the same workplace. The phrase “work previously performed by employees in the bargaining unit” indicated that the work of the contracted workers would be

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271. *Id.* at 209.

272. *See id.* at 215–17 (Section II addressed an issue of remedy, holding that the Board was empowered to order Fibreboard to resume its maintenance operations and reinstate with back pay the workers who were laid off. *Id.* at 209 and 215.)

273. *Id.* at 209–10.

274. *Id.* at 210.

identical to the work of the bargaining unit employees, and the reference to “plant maintenance work” indicated that the work of the contracted workers would be performed in the same workplace in which the bargaining unit employees worked.

Another interpretation of the passage is that it addressed Rule B(2), which operated at a high level of abstraction that applied to any sort of work that might be contracted out. Support for this interpretation comes from what would otherwise be a conundrum: why did the Chief Justice mention that the bargaining unit employees “were capable of continuing to perform” the work? One possible answer is that the Chief Justice was merely stating the obvious: if the contracted workers performed the same work as the bargaining unit employees, the latter were capable of continuing to perform the work. Another possible answer is that he mentioned this fact for its emotional impact: we sympathize with employees who lose jobs which they are capable of performing, and helping such employees is appealing. A third possible answer is that the Chief Justice intended to lay the basis for distinguishing a future case in which the bargaining unit employees could not perform the contracted work. Surely the argument for decision bargaining would be weaker in such a case. This answer seems the most likely to us. If we are right, the passage did not address Issue C. Now, a distinction must be drawn against another case; here, the other case would be *Fibreboard*. But if Court adopted Rule C(1), the distinction that Chief Justice Warren suggested would never have been necessary: for it is improbable that a subsequent case would arise in which an employer would desire to contract out bargaining unit work, the contracted workers would perform the same work that the bargaining unit employees were performing in the same workplace, and the latter would not be capable of continuing to perform the work. Therefore, in order for the Chief Justice to have distinguished a future case in which bargaining unit employees could not perform the contracted work, he must have drawn the distinction against a rule other than Rule C(1). The only other rule that the passage could have addressed was Rule B(2). The future case would be an exception to the general rule requiring decision bargaining.

These two interpretations of the passage seem equally compelling to us. Our guess is that either the Chief Justice was going for emotional impact or that he had both Rules B(2) and C(1) in mind and did not separate them adequately.

Chief Justice Warren continued section I with four arguments. Three of them operated on the level of abstraction of Rule B(2), though one of these depended on unproven legislative facts. The fourth argument committed an abstraction shift.

The Chief Justice grounded the first argument on the text of the statute. Citing *Railroad Telegraphers*, he wrote, “The subject matter of the present

dispute is well within the literal meaning of the phrase ‘terms and conditions of employment.’”<sup>275</sup> An agreement between an employer and a union on contracting out would be a condition of employment, as would be the resulting termination of employment.<sup>276</sup> This argument operated on the same level of abstraction as Rule B(2) and supported it. The argument applied to all contracting out; the argument did not even hint that contracting out might be a mandatory subject of bargaining in some cases but not necessarily in others.

The second argument drew upon the purpose of the statute. The Chief Justice stated that refusal to negotiate had been a prolific cause of industrial strife. One of the primary purposes of the Labor Act is to avert strife via collective bargaining. Classifying contracting out as a mandatory subject of bargaining would bring this “problem of vital concern to labor and management within the framework established by Congress as most conducive to industrial peace.”<sup>277</sup> The Chief Justice’s argument, which seems to have been inspired by the General Counsel’s Warning Argument, did not go so far as the latter because the Chief Justice’s argument was limited to contracting out. Nevertheless, the argument did pertain to all contracting out. Thus, like the argument based on *Railroad Telegraphers*, this one operated on the same level of abstraction as Issue B(2) and was satisfactory.

The third argument examined industrial experience regarding contracting out:

While not determinative, it is appropriate to look to industrial bargaining practices in appraising the propriety of including a particular subject within the scope of mandatory bargaining. *Labor Board v. American Nat. Ins. Co.*, 343 U.S.

395, 408. Industrial experience is not only reflective of the interests of labor and management in the subject matter but is also indicative of the amenability of such subjects to the collective bargaining process. Experience indicates that contracting out in one form or another has been brought, widely and successfully, within the collective bargaining framework.<sup>6</sup> Provisions relating to contracting out exist in numerous collective bargaining agreements,<sup>7</sup> and “[c]ontracting out is the basis of many grievances; and that type of claim is grist in the mills of the arbitrators.” *United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S., 574, 584.

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275. *Id.* at 210.

276. *Id.* This statement refuted, intentionally or unintentionally, the argument of the majority of the Board in *Fibreboard-I* that the duty to bargain does not pertain to the question of whether the employment relationship will persist. See *supra* text at n. 70 and n. 74.

277. *Id.* at 211 (footnote 5 omitted).

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<sup>6</sup> See Lunden, Subcontracting Clauses in Major Contracts, Pts. 1, 2, 84 Monthly Lab. Rev. 579, 715 (1961).

<sup>7</sup> A Department of Labor study analyzed 1,685 collective bargaining agreements, which applied to approximately 7,500,000 employees (about one-half of the estimated work force covered by collective bargaining agreements). Among the agreements studied, approximately one-fourth (378) contained some form of a limitation on subcontracting. Lunden, *supra*, at 581.

This argument, too, operated on the same level of abstraction as Issue B(2). The argument relied on legislative facts (the importance of the subject to labor and management and the outcomes of bargaining over it) that pertained to the entire economy, not on adjudicative facts that pertained only of the parties and transaction in the case at bar. The argument did not suggest that decision bargaining would be mandatory only when the employer was motivated by labor costs or when the bargaining might succeed; the phrase “contracting out in one form or another” comprehended all forms of the phenomenon.

Yet the argument violated Principle 10 because of the “evidence” of industrial experience. Above we faulted the majority of the Labor Board in *Fibreboard-II* for relying on the study by Mr. Lunden and on the assertion of Arbitrator Dash cited in *Warrior & Gulf*,<sup>278</sup> neither of which had appeared in the record and been subjected to the adversarial process, and our criticism of the Board in this regard applies equally to the Court. The upshot is that the Chief Justice had no legitimate evidence of the legislative fact that bargaining over contracting out was widespread in the economy; and, therefore, to the extent that his argument in favor of Rule B(2) depended on information about industrial experience, the argument failed.

Whereas the preceding three arguments operated on the same level of abstraction as Issue B(2), the fourth argument committed an abstraction shift, using a precedent decided on a lower level of abstraction to support a proposition at a higher level. The fourth argument was based on two precedents, the Court’s own decision in *Teamsters v. Oliver*<sup>279</sup> and the Labor Board’s decision in *Timken Roller Bearing*.<sup>280</sup> The issue in *Oliver* was whether the Labor Act precluded the State of Ohio from applying its anti-trust law to a clause in a collective bargaining agreement between a coalition of locals of the Teamsters Union and a coalition of trucking firms. The firms employed two categories of drivers. The first category was composed of drivers who operated vehicles which the drivers themselves owned. These drivers leased their vehicles to their firms (and for this reason were called

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278. See text above following n. 193 (beginning, “The second variety was industrial experience . . .”).

279. Local 24, Int’l Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America v. Oliver, 358 U.S. 283 (1959).

280. Timken Roller Bearing Co., 70 NLRB 500 (1946), *enf. den. on other grounds*, Timken Roller Bearing Co. v. NLRB 161 F.2d 949 (6th Cir. 1947).

“lessor-drivers”). A lessor-driver received wages plus a separate fee for leasing his vehicle. The second category was composed of drivers who were employees of the firms (“employee-drivers”); they operated vehicles which the firms either owned or leased from other firms at (we presume) the market rate. The labor agreement covered both categories of drivers and specified the same wage for them.

The clause in the agreement that precipitated the lawsuit provided that the leasing fee must not fall below a specified minimum, which we assume approximated the market rate for leasing vehicles. The reason for this clause was the Teamsters’ concern that the firms were paying a leasing fee that was less than the market rate. We presume that the market rate reflected the cost of providing a vehicle and that this cost was approximately the same whoever owned the vehicle. Consequently, if a firm paid a lessor-driver a leasing fee below the market rate, the driver sustained a loss on the lease and, in effect, the compensation for his labor was reduced. As a practical matter, such a lessor-driver would be working for less than the contractual wage. In purpose and effect, therefore, the clause in question protected the contractual wages of lessor-drivers, a mandatory subject of bargaining.

Ohio claimed that the minimum-fee clause violated the state’s anti-trust statute, but the Supreme Court held in *Oliver* that federal labor law preempted the statute. Concerning this holding, the Court in *Fibreboard* wrote:

Thus, we concluded [in *Oliver*] that such a matter [the minimum leasing fee] is a subject of mandatory bargaining under § 8(d). The only difference between that case and the one at hand [*Fibreboard*] is that the work of the employees in the bargaining unit was let out piecemeal in *Oliver*, whereas here the work of the entire unit has been contracted out. In reaching the conclusion that the subject matter in *Oliver* was a mandatory subject of collective bargaining, we cited with approval *Timken Roller Bearing Co.*, where the Board in a situation factually similar to the present case held that §§ 8(a)(5) and 9(a) required the employer to bargain about contracting out work then being performed by members of the bargaining unit.<sup>281</sup>

This passage explicitly adopted Rule B(2): decision bargaining is a mandatory subject of bargaining.

The argument in this passage violated Principle 7 (an authority may not support a proposition that operates on a level of abstraction higher than the level on which the authority operated). The holdings of *Timken Roller Bearing* and *Oliver* resolved Issue C or Issue E, not Issue B(2), but the Chief Justice used them in support of Rule B(2).

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281. *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 213 (1964) (citations omitted).

The reader will recall that in *Timken Roller Bearing* the Steelworkers, which represented employees who performed certain tasks in a plant, sought to bargain over the company's practice of engaging independent contractors to perform other tasks in the plant.<sup>282</sup> The Labor Board did not hold that decision bargaining is a mandatory subject of bargaining (Rule B(2)). Rather, by adopting Trial Examiner Ruckel's recommendation, the Board decided the case at the level of its facts. In *Fibreboard-I* Member Fanning had erroneously used *Timken Roller Bearing* to support Rule B(2),<sup>283</sup> and here Chief Justice Warren made the same error. Our point is not that *Timken Roller Bearing* was not analogous to *Fibreboard*. The cases were analogous; and, if the Chief Justice had been addressing Issue C and had wished to use *Timken Roller Bearing* as the source of the standard for resolving the dispute before him, the case would have borne that weight.<sup>284</sup> Likewise, again because the cases were analogous, the Chief Justice could have used *Timken Roller Bearing* as a precedent in a common law approach to *Fibreboard*: because decision bargaining was justified in the former case (bargaining unit jobs were jeopardized by contracted workers who performed tasks that union members had never performed), a fortiori decision bargaining was justified in the latter case (bargaining unit jobs were lost to contracted workers who performed the very tasks that union members had been performing). Thus, *Timken Roller Bearing* would have been an appropriate citation if Chief Justice Warren had invoked Rule E(2). Instead, however, he was addressing Issue B(2). He was arguing that decision bargaining is a mandatory subject of bargaining, and he had just presented three arguments that operated on that high level of abstraction. The citation to *Timken Roller Bearing*, therefore, was inappropriate. A case at a lower level of abstraction does not support a rule at a higher level.

As for *Oliver*, it did not hold that contracting out is a mandatory subject of bargaining. In fact, contracting out was not an issue between the parties. The collective bargaining agreement was silent regarding the power of a trucking firm to use lessor-drivers instead of employee-drivers. The reason for the silence is obvious: both types of driver were in the bargaining unit. Thus, jobs in the unit were not affected by a firm's use of lessor-drivers instead of employee-drivers or vice-versa. Accordingly, *Oliver* held nothing about decision bargaining, but held simply that the minimum leasing fee was a mandatory subject of bargaining because the minimum fee protected drivers' wages, which are a mandatory subject. However, if we are mistaken and *Oliver* did pertain to contracting out, the case addressed Issue C, not Issue B(2). Surely, the holding of *Oliver* was not that contracting out is always a

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282. See *supra* text beginning at n. 87 (beginning, "The first Board case on which . . .").

283. See *supra* text following n. 101 (beginning, "Let us turn now to the role . . .").

284. See *supra* text following n. 57 (beginning, "A precedent may be cited . . .").

mandatory subject (Rule B(2)); at most, the holding was that contracting out was a mandatory subject regarding lessor-drivers, in other words, a version of Rule C: decision bargaining is required when a company employs drivers who own their own vehicles which the firm leases. Therefore, as precedents for a proposition that operated on a high level of abstraction, the Chief Justice improperly cited *Timken Roller Bearing* and *Oliver*, the holdings of which operated on lower levels.

At this point in section I, Chief Justice Warren returned to the facts of the case at bar. He began by writing, “The facts of the present case illustrate the propriety of submitting the dispute to collective bargaining.”<sup>285</sup> This statement was consonant with Issue B(2). An argument regarding a rule at a high level of abstraction may use the facts of a single case (the case at bar or another case), not as a reason for the rule, but as an illustration of how the rule will operate; the rule will do good in this case and, by extension, in others. But a writer presenting such an argument must be careful not to allow the details of the case to become adjudicative facts that effectively lower the level of abstraction of the issue. The Chief Justice was not careful enough. In order to support Rule B(2), he needed to show that decision bargaining would not have negative effects on Fibreboard’s ability to manage its business; that the contracting out in Fibreboard’s case was typical of contracting out across the nation; and, therefore, that decision bargaining would not interfere with most employers’ ability to manage their businesses. Instead, the Chief Justice wrote:

The Company’s decision to contract out the maintenance work did not alter the Company’s basic operation. The maintenance work still had to be performed in the plant. No capital investment was contemplated; the Company merely replaced existing employees with those of an independent contractor to do the same work under similar conditions of employment. Therefore, to require the employer to bargain about the matter would not significantly abridge his freedom to manage the business.<sup>286</sup>

We will call this the “Management Prerogatives Passage.” The facts in it did not illustrate the effect of decision bargaining across the nation; if the facts had illustrated this effect, they would have related back to the arguments which the Chief Justice had just stated in support of Rule B(2).<sup>287</sup> Instead,

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285. *Fibreboard*, 379 U.S. at 213.

286. *Id.*

287. *See generally id.* Those arguments were that contracting out is a term or condition of employment as defined in the Labor Act, that bargaining over contracting out would avert industrial strife, and that experience shows that bargaining over contracting out is often successful. (We omit the argument based on precedent because, as we argued above, neither *Oliver* nor *Timken Roller Bearing* supported Rule B(2)). If the Chief Justice had used the facts of *Fibreboard* to illustrate those arguments, he might have written something like the following: The case at bar provides an

the Chief Justice stated facts which no one could reasonably believe were typical of contracting out across the nation: Fibreboard merely replaced bargaining unit employees with contracted workers; the work did not change; the place of work did not change; investment did not change; indeed, nothing else about the business changed. These facts demonstrated that decision bargaining was required only in the case at bar and were silent as to whether decision bargaining might be required in another case. In other words, these facts pertained to Rule C(1). A reader must wonder whether Chief Justice Warren (perhaps in response to the concurring opinion of Justice Potter Stewart, which is discussed below) intended the Management Prerogatives Passage to change the level of abstraction of the issue as well as the holding of the case.

The next paragraph of the opinion turned to the cause of the labor dispute.

The Company was concerned with the high cost of its maintenance operation. It was induced to contract out the work by assurances from independent contractors that economies could be derived by reducing the work force, decreasing fringe benefits, and eliminating overtime payments. These have long been regarded as matters peculiarly suitable for resolution within the collective bargaining framework, and industrial experience demonstrates that collective negotiation has been highly successful in achieving peaceful accommodation of the conflicting interests. . . [A]lthough it is not possible to say whether a satisfactory solution could be reached, national labor policy is founded upon the congressional determination that the chances are good enough to warrant subjecting such issues to the process of collective negotiation.<sup>288</sup>

We will call this the “Labor Costs Passage.” Unlike the facts in the Management Prerogatives Passage, the facts in the Labor Costs Passage operated on the right level of abstraction for justifying Rule B(2). Fibreboard was dissatisfied with its high labor costs, and an independent contractor promised that economies could be achieved by reducing the number of employees, their overtime hours, and their fringe benefits. Probably a great

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apt illustration of these principles. The work of a bargaining unit has long been considered to be a term or condition of employment, and the contracting out in the case at bar reduced the work of the unit. Bargaining over labor costs is “grist in the mills” of collective bargaining, and Fibreboard decided to contract out because of labor costs. Bargaining over contracting out would reduce industrial strife because, if an agreement were reached, the union would have no cause to strike; and even if an agreement were not reached, the union would learn during negotiations the price at which substitute labor could be contracted for in the market and, knowing that strikers could easily be replaced, might well refrain from striking. Although we cannot say whether Fibreboard and the Steelworkers would have reached an agreement, at least the union would have learned the price at which the company could engage contracted workers and might have realized the futility of striking.

288. *Id.* at 213–14.

deal of contracting out is similarly motivated, and so the case at bar was an apt illustration for a rule of general application. Also, the passage related its facts to the reasons the Chief Justice had previously given in support of Rule B(2). Labor costs are terms or conditions of employment (“have long been regarded as matters peculiarly suitable for resolution within the collective bargaining framework”). Bargaining over labor costs often succeeds (“collective negotiation has been highly successful”) and contributes to labor peace (“achieving peaceful accommodation of the conflicting interests”). Accordingly, the Labor Costs Passage pertained to Issue B.

The Management Prerogatives Passage pertained to issues at a low level of abstraction, and the Labor Costs Passage pertained to an issue at a higher level. The next passage is more difficult to analyze:

The appropriateness of the collective bargaining process for resolving such issues was apparently recognized by the Company. In explaining its decision to contract out the maintenance work, the Company pointed out that in the same plant other unions “had joined hands with management in an effort to bring about an economical and efficient operation,” but “we had not been able to attain that in our discussions with this particular local.” Accordingly, based on past bargaining experience with this union, the Company unilaterally contracted out the work. While “the Act does not encourage a party to engage in fruitless marathon discussions at the expense of frank statement and support of his position,” it at least demands that the issue be submitted to the mediatory influence of collective negotiations. As the Court of Appeals pointed out, “[i]t is not necessary that it be likely or probable that the union will yield or supply a feasible solution but rather that the union be afforded an opportunity to meet management’s legitimate complaints that its maintenance was unduly costly.”<sup>289</sup>

We will call this the “Union’s Opportunity Passage.”

Before we can determine the level of abstraction at which the argument in the Union’s Opportunity Passage operated, we must discover its meaning. In particular, two terms in the passage require attention. The first term is “such issues,” which we find in the opening sentence of the passage. An interpretation based on form immediately springs to mind. The Chief Justice had used the same term in the Labor Costs Passage, in which the term plainly referred to “reducing the work force, decreasing fringe benefits, and eliminating overtime payments. These have long been regarded as matters peculiarly suitable for resolution within the collective bargaining

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289. *Id.* at 214 (citation omitted).

framework.”<sup>290</sup> The Labor Costs Passage immediately preceded the Union’s Opportunity Passage, and the term appeared in the last sentence of the former passage and in the first sentence of the latter passage. A reader would naturally assume that a term used in consecutive sentences of an opinion was intended to carry the same meaning in both sentences. Based on form, therefore, “such issues” in the Union’s Opportunity Passage must have referred to reducing the work force, decreasing fringe benefits, and eliminating overtime payments, in short, labor costs.

The second term that requires attention is “the issue,” which we encounter in the fourth sentence of the Union’s Opportunity Passage. Considering again the form of the passage, one would say that “the issue” was the singular version of “such issues” and, therefore, also referred to labor costs. But considering the substance of the sentence in which “the issue” appeared, we are led to a different conclusion. The sentence stated that, although the law does not require fruitless bargaining, the law “at least demands that the issue be submitted to the mediatory influence of collective negotiations.” In this context, “the issue” could not have meant labor costs; no one doubted that they were mandatory subjects of bargaining. The term could only have meant the issue in *Fibreboard*, namely, contracting out.

Can we harmonize interpretations based on form and on substance? Our guess is that Chief Justice Warren conflated bargaining over labor costs with bargaining over contracting out. In the context of the *Fibreboard* case, they did mean the same thing: if the company had discussed contracting out with the union, the discussion would have pertained to labor costs. This interpretation also explains the first two sentences of the Union’s Opportunity Passage, which otherwise would be puzzling. The Chief Justice wrote that *Fibreboard* recognized that contracting out was an appropriate subject for collective bargaining because the company had bargained successfully with its other unions to reduce labor costs. Bargaining with its other unions over labor costs would have taught the company little about the possibility of successful bargaining over contracting out with the Steelworkers unless the issues in both sets of bargaining would have been the same.<sup>291</sup>

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290. *Id.* at 213.

291. We say that Chief Justice Warren conflated bargaining over labor costs with bargaining over contracting out because we believe, for two reasons, that these phenomena overlap but are not congruent. First, often the cause of contracting out is not labor costs. For example, suppose a company prefers to contract out instead of replacing obsolete or broken equipment. Second, even when the cause is labor costs, negotiating over reducing labor costs is not the same as negotiating over contracting out. In contrast, when labor costs are the issue and contracting out does not loom in the background, employees know that failure to agree on reductions in labor costs might lead to a strike or a lockout. The risks to employees of a strike or a lockout are losing pay for a period of time and, in the case of a strike, being permanently replaced; but employees also know that most strikes and lockouts are settled, often quickly, and many permanently replaced strikers are eventually recalled to their jobs. When contracting out is the issue, employees know that failure to

We can now interpret the Union's Opportunity Passage. The first sentence asserted that Fibreboard recognized that bargaining with its unions over labor costs/contracting out was appropriate. The second sentence presented evidence for the assertion in the first sentence: Fibreboard knew that bargaining to reduce labor costs could succeed because the company's negotiations with its other unions to improve efficiency had succeeded. Previous negotiations with the Steelworkers had failed, said the third sentence, and contracting out followed. The fourth sentence stated that, although the law does not require fruitless bargaining, the law does demand that labor costs/contracting out "be submitted to the mediatory influence of collective negotiations."<sup>292</sup> The fifth sentence made clear the obligation to bargain over contracting out was not contingent on the likelihood of success of the bargaining; rather, the union was entitled to the opportunity "to meet management's legitimate complaints that its maintenance was unduly costly."<sup>293</sup>

Although we may understand the meaning of each sentence in the Union's Opportunity Passage, we must make sense of the passage as a whole in order to determine its level of abstraction. The first part of the passage (the initial three sentences) stated facts; the second part (the final two sentences) announced a rule of law. Do these parts cohere into a meaningful argument? Three possibilities exist.

In the usual case, facts that closely precede the announcement of a rule of law are legislative facts that justify the rule. One possibility, then, is that the facts in the first part of the passage were legislative, offered to help justify the rule of law in the second part. However, the facts were adjudicative, not legislative, and did not justify the rule. The facts were that Fibreboard knew that bargaining over labor costs could be productive because it had bargained successfully over labor costs with its other unions, but bargaining with the Steelworkers had been unsuccessful and so the company unilaterally contracted out the maintenance work. These facts were true only of the case at bar. They could not justify a rule requiring all employers to engage in decision bargaining when the motive for contracting out is labor costs.

As we have noted, adjudicative facts can properly be used by way of illustration if they are typical of the legislative facts that justify a rule of law. ("This case provides a good example....") Accordingly, a second possibility is that Chief Justice Warren intended Fibreboard's successful bargaining with its other unions over labor costs to be an example of the legislative fact that labor costs are amenable to collective bargaining—a plausible proposition, as Fibreboard knew and other employers would also know.

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agree means that the employer will proceed with contracting out. The risk to employees is the irrevocable loss of their jobs. When risks change, bargaining changes.

292. *Id.* at 214.

293. *Id.*

However, the Chief Justice also mentioned that Fibreboard had made no headway in reducing labor costs via bargaining with the Steelworkers. This fact exemplified the opposite of what he wanted to prove and, therefore, casts doubt on the second possibility.

The third possibility is that the Chief Justice Warren intended the Union's Opportunity Passage to apply law to fact. Often, facts stated in close proximity to a rule of law are part of the process of applying law to fact. On the one hand, two formal considerations suggest that the Chief Justice did not intend the Union's Opportunity Passage to apply law to fact. First, when law is applied to fact, the law is normally stated first, followed by the facts to which the law is applied. This order was reversed in the Union's Opportunity Passage. Second, when law is applied to fact, only the adjudicative facts that are material to the law are mentioned. Extraneous facts that form the background are presented in another, usually earlier part of the opinion. The law (stated in the fourth sentence) was that decision bargaining is mandatory when the reason for contracting out is labor costs. Although the first part of the Union's Opportunity Passage included the adjudicative facts that were material to the rule (Fibreboard contracted out bargaining unit work due to labor costs and did not bargain over the decision with the Steelworkers), the passage also included additional facts that were not material to the rule (Fibreboard had reduced labor costs in bargaining with its other unions and, therefore, the company recognized that collective bargaining was appropriate for reducing labor costs; but the company had failed to reduce labor costs in bargaining with the Steelworkers).

On the other hand, a substantive consideration suggests that the Chief Justice did intend the passage to apply law to fact. The fifth sentence, a quotation from Judge Burger's opinion in the Court of Appeals, may have been application of law to fact: "[i]t is not necessary that it be likely or probable that the union will yield or supply a feasible solution but rather that the union be afforded an opportunity to meet management's legitimate complaints that its maintenance was unduly costly." The last five words may indicate that the sentence specifically addressed Fibreboard's duty to bargain with the Steelworkers over the contracting out of maintenance.<sup>294</sup>

The Union's Opportunity Passage did not comprise legislative facts in support of Rule B(2), nor did the passage comprise adjudicative facts that exemplified the benefits of the rule. The passage might or might not have been application of law to fact. If it were application of law to fact, the passage was coherent; if not, it made no sense. We prefer to conclude that it was coherent. As application of law to fact, the passage adopted Rule D(2) (the appropriate standard requires decision bargaining in this case).

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294. See *supra* text following n. 219 (beginning, "The second interpretation . . .").

Application of law to fact operates at a low level of abstraction because it applies only to the parties and the transactions in the case at bar.

The Labor Costs Passage stated facts at a high level of abstraction, addressing Issue B. The Management Prerogatives Passage stated facts at a low level of abstraction and therefore addressed Issue C, implying a rule that combined Rules C(2) and (3) (decision bargaining is required if the employer wants to replace bargaining unit employees with contracted workers and bargaining would not infringe management prerogatives). The Union's Opportunity Passage applied law to fact; the standard was Rule C(2) (labor costs motivated the contracting out). Attorneys in subsequent cases, whether advocating a broad scope of decision bargaining or a narrow scope, would find ample support in these passages for conflicting arguments as to which issue the Court addressed and how it decided the issue.

It seems fitting, then, that the opening paragraph of Chief Justice Warren's opinion clearly stated the issue at a high level of abstraction ("The primary issue is whether the 'contracting out' of work being performed by employees in the bargaining unit is a statutory subject of collective bargaining. . ."<sup>295</sup>) and the closing paragraph of his discussion of contracting out just as clearly resolved the issue at a low level of abstraction:

We are thus not expanding the scope of mandatory bargaining to hold, as we do now, that the type of "contracting out" involved in this case—the replacement of employees in the existing bargaining unit with those of an independent contractor to do the same work under similar conditions of employment—is a statutory subject of collective bargaining under § 8(d). Our decision need not and does not encompass other forms of "contracting out" or "subcontracting" which arise daily in our complex economy.<sup>296</sup>

This paragraph, also perhaps a consequence of the criticism that Justice Stewart leveled at the majority, resolved Issue C with Rule C(1), the standard at the lowest level of abstraction. We will call such contracting out the "Fibreboard Model."

What is a reader to make of section I of the Court's opinion in *Fibreboard*? In the first part of the opinion, Chief Justice Warren framed the issue at a high level of abstraction, promising to resolve Issue B. In the second part of the opinion, he moved down the abstraction ladder, albeit not steadily, and ended by framing the issue in the case at a lower level of abstraction, Issue C. Is it possible that he intended the four arguments in the first part of the section to justify the standard in the second part? The possibility seems unlikely. It is true that he might have thought that

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295. *Fibreboard*, 379 U.S. at 204–05.

296. *Id.* at 215.

bargaining over the Fiberboard Model, although it would probably be infrequent, would contribute to labor peace. But when he argued that contracting out fell well within the literal meaning of the phrase “terms and conditions of employment,”<sup>297</sup> he could not have expected a reader to think that he was referring only to the Fibreboard Model. Also, the lesson from industrial experience about the success of bargaining over contracting out was certainly not limited to the Fibreboard Model, and not *Oliver* nor *Timken Roller Bearing* nor *Town & Country* involved that model. We are left wondering whether Chief Justice Warren lacked a working understanding of the principles of levels of abstraction. Did he understand them, but lose focus, perhaps misled by the briefs of the parties? Did he revise his opinion hastily in response to Justice Stewart’s forcible concurring opinion? Whatever the explanation, the ambiguity of his opinion was likely to cause problems in the future for judges and attorneys, unions and employers.

#### 4. Justice Stewart’s Concurring Opinion

Justice Stuart recognized this problem and, joined by Justices John Marshall Harlan and William Orville Douglas, filed a concurring opinion.<sup>298</sup> Justice Stewart wrote, “The Court purports to limit its decision to ‘the facts of this case.’ But the Court’s opinion radiates implications of such disturbing breadth that I am persuaded to file this separate statement of my own views.”<sup>299</sup> He immediately made clear his belief that the Court did not adopt Rule C(3): “The Court most assuredly does not decide that every managerial decision which necessarily terminates an individual’s employment is subject to the duty to bargain.”<sup>300</sup> He continued that the Court did not adopt Rule B(2): “Nor does the Court decide that subcontracting decisions are as a general matter subject to that duty.”<sup>301</sup> Instead, he concluded the Court adopted Rule C(1), and in that decision he concurred:

The question posed is whether the particular decision sought to be made unilaterally by the employer in this case is a subject of mandatory collective bargaining within the statutory phrase “terms and conditions of employment.” That is all the Court decides. . . . Within the narrow limits implicit in the specific facts of this case, I agree with the Court’s decision.”<sup>302</sup>

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297. *Id.* at 210.

298. *Id.* at 217–18 (Stewart, J., concurring).

299. *Id.*

300. *Id.* at 218.

301. *Id.*

302. *Id.* (footnote omitted).

Justice Stewart proceeded to state the facts of the case.<sup>303</sup> Fibreboard's maintenance employees were represented by the Steelworkers.<sup>304</sup> The company determined that it could effect substantial savings annually by contracting out the maintenance work because the contractor would eliminate fringe benefits, adjust work schedules, and enforce stricter work quotas.<sup>305</sup> The company signed a contract with Fluor and refused to discuss the decision with the union.<sup>306</sup> Thereafter, Fluor's employees, ultimately supervised by Fibreboard's managers, performed the maintenance and functioned "as an integral part of the company."<sup>307</sup> Fluor received a fixed monthly fee plus reimbursement for the cost of maintenance.<sup>308</sup> All these facts were adjudicative, pertinent only to the case at bar and, therefore, only to Rule C(1).

Then Justice Stewart directed two criticisms at the Chief Justice's opinion. They provide us an opportunity to state another principle of levels of abstraction:

*Principle 9*

A reply to an argument (including criticism of the argument, a counter-argument, and so forth) should operate on the same level of abstraction as the argument, or an explanation should be provided.

How often we encounter a reply that does not seem to meet the argument squarely! Many times, the reason is the argument and the reply operate on different levels of abstraction and leave us puzzled. Suppose, for example, a critic of capital punishment argues that capital punishment is bad because it is murder by the state. An advocate of capital punishment replies that capital punishment is good because it deters crime. The argument and the reply do not respond to one another, nor do they join an issue, because they operate on different levels of abstraction. The critic's argument seeks to define the crime and, therefore, functions at a higher level of abstraction than the advocate's reply, which assumes a (different) definition of the crime and pertains to its likelihood. A more effective argument for the critic would make clear the argument and reply operate on different levels and address different issues. Such an argument might say that the question is not whether capital punishment deters crime; the question is whether capital punishment itself is a crime. Murder is the crime of intentionally taking a human life,

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303. *Id.*

304. *Id.* at 218–19.

305. *Id.* at 219.

306. *Id.*

307. *Id.*

308. *Id.*

whoever the agent is. Execution by the state is the intentional taking of a human life and, therefore, is the crime of murder. A crime, most especially murder, cannot be justified by its consequences. It follows that, even if capital punishment deters crime, it is itself a crime.

Justice Stewart's first criticism of Chief Justice Warren's opinion was a model of courtesy among colleagues:

data showing that many labor contracts refer to subcontracting or that subcontracting grievances are frequently referred to arbitrators under collective bargaining agreements, while not wholly irrelevant, do not have much real bearing, for such data may indicate no more than that the parties have often considered it mutually advantageous to bargain over these issues on a permissive basis.<sup>309</sup>

The facts in this passage were simple; but to understand and evaluate Justice Stewart's argument, we need to identify the background of law that he accepted, the inference he drew from the facts, and the standard that guided him.

The background comprised two principles which Justice Stewart accepted. The first principle was Rule A(1), which distinguished between mandatory and permissible subjects of bargaining.<sup>310</sup> Without this principle, that is, if Rule A(2) obtained, any lawful subject on which a party wished to bargain would be mandatory. The second principle was that industrial experience properly plays some role in defining the scope of the duty to bargain.<sup>311</sup> Without this principle, the usual tools of statutory interpretation would control (text, purpose of the statute, and so on) and industrial experience would be irrelevant.<sup>312</sup>

At this point, the question became, what is the proper role for industrial experience to play? What is the standard? Justice Stewart did not specify it,

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309. *Id.* at 220.

310. *Id.* at 219 n. 2 (citations omitted) ("There was a time when one might have taken the view that the National Labor Relations Act gave the Board and the courts no power to determine the subjects about which the parties must bargain—a view expressed by Senator Walsh when he said that public concern ends at the bargaining room door. But too much law has been built upon a contrary assumption for this view any longer to prevail, and I question neither the power of the Court to decide this issue nor the propriety of its doing so.")

311. *Id.* at 220 ("[I]ndustrial experience may be useful in determining the proper scope of the duty to bargain.")

312. Justice Stewart did not accept these principles wholeheartedly. His statement quoted above in n. 312 (beginning, "There was a time . . .") expressed the view that, as the Labor Act was originally conceived, the choice of the subjects of bargaining should belong entirely to the parties. This statement was unnecessary to his argument and suggested sympathy with the original view. And although he acknowledged the Court's precedent allowing industrial experience to play a role in defining the scope of the duty to bargain, he defined that role in a way that it became meaningless, as we show in the following text.

but he stated facts and drew an inference from them, thereby allowing us to identify his standard. The facts were that labor agreements in America often cover contracting out and that the parties to those agreements take grievances over contracting out to arbitration. He inferred from these facts that the Court could not know the parties' opinions on whether contracting out was a mandatory or a permissible subject of bargaining, and this inference was correct.<sup>313</sup> Why did Justice Stewart draw the inference? He must have thought that the parties' opinions were pertinent to his standard for using industrial experience in construing the duty to bargain, and so we can use the inference to identify his standard. The data on collective bargaining were unhelpful, he wrote, because they did not reveal the parties' opinions of the proper classification of contracting out.<sup>314</sup> It follows that if the data *did* reveal the parties' opinions, it would help the Court classify the topic—else why mention that we cannot know their opinions? Now we know Justice Stewart's standard. The role that industrial experience plays in classifying a topic as mandatory or permissible is that the experience can reveal the parties' opinions of the proper classification of the topic. As it happened, the evidence in the case at bar did not reveal the parties' opinions on decision bargaining.

We are not convinced by Justice Stewart's first criticism of Chief Justice Warren's opinion.<sup>315</sup> Nonetheless, the criticism operated on the right

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313. *Id.* at 221. The basis of this inference may have run along the following lines: The parties bargained over contracting out because one of them raised the topic. The one who raised the topic either thought it was a mandatory subject or thought it was a permissible subject. Either way, this party must have thought that bargaining over the topic would be advantageous; otherwise, the party would not have raised the topic. The counterparty agreed to bargain over the topic either in the belief that it was a permissible subject over which bargaining would be advantageous, or in the belief that it was a mandatory subject over which bargaining was required regardless of whether it seemed advantageous. Thus, both parties might have thought that contracting out was a mandatory subject; both might have thought that contracting out was a permissible subject over which bargaining would be advantageous; or the parties might have disagreed on the legal classification of contracting out and the advantageousness of bargaining over it. Accordingly, we cannot know from their behavior their opinion on the legal classification of contracting out as a subject of bargaining.

314. *Id.* at 220.

315. We find the criticism unconvincing for two reasons. First, Justice Stewart's standard was hollow. His inference that industrial experience could not reveal the parties' opinion about how contracting out should be classified would be equally true of any other topic which the Labor Board and courts have not definitively classified. When parties bargain over such a topic, they always believe it is mandatory or permissible, and we can never know, merely from the fact that they bargain over a topic, into which category they believe the topic falls. The result is that, although Justice Stewart conceded that industrial experience properly plays some role in defining the scope of the duty to bargain, in his view, as a practical matter, a tribunal could never use that experience.

Second, even if we could know the parties' view on whether decision bargaining is a mandatory or a permissible subject of bargaining, that view would be of little moment. The opinions of lay persons on a legal question, even lay persons with substantial experience in the field, are rarely influential in court. At least in the field of labor law, lay persons' opinions on legal questions are probably governed by their lawyers' opinions, not the lay persons' own legal analysis. The opinions of lawyers are the opinions of advocates for their clients and are far from impartial. Therefore, even

level of abstraction. The issue was whether industrial data on the extent of bargaining over contracting out were helpful in classifying it as a mandatory or a permissible subject, that is, in choosing between Rules D(1) and D(2). The data were at the appropriate level of abstraction because they applied to

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if knowledge of the parties' view on this legal question could have been inferred from industrial experience, that view would not have mattered.

What, then, is the proper role for industrial experience in delimiting the duty to bargain? Our answer begins with two practical considerations. First, the issue arises only when the Labor Board and courts have not yet decided whether a topic is mandatory or permissible. Second, parties bargain when they believe that bargaining serves their interests. With these considerations in mind, we can see that a party will lay a topic on the table only if the party believes that bargaining over it would be advantageous. If the party believes the topic will be classified as permissible, the party is free to ignore it and, therefore, will raise it only in the belief that bargaining over it would be advantageous. The same is true if the party believes the topic will be classified as mandatory: not every mandatory subject must be (or could be) discussed, and why raise a topic that would be disadvantageous? A counterparty will pick up the topic from the table if the counterparty also believes that bargaining would be advantageous, again regardless of whether the counterparty believes the topic will be classified as mandatory or permissible. But if the counterparty believes that bargaining would not be advantageous, the counterparty will not pick up the topic. Instead, the counterparty will decline to bargain and leave it to the other party to file an unfair labor practice charge. The counterparty knows that the tribunals may well find the topic to be permissible, in which event the counterparty had the right to decline to bargain. The counterparty also knows that the tribunals may find the topic to be mandatory, in which event the counterparty will have to bargain—but only after two or more years have elapsed while the case proceeds through the tribunals. Thus, although we may not know whether the parties believe an unclassified topic is mandatory or permissible, we do know that, if they bargain over it, they believe that the bargaining advances their interests.

This knowledge bears heavily on how a topic should be classified. We hold that a topic should be classified as mandatory if bargaining over it would serve the goal of the Labor Act, which, per § 1 of the Act, is to promote efficiency, safety, and stability in labor relations. Parties are in the best position to know what is good for themselves. Their good ultimately coincides with the goal of the Act; they too want efficiency, safety, and stable labor relations. Therefore, their views of what promotes their own good reveal a great deal about what actually promotes the goal of the Act. If they believe that bargaining over a topic is valuable, it probably is. Unless it is clear beyond peradventure that a topic is mandatory (e.g., wages) or permissible (e.g., managers' salaries), industrial experience should play a major role in determining whether a topic is mandatory or permissible.

Justice Stewart evidently believed that whether decision bargaining was a mandatory or permissible subject of bargaining was a purely legal question. He was mistaken. The issue was debatable, and its resolution should have been informed by industrial experience.

Chief Justice Warren held the better view:

Industrial experience is not only reflective of the interests of labor and management in the subject matter but is also indicative of the amenability of such subjects to the collective bargaining process. Experience illustrates that contracting out in one form or another has been brought, widely and successfully, within the collective bargaining framework.

*Id.* at 211.

Nevertheless, although Chief Justice Warren's view was consistent with ours, he erred in applying it because he lacked findings of legislative facts (the extent and success of bargaining over contracting out) which were not proved by evidence in the record of the case. *See supra* text following n. 277 (beginning, "The third argument examined . . .").

parties across the country, not merely to Fibreboard and the Steelworkers.<sup>316</sup> Similarly, Justice Stewart's criticism of these data was at the appropriate level of abstraction. He criticized them for failing to reveal the opinion of the parties across the country on how to classify contracting out; he did not criticize the data for failing to reveal the opinions of Fibreboard and the Steelworkers.

Justice Stewart's second criticism of the Chief Justice's opinion also operated on the correct level of abstraction. After commenting on the uselessness of the data on industrial experience, Justice Stewart wrote, "In any event, the ultimate question is the scope of the duty to bargain defined by the statutory language,"<sup>317</sup> implying that even if the industrial data did reveal something worth knowing, the intent of Congress was controlling. He proceeded to employ conventional tools of statutory construction. He began by reviewing the text and legislative history of section 8(d).<sup>318</sup> The central point was, "the words of the statute are words of limitation."<sup>319</sup> The Labor Act of 1935 had not defined the duty to bargain.<sup>320</sup> The House bill to amend the Act in 1947 contained a list that named the subjects of the duty and excluded all others.<sup>321</sup> Contracting out was not named and, therefore, would have been excluded if the House bill had been enacted.<sup>322</sup> But the Senate bill was enacted, and it contained the present text of section 8(d).<sup>323</sup> Although the Senate version was not so stringent as the House version, both versions adopted the same approach, creating a limited class of mandatory subjects.<sup>324</sup>

Justice Stewart acknowledged that the phrase "conditions of employment" could be interpreted to require bargaining over any subject that affects whether employment will be continued (shades of Rule C(3)), and stated that passages in Chief Justice Warren's opinion suggested such an extreme interpretation.<sup>325</sup> But on this interpretation, Justice Stewart argued, any subject would be mandatory.<sup>326</sup> Only a narrower interpretation would

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316. *Id.* at 211 n. 6. Although we have argued that Chief Justice Warren should not have relied on data that were untested in the adversarial process, *see supra* text following n. 277 (beginning, "The third argument examined . . ."), here we assume *arguendo* that the data were true.

317. *Id.* at 220 (Stewart, J., concurring).

318. *Id.*

319. *Id.*

320. *Id.*

321. *Id.* at 220 n. 4.

322. *Id.* at 220–21.

323. *Id.*

324. *Id.* The General Counsel had cited this same legislative history for the opposite conclusion, namely, that the terms and conditions of employment are any provisions about which either party may wish to bargain, *see supra* text accompanying n. 239 (beginning, "In his first argument following . . ."), and we sensed that Justice Stewart was sympathetic to this argument, *see supra* n. 313.

325. *Id.* at 221.

326. *Id.*

serve the statutory purpose of creating a limited class of mandatory subjects, and seven Circuit Courts of Appeals had taken this position.<sup>327</sup>

Justice Stewart continued that although the Chief Justice seemed to argue that recognizing contracting out as a mandatory subject would promote industrial peace, this argument failed to take into account that, even if decision bargaining were not mandatory, it would still be permissible and parties could bargain about it if they wished.<sup>328</sup> Also, Justice Stewart mentioned that economic weapons may be used to force concessions only regarding mandatory subjects.<sup>329</sup> Thus (we complete his argument) classifying contracting out as a permissible subject would promote industrial peace by allowing parties to bargain over contracting out while outlawing strikes over it.<sup>330</sup>

Justice Stewart added that, in common parlance, “conditions of employment” include the physical work environment, the hours of work and the amount of work expected, and safety practices, as well as even less tangible things such as employment security, which includes freedom from discriminatory discharge and seniority rights.<sup>331</sup> But not every management decision that affects employment security is a mandatory subject of bargaining. Advertising, product design, financing, and sales all bear on employment security, yet none is a mandatory subject, even though decisions regarding them can eliminate jobs.<sup>332</sup> Consider, for example, a decision to invest in labor-saving machinery, or a decision to go out of business.<sup>333</sup>

Nothing the Court holds today should be understood as imposing a duty to bargain collectively regarding such managerial decisions, which lie at the core of entrepreneurial control. Decisions concerning the commitment of investment capital and the basic scope of the enterprise are not in themselves primarily about conditions of employment, though the effect of the decision may be necessarily to terminate employment.<sup>334</sup>

Justice Stewart pitched his second criticism of the Chief Justice’s opinion, like the first criticism, at the appropriate level of abstraction. His goal was to explicate the meaning of section 8(d), which defined the duty to

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327. *Id.* at 221–22.

328. *Id.* at 221 n. 6.

329. *Id.*

330. *Id.* The argument based on industrial peace as an end is dangerous because it can be used to justify restricting almost any union behavior. The argument is constrained, however, by § 1 of the Act, which states that the means to this end is “encouraging the practice and procedure of collective bargaining.” Justice Stewart may have lost sight of this constraint.

331. *Id.* at 222.

332. *Id.* at 223.

333. *Id.* at 222–23.

334. *Id.* at 223.

bargain. This section applied to all employers and all unions covered by the Labor Act, and so his arguments about the meaning of the section should have been cast at a high level of abstraction—and they were. The legislative history revealed the intent of Congress, which applies to all parties and transactions. So did the meaning of terms in the statute, such as “conditions of employment,” and the effect on industrial peace of classifying contracting out as a permissible subject.

Then, Justice Stewart applied the foregoing principles to the case at bar. Contracting out, he wrote, as a general matter is not a condition of employment, as four Circuit Courts had held.<sup>335</sup> Nonetheless, the facts of the case at bar constituted a narrow exception. Fibreboard had a duty to bargain over its contracting out because

all that is involved is the substitution of one group of employees for another to perform the same task in the same plant under the ultimate control of the same employer. The question whether the employer may discharge one group of employees and substitute another for them is closely analogous to many other situations within the traditional framework of collective bargaining. Compulsory retirement, layoffs according to seniority, assignment of work among potentially eligible groups within the plant— all involve similar questions of discharge and work assignment, and all have been recognized as subjects of compulsory collective bargaining.<sup>336</sup>

The case at bar, in Justice Stewart’s view, was analytically similar to one in which an employer discharges all employees and replaces them with employees willing to do the same jobs in the same plant but without fringe benefits of the sort that were so costly to Fibreboard.<sup>337</sup> Such a case could be regarded either as discrimination in violation of section 8(a)(3) or as unilateral action in violation of section 8(a)(5).<sup>338</sup> Similarly, if Fibreboard had engaged in decision bargaining with the Steelworkers, the negotiations would not have concerned entrepreneurial questions about the basic scope of the enterprise, such as what should be produced or how capital should be invested.<sup>339</sup> Rather, the negotiations would have concerned labor costs, which were Fibreboard’s motivation.<sup>340</sup> By frustrating bargaining over this mandatory subject, Fibreboard violated section 8(a)(5).<sup>341</sup>

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335. *Id.* at 224 n. 11.

336. *Id.* at 224 (footnote omitted).

337. *Id.*

338. *Id.*

339. *Id.* at 225.

340. *Id.*

341. *Id.* at 224–25.

Justice Stewart advocated Rule C(1) and applied it to the facts of the case to reach Rule D(2). Application of law to fact turns on adjudicative facts and operates on a low level of abstraction. Justice Stewart used the adjudicative facts of the case before him. Not all or even many employers, but this very employer discharged its employees and contracted for other employees to perform the same work in the same place for lesser compensation. If this employer had bargained with the union, the issue would have been labor costs. Thus, Justice Stewart's application of law to fact operated on the correct level of abstraction.

Justice Stewart adhered rigorously to the principles of levels of abstraction. He addressed the issue at the lowest level of abstraction that could do justice in the case. Every fact and argument he presented matched the level of the issue to which they were addressed, and the rules that resolved the issues matched the levels of those issues. Thus, his opinion stands as a model of how to frame an issue at the correct level of abstraction, to present arguments that are on the same level as the issue, and to resolve the issue with a rule on the same level as the issue and arguments. The reader should not be surprised to learn that the opinion of Justice Stewart in *Fibreboard*, and not the opinion of the Chief Justice, has influenced the subsequent development of the law.<sup>342</sup>

We reach the final principle of levels of abstraction that we shall discuss:

*Principle 14*

An issue or a case should be decided at the lowest reasonable level of abstraction.

Is there a level of abstraction at which an issue or a case ought to be resolved? If so, how can that level be determined?

The answer to the first question is yes, as four examples demonstrate. In the first example, two couples are searching for a house in the Los Angeles metropolitan area, in which neither has ever lived. One couple, *A* and *B*, talk with a real estate agent about the neighborhoods on which to focus. One of their criteria pertains to the school that their son would attend.

*A* says to the agent, "Our son has his own personality, and we want a school where he will fit in."

The agent replies, "I recommend Beverly Hills. It has the best schools in the area."

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342. See *NLRB v. First Nat'l Maint. Corp.*, 627 F.2d 596, 599 (1980) ("*Fibreboard* was expressly limited to its facts"); *id.* at 604 (Kearse, J., dissenting) ("the carefully limited decision in *Fibreboard*"); see also GORMAN, *supra* n. 10, at 511 ("Mr. Justice Stewart delivered a concurring opinion which has perhaps been more influential than the opinion of the Court.").

And *A* says, “Maybe so, but what we really need to know is what the children are like, what their values are. Are they open to strangers? How do they feel about disabilities?”

The agent has addressed *A*'s concern at too high a level of abstraction. A judgment as to the “best schools” is an overall assessment, based on numerous criteria, whereas *A* and *B* want to base their decision on a specific criterion.

The second couple, *C* and *D*, talk to the same real estate agent about neighborhoods. This couple has no children yet, but they are trying.

*C* says to the agent, “We want a house in a good school district.”

The agent replies, “I recommend Beverly Hills. It has the best schools in the area.”

And *C* says, “Good. Let's begin looking there.”

This time, the agent has addressed *C* and *D*'s concern at the appropriate level of abstraction. They cannot not base their choice on the particular characteristics of their children; they can only base their judgment on an overall assessment.

In the second example, *E* says to her child, *F*, “I can't find my bracelet. Do you know where it is?”

*F* replies, “It's in my room. I've been playing with it.”

*E* scolds, “I told you not to do that.”

*F* defends, “No, you didn't.”

And *E* says, “Yes, I did. When you took my ring last week, I told you not to play with my jewelry.”

Young children often think in specifics; they do not understand general statements. *F* understood her mother's injunction to apply only to the ring that *F* had taken. Instead of referring to jewelry, *E* ought to have named the items—rings, bracelets, necklaces—with which the child should not play.

In the third example, Gondwana has just seceded from Pangaea, and *G* and *H* are charged with writing a code of law for the new nation.

*G* says, “We need a law against stealing garden hoses and a law against stealing long johns and a law against—”

*H* replies, “That would be impracticable. We could never name every item that might be stolen. Better to outlaw stealing personalty.”

*G* has addressed the issue at too low a level of abstraction. A statute against theft need not specify every item that might be stolen. Reasonable adults understand that a law against stealing personalty comprehends stealing garden hoses and long johns and so forth.

The fourth example concerns polling prior to a presidential election. A newscaster says, “Candidate *X* trails candidate *Y* by 6 percentage points,” meaning that 47% of likely voters say they plan to vote for *X* and 53% say they plan to vote for *Y*. But this information operates on too high a level of abstraction. The president of the United States is elected, not by a majority

of all votes cast in the nation, but by weighted voting on a state-by-state basis in the Electoral College. The winner of the majority in a state receives the number of votes in the Electoral College equal to the number of the state's representatives and senators in Congress. Five times in American history, a candidate who has won the greater number of votes across the nation has lost the election in the Electoral College. In 2016, for example, Hillary Clinton received 48% of the national vote as compared to Donald Trump's 45.9%, but Mr. Trump won the election with 304 votes in the Electoral College as compared to Ms. Clinton's 227 votes.<sup>343</sup> The correct level of abstraction for polling results, therefore, is the state, not the nation. The newscaster should have said, "X leads Y by 4 percentage points in Alabama, trails Y by 2 percentage points in Arkansas [and so on]" or "A majority of voters in states with 291 votes in the Electoral College favor X and a majority in states with 246 favor Y."

Thus, a correct level of abstraction exists on which to address some issues. The second question is more difficult. The correct level of abstraction in the foregoing examples was readily determined from the parties' purposes, and purpose may similarly guide a tribunal with respect to appropriate evidence. But issues vary. We know from Principle 4 that the level of abstraction of an issue can affect its outcome.<sup>344</sup> An advocate may frame an issue at a particular level of abstraction because of the desired outcome, but a tribunal must be neutral. A tribunal should reason to an outcome, not choose an outcome and frame the issue at the level of abstraction that makes that outcome appealing.<sup>345</sup> Accordingly, considerations more general than specific purposes—that is to say, principles—should guide a tribunal as it chooses the level of abstraction of an issue.

What are those principles? Our answer, on which we have reflected for years but which must still be considered tentative, follows from the values of liberty, justice, and prudence. As an initial proposition, more liberty is better than less. Sometimes, however, liberty allows injustice. Laws may restrict liberty in the name of justice, but such restrictions should never be greater than necessary to serve the ends of justice. Thus, a balance between liberty and justice must be struck. Striking that balance requires wisdom. The

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343. *Clinton Wins Popular Vote by Nearly 2.9 Million*, CHI. TRIBUNE, Dec. 22, 2016, 12:47 PM, <http://www.chicagotribune.com/news/nationworld/politics/ct-clinton-popular-vote-20161222-story.html>.

344. See *supra* text following n. 224 (beginning, "The level of abstraction of an issue . . .").

345. We suspect that tribunals are commonly unaware of the connection between the level of abstraction of an issue and its outcome. They may well be unaware that they desire a particular outcome. We believe a tribunal chooses to frame an issue at a particular level of abstraction because the choice seems "right" or "natural," and the tribunal does not feel that its neutrality has been compromised. We suggest that the level may feel right because the tribunal desires the outcome to which the level conduces.

wisdom of a tribunal is limited. Prudence, therefore, dictates that tribunals should make new laws with the greatest of caution.

Liberty, justice, and prudence lead to the following general principles. A decision at a lower level of abstraction will restrict the liberty of fewer parties in fewer transactions than a decision at a higher level. Therefore, presumptively, an issue should be decided at the lowest reasonable level of abstraction. However, although deciding issues at a low level may do justice between the parties, litigation is costly and, in many cases, predictability of outcome serves parties' interests satisfactorily.<sup>346</sup> Accordingly, at some point an issue should be settled at a high level of abstraction. Nonetheless, a tribunal should take this step hesitantly because the more the experience of similar transactions with which a tribunal is familiar, the more the arguments of interested parties by which a tribunal is informed, and the more the reasoning of other tribunals which is available for study, the wiser a law will be.

Now let us apply these principles. If the parties to a case frame the issue at a low level of abstraction, the tribunal should resolve the issue at that level. This proposition does not require that the parties agree on what the issue is, but only that their issues operate on the same level of abstraction. This proposition seems uncontroversial. In a judicial system in which the jurisdiction of tribunals is generally limited to cases and controversies, a tribunal should not manufacture issues.

If the parties to a case frame the issue at a high level of abstraction, and resolution of the dispute at a lower level is not reasonable, the tribunal may resolve the issue at a high level—provided, of course, that the relevant legislative facts are proved in the record. (If the legislative facts are not proved satisfactorily, the tribunal should either dismiss the case or instruct the parties to present additional evidence.) For example, in *Railroad Telegraphers* the issue was whether federal courts had jurisdiction to hear the case, which depended on whether the railroad's decision to close stations was a bargainable issue under the Railway Labor Act.<sup>347</sup> The issue operated at a high level of abstraction because whether the partial closing of a business was bargainable applied to all employers and unions covered by the Railway Labor Act. A decision at a lower level of abstraction would not have settled the dispute, and the Supreme Court properly resolved the issue with arguments based on two legislative facts, the intent of Congress, and practices in the industry.

Nonetheless, a judicious tribunal should normally seek a way to decide a case at the lowest level of abstraction possible in order to minimize judicial

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346. "[I]n most matters, it is more important that the applicable rule of law be settled than that it be settled right." *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (Brandeis, J., dissenting).

347. *Order of R.R. Telegraphers v. Chicago & Nw. Ry. Co.*, 362 U.S. 330 (1960).

law making. Accordingly, even though the parties desire a decision at a high level of abstraction, the tribunal must be free to decide the issue at a lower level if such a decision would resolve the dispute. In the event of such a decision, the tribunal should inform the parties of its intent and allow them to present evidence and arguments on the issue which the tribunal intends to address, remanding the case to a lower tribunal if appropriate.

Sometimes both parties frame and address an issue at two levels of abstraction. Typically, the parties present the issues in the alternative, as in *Town & Country*, in which the issue was either, did the employer contract out the hauling of its mobile homes out of anti-union animus, or, do employers have a duty to bargain over the contracting out of bargaining unit work? The Labor Board ruled on both issues, answering both questions yes.<sup>348</sup> The latter answer operated on a high level of abstraction, overruling *Fibreboard-I*. The former answer operated on a low level of abstraction because the ruling turned on the adjudicative fact of the company's motivation, which involved only these two parties and one transaction between them. This answer sufficed to provide relief for the employees and the union, and the Board did not need to rule on whether the Labor Act requires decision bargaining for all employers and unions. Accordingly, we believe that Member Leedom, who concurred in the finding that the company had acted out of anti-union animus, was right to dissent from the unnecessary overruling of *Fibreboard-I*; and the Fifth Circuit, which enforced the Board's order on the basis of anti-union animus, wisely pretermitted deciding whether the Act requires decision bargaining.

Similarly, Justice Stewart honored this principle in his concurring opinion in *Fibreboard* (though his motivation was apparently not judicial restraint, but distaste for a rule requiring decision bargaining in all cases). His opinion in *Fibreboard* demonstrates that justice between the parties could have been done at a low level of abstraction. The issue between the company and the union was the cost of labor; the company contracted out the maintenance work in order to reduce that cost. The cost of labor is surely one of the oldest issues in American labor relations.<sup>349</sup> Also, the nature of the work and the place it was performed did not change; the contracted workers essentially stepped into the shoes of the laid off employees. Thus, *Fibreboard's* action was similar to the unfair labor practice of replacing union workers with non-union workers at lesser pay without bargaining with the union. The Labor Board and the courts could have held that decision bargaining is required over contracting out when the employer's motivation

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348. *Town & Country* is discussed *supra* following n. 150.

349. See, for example, the Philadelphia Cordwainers case (1806), 3 COMMONS AND GILMORE, A DOCUMENTARY HISTORY OF AMERICAN INDUSTRIAL SOCIETY 55 (society of bootmakers held guilty of criminal conspiracy for refusing to work in the same shop as bootmakers who accepted less than the scale of prices set by the society).

is to reduce labor costs and the contracted workers perform the same work in the same place as the displaced employees, and left other cases for another day. Such a holding would have provided complete relief for the Steelworkers and the maintenance employees, and Justice Stewart concurred in the judgment of the Court on this basis.<sup>350</sup>

Not infrequently, the parties disagree about the issue in a case. When the competing statements of the issue operate on different levels of abstraction, the tribunal should decide the case on the lowest level that will resolve the dispute, giving the parties sufficient notice that they can offer appropriate evidence and arguments.

Cases arise, of course, in which the parties state the issue and present evidence and arguments at a low level of abstraction, but the tribunal is unsatisfied with the rule of law and wants to announce a new rule, that is, move the issue to a higher level of abstraction. The tribunal should stay its hand. The parties are content with the existing rule, and they have not presented, and probably are not prepared to present, legislative facts or arguments that would inform the court concerning another rule.

We recognize, however, that a tribunal may feel a pressing need to resolve an issue at a high level of abstraction. In this event, even though the dispute could be decided at a low level, the tribunal may decide the issue at a high level, provided that the tribunal informs the parties of its intent, all parties are willing and able, and given adequate time, to address the issue at a high level, and the tribunal's opinion explains the reason why a decision at a lower level would be unsatisfactory. Often the explanation will be a justification for a new rule of law, and the justification will rest on legislative facts (which should be evidence in the record of the case). This step should not be taken lightly or frequently.

### III. CONCLUSION

The purpose of this article has been to apply the concept of levels of abstraction to a number of aspects of legal argumentation. We have sought to draw attention to these aspects, to provide a vocabulary for discussing and clarifying them, and, in the context of evaluating a number of opinions of tribunals, to derive principles that will improve argumentation.

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350. We must resist speculating on how Justice Stewart would have reacted if the General Counsel and the Steelworkers had framed the issue as whether decision bargaining is required when labor costs motivate the contracting out, and if Chief Justice Warren had answered yes. Rule C(2) is so much narrower than Rule B(2) (operates at such a lower level of abstraction) that Justice Stewart might have not felt the need to write separately. But we will speculate that, if the majority of the Court had adopted Rule C(2), Justice Stewart's opinion would have had less effect, and decision bargaining over labor costs might be required today.

We believe that other useful applications the concept of levels of abstraction may exist, and we trust that other students of the law will discover them. For example, this article has not addressed absolute levels of abstraction, that is, the level of abstraction of an issue and its resolution as compared to the levels in all possible cases. Absolute levels, however, may merit study. For instance, whether an issue should be assigned to a judge or a jury is commonly determined by applying the distinction between issues of law and issues of application of law to fact. Yet this distinction is notoriously problematic. The level of abstraction of an issue is perhaps a better way to assign the case, an issue at a high level to the judge and an issue at a low level to the jury.