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Lockouts and Replacements in Bargaining—Management on the Offensive

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LOCKOUTS AND REPLACEMENTS IN BARGAINING—MANAGEMENT ON THE OFFENSIVE

Mob Law at Homestead

Provoked by an Attack of Pinkerton Detectives

Ten Men Killed and at Least Fifty Wounded

Fierce Battles Fought at the Steel Works—The

Detectives Attempt to Land from Boats and are Driven Back and

*Held Until they Surrender.**

The use of the lockout[1] as a bargaining weapon by an employer has had a relatively restricted history. Since the passage of the National

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* Headline account of events following the lockout at the Homestead Steel Works, N.Y. Times, July 7, 1892, at 1, col. 7.

1. A lockout has been defined at common law as the cessation by the employer of the furnishing of work to employees in an effort to obtain for the employer more desirable terms. The term "lockout" has been used in more recent years to denote a temporary layoff of employees as distinguished from a discharge or severance of the employment relationship. Associated Gen. Contractors, Ga. Branch, 138 N.L.R.B. 1432, 1442 (1962). A lockout does not exist when an employer lays off employees or shuts down the plant when these actions have no direct relation to unionization or union activities. *See, e.g.*, American Ship Bldg. Co. v. NLRB, 380 U.S. 300, 307-08 (1965). Generally, there are three reasons related to union activities why an employer might wish to lock employees out: (1) the desire to frustrate organizational efforts by a union attempting to gain a foothold in the business or to avoid the duty to bargain with an established union, (2) he might lockout his employees to put pressure on the union to accept a contract favorable to himself, or (3) he might lockout his employees in an effort to minimize losses from an impending strike or other aspect of a labor dispute. *See* Associated Gen. Contractors, Ga. Branch, *supra* at 1442.

The term "offensive lockout" has recently fallen into judicial disfavor due to the difficulties in ascertaining the motivating force behind the lockout. *See, e.g.*, Inter-Collegiate Press, Graphic Arts Div. v. NLRB, 486 F.2d 837, 844 (8th Cir. 1973), *cert. denied*, 416 U.S. 938 (1974); Laclede Gas Co. v. NLRB, 421 F.2d 610, 615 n.11 (8th Cir. 1970). In this comment, however, the terms "offensive" or "bargaining lockout" should be understood to mean those lockouts which are *substantially* motivated by a desire on the part of the employer to achieve an advantage in a collective bargaining situation.

In recent years lockouts have consistently been held not to be in violation of the Act when motivated by economic considerations in response to a threatened strike, Quaker State Oil Ref. Corp. v. NLRB, 270 F.2d 40, 44 (3rd Cir.) (dicta), *cert. denied*, 361 U.S. 917 (1959), or when in support of the employer's bargaining position after a bargaining impasse has been reached. American Ship Bldg. Co. v. NLRB, *supra* at 318. It is now accepted that lockouts are not illegal per se. *See, e.g.*, American Ship Bldg. Co. v. NLRB,

Labor Relations Act (the Act),[2] the primary question answered by the National Labor Relations Board (the Board) has been whether the lockout was legal at its threshold. Until recently the Board and the courts rarely had the opportunity to deal with the employer's use of a lockout coupled with the use of temporary replacements.[3] This bargaining tactic allows the employer to continue operations during the lockout, placing additional pressures on the employees to accept his demands.

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supra at 318; Hess Oil & Chem. Corp. v. NLRB, 415 F.2d 440, 446 (5th Cir. 1969), *cert. denied*, 397 U.S. 916 (1970); Quaker State Oil Ref. Corp. v. NLRB, *supra* note 43.

Generally, the key factor in determining the legality or illegality of a lockout has been employer motivation. *See, e.g.*, American Ship Bldg. Co. v. NLRB, *supra* at 308-09; NLRB v. George J. Roberts & Sons, 451 F.2d 941, 946 (2d Cir. 1971); NLRB v. Bagel Bakers Council, 434 F.2d 884, 890 (2d Cir. 1970), *cert. denied*, 402 U.S. 908 (1971); NLRB v. Rubin, 424 F.2d 748, 750 (2d Cir. 1970); NLRB v. Southern Beverage Co., 423 F.2d 720 (5th Cir. 1970); Plastics Transp. Inc., 193 N.L.R.B. 54, 58 (1971). However, where the lockout is inherently destructive of protected employee rights, the Board need not examine the motivation of the employer. *See, e.g.*, NLRB v. Brown, 380 U.S. 278, 287 (1965).

Also, a lockout is not illegal if motivated by economic rather than antiunion considerations. *See, e.g.*, American Ship Bldg. Co. v. NLRB, *supra* at 308, 318; NLRB v. Brown, *supra* at 287-88; NLRB v. Drapery Mfg. Co., 425 F.2d 1026, 1027 (8th Cir. 1970); NLRB v. Sun Hardware Co., 422 F.2d 1296, 1297 (9th Cir. 1970) (by implication); Lane v. NLRB, 418 F.2d 1208, 1211-12 (D.C. Cir. 1969); NLRB v. Gopher Aviation, Inc., 402 F.2d 176, 183 (8th Cir. 1968); Botsford Concrete Co., 185 N.L.R.B. 804 (1970). This may be true even when the economic conditions to which the employer is reacting arise out of union activity. *See, e.g.*, Laclede Gas Co. v. NLRB, *supra* at 614; Royal Packing Co., 198 N.L.R.B. No. 148, 81 L.R.R.M. 1059, 1061 (1971), *aff'd* by order 86 L.R.R.M. 2571 (D.C. Cir. 1974); Stokely-Van Camp, Inc., 186 N.L.R.B. 440, 450-51 (1970). Lockouts are also recognized as legal if used to advance the employer's position in a collective bargaining situation. *See, e.g.*, American Ship Bldg. Co. v. NLRB, *supra* at 313; Local 155, Int'l Molders & Allied Workers Union v. NLRB, 442 F.2d 742, 745-46 (D.C. Cir. 1971). On lockouts generally see, Baird, *Lockout Law: The Supreme Court and the NLRB*, 38 GEO. WASH. L. REV. 396 (1970) [hereinafter cited as Baird]; Bernhardt, *Lockouts: An Analysis of Board and Court Decisions Since Brown and American Ship*, 57 CORNELL L. REV. 211 (1972) [hereinafter cited as Bernhardt]; Meltzer, *Lockouts Under the LMRA: New Shadows on an Old Terrain*, 28 U. CHI. L. REV. 614 (1961) [hereinafter cited as Meltzer]; Oberer, *Lockouts and the Law: The Impact of American Ship Building and Brown Food*, 51 CORNELL L.Q. 193 (1966).

Offensive lockouts are characterized by

> [T]he use of a temporary layoff of employees solely as a means to bring economic pressure to bear in support of the employer's bargaining position, after an impasse has been reached.

American Ship Bldg. Co. v. NLRB, *supra* at 308.

2. 29 U.S.C. § 151 *et seq.* (1970).

3. It has been said that the use of replacements "poses a more serious threat to industrial peace than does a lockout; the prospect of replacements constitutes, moreover, a more effective restraint on concerted activities than does a lockout." Meltzer, *supra* note 1, at 617.

The past decade, however, has seen increasing use of this tactic and an accompanying increase in the amount of litigation concerning its legality under sections 8(a)(1) and (3)[4] of the Act. These sections provide that:

> (a) It shall be an unfair labor practice for an employer-
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> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;
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> . . . .
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . .[5]

While the language of these sections would appear to be an *absolute* prohibition of employer actions having a detrimental effect on the free exercise of employee rights, the Board and the courts have not adopted this position. Rather they have interpreted the language of these sections to require that the employer's conduct, to be found unlawful, must not only restrict employees in the exercise of the rights granted to them under the Act, but also must flow from an antiunion animus.[6] This motivation requirement holds the seeds of an unjust application of the law as it presently relates to offensive lockouts and temporary replacements.

In *American Ship Building Co. v. NLRB*,[7] sections 8(a)(1) and (3)

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4. 29 U.S.C. § 158(a)(1), (3) (1970).

5. *Id.*

6. This test requires that a requisite mens rea be shown to support a finding that an individual has violated a particular section of the National Labor Relations Act of 1935. *See* Christensen & Svanoe, *Motive and Intent in the Commission of Unfair Labor Practices: The Supreme Court and the Fictive Formality*, 77 YALE L.J. 1269, 1273-1314 (1968) [hereinafter cited as Christensen & Svanoe] for an excellent discussion of history of the use of motive in this context. Christensen and Svanoe suggest that the use of a motive test "merely obscures" the real policy considerations which form the actual foundation of many court decisions. *Id.* at 1325-28.

The Act is designed

> [T]o eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions . . . by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment . . . .

29 U.S.C. § 151 (1970).

An employer's state of mind alone bears little relation to the economic efficiency or the social utility of his acts. In order to achieve the goals of the Act the employer's actions rather than his motivation should be examined.

7. 380 U.S. 300 (1965). The employer in *American Ship* was engaged in the "highly seasonal business" of operating shipyards on the Great Lakes. *Id.* at 302. The possibility

were found not to prohibit the use of a lockout to force union acceptance of an employer's bargaining position after a lawful bargaining impasse had been reached, in the absence of antiunion motivation.[8] On the same day that the Court decided *American Ship* it also decided *NLRB v. Brown.*[9] *Brown* held that an employer may use temporary replacements to continue operations during a lockout called in response to a whipsaw strike.[10] The Court expressly reserved, however, the question of the legality of the use of temporary replacements during an offensive bargaining lockout.[11]

At present, two conflicting yet somewhat overlapping tests are being used by the Board and by the courts to determine if the employers' actions, in cases in which a section 8(a)(1) or (3) violation is alleged in the lockout/temporary replacement area, arise from antiunion animus. The two positions which seem to appear in the cases are (1) the motivational test, which derives from a questionable interpretation of *NLRB v. Great Dane Trailers, Inc.*;[12] and (2) the balancing test,

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of a customer's ship being stranded in the yards if the employees went out on a wildcat strike was the primary concern of the employer. *Id.* at 303-04. That this was a distinct possibility was indicated by the fact that a bargaining impasse had been reached in the contract negotiations and that a similar wildcat strike had occurred in 1961. *Id.* at 304. To forestall the concomitant economic loss this would entail, the employer locked out his employees in the slack season and, as a result, a new contract was agreed upon before the busy season began. *Id.* at 304.

8. *Id.* at 313.

9. 380 U.S. 278 (1965). In *Brown* an employer bargaining unit composed of five food stores was engaged in negotiations for a new contract with the Retail Clerk's Union. During the bargaining the union struck one of the stores and in response to this action the remaining stores locked out their employees and continued operations through the use of temporary replacements composed primarily of management personnel and their families. *Id.* at 280-81. The Court characterized the employer's action as defensive, *id.* at 284, and noted with approval the statement of the lower court 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 inescapable prospect of success.

Id. at 285, *citing*, 319 F.2d 7, 11 (10th Cir. 1963). The courts have not been equally as eager to apply an "inescapable prospect of success" test when judging the actions of the employer. *Cf.* Ottawa Silica, 197 N.L.R.B. 449, *aff'd mem.*, 482 F.2d 945 (6th Cir. 1972), *cert. denied*, 415 U.S. 916 (1974).

> 10. Usually the smallest of the group is struck in order to focus the economic burden of the strike at the weakest point. If successful at this point, successive strikes follow against other single members of the group until the final goal is accomplished.

319 F.2d at 9 n.3.

11. 380 U.S. at 308 n.8.

12. 388 U.S. 26 (1967). The Court in *Great Dane* examined the actions of an employer who refused to pay vacation benefits to those who had gone out on strike while making no such refusal to those who had worked during the strike. *Id.* at 30.

proposed by a faction of the Board,[13] several commentators,[14] and some courts.[15] While these two primary poles of thought are identifiable, neither the courts nor the Board apply the available standards with any degree of clarity or certainty. Thus, the cases often reflect a somewhat confused mixing and blending of the various factors which have been held significant in other cases.

I. GREAT DANE AND AMERICAN SHIP: THE JUDICIAL REFINEMENTS OF SECTIONS 8(a) (1) and (3).

The language of *Great Dane* clearly established two standards by which the conduct of an employer may be held to be motivated by an antiunion animus. First, if the employer's conduct is "inherently destructive," a violation may be found because the very nature of the employer's action implies an antiunion animus.[16] Second, if the employer's conduct has only a slight effect on employee rights, a violation may nonetheless be found if the employer fails to come forward with some evidence of business justification.[17] The Court in *Great Dane* stated:

> 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 and the Board can find an unfair labor practice even if the employer introduced evidence that the conduct was motivated by business considerations. Second, if the adverse effect of the discriminatory conduct on employee rights 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. Thus, in either situation, once it has been proved that the employer engaged in discriminatory conduct which could have adversely affected employee rights to

13. *See* notes 93-107 *infra* and accompanying text.

14. *See* Christensen & Svanoe, *supra* note 6, at 1329-32; Shieber & Moore, *Section 8(a)(3) of the National Labor Relations Act: A Rationale—Part II Encouragement or Discouragement of Membership in any Labor Organization and the Significance of Employer Motive*, 33 LA. L. REV. 1, 27-37 (1972) [hereinafter cited as Shieber & Moore].

15. *See* NLRB v. Prescott Indus. Prods. Co., 500 F.2d 6, 10 (8th Cir. 1974) (using a balancing test in the area of employee free speech: "The employees' rights are to be weighed against the interests of management in the pursuit of its lawful objectives"); Lane v. NLRB, 418 F.2d 1208, 1211 (D.C. Cir. 1969) (suggesting that the Supreme Court is moving away from the motivation test).

16. *See* Baird, *supra* note 1, at 407-08.

17. *See* NLRB v. Fleetwood Trailer Co., 389 U.S. 375, 380 (1967) (indicating that the employer's burden is one of going forward with the evidence rather than a burden of proof).

> *some* extent, the burden is upon the employer to establish that he was motivated by legitimate objectives since proof of motivation is most accessible to him.[18]

It has been said that *Great Dane* represents a retreat from the high point of the motivation test as expressed in *American Ship*.[19] However, in laying down the standards by which an employer's conduct is to be tested, the Court did not retreat from the motivation test as much as it changed the allocation of the burden of proof by requiring the employer to demonstrate the absence of antiunion motivation in some circumstances.

The key question to be asked in applying the test of *Great Dane* is how have the courts and the Board interpreted the terms "inherently destructive," "slight effect," and "business jusification." An assessment of the first two terms would seem to require an examination of the relative economic strengths of the parties involved in the labor dispute before deciding the effect of the employer's action. Indeed, what might be "inherently destructive" to one union might have only a slight effect on another. For example, skilled employees who are more difficult to replace are at less of a disadvantage than nonskilled and easily replaceable employees. The latter could not long withstand an extended lockout. However, in *American Ship* the Supreme Court laid down a broad prohibition against the Board taking economic power into consideration:

> Sections 8(a)(1) and (3) do not give the Board a general authority to assess the relative economic power of the adversaries in the bargaining process and to deny weapons to one party or the other because of its assessment of that party's bargaining power. In this case the Board has, in essence, denied the use of the bargaining lockout to the employer because of its conviction that use of this device would give the employer "too much power." In so doing, the Board has stretched §§ 8(a)(1) and (3) far beyond their functions of protecting the rights of employee organization and collective bargaining.[20]

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18. 388 U.S. at 34. *Great Dane* could provide the support for a balancing test as well as the motivational test. This indicates that the present application of *Great Dane* as support for the contention that an unlawful motivation is *required* to find a violation of sections 8(a)(1) and (3) may be in error. *See, e.g.*, 9 B.C. IND. & COM. L. REV. 213, 221 (1967); 48 B.U.L. REV. 142, 147-50 (1968) (indicating *Great Dane* combines a balancing test with a motivational test). *See also* note 80 *infra* and accompanying text.

The *Great Dane* criteria were held applicable to § 8(a)(1) violations in NLRB v. Fleetwood Trailer Co., 389 U.S. 375, 380 (1967).

19. *See* Lane v. NLRB, 418 F.2d 1208, 1211 (D.C. Cir. 1969); 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, 91 (1970) [hereinafter cited as Janofsky].

20. 380 U.S. at 317 (citation omitted). *But see* Inter-Collegiate Press, Graphic Arts

The Court then stated that the balancing of interests was a function more appropriately reserved to Congress.[21]

II. INLAND TRUCKING, OTTAWA SILICA AND INTER-COLLEGIATE PRESS: APPLICATION OF GREAT DANE TO THE LOCKOUT/REPLACEMENT AREA

Perhaps in response to the edict of the Supreme Court in *American Ship*, the Seventh Circuit, when faced with a situation which might have been better resolved by balancing the interests of the employer against those of the employees,[22] chose instead to embark upon a judicial expedition through the employer's mind. *Inland Trucking Co. v. NLRB*,[23] involved three employers engaged in the business of delivering ready-mixed concrete to the construction industry.[24] Anticipating a strike during their busy season, the employers locked out their

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Div. v. NLRB, 486 F.2d 837, 847 (8th Cir. 1973), *cert. denied*, 416 U.S. 938 (1974); Baird, *supra* note 1, at 428-30.

21. We are unable to find that any fair construction of the provisions relied on by the Board in this case can support its finding of an unfair labor practice. Indeed, the role assumed by the Board in this area is fundamentally inconsistent with the structure of the Act and the function of the sections relied upon. The deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress. Accordingly, we hold that an employer violates neither § 8(a)(1) nor § 8(a)(3) when, after a bargaining impasse has been reached, he temporarily shuts down his plant and lays off his employees for the sole purpose of bringing economic pressure to bear in support of his legitimate bargaining position.

380 U.S. at 318.

22. The ideal balancing test would require the Board to weigh the business justification behind the actions of the employer against the impact these actions have on the free exercise of employee rights. For a discussion of those factors which should be considered in making this determination, see notes 108-15 *infra* and accompanying text.

We believe that only employer actions that constitute discrimination and unduly interfere with employee exercise of Section 7 rights are Section 8(a)(3) unfair labor practices. Further, whether particular discriminatory employer action does or does not unduly interfere with employee exercise of Section 7 rights can only be determined by weighing the social utility of the employer's action, its business justification, against its social disutility, the resulting interference with employee exercise of Section 7 rights. When the utility of the action outweighs its disutility, the discriminatory action is lawful; when the contrary is true, the employer's action is held to "encourage or discourage membership in any labor organization" and is thus an unfair labor practice in violation of Section 8(a)(3).

Shieber & Moore, *supra* note 14, at 7.

23. 179 N.L.R.B. 350 (1969), *enforced*, 440 F.2d 562 (7th Cir.), *cert. denied*, 404 U.S. 858 (1971). *See generally* 3 TEX. TECH. L. REV. 401 (1972).

Some commentators have suggested that the Board may have applied a balancing test *in Inland*. *See* 85 HARV. L. REV. 680, 685 (1972); 50 TEX. L. REV. 552, 556 (1972). In this comment "motivation test" should be understood to include any balancing which may take place as a condition precedent to the court's inference of an improper motivation. *See, e.g.*, Baird, *supra* note 1, at 407-08.

24. 179 N.L.R.B. at 350.

employees after an impasse had been reached in the labor negotiations.[25] Despite temporary replacements, hired ostensibly to maintain "business commitments,"[26] the lockout failed; the employees returned to work only to go on strike the next day.[27]

The Board, employing a balancing test, held the employers' actions inherently destructive of protected employee rights:[28]

> [W]here "the employer's action is thus defensive, in response to the employees' own concerted activity, it cannot be said . . . to be designed necessarily to destroy the exercise of employees' rights or the capacity of the union to represent them."
>
> However, where the employer, as here, locks out his employees with the purpose of forcing them to accede to his terms and at the same time is able to demonstrate, by continued operation through other employees, that resistance to the employer's terms, . . . is unlikely of success, . . . and reemployment can be obtained only by concession to the employer's terms, . . . the almost inevitable, tendency of the employer's conduct would be capitulation.[29]

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25. *Id.* at 352.

26. *Id.* at 353.

27. *Id.*

28. *Id.* at 358.

29. *Id.* at 357-58 (citation omitted). The Seventh Circuit Court of Appeals noted that the use of replacements

> would not merely pit the employer's ability to withstand a shutdown of its business against the employees' ability to endure cessation of their jobs, but would permit the employer to impose on his employees . . . the pressure of being out of work while ["obtaining for himself the returns of con-"] tinued operation. Employees would be forced, at the initiative of the employer, not only to forego their job earnings, but, in addition, to watch other workers enjoy the earning opportunities over which the locked out employees were endeavoring to bargain. Permitting an employer to impose this additional price on the protected right to collective bargaining would, in our opinion, conflict with the intended scope and content of that right, as protected in 29 U.S.C. § 157.

440 F.2d at 564.

However, the situation would not be so grim for employees in those states which provide unemployment benefits to workers expelled from their jobs by an offensive lockout. CAL. UNEMP. INS. CODE ANN. § 1262 (West 1972) provides:

> An individual is not eligible for unemployment compensation benefits, and no such benefit shall be payable to him, if he left his work because of a trade dispute. Such individual shall remain ineligible for the period during which he continues out of work by reason of the fact that the trade dispute is still in active progress in the establishment in which he was employed.

Although this might appear to foreclose any recovery of benefits by an employee locked out of his job for any reason, the California Supreme Court has held that the unemployment insurance disqualificiation applies only when the workers "voluntarily leave their work because of a trade dispute." Bodinson Mfg. Co. v. California Employment Comm'n, 17 Cal. 2d 321, 328, 109 P.2d 935, 940 (1941). *Accord*, Ruberoid Co. v. California Unemployment Ins. Appeals Bd., 59 Cal. 2d 73, 78, 378 P.2d 102, 105, 27 Cal. Rptr. 878, 881 (1963). The court in the *Ruberoid* decision found that permanently replaced striking workers were not voluntarily remaining away from work and, therefore,

The Board concluded that a lockout coupled with temporary replacements would be inherently destructive.[30]

The Court of Appeals, using a more traditional test, agreed with the Board's conclusion that the employer's action was in violation of the Act[31] and found it significant that this type of lockout "forecloses the employees' opportunity to earn without surrendering the corresponding opportunity of the employer."[32] The court then indicated that even if the employers' actions were not inherently destructive, the employers had failed to meet the *Great Dane* test by failing to establish substantial business justification.[33] The court treated the employers' desire to avoid a strike during the peak business season as a "preference for a labor confrontation in May rather than the peak summer period,"[34] and, hence, not business justification.[35] The holding of *Inland Trucking* that

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were eligible for unemployment benefits. 59 Cal. 2d at 77, 378 P.2d at 105, 27 Cal. Rptr. at 881. Thus, the California courts have made it clear that workers who leave their jobs as casualties of a bargaining lockout will be eligible for unemployment benefits. *See, e.g.*, Coast Packing Co. v. California Unemployment Ins. Appeals Bd., 64 Cal. 2d 76, 79-80, 410 P.2d 358, 360-61, 48 Cal. Rptr. 854, 856-57 (1966); John Morrell & Co. v. California Unemployment Ins. Appeals Bd., 254 Cal. App. 2d 455, 461, 62 Cal. Rptr. 245, 248-49 (1967) (lockout following reasonable expectation of strike). *But see* Artigues v. California Dep't of Employment, 259 Cal. App. 2d 409, 416, 66 Cal. Rptr. 390, 394 (1968) (holding unemployment benefits unavailable to employees locked out by a multi-employer bargaining group in response to a whipsaw strike). *See also* Lewis, *The Lockout Exception: A Study in Unemployment Insurance Law and Administrative Neutrality*, 6 CAL. WESTERN L. REV. 89 (1969).

30. 179 N.L.R.B. at 358.

31. 440 F.2d at 565. The court also denied that either it or the Board had engaged in a balancing test. *Id.* at 564.

32. 440 F.2d at 564. *But see* note 29 *supra.*

33. *Id.* at 565.

34. *Id.*

35. *Id.* This language was basically a condensation of the Board's position that the employer had to show some additional business justification beyond the desire for a favorable bargaining result. *See* notes 73-80 *infra* and accompanying text.

The interpretation of "substantial and legitimate business justification" in other cases lends little aid to the development of a working definition. *Compare*, Allied Indus. Workers, Local 289 v. NLRB, 476 F.2d 868, 878 (D.C. Cir. 1973) (financial hardship is not substantial business justification so as to avoid paying "accrued vacation compensation" upon cessation of a union-instigated strike); International Ass'n of Mach. & Aerospace Workers, Dist. 8 v. J.L. Clark Co., 471 F.2d 694, 696 (7th Cir. 1972) ("[o]ne business justification now recognized to be 'legitimate and substantial' results when an employer hires 'permanent replacements' to perform the work of striking employees"); NLRB v. Jemco, Inc., 465 F.2d 1148, 1154 (6th Cir. 1972), *cert. denied*, 409 U.S. 1109 (1973) ("[c]ompany's attempt to set off its legal costs against the employees' vacation pay did not constitute a legitimate objective as required under *Great Dane*"); NLRB v. Duncan Foundry & Mach. Works, Inc., 435 F.2d 612, 619 (7th Cir. 1970) (subsequent finding that the employer was in a poor economic position was not substantial and legitimate justification for prior discrimination in the form of a denial of

a lockout coupled with temporary replacements is inherently destructive did not enjoy even a brief period of acceptance by the Board and the other circuits, but rather fell victim to the motivation test which had spawned it. Two recent cases, *Ottawa Silica*[36] and *Inter-Collegiate Press, Graphic Arts Division v. NLRB*,[37] have limited the impact of *Inland* and clarified the difference between the motivational and balancing tests as presently applied to the lockout/replacement labor situation.

In *Ottawa Silica* the employer locked out its employees after a bargaining impasse had been reached, but continued operations using sales and supervisorial personnel.[38] The lockout lasted five working days and the union thereafter filed charges alleging that the employer had violated sections 8(a)(1) and (3) of the Act.[39] The Board rejected the union's claim. Two members of the Board, Kennedy and Penello, repudiated the holding in *Inland Trucking* and held that the lockout and use of temporary replacements were not, in all situations, destructive of protected employee rights.[40] Relying on *Brown* to sanction the use of lockouts, and *American Ship* to support the use of replacements, they reached the conclusion, based on the facts of the case, that there was a substantial and legitimate business justification for the employer's actions.[41]

Miller, then chairman of the Board,[42] came to the same result as Kennedy and Penello but by a different approach, employing a quasi-

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benefits); Pay 'N Save Corp., 210 N.L.R.B. No. 46, 86 L.R.R.M. 1457, 1459 (1974) (fire department order to shut down is substantial and legitimate business justification to stop operations). If any conclusion at all can be drawn from the above cases it is that no bright line rule exists delineating the boundaries to the substantial and legitimate business justification test. It seems instead that the issue is one of the *degree* of economic justification.

In Lane v. NLRB, 418 F.2d 1208 (D.C. Cir. 1969), the court hints that substantial business justification is a label placed on various economic factors on the employer's side which outweigh the impact the lockout has on employee rights. "Apparently the employer must demonstrate that his interest in pursuing the conduct at least balances the harm inflicted upon the rights of the employees." 418 F.2d at 1211. A use of *Great Dane* in this manner would approach the balancing tests discussed later in the text; see notes 90-107 *infra* and accompanying text.

36. 197 N.L.R.B. 449, *aff'd mem.*, 482 F.2d 945 (6th Cir. 1972), *cert. denied*, 415 U.S. 916 (1974).

37. 199 N.L.R.B. 177 (1972), *enforced*, 486 F.2d 837 (8th Cir. 1973), *cert. denied*, 416 U.S. 938 (1974).

38. 197 N.L.R.B. at 452.

39. *Id.* at 449.

40. *Id.* at 451.

41. *Id.* at 450-51.

42. Miller's replacement, Ms. Betty S. Murphy, was confirmed by the Senate on February 5, 1975. 88 LAB. REL. REP. 113 (Feb. 10, 1975).

balancing process. While refusing to expressly overrule *Inland*, Miller said that the lockout and the use of replacement labor was not per se destructive in the present context. The thrust of his reasoning in support of this conclusion emphasized the effect of the employer actions and not the motivation. First, the employer had used its own non-union employees as replacements.[43] Second, the union had refused to assure the employer that it would not strike.[44] Third, there was some evidence of legitimate and substantial business justification.[45] Miller qualified his holding, however, noting that:

> I do not intend my conclusions in this case to be understood as sanctioning the utilization of temporary replacements, *particularly when hired from the outside*, in all permissible lockout situations. Thus to the extent that my colleagues intend, by their readiness to overrule *Inland Trucking Co.*, to indicate a contrary view, I would disassociate myself from their rationale.[46]

This singling out of outside replacement labor is difficult to understand. It would seem that the threat of illegal discrimination would be greater if inside, nonunion personnel were used, rather than outside help. In such cases the locked out employees as well as the courts might reasonably conclude that the employer wished to single out only union members for

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43. 197 N.L.R.B. at 451. In *American Ship* the Court seems to intimate that the use of in-house nonunion employees might be violative of the act:

> [I]t is difficult to understand what tendency to discourage union membership or otherwise discriminate against union members was perceived by the Board. There is no claim that the employer locked out only union members . . . .

380 U.S. at 312. However, in WGN of Colo., Inc., 199 N.L.R.B. 1053 (1972), the Board found continued operation after an offensive lockout, with employees "not covered by the expired contract," legal, due to the employer's reasonable expectation of a strike.

44. 197 N.L.R.B. at 451. Regardless of the language in *Ottawa* it appears that a union cannot insulate itself from an offensive lockout simply by assuring the employer that it will be given reasonable notice before the employees go on strike. In Ralston Purina Co., 204 N.L.R.B. 366 (1973), the union president gave the employer, a manufacturer of spoilable food products, assurances that the union would give the company twenty-four hours notice of an impending strike (or more if requested). Kennedy and Penello found the lockout legal as there was no evidence of antiunion motivation. Miller upheld the company's lockout and use of replacement labor on the grounds that the impact on employee rights was outweighed by the interests of the employer. *Id.* at 366-67.

45. 197 N.L.R.B. at 451. Subsequent Board decisions have made it clear that a "reasonable apprehension of a strike" will provide the necessary business justification to support a lockout plus the use of temporary replacements. Ozark Steel Fabricators, Inc., 199 N.L.R.B. 847 (1972). In *Ozark* the employees had not taken a strike vote at the time of the lockout yet the Board still found the requisite apprehension as the negotiations had reached an impasse. *Id.* at 847. Of course, if the employer had to wait for a strike vote the use of the offensive lockout would be vitiated as an effective bargaining weapon. In *Ozark*, the replacements were management personnel. *Id.* at 847.

46. 197 N.L.R.B. at 451-52 (citations omitted & emphasis added).

punishment. On the other hand, if all employees were locked out the strength of this inference would be lessened as the employees would be locked out regardless of their union membership. Perhaps Miller was considering the use of only management personnel rather than the use of nonmanagement, nonunion workers.

Members Fanning and Jenkins dissented and concentrated on Miller's reasoning. They criticized Miller's approach and conclusion, finding it inapplicable to the case at hand. First, they reasoned that the coercion of union members is just as great when the employer uses in-plant personnel as when the employer hires temporary replacements from the outside.[47] They buttressed their reasoning by noting that nothing in *Inland Trucking* requires a union to provide an employer with assurances that it will not strike.[48] Additionally, the employer in *Ottawa* had assured a client that in the event of a strike he would be able to maintain deliveries, thus indicating that there was not substantial and legitimate business justification for the use of the replacement labor.[49]

The facts in *Inter-Collegiate* were similar to those in *Ottawa Silica*, except that the employer was engaged in the manufacture of highly seasonal items, with business reaching full production in the first half of the year.[50] The employer locked out his employees in an effort to achieve a contract settlement before the peak season arrived. The union refused to accede to the employer's terms and in response the employer resumed operations with temporary replacements.[51]

Inter-Collegiate crystallized the Board Members' positions. Kennedy and Penello simply stated that, "absent antiunion motivation, which is not shown here, an employer does not violate Section 8(a)(3) or (1) of the Act by hiring temporary replacements to continue operations during an otherwise lawful lockout."[52] Miller, on the other hand, took the opportunity to develop more thoroughly his criteria for judging whether an 8(a)(1) or (3) violation had taken place. The limits which the Supreme Court had placed on the Board's exercise of a balancing test in *American Ship*, he stated, only applied to those cases in which the Board was "determining the legality of a lockout as such."[53] He then went on to point out that in *Brown*, a case dealing specifically with the problem

47. *Id.* at 453.
48. *Id.*
49. *Id.* at 453-54.
50. 199 N.L.R.B. at 182 (trial examiner's decision).
51. *Id.* at 184 (trial examiner's decision).
52. *Id.* at 177.
53. *Id.*

of temporary replacements, the Court had "balanc[ed] the impact of such conduct by the Respondents on possible discouragement of union membership against the importance and the legitimacy of the objectives of the employer."[54] By this reasoning Miller indicated that he would no longer rely solely upon a motivation test in the lockout/replacement area; he would adhere, however, to the motivation test when asked to determine the legality of a lockout standing alone.[55] Once again, Fanning and Jenkins dissented arguing that a lockout accompanied by the use of replacement labor was inherently destructive and that, even if the secondary test of *Great Dane*,[56] requiring the employer to show lack of antiunion motivation, were to be applied, there was still no evidence of substantial and legitimate business justification.[57]

On appeal, the Eighth Circuit Court of Appeals applied the *Great Dane* tests and affirmed the Board's findings.[58] The court first found that the employer's conduct was not inherently destructive of employee rights.[59] Inherently destructive, the court suggested, is "conduct . . . which creates visible and continuing obstacles to the future exercise of employee rights."[60] Although fifteen employees did not return to work after the lockout, the court found that the union had experienced no decline in its ability to represent its members.[61]

Three factors influenced the court in this finding:

> First, the replacements were expressly hired only for the duration of the labor dispute, and a definite date was given for their termination even if the dispute was not resolved. This was communicated to both the union and the employees. Second, at all times the option was available to the employees to return to work by simply agreeing to the employer's terms, which were better than those in the old contract. Third, the employer had already agreed to continue in effect the union-security clause from the old contract.[62]

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54. *Id.* at 177-78.

55. *Id.*

56. *See* note 18 *supra* and accompanying text.

57. 199 N.L.R.B. at 180 (Fanning and Jenkins, members, concurring in part and dissenting in part).

58. 486 F.2d at 847.

59. *Id.* at 845.

60. *Id.* (footnote omitted).

61. *Id.*

62. *Id.* (footnote omitted). As to the first factor, it appears that the use of permanent replacements would be inherently destructive of protected employee rights. *See* Bernhardt, *supra* note 1, at 236 n.149 (wherein it is suggested that the use of permanent replacements would be "clearly coercive").

The observation that the employees could have returned to a better contract presents

It should be noted that in using these factors, the court was, to a certain extent, employing a balancing test integrating the specific facts of the case; but the court made it clear that the purpose behind the examination was to discover if the "employer's conduct . . . [had] 'unavoidable consequences . . . which he must have intended,' "[63] thus returning full circle to the motivation test.

III. INHERENT DESTRUCTIVENESS

The courts have generally been loathe to find inherent destructiveness in the lockout/replacement labor area. Under the view espoused by Kennedy and Penello, a lockout coupled with the use of temporary replacements "never creates a violation, assuming that the lockout itself is proper."[64] According to this view, all that need be determined is the legality of the lockout and the use of replacement labor would have no effect upon the legality or illegality of the lockout itself. This conclusion has been reached by a process of legal addition, the validity of which is open to serious question. First, *American Ship* is cited for the proposition that a lockout occurring after a bargaining impasse is not always destructive.[65] Second, *Brown* is cited for the proposition that the use of

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some difficulties. An apparent increase in benefits may actually be illusory due to inflation.

The last factor probably indicates that the court thought it significant that a union security clause existed rather than the alternative interpretation that the court found it significant that the employer did not attempt to force a relatively inferior contract on the union.

One problem with using these factors is that they are somewhat redundant as they will probably be applied by the court in determining whether the employer has breached his duty to bargain in good faith. In situations where the employer's refusal to bargain in good faith created an impasse, and there was no immediate threat of a strike, lockouts have been declared illegal. In NLRB v. Bagel Bakers Council, 434 F.2d 884, 889 (2d Cir. 1970), *cert. denied*, 402 U.S. 908 (1971), the court stated:

> Since the lockout in this case was in support of bad faith bargaining and not merely to bring economic pressure to bear upon a legitimate bargaining position, it falls outside the conduct protected in American Ship . . . .

Accord, American Stores Packing Co., 158 N.L.R.B. 620 (1966).

However, it is important to note that even if there is unlawful refusal to bargain, due to a feigned impasse by the employer, replacement labor during an offensive lockout will be legal if the employer reasonably believes that it will soon be subjected to a strike; *see* Sargent-Welch Scientific Co., 208 N.L.R.B. 811 (1974). It may have been significant in the *Sargent* case that the union refused to give the employer a "no-strike commitment." *Id.*

63. 486 F.2d at 845, *quoting* NLRB v. Erie Resistor Corp., 373 U.S. 221, 228 (1963) (emphasis added). *See* note 19 *supra* and accompanying text.

64. Inter-Collegiate Press, Graphic Arts Div., 199 N.L.R.B. 177 (1972) (Miller concurring), *enforced*, 486 F.2d 837 (8th Cir. 1973), *cert. denied*, 416 U.S. 938 (1974).

65. Ottawa Silica Co., 197 N.L.R.B. 449 (1972) *aff'd mem.*, 482 F.2d 945 (6th Cir.

temporary replacements is no more inherently destructive "than the lockout itself."[66] The argument then concludes that since the two actions

1973), *cert. denied*, 415 U.S. 917 (1974).

One of the tests for inherent destructiveness in *American Ship* is examination of the employer's action to discover if the behavior "will necessarily destroy the unions' capacity for effective and responsible representation." 380 U.S. at 309. This standard has been generally ignored by the courts in favor of a test which places primary emphasis on the continued existence of the union. Even when the test *is* used the word "necessarily" can provide a handy escape device for any court wishing to avoid a result favorable to the union. In NLRB v. Golden State Bottling Co., 401 F.2d 454 (9th Cir. 1965), the employer and the union had reached an impasse after a month of bargaining. The employer's last contract proposals were narrowly rejected by the union and the next day the employer instituted a lockout. The lockout had the effect of splitting unit employees into two opposing camps, those who favored a settlement and those who did not. *Id.* at 455. The court said:

> True, the effect of this lockout was to disrupt the orderly internal functioning of the union, but this result of an otherwise lawful act cannot make that act an unfair labor practice. This was not a necessary consequence of the lockout and the employer's refusal of work did not necessarily destroy the union's capacity for effective and responsible representation.
>
> [T]he union split into two factions and . . . one of these factions promptly backed away from the union's earlier position and decided to accept the company's proposal. This seems to us to be simply a possible result of a legal lockout. In the absence of evidence that the employer was wrongfully motivated in the exercise of his right to refuse work or that union disruption was a necessary consequence thereof, we cannot sustain the view that the lockout was an unfair labor practice.

Id. at 457. Thus 'inherently destructive' may be read in two different ways by placing the unspoken words, ". . . in all cases," or ". . . in this particular case," after the words "inherently destructive." The court in *Golden State* chose the former. That this has strong implications for the use of temporary replacements is indicated by dicta which said that the employer should have hired temporary replacements. *Id. Golden State* may be contrasted with NLRB v. Erie Resistor Corp., 373 U.S. 221 (1963) where the court stated that the employer's action

> creates a cleavage in the plant continuing long after the strike is ended. Employees are henceforth divided into two camps: those who stayed with the union and those who returned before the end of the strike and thereby gained extra seniority. This breach is reemphasized with each subsequent layoff and stands as an ever-present reminder of the dangers connected with striking and with union activities in general.

Id. at 231.

Also, the Court in *Great Dane* indicated that it was necessary only that the conduct in question have a "potential for adverse effect" to find an 8(a)(3) violation. 388 U.S. at 35 (by implication). Another less restrictive interpretation of 'inherently destructive' was set forth in Local 155 Int'l Molders & Allied Workers, AFL-CIO v. NLRB, 442 F.2d 742 (D.C. Cir. 1971) (Tamm, J., concurring in part and dissenting in part), which held that withdrawal of benefits for the purpose of inducing a strike in the slack season is inherently destructive. The court found it unnecessary for actual harm to occur to the union in order to make a finding that the employer's action was inherently destructive.

> As this court has said, the proper question "is not whether an employee actually felt intimidated but whether the employer engaged in conduct which may reasonably be said to interfere with the free exercise of employee rights under the Act."

Id. at 747 n.4, *quoting*, Joy Silk Mills, Inc. v. NLRB, 185 F.2d 732, 743-44 (D.C. Cir. 1950), *cert. denied*, 341 U.S. 914 (1951).

66. Ottawa Silica Co., 197 N.L.R.B. 449, 450, *aff'd mem.*, 482 F.2d 945 (6th Cir. 1973), *cert. denied*, 415 U.S. 917 (1974).

are not intrinsically destructive when used alone, they are not inherently destructive when combined. In actuality, however, *Brown* may not be validly cited for this proposition, because if *Brown* had legitimized the use of temporary replacements with the offensive lockout, the Supreme Court would not have expressly reserved a decision on the same issue in *American Ship*.[67]

The Eighth Circuit Court of Appeal's decision in *Inter-Collegiate* is recognized authority for the proposition that a lockout coupled with temporary replacements is not inherently destructive. A union attorney might argue that the employer's action is inherently destructive if one of the factors considered by the court of appeals in *Inter-Collegiate* is absent.[68] But initially one might question the significance of these factors within the context of present negotiating practices. In *Inter-Collegiate* the court stressed the employee's opportunity to return to a better contract and the existence of a union security clause.[69] However, these factors exist in the great majority of collective bargaining situations.[70] The prohibition against hiring permanent replacements is somewhat more significant. Perhaps an analogy might be drawn to the prohibition of hiring permanent replacements for unfair-labor-practice strikers.[71]

IV. SLIGHT EFFECT AND SUBSTANTIAL AND LEGITIMATE BUSINESS JUSTIFICATION

The second test proposed by *Great Dane* (requiring an employer to come forward with evidence of substantial and legitimate business justi-

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[T]he [Brown] Court stated that it did not see how the continued operations of the employers there involved and their use of temporary replacements implied hostile motivations any more than the lockout itself; nor could the court see how they were inherently more destructive of employee rights.

Id.

Note the distinction between this and the original *Brown* passage.

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

NLRB v. Brown, 380 U.S. 278, 284 (1965) (emphasis added).

As to this argument, it is well to ask "whether the thrust of the National Labor Relations Act is to prohibit bad thoughts, or to curb the harmful conduct. And if the latter, are bad thoughts to be held to make harmless conduct illegal?" Christenson & Svanoe, *supra* note 6 at 1326-27. *See also* Koretz & Rabin, *The Development and History of Protected Concerted Activity*, 24 SYRACUSE L. REV. 715, 727-28 (1973).

67. 380 U.S. at 308 n.8. *See* note 80 *infra* and accompanying text.

68. *See* note 62 *supra* and accompanying text.

69. *See* note 62 *supra.*

70. *Cf.* 1 BNA COLLECTIVE BAR. NEG. & CONT. 18:903 (1972).

71. *See* 2 BNA COLLECTIVE BAR. NEG. & CONT. 87:1 (1975).

fication once a slight effect on the union has been shown)[72] has either been ignored or subverted through an expansive definition of "substantial and legitimate business justification." Members Kennedy and Penello make little effort to justify their position under *Great Dane* but they do quote a somewhat bowdlerized provision from *Brown*: "When the resulting harm to employee rights is thus comparatively slight, and a substantial and legitimate business end is served, the employers' conduct is *prima facie* lawful."[73] This passage differs from that in *Great Dane* in that *Great Dane* requires the employer to *come forward* with evidence of business justification.[74] Even if the *Great Dane* test were used, the employer could never fail to have the requisite business justification in a lockout/replacement labor situation under the present analysis. The Board in *Ottawa Silica* noted:

> As stated by the Supreme Court in *Brown Food Stores*, not only was the prospect of discouragement of membership comparatively remote, but the attempt to remain open for business with the help of temporary replacements was a measure reasonably adapted to the achievement of a legitimate end.[75]

Thus, the substantial and legitimate business justification upon which the employer is allowed to justify his hiring of temporary replacements arises out of the employer's initial action of locking out his employees. The expansion of the *Brown* doctrine into the area of offensive bargaining lockouts eviscerates the *Great Dane* test, as the only time the employer would fail to have the necessary justification after a lockout would be where he attempted to remain open for business when it would be economically more advantageous for him to remain closed.[76] Further, if it is true, as has been suggested,[77] that the second test in *Great Dane* represents a retreat from a strict motivational test, then it would seem clear that the business justification the Court anticipated is one arising from external economic factors.[78]

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72. 388 U.S. at 317.

73. Ottawa Silica Co., 197 N.L.R.B. 449, 450 (1972), *aff'd mem.*, 482 F.2d 945 (6th Cir. 1973), *cert. denied*, 415 U.S. 916 (1974), *quoting* Brown v. NLRB, 380 U.S. 278, 289 (1965).

74. *See* Janofsky, *supra* note 19, at 91-94.

75. Ottawa Silica Co., 197 N.L.R.B. 449, 451 (1972) *aff'd mem.*, 482 F.2d 945 (6th Cir. 1973), *cert. denied*, 415 U.S. 916 (1974).

76. *See, e.g.*, Inter-Collegiate Press, Graphic Arts Div. v. NLRB, 486 F.2d 837, 846 n.14 (8th Cir. 1973), *cert. denied*, 416 U.S. 938 (1974) (noting that "it is unlikely an employer would hire temporary replacements during an otherwise lawful lockout unless motivated by business exigencies.").

77. *See* note 19 *supra* and accompanying text.

78. This is not to say that the external economic factors referred to could not have

The Board's definition of 'substantial and legitimate business justification' corresponds more closely to White's concurrence in *American Ship* than to any pronouncement of the full Court. Justice White stated:

> If the Court means what it says today, an employer may not only lock out after impasse consistent with [sections] 8(a)(1) and (3), but replace his locked-out employees with temporary help or perhaps permanent replacements, and also lock out long before an impasse is reached. Maintaining operations during a labor dispute is at least equally as important an interest as achieving a bargaining victory and a shutdown during or before negotiations advances an employer's bargaining position as much as a lockout after impasse.[79]

In a footnote, however, the majority specifically stated that this was an incorrect interpretation of its opinion.[80] Explicitly, therefore, *American Ship* is not persuasive authority for the present position of the Board and courts regarding substantial and legitimate business justification.

V. PROVING MOTIVATION

Although cases subsequent to *Great Dane* have indicated that the burden regarding the existence of antiunion motivation shifts to the employer upon a showing of a slight effect on the rights of employees,[81]

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their origin in some offensive concerted union activity. *Cf.* Shieber & Moore, *supra* note 14, at 60.

79. 380 U.S. at 324-25 (citations omitted).

80. Contrary to the views expressed in a concurring opinion filed in this case, we intimate no view whatever as to the consequences which would follow had the employer replaced its employees with permanent replacements or even temporary help.

Id. at 308 n.8. White's interpretation was interposed in his concurring opinion to illustrate his objections to the majority holding in *American Ship* and specifically his objection to the majority's finding that an antiunion motivation must always exist to support a section 8(a)(1) violation in cases involving less than inherently destructive conduct. The fact that Stewart, who authored the opinion in *American Ship*, dissented in *Great Dane*, which together with NLRB v. Fleetwood Trailer Co., 389 U.S. 375 (1967), represented a reduction in the emphasis placed on motivation, would seem to indicate a movement toward the position feared by Justice White.

> [I]n *NLRB v. Great Dane Trailers*, which was decided after the Court of Appeals' opinion in the present case, we held that proof of antiunion motivation is unnecessary when the employer's conduct "could have adversely affected employee rights to *some* extent" and when the employer does not meet his burden of establishing "that he was motivated by legitimate objectives." *Great Dane Trailers* determined that payment of vacation benefits to nonstrikers and denial of those payments to strikers carried "a potential for adverse effect upon employee rights." Because "no evidence of a proper motivation appeared in the record," we agreed with the Board that the employer had committed an unfair labor practice. A refusal to reinstate striking employees, which is involved in this case, is clearly no less destructive of important employee rights than a refusal to make vacation payments. And because the employer here has not shown "legitimate and substantial business justifications," the conduct constitutes an unfair labor practice *without reference to intent.*

Id. at 380 (citations omitted and emphasis added in part).

81. *See* note 17 *supra* and accompanying text.

the Board and the courts have adhered to a more restrictive approach, requiring proof in some direct manner of the existence of an antiunion animus.[82]

The problems which might be faced in attempting to directly prove antiunion motivation are illustrated by *NLRB v. Wire Products Manufacturing Corp.*[83] Here the Board found an antiunion motivation based upon the employer's "tavern tongue-loosened remarks" which followed the initiation of a lockout and use of temporary replacements by the company's attorneys.[84] The Board gave great weight to the vitriolic remarks of the employer which "conditioned the end of the lockout on the employees' abandoning the Union."[85] It would be difficult to find more direct evidence of illegal motivation, yet on appeal the Seventh Circuit declined to enforce the Board's order and found instead that there was insufficient evidence to support a finding of illegal intent as the decision to lock out was made by the attorneys, not the employer.[86] The statements of the employer following the lockout, the court said, could not be used to prove "that the lockout was improperly motivated *ab initio*."[87] Thus, it seems, at least in the Seventh Circuit, that the only way to prove antiunion motivation is through direct

82. *Ottawa Silica* was the first and only time that Kennedy and Penello attempted to justify their position using any analysis resembling that mandated by *Great Dane*. They have been content in subsequent cases to simply state that absent antiunion motivation it is lawful to use replacements during a legal lockout. *See, e.g.*, Ralston Purina Co., 204 N.L.R.B. 366 (1973).

83. 484 F.2d 760 (7th Cir. 1973), *enforcing in part* 198 N.L.R.B. No. 90, 81 L.R.R.M. 1075 (1972).

84. 484 F.2d at 765-66.

85. 81 L.R.R.M. at 1078.

86. 484 F.2d at 764.

> The substance of the decisions which have occupied the major portions of this study is illustrative of the great variety of highly important employer and union activity which now takes place under circumstances which makes proof of actual motive either artificial or impossible. . . . [L]ockouts . . . involve conduct as to which the "true" motive of the employer or the union is highly unlikely to have been registered in a form capable of direct proof. In such instances "motive" must normally be a matter of speculation.

Christensen & Svanoe, *supra* note 6, at 1325. However, although motive is almost impossible to directly prove, the courts have generally held that the Board's choice between two conflicting views as to the existence of unlawful motive may not be overturned if supported by substantial evidence. *See, e.g.*, NLRB v. Ayer Lar Sanitarium, 436 F.2d 45, 48-49 (9th Cir. 1970); Black Hawk Corp. v. NLRB, 431 F.2d 900, 902 (4th Cir. 1970), *cert. denied*, 401 U.S. 911 (1971).

87. 484 F.2d at 766. *But cf.* NLRB v. Southern Beverage Co., 423 F.2d 720 (5th Cir. 1970). In *Southern Beverage* the court found that the employer's actions subsequent to a lockout could give "retroactive coloration" to a lockout. The court went on to say that this "coloration resolved the issue of intent" and that thus there was evidence to support the Board's findings.

statements by the instigator of the lockout. This is contrary to the Supreme Court's position in *Great Dane* which states that evidence of antiunion motivation is not vital to a finding of an 8(a)(3) violation:

> Since discriminatory conduct carrying a potential for adverse effect upon employee rights was proved and no evidence of a proper motivation appeared in the record, the Board's conclusions were supported by substantial evidence, and should have been sustained.[88]

It thus appears that the courts may be unwilling to follow the Supreme Court's indication that lessening importance be accorded the traditional requirement of improper motivation.[89]

VI. BALANCING TEST

The balancing test is gaining support as a viable alternative to the motivation test presently used,[90] and some courts, while paying homage to motivation, actually apply a hybrid test.[91] The Supreme Court's

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88. 388 U.S. at 35 (citation omitted). In *Ottawa Silica* Kennedy and Penello noted in a footnote that *Great Dane*

> does not constitute a dilution of the principles announced in *American Ship Building* and *Brown Food Stores.* Indeed, there the Court cites with approval its decisions in *American Ship Building* and *Brown Food Stores.*

197 N.L.R.B. at 451. But is this an accurate statement? One commentator has said of *Great Dane,*

> The contours of the applicable rules in such cases has been well outlined only two years previously in *American Ship Building* and *Brown* only to be converted by *Great Dane* into an uncertain and ominous state as evidenced by *Laidlaw.*

Janofsky, *supra* note 19, at 99. Laidlaw Corp., 171 N.L.R.B. 1366, 1369 (1968), *enforced,* 414 F.2d 99 (7th Cir. 1969), held that failure to come forward with evidence of substantial and legitimate business justification as required by the second test in *Great Dane* renders the employer's conduct inherently destructive. In Lane v. NLRB, 418 F.2d 1208 (D.C. Cir. 1969), the court characterizes *Great Dane* as a retreat from the absolute requirement of improper motivation imposed by *American Ship* in those cases involving less than inherently destructive conduct. *Id.* at 1211. *Accord,* NLRB v. Hudson Transit Lines, Inc., 429 F.2d 1223, 1228-29 (3d Cir. 1970), *cert. denied,* 401 U.S. 911 (1971).

89. It would seem that *Great Dane* is a return to the earlier position expressed by the Court in NLRB v. Erie Resistor Corp., 373 U.S. 221 (1963).

> We think the Court of Appeals erred in holding that, in the absence of a finding of specific illegal intent, a legitimate business purpose is always a defense to an unfair labor practice charge. . . . [S]pecific evidence of such subjective intent is "not an indispensable element of proof of violation."

Id. at 227 (citation omitted).

90. *See, e.g.,* Lane v. NLRB, 418 F.2d 1208, 1211 (D.C. Cir. 1969); *But cf.* Comment, *Employer Discrimination Under Section 8(a)(3),* 5 U. TOL. L. REV. 722, 774 (1974) [hereinafter cited as Employer Discrimination].

91. *See, e.g.,* sources cited in note 19 *supra. See also* Christensen & Svanoe, *supra* note 6, at 1315.

> [E]stablishment of motive as the benchmark of the violation has obscured the actual basis of decision, and the process of decision has been warped by the necessity to frame results in terms of motive.

admonition in *American Ship* that the Board has no power to examine the bargaining strength of the parties involved[92] is probably the primary roadblock in the path of a balancing test. Miller avoided this in *Ottawa Silica* and *Inter-Collegiate* by effectively limiting *American Ship* to its facts.[93] He pointed out that in *Brown*, a case in which temporary replacements were an issue, the Court itself, "engaged in a lengthy discussion, balancing . . . the discouragement of union membership against the importance and the legitimacy of the objectives of the employer."[94] Analyzing *Inter-Collegiate* in this manner, Miller came to the conclusion that the lockout coupled with the use of temporary replacements was not per se illegal[95] but that a holding of per se illegality would be contrary to the Supreme Court's opinion in *Brown*.[96]

> If I understand the reasoning of the majority opinion of the Supreme Court in the Brown case, therefore, it is incumbent upon this Board in each case involving the use of temporary replacements during an otherwise legitimate lockout to: (1) Weigh carefully all of the circumstances in order to determine the extent to which the use of such replacements has a tendency to discourage union membership, and (2) balance against our conclusions in that regard the extent to which the use of such replacements was supported by a legitimate and significant business justification or, on the other hand, the extent to which antiunion animus rather than bona fide business considerations motivated the employer's decision to utilize replacements.[97]

It is not clear under this analysis if the lack of antiunion motivation becomes one of many factors to be balanced against the harm to the union activities or whether it is an alternative test. The cases subsequent to *Ottawa Silica* seem to indicate that it is one of many factors,[98] although Miller never reached a conclusion contrary to that of Kennedy and Penello who use the motivational test.[99] The key factor considered by Miller in his balancing test appears not to be motivation, but rather the existence of an extremely competitive market requiring the employer

92. 380 U.S. at 317. *See* note 20 *supra* and accompanying text.

93. Inter-Collegiate Press, Graphic Arts Div., 199 N.L.R.B. 177 (1972) (Miller concurring), *enforced*, 486 F.2d 837 (8th Cir. 1973), *cert. denied*, 416 U.S. 938 (1974).

94. *Id.* at 177-78.

95. *Id.* at 178.

96. *Id.*

97. *Id.*

98. *See, e.g.*, cases cited in notes 100-02 and accompanying text.

99. It has been suggested that the proper use of a balancing test would result in the same conclusions as are now being reached by the Board. *See, e.g.*, Shieber & Moore, *supra* note 14, at 61.

to continue production.[100] Correspondingly, if the employer is engaged in the manufacture of perishable goods,[101] or if a probable strike will eliminate a substantial portion of the company's revenue,[102] these realities will also weigh in favor of the employer.

The balancing test thus has not eased the Board's burden in proving an 8(a)(1) or (3) violation because the words "legitimate and significant business justification" in the balancing test have been interpreted in the same manner as "substantial and legitimate business justification" in the motivation test. In *Inter-Collegiate*, Miller defended his use of *Brown* in finding business justification. Though *Brown* involved an employer response to a whipsaw strike, this made no "significant difference in [his] analysis."[103]

> While it is true that, unlike Brown, Respondent was not seeking to preserve the integrity of a multiemployer bargaining unit, . . . the realistic fact is that the real meaning of preserving that integrity is the maintenance of maximum employer economic strength in dealing with a union across the bargaining table. . . . I see, therefore, no basis for deciding that the instant Employer's interest in maintaining its economic viability was any less justifiable a business consideration than the desire of Brown Food Stores to maximize its economic strength in bargaining by maintaining a solid bargaining front with other companies in its industry.[104]

This argument overlooks the fact that the desire to maximize economic strength has no correlation with an action's legality or illegality under sections 8(a)(1) and (3). If an employer fires key union employees, certainly the desire to maximize his bargaining power vis-a-vis the union does not shield his actions.[105] There appears to be another difference between a whipsaw strike and a normal bargaining situation. One might paraphrase the language in *Inland Trucking* and say that a whipsaw strike forecloses the *employer's* opportunity to earn without surrendering the corresponding opportunity of the employee.[106]

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100. *See* Sargent-Welch Scientific Co., 208 N.L.R.B. 811 (1974); Inter-Collegiate Press, Graphic Arts Div. v. NLRB, 199 N.L.R.B. 177, 179 (1972), *enforced*, 486 F.2d 837 (8th Cir. 1973), *cert. denied*, 416 U.S. 938 (1974).

101. *See* Ralston Purina Co., 204 N.L.R.B. 366 (1973).

102. *See* WGN of Colo., Inc., 199 N.L.R.B. 1053 (1972).

103. Inter-Collegiate Press, Graphic Arts Div. v. NLRB, 199 N.L.R.B. 177, 179 (1972), *enforced*, 486 F.2d 837 (8th Cir. 1973), *cert. denied*, 416 U.S. 938 (1974).

104. *Id.* However, one of the most telling arguments for the respondent in the *Brown* case was that during a whipsaw strike the employers were, in effect, "subsidizing" the strike against themselves. Brief for Respondent at 11, 380 U.S. 278 (1965).

105. 29 U.S.C. § 158(a)(3) (1974).

106. *See* text accompanying note 32 *supra*.

There has been little discussion in the lockout replacement labor cases about the effect the employer's actions have upon the union activities of the employees. Most cases concentrate on the business justification aspect of the balancing test and neglect that part of the test dealing with discouragement of union membership.[107]

VII. CONCLUSION

If the balancing test does become the accepted method for deciding cases, then the Board should deal with the following considerations.

1. The legality of the lockout should not determine the legality of temporary replacements. To say that the impact on the free exercise of employee rights is not changed when the employer adds the use of temporary replacements is to ignore both industrial reality and expressed Congressional purpose.[108] For this reason, the replacement question should be examined independently.

2. In determining the legality of temporary replacements, the Board should give substantial weight to the competitive posture of the employer only if he is one of a few union employers in a primarily non-union industry. Absent preferential union treatment, the fear of permanent loss of customers to competitors[109] would seem to be exaggerated as those competitors would be subject to the same union pressures.

3. Perhaps under certain circumstances, such as where perishable goods are involved,[110] the Board should examine how extensively temporary replacements are used. If used *only* to prevent an unusual economic loss (that is, an excessive loss that one would not ordinarily find in a collective bargaining situation) the use of temporary replacements would be easier to justify.

4. Reasonable anticipation of a strike alone should not permit the use of temporary replacements. As employees have the right to strike,[111] the economic strength of the parties involved should be examined. Here there is great potential for the employer's action to restrain employees in the exercise of this right.[112] Thus, for a small union in a highly seasonal industry, a strike during that period of time might be the only

107. *See* note 35 *supra.*

108. 29 U.S.C. § 151 (1974). *See also,* Shieber & Moore, *supra* note 14, at 26-27.

109. Sargent-Welch Scientific Co., 208 N.L.R.B. 811, 818 (1974) (administrative judge's opinion).

110. Ralston Purina Co., 204 N.L.R.B. 366 (1973).

111. 29 U.S.C. § 157 (1970).

112. *See e.g.,* Shieber & Moore, *supra* note 14, at 7-12.

bargaining weapon the union possesses. If the employer locks out prior to the busy season and hires temporary replacements, the union is left with two unpalatable alternatives. One is to remain on strike until the busy season begins and hope that the temporary replacements have not been trained to a level of full productivity, and the other is to accede to the employer's demands. The former alternative is one that few unions would gamble on, especially those representing unskilled labor. Therefore, the practical result would be stripping the union of its effectiveness, under color of law.

5. The source of the replacements is another factor which the Board should consider when weighing the impact of replacements on employee rights.[113] It has been suggested[114] that the continuation of operations with non-union unit employees might have a more serious effect on the exercise of employee rights than the use of outside replacements. This is especially true when the only thing which separates the workers is membership in the union.

6. The serious impact of having to forego income while the employer continues to make money can be considerably lessened by the availability of state unemployment compensation.[115] Similarly, the existence of a union security clause should be another factor considered to lessen the impact on employees, although it probably should not be given as much weight as it has in previous cases. Generally, the existence of a union security clause insures the continued existence of the union, but does not insure the continued effectiveness of union representation. The danger of an adverse effect on the free exercise of employee rights can still exist.

Perhaps a valid basis exists for the statement that the use of temporary replacements is no more illegally motivated than the lockout preceding the replacements. Even if the statement is true, it is irrelevant. The purpose of the Act is not punishment of culpable employers or

113. *See also* 50 TEXAS L. REV. 552, 558 (1972).

114. *See* note 65 *supra.*

115. The following states allow unemployment compensation to offensively locked out employees: Arkansas, ARK. STAT. ANN. § 81-1105(f) (1960); California, CAL. UNEMPLOYMENT INS. CODE § 1262 (West 1956); Colorado, COLO. REV. STAT. § 8-73-109(1) (1973); Connecticut, CONN. GEN. STAT. ANN. § 7508(3), *as amended* § 718(f)(b)(3), *as amended* § 31-236(3) (1972); Kentucky, KY. REV. STAT. ANN. § 341.360(1) (1972); Maryland, MD. ANN. CODE ART. 95A § 6(e) (1969); Michigan, MICH. STAT. ANN. SUPP. § 17.531(g)(I) (1974) (as interpreted); Minnesota, MINN. STAT. ANN. SUPP. § 268.09(5)(a) (1974); New Hampshire, N.H. REV. STAT. ANN. § 282: 4F(3) (1966); Ohio, OHIO REV. CODE ANN. § 4141.29(D)(1)(a) (Anderson 1973); Pennsylvania, 43 PA. STAT. ANN. § 802(d) (1964); Utah, UTAH CODE ANN. § 35-4-5(d) (1953).

unions; the Act is not a criminal statute, but rather an administrative tool.[116] As an administrative agency, the Board should be concerned more with effect than intent. It seems that the Act was designed in part to provide for the exercise of employee rights.[117] To ignore the impact that the offensive lockout coupled with temporary replacements has on these rights would be to exalt the state of the employer's mind over the state of labor-management relations.

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116. 29 U.S.C. § 153 (1970).
117. 29 U.S.C. § 157 (1970).