

COMMENT

SECURING WORKERS' FUTURES: WHY REPLACING UNION WORKERS WITH ARTIFICIAL INTELLIGENCE IN CREATIVE PROFESSIONS IS THE NEW SUBCONTRACTING

KATHERINE J. KYRIAKOUCES*

Artificial intelligence poses a significant threat to unionized professionals in creative industries, particularly as employers may be tempted to replace unionized workforces with artificial intelligence. However, Supreme Court precedent and the National Labor Relations Act paves a path forward for unionized workers in creative fields to safeguard themselves from job displacement through collective bargaining.

*This Comment argues that replacing a unionized workforce with artificial intelligence is analogous to subcontracting under *Fibreboard Paper Products Co. v. NLRB*, *First National Maintenance Corp. v. NLRB*, and congressional intent behind the National Labor Relations Act. Consequently, artificial intelligence should be a mandatory subject of collective bargaining because it directly affects workers' "terms and conditions of employment." Applying *Fibreboard*, requiring employers and employees to bargain over artificial intelligence use would not "significantly abridge" an employer's ability to operate its business nor alter the basic scope of the business. Moreover, as*

* Junior Staffer, *American University Law Review*, Volume 73; J.D. Candidate, May 2025, *American University Washington College of Law*; B.A., Political Science, May 2019, *University of North Carolina at Chapel Hill*. Thank you to my faculty advisor, Professor Michael Gan, and the entire *American University Law Review* staff for helping bring this piece to life.

suggested by First National, the decision to implement artificial intelligence is appropriately suited for resolution through collective bargaining. Ultimately, treating the replacement of union workers with artificial intelligence as a form of subcontracting aligns with the congressional intent and objectives behind the National Labor Relations Act.

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INTRODUCTION

In 2023, the Writers Guild of America (“WGA”) and the Screen Actors Guild and American Federation of Television and Radio Artists (“SAG-AFTRA”) went on strike together, exercising their labor rights in a historic action that shut down film and television production across Hollywood and the United States.¹ After sixty-three years, the 2023 double WGA and SAG-AFTRA strike was only the second time that the two unions had participated in a strike together.²

While it is uncommon for the WGA and SAG-AFTRA to strike simultaneously, strikes have helped professionals in the industry secure better working conditions while adapting to new technologies.³ In 1960, during the emergence of the television era, SAG (before its merger with AFTRA) and WGA went on a double strike demanding better compensation for residuals for films and shows sold to television

1. Megan McCluskey, *What Happened the Last Time SAG and the WGA Went on Strike Together*, TIME (July 14, 2023, 4:10 PM), <https://time.com/6294777/sag-wga-strike-1960> [<https://perma.cc/JX46-N3T5>]. Since 1960, each union has independently gone on strike. *Id.* WGA went on strike from 2007 to 2008 over residual concerns for DVD and video-on-demand sales. Alan Sepinwall, *How the 2007–08 Writers’ Strike Changed ‘The Office’ and ‘Breaking Bad’*, ROLLING STONE (May 3, 2023), <https://www.rollingstone.com/tv-movies/tv-movie-features/writers-strike-2007-2008-wga-change-tv-breaking-bad-the-office-friday-night-lights-1234727839> [<https://perma.cc/TDE3-M4F2>]. In 2000, SAG-AFTRA unanimously voted to strike regarding compensation for commercials and advertisements. Dave McNary, *20 Years Later, Actors Wrestle with Legacy of Divisive Six-Month Commercials Strike*, VARIETY (Oct. 20, 2020, 11:01 AM), <https://variety.com/2020/tv/news/sag-aftra-strike-20-years-later-1234792060> [<https://perma.cc/R7DY-CQGF>]. See generally Mandalit del Barco, *Striking Movie and TV Writers Worry That They Will Be Replaced by AI*, NAT’L PUB. RADIO (May 20, 2023, 5:17 PM), <https://www.npr.org/2023/05/20/1177366800/striking-movie-and-tv-writers-worry-that-they-will-be-replaced-by-ai> [<https://perma.cc/QMV6-VZ88>] (noting lackluster wages and residuals from streaming platforms and the future impact of AI on the screenwriting process as the major concerns for the strike).

2. McCluskey, *supra* note 1.

3. Stephen R. Greenwald & Paula Landry, *It’s Not the First Time That Technology Has Upended Hollywood’s Business Model—but the WGA-SAG Strikes Could Be the Last Chance for Artists to Get Justice*, FORTUNE (Sept. 4, 2023, 12:17 PM), <https://fortune.com/2023/09/04/technology-hollywood-business-model-wga-sag-strikes-last-chance-for-artists-to-get-justice-entertainment-labor> [<https://perma.cc/VGH8-4YLH>].

networks, improved health care, and increased pension funds.⁴ SAG ended its strike after securing the right to “residuals [for] all films made from 1960” forward and a \$2.25 million pension and health payment for its members.⁵ WGA’s strike ended when it secured the first residuals for theatrical motion pictures and for domestic and foreign television reruns, a pension fund, and a health insurance plan for its members.⁶

During their most recent double strike in 2023, WGA and SAG-AFTRA again utilized the power of collective action after negotiations with the Alliance of Motion Picture and Television Producers (“AMPTP”) regarding their collective bargaining agreements stalled.⁷ A collective bargaining agreement is a legal contract that governs labor relations regarding wages, hours, and other terms and conditions of employment.⁸ AMPTP is the trade association⁹ that negotiates union contracts with WGA and SAG-AFTRA on behalf of large television and movie producers, including Netflix, Amazon, Apple, Disney, Warner Brothers, NBC Universal, Paramount, and Sony.¹⁰ WGA and AMPTP negotiated for six weeks over compensation and working conditions for WGA members before the WGA collective bargaining agreement expired.¹¹ Similarly, SAG-AFTRA negotiated with AMPTP for over four weeks and also failed to reach a mutual agreement on working conditions and compensation before the collective bargaining

4. McCluskey, *supra* note 1; Thomas Doherty, *The Last Time Actors and Writers Both Went on Strike: How Hollywood Ended the 1960 Crisis*, HOLLYWOOD REP. (July 18, 2023, 6:45 AM), <https://www.hollywoodreporter.com/business/business-news/sag-wga-1960-hollywood-strike-reagan-history-1235538551> [<https://perma.cc/PR9D-SPBT>].

5. McCluskey, *supra* note 1.

6. *Id.*

7. Alissa Wilkinson, *Hollywood’s Writers Are on Strike. Here’s Why That Matters.*, VOX (July 13, 2023, 4:16 PM), <https://www.vox.com/culture/23696617/writers-strike-wga-2023-explained-residuals-streaming-ai> [<https://perma.cc/PLD7-NY69>]; Letter from WGA Negotiating Committee to WGA Members (May 1, 2023) [hereinafter WGA Negotiating Committee Letter], <https://www.wgacontract2023.org/announcements/wga-on-strike> [<https://perma.cc/B5JJ-4EZ8>].

8. See generally NLRA §§ 1–19, 29 U.S.C. §§ 151–69 (creating the right to collectively bargain and establishing the NLRB).

9. A trade association is an organization comprised of individuals in a certain industry that work for the protection and advancement of their common industry interests. *Trade Association*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/trade%20association> [<https://perma.cc/K27T-KLH4>].

10. *Welcome*, ALL. MOTION PICTURE & TELEVISION PRODS., <https://www.amptp.org> [<https://perma.cc/S86U-GVUS>].

11. WGA Negotiating Committee Letter, *supra* note 7.

agreement expired, mainly due to insufficient artificial intelligence (AI) protections¹² and murky compensation models for video streaming.¹³ The double strike halted production and closed writers' rooms for at least forty television shows and twenty major motion pictures.¹⁴ Between the two unions, roughly 171,000 members went on strike without pay or work.¹⁵ These strikes cost approximately more than \$5 billion, particularly affecting California and New York, and resulted in roughly 45,000 jobs lost.¹⁶

12. AI refers to machines that can “think” autonomously by mirroring aspects of human cognition or characteristics. Ryan Calo, *Artificial Intelligence Policy: A Primer and Roadmap*, 51 U.C. DAVIS L. REV. 399, 404 (2017); Darrell M. West, *What is Artificial Intelligence?*, BROOKINGS INST. (Oct. 4, 2018), <https://www.brookings.edu/articles/what-is-artificial-intelligence> [<https://perma.cc/5PYP-CZLE>]. Generative AI can “learn” by being trained on certain data sets to produce content like to those data sets. Pauline T. Kim & Matthew T. Bodie, *Artificial Intelligence and the Challenges of Workplace Discrimination and Privacy*, 35 ABA J. LAB. & EMP. L. 289, 290 (2021). For the purposes of this Comment, AI means computer systems and algorithms that emulate human-level intelligence and thinking. See *infra* Section I.E. for an in-depth discussion on AI.

13. Letter from Fran Drescher, President, and Duncan Crabtree-Ireland, Nat'l Exec. Dir. & Chief Negot., SAG-AFTRA, to SAG-AFTRA Members (July 13, 2023), <https://www.sagaftra.org/message-sag-aftra-president-and-chief-negotiator> [<https://perma.cc/BCS3-DD7E>].

14. Jason P. Frank, The 2023 Hollywood Strike for Dummies, VULTURE (Nov. 9, 2023), <https://www.vulture.com/article/wga-strike-2023.html> [<https://perma.cc/9M2Y-PZWN>]; see Sonaiya Kelley, *All the Major Movies and TV Shows Delayed by the Strike*, L.A. TIMES (Oct. 23, 4:56 PM), <https://www.latimes.com/entertainment-arts/business/story/2023-09-19/tv-shows-movies-delayed-list-writers-strike-sag-aftra> [<https://perma.cc/74RX-A2RX>] (listing movies and television shows affected by the writers' strike).

15. See Lindsay Lowe & Anna Kaplan, *Hollywood Writers and Studios Have Struck a Tentative Deal. Is the Strike Ending?*, TODAY (Sept. 25, 2023, 8:36 AM), <https://www.today.com/news/hollywood-writers-strike-2023-explained-rcna83508> [<https://perma.cc/J5UU-ZLLA>] (noting that WGA and SAG-AFTRA have over 11,000 and 160,000 members, respectively); Jennifer Liu, *'Survival Jobs,' Ex-Careers and Side Hustles: How Hollywood Writers Are Making Ends Meet 100 Days into the Strike*, CNBC (Aug. 9, 2023, 4:47 PM), <https://www.cnbc.com/2023/08/09/how-hollywood-writers-make-ends-meet-100-days-into-the-writers-guild-strike.html> [<https://perma.cc/7U9H-L539>] (explaining that, to make ends meet during a strike, individuals may take up “survival jobs” including working as servers, retail associates, substitute teachers, and other gig economy roles).

16. Chris Isidore, *Writers Guild and Studio Bigwigs Make Progress to End Strike—but Don't Expect Filming to Resume*, CNN (Sept. 21, 2023, 12:56), <https://www.cnn.com/2023/09/21/business/writers-strike-negotiations/index.html> [<https://perma.cc/B763-8Z8Y>]; Alex Weprin, *Film and TV Business Has Lost 45K Jobs Since Labor Strikes Began, U.S. Labor Report Says*, HOLLYWOOD REP. (Oct. 6, 2023, 6:22 AM), <https://www.hollywoodreporter.com/business/business-news/wga-sag-strikes-film-tv-business-job-losses-september-1235610968> [<https://perma.cc/ABZ2-EJ58>].

Although many issues were on the table, two key problems related to technological developments in the industry were the basis for the strike: residuals from video streaming and AI use in media content development, particularly in the screenwriting process.¹⁷ WGA and SAG-AFTRA members shared interrelated concerns about AI minimizing or replacing the use of actors and writers in the television and film industries.¹⁸ Actors were concerned that AI could threaten acting roles by undermining their control over their image, voice, and likeness.¹⁹ Likewise, writers feared for their job security due to AI's ability to generate scripts based on writers' works.²⁰ A key goal of the WGA and SAG-AFTRA strikes was to secure collective bargaining agreements that would minimize the impact of rapidly improving AI on their job security.²¹ However, one important question must be thoroughly considered: How might unions leverage existing labor law to ensure that these issues are adequately addressed in the collective bargaining process?²²

Generally, employers and unions must bargain over subcontracting. Bargaining over subcontracting is triggered when an employer replaces a group of unionized workers with non-unionized workers to complete the same work under the control and supervision of the same

17. Frank, *supra* note 14.

18. See del Barco, *supra* note 1 (“TV writer Lanett Tachel said she’s worried studios will hire fewer writers to simply doctor up whatever the [AI] come[s] up with.”); *id.* (explaining that AI can create a script in the structure of a television show, though it lacked depth or nuance).

19. Letter from Jeffery Bennett, Gen. Couns., SAG-AFTRA, https://www.sagaftra.org/files/sa_documents/SAG-AFTRA%20AI%20Letter.pdf [<https://perma.cc/V6F2-66NU>].

20. Gene Maddaus, *WGA Would Allow Artificial Intelligence in Scriptwriting, As Long As Writers Maintain Credit*, VARIETY (Mar. 21, 2023, 7:41 PM), <https://variety.com/2023/biz/news/writers-guild-artificial-intelligence-proposal-1235560927> [<https://perma.cc/5T3Z-AQJC>]; see del Barco, *supra* note 1 (stating that WGA members do not want their work to be used to train AI).

21. See Maddaus, *supra* note 20 (noting that WGA members do not want AI to be considered a “writer” for compensation purposes).

22. See *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 209–10 (1964) (establishing subcontracting as a mandatory subject of bargaining).

employer.²³ The National Labor Relations Act (NLRA)²⁴ requires employers and unions to bargain over mandatory subjects of bargaining, which touch on wages, hours, and other terms and conditions of employment.²⁵ Since subcontracting affects an employee's "terms and conditions of employment," it is generally considered a mandatory subject of collective bargaining.²⁶ Refusal by either party to bargain over this practice is an unfair labor practice, in violation of the NLRA, and allows the aggrieved party to file an unfair labor practice charge with the National Labor Relations Board (NLRB).²⁷ Might that same theory be utilized to require employers and unions to bargain over the implementation of AI when it may replace workers by taking on tasks that those employees previously performed?²⁸

This Comment uses the context of the 2023 WGA and SAG-AFTRA strikes to argue that replacing unionized workers with AI is analogous to subcontracting and should thus be a mandatory subject of collective bargaining.²⁹ Part I of this Comment introduces the NLRA and the

23. *Id.*; Cynthia L. Estlund, *Economic Rationality and Union Avoidance: Misunderstanding the National Labor Relations Act*, 71 TEX. L. REV. 921, 944 (1993). *But see* Furniture Rentors of Am., Inc. v. NLRB, 36 F.3d 1240, 1243, 1250 (3d Cir. 1994) (declining to mandate bargaining on subcontracting when employer's decision was based on history of employee theft and carelessness).

24. National Labor Relations Act of 1935, Pub. L. No. 74-198, 49 Stat. 449 (codified as amended at 29 U.S.C. §§ 151-69).

25. *Id.* § 8(d), 29 U.S.C. § 158(d).

26. Russell A. Smith, *Subcontracting and Union-Management Legal and Contractual Relations*, 17 CASE W. RES. L. REV. 1272, 1273 (1966); *see Fibreboard Paper Prods. Corp.*, 379 U.S. at 210 (explaining that ensuing termination from hiring a subcontractor is a "term[] and condition[] of employment").

27. NLRA § 8(a), 29 U.S.C. § 158(a); *see Fibreboard Paper Prods. Corp.*, 379 U.S. at 209-10 (holding that an employer had engaged in unfair labor practices when it subcontracted out maintenance work previously done by union employees without first bargaining on the issue).

28. *Cf. A Transit Employer's Duty to Bargain over Automation: Potential Subjects of Bargaining*, FISHER PHILLIPS (Sept. 23, 2019), <https://www.fisherphillips.com/en/news-insights/autonomous-vehicles-blog-driving-the-future/a-transit-employer-s-duty-to-bargain-over-automation-potential-subjects-of-bargaining.html> [<https://perma.cc/B8AA-4XJ8>] (likening removal of work for unionized transit employees due to automation to subcontracting under the NLRA).

29. Admittedly, this Comment does not address the argument that AI is *not* analogous to subcontracting because it would be better treated as an investment in a technological substitute for labor, as opposed to a substitute of labor for labor. The

legislative intent behind it.³⁰ It then explains collective bargaining and the relevant case law surrounding subcontracting in unionized workforces.³¹ Additionally, Part I defines AI³² and explores its uses through the lens of the 2023 WGA and SAG-AFTRA strikes.³³ Part II argues that employing AI in the unionized workplace of writers, actors, and other creative professionals to perform tasks traditionally handled by those employees is akin to subcontracting out the work of the union and, therefore, should be treated as a mandatory subject of collective bargaining.³⁴ Finally, Part II asserts that treating AI as a subcontractor falls squarely within the legislative intent of the NLRA.³⁵

I. BACKGROUND

A. *Legislating Labor: The Passage of the National Labor Relations Act and the Power of the National Labor Relations Board*

1. *The Passage of the National Labor Relations Act*

In early 1935, Senator Robert F. Wagner introduced the NLRA.³⁶ By July 1935, President Franklin D. Roosevelt had signed it into law, establishing a new, pro-worker labor policy in the United States.³⁷ The

scope of this Comment will focus instead on how AI *is* a substitute of labor for labor and should be treated as subcontracting under relevant labor law and Supreme Court precedent.

30. See *infra* Section I.A (explaining the history behind the NLRA).

31. See *infra* Sections I.B–D (explaining how the NLRB operates, subjects of collective bargaining, and subcontracting case law).

32. See *infra* Section I.E (explaining the nuances of AI).

33. See *infra* Section I.F (explaining the relevant issues of the strike).

34. See *infra* Section II.A (arguing for treating AI like a subcontractor).

35. See *infra* Section II.B (comparing issues surrounding AI to legislative intent and history).

36. THEODORE R. ISERMAN, *INDUSTRIAL PEACE AND THE WAGNER ACT: HOW THE ACT WORKS AND WHAT TO DO ABOUT IT* 10 (1947); *Robert Wagner: A Featured Biography*, U.S. SENATE [hereinafter *Wagner Biography*], https://www.senate.gov/senators/FeaturedBios/Featured_Bio_Wagner.htm [<https://perma.cc/8DLA-H2ZB>].

37. See ISERMAN, *supra* note 36, at 10, 12 (discussing the NLRA's policy to encourage collective bargaining, strengthen unions and equalize bargaining power between employers and employees); Kenneth G. Dau-Schmidt, *A Bargaining Analysis of American Labor Law and the Search for Bargaining Equity and Industrial Peace*, 91 MICH. L. REV. 419, 420–22 (1992) (noting that since the 1930s, American labor law was “necessary for workers to achieve the benefits of industrial democracy and a larger share of [the] industry’s profits”); *Allied Chem. & Alkali Workers of Am., Loc. Union No. 1 v.*

NLRA provides private sector workers with the fundamental right to fight for better working conditions without fear of retaliation through collective bargaining.³⁸

The NLRA was passed in response to the 1911 deadly Triangle Shirtwaist Company fire in New York City.³⁹ A fire broke out in a garment factory located on the top three floors of a ten-story building, where managers had locked the emergency exits, trapping factory workers among the flames or forcing them to jump to their deaths in an attempt to escape.⁴⁰ Senator Wagner was charged with investigating the deadly fire while he was chairman of the New York State Assembly.⁴¹ This was the impetus for his political advocacy for working-class people, which he brought with him to the U.S. Senate when elected in 1926.⁴² Senator Wagner likewise sponsored other progressive legislation like the Social Security Act of 1935⁴³ and the Housing Act of 1937.⁴⁴ Nearly a decade after Senator Wagner was elected, President Franklin D. Roosevelt finally signed the NLRA into law.⁴⁵

When the Senate passed the NLRA, it governed all workers involved in interstate commerce except airline, railroad, agriculture, and

Pittsburgh Plate Glass Co., Chem. Div., 404 U.S. 157, 163–64 (1971) (stating that intent behind American labor law is to promote equity in bargaining between employer and employees).

38. *National Labor Relations Act*, NLRB, <https://www.nlrb.gov/guidance/key-reference-materials/national-labor-relations-act> [https://perma.cc/LR5E-AGD2] (last visited Apr. 19, 2024).

39. *Senator Wagner and the Triangle Shirtwaist Fire*, U.S. SENATE [hereinafter *Triangle Shirtwaist Fire*], https://www.senate.gov/artandhistory/history/minute/Senator_Wagner_and_the_Triangle_Shirtwaist_Fire.htm [https://perma.cc/5SJT-236P].

40. *Id.*; David von Drehle, *Uncovering the History of the Triangle Shirtwaist Fire*, SMITHSONIAN MAG. (Aug. 2006), <https://www.smithsonianmag.com/history/uncovering-the-history-of-the-triangle-shirtwaist-fire-124701842> [https://perma.cc/3DYG-RTXW]. In total, 146 workers perished in the Shirtwaist Factory fire, and it was one of the deadliest workplace accidents at the time. *Id.*

41. *Wagner Biography*, *supra* note 36.

42. *Id.*

43. See Social Security Act, Pub. L. No. 74-271, 49 Stat. 620 (codified as amended at 42 U.S.C. §§ 301–1397mm) (establishing the Social Security program).

44. MICHAEL WOODSWORTH, BATTLE FOR BED-STUY: THE LONG WAR ON POVERTY IN NEW YORK CITY 32 (2016); see Housing Act of 1937, Pub. L. 75-412, 50 Stat. 888 (codified as amended at 42 U.S.C. §§ 1437 et seq.) (providing subsidies for public housing to improve conditions for low-income families).

45. National Labor Relations Act of 1935, Pub. L. No. 74-198, 49 Stat. 449 (codified as amended at 29 U.S.C. §§ 151–69).

government workers.⁴⁶ Today, the NLRA covers most private sector employees except agricultural workers, independent contractors, and supervisors.⁴⁷ A U.S. Department of Labor study calculated that in 2023, 14.4 million, or ten percent, of workers in the United States belonged to a union.⁴⁸ Of those 14.4 million, 7 million, or 32.5 percent, work in the public sector, and 7.4 million, or six percent, work in the private sector.⁴⁹ These recent figures underscore the present influence of unions both in the public and private sectors.⁵⁰

2. *The National Labor Relations Act in Practice*

The NLRA has two major prongs.⁵¹ First, the NLRA established the right of employees to form unions and collectively bargain with their employers.⁵² Collective bargaining is the process in which unions and employers negotiate to reach a contract, known as a collective

46. *National Labor Relations Act (1935)*, NAT'L ARCHIVES, <https://www.archives.gov/milestone-documents/national-labor-relations-act> [<https://perma.cc/EJ4Z-CNZN>]; see David Allen Larson, *Subcontracting and the Duty to Bargain*, 17 N.Y.U. REV. L. & SOC. CHANGE 255, 267 (1989) (discussing that the NLRA was enacted to preserve industrial peace and protect the flow of interstate commerce).

47. *Frequently Asked Questions—NLRB*, NLRB, <https://www.nlr.gov/resources/faq/nlr> [<https://perma.cc/7SUP-82XU>]. The Railway Labor Act, 45 U.S.C. § 151 et seq., which was enacted in 1926, covers both airline and railway workers, governs labor-management relationships, and allows for collective bargaining in those industries. OFF. OF POL'Y, OFF. OF RAIL POL'Y & DEV., FED. R.R. ADMIN., HIGHLIGHTS OF THE RAILWAY LABOR ACT ("RLA"), AND THE U.S. DEPARTMENT OF TRANSPORTATION'S ("DOT") ROLE IN RLA DISPUTES, https://railroads.dot.gov/sites/fra.dot.gov/files/fra_net/1647/Railway%20Labor%20Act%20Overview.pdf [<https://perma.cc/LNP7-XWT9>]. The Railway Labor Act was expanded to include airline workers in 1936. *Id.*

48. BUREAU OF LAB. STAT., U.S. DEP'T OF LAB., UNION MEMBERS—2023 1 (2024), <https://www.bls.gov/news.release/pdf/union2.pdf> [<https://perma.cc/25TH-Z3Y5>].

49. *Id.* at 2. See generally Greg Rosalsky, *You May Have Heard of the 'Union Boom.' The Numbers Tell a Different Story*, NAT'L PUB. RADIO (Feb. 28, 2023, 6:31 AM), <https://www.npr.org/sections/money/2023/02/28/1159663461/you-may-have-heard-of-the-union-boom-the-numbers-tell-a-different-story> [<https://perma.cc/GQ7M-EJMQ>] (explaining that state right-to-work statutes and corporate anti-union campaigns create obstacles to union formation).

50. See *Union Membership Grew by 139,000 in 2023, Thanks to Worker Wins*, AFL-CIO (Jan. 23, 2024), <https://aflcio.org/press/releases/union-membership-grew-139000-2023-thanks-worker-wins> [<https://perma.cc/R3PV-J3AL>] (attributing heightened union membership in 2023 to increased union organizing and public enthusiasm for unions).

51. See generally NLRA §§ 1–19, 29 U.S.C. §§ 151–69 (creating the right to collectively bargain and establishing the NLRB).

52. *Id.* § 8(d), 29 U.S.C. § 158(d).

bargaining agreement, that governs labor-management relations concerning wages, hours, and other terms and conditions of employment.⁵³ Second, the NLRA established an independent agency, the NLRB, to oversee and ensure that the right to unionize and collectively bargain is enforced.⁵⁴ At its core, the NLRA provides workers with “the right to self-organization, to form, join, or assist labor organizations” and bargain collectively through union representatives.⁵⁵ Further, the NLRA protects concerted activity related to collective bargaining, unionization, and workplace issues, such as openly conversing with co-workers about wages and benefits.⁵⁶

First, the NLRA laid the foundation for employees to unionize and bargain collectively with their employers on topics related to “wages, hours, and other terms and conditions of employment.”⁵⁷ Under the NLRA, workers may form a union in two different ways.⁵⁸ The first method requires employees to vote to form a union, usually by signing union recognition cards or a petition.⁵⁹ Then, the NLRB conducts an election to certify the union, contingent upon a majority vote among the workers in favor of forming a union.⁶⁰ The second pathway to unionization arises when an employer voluntarily recognizes a union.⁶¹ After the NLRB certifies a union through either method, that union represents the employees and has the right to negotiate a collective bargaining agreement with the employer.⁶²

53. *Id.*; *Collective Bargaining*, AFL-CIO, <https://aflcio.org/what-unions-do/empower-workers/collective-bargaining> [<https://perma.cc/44QV-VJCX>].

54. NLRA § 3, 29 U.S.C. § 153.

55. *Id.* § 7, 29 U.S.C. § 157.

56. *Id.*; BRUCE S. FELDBACKER & MICHAEL J. HAYES, *LABOR GUIDE TO LABOR LAW* 124–25 (2014). In this context, “concerted” simply means that more than one employee is engaged in the activity. *Id.* at 125.

57. NLRA § 8(d), 29 U.S.C. § 158(d); ISERMAN, *supra* note 36, at 11.

58. FELDBACKER & HAYES, *supra* note 56, at 84–85.

59. *Id.* at 84. For the initial vote among employees, thirty percent of workers must sign a card or petition expressing interest in forming a union. *Id.* When the NLRB conducts an election, a majority of employees must vote in favor of forming a union. *Id.*

60. *Id.*

61. *Id.* at 38; HARRY C. KATZ, THOMAS A. KOCHAN & ALEXANDER J. S. COLVIN, *AN INTRODUCTION TO U.S. COLLECTIVE BARGAINING & LABOR RELATIONS* 455 (5th ed. 2017). Employers may voluntarily recognize unions based on evidence of employees’ desire to form a union, which is often in the form of signed union-authorization cards by at least fifty percent of eligible employees. *Id.*

62. NLRA §§ 7, 8(d), 29 U.S.C. §§ 157, 158(d).

Congress intended for employers and unions to bargain on “any [future] matter . . . of contention between them ‘[with] respect to rates of pay, wages, hours of employment, or other conditions of employment.’”⁶³ Additionally, in *First National Maintenance Corp. v. NLRB*,⁶⁴ the Supreme Court stated that Congress intentionally left “wages, hours, and other terms and conditions of employment” ambiguous and without further definition because Congress “did not intend to deprive the [NLRB] of the power . . . to define those terms in light of specific industrial practices.”⁶⁵ Moreover, in *Ford Motor Co. v. NLRB*,⁶⁶ the Supreme Court asserted that the NLRA’s goal was not to limit subjects of bargaining to government regulation.⁶⁷ Instead, the NLRA promotes discussion through collective bargaining between employers and unions to reach mutually beneficial workplace agreements.⁶⁸

Second, through the NLRA, Congress delegated power to the NLRB to resolve unfair labor practice claims between labor and management, or in other words, the employees and the employers.⁶⁹ The NLRB is comprised of five members appointed by the President and confirmed by the Senate.⁷⁰ It is supported by thirty-three regional offices, each led by a regional director.⁷¹ The NLRB oversees union representation, ensures democratic union elections, investigates unfair labor practices, issues appropriate remedies when charges are upheld, and generally oversees labor-management relations.⁷² If an employer or a union violates their collective bargaining agreement or a provision of the NLRA, either party may bring a charge against the other called an “unfair labor practice [charge].”⁷³ After filing an unfair labor practice charge, the NLRB, through its regional directors, investigates to

63. *W. W. Cross & Co. v. NLRB*, 174 F.2d 875, 878 (1st Cir. 1949).

64. 452 U.S. 666 (1981).

65. *Id.* at 675.

66. 441 U.S. 488 (1979).

67. *Id.* at 498.

68. *Id.* at 498–99.

69. NLRA §§ 3, 10, 29 U.S.C. §§ 153, 160; NAT’L ARCHIVES, *supra* note 46; *see* ISERMAN, *supra* note 36, at 11–12 (explaining the NLRB’s “cease and desist” power).

70. KATZ ET AL., *supra* note 61, at 447; NAT’L ARCHIVES, *supra* note 46.

71. NAT’L ARCHIVES, *supra* note 46.

72. DAVID CRONON, LABOR & THE NEW DEAL 29 (E. David Cronon, ed., 1963); KATZ ET AL., *supra* note 61, at 447; NAT’L ARCHIVES, *supra* note 46.

73. NLRA § 8, 29 U.S.C. § 158; *see* ISERMAN, *supra* note 36, at 11–12 (explaining unfair labor practices in Section 8 of the NLRA).

determine whether formal action should be taken.⁷⁴ If formal action is deemed necessary, it undertakes a quasi-judicial process where a complaint is issued, the employer or union has an opportunity to respond, a hearing is conducted, and an administrative law judge issues a decision and remedial order, if any.⁷⁵ Thereafter, the losing party may file an appeal.⁷⁶

B. *Workplace Wins Through Collective Bargaining*

Section 8(d) of the NLRA establishes that collective bargaining is the mutual obligation of employers and unions to negotiate in good faith with respect to “wages, hours, and other terms and conditions of employment” to reach a written contract or collective bargaining agreement.⁷⁷ This agreement memorializes the results of the negotiations and governs the labor-management relations between the employer and its employees.⁷⁸

Collective bargaining helps to resolve many issues that arise in unionized workplaces, as it allows unionized workers to advocate for fair wages, robust benefits and leave, and improved health and safety policies, among other workplace policies or conditions.⁷⁹ For example, in 2023, the unions representing employees for United Postal Service (UPS), American Airlines, and the big three automobile manufacturers—Ford Motor, Stellantis, and General Motors—negotiated major increases to compensation and benefits for their members.⁸⁰ Representing UPS workers, the International Brotherhood

74. NLRA § 10, 29 U.S.C. § 160; FELDBACKER & HAYES, *supra* note 56, at 8–10.

75. FELDBACKER & HAYES, *supra* note 56, at 8, 13.

76. *Id.* at 12–17.

77. NLRA § 8(d), 29 U.S.C. § 158(d).

78. *Id.*; KATZ ET AL., *supra* note 61, at 438; *Collective Bargaining*, *supra* note 53.

79. *Collective Bargaining*, *supra* note 53; see BUREAU OF LAB. STAT., *supra* note 48, at 1 (finding that median weekly earnings of nonunion workers were eighty-six percent of those workers who are members of unions at \$1,090 versus \$1,263). See generally *Singer Mfg. Co.*, 24 N.L.R.B. 444 (1940) (establishing employers must negotiate on paid holidays, vacations, and bonus), *enforced as modified by Singer Mfg. Co. v. NLRB*, 119 F.2d 131 (7th Cir. 1941); *NLRB v. Gulf Power Co.*, 384 F.2d 822 (5th Cir. 1967) (establishing safety rules and practices as a mandatory subject of collective bargaining).

80. Leslie Josephs, *UPS Workers Approve Massive New Labor Deal with Big Raises*, CNBC (Aug. 22, 2023, 4:27 PM), <https://www.cnbc.com/2023/08/22/ups-workers-approve-new-labor-contract.html> [<https://perma.cc/8QCT-KWP4>]; Tom Krisher, *UAW Members at the First Ford Plant to go on Strike Overwhelmingly Approve the New Contract*,

of Teamsters ratified a collective bargaining agreement that increased wages for both part-time and full-time union employees.⁸¹ The union negotiated a \$5.50 hourly wage increase for part-time employees and a \$7.50 wage increase for full-time employees spread out over the five-year contract.⁸² Meanwhile, American Airlines pilots saw increased employer contributions to 401(k) plans and an increase in wages by over forty percent.⁸³ Additionally, the United Automobile Workers (“UAW”) ratified an agreement with each of the big three automobile makers, which included a twenty-five percent total pay increase, reinstated cost-of-living adjustments, reduced the timeframe to reach top wage rates, and provided additional strike protections.⁸⁴

C. *Subjects of Collective Bargaining: Mandatory, Permissive, and Illegal*

Although the NLRA requires employers and unions to negotiate in good faith, neither party is compelled to “agree to a proposal or [make] a concession.”⁸⁵ Nor does the NLRA mandate that employers and unions negotiate on anything and everything.⁸⁶ Instead, there are three categories of collective bargaining subjects—mandatory, permissive, and illegal.⁸⁷

1. *Mandatory subjects of collective bargaining*

Section 8(d) of the NLRA identifies mandatory subjects of bargaining, or topics on which employers and unions are required to negotiate, as “wages, hours, and other terms and conditions of

ASSOC. PRESS (Nov. 2, 2023, 7:48 PM), <https://apnews.com/article/ford-plant-ap-proves-tentative-contract-agreement-uaw-strike-12e62184b7c321b502ca268ae30f7901> [<https://perma.cc/3XZ5-X2RT>]; Marley Jay, *UAW Members Approve 4½-Year Contract with Detroit’s Big Three*, NBC NEWS (Nov. 16, 2022, 6:42 PM), <https://www.nbcnews.com/business/business-news/uaw-approves-new-contract-ford-gm-stellantis-details-vote-tals-rcna125528> [<https://perma.cc/R38A-NRG4>].

81. Josephs, *supra* note 80.

82. *Id.* By the end of the five-year contract, UPS drivers will average \$170,000 in pay and benefits. *Id.*

83. *Id.*

84. Jay, *supra* note 80.

85. NLRA § 8(d), 29 U.S.C. § 158(d).

86. *See id.* (“[Duty to] confer . . . with respect to wages, hours, and other terms and conditions of employment . . .”).

87. NLRB, BASIC GUIDE TO THE NATIONAL LABOR RELATIONS ACT (1997), <https://www.nlr.gov/sites/default/files/attachments/basic-page/node-3024/basicuide.pdf> [<https://perma.cc/ZD28-HDYS>].

employment.”⁸⁸ Employers and unions are both obligated to meet “in good faith” with respect to these subjects.⁸⁹ If either party refuses to bargain on a mandatory subject of bargaining, the non-refusing party has grounds to file an unfair labor practice charge.⁹⁰ Further, if one party makes a unilateral change to a mandatory subject of bargaining, the aggrieved party also has grounds to file an unfair labor practice charge.⁹¹

The NLRB and courts have determined which subjects fall within the scope of “wages, hours, and other terms and conditions of employment.”⁹² Some subjects within the scope include work assignments, job duties and descriptions,⁹³ and fringe benefits, such as pension and retirement plans,⁹⁴ health insurance,⁹⁵ vacation and sick leave,⁹⁶ holidays,⁹⁷ and additional unemployment benefits.⁹⁸ However, topics that may appear trivial on the surface have also been deemed mandatory bargaining subjects. For instance, in *Ford Motor Co.*, the

88. NLRA § 8(d), 29 U.S.C. § 158(d).

89. *Id.*; *Ford Motor Co. v. NLRB*, 441 U.S. 488, 495 (1979).

90. NLRA § 8(a)(5), (d), 29 U.S.C. § 158(a)(5), (d).

91. *Id.*; *First Nat’l Maint. Corp. v. NLRB*, 452 U.S. 666, 674–76 (1981); *Norelli v. HTH Corp.*, 699 F. Supp. 2d 1176, 1190 (D. Haw. 2010).

92. NLRA § 8(d), 29 U.S.C. § 158(d); *see* LARSON, *supra* note 46, at 260 (discussing *W.W. Cross & Co. v. NLRB*, 174 F.2d 875, 878 (1st Cir. 1949), which held that group insurance programs fell within the term “wages” thus are a mandatory subject of bargaining and explaining that Congress did not intend for the National Labor Relations Act to be static and restrict mandatory subjects only to those commonly bargaining on during that time).

93. *Int’l Longshore & Warehouse Union v. ICTSI Or., Inc.*, 863 F.3d 1178, 1193 (9th Cir. 2017).

94. KATZ ET AL., *supra* note 61, at 260. *See generally* *Inland Steel Co. v. NLRB*, 170 F.2d 247 (7th Cir. 1948) (establishing pension funds as a mandatory subject of collective bargaining), *aff’d*, *Am. Commc’ns Ass’n, C.I.O v. Douds*, 339 U.S. 382 (1950); *Allied Chem. & Alkali Workers of Am., Loc. Union No. 1 v. Pittsburgh Plate Glass Co., Chem. Div.*, 404 U.S. 157 (1971) (explaining pension and insurance benefits for active employees are mandatory subjects of collective bargaining).

95. *See generally* *W.W. Cross & Co. v. NLRB*, 174 F.2d 875 (1st Cir. 1949) (holding group health insurance as a mandatory subject of bargaining); *Posadas de P.R. Assocs., Inc. v. NLRB*, 243 F.3d 87, 91–93 (1st Cir. 2001) (holding unilateral discontinuation of certain group insurance policies an unfair labor practice).

96. *See generally* *Great S. Trucking Co. v. NLRB*, 127 F.2d 180 (4th Cir. 1942) (holding paid vacations as a mandatory subject of collective bargaining).

97. *See generally* *Singer Mfg. Co.*, 24 N.L.R.B. 444 (1940) (holding paid holidays as a mandatory subject of collective bargaining), *enforced as modified by* *Singer Mfg. Co. v. NLRB*, 119 F.2d 131 (7th Cir. 1941).

98. KATZ ET AL., *supra* note 61, at 260.

Supreme Court held that cafeteria and vending machine prices inside a factory were “terms and conditions of employment” subject to mandatory bargaining because access to food on the job site is germane to one’s working environment.⁹⁹ Likewise, the effects of selling a business are considered a mandatory bargaining subject, though the decision to sell a business itself is not.¹⁰⁰

Certain widely recognized subjects fall within the scope of wages, hours, and other terms and conditions of employment; however, the legislative history of the NLRA suggests that this phrase is neither a finite nor definitive list.¹⁰¹ Instead, the phrase is intended to be fluid and adapt based on the “traditions of an industry, the social and political climate at any given time, the needs of employers and employees, and many related factors.”¹⁰² The Supreme Court stated that it is the NLRB’s responsibility to identify on a case-by-case basis what falls within the scope of section 8(d) of the NLRA.¹⁰³

2. *Permissive subjects of collective bargaining*

Permissive subjects of bargaining are those on which employers and unions may choose to negotiate but are not required to do so.¹⁰⁴ Unlike mandatory subjects of bargaining, permissive subjects of bargaining fall outside the scope of section 8(d) of the NLRA, and refusal to bargain on such by either party does not constitute an unfair labor practice.¹⁰⁵ Some topics are deemed permissive because they affect individuals outside of the union.¹⁰⁶ For example, in *Allied Chemical &*

99. *Ford Motor Co. v. NLRB*, 441 U.S. 488, 498–501 (1979).

100. *Kirkwood Fabricators, Inc. v. NLRB*, 862 F.2d 1303, 1306 (8th Cir. 1988).

101. H.R. REP. NO. 80-245, (1947), reprinted in I NLRB LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 314; see *Ford Motor Co.*, 441 U.S. at 495–96 (“The original House bill had contained a specific listing of the issues subject to mandatory bargaining . . . but this attempt to ‘strait-jack[e]’ and to ‘limit narrowly the subject matters appropriate for collective bargaining,’ . . . was rejected . . . in favor of the more general language . . .”).

102. H.R. REP. NO. 245, *supra* note 101, at 362.

103. *Ford Motor Co.*, 441 U.S. at 495.

104. *KATZ ET AL.*, *supra* note 61, at 425; *Idaho Statesman v. NLRB*, 836 F.2d 1396, 1400 (1988).

105. *Idaho Statesman*, 836 F.2d at 1400; see *Am. Fed’n of Gov’t Emps., Loc. 3013 v. Fed. Lab. Rels. Auth.*, 762 F.2d 183, 183–84 (1st Cir. 1985) (noting refusal to bargain is not illegal).

106. See *Allied Chem. & Alkali Workers of Am., Loc. Union No. 1 v. Pittsburgh Plate Glass Co., Chem. Div.*, 404 U.S. 157, 159–60 (1971) (discussing benefits for

Alkali Workers of America, Local Union No. 1 v. Pittsburgh Plate Glass Co., Chemical Division,¹⁰⁷ the Supreme Court held that an employer was not required to negotiate on a change in health care benefits when the benefits only changed for retired employees.¹⁰⁸ Likewise, some topics concerning internal matters for either the union or the employer are not deemed mandatory, such as internal union discipline, the scope of the bargaining unit,¹⁰⁹ or core managerial decisions for a company.¹¹⁰ For example, a company may make unilateral decisions regarding its capital investment so long as the decision is based on factors other than labor costs.¹¹¹ Other permissive subjects of bargaining include interest arbitration,¹¹² the use of union labels, pins, or buttons,¹¹³ bonuses in the form of gifts,¹¹⁴ and the selection of insurance carriers.¹¹⁵

3. *Illegal subjects of collective bargaining*

Illegal subjects of bargaining are those for which negotiation is prohibited, even if there is a mutual agreement to do so.¹¹⁶ This includes anything that would violate state or federal law.¹¹⁷ This category also includes closed shop provisions, where individuals must

nonemployees); *see also* Star Trib., 295 N.L.R.B. 543, 545–47 (1989) (holding pre-employment drug testing is a permissive subject of bargaining).

107. 404 U.S. 157 (1971).

108. *Id.* at 159–60, 187–88.

109. *See* Reichhold Chem., Inc. v. NLRB, 953 F.2d 594, 596–97 (11th Cir. 1992) (holding that which job positions are part of the union, or “scope of the bargaining unit” is a permissive subject); NLRB v. Carrier Corp., 66 F. Supp. 2d 346, 352 (N.D.N.Y. 1999) (holding that an addendum to a collective bargaining agreement altering the scope of the bargaining unit was a permissive subject).

110. *See* NLRB v. Borg-Warner Corp., 356 U.S. 342, 350 (1958) (discussing internal operations of union).

111. *See* First Nat’l Maint. Corp. v. NLRB, 452 U.S. 666, 681–84 (1981) (contending decisions regarding ceasing of operations or the scope of a business are permissive).

112. NLRB v. Columbus Printing Pressmen & Assistant’s Union No. 252, 543 F.2d 1161, 1164–65, 1171 (5th Cir. 1976).

113. UNITED STEEL WORKERS, SUBJECTS OF BARGAINING, <https://m.usw.org/workplaces/public-sector/2015-conference-material/5-Subjects-of-Bargaining.pdf> [<https://perma.cc/H32W-9JF8>]; *see* Kit Mfg. Co. v. NLRB, 365 F.2d 829, 830 (9th Cir. 1966) (*per curiam*) (failing to reach the issue of whether a union label could be mandatory bargaining).

114. NLRB v. Wonder State Mfg. Co., 344 F.2d 210, 214 (8th Cir. 1965).

115. *Conn. Light & Power Co. v. NLRB*, 476 F.2d 1079, 1080, 1083 (2nd Cir. 1973). Selection of an insurance carrier is only a mandatory subject if it has a direct impact on benefits. *Id.*

116. UNITED STEEL WORKERS, *supra* note 113.

117. *Id.*; *Hill-Rom Co. v. NLRB*, 957 F.2d 454, 457 (7th Cir. 1992)

be union members to be eligible for hire,¹¹⁸ or hot cargo provisions, where employers agree to refrain from dealing with products of another employer or cease doing business with another company.¹¹⁹ Additionally, any contract provision that would discriminate “against a group of employees based on race, sex, disability, age, veteran’s status, religion, sexual orientation, [or] marital status” is an illegal subject of bargaining that may not be negotiated.¹²⁰

D. *Subcontracting and the Duty to Bargain*

Subcontracting is often negotiated during collective bargaining because it affects an employee’s terms and conditions of employment.¹²¹ Subcontracting, or “contracting out,” occurs when an employer hires a third party to perform part or all of the work described in the original contract.¹²² Generally, an employer has a duty to bargain with the union over the decision to subcontract when the employer replaces existing union employees with subcontractors to perform the same work.¹²³ While subcontracting is typically a mandatory subject of bargaining, the NLRB, the Court of Appeals, and the Supreme Court have not consistently held it as such when considering facts and circumstances relevant to each case.¹²⁴ If the

118. KATZ ET AL., *supra* note 61, at 438.

119. NLRA § 8(5), 29 U.S.C. § 158(e). “It shall be an unfair labor practice for any [employer and union to agree to] . . . refrain from handling, using, selling, [or] transporting . . . products [of another] employer, or to cease doing business with any other person . . .” *Id.*

120. UNITED STEEL WORKERS, *supra* note 113.

121. *Mi Pueblo Foods & Int’l Bhd. of Teamsters Local 853*, 32-CA-025677 at 1098; *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 209–10 (1964); *see* Wayne R. Evenson, *Subcontracting and the Duty to Bargain Under the National Labor Relations Act*, 3 AM. BUS. L.J. 189, 193–94 (1965) (contending that job security is of utmost importance to a union and its members).

122. Evenson, *supra* note 121, at 194; *Subcontract*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/subcontract> [<https://perma.cc/58N3-K7PS>].

123. *Fibreboard Paper Prods. Corp.*, 379 U.S. at 208, 213.

124. *Id.* at 209–10. *But see* *Furniture Rentors of Am., Inc. v. NLRB*, 36 F.3d 1240, 1243, 1250 (3d Cir. 1994) (declining to mandate negotiation on subcontracting when employer’s decision was based on history of employee theft and carelessness); *First Nat’l Maint. Corp. v. NLRB*, 452 U.S. 666, 677, 680–81, 686 (1981) (holding subcontracting is not a mandatory subject of bargaining when concerned with full or partial closure). *See generally* *First Nat’l Maint. Corp.*, 452 U.S. at 666 (stating that the decision to do business at all does not primarily concern “conditions of employment”);

decision to subcontract is based on the scope, direction, or nature of the business, an employer may be exempt from bargaining with the union on its decision.¹²⁵ The following Supreme Court cases explore when subcontracting is a mandatory subject of bargaining.

1. *The Fibreboard Paper Products Corp. v. NLRB majority decision*

The Supreme Court addressed whether subcontracting is a mandatory subject of collective bargaining in the seminal case, *Fibreboard Paper Products Corp. v. NLRB*.¹²⁶ In *Fibreboard*, workers at Fibreboard Paper Product Corporation (“Fibreboard”) were members of the United Steelworkers of America union (“USW”).¹²⁷ Days before USW’s collective bargaining agreement was set to expire, Fibreboard hired outside contractors to replace its union employees to save substantial sums by reducing the workforce, decreasing the amount paid in fringe benefits, and eliminating overtime payments.¹²⁸ In response, USW filed an unfair labor practice charge against Fibreboard, alleging it violated the NLRA.¹²⁹ The NLRB held that Fibreboard’s failure to negotiate with USW regarding its decision to subcontract maintenance work violated the NLRA for failure to bargain in good faith regarding wages, hours, and other conditions of employment, or mandatory subjects of bargaining.¹³⁰ The NLRB ordered Fibreboard to reinstate the positions previously held by union members before the decision to subcontract and the union employees

Mi Pueblo Foods, 32-CA-025677 at 1098 (holding that an employer’s decision to subcontract employees in supply chain process was a unilateral change to terms and conditions of employment and the employer and the union were required to bargain on such); *Overnight Transp. Co.*, 330 NLRB 1275 (2000), *aff’d. in part, reversed in part*, 248 F.3d 1131 (3d Cir. 2000) (holding that the employer and the union were required to bargain over the employer’s decision to subcontract to address an influx of work that bargaining unit employees could not handle).

125. Larson, *supra* note 46, at 256.

126. 379 U.S. 203, 208–09 (1964).

127. *Id.* at 204–05.

128. *Id.* at 205–207, 213–14.

129. *See id.* at 207 (alleging violations of NLRA § 8(a)(1), 8(a)(3), and 8(a)(5)); NLRA § 8(a)(1), 29 U.S.C. § 158(a)(1) (stating it is illegal for an employer to interfere with employees’ rights such as to organize, to form or join a union, and to collectively bargain); NLRA § 8(a)(3), 29 U.S.C. § 158(a)(3) (stating it is illegal to discriminate against employees relating to union affiliation); NLRA § 8(a)(5), 29 U.S.C. § 158(a)(5) (stating it is illegal to refuse to bargain in good faith about wages, hours, and other conditions of employment).

130. NLRA § 8(a)(5), 29 U.S.C. § 158(a)(5); *Fibreboard Paper Prods. Corp.*, 379 U.S. at 208.

themselves.¹³¹ Fibreboard appealed to the Court of Appeals for the District of Columbia, which upheld the NLRB's order.¹³² Fibreboard appealed again to the Supreme Court.¹³³

The Supreme Court, agreeing with the Court of Appeals and the NLRB, held that subcontracting is a mandatory subject of bargaining.¹³⁴ It stated that contracting out work previously performed by employees in the bargaining unit that the employees were capable of continuing to perform falls squarely within the literal meaning of "terms and conditions of employment."¹³⁵ Accordingly, "terms and conditions of employment" encompasses the termination of employees that would ensue from contracting out under these circumstances.¹³⁶ Further, the Supreme Court stated that since Fibreboard was motivated by cost-saving measures by reducing the workforce, the issue was particularly suited for collective bargaining.¹³⁷

The Supreme Court then considered whether mandating that employers bargain on the issue of subcontracting would "significantly abridge" an employer's freedom to manage its business.¹³⁸ Considering two primary factors, the Court decided that it would not.¹³⁹ First, the Court considered whether the decision to subcontract altered the basic

131. *Fibreboard Paper Prods. Corp.*, 379 U.S. at 208.

132. *Id.* at 208–09.

133. *Id.*

134. *See id.* at 209–10 (explaining that management is required to bargain); *see also* NLRB v. Westinghouse Broad. & Cable, Inc., 849 F.2d 15, 22–24 (1st Cir. 1988) (holding that eliminating a bargaining unit and replacing it with subcontractors violated the NLRA and was a mandatory subject of bargaining). *But see* Furniture Rentors of Am., Inc. v. NLRB, 36 F.3d 1240, 1243, 1250 (3d Cir. 1994) (declining to mandate negotiation on subcontracting when employer's decision was based on history of employee theft and carelessness).

135. *Fibreboard Paper Prods. Corp.*, 379 U.S. at 209–10; *see* Quality Health Servs. of P.R., Inc. v. NLRB, 873 F.3d 375, 385–86, 388 (1st Cir. 2017) (holding an employer subject to the duty to bargain when its decision to subcontract was merely replacing existing employees with non-union employees).

136. *Fibreboard Paper Prods. Corp.*, 379 U.S. at 210.

137. *Id.* at 211–14; *see Westinghouse Broad. & Cable, Inc.*, 849 F.2d at 23 (explaining that a goal of reducing "body count" is method of reducing labor costs); *see also* Dau-Schmidt, *supra* note 37, at 492 (discussing bargaining as a method to promote industrial peace on part of unions and employers).

138. *Fibreboard Paper Prods. Corp.*, 379 U.S. at 213.

139. *Id.*; *see Westinghouse Broad. & Cable, Inc.*, 849 F.2d at 23 (stating that without capital investment or alteration of company's basic operation, subcontracting does not significantly abridge company's freedom to manage its business).

operation of the business and concluded that it did not.¹⁴⁰ Rather, Fibreboard intended to have maintenance work completed by independent contractors just as the bargaining unit had once done.¹⁴¹ Second, the Court asked whether Fibreboard had contemplated capital investment before making the decision, which the Court explained it had not.¹⁴² Fibreboard had merely hired independent contractors to do the same work under similar employment conditions, which required no capital investment because it was solely a swap of union employees for non-union employees.¹⁴³

The Court held that the NLRB's decision was consistent with the purpose of the NLRA.¹⁴⁴ It stated that “[t]o hold, as the [NLRB] has done, that contracting out is a mandatory subject of collective bargaining would promote the fundamental purpose of the [NLRA] by bringing a problem of vital concern to labor and management within the framework established by Congress as most conducive to industrial peace.”¹⁴⁵

2. Justice Stewart's concurrence in *Fibreboard*

Justice Stewart, joined by Justice Douglas and Justice Harlan, wrote a concurrence to the majority's opinion in *Fibreboard*.¹⁴⁶ In his concurrence, Justice Stewart argued that not all management decisions that bear on workers' job security necessarily fall within “terms and conditions of employment.”¹⁴⁷ Justice Stewart presented two types of

140. *Fibreboard Paper Prods. Corp.*, 379 U.S. at 213; see *Westinghouse Broad. & Cable, Inc.*, 849 F.2d at 22–23 (rejecting company's argument that subcontracting decision altered the basic scope of the operation of business when subcontractors performed nearly identical duties as previously employed unit members). *But see* *Automatic Sprinkler Corp. of Am. v. NLRB*, 120 F.3d 612 (6th Cir. 1997) (holding that subcontracting was not a mandatory subject of collective bargaining when fire sprinkler company became a general contractor, fundamentally changing the nature of its business).

141. *Fibreboard Paper Prods. Corp.*, 379 U.S. at 213.

142. *Id.* *But see* *NLRB v. Royal Plating & Polishing Co.*, 350 F.2d 191, 196 (3d Cir. 1965) (stating that a decision to close a plant and reinvest funds elsewhere constitutes a capital investment).

143. *Fibreboard Paper Prods. Corp.*, 379 U.S. at 213; see also *Westinghouse Broad. & Cable, Inc.*, 849 F.2d at 22 (subcontracting impermissible when new employees performed nearly identical tasks).

144. *Fibreboard Paper Prods. Corp.*, 379 U.S. at 211.

145. *Id.*

146. *Id.* at 217 (Stewart, J., concurring).

147. *Id.* at 223.

managerial decisions—ones that only indirectly affect the employment relationship and are not mandatory subjects of bargaining, such as advertising, product type, or design decisions, and ones that directly affect the employment relationship, like production quotas or work rules, which are mandatory subjects of bargaining.¹⁴⁸ Justice Stewart further contended that decisions regarding the basic scope of the enterprise or commitment of investment capital are outside the scope of “terms and conditions of employment,” even if these decisions indirectly affect employment terms.¹⁴⁹ He continued that these management decisions, which are “fundamental to the basic direction of a corporate enterprise or which impinge only indirectly upon employment security,” should not be mandatory subjects of collective bargaining.¹⁵⁰

Justice Stewart distinguished decisions “fundamental to the basic direction of a corporate enterprise” from the decision to replace union employees with non-union employees doing the same job.¹⁵¹ In *Fibreboard*, Justice Stewart agreed with the majority’s holding that subcontracting, in this instance, was a mandatory subject of bargaining because Fibreboard simply replaced unionized workers with cheaper non-union subcontractors to complete the same work under the ultimate control of the same employer.¹⁵²

3. *Justice Stewart’s Fibreboard concurrence as applied in First National Maintenance Corp. v. NLRB*

148. *First Nat’l Maint. Corp. v. NLRB*, 452 U.S. 666, 676–77 (1981). *But see* *Ford Motor Co. v. NLRB*, 441 U.S. 488, 498 (1979) (requiring an employer to bargain on pricing of in-factory cafeteria and vending machines is not a “managerial decision[] . . . at the core of entrepreneurial control” nor is it permitting the union to supplant managerial decision making).

149. *Fibreboard Paper Prods. Corp.*, 379 U.S. at 219, 223 (Stewart, J., concurring).

150. *See id.* at 223 (stating how decisions regarding “the basic scope of the enterprise” and how to invest capital are not mandatory bargaining subjects).

151. *See id.* at 223–24 (arguing that subcontracting practices as a general matter should not be considered terms and conditions of employment; however, certain kinds of subcontracting may be impermissible).

152. *See id.* at 224 (comparing subcontracting to other mandatory subjects of bargaining, such as layoffs according to seniority, and other decisions around work assignments and discharge). Justice Stewart also contends that Fibreboard could be found in violation of section 8(a)(3) of the NLRA for discrimination against the discharged employees for union affiliation. *Id.* at 224–25.

In *First National Maintenance Corp. v. NLRB*,¹⁵³ the Supreme Court applied Justice Stewart's concurrence and held that the employer did not have a duty to bargain with workers over the decision to terminate them when partially closing a business.¹⁵⁴ First National Maintenance ("First National") ran a housekeeping service, providing contract cleaning services for commercial clients.¹⁵⁵ First National and Greenpark, a nursing home company that received cleaning services from First National, were in a dispute over the weekly service fee.¹⁵⁶ Unable to come to a resolution, First National decided to terminate its relationship with Greenpark due to operational losses.¹⁵⁷ Meanwhile, having won an election to represent Greenpark employees, a union was prepared to bargain with First National.¹⁵⁸ Instead, facing financial turbulence because of the service fee dispute, First National terminated its employees at the Greenpark location.¹⁵⁹ The union then filed an unfair labor practice charge against First National, alleging that it had violated the NLRA by refusing to bargain with the union.¹⁶⁰ The NLRB ruled in favor of the union, stating that First National failed to satisfy its duty to bargain collectively in its decision to terminate the Greenpark contract and Greenpark employees.¹⁶¹ On appeal, the U.S. Court of Appeals for the Second Circuit affirmed the NLRB's ruling.¹⁶² First National appealed to the Supreme Court.¹⁶³

153. 452 U.S. 666 (1981).

154. *Id.* at 677; *see Furniture Rentors of Am., Inc. v. NLRB*, 36 F.3d 1240, 1246 (3d Cir. 1994) (explaining bargaining over closing a business would not change the outcome).

155. *First Nat'l Maint. Corp.*, 452 U.S. at 668.

156. *Id.* at 668–69.

157. *Id.* Under the initial agreement, Greenpark was to pay First National \$500 per week plus gross weekly payroll and fringe benefits. *Id.* at 668. The weekly fee was subsequently reduced to \$250. *Id.* First National provided opportunities for Greenpark to reinstate the \$500 agreed upon fee, but it refused, thus First National terminated the relationship. *Id.* at 669.

158. *See id.* (explaining that the union had sent a letter to First National requesting an opportunity to bargain collectively, but First National did not respond).

159. *Id.* at 669–70. When it terminated its relationship with Greenpark, it fired roughly thirty-five employees at the Greenpark location. *Id.* at 668.

160. *Id.* at 670.

161. *Id.*

162. *Id.* at 671.

163. *See id.* at 672–74 (noting the difference in decisions between the U.S. Court of Appeals for the Fifth Circuit and the NLRB, including inconsistencies between the NLRB's own rulings).

Relying on Justice Stewart's concurrence in *Fibreboard*, the Court distinguished the facts in *First National* from those in *Fibreboard*.¹⁶⁴ Justice Blackmun, writing for the majority, took Justice Stewart's concurrence in *Fibreboard* one step further by introducing a third category of management decisions—those that alter the direction and scope of the business, including the decision of whether to do business at all.¹⁶⁵

The Court ultimately held that First National had no duty to bargain about its decision to terminate its relationship with Greenpark, which included discharging Greenpark employees.¹⁶⁶ The majority holding in *First National* gave life to Justice Stewart's concurrence while establishing important parameters of *Fibreboard* by defining actions that would fall within the scope of "fundamental to the basic direction of a corporate enterprise," such as the decision to be in business.¹⁶⁷

One of the underlying theories behind collective bargaining is that it will result in better outcomes for management, labor, and society.¹⁶⁸ However, this underlying principle can only prove true if an issue is amenable to resolution via collective bargaining.¹⁶⁹ Here, First National did not need to be encumbered by collective bargaining to the extent necessary to run a profitable business.¹⁷⁰ The result was inevitable—First National had to terminate its contract with Greenpark

164. *Id.* at 676–77.

165. *See* *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 223 (1964) (Stewart, J., concurring) (opining that management decisions "fundamental to the basic direction of a corporate enterprise" are not subject to the duty of collective bargaining); *First Nat'l Maint. Corp.*, 452 U.S. at 667, 676–77 (relying on Justice Stewart's reference to decisions that alter the "scope and direction of the enterprise" to draw this analogy) (citing *Fibreboard Paper Prods. Corp.*, 379 U.S. at 223 (Stewart, J., concurring)).

166. *First Nat'l Maint. Corp.*, 452 U.S. at 688; *cf.* *Textile Workers Union of Am. v. Darlington Mfg. Co.*, 380 U.S. 263, 268 (1965) ("[A]n employer has the absolute right to terminate his entire business for any reason he pleases . . .").

167. *First Nat'l Maint. Corp.*, 452 U.S. at 677; *see* *Furniture Rentors of Am., Inc. v. NLRB*, 36 F.3d 1240, 1246 (3d Cir. 1994) (observing that *First National* made explicit the test that *Fibreboard* had implicitly used); *Fibreboard Paper Prods. Corp.*, 379 U.S. at 223 (Stewart, J., concurring) (outlining that certain managerial decisions that do not "so involve 'conditions of employment'" need not be included in bargaining negotiations).

168. *First Nat'l Maint. Corp.*, 452 U.S. at 678.

169. *Id.*

170. *Id.* at 678–88.

and cease operations.¹⁷¹ Unlike in *Fibreboard*, the decision to close an unprofitable enterprise was not an issue appropriately suited for collective bargaining.¹⁷² In *Fibreboard*, employees sought to maintain employment rather than be replaced with non-union employees.¹⁷³ Here, First National was not replacing discharged employees like in *Fibreboard*.¹⁷⁴ Instead, it shut down a part of its business.¹⁷⁵ Further, the primary dispute was whether Greenpark would pay a certain monthly fee, a decision over which the union had no control nor authority.¹⁷⁶ Relying on these key facts, the Court distinguished the issues in *First National* from those in *Fibreboard*.¹⁷⁷

E. *Looking Ahead: A Primer on Artificial Intelligence*

AI is revolutionizing the workplace as we know it, and the extent of its capabilities remains unknown.¹⁷⁸ AI is a widely used term encompassing a vast range of technologies, making it difficult to define with precision.¹⁷⁹ At its most basic, AI refers to machines that can “think” autonomously by mirroring aspects of human cognition or

171. See *id.* at 681, 683 (contending that the role of unions and collective bargaining in the context of ceasing operations would be to delay or halt the closing and often employers have no reasonable alternative but to shut down operations).

172. See *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 209–11 (1964) (stating that the issue falls squarely within the intended purposes of collective bargaining).

173. *Id.* at 206, 213–14.

174. *Id.* at 213; *First Nat’l Maint. Corp.*, 452 U.S. at 687.

175. *First Nat’l Maint. Corp.*, 452 U.S. at 687–88.

176. *Id.* at 687.

177. *Id.* at 688.

178. See generally IAM CANADA, CHARTING CHANGE: WORKERS’ VOICES IN AN AUTOMATED WORLD (2021) (discussing changes, improvements, and disruptions in various industries that come with technological changes); Sarah Kessler, *The A.I. Revolution Will Change Work. Nobody Agrees How.*, N.Y. TIMES (June 10, 2023), <https://www.nytimes.com/2023/06/10/business/ai-jobs-work.html> (estimating forty-seven percent of U.S. jobs are at risk of automation).

179. See IAM CANADA, *supra* note 178, at 10 (explaining that AI is based on complex algorithms allowing machines to replicate human behavior); Pauline T. Kim & Matthew T. Bodie, *Artificial Intelligence and the Challenges of Workplace Discrimination and Privacy*, 35 ABA J. LAB. & EMP. L. 289, 290 (2021) (“AI loosely [] refer[s] to systems that leverage data-rich inputs and computational techniques to make predictions that either aid or replace human decision-making.”).

characteristics, such as contemplation, judgment, and intention.¹⁸⁰ These systems may aid or replace human decision-making by utilizing “data-rich inputs and computational techniques to make predictions.”¹⁸¹ One type of AI, generative AI, can “learn” by being trained on certain data sets called “training data,” and then, after being “trained,” it can produce new work in the form of high-quality text, images, or other content based on that original data.¹⁸² In the context of this Comment, AI means computer systems and algorithms that emulate human-level intelligence and thinking.¹⁸³

With the rise of generative AI, some contend that the AI apocalypse is before us.¹⁸⁴ Systems like Chat GPT¹⁸⁵ or Dall-E2¹⁸⁶ may drastically change workers’ primary duties.¹⁸⁷ These platforms can draft essays, emails, and news articles, moving traditional tasks away from employees.¹⁸⁸ A key factor in generative AI is that it may be trained on data derived from human works to produce its content.¹⁸⁹ Because of this, artists have begun to sue companies for using their works as

180. Ryan Calo, *Artificial Intelligence Policy: A Primer and Roadmap*, 51 U.C. DAVIS L. REV. 399, 404 (2017); Darrell M. West, *What is Artificial Intelligence?*, BROOKINGS INST. (Oct. 4, 2018), <https://www.brookings.edu/articles/what-is-artificial-intelligence> [<https://perma.cc/N42N-DJ9B>].

181. Kim & Bodie, *supra* note 179, at 290.

182. Kim Martineau, *What is Generative AI?*, IBM (Apr. 20, 2023), <https://research.ibm.com/blog/what-is-generative-ai> [<https://perma.cc/58KX-N6HY>].

183. Bradford J. Kelley, *Wage Against the Machine: Artificial Intelligence and the Fair Labor Standards Act*, 34 STAN. L. & POL’Y REV. 261, 268 (2023).

184. *See* Calo, *supra* note 180, at 431 (quelling fears people may have on AI and an extensional threat to humanity).

185. OPENAI, *ChatGPT* [hereinafter ChatGPT], <https://chat.openai.com> [<https://perma.cc/445W-LPCZ>].

186. OPENAI, *Dall-E2* [hereinafter *Dall-E2*], <https://openai.com/dall-e-2> [<https://perma.cc/WDR4-NGLN>].

187. *See* Kelley, *supra* note 183, at 268–74 (expressing wage and hour concerns regarding the ability of AI to do human-level tasks); Nicole Black, *The Case for ChatGPT: Why Lawyers Should Embrace AI*, ABA J. (Feb. 21, 2023), <https://www.abajournal.com/columns/article/the-case-for-chatgpt-why-lawyers-should-embrace-ai> [<https://perma.cc/99WH-3HUV>] (arguing that AI should be accepted in the legal profession because of its ability save time and money by producing first drafts of legal documents).

188. *See* Black, *supra* note 187 (stating that ChatGPT can draft documents).

189. *See* Martineau, *supra* note 182 (discussing, for example, that generative AI may be trained on all of Wikipedia or a collection of Rembrandt works to generate outputs in those styles).

training data for AI without a license.¹⁹⁰ Further, the ability of AI to produce content resembling or derived from the work of creative professionals poses a threat to job security.¹⁹¹ For example, AI that can produce scripts in the style of famous television shows or films presents a challenge to creative professionals in the media industry.¹⁹² This dynamic was pivotal in precipitating the 2023 WGA and SAG-AFTRA strikes.¹⁹³

F. 2023 WGA and SAG-AFTRA Strikes and Artificial Intelligence

On May 2, 2023, the WGA, representing nearly 12,000 writers for movies and television shows in Hollywood, declared a strike and walked off the job.¹⁹⁴ A few months later, on July 14, 2023, the SAG-AFTRA, which represents roughly 160,000 actors, broadcast journalists, dancers, voiceover artists, announcers, news writers, among other media professionals,¹⁹⁵ also declared a strike and joined WGA on the picket lines.¹⁹⁶ The main reasons for the 2023 WGA and SAG-AFTRA strikes were concerns over working conditions, compensation structure, and job security threats because of the quick rise of AI.¹⁹⁷

In particular, the WGA feared that screenwriting would become automated, eliminating the need for writers or writers' input on scripts. Screenwriters feared that their works would be used to train AI, without their permission, to produce scripts in their writing style, resulting in less demand for writers and greater profits for studios.¹⁹⁸ Additionally, they were concerned that this would put many screenwriters out of work and leave them without compensation for the data used to train

190. See, e.g., *Andersen v. Stability AI Ltd.*, No. 23-CV-00201-WHO, 2023 WL 7132064, at *1–2 (N.D. Cal. Oct. 30, 2023) (three artists suing an AI company that trained its AI platform off unlicensed works).

191. David De Cremer, Nicola Morini Bianzino & Ben Falk, *How Generative AI Could Disrupt Creative Work*, HARV. BUS. REV. (Apr. 13, 2023), <https://hbr.org/2023/04/how-generative-ai-could-disrupt-creative-work?registration=success> [<https://perma.cc/4LYN-XUH5>].

192. See Appendix (providing examples of ChatGPT's current capabilities). The Appendix includes scripts written by ChatGPT in the style of *Succession* (HBO); *30 Rock* (NBC). See generally *Succession* (HBO); *30 Rock* (NBC).

193. Wilkinson, *supra* note 7.

194. *Id.*

195. About, SAG-AFTRA, <https://www.sagaftra.org/about> [<https://perma.cc/QM3X-6E7Z>].

196. McCluskey, *supra* note 1.

197. *Id.*

198. del Barco, *supra* note 1.

AI.¹⁹⁹ Likewise, actors, including voice actors, expressed concerns about the potential loss of their rights to their name, image, and likeness.²⁰⁰ They worried that studios would use AI to generate their voice or likeness without consent, which could diminish their value, even when used with consent.²⁰¹ The SAG-AFTRA even alleged that studios wanted to use AI to replicate an actor's image, voice, and likeness for any purpose indefinitely without the actor's consent.²⁰²

The WGA sought protections against AI replacing writers or receiving writers' credits on shows and movies, while the SAG-AFTRA sought the protection of actors' image, voice, and likeness.²⁰³ These issues raise two key questions: (1) Is the use of AI in this capacity analogous to studios subcontracting the work of their union employees to non-union labor (e.g., AI),²⁰⁴ and (2) if so, should the use of AI be considered a mandatory subject of collective bargaining in unionized workplaces of creative professionals?²⁰⁵

II. ANALYSIS

This Part argues that using AI to do the work of unionized writers, actors, and other creative professionals is analogous to subcontracting.²⁰⁶ First, this Part contends that removing work from bargaining unit employees to AI platforms or substituting employees for AI should be analyzed under *Fibreboard Paper Products Corp. v.*

199. *Id.*

200. Bennett, *supra* note 19.

201. *See id.* (expressing concerns over studio's ability to manipulate a performer's voice or likeness to create new audio, visual, or audiovisual performances without actor's consent). Screenwriters and actors may find protections in intellectual property law; however, those topics are beyond the scope of this Comment. *See* Riddhi Setty, *Copyright Office Sets Sights on Artificial Intelligence in 2023*, BL (Dec. 29, 2022, 5:00AM), <https://news.bloomberglaw.com/ip-law/copyright-office-sets-sights-on-artificial-intelligence-in-2023> [<https://perma.cc/GY6Y-7YKE>] (explaining that the U.S. Copyright Office is attempting to find a balance between the rights of creators whose work is being used to train AI while encouraging innovation).

202. Bennett, *supra* note 19.

203. *Id.*; *see* Maddaus, *supra* note 20 (describing a WGA proposal involving terms allowing for AI as long as it does not receive writers' credit).

204. *See cf.* PHILLIPS, *supra* note 28 (arguing that removal of work for unionized transit employees due to automation should be treated as subcontracting).

205. *Id.*

206. *See id.* (discussing how workplace automation can be analogized to subcontracting because it removes work from the union).

NLRB.²⁰⁷ It then asserts that using AI in this way is analogous to subcontracting work to non-union employees and, therefore, should be a mandatory subject of collective bargaining.²⁰⁸ This Part further establishes this argument by differentiating this issue from that in *First National Maintenance Corp. v. NLRB*, where bargaining on the issue would not be required.²⁰⁹ Lastly, this Part asserts that congressional intent behind the NLRA supports the conclusion that subcontracting human work to AI is a mandatory bargaining subject.²¹⁰

A. *Artificial Intelligence is the New Subcontracting for Unionized Creative Professionals*

While technology has long supplanted physical labor, workers in creative fields have historically been unaffected by rapid increases in automation, making the introduction of AI in this field somewhat untouched ground.²¹¹ AI has only begun to play a role in modern life, and its full capabilities are yet unknown.²¹² The ever-improving AI technology may threaten job security, and many fear that it will soon replace jobs done by humans, as was the central theme in the 2023

207. 379 U.S. 203, 209–10 (1964).

208. *See id.* (holding that replacing union employees with non-union employees is a mandatory subject of collective bargaining); *Ford Motor Co. v. NLRB*, 441 U.S. 488, 495 (1979) (suggesting NLRB has authority to deem topics mandatory subjects of bargaining).

209. *See* 452 U.S. 666, 667–68 (1981) (holding that an employer's decision to terminate operations is not necessarily a subject of mandatory bargaining).

210. *See id.* (stating that the NLRB holds the power to define wages, hours, and other terms and conditions of employment to meet specific industrial practices).

211. *See* Alana Semuels, *Millions of Americans Have Lost Jobs in the Pandemic—And Robots and AI Are Replacing Them Faster than Ever*, *TIME* (Aug. 6, 2020, 6:22 AM), <https://time.com/5876604/machines-jobs-coronavirus> [<https://perma.cc/5JA4-Z7Z8>] (explaining that technology advances have replaced workers like buttons displacing elevator operators); Calo, *supra* note 180, at 426 (noting few sectors will be untouched by AI's "contemporary and anticipated capabilities").

212. *See* Michael Gaynor, *Automation and AI Sound Similar, but May Have Vastly Different Impacts on the Future of Work*, *BROOKINGS INST.* (Jan 29, 2020), <https://www.brookings.edu/articles/automation-and-artificial-intelligence-sound-similar-but-may-have-vastly-different-impacts-on-the-future-of-work> [<https://perma.cc/9N9H-UMGD>] (noting occupations at risk of replacement due to AI); *cf.* *IAM CANADA*, *supra* note 178, at 6–10 (explaining impacts of the First Industrial Revolution, Second Industrial Revolution, and Computerization on society).

WGA and SAG-AFTRA strikes.²¹³ Without sufficient legal protections, actors, writers, and many other creative professionals risk losing their jobs and being replaced with AI.²¹⁴

1. *Artificial Intelligence as analyzed under Fibreboard and First National Maintenance*

The majority holding in *Fibreboard* establishes a framework that suggests substituting union employees in creative professions with AI is comparable to subcontracting under the NLRA.²¹⁵ Relying on Justice Stewart's concurrence from *Fibreboard* to make its argument, *First National* further supports this argument by providing parameters to the *Fibreboard* decision.²¹⁶

Under the majority's holding in *Fibreboard*, employers may not subcontract work from union to non-union employees.²¹⁷ The Court further held that subcontracting is a mandatory subject of collective bargaining.²¹⁸ Applying the majority's holding to the 2023 WGA and SAG-AFTRA strikes and other situations involving unionized creative professionals, replacing union workers with AI to perform tasks traditionally handled by union employees is no different than subcontracting that work to non-union employees.²¹⁹

213. del Barco, *supra* note 1; see *First Nat'l Maint. Corp.*, 452 U.S. at 667–68 (holding that the employer did not commit an unfair labor practice against employees when it decided to terminate all employees and close its business).

214. See CHALLENGER, GRAY & CHRISTMAS, INC., CHALLENGER REPORT—MAY 2023, <https://omscgcinc.wpenginepowered.com/wp-content/uploads/2023/06/The-Challenger-Report-May23.pdf> [<https://perma.cc/M36R-Y9NU>] (noting 3,900 layoffs among U.S.-based employers due to AI in 2023).

215. See *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 209–10 (1964) (establishing subcontracting as mandatory bargaining subject); *infra* Part D (discussing the *Fibreboard* framework).

216. See *First Nat'l Maint. Corp.*, 452 U.S. at 667–68 (holding that an employer's decision to terminate operations is not necessarily a subject of mandatory bargaining).

217. *Fibreboard Paper Prods. Corp.*, 379 U.S. at 209–10.

218. *Id.*

219. See Evenson, *supra* note 121, at 194 (explaining that eliminating job positions involves “terms and conditions” of employment within the meaning of section 8(d) of the NLRA); Gaynor, *supra* note 212 (explaining AI may replace human labor in intelligence rather than just tasks, like automation); see also *NLRB v. Westinghouse Broad. & Cable, Inc.*, 849 F.2d 15, 22–24 (1st Cir. 1988) (eliminating a bargaining unit and replacing it with subcontractors was a mandatory subject of bargaining). *But see Furniture Rentors of Am., Inc. v. NLRB*, 36 F.3d 1240, 1243, 1250 (3d Cir. 1994) (declining to mandate negotiations on subcontracting when decision was based on employee theft and carelessness).

Unlike traditional technological advancements, whereby technology substitutes for labor by more efficiently replicating a mechanical process, AI is more akin to substituting labor for labor. For example, the transition from physical stitching to the use of the sewing machine leveraged the engineering of a mechanism to replicate the physical process.²²⁰ A sewing machine does not “learn” to mimic the process of stitching but is designed to stitch.²²¹ By contrast, AI is not designed to write but is “taught” through repetition to mimic the outputs of creative labor.²²² Unlike prior technological advancements, the implementation of generative AI effectively substitutes future labor with past labor by leveraging massive amounts of computing inputs to train a model and recycle the past labor—while no sewing machine could recycle a previous sewer’s stitch.²²³

Because the use of AI is more akin to substituting past creative labor for future creative labor than substituting mechanical processes for physical labor, it should be treated as subcontracting to evaluate its role in labor relations. Therefore, implementing AI in the workplace of creative professionals should be a mandatory subject of collective bargaining.²²⁴ The majority in *Fibreboard* focused on two major factors: (1) whether the decision to subcontract altered the basic operations of the business and (2) whether the business contemplated a capital investment before making the decision.²²⁵ First, the decision to implement AI in the unionized workplace to produce scripts for television shows and movies would not alter the basic operations of television or movie studios—the studios would still produce media for

220. See generally Jimmy Stamp, *The Many, Many Designs of the Sewing Machine*, Smithsonian Mag. (Oct. 16, 2013), <https://www.smithsonianmag.com/arts-culture/the-many-many-designs-of-the-sewing-machine-2142740> [<https://perma.cc/8DUU-ZUYN>] (explaining the development of the sewing machine).

221. *Id.*

222. See Martineau, *supra* note 182 (explaining how AI can “learn” from data sets to produce new work based on the original data).

223. See *id.* (outlining how the new work AI creates is “similar, but not identical” to the original data inputs); Gaynor, *supra* note 212 (discussing how AI can replicate human intelligence in the workplace, including planning, problem-solving, or perception).

224. See *Fibreboard Paper Prods. Corp.*, 379 U.S. at 209–10 (holding that subcontracting bargaining unit employees by replacing them with non-union employees is a mandatory subject of collective bargaining).

225. *Id.* at 213.

public consumption and turn a profit.²²⁶ As in *Fibreboard*, where an employer replaced its unionized maintenance workers with non-union subcontractors to perform the same work at a lower cost, studios that use AI to write scripts or replace actors' voices or images will continue to produce the same work as they did with unionized, human writers or actors.²²⁷ Studios could continue to use unionized labor to produce scripts, speak as voice actors, and create similar media.²²⁸ However, studios may save substantial sums by unilaterally replacing unionized workers with AI.²²⁹ Similar to the employer in *Fibreboard*, the studios' freedom to operate their business would not be "significantly abridge[d]" by being required to bargain with WGA and SAG-AFTRA on the use of AI in the workplace because the business itself, producing film media, would remain unchanged.²³⁰

Second, like the employer in *Fibreboard*, studios may not have to contemplate a capital investment to implement AI instead of human writers or actors.²³¹ With the availability of AI platforms at little or no cost, studios could save significant costs by relying on free platforms

226. See *id.* at 209–10 (arguing that the employer operated the same business but wanted to cut costs by hiring non-union employees); Martineau, *supra* note 182 and accompanying text (explaining how AI is trained).

227. See *Fibreboard Paper Prods. Corp.*, 379 U.S. at 209–10 (stating that the company hired non-union employees to conduct the same work under the same conditions of employment); Gaynor, *supra* note 212 (discussing range of tasks AI can perform).

228. See Winston Cho, *Hollywood's AI Compromise: Writers Get Protections, Studios Aim for Copyright*, HOLLYWOOD REP. (Sept. 27, 2023, 2:35 PM), <https://www.hollywoodreporter.com/business/business-news/wga-deal-studios-plan-pursue-copyrights-ai-generate-d-scripts-1235602466> [<https://perma.cc/ENB6-82L6>] (explaining the ways studios can use AI).

229. See *Fibreboard Paper Prods. Corp.*, 379 U.S. at 213 (stating that the employer's decision was fueled by cost-saving measures); Jack Kelly, *Goldman Sachs Predicts 300 Million Jobs will be Lost or Degraded by Artificial Intelligence*, FORBES (Mar. 31, 2023, 10:48 AM), <https://www.forbes.com/sites/jackkelly/2023/03/31/goldman-sachs-predicts-300-million-jobs-will-be-lost-or-degraded-by-artificial-intelligence/?sh=3cdebdea782b> [<https://perma.cc/Z4CB-JN22>] (acknowledging the cost savings when companies incorporate AI into their work).

230. See *Fibreboard Paper Prods. Corp.*, 379 U.S. at 213 (finding bargaining would not significantly abridge business freedom). *But see* *Automatic Sprinkler Corp. of Am. v. NLRB*, 120 F.3d 612, 620 (6th Cir. 1997) (holding that subcontracting not mandatory subject of collective bargaining when company fundamentally changed the nature of business).

231. See *Fibreboard Paper Prods. Corp.*, 379 U.S. at 213 (holding that there was no capital investment contemplated because it was a cost-saving measure, and the subcontracting employees were hired to the same work under similar conditions as the union employees).

such as ChatGPT to produce scripts.²³² In this event, the lack of capital investment would satisfy the second factor in *Fibreboard*. Thus, the duty to bargain should extend to the decision to implement AI to replace union workers.²³³ However, relying on free platforms raises intellectual property issues regarding the output.²³⁴ With this in mind, studios may opt to purchase an already-developed AI platform.²³⁵ For example, a county government in New York began using a free version of an AI-powered software to answer questions from the public, like whether certain facilities were open.²³⁶ The county now pays for the software, which can answer about seventy-five percent of questions asked by the public and costs pennies per conversation, saving the office significantly in staff costs.²³⁷ Consequently, studios could employ AI platforms to write scripts at a fraction of the cost of human writers.²³⁸

Alternatively, studios may develop their own AI platforms tailored to the television and film industry.²³⁹ In creating an industry-specific platform, studios would likely contract with established AI companies,

232. See *ChatGPT*, *supra* note 185 (demonstrating a free platform to produce content generated by AI); *infra* Appendix (showing examples of ChatGPT's current capabilities).

233. See *Fibreboard Paper Prods. Corp.*, 379 U.S. at 213 (holding that without a capital investment, subcontracting is likely mandatory bargaining subject).

234. Intellectual property issues are outside the scope of this Comment. See Gil Appel, Juliana Neelbauer, & David A. Schweidel, *Generative AI Has an Intellectual Property Problem*, HARV. BUS. REV. (Apr. 7, 2023), <https://hbr.org/2023/04/generative-ai-has-an-intellectual-property-problem> [<https://perma.cc/9S3W-TNK6>] (discussing the convergence of generative AI and intellectual property law). Content created by generative AI raises questions about ownership of the product and the legality of using unlicensed data used in training AI platforms. *Id.*

235. See Semuels, *supra* note 211 (providing uses of AI in different business sectors); Rob Toews, *These are the Startups Applying AI to Transform Healthcare*, FORBES (Aug. 26, 2020, 10:47 AM), <https://www.forbes.com/sites/robtoews/2020/08/26/ai-will-revolutionize-healthcare-the-transformation-has-already-begun/?sh=62b98f8a722f> [<https://perma.cc/9C5R-FNPJ>] (explaining healthcare-specific AI platforms available for use).

236. See Semuels, *supra* note 211 (discussing different types of AI platforms).

237. See *id.* (implementing AI because of the need to cut ten percent of staff due to budget issues).

238. See *id.* (stating tax incentives help drive the push for automation and implementation of AI to replace workers); *ChatGPT*, *supra* note 185, and *Dall-E2*, *supra* note 186 as examples of free AI services.

239. See *cf.* *A&O Announces Exclusive Launch Partnership with Harvey*, ALLEN & OVERY (Feb. 15, 2023), <https://www.allenoverly.com/en-gb/global/news-and-insights/news/ao-announces-exclusive-launch-partnership-with-harvey> [<https://perma.cc/NV28-KN54>] (announcing the launch of an AI platform built from OpenAI's ChatGPT specifically tailored to the legal career).

like OpenAI, Meta, or Anthropic, and use content from the studios' library as training data.²⁴⁰ This, of course, would require a significant capital investment by the studios because of the upfront costs; however, the actual investment would be repurposed labor.²⁴¹ Studios would feed the AI platform scripts and other data they already own, originally created by unionized employees, allowing studios to produce non-rivalrous products for endless consumption.²⁴² This would allow studios to consistently reuse old labor, e.g., scripts, to produce more and more content similar to the archival inputs.²⁴³ Under this model, studios are essentially subcontracting out their writers with their own writers' work product.²⁴⁴ Studios might contend that, given the significant capital investment in building the AI platform, they have not met the second factor under *Fibreboard*.²⁴⁵ Therefore, they would argue that they are exempt from the duty to bargain over their decision

240. See *Pricing*, OPENAI, <https://openai.com/pricing#language-models> [<https://perma.cc/BC7R-32K3>] (individualized models available for purchase where buyer supplies its own training data); *Llama 2: Open Source, Free for Research and Commercial Use*, META, <https://ai.meta.com/resources/models-and-libraries/llama> [<https://perma.cc/T82F-9GZG>] (showing AI platforms may be purchased for corporate use); *Meet Claude*, ANTHROPIC, <https://www.anthropic.com/product> [<https://perma.cc/VSP7-7ZWF>] (discussing purchase options). A financial organization, which integrated AI to improve its customer support, used its own data and codes to alter an open source AI platform to meet the organization's precise needs. Silvio Palumbo & David Edelman, *What Smart Companies Know About Integrating AI*, HARV. BUS. REV., <https://hbr.org/2023/07/what-smart-companies-know-about-integrating-ai> [<https://perma.cc/KU2K-KAG9>]. Companies can create personalized AI platforms based on the data a company feeds it. *Id.*

241. *Infra* note 244 and accompanying text. *But see* *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 213 (finding the employer had not contemplated capital investment).

242. See HANNELE NIEMI, ROY D. PEA & YU LU, *AI IN LEARNING: DESIGNING THE FUTURE* 39–40 (2023) (explaining data inputs resulting in AI “learning” patterns resembling human learning and discussing how AI “learn[s]”); OPENAI, *Dall-E2 Pre-Training Mitigations* (June 28, 2022) [hereinafter *Pre-Training Mitigations*], <https://openai.com/research/dall-e-2-pre-training-mitigations> [<https://perma.cc/Y7TT-LCBQ>] (explaining DALL-E2 is training on millions of images from the internet).

243. See NIEMI, PEA & LU, *supra* note 242, at 39–40 (discussing how AI “learn[s]”); *Pre-Training Mitigations*, *supra* note 242 (discussing training data).

244. *Cf. Fibreboard Paper Prods. Corp.*, 379 U.S. at 209–210 (discussing subcontracting when replacing union members with non-union members to do the same job); *NLRB v. Westinghouse Broad. & Cable, Inc.*, 849 F.2d 15, 22–23 (1st Cir. 1988) (holding subcontracting impermissible when new employees performed nearly identical tasks).

245. *Fibreboard Paper Prods. Corp.*, 379 U.S. at 213 (factoring in lack of capital investment to find employer's decision to subcontract impermissible).

to implement AI.²⁴⁶ While there are capital expenditures, the purpose of this prong of the *Fibreboard* framework is to enable companies to change the course of their business, not retain the same business but with a substituted labor force.²⁴⁷

In any case, even if studios still used human writers to refine and finalize a script initially written by AI, which has been trained off the work of a human writer, the need for writers would significantly decrease.²⁴⁸ This reduction in the workforce would save the studios substantial untold costs in salaries and benefits.²⁴⁹ Some argue that studios could even replace most, if not all, of a writing team with AI and retain only a handful of writers to edit the AI's work.²⁵⁰

Therefore, applying the *Fibreboard* framework, it is logical to extend mandatory subjects of bargaining to encompass subcontracting work traditionally performed by union employees to AI, resulting in the displacement of those employees.²⁵¹ The decision to replace unionized workers with AI would not alter the basic operation of the corporation—studios would still produce television and film media—nor would the capital investment contemplated by the studios outweigh the considerable labor cost savings.²⁵²

246. *Id.*

247. *See e.g.*, *First Nat'l Maint. Corp. v. NLRB*, 452 U.S. 666, 687 (1981) (allowing the company to change its course of business or operations through partial closure); *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 549 (1964) (“The objectives of national labor policy . . . require that the rightful prerogative of owners independently to rearrange their businesses”); *Gen. Motors Corp.*, 191 N.L.R.B. 951 (1871) (“[T]his issue is controlled by the rationale the courts have generally adopted . . . in which a significant investment . . . of capital will affect the scope and ultimate direction of an enterprise [and] are matters essentially financial and managerial in nature . . . [and] not the types of subject [that] Congress intended to encompass within ‘wages, hours of employment, or other conditions of employment.’”).

248. *See* NIEMI, PEA & LU, *supra* note 242, at 39–40 (2023) (explaining data inputs).

249. *See* Gary Friedman, *Why Studio Transparency is Critical to Resolving WGA Battle over AI*, VARIETY (June 22, 2023, 6:00 AM), <https://variety.com/vip/setting-the-scene-for-bot-scripts-1235651157> [<https://perma.cc/G6AZ-S6AH>] (explaining that using AI to write scripts for television shows would likely lead to fewer screenwriters per series).

250. *See id.* (noting that AI could be used to write initial scripts and studios would save money by employing fewer professional screenwriters).

251. *See* *First Nat'l Maint. Corp. v. NLRB*, 452 U.S. 666, 675 (1981) (explaining that Congress delegated power to the National Labor Relations Board to condemn unfair labor practices by either management or union).

252. *See* *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 213 (1964) (analyzing capital investment).

Moreover, when viewed through the framework from Justice Stewart's concurrence in *Fibreboard* and elaborated upon in *First National*, AI would nevertheless be a mandatory subject of bargaining.²⁵³ Justice Stewart argued that decisions regarding the basic scope of the enterprise or commitment of investment capital are beyond the scope of mandatory subjects and exempt from collective bargaining even if such decisions directly impact employment terms or conditions.²⁵⁴ Following Justice Stewart's concurrence, the decision to lay off or downsize the size of a writers' room or limit the cast or crew is neither a decision regarding the basic scope of the enterprise nor a commitment of investment capital.²⁵⁵ Moreover, applying the holding of *First National*, the decision to replace union employees with AI is not a managerial decision that only indirectly affects employment relationships, such as how and where to advertise.²⁵⁶ Nor is it a decision that alters the direction and scope of the business, like *First National's* decision to even be in business.²⁵⁷ Rather, if utilized to replace a unionized workforce, it becomes a decision that directly affects an employee's terms and conditions of employment, all the while allowing studios to produce similar content faster and cheaper without altering the fundamental scope of its business.²⁵⁸

Unlike in *First National*, implementing AI in the unionized workplace is well-suited for resolution via collective bargaining.²⁵⁹ In

253. *Id.* at 223 (Stewart, J., concurring); see *First Nat'l Maint. Corp.*, 452 U.S. at 686 (holding partial closure of business outside the scope of the NLRA).

254. *Fibreboard Paper Prods. Corp.*, 379 U.S. at 223 (Stewart, J., concurring).

255. *Id.* at 223; see *Ford Motor Co. v. NLRB*, 441 U.S. 488, 495 (1979) (differentiating managerial decisions at core of entrepreneurial control from those ripe for bargaining).

256. *First Nat'l Maint. Corp.*, 452 U.S. at 676–77; see Calo, *supra* note 180, at 426 (noting few sectors will be untouched by AI).

257. *First Nat'l Maint. Corp.*, 452 U.S. at 677 (relying on Justice Stewart's language "fundamental to the basic direction of the corporate enterprise" to draw this analogy) (quoting *Fibreboard Paper Prods. Corp.*, 379 U.S. at 223 (Stewart, J., concurring)).

258. Friedman, *supra* note 249; see Kim & Bodie, *supra* note 179, at 290 ("[B]uilt by analyzing large amounts of data to extract patterns and then using those patterns to predict outcomes in new cases or situations."). AI continues to learn through new data inputs. *Id.*; see *Pre-Training Mitigations*, *supra* note 242 (discussing how AI that produces pictures is trained on millions of images from the internet).

259. See *First Nat'l Maint. Corp.*, 452 U.S. at 677–79 (contending that the role of union and collective bargaining in the context of ceasing operations would be to delay or halt the closing, and that often employers have no reasonable alternative but to shut

the context of the WGA and SAG-AFTRA strikes and anticipating future labor relations disputes regarding AI, employees, and employers should be able to come together and reach mutually beneficial resolutions through mandatory bargaining.²⁶⁰ The issue is not outside the hands of both the management and the union, like in *First National*.²⁶¹ Establishing the decision to implement AI in the unionized workplace as a mandatory subject of bargaining would ensure that the parties meet at the bargaining table to discuss potential solutions to the threat AI poses to unionized creative professionals.²⁶²

B. The Duty to Bargain Explored Through Congressional Intent

Congress's intent in enacting the NLRA strongly reinforces the notion that subcontracting tasks to AI, which union employees previously performed, is a contemporary manifestation of traditional subcontracting.²⁶³ "[W]ages, hours, [and] other terms and conditions of employment" were left undefined for this exact reason—to be dynamic and adapt to present-day issues.²⁶⁴ Congress intended these words to mold to modern society and meet industry-specific needs, as well as the social and political climate of the times.²⁶⁵ Additionally, as discussed in *Fibreboard*, the role of AI in the unionized workplace is a

down operations); *Ford Motor Co.*, 441 U.S. at 498–99 (explaining that the NLRA promotes discussion to come to mutually beneficial agreements regarding workplace issues); Dau-Schmidt, *supra* note 37, at 420–22; *Allied Chem. & Alkali Workers of Am., Loc. Union No. 1 v. Pittsburgh Plate Glass Co., Chem. Div.*, 404 U.S. 157, 163–64 (1971) (promoting equity in bargaining power between labor and management is goal of American labor law).

260. See *Ford Motor Co.*, 441 U.S. at 498–99 (“The object of this Act . . . [is] to [e]nsure that employers and their employees could work together to establish mutually satisfactory conditions. The basic theme of the [NLRA] was that through collective bargaining the passions, arguments, and struggles of prior years would be channeled into constructive, open discussions leading, it was hoped, to mutual agreement.”).

261. *First Nat'l Maint. Corp.*, 452 U.S. at 687–88 (stating that neither the employer nor the union could control or have authority over the decisions of a third-party).

262. See *supra* notes 257–60 and accompanying text (discussing how the decision to replace union employees with AI directly affects employees' terms and conditions of employment).

263. See *Ford Motor Co.*, 441 U.S. at 495–96 (“The original House bill had contained a specific listing of the issues subject to mandatory bargaining [], but this attempt to ‘straight jacke[t]’ and to ‘limit narrowly the subject matters appropriate for collective bargaining’ was rejected in conference in favor of more general language . . .”).

264. H.R. REP. NO. 245, *supra* note 101, at 310.

265. *Id.* at 362.

subject particularly suited for the collective bargaining process.²⁶⁶ It is a technology that cannot be ignored, which leaves the door open for labor and management to work together to establish viable solutions for both sides.²⁶⁷ It is within the power of the NLRB to bring this issue into the problem-solving framework that is collective bargaining.²⁶⁸

Notably, both the NLRB and the courts can amend the list of mandatory bargaining subjects by interpreting “wages, hours, and other terms and conditions of employment” in light of specific industrial practices.²⁶⁹ The advent of AI and its use in the workplace presents an ideal opportunity to address industry-specific concerns and the social and political climate around AI in the television and film industries.²⁷⁰ Given the NLRB’s broad authority and discretion to find mandatory subjects of collective bargaining, should it encounter this question, it should rule affirmatively that using AI to replace work previously done by union employees is a mandatory subject of collective bargaining because it is functionally no different than replacing union employees with less expensive non-union workers.²⁷¹

CONCLUSION

The National Labor Relations Act paves a clear path forward for unionized workers, especially those in creative professions, to protect themselves from displacement by AI through collective bargaining. Mandatory bargaining over subcontracting should not be limited solely to human workers replacing other human workers.²⁷² Drawing on the *Fibreboard* and *First National* precedents, the scope of mandatory bargaining on subcontracting should extend beyond human workers

266. See *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 211 (1964) (stating that holding subcontracting as a mandatory subject of bargaining promotes the fundamental purpose of the NLRA).

267. *Id.*

268. *Id.*; see *Ford Motor Co.*, 441 U.S. at 495 (stating that the NLRB has authority to determine mandatory subjects of bargaining on a case-by-case basis).

269. *First Nat’l Maint. Corp. v. NLRB*, 452 U.S. 666, 675 (1981); H.R. REP. NO. 245, *supra* note 101, at 310; see *Fibreboard Paper Prods. Corp.*, 379 U.S. at 220–21 (explaining “wages, hours, and other terms and conditions” was intentionally left blank for NLRB to interpret in light of industry specific practices).

270. H.R. REP. NO. 245, *supra* note 101, at 362.

271. See *First Nat’l Maint. Corp.*, 452 U.S. at 675 (stating that the NLRB holds the power to define wages, hours, and other terms and conditions of employment to meet specific industrial practices).

272. *Supra* Section II.A.

to include subcontracting to AI.²⁷³ Further, this extension is consistent with the congressional intent of the NLRA.²⁷⁴

Applying the *Fibreboard* holding, mandating bargaining on AI does not “significantly abridge” an employer’s ability to operate its business.²⁷⁵ The decision to implement AI to replace unionized workers would not alter the basic operations of the business.²⁷⁶ Rather, studios would continue producing television and film media for public consumption. The decision to use free or inexpensively priced AI, satisfying the second prong of the *Fibreboard* framework, likely does not involve capital investment.²⁷⁷ Alternatively, if a studio contemplates capital investment by developing its own AI, it will only build on previous labor, e.g., the scripts written by employed writers.²⁷⁸ This labor input far outweighs any capital investment contemplated by the studios, and the existence of a capital investment should not be treated as dispositive.²⁷⁹

Moreover, under *First National*, the decision to implement AI to replace union employees should be a mandatory subject of collective bargaining. This decision is not a managerial decision that indirectly affects employment relationships,²⁸⁰ nor should it be exempt from collective bargaining, like decisions regarding the basic scope of the enterprise.²⁸¹ Rather, this issue is appropriately suited for problem-solving through the collective bargaining framework.²⁸²

Finally, treating subcontracting union employees with AI as a mandatory subject of bargaining is fully consistent with the congressional intent behind the NLRA.²⁸³ The legislative history of the NLRA and the Supreme Court’s discussions of the history support the idea that this issue is particularly ripe for problem-solving through collective bargaining.²⁸⁴ Congress never intended for mandatory

273. *Supra* Section II.A.

274. *Supra* Section II.B.

275. *Supra* Section II.A.1.

276. *Supra* Section II.A.1.

277. *Supra* Section II.A.1.

278. *Supra* Section II.A.1.

279. *Supra* Section II.A.1.

280. *Supra* Section II.A.1.

281. *Supra* Section II.A.1.

282. *Supra* Section II.A.1.

283. *Supra* Section II.B.

284. *Supra* Section II.B.

subjects to be rigid or finite.²⁸⁵ Instead, mandatory subjects are meant to be fluid and adjust to meet societal and industrial interests and needs of the time.²⁸⁶ As the Supreme Court has held, the NLRB possesses the authority to deem certain topics to be mandatory, permissive, or illegal subjects of bargaining.²⁸⁷ For creative professionals, introducing AI into the workplace should be a mandatory subject of bargaining.²⁸⁸ By ensuring this protection, unionized creative professionals with valid concerns about job security will have a federally protected opportunity to negotiate with their employer and come to solutions that benefit the employers, the union, and society.²⁸⁹

APPENDIX

For this Comment, I asked ChatGPT to write two short scripts—one in the style of *30 Rock* and one in the style of *Succession*. While the scripts were not perfect, ChatGPT captured the witty comedic style of *30 Rock* and the competitive, complex, and dark essence of *Succession*. Below are scripts that ChatGPT wrote.²⁹⁰

ChatGPT's Take on *Succession*:

Title: "A Family's Ambition"

INT. LUXURIOUS PENTHOUSE—DAY

The opulent penthouse showcases Manhattan's skyline. The ROY FAMILY gathers around a lavish conference table.

LOGAN

(grimly)

The shareholders' meeting approaches.

KENDALL

(resolute)

Dad, it's time for a change. The shareholders need new leadership.

ROMAN

(raising an eyebrow)

Kendall, thinking for once?

SHIV

(coyly)

What's on your mind?

Kendall braces himself.

285. *Supra* Section II.B.

286. *Supra* Section II.B.

287. *Supra* Section II.B.

288. *Supra* Section II.A.1.

289. *Supra* Section II.B.

290. *ChatGPT*, *supra* note 185.

KENDALL

(determined)

I want to be CEO, Dad. I'm ready to lead.

Roman quips.

ROMAN

(smiling)

Kendall, vanilla's still a flavor.

Logan studies Kendall.

LOGAN

(resolute)

Prove it, Kendall. Secure the votes at the shareholders' meeting.

The room grows tense. Kendall knows this is his moment to prove himself.

INT. LUXURIOUS PENTHOUSE—CONTINUOUS

The siblings exchange tense glances, realizing the family power struggle has begun. The penthouse, once warm, is now a battleground for ambition.

FADE OUT.²⁹¹

ChatGPT's Take on *30 Rock*:

Liz Lemon, head writer of "TGS with Tracy Jordan," was facing yet another chaotic day at 30 Rockefeller Plaza. She shuffled into her office, clutching a coffee cup that might as well have been an IV drip. Her assistant, the perpetually cheerful Jenna Maroney, burst in wearing a tiara.

Jenna exclaimed, "Liz, darling, guess what?! I'm the new face of 'Sabor de Soledad' cheese singles! They're targeting single women who cry into their cheese at night!"

Liz blinked, her tired brain struggling to comprehend. "Jenna, we have a show to produce. And you can't wear a tiara on set again."

Tracy Jordan, the unpredictable star of the show, barged in wearing a cape and holding a monkey. "Liz Lemon, I've decided this monkey is going to be my life coach. His name is Dr. Bananas."

Liz sighed. "Tracy, we need to rehearse for tonight's show. And that's a raccoon, not a monkey."

Kenneth Parcell, the eternally optimistic NBC page, chimed in, "Well, Liz, I've been hearing that Dr. Bananas has a very calming presence."

Liz pinched the bridge of her nose. "Kenneth, please focus. We have a sketch about a time-traveling pizza delivery guy and another about a singing toilet that need to be ready in a few hours."

As Liz tried to rally her team, Jack Donaghy, the slick and authoritative network executive, waltzed in. "Lemon, I've just negotiated a deal to have a live alligator as a guest on tonight's show. It's a synergy opportunity with the network's new wildlife reality series, 'Gator Grapplers: Office Edition.'"

Liz stared at Jack, a mix of bewilderment and exasperation on her face. "Jack, we can't have a live alligator on set! This is a sketch comedy show, not a zoo!"

291. *Id.* (script on file with the author).

“Nonsense, Lemon,” Jack replied. “It’s the perfect chance for some cross-promotion. Besides, we already have a liability waiver ready for the audience.” As the chaos unfolded, Liz’s phone buzzed with a message from her best friend, Pete Hornberger, the show’s producer. The message read, “Liz, emergency! The cue cards are all mixed up, and Grizz just accidentally stapled his costume to his leg!”

Liz muttered to herself, “Of course, because that’s just how things work around here.”

In the midst of the madness, Liz took a deep breath and realized that, despite the absurdity, the unpredictable cast and crew were like her dysfunctional family. And somehow, every week, they managed to put on a show that left the audience laughing.

As the clock ticked down to showtime, Liz Lemon braced herself for the whirlwind of hilarity, mishaps, and unexpected triumphs that was a day at “TGS with Tracy Jordan.”

[Note: This short story is written in the style of the TV show “30 Rock,” with its trademark blend of absurdity, fast-paced humor, and quirky characters.]²⁹²

292. *Id.* (script on file with the author).