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Volume 34

Number 1 *The Seventh Annual Fritz B. Burns
Lecture: The War Powers Resolution and
Kosovo*

Article 7

11-1-2000

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Ellen J. Daninn & Terry H. Wagar, *Lawless Law—The Subversion of the National Labor Relations Act*, 34 Loy. L.A. L. Rev. 197 (2000).

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LAWLESS LAW? THE SUBVERSION OF THE NATIONAL LABOR RELATIONS ACT

Ellen J. Dannin & Terry H. Wagar***

I. INTRODUCTION

Why is it that since the mid-1950s United States union density has declined from about 30% to its current level of 11% to 15%?¹ We know the decline has not affected all groups. Public sector union membership has risen while unionization in the private sector has plummeted: nearly 38% of government workers were union mem-

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1. See Daniel J.B. Mitchell, *A Decade of Concession Bargaining*, in *LABOR ECONOMICS AND INDUSTRIAL RELATIONS: MARKETS AND INSTITUTIONS* 435, 440 (Clark Kerr & Paul D. Staudohar eds., 1994); Joel Cutcher-Gershenfeld et al., *How Do Labor and Management View Collective Bargaining?*, *MONTHLY LAB. REV.*, Oct. 1998, at 23, 23. Some variation occurs based on whether only private sector or public and private sector union members are included. See MICHAEL D. YATES, *WHY UNIONS MATTER* 107 (1998) (public and private sector); Richard B. Freeman & Joel Rogers, *Who Speaks for Us? Employee Representation in a Nonunion Labor Market*, in *EMPLOYEE REPRESENTATION: ALTERNATIVES AND FUTURE DIRECTIONS* 13, 13 (Bruce E. Kaufman & Morris M. Kleiner eds., 1993) (private sector); see also Gary N. Chaison & Joseph B. Rose, *The Macrodeterminants of Union Growth and Decline*, in *THE STATE OF THE UNIONS* 3, 3 (George Strauss et al. eds., 1991).

bers in 1998 compared to only 10% of private nonagricultural workers.² Furthermore, not all private sector workers have faced declines: organization in the railway and airline industries remain high.³

The thing that distinguishes these groups, and thus might account for the differences, is the law under which their respective union membership is organized. The rights of state public sector workers' to organize are covered by state law; federal public sector workers are covered by the Federal Service Labor-Management Relations Act;⁴ the Railway Labor Act covers private sector railway and airline workers;⁵ and the National Labor Relations Act (NLRA) controls collective bargaining rights for most private sector employees.⁶ Those who have attempted to find differences in the law to explain the decline in private sector union membership have limited their examination to differences in union election processes or have preferred nonlegal causes such as economics, employee choice, and employer opposition.⁷

We contend that the court-developed doctrine which allows an employer to implement its final offer upon reaching an impasse has now become a tool for lawlessness and this important explanation for the decline of union density has been unwisely ignored and overlooked.⁸ There are but a few law review articles that examine im-

2. See *Union Members: Who They Are, Where They Work, and What They Earn*, MONTHLY LAB. REV., May 1996, at 42, 42 (same figures for 1995). Public sector employers show less opposition to union organizing campaigns. See KATE BRONFENBRENNER & TOM JURAVICH, UNION TACTICS MATTER: THE IMPACT OF UNION TACTICS ON CERTIFICATION ELECTIONS, FIRST CONTRACTS AND MEMBERSHIP RATES.

3. See Charles J. Morris, *A Tale of Two Statutes: Discrimination for Union Activity Under the NLRA and RLA*, 2 EMPLOYEE RTS. & EMP. POL'Y J. 317, 320 (1998).

4. 5 U.S.C. §§ 7101-7106 (1996).

5. See 45 U.S.C. §§ 151-188 (1994). For a recent comparison of the NLRA and RLA, see Morris, *supra* note 3.

6. See 29 U.S.C. §§ 151-169 (1994).

7. See, e.g., THOMAS KOCHAN ET AL., THE TRANSFORMATION OF AMERICAN INDUSTRIAL RELATIONS 109-77 (1994); Cutcher-Gershenfeld et al., *supra* note 1, at 25-27. But see Julius G. Getman, *Explaining the Fall of the Labor Movement*, 41 ST. LOUIS U. L.J. 575 (1997) (blaming the decline in union membership on both legal and nonlegal forces).

8. Industrial relations literature generally overlooks or even fails to mention impasse and implementation. See, e.g., KOCHAN ET AL., *supra* note 7. An

plementation upon impasse.⁹ Implementation upon impasse not only allows employers to undermine the very purposes for which the NLRA was enacted, it actually creates an incentive for employers to use the law as a tool to de-unionize. An analysis of data collected from National Labor Relations Board (hereinafter "Board") decisions provides powerful support for the conclusion that employers are using this doctrine to create roadblocks to agreement and to end collective bargaining relationships. As a result, a law enacted to promote collective bargaining has, instead, become one which destroys collective bargaining.

The evidence of this is everywhere; yet somehow it remains invisible. Implementation is not an obscure or rare event. Rather, it has become common and has played a part in high-profile labor disputes that have made headlines, including disputes at Caterpillar,¹⁰ the Detroit News,¹¹ the National Football League,¹² the baseball

example of this can be found in RICHARD BLOCK ET AL., *LABOR LAW, INDUSTRIAL RELATIONS AND EMPLOYEE CHOICE: THE STATE OF THE WORKPLACE IN THE 1990S*, at 88-93 (1996). The authors recount an incident in which an employer implemented its final offer and replaced all strikers. The authors, however, failed to discuss the role the employer's power to implement its final offer played in events which weakened the union. *But see* MICHAEL YATES, *POWER ON THE JOB: THE LEGAL RIGHTS OF WORKING PEOPLE* 121-26 (1994); YATES, *supra* note 1, at 69-71; Adrienne Eaton & Jill Kriesky, *Collective Bargaining in the Paper Industry: Developments Since 1979*, in *CONTEMPORARY COLLECTIVE BARGAINING IN THE PRIVATE SECTOR* 25, 44-49 (Paula Voos ed., 1994).

9. See, e.g., Ellen J. Dannin, *Collective Bargaining, Impasse and the Implementation of Final Offers: Have We Created a Right Unaccompanied by Fulfillment*, 19 U. TOL. L. REV. 41 (1987) [hereinafter Dannin, *Collective Bargaining*] (examining the historical development of the doctrine); Ellen J. Dannin & Clive Gilson, *Getting to Impasse: Negotiations Under the National Labor Relations Act and the Employment Contracts Act*, 11 AM. U. J. INT'L L. & POL'Y 917 (1996); Ellen J. Dannin, *Legislative Intent and Impasse Resolution Under the National Labor Relations Act: Does Law Matter?*, 15 HOFSTRA LAB. & EMP. L.J. 11 (1997) [hereinafter Dannin, *Legislative Intent*]; Clive Gilson et al., *Collective Bargaining Theory and the Doctrine of Implementation of Final Offers Collide*, 48 LAB. L.J. 587 (1997); Joseph E. Kolick, Jr. & Merle M. DeLancey, Jr., *Can One Unilaterally Gain the Right to Make Unilateral Changes in Working Conditions?*, 9 LAB. LAW. 137 (1993); Terrence H. Murphy, *Impasse and the Duty to Bargain in Good Faith*, 39 U. PITT. L. REV. 1 (1977).

10. See Caterpillar, Inc., 324 N.L.R.B. 201 (1997).

11. See Detroit News, Inc., 319 N.L.R.B. 262 (1995).

12. See Nat'l Football League Mgmt. Council, 309 N.L.R.B. 78 (1992).

players' strike,¹³ and International Paper.¹⁴

Furthermore, the destructive role implementation upon impasse plays should not have gone unnoticed for lack of its importance as measured in dollars. Even in less publicized cases, its impact on employers, workers, and the government, can be sizeable. The recent Board case of *Don Lee Distributor, Inc. (Warren)*¹⁵ demonstrates its economic impact. *Don Lee Distributor* involved ten consolidated cases filed over a period of two years, beginning in 1990.¹⁶ The hearing was held in Detroit, Michigan and lasted sixty nonconsecutive days from November 16, 1992, to October 26, 1993.¹⁷ More

13. See *Silverman v. Major League Baseball Player Relations Comm., Inc.*, 67 F.3d 1054 (2d Cir. 1995).

14. See *Int'l Paper Co.*, 319 N.L.R.B. 1253 (1995); see also JULIUS GETMAN, *THE BETRAYAL OF LOCAL 14: PAPERWORKERS, POLITICS, & PERMANENT REPLACEMENTS* (1998) (recounting the story of the seventeen-month strike by Local 14 of the United Paperworkers International Union against International Paper beginning in June 1987 and ending in October 1988).

15. 322 N.L.R.B. 470 (1996), *aff'd sub nom.*, *Don Lee Distrib. Inc. (Warren) v. NLRB*, 145 F.3d 834 (6th Cir. 1998), *cert. denied*, 525 U.S. 1102 (1999). A discussion of the facts of the case can be found in Dannin, *Legislative Intent*, *supra* note 9, at 14-20.

16. See *Don Lee Distrib.*, 322 N.L.R.B. at 470.

17. See *id.* at 479 n.1. The decision of the Administrative Law Judge (ALJ) recites the many NLRB charges which were eventually consolidated for hearing and decision:

The relevant docket entries are as follows: Local 1038, International Brotherhood of Teamsters, AFL-CIO filed charges against West Coast in Case 7-CA-31302 on December 14, 1990, and a complaint issued on January 31, 1991. The Union filed charges on April 3, 1991, against Don Lee (Warren) in Case 7-CA-31719(2), against Don Lee (Dearborn) in Case 7-CA-31719(3), against Powers in Case 7-CA-31719(4), against Eastown in Case 7-CA-31719(5), against Hubert in Case 7-CA-31719(6), and against Oak in Case 7-CA-31719(7). Amended charges in Cases 7-CA-31719(2)-(7) were filed by the Union on April 26, 1991. The Union filed its charge in Case 7-CA-32164(1) against Don Lee (Dearborn) and Don Lee (Warren) on August 2, 1991. The Union filed its charge in Case 7-CA-32896 against Don Lee (Dearborn) on February 10, 1992, and amended it on February 11 and March 16. The Union filed another charge in Case 7-CA-32986 against Don Lee (Dearborn) on March 2, and amended it on March 16 and 19. The charge in Case 7-CA-33649 against Powers was filed by the Union on August 26, 1992, and the charge in Case 7-CA-33707 against Don Lee (Warren) and Don Lee (Dearborn) was

than 1000 pages of briefs were filed.¹⁸ Based on this record, the Board found the employers had violated the law and ordered them to rescind changes they had made in working conditions and to make employees whole for lost wages.¹⁹

Back pay began accumulating in 1991 and, with accumulated interest over the time the case was pending, the total became an enormous sum.²⁰ Approximately 450 employees, some of whom lost \$17,000 a year, were entitled to back pay.²¹ There were additional losses from cutbacks in pensions, vacations, holidays, and other sorts of employee compensation.²² In 1994, after the ALJ issued his decision, Tinamarie Pappas, one of the Board attorneys who tried the case, estimated the back pay liability for driver-salesmen's lost commissions alone at \$20 million.²³ By June 1998, when the Court of Appeals for the Sixth Circuit issued its decision affirming the violation, the union attorney estimated back pay to be at least \$40 million.²⁴

These employer losses were not the only financial costs. Although it did not suffer personally, trying and deciding a case lasting sixty days was enormously expensive for the government. The back pay was so great the employers risked being put out of business. The workers lost homes, had marriages broken, and suffered mental distress as a result of the employers' use of implementation upon impasse.²⁵ All these losses were suffered despite the fact that the employers' purpose was not to gain important business ends: they wrecked lives and risked their own businesses to destroy workplace codetermination and worker participation in the decisions that affect

filed on September 10, 1992. The first complaint issued on July 29, 1991, and subsequent complaints issued on September 30, April 28, August 28, and October 30, 1992.

Id.

18. See *Don Lee Distrib., Inc.* (Warren), No. 7-CA-31719(2)-(7), 1994 NLRB LEXIS 971, at *105 n.20 (Dec. 1, 1994).

19. See *Don Lee Distrib.*, 322 N.L.R.B. at 472-79.

20. See *Beer Distributors Found to Bargain in Bad Faith With Detroit IBT Local*, 241 Daily Lab. Rep. (BNA) D-13 (Dec. 19, 1994).

21. See *id.*

22. See *id.*

23. See *id.*

24. See Terry Kosdrosky, *Beer Distributors Lose Back-pay Ruling Appeal*, CRAIN'S DETROIT BUS., June 8, 1998, at 22, available at 1998 WL 8236116.

25. See Dannin, *Legislative Intent*, *supra* note 9, at 20.

workers' lives—rights guaranteed in the NLRA—just so the employers could have unilateral control of their businesses.²⁶ As bad as all this is, the worst that could have happened from the union and workers' point of view did not occur—the workers did not strike and were not permanently replaced. The union was also able to hang on as the workers' representative and fight to regain what was taken from them.²⁷ Other workers have not been as lucky.

During the last two decades the doctrine of implementation upon impasse has come to play a pernicious role: destroying collective bargaining, encouraging employers to de-unionize, discouraging unorganized workers from attempting to better their lot through collective bargaining, and ultimately driving down all workers' conditions of employment.²⁸ To understand how this can occur, it is necessary to understand how implementation upon impasse works in practice.

Suppose you are a private sector employer and that your employees are represented by a union. The labor laws under which you bargain state that when the parties get to an impasse, you, the employer, get to impose your final offer. What would you do if this was, and it is, the law?²⁹ Would you bargain with your employees' collective bargaining representative with the goal of codetermining the workplace? Possibly. Or would you offer the very terms you would most like to have, were there no union, and which are also likely to be terms the union and employees will find objectionable?

Indeed, the doctrine of implementation upon impasse offers almost no downside for the employer. Demanding deep concessions and demanding unilateral control over working conditions not only get you to an impasse, but once there, the employer is in a position to impose the very terms it wants. If the union strikes, the employer may permanently replace the strikers, and eventually the replacements will vote the union out, or the union will walk away. All

26. *See id.*

27. Telephone Interviews with Samuel C. McKnight, Attorney (Dec. 1996-Jan. 1997).

28. The doctrine that allows an employer to implement its final offer upon reaching a bargaining impasse began to develop early in the history of the NLRA; however, changes in the mid-1980s have fundamentally altered the doctrine. For a history of these developments, see Dannin, *Collective Bargaining*, *supra* note 9, at 41.

29. *See id.*

through bargaining, an employer can use the threat of replacement to force the union to agree to its terms, because the union does not dare strike. The employer can threaten this or remind the union of the law, but it does not even need to mention it; the union will know it is in a very weak position.³⁰

It does not even matter if the workers strike or not; if they stay on the job, the employer can implement its final offer and enter an uneasy situation with increasing employee dissatisfaction with the union because it cannot improve their working conditions. In the end, this may lead to de-unionization.

A recent study found that actual implementation occurred in 23% of negotiations.³¹ Kate Bronfenbrenner found that implementation occurred in 7% of negotiations, with unions striking as a result of "blatantly unacceptable demands" in another 7%.³² She also found that when an employer declares an impasse and implements its final offer, unions won first contracts in only four of seven units.³³

Such a doctrine does nothing to promote collective bargaining, an express purpose of the NLRA.³⁴ Indeed, almost nothing could be better designed to undermine authentic negotiating. Yet, we contend, this is the way the NLRA works and has been working, particularly since the mid-1980s when the Board increasingly allowed employers to come to the table with proposals that were predictably unacceptable to unions and workers and, once there, make no movement.³⁵ Since the mid-1980s, Board cases have forbidden the decision-maker

30. In a prior study of impasse and implementation, we found that the doctrine was involved in over half of all negotiations and had a pernicious influence on how bargaining takes place. See Ellen Dannin et al., *Bargaining Impasses: Global Reflections* (Jan. 5, 1997) (paper presented at the Industrial Relations Research Association Meeting, New Orleans).

31. See Joel Cutcher-Gershenfeld et al., *Collective Bargaining in Small Firms: Preliminary Evidence of Fundamental Change*, 49 INDUS. & LAB. REL. REV. 195, 204 (1996).

32. See Kate Bronfenbrenner, *Employer Behavior in Certification Elections and First-Contract Campaigns*, in RESTORING THE PROMISE OF AMERICAN LABOR LAW 75, 86 (Sheldon Friedman et al. eds., 1994).

33. See *id.* at 84, 86.

34. See 29 U.S.C. § 151 (1998).

35. See Dannin, *Legislative Intent*, *supra* note 9, at 33; Dannin, *Collective Bargaining*, *supra* note 9, at 41 (examining the historical development of the doctrine).

from examining the content of employer proposals to determine whether the employer is advancing them in good faith, rather than as a ploy to create an impasse.³⁶ In addition, the NLRA does not require employers to make any concessions or take any steps to reach agreement.³⁷

Indeed, during the mid-1980s the Board issued a number of decisions which made it easier to reach a bona fide impasse and thus for employers to implement their final offers. None of these decisions has been overruled by the Board, so they continue to affect future decisions as to whether a bona fide impasse exists and whether implementation is legal. Through these decisions, the Board has given employers freer rein to seek concessions without justifying the need for them;³⁸ to seek total discretion in setting wages;³⁹ and to have less obligation to provide information to the union upon the employer's making a plea of poverty.⁴⁰ The Board also became more lenient in allowing an employer to re-implement an offer which had been implemented prior to reaching impasse rather than having to restore the status quo ante⁴¹ and lowering the number of bargaining sessions necessary to find an impasse existed.⁴² Employers were even allowed to "schedule" impasse rather than having to reach a

36. See Dannin, *Legislative Intent*, *supra* note 9, at 38.

37. See *id.* at 11; Dannin, *Collective Bargaining*, *supra* note 9, at 41 (examining the historical development of the doctrine). The 1980s were also a time that saw a break with prior understandings and practices as to collective bargaining. See Mitchell, *supra* note 1.

38. See *Allbritton Communications, Inc.*, 271 N.L.R.B. 201, 206 (1984), *enforced*, 766 F.2d 812 (3d Cir. 1985).

39. See *Walter A. Zlogar, Inc.*, 278 N.L.R.B. 1089, 1094 (1986); *cf.* *Bozuto's, Inc.*, 277 N.L.R.B. 977, 977 n.5 (1985); *Taft Broad. Co.*, 274 N.L.R.B. 260, 268 (1985).

40. See *E.I. duPont de Nemours & Co.*, 268 N.L.R.B. 1075, 1087 (1984) (displaying that take-it-or-leave-it attitude not indicative of bad faith bargaining).

41. See *Dependable Bldg. Maint. Co.*, 276 N.L.R.B. 27, 30 (1985); *Fred E. Fugazzi, Jr.*, 273 N.L.R.B. 501, 507 (1984).

42. See *Walter A. Zlogar*, 278 N.L.R.B. at 1090-91 (five sessions during which the employer sought to cut wages by two-thirds, with discretion vested in the employer to set wages); *Hamady Bros. Food Mkts.*, 275 N.L.R.B. 1335, 1335 (1985) (five sessions); *Lou Stecher's Super Mkts.*, 275 N.L.R.B. 475, 477 (1985) (three meetings of relatively brief duration in one week); *Thomas Sheet Metal Co., Inc.*, 268 N.L.R.B. 1189, 1190 (1984) (no meetings and no negotiations prior to finding impasse).

real deadlock, a point at which, despite the parties' best efforts, movement is not possible.⁴³ Finally, the Board reclassified subjects as mandatory or permissive in a way that made impasse easier.⁴⁴ Indeed, the Board's view during this period was summed up by its statement in *E.I. duPont de Nemours & Co.* that the Board should have "no undue reluctance to find that an impasse existed."⁴⁵

As a result, an employer today can do no real bargaining and still not violate the law by bargaining in bad faith. The best unions can do is make successive concessions in an effort to show that the parties are not yet at impasse. They know that if the workers strike, the employer cannot fire them but can permanently replace them. As labor law professors are fond of asking rhetorically: "Query. Would you rather be fired or permanently replaced?"⁴⁶

It is our contention that allowing employers to implement their final offers makes a tremendous difference in how U.S. collective bargaining works and also limits how effective U.S. unions can be. It does this in many ways, including offering a legal tool to de-unionize, rewarding employers who do not engage in real bargaining, and ensuring that unions have less to offer workers and are thus less attractive to workers.

II. THE STUDY

A. Methodology

All cases selected were decided by the Board in the period 1980 through 1994 which raised the issue of implementation upon impasse in the context of negotiations for a complete collective bargaining

43. See *H&H Pretzel Co.*, 277 N.L.R.B. 1327, 1334 (1985).

44. See *Reichhold Chems., Inc.*, 277 N.L.R.B. 639, 640 (1985).

45. *E.I. duPont*, 268 N.L.R.B. at 1076.

46. The difference is that strikers who have been permanently replaced retain limited rights as employees. Strikers are included in the definition of employee. See 29 U.S.C. § 152(3) (1994). The right to strike cannot be infringed upon. See *id.* § 163. Strikers have recall rights, see *Laidlaw Corp.*, 171 N.L.R.B. 1366, 1367 (1968), *enforced*, 414 F.2d 99 (7th Cir. 1969), *cert. denied*, 397 U.S. 920 (1970), and can participate in Board elections for twelve months after the strike commences. See 29 U.S.C. § 159(c)(3). But for the most part, and especially after that time, this seems to be a difference without any real distinction.

agreement and all cases involving permanent replacement of strikers.⁴⁷ Impasse and implementation cases were excluded in situations other than negotiations for a complete contract such as partial reopeners, mid-term bargaining, or mid-term unilateral modifications of contract terms. Excluding these situations provided a set of cases focused more directly on implementation upon impasse unclouded by other applicable doctrines.⁴⁸ Only about 2% of charges filed, or roughly 500 cases, each year go through to Board decision.⁴⁹ The study found 228 cases that fit the requisite parameters. Even though these cases are a small subset of all implementation upon impasse cases decided by the Board and of all bargaining affected by this

47. To do this, we used the Bureau of National Affairs' (BNA) *Labor Relations Reporting Manual* Classification Index to locate all cases which were classified as involving the issues of employer unilateral implementation of changed terms and of permanent replacement of strikers.

48. We are conscious that there are special problems that apply to a study based on NLRB decisions, and these affect both gathering and interpreting data. Board decisions are not written for the needs of researchers and do not include all the data we were looking for that would allow us to present it in a uniform way. More important, cases that reach the Board are a select group that may not fully represent the overall state of negotiations. Before a case reaches the Board, a charge must first be filed with one of the Board's regional offices. Unions facing bad faith bargaining—potential violations of § 8(a)(5)—must decide whether to file a charge. Those decisions reflect accurate or inaccurate readings of the law, political decisions by the local or international, and a weighing of the practical impact of winning or losing the case.

One of the authors was a field attorney in a Board region during much of the period under study and has first-hand experience with regional Board practices. If a charge is filed, the NLRB region decides whether to issue a complaint after an investigation lasting about thirty days. Complaints are issued in about thirty to forty percent of charges filed. Many cases settle at this point, as well as just before the hearing before an ALJ and just after the ALJ decision is issued. Impasse cases which settle are likely to involve clear violations. This means that cases decided by the Board on appeal from the ALJ decision will include more controverted disputes than those which are resolved at earlier stages. It is also far more likely that appeals will be filed by employers who have lost before the ALJ. This is the result of Board policy not to appeal ALJ decisions, particularly those based on credibility findings, because it is difficult to get them reversed. An employer who loses, on the other hand, may see it as beneficial to delay the ultimate decision and may, therefore, appeal a loss based on credibility findings. Thus, cases decided by the Board will be a small and skewed set of the charges filed.

49. See NAT'L LABOR RELATIONS BD., FORTY-EIGHTH ANNUAL REPORT OF THE NATIONAL LABOR RELATIONS BOARD 6 (1985).

doctrine, it seems likely that many of the issues examined in this study will also apply to that larger set of cases. The cases in this study comprise about 22% of the Board cases dealing with the issue of implementation upon impasse. It is important, then, to bear in mind that implementation occurs in many other contexts and has a far wider impact than is captured in this study.

B. The Results

1. The Board decisions

A major factor potentially affecting outcomes before the Board is the make-up of the five-member Board itself. During the period studied, there were twenty-one Board members, of whom twelve were Republicans, eight Democrats, and one Independent. Table 1 shows each member's voting record on implementation. If a member sat on a case which found implementation to be illegal, but that member dissented, the vote was counted as upholding implementation. Table 1 demonstrates a loose link between party affiliation and votes on implementation. Seven Democrats and four Republicans found more cases to involve an illegal implementation than the mean indicates. By contrast, those more likely to find implementation legal included one Democrat, seven Republicans, and one Independent.

Republicans were also far more likely to dissent. Of the twelve dissenters, eight were Republicans, three Democrats, and one Independent. Of the nine members who never dissented, there were four Republicans and five Democrats. Chairman Donald Dotson (1983-1987) dissented most often—of the twenty-nine dissenting opinions, six (24%) were by Dotson.

The data demonstrate that not all Republicans are the same and that not all Democrats are the same. Even more important than party affiliation appears to be the era during which a member served. Thus, in the earliest and latest years in the study, all members were less likely to uphold implementation; whereas, in the middle years—the Van de Water-Dotson years—the Board was more likely to uphold implementation.

The Dotson years were particularly notable for the high degree of discord within the Board as characterized by the number of dis-

sents. Both before and after, dissents were relatively rare. Thus, it is fair to say that by the middle years of this period, the Board had become highly politicized, less collegial, and less able to reach consensus than in earlier years.⁵⁰

TABLE 1: CASES DECIDED BY BOARD MEMBERS⁵¹

Name * = Chair	Party	Term	Months in Period	Number of Cases	Implemen- tation Legal ⁵²	Dissents
Mean					25.4%	
Jenkins	R	8/28/63 - 8/27/83	44	29	24.1%	2
Fanning*	D	12/20/57 -12/16/82	24	28	25%	
Penello	D	2/22/72 - 1/14/81	13	13	7.7%	
Truesdale	D	10/25/77 - 8/27/80 10/23/80 - 1/26/81 1/24/94 - 3/3/94	13	8	0%	
Zimmerman	I	9/17/80 - 12/16/84	51	29	37.9%	1
Hunter	R	8/14/81 - 8/27/85	48	29	55.2%	1
Van de Water*	R	8/18/81 - 12/16/82	16	4	50%	1

50. See Jules Bernstein & Laurance E. Gold, *Mid-life Crisis: The N.L.R.B. at Fifty*, 106 Daily Lab. Rep. (BNA) E-1 (June 3, 1985).

51. Information derived from National Labor Relations Board Members, available at <http://www.nlr.gov/members.html> (last visited Sept. 18, 2000), and our data.

52. Boldface indicates more likely than the mean to find the implementation illegal.

Name * = Chair	Party	Term	Months in Period	Number of Cases	Implemen- tation Legal	Dissents
Miller*	R	12/23/82 - 3/7/83	3	0	---	
Dotson*	R	3/7/83 - 12/16/87	58	53	45.3%	6
Dennis	D	5/5/83 - 6/24/86	37	29	34.5%	5
Johansen	R	5/28/85 - 6/15/89	48	57	17.5%	2
Babson	D	7/1/85 - 7/31/88	36	55	7.3%	
Stephens	R	10/16/85 - 8/27/95	118	122	25.4%	2
Cracraft	D	11/7/86 - 8/27/91	57	61	23.0%	4
Devaney	D	11/22/88 - 12/16/94	60	60	21.7%	3
Higgins	R	8/29/88 - 11/22/89	15	11	45.5%	
Oviatt	R	12/14/89 - 5/28/93	41	39	28.2%	1
Raudabaugh	R	8/27/90 - 11/26/93	39	33	33.3%	1
Gould*	D	3/7/94 - 8/27/98	10	6	0%	
Browning	D	3/9/94 - 2/28/97	10	6	0%	
Cohen	R	3/18/94 - 8/27/96	9	3	0%	

In short, these figures demonstrate not only a great deal of dissension in the Dotson years with an eventual return to a more collegial atmosphere by the early 1990s, but also a greater likelihood that the NLRB would find an implementation to be legal during that same period than either before or after.

2. Effect of implementation upon impasse on negotiations

The biggest surprise in the data was the extent of implementation upon impasse in mature bargaining relationships. Cases in the study varied from relationships of under one year to over seventy-five years. *See Figure 1*. The figures greatly understate the extent to which this is the case because 23% of cases did not specify the length of the bargaining relationship. Ten percent of the cases stated they involved long-term collective bargaining relationships. It also seems likely that the data account for all cases which involve first contracts or very young bargaining relationships, because these facts would likely be relevant to the discussion of bargaining. In older cases, events connected with the formation of the relationship are less relevant to bargaining and, in very long relationships, may even have been forgotten. In any case, even excluding cases for which there are no exact figures, it is clear that a very large number involve long-established relationships: over 23% of cases had relationships of over twenty-five years, 6% of which were older than forty years.

Implementation upon impasse certainly also occurs within long-established collective bargaining relationships in the real world and that this is not solely an artifact of our sample. Many previously unionized firms were in the process of de-unionizing in this period, including by opening new nonunion plants to replace older plants or by de facto conversions to nonunion status through replacement of union workers during labor disputes.⁵³ Both processes could involve bargaining to impasse, implementation of a final offer, a strike, or lockout and replacement of the workers.

To the extent that implementation upon impasse is used as a tool to de-unionize, the presence of so many troubled long-term relationships should be of deep concern to unions. Union membership can

53. *See Mitchell, supra* note 1, at 441.

decline as a result of de-unionization just as much as from failing to organize new members. Even worse, implementation upon impasse and de-unionization may actually make organizing new members more difficult. Each time a union loses a site, it could be used to demonstrate the ineffectiveness of unions and the futility of collective bargaining.

FIGURE 1: LENGTH OF THE COLLECTIVE BARGAINING RELATIONSHIP

Indeed, the problem of impasse for longer-term relationships is even more serious than the fact that many very mature relationships are included in the data. Unions with long-term relationships fared less well when employers declared impasse and implemented their final offers than those in first contract cases. The Board found implementation legal in 21.4% of first-contract cases versus 26.3% for all other contracts. Furthermore, the longer the relationship, the less likely the Board was to find implementation to be illegal. The success rate declines from 21% for first contracts to 30% for bargaining

relationships over thirty years. This is summarized in Table 2.

TABLE 2: IMPLEMENTATION FOUND PROPER BY LENGTH OF
BARGAINING RELATIONSHIP

	Number of Cases	Implementation Legal
First Contract	42	21.43%
1-10 years	46	23.91%
11-20 years	26	23.08%
21-30 years	41	24.39%
+30 years	43	30.23%
Total	198	

Many factors might explain this trend. In first contract cases, the record often included evidence of a hard-fought anti-union campaign complete with many anti-union statements and § 8(a)(1)⁵⁴ and (3) violations.⁵⁵ Such a record would more easily permit the decision-maker to infer that anti-union motives existed and, thus, that the bargaining was not taking place in good faith where evidence was otherwise ambiguous.

The passage of many years alters this picture drastically. Not only would evidence of the organizing campaign be irrelevant, but the campaign might have taken place so long ago that no one recalls it. Compared with an organizing campaign, bargaining does not necessarily lend itself to opportunities to make the sort of statements that would reveal an anti-union motive. Indeed, it would be reasonable to assume that parties to a long-term relationship have worked out an amicable way of dealing with one another. In addition, particularly through the 1980s, the record often included evidence of declining industries suffering severe financial distress. All this would make it easier to conclude whether an employer's demands, even for deep

54. See 29 U.S.C. § 158(a)(1) (1994).

55. See *id.* § 158(a)(3).

concessions, were legitimate, that impasse was bona fide, and that implementation was legal.

These assumptions, reasonable as they may appear, may nevertheless be inaccurate. An employer with a long-term relationship could have had long harbored anti-union motives but felt it was unable to extricate itself from its bargaining obligation. Alternatively, an employer could have changed its attitude toward union representation as a result of economic need, management consultants' advising it of the benefits of de-unionizing, or an anti-union climate. It may be that, although the corporate employer remains the same, in reality, it had changed ownership—which was common throughout this period—and the new owners had different attitudes and policies towards unionization. This sort of evidence was included in a few cases but may have existed in others where it was not presented. If so, it would be wrong to assume that a long-term relationship negates the possibility of anti-union motives for reaching an impasse.

Knowing that implementation upon impasse is more likely to be found legal in longer-term relationships, in and of itself, is of no clear significance. On the one hand, disagreements occur during all phases of human relationships. Thus, the problems that led to filing a charge and eventually a Board decision may be temporary and, once the parties have sorted things out, may have little long-term import. However, if implementation upon impasse is being used as a tool to de-unionize, there should be real concern on many levels. For unions, it means that bargaining is not a process of negotiating the reordering of the relationship to meet new needs. Rather, it is entering a treacherous minefield from which they may not return alive. For those who believe in the rule of law, it would mean that the vision set out in the NLRA—to promote collective bargaining as a means of promoting democratic values and defusing conflict—is being subverted by the very process that is supposed to strengthen collective bargaining.⁵⁶ It is almost as if the law had become a victim of demonic possession, wreaking havoc amongst its loved ones.

What we have found—and the data supporting this are discussed below—demonstrates that, in many cases, implementation upon impasse is indeed being used by employers who do not want to bargain

56. See Dannin, *Collective Bargaining*, *supra* note 9, at 41.

but, rather, want to rid themselves of unions including shedding very long-term collective bargaining relationships. This was not always the case. It was only made possible by changes that took place in the interpretation of the doctrine of implementation upon impasse in the mid-1980s. Each of these changes resulted in making it easier to reach a bona fide impasse and to implement a final offer.

One key change involved how much time, if any, the Board would require the parties to spend bargaining as evidence that a good faith effort had been made to resolve the parties' differences. If there is no such requirement, in the most extreme case, an employer could, at the first session, say it was firm in its views and would not be swayed, so the parties were at an impasse. Before the mid-1980s, the Board required the parties to meet and negotiate for sufficient time, defined by the number of sessions, before it would find an impasse.⁵⁷ During the 1980s it would find a bona fide impasse even though the parties had engaged in minimal bargaining.⁵⁸

We found a mixed pattern, as we would expect if some employers were engaging in actual bargaining and some were trying to get to impasse as quickly as possible. In a large number of cases, the total number of bargaining sessions could not be determined, so it is useful to consider the data both including and excluding the missing cases. Thirty percent of the overall cases involved more than ten negotiating sessions, but 21% involved five or fewer. Most striking, 4% involved no sessions at all. *See Table 3.* The comparable figures when the missing cases are excluded show impasse declared in 39% of cases with more than ten sessions, 25% with five or fewer, and 5% with no meetings. These figures alone are not sufficient to conclude that employers were seeking to achieve impasse. Clearly, many—though not a majority—met enough times that even if they wanted to reach impasse they were not trying to reach it as quickly as possible. However, roughly a quarter involve so few sessions they at least do not dispel the possibility that impasse was a goal. Certainly the fewer sessions, and especially those cases in which no bargaining

57. *See id.* at 55-56.

58. *See id.*; cf. Matthew M. Bodah & Joel Cutcher-Gershenfeld, *Employer Escape from Collective Bargaining: A Longitudinal Analysis* 5-6 (Nov. 12, 1996) (Industrial Relations Research Association Contributed Papers in *Collective Bargaining*).

took place, suggest that reaching impasse and thus being able to de-unionize was a goal. In sum, the number of bargaining sessions does not rule out that reaching impasse and, ultimately, de-unionizing was the goal.

TABLE 3: NUMBER OF BARGAINING SESSIONS BEFORE IMPASSE WAS DECLARED

NUMBER OF SESSIONS	TOTAL
None	9
1-5	38
6-10	69
11-15	36
16-20	13
21-30	13
>30	11
Unknown	39

In addition to the number of meetings, the time within which these occurred is useful in assessing efforts to bargain in good faith. Figure 2 shows the length of bargaining in terms of months at the time the charge was filed.

FIGURE 2: LENGTH OF BARGAINING

Forty percent of cases involved bargaining extending less than six months, 36% involved bargaining of under three months, and 14% involved bargaining of less than one month. On the other end, 17% of cases involved bargaining of one year or longer. Thus, there is no strong pattern overall. Putting together the number of times parties met and the length of time during which many negotiations took place, it is fair to say that somewhat less than half of employers made serious efforts to meet. However, a slight majority of negotiations show employers claimed impasse had been reached relatively soon after the start of bargaining. The earlier an employer claims impasse has been reached, the more this suggests a strategy of union avoidance rather than a bona fide breakdown in negotiations.⁵⁹ However, without more, no real conclusions can be reached.

Our data should naturally show a connection between impasse and permanent replacement of strikers. Strikes generally occur in response to a bargaining impasse, and once a strike occurs, strikers may be replaced. Permanently replacing economic strikers⁶⁰ is one effective way to de-unionize.⁶¹ Once strikers are replaced, either the union and workers will be so dispirited that they give up or find other jobs and drift away, or a decertification vote can be held in which the replacements are likely to be the majority of voters. Furthermore,

59. A recent survey found that most settlements were reached within one month of the contract expiration date but did not break down total length of negotiations. See Cutcher-Gershenfeld et al., *supra* note 1, at 27.

60. Employers may permanently replace economic strikers. See I THE DEVELOPING LABOR LAW 237-45 (Patrick Hardin et al. eds., 3d ed. 1992) [hereinafter I THE DEVELOPING LABOR LAW]. They may hire only temporary replacements for unfair labor practice strikers. See II THE DEVELOPING LABOR LAW 1100-02 (Patrick Hardin et al. eds., 3d ed. 1992) [hereinafter II THE DEVELOPING LABOR LAW].

61. The industrial relations community has expressed strong concern over employers' ability to replace strikers. See Cynthia L. Gramm, *Empirical Evidence on Political Arguments Relating to Replacement Worker Legislation*, 42 LAB. L.J. 491, 492-93 (1991); Michael H. LeRoy, *The McKay Radio Doctrine of Permanent Striker Replacements and the Minnesota Picket Line Peace Act: Questions of Preemption*, 77 MINN. L. REV. 843 (1993); John F. Schnell & Cynthia L. Gramm, *The Empirical Relations Between Employers' Strike Replacement Strategies and Strike Duration*, 47 INDUS. & LAB. REL. REV. 189 (1994). This concern has been taken sufficiently seriously as to have generated proposals for federal legislation regulating employers' ability to replace strikers. See Cesar Chavez Workplace Fairness Act, H.R. 5, 103d Cong. (1993).

the threat of permanent replacement should make unions less effective in bargaining. All parties realize that striking workers can be replaced. If everyone knows the union cannot afford to strike, the union has lost a significant resource to pressure the employer to settle and certainly to reach a good settlement. As a result, the union will likely have dissatisfied members. Unions became acutely aware of the problems of using a strike within the period of this study and thus moved to using alternate pressure strategies, such as "the inside game."⁶²

Given all this, one would expect to find relatively few strikes; however, strikes occurred in 144 of 228 cases, or in 63.6% of cases. It is impossible to know whether this percentage would have been higher in the absence of union concerns about striker replacement and the consequently lower value of the strike as an economic weapon. In any case, unions were either unaware of the consequences of striking or found themselves unable to conceive of any other strategy once they reached impasse. Permanent replacements were hired in sixty-seven cases, or in 46.5% of the strikes.⁶³

Joel Cutcher-Gershenfeld found that unions perceived a threat to use replacements in about 15% of negotiations and that replacements were actually used in 28.6% of first contract negotiations and 4.2% of renewal contracts.⁶⁴ It is impossible to say why employers did not hire replacements in more cases. It may be that they could not find replacements with appropriate skills, or other factors may have prevented them. Unions might have failed to file charges in every case

62. Cf. YATES, *supra* note 1, at 57-71; see also Mitchell, *supra* note 1, at 441-46 (noting the rise of concession bargaining); Cutcher-Gershenfeld et al., *supra* note 1, at 27 (noting that strike threat has diminished); Craig Becker, "Better Than a Strike": Protecting New Forms of Collective Work Stoppages Under the National Labor Relations Act, 61 U. CHI. L. REV. 351 (1994) (promoting an alternative form of collective work stoppage called repeated grievance strike); Stewart J. Schwab & Randall S. Thomas, *Realigning Corporate Governance: Shareholder Activism by Labor Unions*, 96 MICH. L. REV. 1018 (1998) (describing various tactics and goals of shareholder activism).

63. This figure may understate the existence of permanent replacement. The union might not have alleged this as a violation in an impasse case charge even though it might have occurred, and if it was not alleged as a violation it might well not have been litigated and certainly the decision would then be unlikely to discuss it.

64. See Cutcher-Gershenfeld et al., *supra* note 1, at 28.

involving permanent replacements, meaning the figures would understate the actual incidence. This, however, seems unlikely. Replacement is such a dire event for a union that even if the union felt its chances of prevailing on the charge were low it would nonetheless try.

Given the nature of the law, a key union strategy to preserve the right to strike must be to prevent permanent replacement of strikers. It is possible to do this depending on how a strike is characterized. Strikes are classified based on whether they are motivated by employer unfair labor practices or by economic issues.⁶⁵ This classification has enormous implications. Employers may hire temporary replacements for either economic or unfair labor practice strikers but may not permanently replace unfair labor practice strikers.⁶⁶ Unions thus have an incentive to position themselves so a strike will be classified as an unfair labor practice strike. The determination as to how a strike is classified is highly fact sensitive and depends on evidence which demonstrates why the workers struck. This evidence can be found in the subjects discussed during the meeting at which a strike vote was taken, the wording of a strike resolution, and the language on picket signs. However, unless the employer is found to have committed unfair labor practices and unless those unfair labor practices are found to have actually motivated the strike, the strike will ultimately be found to be an economic strike.⁶⁷ This means that unions have an incentive to file bad faith bargaining charges when a strike has occurred or is about to occur.

A strike's initial classification can change. Thus, a strike initially classified as economic, and which leaves workers vulnerable to replacement, can convert to an unfair labor practice strike if the employer's unfair labor practices prolong it.⁶⁸ This new status will then affect whether strikers may be permanently replaced from that point on.⁶⁹ Given union incentives to ensure that a strike be classified as an unfair labor practice strike, it is worth noting that most strikes in

65. See II THE DEVELOPING LABOR LAW, *supra* note 60, at 1099-110.

66. See *id.* at 1100-10; I THE DEVELOPING LABOR LAW, *supra* note 60, at 237-45.

67. See II THE DEVELOPING LABOR LAW, *supra* note 60, at 1100.

68. See *id.* at 1102-03.

69. See *id.*

the study were economic—both initially and at their end. Nearly two-thirds of strikes were initially economic strikes. As shown in Table 4, only about 10% converted from economic to unfair labor practice strikes. This means that most employers faced with strikes had the power to permanently replace the strikers, a step that can easily lead to de-unionization.

TABLE 4: NUMBER OF ECONOMIC V. UNFAIR LABOR PRACTICE STRIKES

	INITIAL PURPOSE	FINAL PURPOSE
Economic	63.6%	52.7%
ULP	36.4%	47.2%

In summing up the data so far, many of the preconditions for de-unionization actually existed. Many employers were claiming to reach impasse after relatively few bargaining sessions; many negotiations resulted in strikes; and most strikes were found to be economic strikes. Although impasse can lead to permanent replacement of strikers, and through it to de-unionization, it remains to be proven that these outcomes were actually desired by employers and that they took steps designed to reach these outcomes. The data discussed in the next section provide support that this is precisely what was taking place in many of these negotiations.

3. Are employers using implementation upon impasse to de-unionize?

The mere fact that an impasse occurs in bargaining is not itself a cause for concern. Human beings often disagree, particularly when their interests clash, and employers and unions often have adverse interests. The concern is that impasse has become not so much a description of a normal stage in negotiations as a goal employers desire to reach—and one that the law assists employers in reaching. It has become a desirable goal because it triggers an employer's right to take unilateral control of a workplace whether or not it also leads to de-unionization.

Determining whether employers were—and are—using implementation upon impasse as a tool to de-unionize is not easy. If an employer admitted doing such a thing, it would be confessing to violating the law. Thus, employers, especially those with attorneys and those facing Board charges, are unlikely to admit they tried to cause an impasse because they wanted to get rid of a union. Nonetheless, an employer who uses bargaining to de-unionize should behave differently than one who wants to reach an agreement, and those differences should give us insights into the scope of the problem.⁷⁰

In this sample, all cases (except the few selected only because they involved permanent replacement of strikers) should be ones in which the employer declared that an impasse was reached. It seems significant then that the Board did not agree with this conclusion in the majority of cases. Instead, the Board found that a state of impasse was reached in only 39.92% of our cases. Reaching impasse should mean that the parties are deadlocked and can make no further movement. In other words, the Board found that 60% of the employers had declared an impasse when there was not, in fact, a true deadlock or impasse.

Even if an impasse is reached, it may not be a legal impasse. An employer can only implement its final offer if a legal or bona fide impasse is reached. When an impasse is bona fide and thus legal, it has occurred despite the parties' good faith efforts to reach an agreement. An impasse can be held to be illegal or not bona fide for a variety of reasons including an employer's insistence to impasse on a nonmandatory subject⁷¹ or its commission of other unfair labor

70. Our data suggests that at least some employers are motivated by anti-union sentiment in reaching impasse. Given the nature of our sample, it is unclear to what extent this conclusion may apply to bargaining generally. We recognize that not all instances in which impasses occur, even those which may potentially present violations, will result in the filing of a charge. The overwhelming majority of cases settle or are dismissed after charges are filed. Cases in which outcomes are fairly predictable are most likely to settle early. Thus, cases decided by the Board should represent the most protracted degree of conflict. On the other hand, to say that they are not fully representative does not mean that they tell us nothing about negotiations.

71. See I THE DEVELOPING LABOR LAW, *supra* note 60, at 604-07.

practices.⁷² The Board found that 69.9% of impasses were not legal. Unfortunately, Board and ALJ decisions often are not as clear as they could be as to whether they have found that no impasse occurred or that an impasse occurred that was the result of bad faith bargaining and thus not a bona fide impasse. Given the vagueness of many decisions on this point, it is more meaningful to note that in 74% of cases in the study, the Board found that no impasse or bona fide impasse had been reached. This means that any implementation would therefore be illegal.

In other words, the overwhelming majority of cases in which employers were claiming to be at impasse were found by the Board either (1) not to be true impasses or (2) not to be legal impasses. This finding in and of itself calls into question the role implementation upon impasse plays. If these findings are eventually supported by other studies, then employers are wrong three-fourths of the time when they declare impasses. Given the serious consequences which can flow from the declaration of an impasse and the length of time it can take to reach a decision—a decision which in most cases will find that no legal impasse was reached—something very wrong is happening here. Either employers are very confused as to the law and its application to collective bargaining, or they are purposely acting in ways the law defines as violations of good faith collective bargaining. It should not be the case that such a large percentage of employers—most of whom are guided by legal counsel or management consultants—is getting the law wrong so often. If they are, whatever the cause, this, in and of itself, suggests that the doctrine of implementation upon impasse should be rethought.

Unfortunately, merely being wrong on the law is not the most serious problem. More troubling is evidence that these wrong calls are part of a strategy to subvert the collective bargaining rights of millions of workers. Finding that most of these cases did not involve legal or bona fide impasses does not necessarily mean they were a mere tactic to de-unionize. More is needed before we can draw that conclusion.

One way to determine whether an impasse is a tactic is to examine the nature of the issues which led to impasse. Until the mid-

72. *See id.*

1980s, the Board examined the content of employer proposals to determine whether they were advanced to undermine negotiations. If the Board concluded an employer had offered proposals no self-respecting union would accept, it found there was bad faith bargaining.⁷³ Proposals that were characterized in this way included matters that intruded into intra-union affairs or which effectively precluded unions from having a role in codetermining employee wages, hours, and other terms and conditions of employment—that is, proposals that removed the union's ability to act as an effective representative.⁷⁴

During the mid-1980s, the Board reversed this line of cases. It refused to permit any conclusions about an employer's good faith based on an examination of its proposals beyond determining whether they were to be classified as mandatory or permissive subjects of bargaining.⁷⁵ The consequences of this change in doctrine of making impasse more easily reached should be obvious. One way to achieve impasse in any negotiations is to come to the table with proposals you know the other side will not accept. With no check on what could be offered, this change in the law practically invited an employer that wished to de-unionize to advance proposals it knew would be unacceptable to the union, insist upon them to impasse, and then, if it wished, implement its final offer containing the unacceptable proposals.⁷⁶

One would expect most real impasses in bargaining to involve economic issues. Economic issues generally involve wages in some form and, after all, these are the issues that are most likely to be important to both employers and workers.⁷⁷ However, the data summa-

73. See Dannin, *Collective Bargaining*, *supra* note 9, at 44-46.

74. See *id.* at 42-43.

75. For a description of these developments, see Dannin, *Collective Bargaining*, *supra* note 9, at 51-53.

76. Cf. *Indus. Elec. Reels, Inc.*, 310 N.L.R.B. 1069, 1072 (1993) (holding that the duty to bargain does not preclude a party from making its best offer first and refusing to move). Recently, the Board has begun to retreat from this position. In *ConAgra, Inc.*, 321 N.L.R.B. 944, 945 (1996), it stated that it would consider the employer's having made a severe and predictably unacceptable concessionary offer as one among other factors demonstrating the employer's bad faith.

77. In using the term "economic" issues here, we are using it in its common, rather than legal, sense—that is, we are using it to mean proposals on is-

rized in Table 5 show that economic issues were the known key cause of impasse in only 37% of cases. In other words, close to two-thirds of impasses in this sample were caused by the employer's advancing proposals other than those concerning economics.

TABLE 5: ISSUES LEADING TO IMPASSE

ISSUE	NUMBER	PERCENT
Economic Issues	84	36.8
Control Issues	124	50.0
Unknown	30	13.2

If economic issues were not leading to impasse, what sorts of issues so concerned employers that they declared the parties to be deadlocked? The proposals grouped together in Table 5 as "control issues" include proposals designed to give employers unilateral control over the workplace or which concern internal union matters.⁷⁸ The control issues include eliminating or altering seniority, changes in job classifications, rights to contract union work out, management rights, and merit pay or internal union matters, such as dues checkoff and union security. Not only would these proposals give management more control by permitting employers to act as if no union represented the workers, these proposals are ones to which no union is likely to agree.⁷⁹ The majority of what we have classified here as control issues break down into 54% multiple control issues leading to

sues directly affecting money. We are not using it as synonymous with mandatory issues.

78. In using "control issues," we are not using it as synonymous with noneconomic or permissive issues, as commonly defined in labor law. In fact, some of these control issues could be considered mandatory or economic issues. To the extent the employer can force an impasse on a control issue which is also a mandatory subject of bargaining, it can more easily reach a bona fide impasse.

79. A recent study found, for example, that issues of union security were raised in nearly half of negotiations and were likely not to lead to agreement on that issue. In addition, issues such as pay for knowledge—which might include merit pay proposals—and alterations in job classification involving teams and work rule flexibility were very frequently raised and also tended to result in a failure to reach agreement on those items. See Cutcher-Gershenfeld et al., *supra* note 1, at 26-27.

impasse; 20% union security clauses or dues checkoff; 8% changes in job classification; and 18% scope of the unit.

The fact that employers are claiming to have reached impasse on control issues rather than economic issues suggests that reaching impasse is the goal. Certainly, these are the sorts of issues which an employer who abides by the law and recognizes a union as the legitimate representative of its workers will be willing to compromise or to take a hands-off attitude toward. Only an employer unwilling to codetermine the workplace with its workers or one bent on de-unionization will insist to impasse on these sorts of issues. That we would find such a high percentage of them should not be surprising given that the Board found so many of the declared impasses in our sample to be illegal.

Indeed, if anything, looking at reaching impasse on control issues as a proxy for intent to force an impasse actually understates that intent. Employers can also advance economic offers it knows will be unacceptable to the union. For example, an employer's demands for deep concessions—and especially if it is profitable—will present the union with an offer the union will feel it cannot accept and which it is likely to feel is not being made in good faith. A strike based on an impasse on an economic issue will be an economic strike, and the strikers may be permanently replaced. As a result, if an employer is bent on de-unionizing, it is to an employer's advantage to advance predictably unacceptable economic issues. It is impossible in this data set to determine whether this is the case in any instance; therefore, the best that can be said is that the evidence on the causes of impasse likely understates an intent to de-unionize.

Given the impossibility of asking for and receiving a direct answer from an employer as to whether it intended to de-unionize, the next most direct way to determine employer intent is to search for anti-union statements and other evidence of a desire to de-unionize. Employers made anti-union statements in approximately 30% of cases. This figure is likely to understate the existence of anti-union feeling, because we tried to be conservative in classifying cases on this point. Thus, although no statements were found in most cases, this does not mean none were made in reality or that the existence of reported statements captures the scope of a desire to de-unionize. This category also is likely to be understated, given the nature of

Board cases. Unless such a statement was alleged as a violation of section 8(a)(1), evidence of it might not have been introduced. Section 8(a)(1) violations based on anti-union statements are unlikely; section 8(c) allows employers to make anti-union statements as long as they do not involve a threat or a promise of benefit. Therefore, anti-union statements can be made without constituting an unfair labor practice. On the other hand, Board attorneys will attempt to introduce evidence of anti-union animus—and it would be relevant—if a case involved violations of section 8(a)(3). However, an employer which has received good legal advice and is attempting to reach an impasse and to de-unionize would likely be warned not to make anti-union statements and, even if it does, be warned to hedge statements so that a union is less likely to file a charge or a region to issue a complaint. Given all these factors, it seems most likely that the figure strongly understates the existence of anti-union feeling. Thus, at least one-third of these employers made anti-union statements.

If de-unionization is a goal, it seemed possible that the cases might reveal employers' desires to de-unionize. This desire is another factor likely to be understated in the data. An employer may say it does not want a union; however, many may feel this way but do not make such a statement for fear it might make the Board less likely to find a bona fide impasse. The conclusion here is admittedly a somewhat subjective one, based on the totality of employer conduct and statements. Given the subjectivity involved in such an assessment, the study took a conservative approach and found a desire to de-unionize only when it was clearly present. Such a desire was found when an employer stated a desire to de-unionize or when there was clear evidence of such a desire based on a course of conduct which could include anti-union statements and retaliation against employees for union activity, as well as a course of serious bad faith bargaining. This means that these figures likely underrepresent the number of cases in which a desire to de-unionize exists.

As shown in Table 6, employers demonstrated no desire to de-unionize in 18% of cases and wanted to de-unionize in over 39% of cases. The problem is that the conservative approach means cases categorized as "unknown" are the largest percentage. In fact, most cases—43%—were categorized as "unknown." It is not possible

definitively to interpret them, but it is possible with additional consideration to draw some meaningful conclusions as to employers' desires.

The study cannot assume that all 43% wished either to de-unionize or not to de-unionize. Thus, it cannot add this 43% to the known 39% to conclude that 82% of employers wished to de-unionize; nor can we add the 43% to the known 18% to conclude that 61% did not want to de-unionize. If the study treated the unknown cases as representing the same proportion of sentiments as in the known cases, it would find an employer desire to de-unionize in 68% of cases. This figure may be too high or still too low, because it is impossible to know whether the unknown cases reflect the same proportion of sentiments as in the known cases. It may be that none of the employers in the unknown cases wished to de-unionize or all may have wanted to de-unionize. It is fair to conclude that an accurate figure lies somewhere between the two measures.

The least controversial conclusion is that 39% of employers demonstrated a clear desire to de-unionize, and this probably understates the true level of desire. However, even if 39%—the lowest credible figure—is the total of all employers who wish to de-unionize, and have acted on that desire in seeking an impasse, this is actually a high proportion of employers. If a level of 39% is troubling, the true level should be a cause for deep concern. All signs point to the likelihood it is much higher.

TABLE 6: DID THE EMPLOYER WANT TO DE-UNIONIZE?

	NUMBER	PERCENT
Yes	88	38.6
No	41	18.0
Unknown	99	43.4

A recent survey of collective bargaining found that nearly 30% of unions rank low trust as a factor heavily influencing negotiations, and 15% were concerned for the future of the union.⁸⁰ The data

80. *See id.* at 25.

suggest that a basis for those concerns exists in some employers' use of collective bargaining as a tool to de-unionize.

III. DISCUSSION

Section 1 of the NLRA states that it is the policy of the United States to "encourag[e] the practice and procedure of collective bargaining" and to "protect[] 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 or other mutual aid or protection."⁸¹ If this is the law—and it still is—it is difficult to see how the Board could have adopted and continue to use a doctrine that subverts collective bargaining, prevents workers from exercising any rights of self-organization, and prevents them from codetermining the terms and conditions of their employment. Implementation upon impasse disempowers workers and leaves them without access to a friendly means of adjusting labor disputes. It thus undermines a basic institution and democratic values.

Unions have been under severe stress for decades now, some of which has been caused by economic forces. Much of the period examined here was one in which unions faced enormous struggles. It saw the breakdown of established bargaining patterns in core industries, such as automobiles and steel, the introduction of two-tiered wage systems, and the use of bankruptcy proceedings to break contracts.⁸² Concession bargaining—defined as freezes or cuts in the basic wage—was made necessary by U.S. economic problems starting in the late 1970s. Concession bargaining peaked in the period 1982 to 1985 and has declined since then as economic conditions have improved.

However, the end of economic trouble did not mean the end of pressures on unions. Defined more broadly, concession bargaining has lingered into the 1990s.⁸³ Indeed, by the end of the 1980s bargaining units were disappearing in relatively less depressed

81. 29 U.S.C. § 151.

82. See Mitchell, *supra* note 1, at 435.

83. See *id.* at 439.

industries, suggesting that after 1983, employers were increasingly choosing to escape collective bargaining relationships.⁸⁴

Less discussed and even more unfortunate, law has contributed to unbalancing employer and employee power. As economic conditions improved, the Board began introducing changes in impasse law which further tipped the balance of power in the employer's favor. The data support a conclusion that implementation upon impasse has been used to ends other than securing economic concessions and more towards achieving employer hegemony. The outcomes in these cases suggest that the current state of collective bargaining may be worse than economic studies limited to examining concessionary bargaining suggest. In cases involving implementation upon impasse many negotiations would achieve no collective bargaining agreement. Therefore, these cases would not appear in studies of concessionary bargaining because they were limited to examining the terms in collective bargaining agreements and did not examine the details of party behavior or outcomes beyond the four corners of a document.

The data suggest that current Board doctrines have strayed so far from the NLRA's purposes and policies that serious consideration needs to be given to reversing them and replacing them with methods of resolving impasses that promote serious negotiations. Realizing this means urging the Board to reconsider the entire doctrine as well as its discrete parts, including at least refusing to scrutinize proposals to determine whether they were advanced as a tactic to achieve impasse, not sufficiently scrutinizing regressive bargaining, and permitting impasse to be reached after few bargaining sessions and in a very short period.⁸⁵

84. See Bodah & Cutcher-Gershenfeld, *supra* note 58, at 10.

85. Some may ask what alternative should be adopted if implementation is not the way to handle bargaining impasses. This suggests that implementation is a credible way to resolve bargaining conflicts. Indeed, the entire idea is absurd. Certainly, outside the area of collective bargaining, it would be unthinkable to permit one party to dictate the terms of the parties' agreement. Why should it be any different in collective bargaining? Taking away the right to implement would move collective bargaining toward contract law in general. Making it more difficult to reach impasse and, in particular, taking away the reward of implementation for reaching impasse would make it more likely that employers would have no alternative but to engage in real negotiating.

Even taking a very conservative look at the data, they support a conclusion that at least some employers have been using their ability to implement final offers upon impasse with the goal of achieving workplace hegemony and de-unionization. The data, moreover, demonstrate that serious attention and further research is needed as to the role implementation upon impasse plays in breaking down collective bargaining and employee self-determination at all stages. Research involving both surveys of negotiators and case studies of bargaining are essential. Armed with greater information, we are confident that all but those wholly opposed to unions and collective bargaining will see the wisdom of replacing the doctrine of implementation upon impasse with a more reasonable way to resolve disputes.

The preliminary analysis of these data lead to the conclusion that labor law doctrine has advanced far down the wrong road, with disastrous consequences for unions and workers. Certainly, developing Board law so that impasse was a mere description that says the parties have reached a hard point in negotiations rather than making it a goal to be achieved would go far to promote good faith bargaining and achieve the purposes and policies of the NLRA. There are important consequences to preventing the use of impasse as a tool to de-unionize and to avoid the NLRA's bargaining obligation. Put an-

In trying to formulate alternatives, we know that there are only four key ways to resolve impasses in bargaining: get the parties to agree, either by assisting them through mediation or allowing them to work out their dispute by their own means, such as by a strike or lockout; let the union impose its terms; let the employer impose its terms; or let a neutral third party impose the terms, as through interest arbitration. None of these alternatives but the first seems wholly desirable. Allowing one side to implement is the antithesis of bargaining. Allowing a third party to make the hard decisions may also destroy the parties' relationship over time, although experience in the public sector may make it possible to tinker with interest arbitration to avoid dependency on it by making it difficult to trigger or by creating an arbitral process that forces the parties to make their own agreement. The first and fourth alternatives certainly have drawbacks. However, they are no worse than what now exists. As the doctrine of employer implementation has taken root, it has created a lawless labor law. Even employers with long-term successful partnerships with unions may be unable to resist this powerful temptation. Employers with rocky relationships and those who have never accepted their employees' lawful choice to unionize would be tempted to overthrow the employees' choice. This is not the way the NLRA's drafters envisioned how collective bargaining would function.

other way, if it were more difficult to reach impasse and if employers who reached impasse were not rewarded by being allowed to implement their final offers, employers might find it more attractive to negotiate an agreement. At the least, they would be less likely to see negotiations as an anti-union tool as opposed to a means of codetermining workplace conditions and defusing worker discontent. At a minimum, to the extent it is more difficult to reach a bona fide impasse, more strikes would be unfair labor practice strikes and employers could not permanently replace the strikers. And at best, there would be greater workplace harmony, increased productivity, and improved wages and working conditions—the very goals the NLRA was enacted to achieve.⁸⁶

IV. CONCLUSION

Decades ago, the NLRB took the first steps that led finally to the current iteration of implementation upon impasse. Over the years, the boundaries of the doctrine have expanded. It has now become so embedded in practice that some argue it is a legitimate employer economic weapon. However, when the doctrine is examined in the context of the NLRA's purposes, it is easy to see it as a weapon—and a powerful one—but difficult to see it as legitimate.

Taken together, the data on the proposals advanced and evidence of employer views as to unions provide clear support for the conclusion that anti-union sentiment is present among many employers, that many wish to de-unionize, and that many employers are making proposals on issues they know are likely to lead to an impasse. Furthermore, in the overwhelming majority of cases in which employers are declaring impasse no legal impasse exists. Putting this all together suggests that impasse is indeed being used as a tool to de-unionize. This means that the right of employers to implement their final offers upon reaching impasse is a pernicious doctrine which undercuts and even destroys workers' right to self-determination by engaging in collective bargaining and must, therefore, be overturned.

86. See 29 U.S.C. § 151.