Washington and Lee Law Review

Volume 31 | Issue 3 Article 14

Fall 9-1-1974

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Therefore, the *Eason* decision may only introduce unnecessary confusion into an already confused area of the law. In spite of the fact that the *Birnbaum* doctrine was rejected, the analysis used by the court after the rejection was very similar to that required under the *Birnbaum* rule. The decision may also allow courts to ignore the balancing required between the needs for a vigorous securities market and for the protection of investors.[74] In light of the Supreme Court's practice of deferring decisions on matters of securities regulation to the legislative branch,[75] the conflict between *Eason* and cases adhering to the purchaser-seller requirement may not be resolved until Congress or the Securities and Exchange Commission takes steps to clarify the private right of action under § 10(b) and Rule 10b-5.[76]

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BARGAINING LOCKOUTS AND THE USE OF TEMPORARY REPLACEMENTS: A LEGITIMATE EMPLOYER OPTION

The National Labor Relations Act (NLRA) is premised upon the theory that encouragement of the process of collective bargaining will mitigate and eliminate impediments to the "free flow of commerce."[1] When either the union or management acts in a manner which threatens this statutory labor policy, the National Labor Relations Board is "empowered . . . to prevent any person from engaging in

[74]See text accompanying notes 5-8 *supra*.

[75]*See* Blau v. Lehman, 368 U.S. 403, 412-13 (1962).

[76]One commentator has noted that the SEC is better equipped to define the right to due under § 10(b) than are the courts. He asks: "After nearly thirty years of experience with Rule 10b(5) and nearly twenty-five with the private action, has nothing been learned which could usefully be incorporated into an amended or restated rule? Or is the prose of 1942 timeless in its clarity and its verity?" Bradford, *Rule 10b-5: The Search for a Limiting Doctrine*, 19 BUFF. L. REV. 205, 222 (1970).

Another article suggests that "Congress or the S.E.C. should bring some semblance of order by means of workable rules or regulations in this field so that the corporations and their stockholders may not be subjected to countless law suits at the whim or every purchaser, seller, or potential purchaser who may claim he would have acted or refrained from acting." Comment, *Securities—Standing Under Rule 10b-5—Superintendent of Insurance v. Banker's Life & Casualty Co., 404 U.S. 6 (1971)*, 60 GEO. L.J. 1605 (1972).

[1]29 U.S.C. § 141 (1970).

any unfair labor practice . . . affecting commerce."[2] One employer practice which, until recently, had been universally considered to be contrary to collective bargaining was the so-called "bargaining lockout." This particular type of lockout has been defined as "a shutdown initiated by an employer in order to break a bargaining impasse in circumstances where, apart from the lockout, the employer's conduct is blameless."[3] The Board has held that such conduct interferes with the employees' rights as protected under § 7 of the NLRA.[4] However, other Board decisions have recognized that, in certain situations, the employer may resort to a lockout as a defense to a threatened union strike.[5] When using a defensive lockout, the employer has also been permitted to hire temporary replacements to continue his business operations until a settlement has been reached.[6] The bargaining lockout, on the other hand, has been categorized as "offensive" in nature and the use of temporary personnel subsequent to a bargaining lock-

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[2]29 U.S.C. § 160 (1970). Section 8 of the NLRA lists a number of practices for which either the union or the company will be charged with an unfair labor practice. See 29 U.S.C. § 158 *et seq.* (1970).

[3]*See* Meltzer, *Lockouts Under the LMRA: New Shadows On An Old Terrain*, 28 U. CHI. L. REV. 614 (1961). Professor Meltzer notes that the Board has generally found the bargaining lockout to be violative of the provisions of the NLRA. *See, e.g.*, Morand Bros. Beverage Co., 91 N.L.R.B. 409 (1950), *remanded sub nom.* Morand Bros. Beverage Co. v. NLRB, 190 F.2d 576 (7th Cir. 1951); Morand Bros. Beverage Co., 99 N.L.R.B. 1448 (1952), *enforced*, 204 F.2d 529 (7th Cir. 1953), *cert. denied*, 346 U.S. 909 (1953). *See also* Pepsi-Cola Bottling Co., 72 N.L.R.B. 601 (1947).

In contrast to the bargaining lockout, the Board and the courts have upheld the use of lockouts by the employer to prevent unique economic losses or to preserve the effectiveness of a multi-employer bargaining association. These types of lockouts have been defined as "defensive" and were distinguished from the offensive bargaining lockout. See text accompanying notes 20-45 *infra*.

[4]American Brake Shoe Co., 116 N.L.R.B. 820 (1956), *enf. denied*, 244 F.2d 489 (7th Cir. 1957). Section 7 of the NLRA provides that:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment . . . .

29 U.S.C. § 157 (1970). To safeguard against any infringement of these rights, § 8(a)(1) makes it an unfair labor practice for an employer to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 . . . ." 29 U.S.C. § 158(a)(1) (1970).

[5]*See, e.g.*, Buffalo Linen Supply Co., 109 N.L.R.B. 447 (1954), *aff'd sub nom.* NLRB v. Truck Drivers Local 449, 353 U.S. 87 (1957).

[6]NLRB v. Brown, 380 U.S. 278 (1962). See text accompanying note 34 *infra*.

out has been the subject of conflicting decisions.[7]

The Court of Appeals for the Seventh Circuit, in *Inland Trucking Co. v. NLRB*,[8] and the Eighth Circuit in *Inter-Collegiate Press v. NLRB*,[9] were recently presented with the question of whether an employer may lawfully lock-out his employees after a bargaining impasse has occurred[10] and subsequently hire temporary help until an agreement is reached. The Seventh Circuit found that an offensive lockout "accompanied by continued operation with replacement labor, is per se . . . an unfair labor practice under § 158(a)(1) [§ 8(a)(1)]."[11] Since the employer's actions were deemed in conflict with § 8(a)(1), the court also held that the use of temporary personnel following a bargaining lockout was violative of § 8(a)(3).[12]

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[7]The Board has recently recognized that a bargaining lockout followed by the use of temporary replacements may be a lawful bargaining tactic. In Ottawa Silica Co., Inc., 197 N.L.R.B. No. 53, 80 L.R.R.M. 1404 (1972), the Board held that the use of a bargaining lockout and temporary replacements was a logical extension of the Supreme Court's decisions in NLRB v. Brown, 380 U.S. 278 (1964), and American Ship Bldg. Co. v. NLRB, 380 U.S. 300 (1965). 80 L.R.R.M. at 1406. See notes 34-44 and accompanying text *infra*. However, the decision in *Ottawa Silica* points out the split of authority regarding the use of this type of lockout since two members of the Board were in the majority, one member specially concurred and two members dissented. Chairman Miller concurred in the result reached by the majority, but only because:

> (1) Respondent [employer] utilized only its own nonunit personnel in carrying out its operations during the lockout, (2) the Union had refused to provide any assurance of continued operations, and there was therefore reason to believe that a strike was imminent, and (3) there was here some evidence, although perhaps not totally conclusive evidence, of a bona fide business justification for Respondent's actions.

80 L.R.R.M. at 1409. In their dissent, Members Fanning and Jenkins adhered to the principles set forth in Inland Trucking Co. v. NLRB, 440 F.2d 562 (7th Cir. 1971), where the court found the bargaining lockout and the use of temporary replacements to be violative of both § 8(a)(1) and § 8(a)(3). 80 L.R.R.M. at 1408-09. See note 8 and accompanying text *infra*. The Board's decision was upheld by the Sixth Circuit in Ottawa Silica Co., Inc. v. NLRB, 482 F.2d 945 (6th Cir. 1973).

[8]440 F.2d 562 (7th Cir. 1971). The court upheld the decision of the Board. *See* Inland Trucking Co., 179 N.L.R.B. 350 (1969). However, contrary to the Seventh Circuit's opinion, the Board stated that "the legality of the [employers'] actions . . . (or their illegality) cannot be determined simply as a matter of law, *per se*, wholly apart from the context in which such conduct occurred." *Id.* at 356.

[9]486 F.2d 837 (8th Cir. 1973).

[10]An impasse has been defined as a situation where the parties, bargaining in good faith, are deadlocked. See text accompanying note 79 *infra*.

[11]440 F.2d at 565. See note 4 *supra*.

[12]440 F.2d at 565. Section 8(a)(3) states in part that it is an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encouage or discouarge membership in any labor organization . . . ." 29 U.S.C. § 158(a)(3) (1970).

Section 8(a)(1) involves a balancing of the employer's economic interests with the § 7 rights of the employees.[13] However, in order to find a violation of § 8(a)(3), the employer must discriminate against his employees "in regard to hire or tenure of employment or any term or condition of employment" with the intent to "encourage or discourage membership in any labor organization."[14] Under the analysis used by the Seventh Circuit in *Inland Trucking*, the bargaining lockout and the use of temporary personnel was so inimical to the employees' rights under § 7 that it could not be justified in terms of the employer's economic interests.[15] The employer's actions, standing alone, were also held sufficient to show both discrimination against the permanent employees and an anti-union motivation. Thus, the Seventh Circuit found that the company had committed an unfair labor practice under § 8(a)(1) and § 8(a)(3).[16]

In contrast to the Seventh Circuit, the Eighth Circuit in *Inter-Collegiate* specifically rejected the idea that a bargaining lockout followed by the use of temporary replacements was a per se violation of § 8(a)(1). Instead, the court held that the employer's conduct did not jeopardize the union's ability to actively represent its members and had only a slight effect upon the employees' § 7 rights.[17] Emphasizing the fact that a per se rule would interfere with the Board's discretion in such matters, the court ruled that the most desirable approach would be to allow the Board to consider each case on its merits.[18] In evaluating violations of both § 8(a)(1) and § 8(a)(3), the case-by-case analysis would involve a weighing of the impact of the

[13]The Supreme Court, in Textile Workers Union v. Darlington Mfg. Co., 380 U.S. 263 (1965), stated that in order to find a violation of § 8(a)(1) the trier must decide that "the interference with § 7 rights outweighs the business justification for the employer's action . . . ." *Id.* at 269.

[14]29 U.S.C. § 158(a)(3) (1970). See note 12 *supra*.

[15]440 F.2d at 565.

[16]*Id.*

[17]486 F.2d at 841, 845. The circuit court enforced the Board's decision. *See* Inter-Collegiate Press, 199 N.L.R.B. No. 35, 81 L.R.R.M. 1508 (1972). However, as in *Ottawa Silica*, note 7 *supra*, the members of the Board were evenly divided on the issue. The majority held that absent a showing of unlawful intent the hiring of temporary replacements following a bargaining lockout did not violate §§ 8(a)(1) or 8(a)(3). 81 L.R.R.M. at 1510. Two members of the Board dissented, holding that the Seventh Circuit's opinion in *Inland Trucking* should be controlling. *Id.* at 1512. Chairman Miller dissented from both views and found that the correct approach should be to balance the legitimacy of the employer's actions against the effect that those actions have upon the employees' rights. *Id.* at 1510-11. Thus, under the facts of the case, Chairman Miller found that the bargaining lockout and the use of temporary employees was not violative of § 8(a)(1) or § 8(a)(3). *Id.* at 1512.

[18]486 F.2d at 840-41.

lockout upon the employees' protected rights against the business reasons that the company must show to justify its actions. A per se rule, as adopted by the Seventh Circuit in *Inland Trucking*, would appear to obviate a balancing of the competing interests of the company and its employees. However, prior to a determination of the legitimacy of the use of temporary employees, the initial question of the legality of the bargaining lockout should be analyzed. The bargaining lockout must be defined within the context of the various economic weapons to which an employer may resort after negotiations with the union have broken down.

Lockouts[19] may be classified into three different categories: (1) the economic lockout to which the employer resorts to save himself from unique business losses due to a threatened union strike;[20] (2) a lockout by the members of a multi-employer bargaining association which is designed to counter a "whipsaw" strike by the union;[21] and (3) a

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[19]The lockout has been defined as the "temporary withholding of employment in order to serve some interest of the employer vis-a-vis his employees. . . ." Oberer, *Lockouts and the Law: The Impact of American Ship Building and Brown Food*, 51 CORNELL L.Q. 193, 194 (1966). The Wagner Act of 1935 made no reference to the term "lockout." However, lockouts are referred to under the Taft-Hartley Amendments, but the legality of this type of work stoppage is neither specifically denied or upheld. *See* Labor-Management Relations Act of 1947, 29 U.S.C. §§ 158(d), 173, 176, 178(a) (1970). It is submitted that, by implication, the use of the term under the federal labor laws would negate any inference that the lockout is per se an unlawful tactic. For example, 8(d) states in part:

> [W]here there is in effect a collective bargaining contract . . . the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification . . . (4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days . . . .

29 U.S.C. § 158(d). This conclusion is further supported by the Supreme Court's decision in NLRB v. Truck Drivers Local 449, 353 U.S. 87 (1957). See notes 29-34 and accompanying text *infra*. During the course of the opinion, the Court pointed out that "[t]he unqualified use of the term 'lock-out' in several sections of the Taft-Hartley Act is statutory recognition that there are circumstances in which employers may lawfully resort to the lockout as an economic weapon." 353 U.S. at 92-93.

[20]*E.g.*, Associated Gen. Contractors of America, Inc., 105 N.L.R.B. 767 (1953); Betts Cadillac Olds, Inc., 96 N.L.R.B. 268 (1951); International Shoe Co., 93 N.L.R.B. 907 (1951); Duluth Bottling Ass'n, 48 N.L.R.B. 1335 (1943); Brown-McLaren Mfg. Co., 34 N.L.R.B. 984 (1941); Lengel-Fencil Co., 8 N.L.R.B. 988 (1938). *See also* Meltzer, *Single-Employer and Multi-Employer Lockouts Under the Taft-Hartley Act*, 24 U. CHI. L. REV. 70 (1956).

[21]*E.g.*, Buffalo Linen Supply Co., 109 N.L.R.B. 447 (1954), *enf. sub nom.*, NLRB v. Truck Driver's Local 449, 353 U.S. 87 (1957). A whipsaw strike is "the process of striking one at a time the employer members of a multi-employer association." 353 U.S. at 90 n.7. The purpose of "whipsawing" is to bring economic pressure to bear on

bargaining lockout which is used to bring economic pressure to bear upon the union during the course of collective bargaining negotiations.[22] The economic lockout was the earliest form of "employment withholding" to be recognized as a legitimate defensive measure. In *Duluth Bottling Association*,[23] the employer was charged with a violation of § 8(3) of the Wagner Act[24] following a lockout of the company employees. The Board found that the employer was "motivated entirely by a desire to avoid the peculiar economic loss which would have been a fortuitous incident of the strike, [and] that the lockout was intended merely to synchronize with, and not precipitate, economic conflict."[25] In the opinion of the Board, a lockout under these circumstances was a proper defensive measure which was intended to protect the property of the employer.[26]

Utilizing the distinction between a "defensive"[27] and an "offensive"[28] lockout, the Board, in *Buffalo Linen Supply Co.*,[29] held that company members of a multi-employer bargaining association were justified in locking out their employees after the threat of a strike became imminent. The Trial Examiner found no evidence to uphold the retaliatory conduct of the association members, but the Board reversed his decision, and stated: "[A]lthough not specifically announced by the Union, the strike against the one employer necessarily carried with it an implicit threat of future strike action against any or all of the other members of the Association."[30] The threat of the "whipsaw" strike appeared to provide the impetus for the lockout,[31] and the Board held that the members of the association acted in a

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the employers in order to reach an agreement with each one separately. *See* International Ass'n of Machinists v. National Ry. Labor Conf., 310 F. Supp. 905, 910 n.5 (D.D.C. 1970).

[22]*E.g.*, Darling and Co., 171 N.L.R.B. 801 (1968), *aff'd sub nom.*, Lane v. NLRB, 418 F.2d 1208 (D.C. Cir. 1969); Delhi-Taylor Ref. Div., Hess Oil and Chem. Co., 167 N.L.R.B. 115 (1967), *aff'd*, 415 F.2d 440 (5th Cir. 1969); American Ship Bldg. Co., 142 N.L.R.B. 1362 (1963), *enforced*, 331 F.2d 839 (D.C. Cir. 1964), *rev'd*, 380 U.S. 300 (1965).

[23]48 N.L.R.B. 1335 (1943).

[24]49 Stat. 449 (1935). See note 19 *supra*.

[25]48 N.L.R.B. at 1336.

[26]*Id.*

[27]A lockout by the members of a multi-employer association after a whipsaw strike or a lockout necessitated by the employer's economic position have been defined as defensive lockouts. See notes 20-21 and accompanying text *supra*.

[28]Bargaining lockouts have been generally defined as offensive in nature. See note 22 and accompanying text *supra*.

[29]109 N.L.R.B. 447 (1954).

[30]*Id.* at 448.

[31]See note 21 and accompanying text *supra*.

legitimate defensive manner. On review, the Supreme Court upheld the Board's decision.[32] The Court stated that when the employers' economic interests clashed with the employees' and the union's rights, "[t]he ultimate problem [was] the balancing of the conflicting legitimate interests."[33] Thus, the Court held that the lockout had an insubstantial effect upon the union's status as a bargaining agent and was designed only to protect the effectiveness of the multi-employer association.[34]

The validity of balancing the conflicting interests of the union and management was reaffirmed by the Supreme Court in NLRB v. Brown:[35]

> In the absence of proof of unlawful motivation, there are many economic weapons which an employer may use that either interfere in some measure with concerted employee activities, or which . . . discourage union membership, and yet the use of such economic weapons does not constitute conduct that is within the prohibition of either §8(a)(1) or §8(a)(3).[36]

However, *Brown* differed in one important aspect from the previous decisions involving multi-employer lockouts. The employers in *Brown* also hired temporary replacements to fill the positions of the locked-out employees.[37] The Court acknowledged that the use of temporary personnel had a discriminatory effect upon the regular employees, but noted that the impact was comparatively slight and the employers were pursuing a legitimate business end.[38] Although *Brown*

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[32]NLRB v. Truckdrivers Local 449, 353 U.S. 87 (1957).

[33]*Id.* at 96.

[34]*Id.* at 97. There was no evidence of economic justification for the lockout. Instead, the Supreme Court relied on the fact that the employer's actions were prompted by the union's threat to the multi-employer association. The Court found that Congress had recognized that in many industries, the "multi-employer bargaining basis was a vital factor in the effectuation of the national policy of promoting labor peace through strengthened collective bargaining." *Id.* at 95.

[35]380 U.S. 278 (1965).

[36]*Id.* at 283.

[37]*Id.* The Board had found that the initial lockout was legal, but the hiring of temporary replacements was contrary to federal labor policy:

> In the instant case . . . there was no shutdown to protect a bargaining unit . . . . [W]hatever defensive validity there may be for shutting down in the whipsaw context, such consideration is inapposite where, as here, the employers do not shut down.

137 N.L.R.B. 73, 75 (1963). Thus, in the Board's opinion, the use of temporary personnel had a drastic effect upon the employees' § 7 rights. *Id.* at 75.

[38]380 U.S. at 287-88. Since the replacements were employed only for the length of the dispute and the employees could end the lockout by agreeing to the employer's

appeared to settle the question of the legality of hiring temporary replacements during a lockout, the Supreme Court expressly acknowledged that the employers' actions were "part and parcel of [employers'] *defensive* measure to preserve the multi-employer group in the face of the strike."[39] Thus, in cases such as *Brown*, involving the use of temporary replacements, the Supreme Court maintained the differentiation between offensive and defensive lockouts.

Without reaching the question of the legality of using temporary personnel under this type of lockout,[40] the Court in *American Ship Building Co. v. NLRB*[41] held that the employer's resort to a bargaining lockout violated neither § 8(a)(1) nor § 8(a)(3),[42] thereby departing from the traditional offensive-defensive distinction.[43] In the opinion of the Court, the employees' right to bargain collectively and to strike were not seriously threatened and there was no showing of unlawful anti-union motivation.[44] The Supreme Court found that the

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terms, the Supreme Court held that the discrimination was "comparatively remote." *Id.* at 288-89. The Court also pointed out that the pre-existing union-ship agreement had been incorporated into the new bargaining contract. Thus, the union's position as the employee's bargaining agent was not dangerously threatened. *Id.* at 289.

[39]*Id.* at 284 (emphasis added). In NLRB v. Truckdrivers Local 449, 353 U.S. 87 (1957), the Supreme Court recognized the legitimacy of the multi-employer bargaining association. See note 34 *supra*. However, the preservation of the association does not appear to be the compelling reason for the Court's decision in *Brown*. Rather, the attempted whipsaw strike by the union made the prospect of a strike against all the members of the association a very real possibility. 380 U.S. at 284. It appears that the Court in *Brown* was not placing the multi-employer association into a special category, but instead was recognizing the threat posed by the whipsaw strike. Quoting from the Tenth Circuit's decision, the Court noted that:

> If . . . the struck employer does choose to operate with replacements and the other employers cannot replace after lockout, the economic advantage passes to the struck member, the non-struck members are deterred in exercising the defensive lockout, and the whipsaw strike . . . enjoys an almost inespapable prospect of success.

Id. at 285, *quoting*, NLRB v. Brown, 319 F.2d 7, 11 (10th Cir. 1963).

[40]The Court refused to consider whether an employer could resort to temporary or permanent replacements following a bargaining lockout.

[41]380 U.S. 300 (1965). It should be pointed out that *American Ship* was decided on the same day as *Brown*.

[42]*Id.* at 318.

[43]The Board had reversed the Trial Examiner's decision and found that there was no justification for the employer's action since he could not have reasonably anticipated a strike by the union. *See* American Ship Bldg. Co., 142 N.L.R.B. 1362, 1363 (1963). The Supreme Court did not address the question of justification and stated that the sole issue should be whether a lockout intended to bring pressure to bear on the union was a legitimate economic weapon. 380 U.S. at 308.

[44]*Id.* at 308-09.

duty of the Board was to ensure that the individual rights of the employees were protected, but the NLRA did not allow the Board to "deny weapons to one party or the other because of its assessment of that party's bargaining power."[45] The Board's finding that the bargaining lockout was in violation of §§ 8(a)(1) and 8(a)(3) was viewed by the Court as an unwarranted extension of the Board's authority under the NLRA and could not be upheld. By declaring the bargaining lockout to be a legitimate economic weapon, the Supreme Court appeared to vitiate the distinction between offensive and defensive lockouts.

The use of a lockout and temporary replacements seems to be limited under the previous Board and Supreme Court decisions. If the employer is able to show that he has a reasonable fear of a strike, a defensive lockout of the permanent employees will be upheld.[46] At the same time, *NLRB v. Brown* upholds the use of temporary replacements after a defensive lockout by members of a multi-employer bargaining association.[47] Moreover, *American Ship* apparently validates a resort to a bargaining lockout if there is no proof of anti-union motivation and the collective bargaining process is not prejudicially affected.[48] It would seem that the next logical step would be to recognize that an offensive bargaining lockout, having no greater adverse effect upon the employees' § 7 rights than a defensive lockout, could be followed by the use of temporary personnel. Such an approach was taken by the Eighth Circuit in *Inter-Collegitate*.

In contrast, the Seventh Circuit, in *Inland Trucking Co. v. NLRB*,[49] rejected the argument that the Supreme Court's decisions in *American Ship* and *Brown* could be used to uphold the hiring of temporary employees after a bargaining lockout.[50] The court con-

[45]*Id.* at 317. The Court stated that the main purpose of the NLRA was to "protect employee self-organization and the process of collective bargaining from disruptive interferences by employers." *Id.*

[46]See notes 23-34 and accompanying text *supra*.

[47]See text following note 35 *supra*.

[48]See notes 40-45 and accompanying text *supra*.

[49]440 F.2d 562 (7th Cir. 1971). The *Inland Trucking* decision involved a bargaining lockout and the use of temporary replacements by three employers, who were found not to constitute a multi-employer bargaining association. Inland Trucking Co., 179 N.L.R.B. 350, 356 (1969). After the termination of their bargaining agreements with the union, the employers locked-out all the regular employees and hired temporary personnel to continue operations. *Id.* at 351. The Board held that "there [was] no substantial evidence of any affirmative or overt act on the part of the Union which impelled [the employers'] conduct." *Id.* at 358-59. Thus, in the absence of any compelling business reasons for their actions, the employers were found to be in violation of §§ 8(a)(1) and 8(a)(3).

[50]440 F.2d at 564.

ceded that an offensive lockout was a legitimate economic weapon,[51] but when temporary replacements are used to fill the vacancies created by the lockout, the employer's actions "[foreclose] the employees' opportunity to earn without surrendering the corresponding opportunity of the employer."[52] Under these circumstances, the court held that the company should not be able to upset the balance of economic bargaining power by cutting off the employees right to work while the business continues to function. Following the offensive-defensive distinction, the Seventh Circuit found that *American Ship* and *Brown* recognized that replacement employees were allowable only when they were used as a defense to a threatened union strike.[53] Therefore, the court held that a bargaining lockout accompanied by the hiring of temporary employees was a per se violation of §§ 8(a)(1) and 8(a)(3).[54]

However, in *Inter-Collegiate Press v. NLRB*,[55] the Eighth Circuit noted that "a *pro forma* application of the labels 'offensive' and 'defensive' to a lockout [does not assist] in the analysis required to determine the legality of the conduct involved."[56] It appears that the court was unwilling to follow the previous decisions which struck down the employer's use of an offensive lockout.[57] Rather than viewing the problem from the offensive-defensive dichotomy, the Eighth Circuit held that "the legality of an employer's conduct in a lockout should be determined by principles set out by the Supreme Court in *NLRB v. Great Dane Trailers, Inc.* . . . ."[58]

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[51]*Id.*

[52]*Id.*

[53]*Id.* Thus, the court held that where the bargaining lockout is combined with the use of temporary personnel, the employer's actions are no longer "defensive" and fall outside the protection afforded by the Supreme Court in *Brown*.

[54]*Id.* at 565. See text accompanying note 11 *supra*.

[55]486 F.2d 837 (8th Cir. 1973).

[56]*Id.* at 844. (footnote omitted). *See also* Laclede Gas Co. v. NLRB, 421 F.2d 610 (8th Cir. 1970). The Court of Appeals for the Eighth Circuit noted that: "Characterizing a lockout as 'defensive' or 'offensive' is a difficult task at best. . . . [S]uch characterization, if it can be made, may be merely superficial." *Id.* at 615 n.11.

[57]See note 23-34 and accompanying text *supra*. *See also* Quaker State Oil Refining Corp., 121 N.L.R.B. 334 (1958), where the Board held:

> [T]he [employer] resorted to this action not because of any reasonable fear that the Union would call a sudden strike . . . but to force the Union and the Respondent's employees to accept its proposed contract . . . .

Id. at 334-35. Thus, the Board found that the employer was the protagonist and the offensive lockout violated §§ 8(a)(1) and 8(a)(3). *Id.* at 334.

[58]486 F.2d at 844, citing NLRB v. Great Dane Trailers, Inc., 388 U.S. 26 (1967). The Eighth Circuit rejected the per se rule of *Inland Trucking* and noted:

> [W]e do not think that [a per se rule] conforms with the Supreme

Great Dane involved a union charge that the employer had discriminatorily withheld vacation pay from striking employees in violation of §§ 8(a)(1) and 8(a)(3).[59] Upon reviewing its previous decisions,[60] the Court set forth two tests applicable to finding a violation of § 8(a)(3):

> First, if it can reasonably be concluded that the employer's discriminatory conduct was "inherently destructive" of important employee rights, no proof of an antiunion motivation is needed . . . even if the employer introduces evidence that the conduct was motivated by business considerations. Second, if the adverse effect of the discriminatory conduct . . . is "comparatively slight," an antiunion motivation must be proved to sustain the charge *if* the employer has come forward with evidence of legitimate and substantial business justifications for the conduct.[61]

> Court's opinions touching this issue and decide it would be improper for us at this time to adopt a *per se* rule. To do so would remove the development of the law in this area from the special competence of the Board, which has been proceeding on a case-by-case basis . . . by balancing the interests of employees and employers . . . .

486 F.2d at 840. Thus, the court was not ruling out the possibility that a bargaining lockout and the use of temporary employees would be violative of the provisions of the NLRA.

[59]388 U.S. at 30.

[60]The Court primarily relied upon *Brown* and *American Ship*. See notes 35-45 and accompanying text *supra*.

[61]388 U.S. at 34. The Court went on to say that "once it has been proved that the employer engaged in discriminatory conduct which could have adversely affected employee rights to *some* extent, the burden is upon the employer to establish that he was motivated by legitimate objectives . . . ." *Id.* Thus, it appears that the employer's conduct will not be classified as "inherently destructive" or "comparatively slight" until the employer's justifications are presented. The Court in *Great Dane* found no need to "decide the degree to which the challenged conduct might have affected employee rights . . . [since] the company came forward with no evidence of legitimate motives . . . ." *Id.* However, it has been noted that the *Great Dane* decision did not clearly specify when the court will categorize the employer's conduct as inherently destructive or comparatively slight. *See* Janofsky, *New Concepts In Interference and Discrimination Under the NLRA: The Legacy of American Ship Building and Great Dane Trailers*, 70 COLUM. L. REV. 81, 96 (1970). As Mr. Janofsky points out, the most desirable approach appears to be to

> analyze both the effect on employee rights and the justification for the employer's conduct at one and the same time before purporting to characterize the employer's conduct . . . . After all . . . looking first at the effect upon employee rights only and second to the employer's justification, can result in a total disregard of the employer's interest.

Id. at 99. Also, if the employer's conduct was classified as inherently destructive prior

Therefore, under *Great Dane*, it appears that it is incumbent upon the employer, once it is shown that he has discriminated against the employees, to rebut the presumption that the company has violated § 8(a)(3). Since the Court was primarily concerned with an alleged § 8(a)(3) violation, the *Great Dane* presumption would not seem to be applicable to a case involving both § 8(a)(1) and § 8(a)(3. However, as the Eighth Circuit noted in *Inter-Collegiate*, the Supreme Court's decision in *NLRB v. Fleetwood Trailer Co.*[62] indicates that the *Great Dane* presumption may be used to consider alleged violations of § 8(a)(1) as well as § 8(a)(3).[63]

It appears that the *Great Dane* analysis should be applied to determine the legality of a bargaining lockout and the hiring of temporary personnel.[64] The Seventh Circuit in *Inland Trucking* alluded to the principles set forth in *Great Dane*, but decided that since the

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to a consideration of the business reasons for his conduct, it appears that the presumption would be irrebutable since the justification can then be ignored. See text following note 60 *supra*.

However, a great deal of confusion has arisen over the question of when the employer is required to come forward with evidence of substantial business justifications. For example, the Eighth Circuit in NLRB v. Midwest Hanger Co. & Liberty Eng. Co., 474 F.2d 1155 (8th Cir. 1973), held that the discharge of a substantial number of workers during a union organizational campaign was inherently destructive of the employees' rights. The court found that since the employer's actions were inherently destructive, the burden was upon the company to justify its conduct. *Id.* at 1158. Thus, it appears that the court classified the employer's conduct as inherently destructive *prior* to determining the sufficiency of the business justifications presented by the company. *See also* Robinson v. Diamond Housing Corp., 463 F.2d 853, 865 (D.C. Cir. 1972).

Unlike *Midwest Hanger*, the Sixth Circuit in NLRB v. Jemco, Inc., 465 F.2d 1148 (6th Cir. 1972), did not categorize the denial of vacation benefits as being either inherently destructive or comparatively slight. However, the court pointed out that the withholding of benefits did have an adverse effect upon the employees and therefore, it was necessary for the employer to "establish that [he] wu motivated by legitimate objectives." *Id.* at 1152. It seems that the Sixth Circuit was strictly applying the *Great Dane* formulation by refusing to classify the employer's conduct until the business justifications were considered.

[62]389 U.S. 375 (1967).

[63]486 F.2d at 844. In *Fleetwood Trailer*, the Supreme Court reiterated its holding in *Great Dane* by saying:

> Under §§ 8(a)(1) and (3) . . . it is an unfair labor practice to interfere with the exercise of these rights [under § 7]. Accordingly, unless the employer . . . can show that his action was due to "legitimate and substantial business justifications," he is guilty of an unfair labor practice.

399 U.S. at 378. *Fleetwood Trailer* involved the refusal of an employer to reinstate a number of his striking employees. *Id.* at 376-77. However, the decision points out that the *Great Dane* test may be used to consider violations of both § 8(a)(1) and § 8(a)(3).

[64]See text following note 17 *supra*.

employer's actions were unquestionably in conflict with § 8(a)(1), the lockout was "inherently destructive" of the employees' § 7 rights and automatically came within the provisions of § 8(a)(3).[65] In effect, the court held that the use of temporary employees after a bargaining lockout was not only a per se violation of § 8(a)(1), but, a fortiori, violative of § 8(a)(3). In its analysis, the Seventh Circuit disregarded two important considerations which would appear to negate a per se finding of anti-union motivation: (1) the previous decisions of the Supreme Court in *American Ship* and *Brown*, and (2) the fact that a bargaining impasse had been reached between the employer and the union prior to the lockout.[66]

In *American Ship*, the Supreme Court balanced the legitimacy of the bargaining lockout against the possible coercive effect that the lockout would have upon the employees' rights to bargain collectively and to strike. The Court held that:

> Proper analysis of the problem demands that the simple intention to support the employer's bargaining position as to compensation and the like be distinguished from a hostility to the process of collective bargaining which could suffice to render a lockout unlawful.[67]

The Court also found that the employer's actions did not destroy the right to strike since the NLRA does not give the union the exclusive freedom to determine at what precise moment the strike should occur.[68] However, since the Court expressly left open the question of the employer's legal right to hire temporary replacements after a bargaining lockout,[69] the principles espoused in *American Ship* must be read in connection with the Court's decision in *Brown*.[70]

Upholding the use of a lockout and the hiring of temporary replacements, the Supreme Court in *Brown* stated that the "resulting tendency to discourage union membership is comparatively remote,

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[65]See text following note 14 *supra*.

[66]In *Inter-Collegiate*, the court stated that "[i]t is uncontroverted that the Company and the Union were at impasse in their negotiations by October 15th . . . ." 486 F.2d at 841. The *Inland Trucking* decision, on the other hand, does not specifically mention whether the parties had reached an impasse. However, the Board's opinion in *Inland Trucking* noted that there had been five or six negotiation sessions prior to the lockout and that the employers refused to make any further offers. 179 N.L.R.B. at 352. Thus, it appears that both the Board and the Seventh Circuit assumed that a bargaining impasse had been reached.

[67]380 U.S. at 309.

[68]*Id.* at 310.

[69]See note 42 *supra*.

[70]380 U.S. 278. See text following note 35 *supra*.

and that this use of temporary personnel constitutes a measure reasonably adapted to the effectuation of a legitimate business end."[71] The Court went on to say that the lockout and the use of temporary employees may have had a discriminatory effect upon the union as a bargaining agent, but that its effect was "comparatively insubstantial."[72] If, as in both *Inland Trucking* and *Inter-Collegiate*, the permanent employees are assured that their positions are being filled only until the union and the company reach an agreement,[73] the threat to the employees' job status appears minimal. Also, as the Supreme Court noted in *Brown*, "the membership, through its control of union policy, could end the dispute and terminate the lockout at any time simply by agreeing to the employers' terms and returning to work . . . ."[74] Thus, it appears that the use of temporary replacements after a bargaining lockout has no greater restrictive effect upon the employees' or the union's rights than does the hiring of temporary personnel following a multi-employer lockout as in *Brown*.[75] It may be argued that the Supreme Court limited its decision in *Brown* to a defensive lockout.[76] However, in view of the Court's decision in

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[71]380 U.S. at 288.

[72]*Id.*

[73]The *Inter-Collegiate* decision specifically mentioned that the union was told by the employer that the replacements were to be used only until a settlement was reached. 486 F.2d at 842. Also, in *Inland Trucking*, the Board found that the permanent employees were kept from working "for the period of the lockout." 179 N.L.R.B. at 351.

However, this raises the question of whether the employer could lock-out his employees and hire *permanent* replacements. It must be conceded that the employer who resorts to the use of permanent help after a bargaining lockout runs the serious risk of violating both §§ 8(a)(1) and 8(a)(3). In this situation, the employees are not allowed the privilege of choosing to participate in concerted activities at the possible expense of their employment. Justice Goldberg noted in *Brown* that "[t]here would be grave doubts as to whether the act of locking out employees and hiring *permanent* replacements is justified by any legitimate interest of the nonstruck employers . . . ." 380 U.S. at 293 (Goldberg, J., concurring) (emphasis added). It appears that the important distinction is that in cases such as *Inland Trucking* and *Inter-Collegiate*, the loss of employment is temporary and the effect upon the employee's job status is comparatively slight.

[74]380 U.S. at 289.

[75]*See* NLRB v. Brown, 380 U.S. at 284, where the Court stated:

> In the circumstances of this case, we do not see how the continued operations of [the employers] and their use of temporary replacements imply hostile motivation any more than the lockout itself; nor do we see how they are inherently more destructive of employee rights.

Brown involved a so-called "defensive" situation in which the union attempted to use the whipsaw strike against a multi-employer association. See text following note 35 *supra*. However, in the absence of any proof of the employer's illegal motivation, it appears that the logic of *Brown* could be extended to the case of a bargaining lockout followed by the use of temporary replacements.

American Ship and the fact that in both *Inland Trucking* and *Inter-Collegiate* a bargaining impasse had been reached prior to the lockout, the distinction between an offensive and defensive lockout cannot be relied upon to determine the legality of the employer's conduct.[77]

The term "bargaining impasse" has never been clearly defined by the Supreme Court. In *NLRB v. Tex-Tan, Inc.*,[78] the Court of Appeals for the Fifth Circuit stated that an impasse is "a state of facts in which the parties, despite the best of faith, are simply deadlocked."[79] If an impasse has been reached, the parties are free to resort to legitimate bargaining tactics to bring pressure to bear upon the other side. The Supeme Court has noted that "the use of economic pressure by the parties to a labor dispute . . . is part and parcel of the process of collective bargaining."[80] When the parties are truly deadlock, it appears that the union's most potent weapon is a strike. Since negotiations have broken down, the threat of a work stoppage is imminent.[81] Therefore, the employer who locks-out his permanent employees after a bargaining impasse may well be acting defensively. The distinction between an offensive and defensive lockout becomes illusory if the bargaining process is no longer successful and a resort to economic weapons is a very real possibility.[82] In this situation, the employer's

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[76]See text accompanying note 39 *supra*.

[77]See note 66 *supra*.

[78]318 F.2d 472 (5th Cir. 1963).

[79]*Id.* at 482.

[80]NLRB v. Insurance Agents Int'l Union, 361 U.S. 477, 495 (1960). *See also* NLRB v. Brown, 380 U.S. at 283. The *Insurance Agents* decision resolved the question of whether the union had violated § 8(b)(3) of the NLRA by instructing the employees to engage in "on-the-job harassing tactics" while negotiations were in progress. 361 U.S. at 488. Section 8(b)(3) makes it an unfair labor practice for the union to "refuse to bargain collectively with an employer . . . ." 29 U.S.C. § 158(b)(3) (1970). The Supreme Court, while upholding the union's tactics as being legitimate, noted that "if the Board could regulate the choice of economic weapons that may be used . . . it would be in a position to exercise considerable influence upon the substantive terms on which the parties contract." 361 U.S. at 490.

[81]It has been suggested that a pre-impasse bargaining lockout may be lawful. *See* Lane v. NLRB, 418 F.2d 1208 (D.C. Cir. 1969); Detroit Newspaper Publishers Ass'n v. NLRB, 346 F.2d 527 (6th Cir. 1965); NLRB v. Dalton Brick and Tile Corp., 301 F.2d 886 (5th Cir. 1962). However, the additional act of replacing the permanent employees prior to an impasse may be strong evidence of an anti-union motivation on the part of the employer. One writer has also suggested that this may be compared with the unlawful unilateral imposition of bargaining terms by the employer. *See* Note, *The Unanswered Questions of American Ship*, 64 MICH. L. REV. 910 (1966).

[82]It should be noted that the Supreme Court, in *American Ship*, found that a bargaining impasse had been reached prior to the lockout. 380 U.S. at 303. The Trial Examiner's and the Board's conclusions differed over whether the employer, after

conduct should not be held in violation of §§ 8(a)(1) and 8(a)(3) simply because the lockout and the use of temporary personnel has been defined as an offensive measure. Disregarding the offensive-defensive distinction, if as in *Inland Trucking* and *Inter-Collegiate* a bargaining impasse has been reached, the threat of a strike is apparent and the rationale of *American Ship* and *Brown* should be applied.

A lockout combined with the hiring of replacements will have a measurable impact upon both the union as a bargaining agent and the employees' right to engage in concerted activities.[83] It is arguable, however, that the effect will be much less than that emanating from the right of a struck employer to hire permanent replacements. Since 1938, the Supreme Court has recognized that an employer faced with an actual strike by his employees, may hire permanent help without violating the provisions of the NLRA.[84] Even though § 13 of the NLRA[85] prohibits any interference with the right to strike, the Court has found that "it does not follow that an employer, guilt of no act denounced by the statute, has lost the right to protect and continue his business by supplying places left vacant by strikers."[86] It has been said that the right to employ permanent replacements rests upon dicta,[87] but the Court's pronouncement has been reaffirmed in later decisions.[88] The use of permanent replacements after a strike seems to be a legitimate employer prerogative.

In the situation presented by *Inland Trucking* and *Inter-Collegiate*, an analogy can be drawn between the employer's right to hire permanent replacements during a strike and the use of temporary personnel subsequent to a bargaining lockout. The arguments against a comparison of the two practices are premised upon the

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impasse, could reasonably have anticipated a strike. *Id.* at 306. Conversely, the Supreme Court refused to base its decision on these grounds and upheld the bargaining lockout, disregarding the offensive—defensive distinction. *Id.* at 308. However, since the Court did not decide whether an employer may hire temporary replacements following a bargaining lockout, it appears that the impasse may be an important consideration in establishing the legality of the employer's conduct.

[83]"While the use of temporary nonunion personnel in preference to the locked-out union members is discriminatory, we think that any resulting tendency to discourage union membership is comparatively remote . . . ." NLRB v. Brown, 380 U.S. 278, 288 (1965).

[84]NLRB v. Mackay Radio and Tel. Co., 304 U.S. 333 (1938).

[85]Section 13 of the NLRA provides that "[n]othing in this subchapter, except as specifically provided for . . . shall be construed so as . . . to interfere with or impede or diminish in any way the right to strike . . . ." 29 U.S.C. § 163 (1970).

[86]NLRB v. Mackay Radio and Tel. Co., 304 U.S. 333, 345 (1938).

[87]*See* Comment, 85 HARV. L. REV. 680 (1972).

[88]*E.g.*, NLRB v. Fleetwood Trailer Co., 389 U.S. 375, 379 (1967); American Ship Bldg. Co. v. NLRB, 380 U.S. 300, 313 (1965); NLRB v. Brown, 380 U.S. 278, 283 (1965).

theory that "the struck employer is acting defensively, whereas the employer who locks out . . . bears the onus of casting the first stone."[89] However, when a bargaining impasse is reached, it is questionable whether "casting the first stone" is a relevant consideration in determining the legality of the employer's actions.[90] The most important test is whether the bargaining lockout and the use of temporary personnel is "inherently destructive" of the employee's rights under § 7 of the NLRA.[91] By hiring temporary replacements after a lockout and declaring that those replacements will work only until the conflict is resolved, the company is not seriously threatening the job status of the permanent employees. If the union agrees to the terms offered by the company, or a compromise is reached, the employees can return to their jobs immediately.[92] The use of a bargaining lockout and temporary replacements appears to have no greater adverse effect upon the employees' rights than other legitimate employer activities, and certainly has much less significance than the well recognized right to permanently replace striking employees.[93]

A finding that the use of temporary replacements is not inherently destructive of the employees' rights will not automatically prompt a dismissal of the charges against the company. The Supreme Court's decision in *Great Dane* requires the employer to come foward with "legitimate and substantial business justifications" for his conduct.[94] The reasons presented by the employer may negate the inference that the company was motivated by anti-union feelings. The Eighth Circuit in *Inter-Collegiate* found that the company was "engaged in a highly seasonable business"[95] and that the lockout and resort to

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[89]Oberer, *Lockouts and the Law: The Impact of American Ship Building and Brown Food*, 51 CORNELL L.Q. 193 (1966).

[90]See text following note 78 *supra*.

[91]See text following note 60 *supra*.

[92]See note 38 *supra*.

[93]Employers have adopted various legal means to ease the impact that a strike may have upon their business. One such method is the stock piling of inventory prior to a work stoppage. Re-adjusting contract schedules and transferring work to another plant may also be effective. *See* Comment, 76 HARV. L. REV. 1494, 1497 (1963).

However, permanent replacement of striking employees has a decided impact, not only upon the workers job status, but also on their rights as protected under § 7 of the NLRA. If a good faith employer is denied the ability to hire temporary replacements after a bargaining lockout, it appears that perhaps the Supreme Court's ruling in *NLRB v. Mackay Radio and Tel. Co.* should be reconsidered. See text following note 84 *supra*. The vitality of *Mackay* has remained unchallenged since 1938 and the logic of that case seems to extend to the situation presented by the use of temporary personnel following a bargaining lockout. See text accompanying notes 89-93 *supra*.

[94]388 U.S. at 34.

[95]486 F.2d at 842. The employer prepared yearbooks and announcements which were usually completed in time for June graduations.

temporary replacements was prompted by a "very real possibility of a strike."[96] The court relied upon the fact that a majority of the company's business was done between the months of February and June,[97] and that the lockout, which took place on October 16, was used to prevent a union strike during the peak months of production.[98] It appears that by justifying the employer's actions on these grounds, the Eighth Circuit significantly narrowed the class of employers who would be able to lock-out their employees and hire temporary replacements.

There is no precise definition of the phrase "legitimate and substantial business considerations." However, it appears that the nature and amount of proof presented by the employer will determine whether the employer's actions are to be classified as inherently destructive or merely comparatively slight.[99] If the employer's conduct is found to be inherently destructive of the employees' rights, it is arguable whether the company can ever rebut the inference of anti-union motivation.[100] Even though some other employer practices are

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[96]*Id.* at 843.

[97]*Id.* at 842.

[98]*Id.* at 843.

[99]See text accompanying notes 62-63 *supra*. For example, in Allied Indus. Workers Local 289 v. NLRB, 476 F.2d 868 (D.C. Cir. 1963), the company refused to give striking employees their vacation pay until the work stoppage had ended. The court found that even though there was uncontroverted evidence that the company had some financial difficulties, that evidence was insufficient to show substantial business justification. *Id.* at 878. However, the court went on to say that even if the employer had given stronger business rasons for his actions, a violation of §§ 8(a)(1) and 8(a)(3) would have been found since "the Company possessed the requisite antiunion motive to overcome a showing of substantial business justification." *Id.* at 878 n.18.

Unlike *Allied Indus. Workers*, NLRB v. Neuhoff Bros. Packers, Inc., 398 F.2d 640 (5th Cir. 1968), involved an alleged discriminatory discharge of a company employee. The Fifth Circuit found that the Company had presented sufficient business justification by showing that the employee had caused numerous tie-ups on the production line by working too slowly. *Id.* at 643. The court seemed to make a distinction between discharge cases and other employer practices and stated that "in controversies involving employee discharges, the motive of the employer is the controlling factor . . . ." *Id.* at 645, quoting NLRB v. Brown, 380 U.S. at 287. The court went on to say that the discharge of the employee "was not categorically discriminatory as was the withholding of vacation benefits in *Great Dane Trailers* . . . ." *Id.* Thus, it was incumbent upon the Board to show that the employee was fired due to the company's improper anti-union motive. For other cases involving §§ 8(a)(1) and 8(a)(3) after an employee was discharged, *see generally* NLRB v. Advanced Bus. Forms Corp., 474 F.2d 457 (2d Cir. 1973); Avondale Shipyards, Inc. v. NLRB, 391 F.2d 203 (5th Cir. 1968); Signal Oil and Gas Co. v. NLRB, 390 F.2d 338 (9th Cir. 1968); Visador Co. v. NLRB, 386 F.2d 276 (4th Cir. 1967); NLRB v. Montgomery Ward and Co., 242 F.2d 497 (2d Cir. 1957).

[100]Theoretically, it may be possible for the employer to show that his conduct did not "encourage or discourage membership in any labor organization." See text accom-

overwhelmingly adverse to the interests of the employees, the use of temporary replacements subsequent to a bargaining lockout seems to be a justifiable economic weapon. The Eighth Circuit in *Inter-Collegiate* held that a bargaining lockout and the hiring of temporary personnel was not inherently destructive.[101] The seasonable nature of the company's business was found to be a sufficient excuse for the employer's actions.[102] It appears, however, that the employer should not be required to show that he would suffer *unique* economic hardships. A company that has a relatively stable year-round business would not then be cut-off from using a potentially legitimate bargaining technique. If the impact upon the employees is not found to be unduly coercive, the burden of showing a substantial business justification should not be as demanding as in cases where the employer's actions are obviously repugnant to the employees' protected rights.[103]

The aim of the NLRA is to uphold and protect the procedure of collective bargaining.[104] When that process breaks down, the role of the Board and the courts is to ensure that both the union and management play by the rules of the game.[105] Each side should be free to resort to *legitimate* economic weapons to enhance their bargaining power. A bargaining lockout followed by the use of temporary replacements does have a measurable effect upon the employees' right to engage in or refrain from concerted activities. However, it is only when that economic weapon is used either to infringe upon protected employee rights or with the intent to discriminate against union

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panying note 14 *supra*. However, in practical application, a finding that the employer's actions are inherently destructive of the employees' rights appears to negate the possibility of rebutting the presumption of anti-union motivation. *Cf.* Allied Indus. Workers Local 289 v. NLRB, 476 F.2d 868 (D.C. Cir. 1973); NLRB v. Midwest Hanger Co. & Liberty Eng. Corp., 474 F.2d 1155 (8th Cir. 1973); NLRB v. Advanced Bus. Forms Corp., 474 F.2d 457 (2d Cir. 1973); Flambeau Plastics Corp. v. NLRB, 401 F.2d 128 (7th Cir. 1969); NLRB v. Frick Co., 397 F.2d 956 (3d Cir. 1968).

[101]486 F.2d at 845.

[102]See text accompanying notes 97-99 *supra*.

[103]This suggestion would appear to reduce the amount and substance of proof that the *Great Dane* decision requires of an employer who is charged with a violation of §§ 8(a)(1) and 8(a)(3). However, it cannot be doubted that a prolonged strike may have a serious effect upon any employer, whether or not he is engaged in a "highly seasonable business." It seems that the right to hire temporary personnel after a bargaining lockout should not be viewed from the uniqueness of the employer's situation, but rather from the effect that the lockout has upon the employees and the union.

[104]See text accompanying note 1 *supra*.

[105]"In case of a breakdown of relations between employer and organized employees, their respective rights and remedies are governed by the common law of strikes and picketing developed through labor injunction, by state strike-control laws or the Taft-Hartley Act." A. Cox and D. Bok, Cases and Materials on Labor Law, 2 (7th ed. 1969).