

# LOCKOUTS IN EVOLUTIONARY PERSPECTIVE: THE CHANGING BALANCE OF POWER IN AMERICAN INDUSTRIAL RELATIONS

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## INTRODUCTION

There is little question that the face of labor relations in the United States is evolving significantly. These changes spring from several different factors. One such factor is the evolving demographics of the workforce itself, with the entry of significant numbers of women and minorities into a labor market which had traditionally been dominated by white males.<sup>1</sup> These new workers bring with them different job expectations and aspirations.<sup>2</sup> In addition, there has been significant growth in the ranks of white-collar professional workers. This growth has served to shift the focus from the traditional needs of blue-collar industrial labor to the more management-oriented goals and expectations of the new white-collar class.<sup>3</sup>

In addition, the nature of American work itself is changing. The heady post-war period when American manufactured goods dominated world markets has given way to plant closings, lost jobs, automation, and foreign competition.<sup>4</sup> Today, American business and industry are comprised of high-tech and service jobs, while

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1. See generally C. BEZOLD, R. CARLSON, AND J. PECK, *THE FUTURE OF WORK AND HEALTH* (1986) [hereinafter BEZOLD, CARLSON, AND PECK]; E. GINSBERG, *GOOD JOBS, BAD JOBS, NO JOBS* (1979) [hereinafter GINSBERG]; Craver, *The Vitality of the American Labor Movement in the Twenty-first Century*, 1983 U. ILL. L. REV. 633 (1983) [hereinafter Craver].

2. T. KOCHAN, H. KATZ, AND R. MCKERSIE, *THE TRANSFORMATION OF AMERICAN INDUSTRIAL RELATIONS* (1986) [hereinafter KOCHAN, KATZ, AND MCKERSIE]; KANTER, *Work in America*, 107 *Daedalus* (1978) [hereinafter KANTER].

3. See sources cited *supra* note 1.

4. See generally BEZOLD, CARLSON, AND PECK, *supra* note 1, at 37; H. SHAIKEN, *WORK TRANSFORMED: AUTOMATION AND LABOR IN THE COMPUTER AGE* (1984) [hereinafter H. SHAIKEN]; Craver, *supra* note 1, at 639-43; Glyde, *Managing Economic Change: Labor's Role in LABOR AND REINDUSTRIALIZATION* (D. Kennedy ed. 1984) [hereinafter Glyde].

traditional manufacturing and production jobs continue to decline.<sup>5</sup> These shifts in the economic base, like the shifts in the workforce that accompany them, bring new sets of values and goals to the marketplace.

When one thinks about the American system of industrial relations, one generally thinks of employers, labor unions, and collective bargaining. But the modern picture is drastically contradictory. Traditional organized labor appears to be on the defensive; employers have in many ways become significantly more aggressive in treating with their employees. This aggressiveness is a result of hostile attitudes and changed political climates.<sup>6</sup> Indeed, at least for the traditional unions and the employment sectors which they represent, the order of the day appears to be concession bargaining and holding the line on what unions will lose, rather than on what they will gain.<sup>7</sup>

Perhaps nowhere are these changes more clearly illustrated than in the recent resurgence of markedly violent "street warfare" characterizing union strikes and employer lockouts. During a single week in the summer of 1986 lockouts by two major American companies, USX (formerly United States Steel) and Deere & Company, shared the headlines.<sup>8</sup> Violence also marked a protracted strike at Hormel Meat Packing, as well as a strike and lockout at a USX plant in Lorain, Ohio. This aggressiveness on the part of employers, and the equally aggressive backlash by unions, suggests a renewed willingness to do battle outside the confines of the bargaining table. This means resorting to economic self-help rather than the give and take of reasoned negotiations with the focal point being the relative economic, political, and legal strengths of the respective parties.

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5. See BEZOLD, CARLSON, AND PECK, *supra* note 1, at 37-41, 65-70; GINSBERG, *supra* note 1, at 1; Craver, *supra* note 1, at 639-43; Glyde, *supra* note 4.

6. See generally BUREAU OF NATIONAL AFFAIRS, UNIONS TODAY: NEW TACTICS TO TACKLE TOUGH TIMES (1985) [hereinafter UNIONS TODAY]; R. FREEMAN & J. MEDOFF, WHAT DO UNIONS DO? (1984) [hereinafter FREEMAN & MEDOFF]; P. Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1796 (1983) [hereinafter Weiler, *Promises to Keep*]; P. Weiler, *Striking a New Balance: Freedom to Contract and the Prospects for Union Representation*, 98 HARV. L. REV. 351 (1984) [hereinafter Weiler, *Striking a New Balance*]; Estreicher, *Workers Still Need Labor Law's Shield*, N.Y. Times, July 21, 1985 at B2, col. 1.

7. See UNIONS TODAY, *supra* note 6, at 6-7; Wall St. J., Aug. 5, 1986, at 2, col. 2.

8. See Wolf, *Lockout Ruling Entitles Pa. Workers to Benefits*, Philadelphia Inquirer, Aug. 22, 1985, at 1A, col. 4.

Generally speaking, labor's right to exercise self-help in the form of a strike has evolved from virtually non-existent to well established, while the opposite has been true of management's right to exercise self-help in the form of a lockout. The lockout has gone from being virtually unbridled to being almost non-existent, and now, through gradual and often reluctant evolution, enjoys renewed life with a vengeance.<sup>9</sup> The focus of this article will be the disparate treatment of these traditional weapons of economic self-help and how their use both depends upon and reflects the economic, sociological, and political climate of the labor relations system. Specifically, I have concentrated upon the lockout, the treatment of which appears to have closely mirrored shifts in the various factors which comprise bargaining strength.

Accordingly, this article first examines the historical development of the employer lockout in socioeconomic, political, and legal context to its present state as the functional equivalent of the strike. Next, the article explores more closely the shift in the balance of bargaining power inherent in the industrial relations system in light of the operative dynamics of that system and the recharacterization of the factors which comprise it. Finally, the article concludes that, if given a chance to work the way Congress intended, the present day system is not only adaptable, but is indeed well-suited, to present day labor relations.

## I. THE LOCKOUT IN SOCIOECONOMIC AND HISTORICAL AND HISTORICAL PERSPECTIVE: REFLECTIONS ON THE BALANCE OF POWER IN THE INDUSTRIAL RELATIONS SYSTEM

### A. *Basic Socioeconomic Considerations*

The succinct definition of a lockout which still reflects the common understanding of labor relations specialists is a "cessation [by the employer] of the furnishing of work to employees in an effort to get for the employer more desirable terms."<sup>10</sup> The earliest

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9. See *infra* text accompanying notes 369-71.

10. *Betts Cadillac Olds, Inc.*, 96 N.L.R.B. 268, 282 (1951) (quoting *Iron-Molders Union No. 125 of Milwaukee, Wis. v. Allis-Chalmers Co.*, 166 F. 45, 52 (7th Cir. 1908) (Grosscup, J., concurring)). See also *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 321 (1965) (White, J., concurring); Denbo, *Is the Lockout the Corollary of the Strike?*, 14 *LAB. L.J.* 659, 660 (1963) [hereinafter Denbo]; Oberer, *Lockouts and the Law: The Impact of American Ship Building and Brown Food*, 51 *CORNELL L.Q.* 193, 194 (1966) [hereinafter Oberer]. But see Johannesen, *Lockouts: Past, Present, and Future*, 1964 *DUKE L.J.* 257, 265-67 (noting the lack of consistency in definition) [hereinafter Johannesen].

lockout in American labor history occurred in 1643 in Gloucester, "when a group of obstreperous shipwrights were forbidden by the authorities 'to work a stroke of worke more'" unless authorized to do so by the governor.<sup>11</sup> Although the Gloucester lockout was apparently an outgrowth of some public disorder rather than any economic conflict,<sup>12</sup> the term lockout by its very nature suggests force. Indeed, the lockout has traditionally served as the ultimate affirmative assertion of the employer's will in the various labor disputes where it has been utilized.<sup>13</sup> These labor disputes reflect power plays by both labor and management designed to improve their respective positions at various points in their relationship, from employee organization through collective bargaining. In order to understand the role which the lockout plays in these situations, it is necessary to understand the basic socioeconomic context in which they arise.

The American system of labor relations is inevitably tied to our capitalist economic system. The labor movement itself corresponds to the growth and utilization of capital.<sup>14</sup> Economic development in the United States can be characterized as a combination of capital accumulation and rapid industrialization, which began approximately in the 1830's with the modernization of the textile industry and advent of the steam engine.<sup>15</sup>

Industrialization changed the face of labor. While pre-industrial America had been characterized by small shops staffed by artisans and craftspersons, early industrial America was marked by large-scale factories staffed by thousands of workers on the assembly lines.<sup>16</sup> As a result, industrial ownership usurped the art of the industrial crafts. Industrial ownership dictated not only what products were to be produced, but also the way to produce them.<sup>17</sup> The inevitable results of this change were the depersonalization of

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11. R. MORRIS, *GOVERNMENT AND LABOR IN EARLY AMERICA* 196 (1981).

12. *Id.* at n.10.

13. See Oberer, *supra* note 10, at 195 (stating purposes of lockouts as "(1) to defeat an organizing effort; (2) to evade the duty to bargain, as by undermining an incumbent bargaining representative; (3) to avoid peculiar economic loss or operational difficulty resulting from a partial strike or threatened imminent strike; (4) to protect a multiemployer bargaining unit . . . ; (5) to drive a better bargain in the process of negotiating a collective agreement.").

14. S. ARONOWITZ, *WORKING CLASS HERO* 7 (1983).

15. *Id.*

16. *Id.* at 8.

17. *Id.* at 12.

work, and the sapping of employee pride in his or her production. The Homestead Strike of 1892 illustrated this transition. During the strike the Carnegie Steel Company unilaterally abrogated a collective bargaining agreement with the Amalgamated Association of Iron and Steel Workers. Carnegie Steel claimed that advanced technology in steel manufacturing had made the union's wage scale and job controls irrelevant. The union refused to accept the company's proposal to reduce wages and was forced to strike.<sup>18</sup>

With the advent of mass production and the corresponding depersonalization of work, human labor became simply another commodity to be manipulated by the economic dictates and interplays of the marketplace.<sup>19</sup> Concern with workers' needs and wants gave way to a concept of worker fungibility.

Workers, then, were seen as unsatisfactory, unreliable, and refractory agents for the achievement of management's purposes. . . . Their behavior had to be governed by strict rules, minutely enforced. They had to be controlled by loyal, obedient, foremen and supervisors. Their autonomy had to be limited by the design of production processes. They were what an elitist from a less mealy-mouthed age would have called a "swinish multitude," needing to be kept in the proper, inferior place.<sup>20</sup>

With the emphasis now on ownership rather than the art of the industrial craft, the interaction between labor and management became marked by struggle. "It is labor's aim to continue increasing its bargaining power and with it its share of industrial control, just as it is the employer's aim to maintain a *status quo* or better. Although this presupposes a continuous struggle, it is not a revolutionary but an 'opportunistic' struggle."<sup>21</sup> As such, the American industrial relations system is generally regarded as adversarial.<sup>22</sup> And

18. *Id.* at 12-13.

19. See generally E. GINSBERG, *THE HUMAN ECONOMY* (1976) (an explanation of the commodity approach to human labor, as well as the contrary view of the human resources approach, which recognizes labor as people with needs worth accommodating) [hereinafter GINSBERG, *HUMAN ECONOMY*]; see also KOCHAN, KATZ, AND MCKERSIE, *supra* note 2.

20. H. HARRIS, *THE RIGHT TO MANAGE: INDUSTRIAL RELATIONS POLICIES OF AMERICAN BUSINESS IN THE 1940s* 102 (1982) (citations omitted) [hereinafter HARRIS].

21. S. PERLMAN, *A HISTORY OF TRADE UNIONISM IN THE UNITED STATES* 267-68 (1923) [hereinafter PERLMAN].

22. See, e.g., A. SLOANE & F. WHITNEY, *LABOR RELATIONS* 3-6 (4th ed. 1981) [hereinafter SLOANE & WHITNEY]; see also T. KOCHAN, *COLLECTIVE BARGAINING AND INDUSTRIAL RELATIONS: FROM THEORY TO POLICY AND PRACTICE* 36 (1980) [hereinafter KOCHAN]; PERLMAN, *supra* note 21, at 267.

each side's ability to treat with the other depends upon its acquisition, or lack, of bargaining power.

Bargaining power has been variously defined as "the proprietary ability to withhold products or production pending the negotiations for transfer of *ownership* of wealth;"<sup>23</sup> "group restraint over individualistic action;"<sup>24</sup> "all the forces which enable a buyer or seller to set or maintain a price;"<sup>25</sup> and "the ability to control the setting of wage rates, sometimes within given limits."<sup>26</sup> Basically, the term refers to the relative ability of the parties in a conflict situation to achieve their respective goals. Bargaining power has many bases, the primary of which is the economic ability to strike or to lock out.<sup>27</sup> The strike<sup>28</sup> is one means through which labor has a significant ability to affect the employer's capital base by shutting down its operations. In order for the strike to succeed, however, the union must enjoy a high degree of solidarity among its members, as well as adequate financial resources.<sup>29</sup> Similarly, the employer's ability to withstand a strike depends upon its financial resources, the timing of the strike with respect to the employer's operations,<sup>30</sup> and even whether the goods which the employer produces or sells can stand without injury, or are relatively perishable.<sup>31</sup>

A particularly relevant consideration is the employer's ability to hire strike replacements.<sup>32</sup> Whether to hire strike replacements

23. J. COMMONS, *INSTITUTIONAL ECONOMICS: ITS PLACE IN POLITICAL ECONOMY* 267 (1934).

24. N. CHAMBERLAIN & J. KUHN, *COLLECTIVE BARGAINING* 166 (2d ed. 1965) [hereinafter CHAMBERLAIN & KUHN].

25. Lindbloom, *Bargaining Power in Price and Wage Determination*, 62 Q.J. ECON. 402-03 (1948).

26. CHAMBERLAIN & KUHN, *supra* note 24, at 162.

27. See C. PERRY, A. KRAMER, AND T. SCHNEIDER, *OPERATING DURING STRIKES* 111 (1982) [hereinafter PERRY, KRAMER, AND SCHNEIDER].

28. See Weiler, *Striking a New Balance*, *supra* note 8, at 351 (giving an excellent in-depth analysis of unions ability to utilize a strike and of the limitations of the strike as a bargaining tool).

29. See C. LINDBLOOM, *UNIONS AND CAPITALISM* 111 (1949) [hereinafter LINDBLOOM].

30. It is axiomatic that a strike during an employer's busy season will have far more serious detrimental effect on its business than one during its slow season. See, e.g., *American Ship Bldg. Co.*, 142 N.L.R.B. 1362 (1963), *enforced sub nom.* *Local 374, Int'l Bhd. of Boilermakers, Iron Ship Bldrs., Blacksmiths, Forgers, and Helpers, AFL-CIO v. NLRB*, 331 F.2d 839 (D.C. Cir. 1964), *rev'd sub nom.* *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300 (1965).

31. See PERRY, KRAMER, AND SCHNEIDER, *supra* note 27, at 37-38.

32. See generally *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333, 345 (1938) (stating that an employer has a right to replace striking workers in an effort to protect and continue his business). *But see* H. Gillespie, *The Mackay Doctrine and the Myth of Busi-*

is a tactical question. Thus, strike replacements may not be available, particularly if there is full employment in the community, the strikers are relatively skilled, or if the employer is located in a "union town" and the population is hostile to the idea of strike-breaking.<sup>33</sup> Additionally, the employer may not want to run the risk of further antagonizing the union and the striking employees by hiring replacements.<sup>34</sup>

Therefore, the union in determining whether or not to engage in economic self-help, must assess its relative strength to successfully wield a strike against the employer's strength to withstand it. If the union misjudges, it stands to lose a great deal from an unsuccessful strike. Its potential losses range from the obvious lost income of its members during the strike to the realistic possibility of capitulation without having gained any ground, or perhaps having even lost ground.<sup>35</sup> Either of these results may lead to an erosion of both the union's strength and the cohesiveness of its membership.<sup>36</sup>

Analogous economic considerations obtain when an employer is contemplating the use of a lockout. Thus, the employer must consider its financial resources and those of the union, whether its operations are at slow season or peak, and if based upon such considerations as perishability, competition, or similar factors, whether it can afford to have its products off the market for a substantial period of time.<sup>37</sup> If the employer locks out before the union can strike, it can exert control over factors such as timing, competitive ability, and perhaps even shifting economic strength. This is a significant advantage which is lost if the union acts first, forcing the employer into a reactive, rather than an affirmative, position.

In a purely economic sense, the use of self-help weapons entails a waiting game of which side can hold out the longest before

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*ness Necessity*, 50 TEX. L. REV. 782, 783-87 (1972) (arguing that strike replacement doctrine is internally inconsistent as well as inconsistent with federal labor policy and ought to be judicially re-examined) [hereinafter Gillespie]; Weiler, *Striking a New Balance*, *supra* note 6, 389-93 (arguing that *Mackay* is "overinclusive" and does not comport with the intent of federal labor policy and legislation).

33. See Gillespie, *supra* note 32, at 791-94.

34. See PERRY, KRAMER, AND SCHNEIDER, *supra* note 27, at 63-64.

35. See LINDBLOOM, *supra* note 29, at 113.

36. *Id.* at 113-15 (stating that it is possible that some of the union's economic losses attributable to a strike may be alleviated by strike funds and/or unemployment compensation, available to strikers in some states).

37. See CHAMBERLAIN AND KUHN, *supra* note 24, at 179.

it is forced by pecuniary considerations to concede. Therefore, the stakes can be exceedingly high. However, the economic considerations attendant to the use of self-help by both sides to the labor controversy do not operate in a vacuum; rather, they are significantly affected by the other factors which comprise the parties' relative bargaining power—the relevant legal and political climates in which the parties operate and interact with one another.

### B. Legal and Political Considerations

#### 1. The Early Years: Pre-Act and Initial Post-Act Applications

In the days prior to the National Labor Relations Act, the working environment for the American laborer was very much as the Gloucester shipwrights of 1643 must have experienced it. The watchword of the day was "*conflict*, or the intransigent, uncompromising attitude"<sup>38</sup> of both labor and management to, respectively, make desired economic and social gains or preserve the *status quo*. Immediately prior to World War I, organized labor was the strongest it had ever been, having won for the first time effective recognition of its role as a major force in the national economy.<sup>39</sup> Yet management still retained virtually unbridled power to control its labor force and to resist any organizing attempts by its workers. The employer's choice to lock out, individually or in combination with other employers, was well accepted as a property right. "[A]n employer might therefore keep out of his business or property any employee or group of employees for any or no reason."<sup>40</sup> Ideally, the lockout was viewed as the mirror image of the strike, each being "a corresponding means of exerting economic pressure."<sup>41</sup> Employers, however, were often aided in their efforts by the courts, which early on treated the strike as a common criminal conspiracy<sup>42</sup> or a violation of the Sherman Anti-Trust Act.<sup>43</sup> The courts

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38. SLOANE AND WHITNEY, *supra* note 22, at 30 (emphasis in original).

39. F. DULLES AND M. DUBOFKY, *LABOR IN AMERICA: A HISTORY* 215-16 (4th ed. 1984) [hereinafter DULLES AND DUBOFKY].

40. See Johannesen, *supra* note 10, at 258; see also Oberer, *supra* note 10, at 194 ("An employer who could discharge or lay off at will could, by definition, lock out at will.").

41. Lewis, *The Lockout as Corollary of Strike Controversy Reexamined*, 23 *LAB. L.J.* 659, 660-61 (1972).

42. See, e.g., Sayre, *Criminal Conspiracy*, 35 *HARV. L. REV.* 393 (1922).

43. See, e.g., *Bedford Cut Stone Co. v. Journeymen Stone Cutters Ass'n*, 274 U.S. 37 (1927); *Coronado Coal Co. v. United Mine Workers*, 268 U.S. 295 (1925); *Duplex Printing Press Co. v. Deering*, 254 U.S. 443 (1921); *Lowe v. Lawlor*, 208 U.S. 274 (1908).

also utilized their injunctive power to halt strikes.<sup>44</sup>

With the coming of the first World War, hostility between management and labor reached a temporary lull in favor of more pressing issues. Because of increased war-time production, new and better opportunities arose for workers previously on the fringes of the labor market. After the war, however, tension between labor and management returned to its pre-war level. During the 1920's and into the 1930's, management stepped up its campaign against union organization among workers. Tactics included mass discrimination against union activists, resulting in the blacklisting of many workers, as well as blatant refusal to recognize even those unions which enjoyed majority support. In 1932, Congress promulgated the Norris-La Guardia Act.<sup>45</sup> This statute put the federal courts out of the business of granting injunctions in labor disputes.<sup>46</sup> Three years later, Congress passed the first sweeping piece of protectionist labor legislation, the Wagner Act.<sup>47</sup> The Act marked the government's attempt to intervene in what had been essentially a pristine application of the *laissez-faire* principle to labor relations, and take a more active role by encouraging both the idea of unionism and the enforcement of collective bargaining. Thus, government had gone from interjecting itself on the side of management to intervening on the part of labor. This was a Congressional response "to the challenge of an urban industrial economy in distress."<sup>48</sup> Left to its own devices, management had remained intransigent in opposing the organization of its workers. Yet, with the Great Depression of 1929 and the lean years which followed, "social change boiled rather than simmered, and the government moved quickly from lifting legal restraints upon union activities, to approval of union organization, and then to the enforcement of collective bargaining."<sup>49</sup> Government's change of focus "was a natural development, to be expected in a democracy. As the impact of group power upon individuals and the public changes, the law is changed accordingly."<sup>50</sup>

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44. See, e.g., *Vegeahn v. Gunther*, 167 Mass. 92, 44 N.E. 1077 (1896).

45. Norris-LaGuardia Act of 1932, Pub. L. No. 72-65, 47 Stat. 70 (codified as amended at 29 U.S.C. §§ 101-115 (1982)).

46. *Id.* (codified as amended at 29 U.S.C. §§ 103-104 (1982)).

47. Wagner Act of 1935, Pub. L. No. 74-198, 49 Stat. 449 (codified as amended at 29 U.S.C. §§ 151-169 (1982)).

48. CHAMBERLAIN AND KUHN, *supra* note 24, at 293.

49. *Id.* at 294.

50. *Id.* at 293.

The new statute was designed to promote equality between labor and management, and ultimately to lead them to the bargaining table where they theoretically could work out their differences rather than leave them to the economic warfare of the streets.<sup>51</sup> Collective bargaining fit well with the American capitalist system. By requiring that the parties bargain in good faith, government intervention was limited to the point of simply enforcing the principle.<sup>52</sup> This left the participants free to hammer out an agreement on their own. Senator Walsh, Chairman of the Committee on Education and Labor, commenting on former section 8(5)<sup>53</sup> of the Wagner-Connery Bill, stated:

The bill indicates the method and manner in which employees may organize, the method and manner of selecting their representatives or spokesmen, and leads them to the office door of their employer with the legal authority to negotiate for their fellow employees. The bill does not go beyond the office door. It leaves the discussion between the employer and the employee, and the agreements which they may or may not make, voluntary and with that sacredness and solemnity to a voluntary agreement with which both parties to an agreement should be enshrouded.<sup>54</sup>

The Act implies that bargaining power is to remain the cornerstone of the collective bargaining relationship. Consequently, it does not preclude the use of economic self-help in the event that peaceful negotiations fail.<sup>55</sup> As the United States Supreme Court

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51. See 29 U.S.C. § 151 (1982). See also Remarks of Rep. Hartley, reprinted in 1 NLRB Legislative History of the Labor Management Relations Act, 1947, at 617 (1948) (The purpose of section 7 of the Act (29 U.S.C. § 157) which gives employees the right to join unions, or otherwise act in concert for their mutual aid or protection, is primarily "to write equity into the law, to make the relationship between labor and management equitable, to place them on an equal basis."). See also Subcommittee on Labor-Management Relations of the Committee on Education and Labor, *The Failure of Labor Law—A Betrayal of American Workers*, H.R. Rep. No. 98—, 98th Cong., 2d Sess. 4-11 (1984)[hereinafter *Failure of Labor Law*].

52. See *NLRB v. Montgomery Ward & Co.*, 133 F.2d 676 (9th Cir. 1943). The duty to bargain encompasses "an obligation . . . to participate actively in the deliberations so as to indicate a present intention to find a basis for agreement." *Id.* at 686. See also 29 U.S.C. § 158(d) (1982). See generally Cox, *The Duty to Bargain in Good Faith*, 71 HARV. L. REV. 1401 (1958); Fleming, *The Obligation to Bargain in Good Faith*, 47 VA. L. REV. 988 (1961).

53. See 29 U.S.C. § 158(a)(5) (1982) (Section 8(5) is now codified as 29 U.S.C. § 158(a)(5)).

54. 79 CONG. REC. 7659 (1935).

55. See *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 314-15 (1965). The Act does, however, provide for some restrictions on the use of self-help weapons. See, e.g., 29 U.S.C. § 158(b)(4) (1982) which prohibits a union from engaging in a secondary boycott; 29 U.S.C. §

noted in *NLRB v. Insurance Agents' International Union*.<sup>56</sup>

It must be realized that collective bargaining, under a system where the Government does not attempt to control the results of negotiations, cannot be equated with an academic collective search for truth—or even what might be thought to be the ideal of one. The parties—even granting the modification of views that may come from a realization of economic interdependence—still proceed from contrary and to an extent antagonistic viewpoints and concepts of self-interest. The system has not reached the ideal of the philosophic notion that perfect understanding among people would lead to perfect agreement among them on values. The presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized. . . . [N]ecessity for good-faith bargaining between parties, and the availability of economic pressure devices to each to make the other party incline to agree on one's terms—exist side by side.<sup>57</sup>

Thus, "while there is freedom of contract about the content of a collective agreement, there is not an equivalent freedom about whether to contract at all."<sup>58</sup> Accordingly, the Act does not encompass the idea that management would abandon its opposition to unions; it simply forces management to adapt to their presence.<sup>59</sup> Indeed, because neither side is forced by the Act to make concessions or to compromise, but only to sit down together and give the reasonable appearance of a willingness to work things out, management is still free to insist on a broad retention of its power to control both the plant and the workforce. Therefore, the basis for the hostility between labor and management remains entirely viable.<sup>60</sup>

Although the advent of the Act curbed many of the tactics favored by management at the union organizing stage in the days of

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158(d) delays the use of a strike or lockout for the purposes of modifying or terminating a collective bargaining agreement until a mandated period of notice has run (the so called cooling-off period); 29 U.S.C. § 173 seeks to delay a strike or lockout pending mediation by the Federal Mediation and Conciliation Service; and 29 U.S.C. § 178(a) authorizes the President to step in where a strike or lockout creates a national emergency.

56. 361 U.S. 477 (1960).

57. *Id.* at 488-89.

58. Weiler, *Striking a New Balance*, *supra* note 6, at 351, 366. Professor Weiler presents a critical analysis of both the theory and the pragmatic limitations and shortcomings of the free collective bargaining principle and its application in modern labor law.

59. See KOCHAN, KATZ, AND MCKERSIE, *supra* note 2, at 25.

60. See *id.* at 27.

pre-Act resistance, the same suspicions, mistrust, and reluctance to relinquish power still existed after its passage and exerted influence over the bargaining process. When combined with the Act's affirmative and reciprocal requirements to bargain in good faith, these attitudes created a different political atmosphere in which the parties interacted. Hence, labor and management went from blatant street warfare to a more limited form of confrontation within the confines of the bargaining table.

Two bargaining models which incorporated these shifts in hostility have been described as the "Armed Truce" and "Power Bargaining."<sup>61</sup> The "Armed Truce" approach represents a resigned recognition by management that, although the union may be here today and the interests of union and management will always be opposed, head-on conflict is no longer the way to deal with the situation. Instead, both sides, while remaining within the bounds of the law, press their respective positions to the maximum, with management hoping that the union will eventually crumble.<sup>62</sup>

"Power Bargaining" involves the same hard pressure in favor of the parties' respective positions, but with a grudging acceptance of the union as a relatively permanent fact of life that is missing from the "Armed Truce" scenario. Power bargaining, at least from management's point of view, depends upon a realistic assessment of the union's power and a pragmatic but strong approach to bargaining based upon that assessment.<sup>63</sup>

These similar philosophies are easily seen as variations on the theme of pre-Act unbridled warfare fueled by blatant labor-management hostility. Conflict, however civilized by legislative constraint, could be curtailed only so much. For example, in the "Armed Truce" scenario, "the struggle for power goes on indefinitely. Wages, hours, and other rigidly construed employee-relations areas are dealt with as their issues arise, but the more crucial question of union security versus management rights, being insoluble in such an atmosphere, continually blocks more constructive dealings."<sup>64</sup> The Power Bargaining scenario presupposes a "highly tenuous" labor-management relationship which "always contains the danger of regression to [conflict or armed truce] when the

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61. See SLOANE AND WHITNEY, *supra* note 22, at 31-32.

62. *Id.* at 31.

63. *Id.* at 31-32.

64. *Id.* at 31.

power ratios change.”<sup>65</sup> Because the parties are left to resolve disputes at the bargaining table by themselves, based upon their individual bargaining power, “systematic inequalities in the contract terms will inevitably arise.”<sup>66</sup> “To be sure, it is a legal fiction to assume that union representation by itself puts employees on an equal plane with their employer.”<sup>67</sup>

Clearly, the Act does not delineate what tactics or bargaining weapons the parties may utilize in the bargaining process. Inequalities in bargaining strength are the result of the natural economic interplay of a capitalist marketplace. These inequalities manifest themselves at the bargaining table and may be interpreted as concomitants of a Congressional scheme for labor peace which contemplates only limited governmental interference. Therefore, the Act is quite protectionist in the area of employee organization, leaving the National Labor Relations Board and reviewing courts to balance employer and employee interests while ensuring the least amount of harm to each.<sup>68</sup> The balancing approach has been utilized with acute sensitivity to the inherent disparity in both the strength and positions of labor and management. This is attributable to the simple fact that the employees are economically dependent on the employer.<sup>69</sup> The resultant skewing of the law in favor of unions can be viewed as an attempt to carry out the letter and spirit of the Act by giving the employees as free an atmosphere as possible in which to make their choices concerning union representation.<sup>70</sup>

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65. *Id.* at 32.

66. Weiler, *Striking a New Balance*, *supra* note 6, at 382. Professor Weiler nevertheless argues that “however weak a union may be in relation to an employer, the organized unit invariably is stronger than the typical nonunion worker acting alone.” *Id.* at 384 (emphasis in the original).

67. *Id.* at 384.

68. *See, e.g.*, *NLRB v. Babcock & Wilcox*, 351 U.S. 105 (1956).

69. *See, e.g.*, *NLRB v. Gissel*, 395 U.S. 575 (1969) (employer’s communications with its employees must be assessed for illegal threats and coercive qualities “tak[ing] into account the economic dependence of the employees on their employer, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear.”); *NLRB v. Exchange Parts Co.*, 375 U.S. 405, 409 (1964) (limiting employer inducements during an organizing campaign as a “fist inside the velvet glove” which can initially give with the implication that what is given can as easily be taken away again).

70. *See Weiler, Striking a New Balance, supra* note 6, at 352. “Winning an NLRB-sponsored election gives the union no more than the right to sit across the bargaining table from the employer. Only after the union achieves a first contract will it be established within the plant and will its members truly be able to judge the value of collective bargaining in their day-to-day lives.” *Id.*

The early statutory interpretation by the National Labor Relations Board kept the employer lockout firmly in check, even while the strike, protected expressly in the Act, was given quite broad latitude.<sup>71</sup> Of course, those lockouts which were utilized solely in an effort to frustrate the statutory rights of employees to unionize were declared unlawful early on by the NLRB and the reviewing courts. These decisions remain firmly in place.<sup>72</sup> It was far more troublesome, however, to determine the validity of lockouts which were solely designed in some measure to preserve or enhance the bargaining position of the employer.

At first, the NLRB, and to some extent the reviewing courts, attempted to distinguish between lockouts which were used defensively and those used offensively. Where the employer locked out in response to its employees' preventing a foreman from entering the plant, taking such conduct as evidence of a reasonably anticipated work stoppage accompanied by violence;<sup>73</sup> actual intermittent work stoppages;<sup>74</sup> and potential economic loss due to spoilage of goods where a strike had been threatened,<sup>75</sup> the NLRB held the lockouts not to be violative of the Act. The purely defensive nature of these lockouts, at least as far as the Board was concerned, was the key to their legality. For example, the telling finding in *Duluth Bottling Association*<sup>76</sup> was that the "closing of the plants was not intended to interfere with or discourage union activity or to minimize the effectiveness of the Brewery Union's economic weapons, but was intended solely to protect the [employer's] property and was therefore not in violation of the Act."<sup>77</sup> This language forcefully suggests that the employer was not to be permitted a similar option of using bargaining force even to counter that utilized by the union.

If an employer decided to lock out in order to force its bar-

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71. 29 U.S.C. § 163 provides in pertinent part: "[n]othing in this Act . . . shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right." See also *National Woodwork Mfr's Ass'n v. NLRB*, 386 U.S. 612, 643 (1967).

72. See, e.g., *NLRB v. Somerset Classics, Inc.*, 193 F.2d 613 (2d Cir. 1952); *NLRB v. Wallick*, 198 F.2d 477 (3rd Cir. 1952); *Olin Indus., Winchester Repeating Arms Div. v. NLRB*, 191 F.2d 613 (5th Cir. 1951); *Pepsi-Cola Bottling Co. of Montgomery*, 72 N.L.R.B. 601 (1974); *Hobbs, Wall, and Co.*, 30 N.L.R.B. 1027 (1941).

73. *Link-Belt Co.*, 26 N.L.R.B. 227 (1940).

74. *International Shoe Co.*, 93 N.L.R.B. 907 (1951).

75. *Duluth Bottling Ass'n*, 48 N.L.R.B. 1335 (1943).

76. *Id.*

77. *Id.* at 1336 (emphasis added).

gaining position, especially where there had been no impasse and the union had given its assurance that it would not strike, such a lockout was considered offensive and a violation of sections 8(a)(3) and (1) of the Act.<sup>78</sup> As the Board noted in *Quaker State Oil Refining Corp.*,<sup>79</sup> its previous decisions had made it clear that:

absent special circumstances, an employer may not during negotiations either threaten to lock out or lock out [its] employees in aid of [its] bargaining position. Such conduct . . . presumptively infringes upon the collective-bargaining rights of employees in violation of Section 8(a)(1) and the lockout, with its consequent layoff, amounts to discrimination within the meaning of Section 8(a)(3).<sup>80</sup>

The Board essentially believed that when the employer initiated a work-stoppage which could just as easily have been initiated by the union with a strike, such conduct was inherently discriminatory because it resulted in a work-stoppage and *deprived the employees of their right to initiate it*, through a strike.

It is clear at this juncture that the Board did not view the strike as the corollary of the lockout. The objective of the Act was to make labor and management as equal as possible both at the bargaining table and on the way to it; the Board viewed the strike as "merely a compensating and possibly inadequate substitute by which the disparity of economic strength is sought to be reduced. Thus viewed, the lockout would be an aggressive, not a corrective, device."<sup>81</sup> Such a view misperceived the congressional intent and Congress's view of equality under the Act. If government was not meant to intervene in the actual bargaining process except to ensure that the parties bargained in good faith, then equality must

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78. *Quaker State Oil Refining Corp.*, 121 N.L.R.B. 334 (1958), *enforced*, 270 F.2d 40 (3d Cir. 1959), *cert. denied*, 361 U.S. 917 (1959). Section 8(a)(3) of the Act provides that "it shall be an unfair labor practice for an employer . . . by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . ." 29 U.S.C. § 158(a)(3) (1982). Section 8(a)(1) of the Act provides that "it shall be an unfair labor practice for an employer . . . to interfere with, restrain, or coerce employees in their exercise of the rights guaranteed in section 7 . . ." *Id.* § 158(a)(1).

79. 121 N.L.R.B. 334 (1958).

80. *Id.* at 337. *Accord* *Utah Plumbing & Heating Contractors Ass'n*, 126 N.L.R.B. 973 (1960), *enforced*, 294 F.2d 165 (10th Cir. 1961); *contra* *NLRB v. Dalton Brick & Tile Corp.*, 301 F.2d 886, 892 (5th Cir. 1962) ("we think it clear that the statutes do not support any such 'prima facie' or 'presumptive' invalidity to lockout when resorted to during bargaining negotiations.").

81. *Johannesen*, *supra* note 10, at 263. This may be all the more accurate, at least from the NLRB's point of view, because of the employer's ability to utilize strike replacements.

not have meant the absence of a disparity in bargaining power. Rather, equality under the Act must have meant the parties' right to sit equally empowered at the bargaining table to utilize all of the legal means at their disposal to make the best deal they could. Yet the Board in these early decisions sought to redress what it perceived as an imbalance in the parties' bargaining power by keeping a tight rein on the employer's ability to resort to economic self-help. Although this would necessarily have the effect of forcing the employer to the bargaining table by limiting its alternative options, the good faith requirements of the Act ostensibly ought to have served the same purpose.

The NLRB's response to the role of lockouts under the Act was indicative of the significant part which political, social, and economic considerations played in the evolutionary shaping of the nation's labor laws and policy. The lockout was a traditional employer weapon which most certainly antedated the Act, but was now to be constrained within the parameters of new legislation designed to increase the advantages of unionism. The policy which Congress hoped to implement by the Act's passage was left to the NLRB and the courts to shape and develop.<sup>82</sup> In this vein, the offensive-defensive dichotomy which the Board initially utilized soon became unworkable. Its flaws were nicely illustrated by the multi-employer scenario, a focal point of confusion and uncertainty for the Board as it tried to sort out the lockout problems raised in this context.

In a multi-employer bargaining scenario, a group of employers join together for unified strength in bargaining with the union or unions which represent their employees.<sup>83</sup> This arrangement lends itself to the union's utilization of the whipsaw strike tactic, a device whereby the union targets one of the employer group members and strikes it individually. After the target employer capitulates, the union then moves on to strike a second target employer, continuing until it has gained surrender from all of the employers in the group. At first blush, it would seem to be a purely defensive move for the non-struck employers to lock out their employees in order to entrench themselves against the inevitable movement of the strike against them; the only alternative would be to capitulate

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82. See Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 MINN. L. REV. 265, 291 (1978).

83. See, e.g., *Charles D. Bonanno Linen Service v. NLRB*, 454 U.S. 404 (1982).

to the union's demands or suffer being struck. On the other hand, a defensive lockout has many of the same characteristics as a purely offensive lockout which the Board had expressly disallowed. Thus, a lockout against employees who are not yet on strike creates economic pressure forcing them to accede to the employer's terms so that they may once again return to their jobs. Therefore, the lockout may be considered offensive because management, not the union, gains the advantages inherent in controlling the timing of the mass work stoppage. In the Board's view, such a lockout would simply "constitute[] a reprisal against protected activity [or even the threat of it] inconsistent with both the statutory protection of the right to strike embodied in section 13 of the Act and the statutory objective of reducing industrial warfare."<sup>84</sup> This would be so even where at least one of the objectives of the lockout is to preserve the multi-employer unit. The Board's reasoning was typified in the *Davis Furniture*<sup>85</sup> and the *Morand Brothers Beverage Co.*<sup>86</sup> cases. As the Board said in *Morand Brothers*:

In our opinion, the Act does not permit a discharge to reduce, by anticipatory action, the effectiveness of an expected strike by a labor organization. . . . Strike activity, actual or threatened, is concerted activity, and concerted activity does not cease to be protected merely because it is, or may be, effective, or because it subjects the employer to economic hardship.<sup>87</sup>

To allow an employer to lock out in order to protect itself against the effects of a whipsaw strike " 'would set a sweeping precedent for the conversion of any single employer's dispute into an association-wide or industry-wide dispute. An isolated skirmish would become a civil war.' "<sup>88</sup> The NLRB adhered to its original premise that the disparity in bargaining power between labor and manage-

84. Meltzer, *Single-Employer and Multi-Employer Lockouts Under the Taft-Hartley Act*, 24 U. CHI. L. REV. 70, 77 (1956) [hereinafter Meltzer]. See also Koretz, *Legality of the Lockout*, 4 SYRACUSE L. REV. 251 (1953) [hereinafter Koretz, *Legality of the Lockout*]; Koretz, *The Lockout Revisited*, 7 SYRACUSE L. REV. 263 (1956) [hereinafter Koretz, *Lockout Revisited*].

85. 94 N.L.R.B. 279 (1951), *enforcement denied and remanded sub nom. Leonard v. NLRB*, 197 F.2d 435 (9th Cir. 1952), *on remand sub nom. Davis Furniture Co.*, 100 N.L.R.B. 1016 (1952), *enforcement denied sub nom. Leonard v. NLRB*, 205 F.2d 355 (9th Cir. 1953).

86. 91 N.L.R.B. 409 (1950), *enforcement denied and remanded*, 190 F.2d 576 (7th Cir. 1951), *on remand*, 99 N.L.R.B. 1448 (1952), *enforced*, 204 F.2d 529 (7th Cir. 1953), *cert. denied*, 346 U.S. 909 (1953).

87. *Morand Bros. Beverage Co.*, 91 N.L.R.B. at 412.

88. *Id.* at 413 (quoting the brief of the General Counsel in support of the Trial Examiner's Intermediate Report).

ment was to be lessened through tight control of management's alternatives to the bargaining table. While the strike was considered nearly sacrosanct, the lockout was accorded very little tolerance because it was "destructive" of the right to strike. In other words, the lockout was perceived to increase the employer's bargaining power in total disproportion to that of the union, which the NLRB believed could not be countenanced by the Act.

Yet it had become increasingly difficult to ignore the pragmatic implications of the employer lockout, particularly in the rather sympathetic context of the whipsaw strike. After all, the employer's claim that a lockout in such a situation is taken in self-defense is a compelling one. As the United States Court of Appeals for the Seventh Circuit declared:

[The non-struck employers], we believe, could quite properly and realistically view the strike, as they did, as a strike which, though tactically against but one [employer], was, in the strategic sense, a strike against the entire membership of their Associations, aimed at compelling all of them ultimately to accept the contract terms demanded by the Union. It follows that they had a right to counter the strike's effectiveness by laying off, suspending or locking out their salesmen, who were members of the striking Union and as to whom there was not then in effect any collective bargaining agreement.<sup>89</sup>

It is not surprising that the courts unanimously denied enforcement to every Board order in which the Board held multi-employer bargaining lockouts as a response to strikes.<sup>90</sup> In taking the position that multi-employer lockouts are permissible in the

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89. *Morand Bros. Beverage Co. v. NLRB*, 190 F.2d 576, 582 (7th Cir. 1951). See Oberer, *supra* note 10, at 197-99. Professor Oberer argues that the offensive-defensive distinction does not work well for deciding the legality of lockouts; see also Meltzer, *supra* note 84, at 70.

90. See Oberer, *supra* note 10, at 200. Cf. *American Brake Shoe Co. v. NLRB*, 244 F.2d 489 (7th Cir. 1957) (deciding that a single employer may lock out in anticipation of a strike). See also *Betts Cadillac Olds, Inc.*, 96 N.L.R.B. 268 (1951) (upholding validity of lockout utilized in response to whipsaw strike on the grounds that the General Counsel failed to prove that lockout was reprisal for strike). The Board stated:

An employer is not prohibited from taking reasonable measures, including closing down his plant, where such measures are, under the circumstances, necessary for the avoidance of economic loss or business disruption attendant upon a strike. This right may, under some circumstances, embrace the curtailment of operations before the precise moment the strike has occurred. The pedestrian need not wait to be struck before leaping for the curb.

*Id.* at 286.

face of a whipsaw strike, the United States Court of Appeals for the Seventh Circuit declared, "[T]he lockout should be recognized for what it actually is, i.e., the employer's means of exerting economic pressure on the union, a *corollary of the union's right to strike*."<sup>91</sup> This was a rather extraordinary pronouncement, implying as it did the employer's prerogative to initiate a work stoppage on the same footing as the union, despite the resultant effects on the employees. Clearly it represented a radical departure from the NLRB's point of view. Nevertheless, this announcement seemed rather premature because the focus of permissible lockouts was still confined to those promulgated in ostensible self-defense of the multi-employer unit. Presumably, the validity of lockouts utilized solely in aid of an employer's bargaining position, particularly by a single employer, was still very much in doubt. Still, the Seventh Circuit's pronouncement showed at least some general willingness to accept the idea that an employer lockout could be a legitimate weapon, even if it did mean that the employer would thereby enjoy a disparate power advantage over the union.<sup>92</sup> Thus, the Board's attempts to balance the disparities in employer and union bargaining power by restricting the employer's use of economic self-help first began to crumble under the weight of the relatively unworkable offensive-defensive distinction.<sup>93</sup>

## 2. *The Buffalo Linen Decision*

In *Buffalo Linen Supply Company*,<sup>94</sup> the union and a multi-employer association comprised of eight linen supply businesses unsuccessfully bargained for a new collective agreement. After the

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91. *Morand Bros. Beverage Co. v. NLRB*, 190 F.2d 576, 582 (7th Cir. 1951) (emphasis added). *But see Leonard v. NLRB*, 197 F.2d 435, 442 (9th Cir. 1952) (express refusal to pass on the question).

92. Despite its very narrow view of the lockout, the Board itself professed mixed feelings on the question, but had never pronounced the lockout the corollary of the strike as had the Seventh Circuit. *Compare Davis Furniture Co.*, 100 N.L.R.B. 1016, 1018 (1952) with *Betts Cadillac Olds, Inc.*, 96 N.L.R.B. 268, 285 (1951). *See also Denbo, Is the Lockout the Corollary of the Strike*, 23 LAB. L.J. 659 (1972); Maddox, *Lockouts: Fresh Perspectives on an Old Controversy*, 22 BUS. LAW 1095 (1965).

93. The Board had in fact developed factors that aided in deciding whether a lockout was offensive or defensive. These factors were articulated in *Betts Cadillac Olds* and included "[t]he nature of the measures taken, the objective, the timing, the reality of the strike threat, the nature and extent of the anticipated description, and the degree of resultant restriction on the effectiveness of the concerted activity . . ." *Betts Cadillac Olds, Inc.*, 96 N.L.R.B. 268, 286 (1951).

94. 109 N.L.R.B. 447 (1954), *enforcement denied sub nom. Truck Drivers Local Union No. 449 v. NLRB*, 231 F.2d 110 (2d Cir. 1956), *rev'd*, 353 U.S. 87 (1957).

parties reached impasse, the union began a whipsaw offensive, striking one of the eight association members. The other employer members notified the union that, as a result of the strike, they would lay off their employees until the strike against the eighth member ended. In the meantime, negotiations continued; an agreement was finally executed, whereupon the strike and the lockout terminated.

The NLRB, with one member dissenting, dismissed the General Counsel's complaint that the employers had engaged in unlawful conduct by locking out their employees. Reversing the Trial Examiner, as well as years of precedent, the Board declared:

[T]he strike against the one employer necessarily carried with it an implied threat of future strike action against any or all of the other members of the Association. For, the Union's action represents a similar technique of exerting economic pressure to atomize the employer solidarity which is the fundamental aim of the multiemployer bargaining relationship. The calculated purpose of maintaining a strike against one employer and threatening to strike others in the employer group at future times is to cause successive and individual employer capitulations. Therefore, and in the absence of any independent evidence of antiunion motivation, we find that the [employers'] action in shutting their plants until termination of the strike at Frontier was defensive and privileged in nature, rather than retaliatory and unlawful.<sup>95</sup>

The Board thus made the initial inroad upon its traditional view that lockouts, except in the most extreme circumstances, were *per se* unlawful. Nevertheless, the Board still refused to declare whether the lockout was the corollary of the strike.<sup>96</sup> This indicated the Board's reluctance to release its previously tight rein on the lockout beyond the extent required by *Buffalo Linen* situations. In dissent, Member Murdock preferred to remain with the *Davis Furniture* and *Morand Brothers* line of reasoning. Viewing the lockout as an attempt simply to break the strike, he believed that it was *prima facie* discriminatory as retaliation for protected activity.<sup>97</sup> Thus, he believed that in light of the majority's opinion an employer need only join a multi-employer association in order

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95. *Buffalo Linen Supply Co.*, 109 N.L.R.B. at 448.

96. *Id.*

97. *Id.* at 449-50 (Murdock, dissenting). Such conduct would be inherently destructive to employee rights. See *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26 (1967); *NLRB v. Erie Resistor Corp.*, 373 U.S. 221 (1963).

to defeat the employees' rights to engage in protected activity.<sup>98</sup> Drawing from this the inference that the majority did in fact view the lockout as the corollary of the strike, Member Murdock asserted that such a decision was for Congress, not the Board, to make.<sup>99</sup>

The United States Court of Appeals for the Second Circuit, with Judge Waterman dissenting, refused to enforce the Board's order and instead remanded it.<sup>100</sup> The court's rationale centered around the idea that multi-employer bargaining had never received express congressional approval; accordingly, if based on the theory of multi-employer bargaining there was to be such a drastic incursion as a lockout on the employees' right to strike, which did enjoy congressional approval, it ought to come from Congress. The court declared:

We feel the Board's action in restricting employees in the exercise of rights which Congress has expressly protected, merely to effectuate a policy as to which Congress has, as yet, expressed no clear opinion, constitutes an abuse of the Board's legitimate authority under the Act and a usurpation of the power of Congress. Neither the Board nor the courts may make so fundamental a change in the existing law as that which could result from the Board's decision.<sup>101</sup>

In so deciding, the Second Circuit implicitly adopted the Board's traditional view that the lockout constituted an inherently destructive deprivation of the employees' right to strike because it essentially deprived them of it. The United States Supreme Court disagreed.<sup>102</sup> Embracing the idea that Congress, in promulgating the Act, had not outlawed the lockout *per se*, the Court reasoned:

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98. *Id.* at 452 (Murdock, dissenting). Indeed, one glaring inconsistency perceived in the *Buffalo Linen* analysis is that many employers could engage in lawful lockouts in a bargaining situation whereas a single employer could not. See Johannesen *supra* note 10, at 268; Meltzer, *Lockouts Under the LMRA: New Shadows on an Old Terrain*, 28 U. CHI. L. REV. 614, 620-23 (1961).

99. *Buffalo Linen Supply Co.*, 109 N.L.R.B. at 452 (Murdock, dissenting). If the majority had in fact accepted the proposition that the lockout was the corollary of the strike, the Board would have abandoned its attempts to create parity between the parties in accordance with the Act's perceived purpose and accepted the inherent disparity in their bargaining power as a natural fact of life in the bargaining process which is exactly what Congress intended.

100. *Truck Drivers Local No. 449 v. NLRB*, 231 F.2d 110 (2d Cir. 1956).

101. *Id.* at 118. For an in-depth discussion of the court's opinion, see Koretz, *The Lockout Revisited*, *supra* note 84.

102. *NLRB v. Truck Drivers Local Union No. 449*, 353 U.S. 87 (1957) (*Buffalo Linen*).

Although the Act protects the right of the employees to strike in support of their demands, this protection is not so absolute as to deny self-help by employers when legitimate interests of employees and employers collide. . . . The ultimate problem is the balancing of the conflicting legitimate interests. The function of striking that balance to effectuate national labor policy is often a difficult and delicate responsibility, which the Congress committed primarily to the National Labor Relations Board, subject to limited judicial review.<sup>103</sup>

The Supreme Court rejected the traditional Board view that the lockout was inherently destructive because of its pre-emptive effect on the strike. Instead, the Court opted for the traditional balancing test routinely utilized in organizational rights cases.<sup>104</sup> The balance here fell on the side of permitting employers to utilize self-help for the purpose of preserving the integrity of their multi-employer bargaining unit.

In so holding, the Court was extremely careful to emphasize the narrowness of its decision. Thus, it characterized "[t]he narrow question to be decided [as] whether a temporary lockout may lawfully be used as a defense to a union strike tactic which threatens the destruction of the employer's interest in bargaining on a group basis."<sup>105</sup> Since the Court confined the propriety of a lockout to this narrow situation, it, like the Board, refused to pass on the propriety of lockouts generally or on the ultimate question of whether the lockout was the corollary of the strike.<sup>106</sup>

*Buffalo Linen* thus signified the first imprimatur of legitimacy placed upon a potentially very potent employer weapon, one which had been previously treated by the NLRB, arbiter of national labor policy, as a pariah, except in the narrowest of cases. Although confined to its facts, *Buffalo Linen* nevertheless recognized that lockouts were not *per se* violative of employee rights even though they did, in a literal sense, interfere with them. *Buffalo Linen* accordingly provided the first indication that the balance of bargaining power was shifting, and factors which contributed to an inherent disparity in that balance could no longer signify a *per se* violation of the Act. This idea is underscored by the fact that, al-

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103. *Id.* at 96 (footnotes omitted).

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

105. *NLRB v. Truck Drivers Local Union No. 449*, 353 U.S. 87, 93 (1957) (*Buffalo Linen*).

106. *Id.* at 93 n.19.

though the lockout in *Buffalo Linen* was couched in defensive terms, it still has some apparent viability as an offensive weapon. Such a lockout is, after all, wielded against employees who are not yet on strike, and are accordingly subject to the employer's economic pressure without enjoying either the contemporaneous, or prior, exertion of their own.<sup>107</sup> The employer gains the advantage of timing and all of its ramifications, such as the ability to control its competitive position relative to the marketplace as well as economic strength relative to the union.<sup>108</sup>

Nevertheless, the holding is far too restrictive to lend support to Member Murdock's bald assertion that the Board's holding in *Buffalo Linen* necessarily made the lockout the equal of the strike.<sup>109</sup> First, conspicuously absent in *Buffalo Linen* is the applicability of the lockout to single employers. Second, even in the *Buffalo Linen* situation itself, the employers who have locked out do not enjoy a totally independent advantage of timing; their action is still responsive to the union's initial strike of one multi-employer group member. Thus, the actual lockout, although precedent to a strike against the employer's lockout is still dependent upon the union's decision to strike the one group member, a decision over which the union has full control. Accordingly, although *Buffalo Linen* has some characteristics of an affirmative weapon which do serve to enhance the employer's bargaining power, it is still basically reactive and thus defensive in nature.<sup>110</sup>

Following *Buffalo Linen*, the Board continued to guard jealously against any expansion of the narrow protection now afforded for lockouts. Thus, the NLRB refused to permit a *Buffalo Linen* lockout where there was no evidence of a formal, integrated multi-employer bargaining unit.<sup>111</sup> And in *Great Falls Employers Coun-*

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107. *Id.*

108. See *supra* text accompanying notes 28-31.

109. Compare Brundage, *The Lockout and Multi-Employer Bargaining*, 14 LAB. L.J. 976, 979-80 (1963) with Koretz, *The Multi-Employer Lockout Vindicated*, 9 SYRACUSE L. REV. 40, 43 (1958). But see Denbo, *Is The Lockout the Corollary of the Strike?*, 14 LAB. L.J. 406-08 (1963).

110. For an in-depth analysis of *Buffalo Linen*, see Koretz, *The Multi-Employer Lockout Vindicated*, 9 SYRACUSE L. REV. 40 (1958); Oberer, *supra* note 10, at 200-02; Baird, *Lockout Law: The Supreme Court and The NLRB*, 38 GEO. WASH. L. REV. 396 (1969-1970).

111. See David Friedland Painting Co., 158 N.L.R.B. 571, 578 (1966), *enforced*, 377 F.2d 983 (3d Cir. 1967) (lockout of striking union's sister local's employees with whom employer had no bargaining dispute simply to advance cause of struck employer). See also Evening News Ass'n, 145 N.L.R.B. 996 (1964), *enforcement denied*, 346 F.2d 527 (6th Cir. 1965). Cf. Weyerhaeuser Co., 166 N.L.R.B. 299 (1967), *enforced sub nom.* Western States

*cil, Inc.*,<sup>112</sup> the Board held that what had begun as a lawful lockout under *Buffalo Linen* became unlawful due to the subsequent actions of the employer. The union had anticipated the lockout and instructed its members that if the lockout did in fact occur, they should register with the state to receive unemployment compensation.<sup>113</sup> To prevent the employees from qualifying for unemployment benefits, the employer recalled them to work for minimal periods sufficient only to defeat their entitlement under the state unemployment compensation statute. These intermittent lockouts continued until a new contract was executed.<sup>114</sup>

The NLRB concluded, by a 3-2 majority, that the repeated lockouts and recalls of employees constituted "a manipulation of tenure and terms of employment which infringed upon the collective bargaining rights of these employees and tended to discourage support of the Union and concerted activity for mutual aid or protection . . . ."<sup>115</sup> Denying enforcement, the Ninth Circuit relied on the absence of employer hostility to the union<sup>116</sup> and the realization that "collective bargaining is a brute contest of economic power somewhat masked by polite manners and voluminous statistics"<sup>117</sup> to reason that the Board had no business interjecting itself into the economic tug-of-war being played out by the parties.<sup>118</sup> Citing *Buffalo Linen*, and noting that employers were permitted to resort to a lockout, the court concluded that in this case, the employer utilized its lockout simply "to see that the union members who were proposing to pick them off one at a time by the 'whip-saw' tactics were denied the opportunity to collect wages while they were doing this."<sup>119</sup> In declaring "that this economic weapon could not be made fully effective in the manner the [employer] undertook to do,"<sup>120</sup> according to the court, the Board was intruding "into a new area of regulation which Congress had not committed

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Regional Council v. NLRB, 398 F.2d 770 (D.C. Cir. 1968). These decisions were affected significantly by the later cases. See, e.g., *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300 (1965); *NLRB v. Brown Food Store*, 380 U.S. 278 (1965).

112. 123 N.L.R.B. 974 (1960), *enforcement denied*, 277 F.2d 772 (9th Cir. 1960).

113. 277 F.2d 772, 774 (9th Cir. 1960).

114. *Id.*

115. 123 N.L.R.B. at 981.

116. 277 F.2d 772, 776 (9th Cir. 1960).

117. *Id.* (quoting *NLRB v. Insurance Agents' Int'l Union*, 361 U.S. 477, 489 (1960)).

118. *Id.* at 777.

119. *Id.*

120. *Id.*

to it."<sup>121</sup>

The Ninth Circuit's decision in *Great Falls* reflects the recognition that the lockout represents a cornerstone of legitimate economic strength to be wielded independently of regulation once the requisite of good faith bargaining has been met. Thus, while the Board showed remarkable reluctance to expand the use of lockouts, the inroads made by *Buffalo Linen* were enough to spark sweeping changes by reviewing courts, if not by the Board itself.

### 3. *The Revolution of American Ship Building and Brown Food*

Following *Buffalo Linen*, one sweeping question regarding the multi-employer lockout remained conspicuously open: could the locking out employers remain operational by hiring replacements for their locked out employees? Or, would they have to remain shut down and wait out the union in a true test of economic strength? As reluctant as the NLRB was to expand *Buffalo Linen*, it is not difficult to imagine how troubled it was at the idea of utilizing replacements for locked out employees. If the NLRB initially viewed the idea of a defensive lockout as unlawful interference with the right to strike, clearly the idea of the employer's continued operation with replacements during such a lockout would be particularly bothersome. This would be especially true in the purely socioeconomic scheme of things, where the lockout at best envisioned a contest as to who could hold out the longest,<sup>122</sup> the employer with no production or the employees with no work. If the NLRB was correct in classifying the lockout as *per se* violative of employee rights because of the disparity in bargaining strength it creates, then allowing an employer to lock out *while continuing to operate* with replacements would surely upset the entire scheme of the Act by tipping the scales even more heavily in favor of the employer.

On the other hand, it was a well established precept that employers whose employees were on strike had the right to continue

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121. *Id.*

122. It is, however, difficult to imagine that the *Buffalo Linen* lockout could seriously be equated with the right to strike while at the same time denying a concomitant right of the employers to remain operational. This is so because the locked out employees have alternatives to remaining idle: for example, they may seek employment elsewhere; they may initiate consumer boycotts of the struck employer or of the struck employer's products; and they may engender sympathy strikes at other of the struck employer's plants. See PERRY, KRAMER AND SCHNEIDER, *supra* note 27, at 116-17.

operating by replacing them.<sup>123</sup> How then, if *Buffalo Linen* was correct, could there be a justifiable policy of allowing a struck employer to replace its striking employees while not according the same right to a locking out employer, since the defensive multi-employer lockout was indeed a legitimate economic weapon? In answering this question, the Board would necessarily have to address the implications of how broad the lockout was in relation to the strike.

The NLRB, when faced with the issue for the first time, found the employers' temporary replacement of their locked out employees unlawful. In *Brown Food*,<sup>124</sup> a multi-employer bargaining unit of retail food stores opened negotiations for a new collective bargaining agreement with the union representing the food stores' employees. The parties reached an accord on all subjects except the union's request for retroactive wage increases and their effective date.<sup>125</sup> The union authorized a strike in support of its bargaining demands, and subsequently struck Food Jet, one of the multi-employer members. The remaining four employers immediately locked out their employees, explaining that they could come back to work when the strike ended.<sup>126</sup> Food Jet replaced its striking employees.<sup>127</sup> The other four employers also continued to operate, utilizing "supervisory personnel, relatives of management and new employees hired on a temporary basis."<sup>128</sup> None of the employers actually ceased operations during the lockout.<sup>129</sup>

The union filed charges with the NLRB alleging that the employers' actions violated sections 8(a)(3) and (1) of the Act. The Board, affirming the Trial Examiner, agreed.

The Board began with a reiteration of the *Buffalo Linen* principle, enunciated by the Supreme Court, that these matters involved a balancing of the "conflicting legitimate interests [of employees and employers]" and that this task has been "committed

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123. See *NLRB v. MacKay Radio & Tel. Co.*, 304 U.S. 333 (1938). See also *supra* note 32 and accompanying text.

124. 137 N.L.R.B. 73 (1962), *enforcement denied sub nom.* *NLRB v. Brown Food Store*, 319 F.2d 7 (10th Cir. 1963), *aff'd*, 380 U.S. 278 (1965).

125. 137 N.L.R.B. 73, 74 (1962).

126. *Id.* at 74.

127. *Id.*

128. *Id.* Each new employee was told that his or her employment was only for the duration of the strike. *Id.* at n.2.

129. *Id.*

primarily to the Board."<sup>130</sup> In seeking to strike that balance, the NLRB then examined the situation in *Brown Food* in light of *Buffalo Linen*, with the starting premise that "[a] lockout . . . is a drastic form of discrimination . . ."<sup>131</sup> From that viewpoint, the Board distinguished *Buffalo Linen* from the situation in *Brown Food* as justifiable discrimination "deemed appropriate to preserve the established [multi-employer bargaining] unit."<sup>132</sup> But the Board held that the discrimination represented by the lockout and continued operation in *Brown Food* far exceeded justifiable limits because, unlike *Buffalo Linen*, the employers did not shut down. Thus, their continued operation served to remove their conduct from the narrowly circumscribed defensive posture of *Buffalo Linen* "since no reason appears why they could not have continued to operate with their own employees during the strike"<sup>133</sup> instead of utilizing replacements. The employers' utilization of temporary replacements to continue operating was, by inference, "solely because [the employees] were engaging in protected concerted activity, i.e., striking against Food Jet."<sup>134</sup> Since this discrimination exceeded the justifiable limitations of *Buffalo Linen*, it was unlawful.<sup>135</sup>

The Board thus viewed *Buffalo Linen* as solely a one-way proposition: if the struck employer did not continue to operate, the other employers were permitted to discontinue operating as well in an effort to defend the solidarity of their unit. The result was ideally the proverbial economic battle of which side could hold out the longest. But if the struck employer continued to operate with temporary replacements, the others no longer *needed* to lock out in order to preserve their unit because all members were operational;

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130. *Brown Food Store*, 137 N.L.R.B. 73, 75 (1962) (quoting *NLRB v. Truck Drivers Local Union No. 449*, 353 U.S. 87, 96 (*Buffalo Linen*)).

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.* at 75-76.

135. The Board narrowly construed the *Buffalo Linen* type of lockout as necessary to: prevent unfair advantage being taken of the members of an employer unit. If the union could successfully strike one at a time, the other members of the employer unit would in ordinary circumstances continue operating to the severe economic damage of the struck members, and each in turn could be driven to the wall in the "whipsaw." For this reason, if one member is shut down by a strike, the others may also shut down, but they are not *required* to do so. If the struck member operates through replacements, no economic necessity exists for the other members shutting down.

*Id.* at 76.

no economic harm was thus imminent to the struck employer. Accordingly, to permit the other members to lock out *and* keep operating with replacements would put the union at a mutually exclusive economic disadvantage because its members were not working but the employers were. The economic contest of who could hold out the longest would be completely unilateral, and the right to strike would be effectively defeated. The Board found this to be unjustifiable discrimination which by its very nature carried the inference of unlawfulness.<sup>136</sup> *Brown Food* reflected the Board's continued hostility to the lockout, characterized by its persistent reluctance to extend *Buffalo Linen* beyond narrowly circumscribed limits. The Board appeared to adopt somewhat inconsistent positions: a *Buffalo Linen* type lockout was acceptable even though it necessarily affected the employees' rights, yet to replace the locked out employees made the lockout unlawful even though the effect on the locked out employees was unchanged. In the former case, the Board seemed to focus on the employers' motive in assessing the propriety of the lockout; in the latter, it seemed to focus on the effect of the lockout on the balance of power. The majority conspicuously ignored the struck employer's right to replace its striking employees, and the effect that it would have on the locking out employers who were exercising their right to preserve the integrity of their bargaining unit.

Members Rodgers and Fanning noted this inconsistency in their dissent. If the initial lockout was lawful under *Buffalo Linen*, the dissenters did not see how temporarily replacing the locked out employees so affected their employment to the point of being *per se* unlawful. Furthermore, the dissenters could not reconcile the fact that Food Jet, as a struck employer, could lawfully replace its employees while the other four employers could not.<sup>137</sup> Such a disparity unfairly subjected the non-struck employers to competitive disadvantage while the struck employer could emerge relatively unscathed. The non-struck employers, according to the majority, "must either wait to be picked off one at a time by the 'whipsawing' union, or close down completely and cease operating, contrary to their rights under [existing law]."<sup>138</sup> If this were the case, con-

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136. *Id.* at 75 (quoting *Radio Officers' Union v. NLRB*, 347 U.S. 17, 45 (1954)). This was consistent with the Board's traditional view that lockouts were *per se* violative of the Act because of their effect on employee rights.

137. *Id.* at 77 (Rodgers and Fanning, dissenting).

138. *Id.* at 78.

cluded the dissent, then the protection afforded employers in the *Buffalo Linen* lockout was “largely illusory.”<sup>139</sup> Indeed, the dissent suggested that the majority’s finding of discriminatory conduct appeared to represent its quarrel with the Supreme Court’s holding in *Buffalo Linen* rather than with the employer’s actions in *Brown Food*.<sup>140</sup>

The United States Court of Appeals for the Tenth Circuit refused to enforce the Board’s order.<sup>141</sup> Rather than side-step the relationship between the right of a struck employer to replace its striking workers and the use of temporary replacements by locking out employers as the Board majority had done, the court reconciled these distinct yet similar rights to use replacements in light of the *Buffalo Linen* right to lock out. Thus, the court stated:

The impact of the Board’s decisions is such that a denial of a basic right by indirection is inherent in it if unity of the multi-employer group is to be maintained. After the initiation of a whipsaw strike, the struck employer may remain shut down, the other members of the group may lock out, and the unity of interest is thus maintained. But the struck employer is denied his right of replacement and the whipsaw tactic enjoys a privileged advantage. If, however, 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 again enjoys an almost inescapable prospect of success. Such was not the intent of *Buffalo Linen*.<sup>142</sup>

The Board’s decision, in the court’s view, failed to account for “the existence of the overriding business purpose”<sup>143</sup>—the preservation of the multi-employer unit—which could properly outweigh the legitimate interests of the union. The court found that the Board’s decision essentially “denie[d] the privilege of lockout.”<sup>144</sup> In the end, the purpose of preserving the multi-employer unit would fail, because the union would hold the ultimate power to determine which employers could continue operating and which

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139. *Id.*

140. *Id.* at 78 n.10.

141. *NLRB v. Brown Food Store*, 319 F.2d 7 (10th Cir. 1963), *aff’d*, 380 U.S. 278 (1965).

142. *Id.* at 11.

143. *Id.*

144. *Id.*

could not simply by controlling the choice of strike targets.<sup>145</sup>

The Supreme Court agreed. Acknowledging that balancing the conflicting interests of the union and management was in the first instance for the Board to do, the Court nevertheless held that the Board had struck that balance incorrectly here. Hence, the Court found that the employers' continuation of operations with temporary replacements was "all part and parcel of [their] defensive measure to preserve the multiemployer group in the face of the whipsaw strike."<sup>146</sup> This was so because Food Jet, the struck employer, properly and appropriately replaced its striking employees.<sup>147</sup> If the remaining employers of the group, in defense of their collective integrity, locked out and shut down, Food Jet, which remained open and operating, would gain an unfair competitive edge. Therefore, as the Court found:

Faced with the prospect of a loss of patronage to Food Jet, it is logical that [the employers] should have been concerned that one or more of their number might bolt the group and come to terms with the Local, thus destroying the common front essential to multiemployer bargaining.<sup>148</sup>

Although it was indeed true that the employers' act of locking out their employees and then continuing to operate with temporary replacements did have a discriminatory impact on the employees by tending to discourage union membership, the discriminatory impact, like that in *Buffalo Linen*, was outweighed by the legitimate business interests of the employers.<sup>149</sup> Any discriminatory impact thus derived, not from anti-union animus on the part of the employers, but rather from the pressure placed by the employers upon the union's whipsaw strike. The Court stated that such an impact reflected the union's inability to successfully wield the whipsaw weapon, and in fact was "no different from those [effects] that result from the legitimate use of any economic weapon by an

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145. *Id.* The Court did add the caveat that locked out employees did not necessarily share the same legal status as strikers, and that the Board still had primary responsibility for evaluating such cases depending on their particular circumstances. It stated that it was holding, in this particular case, that the Board erred in its interpretation of *Buffalo Linen*. *Id.* Chief Judge Murray dissented, asserting that the Board's determinations were "within the ambit of policy administration" and therefore entitled to deference. *Id.* at 12 (Murray, J., dissenting).

146. *NLRB v. Brown Food Store*, 380 U.S. 278, 284 (1965).

147. *Id.*

148. *Id.*

149. *Id.* at 286, 288.

employer."<sup>150</sup>

The Court again admonished the Board that it was not to be the referee in legitimate economic contests between employees and employers. The issue phrased by the Court was "not whether parity is achieved between struck and nonstruck employers, but rather, whether the nonstruck employers' actions are necessary to counteract the whipsaw effects of the strike and to preserve the employer bargaining unit."<sup>151</sup> Thus, the simple fact of some negative effect on the strike action itself would not be sufficient to warrant the inference of unlawful conduct. Employers would be permitted to take legitimate steps necessary for the preservation of their bargaining unit, and the union would have to stand or fall on its own relative strength if it chose to whipsaw.

Nor was there independent evidence of anti-union animus in this case. As the Court found, the employers were forced to act both to save their multi-employer group and their stock of perishable produce.<sup>152</sup> Moreover, the replacements whom the employers hired were simply temporary; even Food Jet as the struck employer did not exercise its legitimate right to permanently replace the striking workers. Accordingly, the invasive effect on the employees' rights were minimal at best when compared with the employer's legitimate interests achieved through the use of temporary replacements.<sup>153</sup>

Justice White disagreed in a separate dissent. He felt that the Court had overstepped its bounds of review. He thought that the Board's order was well reasoned and, as an expression of the body charged with the interpretation of the Act in light of the broad public policy which it encompasses, should have been affirmed. As an initial matter, Justice White thought that the Court erred in its broad interpretation attributed to *Buffalo Linen*:

The Court makes irrelevant the consideration that justified the lockout in *Buffalo Linen*—the effect of the single employer strike on the unit—on the faulty premise that *Buffalo Linen* established the nonstruck members' right to lock out. Neither the Board nor this Court said the right to lock out

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150. *Id.* at 286.

151. *Id.* at 293-94.

152. *Id.* at 290.

153. *Id.*

ineluctably follows from a single employer strike.<sup>154</sup>

Justice White further observed that if there was a disparity of economic advantage as between the struck and non-struck employers, it was caused, not by the union's whipsawing as the Court had stated, but rather by the unilateral action of the struck employer in replacing its striking employees. Recognizing that the struck employer clearly has the right to do this, he nevertheless did not agree that the right of the other employers to hire replacements was automatically triggered as well. If that were the case, then blatant discrimination against union members, simply because they were union members, would be permissible. The Court's pronouncement that temporary replacements are nothing more than the logical concomitant of preserving the integrity of the multi-employer unit, in Justice White's view:

ignores the fundamental rule that an employer may not displace union members with nonunion members solely on account of their union membership, the prototype of discrimination under [section] 8(a)(3) . . . and may not maintain operations and refuse to retain or hire nonstriking union members, notwithstanding that most of the union members and most of the workers at that very plant are on strike.<sup>155</sup>

In other words, the struck employer may continue operations if it wishes. But if it does, it may not prefer employees who are not affiliated with the union simply by virtue of the fact of their non-affiliation. This, of course, would hold true for the non-struck employers as well. Thus, if the union employees were willing to work, the non-struck employers may not refuse them work in preference for non-union workers simply by virtue of the fact that they are non-union.<sup>156</sup>

Nonetheless, the majority's holding in *Brown Food* made it clear that the preservation of the multi-employer bargaining unit was a legitimate employer interest and could be the basis for conduct that would otherwise be considered violative of the Act. Further, the Court made it clear that the lockout in such instances was not a hollow right. Rather, it carried with it the ability to take any supportive measures necessary to achieve the goal of group preservation as long as the total effect did not have the result of infring-

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154. *Id.* at 296 (White, J., dissenting).

155. *Id.* at 297.

156. *Id.*

ing upon the employees' rights to an extent which outweighed the employers' otherwise legitimate interests. With *Brown Food*, it became clear that the use of temporary replacements in the *Buffalo Linen* setting, did not, without more, carry with it that kind of discriminatory effect. The same, however, did not necessarily hold true as to the use of *permanent* replacements: the Court, in fact, specifically reserved that question.<sup>157</sup> On the same day that the Supreme Court decided *Brown Food*, it also effectively scuttled the NLRB's long held view that the lockout, which was purely offensive in character and utilized solely for the purpose of aiding the employer's bargaining position, was *per se* unlawful.<sup>158</sup>

In *American Ship Building*,<sup>159</sup> a single employer operated a ship repair and manufacture business in and around the Great Lakes area. During a nine year bargaining relationship the employer and the unions had negotiated five different collective bargaining agreements, each agreement having been preceded by a strike.<sup>160</sup>

When the current collective bargaining agreement was about to expire, the unions notified the company that they wished to open negotiations. As negotiations proceeded, the parties were unable to reach agreement on certain key issues. The unions then proposed to extend the old contract for six months, including the no-strike clause. The company refused this offer because such an extension would mean that the contract would expire during its busy season. The deadlock continued until the day the contract was due to expire. The unions again requested an extension of the contract. The company again refused, but finally agreed to extend it just long enough for the unions to take the company's latest proposal back to the members for a vote. The company asked the unions if they intended to strike the following day. The unions replied that they did not intend to strike.<sup>161</sup>

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157. *Id.* at 292 n.6. The *Brown Food* case has been the subject of extensive commentary. See, e.g., Baird, *Lockout Law: The Supreme Court and the NLRB*, 38 GEO. WASH. L. REV. 396 (1969-70); Brundage, *The Lockout and Multi-Employer Bargaining*, 14 LAB. L.J. 976 (1963). Note, *Interest-Balancing and the Use of Economic Weapons in Labor Disputes—A New Look at Management's Arsenal*, 20 RUTGERS L. REV. 102 (1965).

158. See *supra* note 80 and accompanying text.

159. 142 N.L.R.B. 1362 (1963), *enforced sub nom.* Local 374, Int'l Bhd. of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers, and Helpers, AFL-CIO v. NLRB, 331 F.2d 839 (D.C. Cir. 1964), *rev'd sub nom.* American Ship Bldg. Co. v. NLRB, 380 U.S. 300 (1965).

160. 142 N.L.R.B. at 1373 n.3.

161. *Id.* at 1373-74.

The unions' membership rejected the company's proposal. The company again asked the unions whether they intended to strike, and the unions once more replied that they did not.<sup>162</sup>

Subsequently, the parties met again with no progress. The company decided to shut down and lay off its employees. Only some of the employees remained at work; in the Toledo yard, only two employees remained as a skeleton crew, and in Lorain, Ohio, the employees were kept only for the purpose of finishing up a big project that had already begun. The Chicago yard was totally shut down, and the Buffalo employees were laid off gradually as various projects were completed.<sup>163</sup> Following the shutdown, the parties resumed contract negotiations and finally reached accord.<sup>164</sup>

The unions filed charges with the NLRB, claiming that the company had violated sections 8(a)(1), (3), and (5)<sup>165</sup> by locking out its employees "for the purpose of coercing them and the Unions to abandon the Union's [sic] contract demands and to accept instead those terms offered by the Company."<sup>166</sup> The company maintained that the layoffs were in response to a potential strike calculated to occur during its peak season when it would be busy with work, and that at any rate, no work was available for the employees as customers, presumably fearing a strike, were refusing to send in work.<sup>167</sup>

The Trial Examiner initially found that, as of the time of the lockout, the parties had reached an impasse in their negotiations.<sup>168</sup> He further found that the company had good reason, given the past negotiating history between it and the unions, to anticipate a strike "at any time."<sup>169</sup> In addition, the Trial Examiner concluded that lack of work played a part in the company's decision to lock out.<sup>170</sup> Thus, although the lockout was, in part, "concededly . . . for the purpose of putting pressure on employees to refrain

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162. *Id.* at 1374.

163. *Id.*

164. *Id.* at 1374-75.

165. 29 U.S.C. § 158(a)(5) (section 8(a)(5) of the Act) makes it an unfair labor practice for an employer to refuse to bargain with its employees' representatives.

166. 142 N.L.R.B. at 1375.

167. *Id.* at 1374-75.

168. *Id.* at 1380. The question of the propriety of a pre-impasse lockout was never raised in this case.

169. *Id.* at 1381.

170. *Id.* at 1382.

from bargaining as they chose,"<sup>171</sup> the Trial Examiner nevertheless concluded that the company had not violated the Act. Rather, he concluded:

The case at bar falls somewhere within the principles found in a line of cases where an employer has been found to have taken certain "defensive actions" during bargaining. It is well recognized that although employees have the right to strike, employers may, in certain circumstances, take various defensive actions to protect their businesses against loss or inconvenience to themselves or their customers.

. . . .

I conclude, on the basis of all factors involved, that [the company] was economically justified and motivated in laying off its employees when it did, and that the fact that its judgment was partially colored by its intention to break the impasse which existed is immaterial in the peculiar and special circumstances of this case.<sup>172</sup>

The Board reversed the Trial Examiner.<sup>173</sup> It found that the company had not been faced with a real strike threat, and that, on the contrary, the unions had "made every effort to convey to [the company] their intention not to strike . . . ."<sup>174</sup> Moreover, the Board also found that in assuring the company that if a strike were called it would complete any work brought into the company's yards and by its requests that the current contract—with the no-strike clause—be extended, the unions had provided the company with no legitimate defensive reasons for the lockout.<sup>175</sup> Accordingly, the Board found that, by locking out its employees, the employer had violated sections 8(a)(3) and (1) of the Act.<sup>176</sup> In doing so, the Board held consistently with its traditional view that bargaining lockouts were *per se* violative of the Act simply by virtue of the fact that they had a deleterious effect on the union's bargaining power by affecting its right to strike.

Chairman McCulloch and Member Rodgers dissented. They observed that no anti-union animus or any desire to avoid bargain-

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171. *Id.* at 1383.

172. *Id.* at 1382-83.

173. *Id.* at 1364-65.

174. *Id.* at 1364.

175. *Id.*

176. *Id.* at 1365.

ing with the unions motivated the company's lockout.<sup>177</sup> They further agreed with the Trial Examiner that the company had good reason to fear a strike during its peak season, based on the history of negotiations between these parties.<sup>178</sup> The dissent also noted the "particular vulnerability" of the company's customers because of the nature of the work which the company did and the lengthy period it often took to complete it. Thus, customers caught in the net of an ill-timed strike could conceivably suffer "extraordinary economic consequences . . . ."<sup>179</sup> The dissent concluded, like the Trial Examiner, that economic concerns motivated the lockout. In such a case, there could be no violation of the Act. As the dissent reasoned:

We do not go so far as to say that an employer may in all situations suspend operations during the course of collective bargaining simply because an agreement has not been reached and a possible strike may be in the offing. But we think it at least clear that an employer ought not be compelled to invite injury to its own business, and to that of its customers, by soliciting or accepting *new* orders for work to be done during a period when it has a genuine basis to fear strike delays leading to serious damage to its customers' interests, resultant customer ill will, and an attendant loss of future business.<sup>180</sup>

Thus, in the dissenters' view, even though in this situation the company's lockout was in part motivated by a desire to pressure the unions regarding its bargaining position, the economic motivation far outweighed that factor and made the lockout lawful.<sup>181</sup>

The Supreme Court disagreed with the Board and the Circuit Court of Appeals for the District of Columbia which had enforced its order.<sup>182</sup> The Court faced the narrowly drawn issue of whether "[t]he use of a temporary layoff of employees solely as a means to bring economic pressure to bear in support of the employers' bar-

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177. *Id.* at 1367 (McCulloch and Rodgers, dissenting).

178. *Id.* at 1368 (McCulloch and Rodgers, dissenting).

179. *Id.* at 1368-69 (McCulloch and Rodgers, dissenting).

180. *Id.* at 1369 (McCulloch and Rodgers, dissenting) (emphasis in original).

181. *Id.* The dissenters expressly reserved the question of whether this use of pressure would, standing alone, be an unlawful invasion of employee rights. *Id.* at 1369-70 (McCulloch and Rodgers, dissenting).

182. *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300 (1965). The court of appeals essentially decided that the Board's order was supported by substantial evidence on the record as a whole. *Local 374, Int'l Bhd. of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO v. NLRB*, 331 F.2d 839, 840 (D.C. Cir. 1964).

gaining position after an impasse has been reached.”<sup>183</sup>

In deciding first whether such a lockout violated section 8(a)(1) of the Act, the Court initially disagreed with the Board’s view that the lockout punished employees for presenting and adhering to certain bargaining demands. Accordingly, the Court found that, while the lockout may have the effect of dissuading the employees from their original bargaining position, “the right to bargain collectively does not entail any ‘right’ to insist on one’s position free from economic disadvantage.”<sup>184</sup> Pointing out that the employer was not motivated by hostility to the unions but instead sought only to “resist the demands made of it and to secure modifications of those demands,”<sup>185</sup> the Court held that this type of lockout could not be characterized as *per se* destructive of employee rights.

The Court also disagreed with the Board’s assessment that a lockout of this type interfered impermissibly with the employees’ right to strike. Thus, even though the lockout preempts the unions’ strike, it does not work a hardship upon them or interfere with their rights, because the work stoppage which results from the lockout is exactly the same result which would have followed a strike.<sup>186</sup> While it is perhaps true that the pre-emption worked by the lockout may have deprived the unions of the control of timing and duration of the work stoppage, the Court held that there was “nothing in the statute which would imply that the right to strike ‘carries with it’ the right exclusively to determine the timing and duration of all work stoppages. The right to strike as commonly understood is the right to cease work—nothing more.”<sup>187</sup> The Court then chastised the Board for once again trying to set the balance of power between the parties by regulating their use of economic weapons,<sup>188</sup> concluding that “the employer’s use of a lockout solely in support of a legitimate bargaining position is [not] in any way inconsistent with the right to bargain collectively or with the right to strike.”<sup>189</sup>

The Court then went on to disagree with Board’s finding that

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183. *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 308, (1965).

184. *Id.* at 309.

185. *Id.*

186. *Id.* at 310.

187. *Id.*

188. *Id.*

189. *Id.*

the lockout had violated section 8(a)(3) of the Act. It found the principle that this section requires is both discrimination and a resulting discouragement of union membership.<sup>190</sup> The Court further acknowledged that not all employer conduct which had such an effect was necessarily unlawful, provided that it was in furtherance of some legitimate business interest that outweighed the effect.<sup>191</sup> A lockout of the nature involved here, said the Court, did not constitute an act so destructive on its face that no inquiry into employer motive is necessary.<sup>192</sup> Here the Court found no evidence of any employer hostility to the union.<sup>193</sup> Consequently, the Court had difficulty even discerning what negative impact on union membership the Board had in mind when it found the section 8(a)(3) violation. Therefore, the Court pointed out that the union did not claim that the company locked out any employee simply on the basis of union affiliation. While some economic disadvantage had indeed resulted based on the unions' continued persistence in their contract demands, and the employer's resistance of those demands, the potential for negative feelings about union membership which may result could not serve as the basis for a finding of unlawfulness under the Act.<sup>194</sup> As a result, the Court concluded:

[T]here is nothing in the Act which gives employees the right to insist on their contract demands, free from the sort of economic disadvantage which frequently attends bargaining disputes. Therefore, we conclude that where the intention proven is merely to bring about a settlement of a labor dispute on favorable terms, no violation of [section] 8(a)(3) is shown.<sup>195</sup>

The Court in *American Ship Building* thus made more far-reaching inroads on the sacred citadel of virtually unrestricted employee action in support of bargaining demands, with practically no concomitant right of employer action on behalf of its bargaining position. Such a conclusion appeared to follow logically from the evolutionary process begun by *Buffalo Linen* and culminated in *Brown Food*. In *Buffalo Linen*, the Board—some might say out of self-defense—finally loosened the once tightly held reins on what

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190. *Id.* at 311.

191. *Id.*

192. *Id.*

193. *Id.* at 313.

194. *Id.* at 312-13.

195. *Id.* at 313.

were on their face defensive lockouts, but which had some of the same characteristics as offensive—or bargaining—lockouts. So began the initial confusion as to the offensive-defensive distinction, which paved the way for the *Brown Food* decision.

In *Brown Food*, the Court ultimately recognized that, if the employers in a multi-employer bargaining unit could lawfully protect themselves by locking out, then they could also protect themselves by hiring temporary replacements; after all, the evil which both measures were designed to protect against was the demise of the multi-employer unit. Thus, even though the lockout itself worked a discrimination against the affected employees, it was not an unlawful discrimination because the employer had legitimate business reasons for doing it. The same could be said for the act of replacing locked out employees; by using the lockout employers were protecting the integrity of their unit from unfair competition from the struck employer which also rightfully continued to operate, a situation which would destroy the bargaining unit as surely as the whipsaw itself, the cause of the whole situation in the first place. This was so even though the discriminatory effects from replacing locked out employees might be even harsher than those from simply locking out the employees and remaining shut down. Such a result was obtained by shifting the focus of the inquiry from the *effect* of the employers' conduct to their *motives* for the conduct. This suggests that lockouts could no longer be regarded as so inherently destructive of the employees' rights that they were, without more, *per se* violations of the Act; and the employer had legitimate interests which it could protect through the use of the lockout, provided that protection of those legitimate interests outweighed any negative effects on the employees' rights.

Hence, the Court, in initially recognizing the right to lock out in support of a multi-employer unit and then the concomitant right to replace employees in a *Buffalo Linen* situation, essentially changed the economic balance of the parties' use of weapons. In the usual course of things a strike or a lockout contemplates a waiting game where employees do not work and the employer does not produce. If the employer can now lock out *and* continue to operate, it may gain an advantage over the employees who are presumably not working. Still, the economic interests of the employer are legitimate and worthy of protection, even if they have a less serious effect on employee rights.

*American Ship Building* follows quite logically from this posi-

tion. Once it is accepted that an employer does have legitimate economic interests which can overcome a side effect of discriminatory discouragement of union affiliation, it becomes easier to expand the kinds of discrimination-producing conduct which can fall into the legitimate category based on the appropriateness and applicability of those interests. Therefore, the line between offensive and defensive motivations is obliterated entirely. The employer does indeed have legitimate interests in maintaining its bargaining position at the negotiating table. Accordingly, if a lockout is undertaken in aid of that position, the task becomes to weigh the employer's legitimate interest in aiding its position balanced against the resultant discriminatory effect that the lockout necessarily has on the employees. This is a far cry from a finding that such conduct, *simply because* of its discriminatory effect, is necessarily unlawful.<sup>196</sup> With *Buffalo Linen's* initial inroad on the *per se* approach, it proved an easy leap for the Court to conclude that the employer's legitimate interest in maintaining its bargaining position *actually outweighed* the discriminatory effects of its conduct. Thus, the Court in effect recognized the lockout in *American Ship Building* as being in the same class as that in *Buffalo Linen*.

Because the employer's legitimate interests outweighed discriminatory effect, the Supreme Court in *American Ship Building* did not agree with the Board's argument that the employer did not need to lock out in aid of its bargaining position because it had alternative avenues to pursue. These alternatives included the permanent replacement of strikers, maintenance of commercial operations by "stockpiling and subcontracting,"<sup>197</sup> or, since impasse had been reached, unilaterally instituting its bargaining demands once the old collective bargaining agreement had expired.<sup>198</sup> The Court instead pointed out:

The central purpose of these provisions was to protect employee self-organization and the process of collective bargaining from disruptive interferences by employers. Having protected employee organization in countervailance to the employers' bargaining power, and having established a system of collective bargaining whereby the newly coequal adversa-

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196. See *supra* text accompanying notes 78-84.

197. *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 316 (1965).

198. *Id.* For an explanation of the effects of impasse, a lengthy discussion of which is beyond the scope of this paper, see generally *Huck Mfg. Co. v. NLRB*, 693 F.2d 1176, 1186 (5th Cir. 1982); *Latrobe Steel Co. v. NLRB*, 630 F.2d 171, 179 (3rd Cir. 1980), *cert. denied*, 454 U.S. 821 (1981).

ries might resolve their disputes, the Act also contemplated resort to economic weapons should more peaceful measures not avail. 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.<sup>199</sup>

Significantly, it was similar reasoning which led the Court in *Brown* to reject the Board's proposition that maintaining operations with temporary replacements during a *Buffalo Linen* lockout was not likewise legitimate use of economic power.<sup>200</sup> What is noble about *American Ship Building* is the Court's specific reservation of the question concerning an employer's use of replacements during a lockout in aid of its bargaining position.<sup>201</sup> *American Ship Building* addresses itself solely to that situation wherein the employer locking-out shuts down completely until some kind of accommodation is reached.

Justice White, in concurrence, saw the underpinnings of the lockout here much the same as the Trial Examiner had; the company feared a strike and in an effort to protect its customers discouraged business. Subsequently the company laid off employees for whom there was no work.<sup>202</sup> In Justice White's view, the majority had gone too far by condoning lockouts in aid of the employer's bargaining position when in fact the lockout here had simply been economic. The implications of the majority's decisions were enormous. 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 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. And the hiring of replacements is wholly consistent with the employer's intent to resist the demands made of it in the negotiations

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199. *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 317 (1965).

200. See *supra* text accompanying notes 146-52.

201. *American Ship Bldg. Co. v. NLRB*, 380 U.S. at 308 n.8.

202. *Id.* at 319 (White, J., concurring).

and to secure modification of these demands. . . . I would also assume that under [sections] 8(a)(1) and (3) he may lock out for the sole purpose of resisting the union's assertion of grievances under a collective bargaining contract, absent a no-lock-out clause.<sup>203</sup>

Because of these far reaching implications, Justice White believed that the balancing of employee rights to engage in collective activity with the employer's legitimate interest in protecting its business was in the first instance for the Board to determine.<sup>204</sup> By condoning the employer's lockout of all its employees, the majority had fundamentally ignored the employees' side of the equation, together with the Board's initial responsibility for balancing it.<sup>205</sup>

It is clear that *Brown Food* and *American Ship Building* drastically changed the law with respect to the acceptability and appropriateness of lockouts. The lockout had evolved into a legitimate and powerful weapon to be wielded even in the ordinary course of bargaining, and not simply as a drastic measure to be utilized only in extreme cases of self-defense. The Board had suffered severe curtailment of its self-appointed role as arbiter of the balance of the parties' bargaining power. Therefore, the lockout had made great progress toward being the true counterpart of the strike.

Nevertheless, the parameters of the lockout were far from clear. *Brown Food* made the use of replacements permissible in *Buffalo Linen* lockouts; whether it was appropriate in bargaining lockouts such as in *American Ship Building* was still unclear. Moreover, the bargaining lockouts condoned by *American Ship Building* occurred after an impasse had been reached; whether such lockouts were permissible prior to impasse had yet to be determined. Accordingly, it was still too early to declare the lockout to be the exact corollary of the strike, but the two were certainly

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203. *Id.* at 324-25.

204. *Id.* at 325.

205. *Id.* at 326. Justice Goldberg, joined by Chief Justice Warren, also concurred. Justice Goldberg believed that the Court—and the Board—had gone too far in deciding the appropriateness of bargaining lockouts based on the facts of the *American Ship Building* case. Instead, he thought that the Board's determination that the employer did not reasonably anticipate a strike was unsupported by substantial evidence in the record. *Id.* at 328, 332, 336 (Goldberg, J., concurring). Thus, if the company did in fact reasonably anticipate a strike, its lockout was justified under the established rule that a lockout in self-defense to a threatened strike was lawful. *Id.* at 341 (White, J., concurring).

far more related than they had been prior to these revolutionary opinions.

#### 4. *The Early Years: An Empirical Overview*

The early years encompass dramatic shifts in labor relations. Before the advent of the Act, employers enjoyed the lion's share of bargaining power, as evidenced by the relative inability of unions even to organize in the face of the employers' virtually unbridled use of offensive weapons against them. The Act, however, which had as its primary goal the creation of a framework in which labor-management relations could be conducted peacefully and predictably gave a great deal of protection to the organizing process and thus transferred the significance of bargaining power in the main to the bargaining process. Once the parties satisfy their statutory obligation to bargain in good faith, they are essentially on their own with respect to reaching agreement. In this vein, labor relations in the early years of the Act represented simply a transfer of the conflict and hostility from the streets to the bargaining table. The NLRB, as arbiter of the new protectionist legislation, sought to achieve a balance in this conflict not contemplated by the statutory scheme by limiting employer resort to self-help in the hope of creating parity in the parties' bargaining power. The NLRB's attempts to create such parity were finally undercut by its reversal in *Buffalo Linen* and then by the Supreme Court in *American Ship Building* and *Brown Food*.

#### C. *The Maturation of Employer Self-Help*

At the same time as union-management accommodation or cooperation was enjoying increasing viability as an alternative to purely conflict bargaining, management kept on gaining in the area of available self-help in bargaining situations. For a short time during this period, *American Ship Building* was the last word on employer use of economic bargaining weapons.<sup>206</sup> But the nagging question regarding the use of replacements for locked out employ-

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206. See, e.g., *NLRB v. Golden State Bottling Co.*, 401 F.2d 454 (9th Cir. 1965); *Evening News Ass'n*, 166 N.L.R.B. 219 (1967); *Oberer*, *supra* note 10, at 193; Maddux, *Lockout, Fresh Perspective On An Old Controversy*, 22 *BUS. LAW.* 1095 (1967); Baird, *Lockout Law: The Supreme Court and the NLRB*, 38 *GEO. WASH. L. REV.* 396 (1970); *Recent Decisions*, 30 *ALB. L. REV.* 173 (1966); Note, *Interest-Balancing and the Use of Economic Weapons in Labor Disputes*, 20 *RUTGERS L. REV.* 102 (1965).

ees persisted. Another question that remained was the propriety of a lockout in aid of a bargaining position prior to the time of impasse.<sup>207</sup>

In *Darling and Company*,<sup>208</sup> the NLRB decided that bargaining lockouts pursuant to *American Ship Building* were not unlawful if engaged in prior to a bargaining impasse. Darling was a manufacturer and vendor of fertilizer, a seasonal business much like the ship repair business in *American Ship Building*. Seventy per cent of Darling's annual shipments were made between mid-March and May.<sup>209</sup> During the course of Darling's relationship with the two unions which represented its employees—the International Chemical Workers Union and the United Mine Workers—the unions had engaged in strike activity. The latest incident was three years prior to the negotiations. During that strike, Darling had lost its entire shipping season.<sup>210</sup>

Negotiations opened for a new contract some two months prior to expiration of the current agreement. Meaningful bargaining did not begin until about one month prior to the contract's expiration. The parties were unable to reach agreement on several key issues. While bargaining was ongoing, Darling began gearing up for its busy season.<sup>211</sup> The parties were still far apart on the issue of work assignments, and Darling stated at one meeting that if the union was going to insist on its position, "it might take a long strike to get it."<sup>212</sup> The union replied that it was prepared to take a long strike if necessary.<sup>213</sup> A mediator subsequently informed the parties that if they did not "get together" Darling would "shut the plant down."<sup>214</sup> The parties met again and although they could not reach agreement, the union agreed to take Darling's proposal back to its membership. The membership rejected Darling's proposals, and the employer was so advised.<sup>215</sup> The

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207. *American Ship Building* dealt with bargaining lockouts after impasse had been reached, and did not answer the question of replacements; indeed, the Court specifically reserved deciding the latter issue until a proper case came before them. See *supra* text accompanying note 201.

208. 171 N.L.R.B. 801 (1968), *enforced sub nom.* Lane v. NLRB, 418 F.2d 1208 (D.C. Cir. 1969).

209. 171 N.L.R.B. at 801.

210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.*

214. *Id.*

215. *Id.*

parties met subsequently at which time additional items were discussed, and the union expressed its intention to have the proposed medical policy analyzed. The mediator, in view of the impending winter holidays, informed the parties that he would schedule no more meetings until after January 1 "or until he heard from one of the parties." The union advised that when the medical policy analysis was complete, it would let everyone know. The union did not request a specific date for the next meeting, and the mediator did not schedule one.<sup>216</sup>

Darling, claiming impasse, posted a layoff notice on the bulletin board two days later. Darling's general superintendent testified, however, that the layoff was motivated by a desire "to apply economic pressure on the employees . . . to encourage them to accept" Darling's offer.<sup>217</sup> He also testified that Darling was afraid of a strike during its busy season and "absolutely did not want that."<sup>218</sup> The parties continued to negotiate after the lockout, and a new agreement was reached some two months later, subsequent to which the employees were recalled.<sup>219</sup>

The Trial Examiner found that there existed no impasse in the bargaining at the time of the lockout, nor did the employer lock out in fear of an imminent strike.<sup>220</sup> In light of that finding, he concluded that *American Ship Building* was inapposite.<sup>221</sup> Turning to the pre-*American Ship Building* cases, then, the Trial Examiner concluded that the lockout violated section 8(a)(3) and (1) of the Act.<sup>222</sup>

The Board did not agree.<sup>223</sup> Acknowledging that the test of *American Ship Building* was simply that a lockout was not *per se* violative of the Act, and therefore lawful, unless it had as its motive a desire to discourage union activity or evade bargaining obligations, or was "inherently so prejudicial to union interests and so devoid of significant economic justification that no specific evidence of intent . . . is required,"<sup>224</sup> the Board defined three issues

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216. *Id.* at 802.

217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.* at 803 (Brown, dissenting).

224. *Id.* at 802 (quoting *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 311 (1965)).

to be decided in assessing Darling's conduct. These were: (1) the applicability of the *American Ship Building* test to pre-impasse lockouts; (2) whether the record contains evidence which indicates a motive to either discourage union activity or to evade bargaining; and (3) whether the lockout was so inherently prejudicial to union interests as to be unlawful absent specific evidence of unlawful motive.<sup>225</sup>

As to the first issue, the Board held that the absence of an impasse does not render the *American Ship Building* test inapplicable. As the Board held:

The absence of an impasse is one of the surrounding circumstances, but it does not necessarily require a conclusion that the lockout was unlawful on that ground alone. While the finding of an impasse in negotiations may be a factor supporting a determination that a particular lockout is lawful, the absence of an impasse does not of itself make a lockout unlawful any more than the mere existence of an impasse automatically renders a lockout lawful.<sup>226</sup>

In addition, the Board found that there was no unlawful motive for the lockout on the part of Darling, and that the lockout under the particular circumstances was not so prejudicial to union interests as to make it unlawful absent a specific unlawful motive.<sup>227</sup>

*Darling* is highly significant because, in the economic scheme of things, it is most nearly at this point that the lockout can be said to have become the corollary of the strike.<sup>228</sup> *American Ship Building* effectively obliterated the offensive-defensive distinction, if indeed it even existed after *Buffalo Linen*. But *American Ship Building* had left open the key issue of the legitimacy of pre-impasse bargaining lockouts. Because it was unclear whether bargaining lockouts could be used in pre-impasse situations, the strike weapon appeared to be paramount in that the union most decidedly did not have to wait for an impasse to call its members out. Thus, before *Darling*, strikes still had a distinct advantage with respect to timing; lockouts, on the other hand, did not become a clearly viable option until impasse had been reached. After *Darling*, however, the employer had a co-equal advantage as to the

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225. *Id.*

226. *Id.* at 803 (footnote omitted).

227. *Id.*

228. *But see* text accompanying notes 99-121.

timing of a work stoppage, for it now possessed the lockout option at any time during bargaining.<sup>229</sup>

Moreover, if the union decided to strike, it risked the loss of its members' jobs through permanent replacement (assuming the strike was purely in aid of a bargaining position and therefore economic in nature).<sup>230</sup> Thus, the employer could keep on operating while the union employees could not work unless they found employment elsewhere. And, as has been demonstrated, the purely economic model of parity dictates that *neither* party carries on business as usual so that the contest is simply one of pecuniary resources and thus who can afford to hold out the longest.<sup>231</sup>

The replacement issue, then, was still very much alive and very significant after *Darling* had resolved the impasse issue. At first, the Board unequivocally refused to extend to the locking out employer, whose purpose was simply to exert pressure on the union with regard to the employer's bargaining position, the right to continue operating with temporary replacements. In *Inland Trucking*,<sup>232</sup> a partnership's three employers locked out their union employees following an impasse in bargaining.<sup>233</sup> During the lockout, the employers utilized newly hired employees, some of whom were relatives of management personnel, as well as management personnel, to do the work ordinarily performed by the locked out employees. Prior to the lockout, the union had notified the employers that it did not intend to strike at the expiration of the cur-

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229. In the case of both union and management, the strike and the lockout are not necessarily invincible weapons. Aside from the considerations previously discussed, *see also supra* text accompanying notes 27-37, the parties were still obligated by law to bargain in good faith. *See* 29 U.S.C. § 158(a)(5), (b)(3) (1982). Therefore, if one party resorted to the use of economic weapons too prematurely in the bargaining process, it could very well indicate a lack of good faith and an evasion of the duty to bargain. *See Darling and Co.*, 171 N.L.R.B. 801 (1968).

230. *See supra* text accompanying notes 35-36.

231. It might be argued that the employees can manage to sustain themselves during a strike by seeking temporary alternative employment or by utilizing money from a strike fund or even state relief programs such as unemployment compensation. Just how realistic these options are varies with the circumstances of each particular strike situation. In any event it is anybody's guess whether the inconveniences and shortcomings of these options match those encountered by employers faced with the necessity of hiring new employees. *See PERRY, KRAMER, AND SCHNEIDER, supra* note 27, at 62-65.

232. 179 N.L.R.B. 350 (1969), *enforced*, 440 F.2d 562 (7th Cir. 1971), *cert. denied*, 404 U.S. 858 (1971).

233. 179 N.L.R.B. at 351-52. There was no evidence that these employers constituted a multi-employer bargaining unit, and *Buffalo Linen* was thus inapplicable notwithstanding the lack of a strike.

rent contracts and that it would give at least a week's notice before any work stoppage.<sup>234</sup> During the lockout, the employers refused several requests by the union that the employees be reinstated, declaring that they would be reinstated only when agreement with the union was reached.<sup>235</sup> Nevertheless, the employers decided to end the lockout prior to the reaching of an agreement because they felt that it was not achieving its purpose and they wished to get on with normal operations as quickly as possible.<sup>236</sup> The employers thereafter notified the locked out employees that they could return to work, upon application, with the rates of pay specified in the notice and otherwise subject to the terms of the expired collective bargaining agreements. Most of the employees took advantage of the offer and returned to work. Subsequently, a strike ensued at two of the three employers.<sup>237</sup>

The union filed charges with the NLRB alleging that the lockout violated sections 8(a)(3) and (1) of the Act.<sup>238</sup> In finding that the Act had indeed been violated, the Trial Examiner distinguished the instant case from *Brown Food* on the basis that the utilization of temporary replacements in a whipsaw strike situation is "essentially a responsive action designed to counter the thrust of the Union, which the [Supreme] Court put on the same plane as the clearly valid action of the struck employer in replacing his striking employees and the right of the employers to initially lock out their employees *in defense against* the whipsaw strike."<sup>239</sup> Thus, the conduct of hiring temporary replacements cannot be said to be motivated by a desire to destroy the employees' representational rights.<sup>240</sup> Here, however, the employers' conduct was not reactive; rather, it was an affirmative attempt to force the union to capitulate to the employers' bargaining position. Such forced capitulation to the employers' terms essentially serves to substitute for bargaining, and, when accomplished through the deprivation of the employees' livelihood, penalizes them for their resistance to those terms and tends to weaken their bargaining

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234. *Id.* at 352.

235. *Id.* at 353.

236. *Id.*

237. *Id.*

238. *Id.* at 350. The General Counsel did not allege that the lockout was illegal from its inception, but only from the time that the employer hired replacements for the locked out employees. *Id.* at 351 & n.2.

239. *Id.* at 357 (footnote omitted) (emphasis in original).

240. *Id.*

power.<sup>241</sup>

Thus if the employer not only may decide if and when his employees shall be deprived of work, but at the same time replace those employees and continue in operation, making capitulation rather than bargaining the option presented, such action might well be said to have the tendency, which the [Supreme] Court found lacking in *American Ship*, to “necessarily destroy the unions’ capacity for effective and responsible representation” and be “demonstrably so destructive of collective bargaining”. . . as to carry its own indicia of illegal motivation in violation of the Act. Indeed, the employer’s capacity for achieving this result might well be limited only by the available labor market.<sup>242</sup>

The Board affirmed the Trial Examiner.<sup>243</sup> This affirmation was subsequently enforced by the United States Court of Appeals for the Seventh Circuit, which agreed that even the temporary replacing of the locked out employees was *per se* unlawful.<sup>244</sup> As the court stated:

Such lockout forecloses the employees’ opportunity to earn without surrendering the corresponding opportunity of the employer. It would not merely pit the employer’s ability to withstand a shutdown on 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 continued 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 . . . .<sup>245</sup>

Thus, while *American Ship Building* recognized the employer’s right to utilize economic weapons in aid of its bargaining

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241. *Id.* at 358.

242. *Id.* at 358 (quoting *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 309 (1965)) (citation omitted).

243. *Id.* at 350.

244. *Inland Trucking Co. v. NLRB*, 440 F.2d 562 (7th Cir. 1971).

245. *Id.*

position—an affirmative choice rather than simply a reactive one—the Board was still very careful to circumscribe such utilization. As has already been demonstrated, the employer's right to replace workers who are exercising their right to strike impacts negatively on that right, but is seen as legitimate because the strikers have brought the situation on themselves.<sup>246</sup> But, in the Board's view, to allow the *employer*, rather than the employees, to make the first strike by locking out and then to claim a legitimate interest in continuing operations with temporary replacements, would destroy the concept of collective bargaining by essentially nullifying the union's bargaining power. Once again, the Board had taken it upon itself, despite the contemplated scheme of the Act, to regulate the bargaining power of the parties in the name of protecting the collective bargaining process.

However, in 1972, with a change in its membership, the NLRB reversed itself. In *Ottawa Silica*,<sup>247</sup> the employer, a manufacturer and distributor of silica sand and related products, and the union, a local of the Teamsters, were engaged in negotiations for a collective bargaining agreement as the old one was due to expire. The parties exchanged proposals and counter-proposals, and at a subsequent meeting the union's negotiators were joined by the local president who took a hard line and made several references to a strike.<sup>248</sup> The local president then left, and the employer negotiators caucused. After the caucus, the union's negotiator commented that "the time was getting short . . . the company had made only proposals which were designed to take things away from the employees, and that we weren't going to get these things out of the contract without a strike . . ." <sup>249</sup> The parties met again, and the company negotiator reminded everyone present that the current contract was about to expire and then the parties would be faced with a strike or a lockout. He then offered several new proposals to the union, whose negotiator stated: "If that's all you've got you're going to get a strike."<sup>250</sup> He also stated that the union negotiating

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246. See *infra* text accompanying notes 383-84. See also *Inland Trucking Co.*, 179 N.L.R.B. 350, 357 (1969) (employees are the "protagonist" in the event of a strike and employer's action in replacing them, even if it does destroy their right to strike, is simply a "foreseeable consequence of their own actions").

247. 197 N.L.R.B. 449 (1972) *enforced*, 482 F.2d 945 (6th Cir. 1973).

248. 197 N.L.R.B. at 455.

249. *Id.*

250. *Id.*

committee had the authority to call a strike.<sup>251</sup> At the close of the session, the employer asked that the current contract be extended for a week, but the union declared that any extensions could be only on a day-to-day basis.<sup>252</sup>

On the expiration day of the current contract, the parties met again. The employer presented, at the union's request, its final offer. The union representative agreed to take the proposals back to the membership, but stated that he would urge the membership to reject them. At that point, the employer notified the union that the unit employees would be sent home until they either accepted or rejected the employer's offer. The night shift employees were accordingly locked out, and at least one employee was informed that during the lockout he would be replaced by a supervisor.<sup>253</sup>

Following the lockout, the employer continued to operate with temporary replacements for the unit employees, including supervisors and sales personnel brought in from one of its other plants. On the fifth day of the lockout, the employer informed the union that it was willing to take the employees back to work under the terms which it had offered at the final meeting. The employer also expressed its willingness to continue bargaining with the union. Simultaneously, the employer sent notification to the employees that the lockout was ending.<sup>254</sup>

The following day, the union took a vote on the employer's offer. The membership rejected it, and voted to strike.<sup>255</sup> The union set up a picket line outside the plant, which caused a disruption in the employer's business.<sup>256</sup> The dispute finally ended when the parties reached a new agreement.<sup>257</sup>

Charges were filed with the NLRB alleging that the employer had violated sections 8(a)(3) and (1) of the Act by locking out the unit employees while continuing to operate with temporary replacements. As in *Inland Trucking*, the violation lay not in the fact of the lockout itself, but rather in the utilization of the temporary replacements.<sup>258</sup> Based on the prior Board decision in *Inland*

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251. *Id.*

252. *Id.*

253. *Id.* at 456.

254. *Id.*

255. *Id.*

256. *Id.*

257. *Id.*

258. *Id.* at 455.

*Trucking*, the Trial Examiner found that the employer had indeed violated the Act.<sup>259</sup>

The Board, however, disagreed. Relying on *American Ship Building* and *Brown Food*, the Board determined that the employer's conduct, even though necessarily discriminatory, could not be unlawful if the discrimination was comparatively slight when balanced against the legitimate business end to be served by the conduct.<sup>260</sup> Here the Board concluded that the support of the employer's bargaining position was clearly a legitimate business end to be served.<sup>261</sup> Moreover, the resulting discriminatory effect upon employee rights was comparatively slight. The Board decided:

[T]he replacements were expressly used for the duration of the labor dispute only; thus, the displaced employees could not have looked upon the replacements as threatening their jobs. . . . The membership, through its control of union policy, could end the dispute and terminate the lockout at any time by agreeing to [the employer's] terms and returning to work on a regular basis.<sup>262</sup>

The Board concluded that *Inland Trucking* "does not give proper recognition to legitimate interests, devoid of any motive to discourage the exercise of protected employee rights, which was the underlying factor in the Supreme Court's reasoning in *American Ship Building*."<sup>263</sup> To find an illegal motive *per se* from the mere application of economic pressure to win a bargaining dispute would undermine the logic of *American Ship Building* and *Brown Food*.<sup>264</sup> Thus, in the absence of specific evidence of unlawful mo-

259. *Id.* at 458.

260. *Id.* at 450.

261. *Id.* at 451.

262. *Id.*

263. *Id.*

264. *Id.* Interestingly enough, for the first time the Board read *Brown Food* as not being limited to the whipsaw strike situation, even though the *Brown Food* decision has its basis in *Buffalo Linen*. *Id.* at 451 n.8. This reading is highly questionable, since one of the main bases for the decision is the fact that to not allow the use of temporary replacements would have placed the non-struck members of the multi-employer bargaining unit at a disadvantage relative to the struck employer who, under the *Mackay* doctrine, had the right to replace the strikers. Such divisiveness could conceivably have destroyed the multi-employer unit itself, the notion which underlay the right of lockout in *Buffalo Linen*. Such a consideration does not obtain in a single employer situation. See *id.* at 454 (Fanning & Jenkins, concurring in part and dissenting in part). Nevertheless, it is clear that *American Ship Building* does allow an employer to utilize a lockout only in aid of its bargaining position, and not simply as a device for protecting itself. Such a lockout, under the old offensive-defensive dichotomy would have clearly fallen under the category of an unlawful offensive

tive, an employer's continued operation with temporary replacements during a bargaining lockout could not, without more, be held violative of the Act.

Chairman Miller concurred in the result in *Ottawa Silica*, but refused to condone the blanket right of an employer to utilize replacements for employees locked out in support of a bargaining position by flatly overruling *Inland Trucking*. He was willing to allow replacements only because: the employer utilized its own non-unit personnel as replacements; the union had refused to give any assurances against a strike; and there was some evidence that the employer was motivated by legitimate business justifications.<sup>265</sup> His assessment requires a balancing to determine whether, in the circumstances of each individual case, the employer's interests are important and legitimate enough to outweigh the negative impact of the use of temporary replacements upon the employees' union activity.<sup>266</sup> Members Fanning and Jenkins, however, dissented with respect to the temporary replacement issue.<sup>267</sup> Relying on the Sev-

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lockout. Therefore, a more viable basis for the *Ottawa Silica* rationale is simply that of maximum utilization of the employer's economic weapon option. It cannot be gainsaid that the use of replacements constitutes a far greater incursion into an employee's right to organize, insofar as it discourages union membership, than a simple lockout where an employer actually shuts down. But it is also true that the bargaining lockout serves legitimate business interests in the same way that a strike serves legitimate union interests. In that regard, allowing the use of temporary replacements simply makes those legitimate business interests paramount to any interference with the employee's right to organize.

265. *Id.* at 451 (Miller, concurring).

266. *Id.* at 451-52. See also *Inter Collegiate Press, Graphic Arts Div.—Sargent Welch Scientific Co.*, 199 N.L.R.B. 177, 178 (1972) (Chairman Miller, concurring), *aff'd*, 486 F.2d 837 (8th Cir. 1973), *cert. denied*, 416 U.S. 938 (1974). In *Inter Collegiate*, Chairman Miller stated:

[I]t 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.

*Id.*

267. They also point out that given Chairman Miller's express refusal to overrule *Inland Trucking* in favor of a broad pronouncement that employers have an unequivocal right to lock out in aid of a bargaining position while continuing to operate with temporary replacements, a majority of the Board continued, even following *Ottawa Silica*, to abide by *Inland Trucking*. *Ottawa Silica*, 197 N.L.R.B. at 452 (Fanning and Jenkins, concurring in part and dissenting in part).

enth Circuit's decision enforcing *Inland Trucking*,<sup>268</sup> Fanning and Jenkins decided that the employer's use of temporary replacements was inherently destructive of the Act, and further that the employer had presented no legitimate business reasons sufficient to substantiate its conduct.<sup>269</sup> They also disagreed with Chairman Miller's assessment of the situation on the grounds that the conduct is equally egregious whether the replacements are employees of the employer or not. They did not interpret *American Ship Building* as extending to the utilization of lockout replacements regardless of whether the union gave assurances against a strike. They concluded that the employer proffered little in the way of legitimate business justification for its conduct, pointing to the employer's defense "that what was at stake was the risk of its 'loss of reputation of reliability in maintaining shipments in the face of an imminent labor dispute.'"<sup>270</sup> Even that, according to Fanning and Jenkins, could not stand in the face of the employer's assurances to a customer that shipments would continue if a strike were to occur.<sup>271</sup>

While the Board remained split as to the propriety of an employer's use of temporary replacements during an otherwise legitimate bargaining lockout, it was at least clear that a majority was ready to accept this decidedly offensive and powerful weapon as legitimate. More significantly, perhaps, they were willing to accept it, at least in some circumstances, on a level equal to that of the strike. The socio-economic variables which had once theoretically governed the use of economic self-help in labor disputes, were now displaced by different variables. If the employer chose to lock out, its focus now had to be the availability of replacement workers. This determination would not only encompass the level of unemployment or underemployment in the surrounding community, but also whether available workers were of a sentiment to take jobs contrary to union interests. In addition, the feasibility and cost of training replacement employees only to give them up again when the dispute was over would be a factor for the employer to consider. This new development necessarily carried with it a shift in focus for the union when it chose to take a hard-line bargaining

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268. See *supra* text accompanying notes 344-45.

269. *Ottawa Silica*, 197 N.L.R.B. at 453 (Fanning and Jenkins, concurring in part and dissenting in part).

270. *Id.* at 453-54.

271. *Id.* at 454.

position at the table. While the considerations for deciding whether to call a strike remained the same, with the coming of age of the lockout the union effectively lost exclusive control over not only the timing, but also the consequences, of a work stoppage. Before *Ottawa Silica*, an employer may have been able to engage in an affirmatively offensive bargaining lockout but would still be under pressure because it would be suffering production loss. In the worst instance, the workers simply would have no work until the lockout ended. There was always the possibility that the locked out employees could find alternative work or be supported by strike funds or social welfare funds for the duration of the lockout. Thus, perhaps the lockout employee could even gain an economic edge over the non-operational employer. But if the employer were permitted the same replacement rights during a bargaining lockout as it possessed during a strike, the pressure on the employer of non-operation would be replaced only by the pressure of finding and hiring effective replacements. The corresponding pressure on the employees would be equivalent to that obtained from a strike.<sup>272</sup> Accordingly, *Ottawa Silica* went a long way toward freeing the parties from governmental constraints on bargaining power by potentially imposing adverse consequences upon the union if it engaged in hard bargaining. This is the equivalent to those constraints on bargaining power potentially incurred by management for doing the same.

*Ottawa Silica* represents a deference by the Board to the free play of the marketplace rather than the restrictive protectionism

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272. See *Hess Oil Virgin Islands Corp.*, 205 N.L.R.B. 23 (1973). In *Hess*, the parties reached impasse in contract negotiations and the union struck. Subsequently, the strikers offered to return to work, but the employer refused to allow them to do so until agreement was reached. In the interim, the employer utilized its supervisory personnel to do the unit work. The Administrative Law Judge dismissed charges of an unlawful refusal to take back the strikers, without discussing the propriety of the employer's use of supervisors. While Members Kennedy and Penello relied on *Ottawa Silica* and *Inter Collegiate Press* to find no violation in the employer's use of supervisory temporary replacements, Chairman Miller concurred with them on the grounds that "the possible discouragement of union membership arising [from the use of replacements is not] any greater or more significant than that which conceivably could have resulted from the concededly legitimate use of such personnel during the period when the curtailment of operations had been due to the strike." *Id.* at 23 n.2. Members Fanning and Jenkins, in dissent, accused the Chairman of abandoning his own balancing test, which, they stated, ought to control if there was to be no finding that the use of temporary replacements during a bargaining lockout was illegal *per se*. They refused to equate the use of replacements during a strike with the use of replacements during a lockout, perhaps because of the distinct differences in control and its concomitant consequences. *Id.* (Fanning and Jenkins, dissenting).

of its past decisions. If the parties are in an area of high unemployment, the employees are relatively unskilled, and there is no particular union sentiment in the surrounding community, the union is in a rather weak position to make strong demands. The union would be even more foolhardy to call a strike in support of those demands. On the other hand, if the parties are in an area of relatively low unemployment, the employees are relatively skilled and thus difficult to replace, and union sentiment is high in the surrounding community, the employer would be in a considerably weaker position than the union and would have a harder time resisting the union's demands. *Ottawa Silica* represents, for the first time, the Board's refusal, as the Supreme Court admonished it in *Insurance Agents*,<sup>273</sup> to get involved in the parties' wielding of proper economic weapons to the extent of assessing and then acting upon their perceived strengths or weaknesses and adjusting them accordingly.<sup>274</sup>

In any event, it was clear that employers would now be in a position to greatly increase their bargaining power. This result was due in part to the availability of a stronger affirmative economic weapon which at last appeared to be on a par with the strike. Unions, on the other hand, had suffered a blow to their bargaining power with the emergence of this weapon, which in turn forced them to shift their focus to a different set of impacting variables now influencing their position at the bargaining table. These factors, coupled with the increase in employer resistance on the organizing end, together with a dramatic shift in the nature of work and the workforce itself, gave birth to the modern era in industrial relations.

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273. See *supra* text accompanying note 56.

274. The Board stayed split in this area, with two members in favor of overruling *Inland Trucking* and holding the use of replacements non-discriminatory *per se*; two in favor of retaining *Inland Trucking* and holding the use of replacements discriminatory *per se*; and one in favor of deciding the issue on a case-by-case basis rather than as a *per se* rule. See, e.g., *Inter Collegiate Press, Graphic Arts Div.—Sargent Welch Scientific Co.*, 199 N.L.R.B. 177 (1972), *aff'd*, 486 F.2d 837 (8th Cir. 1973), *cert. denied*, 416 U.S. 938 (1974); *Ozark Steel Fabricators, Inc.*, 199 N.L.R.B. 847 (1972); *WGN of Colorado, Inc.*, 199 N.L.R.B. 1053 (1972); *Ralston Purina Co.*, 204 N.L.R.B. 366 (1973); *Sargent-Welch Scientific Co.*, 208 N.L.R.B. 811 (1974) (bargaining lockouts with temporary replacements held lawful). Cf. *Kelly-Goodwin Hardware Co.*, 269 N.L.R.B. 33 (1984) (use of replacements unlawful when motivated by anti-union animus). See also Advice Memoranda of NLRB General Counsel in *Georgia-Pacific Southern Div.*, 104 L.R.R.M. 1167 (1980).

### D. *The Middle Years: An Empirical Overview*

As a two-tiered program of resistance, preventive labor relations coupled with direct attacks on organizing unions—even to the point of violating the law—appeared to work quite nicely. However, if the union managed to survive the vigorous opposition and organize the workers, employers in a growing number of instances would attempt to soften the blow. This would be accomplished by resignedly accepting the union and looking toward it as a party with perhaps valuable input to contribute to the functioning of the enterprise. This did not mean that management was willing to accept the union as a partner in the business. Accommodative bargaining by no means signalled the end of hard bargaining.

It is not surprising to find that the rate of successful union organization dropped off considerably during this period. While the number of NLRB elections remained fairly constant from 1960 to 1980, the number of unfair labor practices committed, including the ultimate 8(a)(3) charge of discrimination based on union activity, rose strikingly. Indeed, the number of total unfair labor practices quadrupled, while the number of discrimination charges tripled.<sup>275</sup> Concurrently, union density in the United States continued a steady decline which began approximately in 1956. In 1956, 33.4 per cent of the non-agricultural workforce was unionized. By 1960, that percentage had decreased to 31.4. By 1965, only 28.4 per cent of the non-agricultural workforce was organized, and by 1970, that figure had declined again to 27.3 per cent. The trend continued, so that by 1978, only 23.6 per cent of the non-agricultural workforce belonged to unions.<sup>276</sup> Perhaps due to the more cooperative attitude of accomodative bargaining prevalent during the early part of this period, the union success rate in achieving first contracts remained fairly constant until 1970. This occurred even while employer resistance to union organization increased and drove down

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275. See Freeman, *Why Are Unions Faring Poorly in NLRB Representation Elections?* in CHALLENGES AND CHOICES FACING AMERICAN LABOR 53 (T. Kochan ed. 1985) [hereinafter CHALLENGES AND CHOICES]; Weiler, *Promises to Keep*, *supra* note 6, at 1780. This particular statistic is striking because while the number of elections has not fluctuated much, the number of employees involved has. For example, in 1960, the NLRB certified 6617 elections involving 501,485 workers. In 1977, it certified 8900 elections involving only 204,000 employees. UNIONS TODAY, *supra* note 6, at 7-8. The number of unfair labor practices has been increasing against a steadily decreasing number of employees.

276. U.S. DEPT. OF LABOR, BUREAU OF LABOR STATISTICS, HANDBOOK OF LABOR STATISTICS 412 (Bulletin 2070, Dec. 1980).

the number of successful organizing attempts. Thereafter, the number of successful organizing attempts also began to decline.<sup>277</sup>

At the same time, non-union businesses were becoming more attractive places to work. Although union employees still received higher wages and better fringe benefits, the differential between union wages and benefits and those of non-union workers began to decrease.<sup>278</sup> Further, non-union employees often enjoyed benefits not received by union employees, suggesting that the non-union compensation package was structured differently from its union counterpart.<sup>279</sup> A greater number of non-unionized production and maintenance workers were more likely to be on salary than unionized workers in this area.<sup>280</sup> While the incidence of cost-of-living-allowances (COLAs) in union plants were higher, the rates of the COLAs paid were virtually equal.<sup>281</sup> Both union and non-union plants were similar in their premium pay for second and third shift work, while overtime pay was still higher in union shops.<sup>282</sup> The two sectors were not far apart in the health insurance plans each offered, although the union plants were still better.<sup>283</sup> Non-union employees received an average of 23.8 days as holidays, while union employees received only 13.<sup>284</sup> Thus, while union sector employees still earned higher wages and better benefits than their non-union counterparts, the differences in many cases were not particularly large. The most significant difference in the structures of the compensation systems is that non-union shops have begun to pay many workers on salary rather than hourly, and many have now introduced pay-for-knowledge schemes.<sup>285</sup>

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277. Professor Weiler points out that, in 1960, although the number of section 8(a)(3) charges filed had risen, as had employer resistance to union organization, the unions which did manage to successfully organize, also lower than in the previous five years, still maintained a roughly equivalent first-contract success rate. By 1970, however, this rate had dropped off by eight per cent. As employer resistance took another dramatic leap, the number of § 8(a)(3) charges jumped with it, and the unions lost even more organizational ground. Weiler, *Striking a New Balance*, *supra* note 6, at 353.

278. Verma & Kochan, *The Growth and Nature of the Nonunion Sector Within a Firm* in CHALLENGES AND CHOICES, *supra* note 275, at 97-102.

279. *Id.* at 102.

280. *Id.* at 104-05.

281. *Id.*

282. *Id.*

283. *Id.* The most significant difference between union and non-union shops with health plans was that in union shops, the employers covered an average of 67 per cent of the cost of eyeglasses, while in non-union shops the employers covered only 33 per cent of such a cost. *Id.*

284. *Id.*

285. *Id.* at 106.

Even more similarities exist between the two sectors in the area of employee involvement. The two appear to be relatively equal for having formal joint committees, and informally, more non-union shops have an open-door policy than their union counterparts.<sup>286</sup> Non-union plants also stress formal feedback from their employees, such as attitude surveys, sensing sessions, and meetings. Formal actual involvement also seems to be more frequent among non-union shops, with respect to a full range of issues, including: quality-of-work-life programs; active involvement in decision making which directly affects the enterprise, such as work procedures, production decisions, and personnel decisions; the number of employee benefit plans; and employee rights and compensation with respect to relocation.<sup>287</sup>

While management's modernized strategy of blocking unions by preventing them from organizing, coupled with preventive labor relations tactics, appeared to be successful. The idea of accommodative bargaining still, at least in the beginning, helped unions which overcame employer organizational resistance to gain a foothold and achieve significant gains for their members. However, during the late 1960's, labor reflected the basic unrest that appeared to characterize the social spirit of the rest of the country. Local issues seemed to be quite incapable of resolution through the centralized master contract procedure cooperatively achieved at the national level. Great strides in in-plant cooperation—such as quality-of-work-life programs and increased worker participation—were still to come.<sup>288</sup> “[M]anagers were sometimes faced with the fact that the union leaders with whom they had forged close working relationships were unable to control their rank and file or to ensure the smooth operation of the institutions created in the previous decade.”<sup>289</sup>

At the same time, union ability to organize slipped even further with the coming of the new industries, such as high technology, which characterizes the modern era of American enterprise. Governmental intervention into the employment relationship in-

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286. This could well be due to the employer's fear of committing an unfair practice by direct-dealing with union employees. See, e.g., *Emporium Capwell Co. v. Western Addition Community Org.*, 420 U.S. 50 (1975); *J.I. Case Co. v. NLRB*, 321 U.S. 332 (1944). But see 29 U.S.C. § 159(a) (1982) (proviso).

287. Verma & Kochan, *supra* note 278, at 109-10.

288. KOCHAN, KATZ, AND MCKERSIE, *supra* note 2, at 39.

289. *Id.*

creased, with the passage of such monumental legislation as title VII of the Civil Rights Act of 1964,<sup>290</sup> the Age Discrimination in Employment Act of 1967,<sup>291</sup> and the Occupational Safety and Health Act of 1970.<sup>292</sup>

The middle years were thus characterized by the entrenchment of collective bargaining as an institution that fostered growing accommodation between the parties that engaged in it. Although management realized in the 1950's that an economic recession could weaken a union's bargaining power and thus once again took a hard line in collective bargaining,<sup>293</sup> it also learned that unions were not as easy to break as they had been before the New Deal.<sup>294</sup> In light of this, many experts believed that the system of collective bargaining would flourish and spread.<sup>295</sup> Although the experts did not realize it then, the mid-1950's represented the "pinnacle" of the system. The 1960's and early 1970's, the pressures which have led to the appearance of a weakened collective bargaining system painfully evident today had already begun to build.<sup>296</sup>

## II. The Modern Lockout in the Collective Bargaining System

### A. *A Re-Examination of Basic Socioeconomic Variables*

The two-tiered plan of management resistance to unionism—attacking unions at the organizational level, both legally and illegally, while creating disincentives for union organization among employees by instituting improved working conditions and benefits in non-union shops—contributed much to the decline of the union presence in American industry since the middle 1950's. In addition, government intervention began once again to back away toward a more reasoned principle of setting boundaries in collective bargaining beyond which the parties were not free to go while leaving them essentially alone so long as they remained within those boundaries. This is after having run the gamut from being a clear tool of management in the days prior to protectionist legislation to

290. 42 U.S.C. §§ 2000a-2000a-6 (1982).

291. 29 U.S.C. §§ 621-634 (1982).

292. 29 U.S.C. §§ 651-678 (1982).

293. KOCHAN, KATZ, AND MCKERSIE, *supra* note 2, at 45.

294. *Id.*

295. *Id. See, e.g.,* S. SLICHTER, J. HEALY, AND E.R. LIVERNASH, *THE IMPACT OF COLLECTIVE BARGAINING ON MANAGEMENT* at 959-60 (1960) (optimistic view of collective bargaining as a successful institution).

296. KOCHAN, KATZ, AND MCKERSIE, *supra* note 2, at 46.

being one of the principal sources of union strength in the early days of the newly enacted labor laws. The use of economic weapons, influenced now primarily by the forces at work in the marketplace rather than the narrow strictures of government-imposed restraints, became even more of a reckoning force at the root of the parties' bargaining power.<sup>297</sup> This was particularly so in light of *Ottawa Silica* and the ostensibly permissible use of temporary replacements for employees locked out solely for the purpose of obtaining bargaining leverage.<sup>298</sup> Nevertheless, during the 1970's, parties who had already achieved a collective bargaining relationship continued to behave as they essentially had in prior years—employers continued to utilize the two-tiered plan of attack, and unions which managed to successfully organize employee units continued with the business of unionization at the bargaining table.

The steel and auto industries are examples of this virtual entrenchment of collective bargaining values during this period.

In steel, the Experimental Negotiating Agreement (adopted in 1970) provided automatic wage-rate escalation in exchange for the steelworkers' giving up the right to strike during contract renegotiation. G.M., in turn, initially set out in a strike in 1970 to get away from the use of an uncapped cost-of-living escalator. After a sixty-day strike, management gave up on those efforts and consolidated its relationship with Leonard Woodcock, the new president of the UAW, agreeing to a contract that preserved the traditional wage formulas (the COLA and 3 percent-per-year annual improvement factor wage increases).<sup>299</sup>

The use of COLAs to fight the inflationary factor continued and expanded during this period, as did the awarding of fringe benefits.<sup>300</sup> Even as the principal players in the collective bargaining game still had as their "major preoccupation . . . the maintenance of stability and continuity in the bargaining process,"<sup>301</sup> the thunder of a changing industrial base together with a changing

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297. For a general analysis and critique of this concept, particularly as it relates to union success at the bargaining table in winning initial collective bargaining agreements, see Weiler, *Striking a New Balance*, *supra* note 6, at 357-63.

298. See *supra* text accompanying notes 327-54.

299. KOCHAN, KATZ, AND MCKERSIE, *supra* note 2, at 40 (footnote omitted).

300. *Id.*

301. *Id.*

workforce was already sounding on the horizon.<sup>302</sup>

### 1. *The Decline of the American Industrial Base*

Deindustrialization—defined as “a widespread systematic disinvestment in the nation’s basic productive capacity”<sup>303</sup>—caused the loss of some thirty-eight million jobs in the United States during the 1970’s.<sup>304</sup> Some of the factors which have been identified as contributing to America’s deindustrialization have been inflation and unemployment, coupled with economic recessions;<sup>305</sup> technological change and a concomitant shift toward high tech industries;<sup>306</sup> and increased foreign competition.<sup>307</sup> American industrial revenues suffered a drastic decline from its once-mighty manufacturing base formed by such commodities as steel and automobiles.<sup>308</sup> While the precise causes of this phenomenon may

302. See generally Farber, *The Extent of Unionization in the United States* in CHALLENGES AND CHOICES, *supra* note 275 [hereinafter Farber].

303. KENNEDY, LABOR AND REINDUSTRIALIZATION at v (1984) [hereinafter KENNEDY].

304. *Id.*

305. Glyde, *supra* note 4, at 4-5.

306. *Id.* Glyde states that “[t]echnology represents a major change that creates structural unemployment and uncertainty. When this effect is combined with a job destroying recession, the shakeout effects can indeed be wrenching.” *Id.* at 6. See also Haddad, *Technological Change and Reindustrialization: Implications for Organized Labor* in LABOR AND REINDUSTRIALIZATION 140-41 (D. Kennedy ed. 1984) [hereinafter Haddad]; Craver, *supra* note 1, at 639-45; H. SHAIKEN, *supra* note 4; W. LEONTIEF & F. DUCHIN, *THE FUTURE IMPACT OF AUTOMATION ON WORKERS* (1985).

307. See generally B. BLUESTONE & B. HARRISON, *THE DEINDUSTRIALIZATION OF AMERICA* (1982); R. BARNETT & R. MILLER, *GLOBAL REACH: THE POWER OF THE MULTINATIONAL CORPORATION* (1974); Price, *Growing Problems for American Workers in International Trade* in CHALLENGES AND CHOICES, *supra* note 275, at 125-47 [hereinafter Price]. Price emphasizes the interdependence of and interrelationship between foreign trade and domestic jobs. For example, he states that, particularly since 1970, exports and imports have outpaced domestic production in terms of growth, with the most dramatic increase occurring in imports. Increased trade does not, however, portend positive effects on domestic jobs; indeed, American jobs become subject “to the vagaries of foreign markets, exchange rates, and international credit.” *Id.* at 126. One estimate has the United States manufacturing sector losing 513,000 jobs due simply to the decline in exports, as well as 240,000 more because of the rise in imports between 1980 and 1982. *Id.* (citation omitted). See also Mitchell, *The Changing World of Work* in THE PARK CITY PAPERS 31-32 (The Labor Law Group 1985) [hereinafter Mitchell]. Lower labor costs in other countries also account for the loss of American jobs to foreign workers, and the decline of wage rates or benefits to make up for the cheaper cost of foreign labor. Price, *supra*, at 126. See also UNIONS TODAY, *supra* note 6, at 12. Donald Ratajczak, director of the Economic Forecasting Project at Georgia State University, states that unions can do little to compete with pressure from foreign competition. “If a union cannot respond to conditions in other countries in which they have no control . . . it is possible that the plant will go abroad.” *Id.*

308. In 1978, 78 per cent of United States Steel’s revenues derived from the production of steel; by 1982, that percentage had dropped to 28 per cent. The lion’s share of that com-

vary, its consequences are certain:

Deindustrialization closed many workplaces, phased down and "milked" others, relocated work, caused massive layoffs, forced early retirement for many workers, forced transfers of others, created a climate in which employees gave back to their employers wages and benefits and made other concessions, sabotaged the economic and social health of communities, and led to a deterioration of the physical and mental health of many Americans. This process also strained such programs as unemployment compensation, public assistance and other social services, and caused a loss of tax revenues and subsequent layoffs of public sector workers.<sup>309</sup>

Erosion of the industrial base is in turn giving way to different types of work. The American economy is fast becoming largely service-oriented rather than rooted in manufacturing.<sup>310</sup> "Thus, today's typical worker moves, handles, and transfers—and even occasionally analyzes and interprets—information as opposed to minerals or auto parts."<sup>311</sup> The fastest growing occupations in the United States from 1982 to 1985 included computer-related jobs such as technicians, programmers, operators, and analysts; office machine repairers, electrical and mechanical engineers; physical therapists and related technicians; occupational therapists; legal and insurance assistants; and personnel-related functionaries.<sup>312</sup> Conversely, the fastest declining occupations during this same period included railroad conductors; shoemaking machine operatives; aircraft structure assemblers; farm laborers; roustabouts; rotary drill operator helpers; farm owners and tenants; typesetters and composers; and butchers and meatcutters.<sup>313</sup> It is clear that jobs particularly related to the creation of products—both agricultural and industrial—are being replaced by jobs related more to the collection and dissemination of information.<sup>314</sup> In turn, the coming of age of the service and information based economy paves the way

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pany's 1982 revenues derived from its newly developed oil and gas ventures, with a resultant permanent closing of 14 steel mills and the loss of 13,000 jobs. Glyde, *supra*, note 4, at 2. See also Atleson, *Labor, Power and Community in THE PARK CITY PAPERS 192* (The Labor Law Group 1985).

309. KENNEDY, *supra* note 303, at v.

310. Mitchell, *supra* note 385, at 28.

311. BEZOLD, CARLSON, AND PECK, *supra* note 1, at 37.

312. *Id.* at 40; Mitchell, *supra* note 307, at 28.

313. BEZOLD, CARLSON, AND PECK, *supra* note 1, at 41.

314. See Craver, *supra* note 1, at 639-43; GINZBERG, *supra* note 1; Glyde, *supra* note 4, at 1; BEZOLD, CARLSON, AND PECK, *supra* note 1, at 37-41, 65-70.

for increased dependence on the high tech industries as a major portion of the economic base.<sup>315</sup> These "new technologies" include "microelectronics, computers, biotechnology, factory automation, lasers, space manufacturing, robotics, new energy sources, advanced materials utilization, surface science, holography, [and] bionics, fiber optics, video, artificial intelligence, [and] advanced information/communication technology."<sup>316</sup> Of course, the new technologies will have counterparts in the service and information economy ready to service their needs, such as "communication, transportation, food preparation, vacations, entertainment, information, health care, and consulting."<sup>317</sup> It is axiomatic that "the entire financial, legal, investment and insurance communities are all service industries."<sup>318</sup>

## 2. *The Changing Workforce*

The growth of the service and information based economy necessarily impacts on traditionally industrial jobs. It is painfully apparent that high technology often displaces manual work and so obviates the need for those who perform it.<sup>319</sup> Accordingly, the deterioration of the traditional industrial base, combined with other socioeconomic factors has changed the demographics of the workforce.

One important change is the entry of large numbers of women into the workforce. In 1956, women made up 32 per cent of the labor force; by 1978 they accounted for 41 per cent.<sup>320</sup> This rise in workforce participation is especially noteworthy among women with children, who comprised only 30 per cent of the labor force in 1960 as compared with 49 per cent in 1976.<sup>321</sup> This trend can be

315. See generally R. LUND AND J. HANSEN, *KEEPING AMERICA AT WORK: STRATEGIES FOR EMPLOYING THE NEW TECHNOLOGIES* (1986).

316. BEZOLD, CARLSON, AND PECK, *supra* note 1, at 65 (quoting Koehn, *The Once and Future Economy*, Security Pacific National Bank, *Trends: The Once and Future Economy*, Future Research Division (1984)).

317. *Id.*

318. *Id.* For an in-depth discussion of the service and information based economy and the new high-tech industry growth, see, Haddad, *supra* note 306, 137-66; Craver, *supra* note 1, at 639-45; Ginzberg, *The Mechanization of Work*, *Sci. Am.*, Sept. 1982, at 67.

319. BEZOLD, CARLSON, AND PECK, *supra* note 1, at 37, 35. See also Haddad, *supra* note 306, at 140-41.

320. Farber, *supra* note 302, at 20. See also BEZOLD, CARLSON, AND PECK, *supra* note 1, at 15.

321. See Craver, *supra* note 1, at 637; KANTER, *supra* note 2, at 48; Mitchell, *supra* note 307, at 24.

expected to continue as economic pressures "encourage married couples to maintain dual careers, and necessity will continue to cause most single women to work, resulting in a future labor force containing even higher percentages of female participants."<sup>322</sup>

The influx of women into the workforce does not at the same time represent their increasing advancement into higher paying or higher prestige jobs. Indeed, women still tend to be clustered into occupations traditionally considered "female," such as clerical positions.<sup>323</sup> With the exception of college and university teaching jobs, women have made comparatively few inroads into the ranks of professional positions.<sup>324</sup> At the same time, however, there has been a greater perception of sex discrimination on the job, with an increase in litigation on these issues.<sup>325</sup>

In addition to the influx of women, more minorities began entering the workforce. Sociologist Rosabeth Moss Kanter reported modest gains in minority employment in 1978. At that time blacks began making inroads into managerial and professional ranks.<sup>326</sup> In the professions, black men have made the most strides in the occupations of physician, engineer, and accountant, with the smallest increase in the area of college and university professor.<sup>327</sup> Black women, on the other hand, decreased their representation in the professions, because of the "vast movement of educated white women into the labor force."<sup>328</sup>

Minority entrance into all ranks of the labor force improved steadily into the 1980's.

Nonwhite minority participation rates are expected to grow

322. Craver, *supra* note 1, at 637; see KANTER, *supra* note 2, at 48.

323. See KANTER, *supra* note 2, at 48. Clerical positions represented some of the fastest growing occupations during the 1960's and early 1970's, and that such growth could be expected to continue into the future. This is consistent with the emerging trend toward a service and information economy, particularly as clerical work tends to become computerized with the advent and expanding use of word processors and other advanced information processing technology. *Id.* See BEZOLD, CARLSON, AND PECK, *supra* note 1, at 15.

324. KANTER, *supra* note 2, at 49. Even so, these minimal gains are primarily among white women; proportionate representation of black women in the professions decreased slightly as of the late 1970's. *Id.* But see Craver, *supra* note 1, at 637.

325. The increase may represent "a change in perception rather than a change in objective discrimination." KANTER, *supra* note 2, at 49.

326. See KANTER, *supra* note 2, at 49-50; see also Mitchell, *supra* note 307, at 26.

327. See KANTER, *supra* note 2, at 40.

328. *Id.* Cf. Mitchell, *supra* note 307, at 26 (the Bureau of Labor Statistics projected increase in non-white females although this projection does not limit itself to the professions).

from about 12% at present to over 20% by the year 2000. By the middle [1980's] the white, male, family breadwinner who was traditionally recognized as the 'typical' worker will be in the minority. Also by the mid-1980's, the historical gap between the educational attainment levels of minority and nonminority workers is expected to be virtually eliminated, placing future labor force participants on a relatively equal competitive basis.<sup>329</sup>

Although women and minorities still comprise a disproportionate share of the lower-paid and lower-prestige workforce,<sup>330</sup> there has been improvement in that area.<sup>331</sup> Changing social policy reflected in social and legal attitudes has aided younger minority workers in their successful participation in the workplace, particularly if they have been educated. Yet black unemployment rates have remained nearly double that of whites, and government predictions do not expect increasing labor demand over the next decade.

Indeed, the unemployment rate is expected to decline gradually in the projections to 6 percent by 1995, a rate marginally higher than existed in 1979 before the economy turned downward. . . . [T]he projections suggest that the types of jobs which are available to a population of below-average educational attainment, i.e. blue-collar factory jobs, will not be centers of employment expansion. Thus, minority labor-market problems can be expected to continue over the next decade.<sup>332</sup>

Aside from the obvious shift in emphasis from traditional blue-collar manufacturing jobs to more technical service-oriented jobs, there is a parallel shift toward the creation of a significant white-collar class.<sup>333</sup> "Between 1900 and 1979, the white-collar segment of the United States economy expanded from 26% to 63% of the labor force."<sup>334</sup> The newly developing service and information

329. KANTER, *supra* note 2, at 50.

330. See BEZOLD, CARLSON, AND PECK, *supra* note 1, at 25-27.

331. *Id.* See also Mitchell, *supra* note 307, at 26.

332. Mitchell, *supra* note 307, at 26. Cf. BEZOLD, CARLSON, AND PECK, *supra* note 1, at 27 (the problems of minorities in the workforce may worsen in the future depending upon immigration patterns).

333. See Craver, *supra* note 1, at 641; KOCHAN, KATZ, AND MCKERSIE, *supra* note 2, at 54-56; KANTER, *supra* note 2, at 64, 67; Osterman, *White-Collar Employment in CHALLENGES AND CHOICES FACING AMERICAN LABOR* at 175-92 [hereinafter Osterman]; Mitchell, *supra* note 307, at 34.

334. Craver, *supra* note 1, at 641. Paul Osterman put the total percentage of white-collar workers in the American labor market as of 1981 at 53 percent. Still, it is "now the single largest job category . . . ." Osterman, *supra* note 333, at 175.

economy is significantly impacting on the white-collar ranks such that their job security is not as strong as it perhaps once was.<sup>335</sup> Employers approach this problem in at least two distinct ways: some hire at the bottom of the company ladder, train their employees themselves, and make considerable efforts to avoid or reduce turnover.<sup>336</sup> "In these circumstances the firms are reluctant to degrade jobs via new technologies and instead seek to broaden job content and to retrain the work force if necessary."<sup>337</sup> On the other hand, some firms will hire laterally from the outside at all entrance levels.

The decline in the traditional industrial base and simultaneous shift to a service economy, coupled with the shifting demographics of the workforce required by the new service economy, have created significant trouble for organized labor.

John J. Richardson [vice president for industrial relations of Northrup Corporation] . . . notes a decline in workers' desire for unions. "As the basic industries began to reduce their workforce[s] and concession bargaining became the predominant pattern, there has been less and less incentive for workers to unionize. Workers no longer view unions as a means to assure income and job security. Those industries most heavily unionized were hardest hit by the recession and the last to recover."<sup>338</sup>

Women as a group have traditionally been difficult to organize.<sup>339</sup> Only one of eight working women belongs to a union.<sup>340</sup> Moreover, there is a significant lack of women on the governing

335. See Osterman, *supra* note 333, at 175. He claims that some of the new technology will have the effect of making obsolete the skills of some of today's white-collar workforce. This will result in a cycle of younger and more computer-literate and technologically trained persons entering the workforce and displacing existing white-collar employees. On the other hand, some experts claim that advancing technology is "de-skilling" the workforce; that is, since technology is replacing skilled labor, the skill requirements of employment are steadily falling. *Id.* at 176-77. It is certain, however, according to Osterman, that whichever theory is correct, employers are going to have to consider some sort of job re-design to increase white-collar employment security and avoid worker unrest. *Id.* at 179.

336. *Id.* at 178.

337. *Id.*

338. UNIONS TODAY, *supra* note 6, at 11.

339. See FREEMAN & MEDOFF, *supra* note 6, at 28; Fiorito and Greer, *Determinants of U.S. Unionism: Past Research and Future Needs*, 21 *INDUS. REL. J.* 1, 6-7 (1982) [hereinafter Fiorito and Greer].

340. See Craver, *supra* note 1, at 649.

boards of unions.<sup>341</sup> As Donald Ratajczak, director of the Economic Forecasting Project of Georgia State University has observed, women have been kept out of power positions "and they know it. . . . In some cases, it's almost as bad as a Harvard men's club."<sup>342</sup>

Traditionally, this vast underrepresentation of women in the rank and file has been explained by a "historically greater degree of attachment to the labor force by men. Greater attachment would increase the expected benefits of unionization . . . ."<sup>343</sup> However, given the recent influx of women into the labor market, from menial to white collar and professional, coupled with a changing societal norm to the two-earner family,<sup>344</sup> such an assessment seems outdated. A more plausible explanation appears to be the still extant disparity between the perceived importance of "female" as opposed to "male" jobs, together with unions ignoring womens' issues, such as the historic inequality of pay between male and female workers.<sup>345</sup> Another significant aspect to the entry of growing numbers of women into the workplace has been the growth of part-time work, job-sharing, home work, and flexible working hours arrangements.<sup>346</sup> "The increase of women in the

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341. *Id.* Craver points out that only 350 of 4,800 reported positions on union governing boards belong to women, and, as of 1978, not one of the 113 AFL-CIO affiliate members had a woman president. Only 173 officers of AFL-CIO state central bodies were women. *Id.*

342. UNIONS TODAY, *supra* note 6, at 14.

343. Fiorito and Greer, *supra* note 339, at 7.

344. *See supra* text accompanying note 322.

345. *See Craver, supra* note 1, at 649; FREEMAN & MEDOFF, *supra* note 6, at 28; Fiorito and Greer, *supra* note 339, at 7. That effective sexism still exists is manifested even in scholarly research into the problem itself. Freeman and Medoff, while cogently arguing that women are in reality interested in unions and make good union members once they have been recruited, nevertheless, in terms of explaining the failings of unions toward laboring women, advance questionable sex-based rationales of their own. For example, Freeman and Medoff state that unions ought to realize that women may have different fringe benefit needs than men: "some of the fringe benefits won by unions are less valuable to women than to men—for example, health insurance (because many women already receive their benefits as a result of their husbands' pay package) . . . ." FREEMAN & MEDOFF, *supra* note 6, at 28. This assumes that: (1) all women in the workforce who are potential union members are married; and (2) husbands and wives are a solitary economic unit. The latter has been the traditional excuse for paying women less money than men for performing the same job. Such a premise is insulting not only to women who do not have husbands and yet have families to support, but also to the growing number of never-married career women in the workforce who have themselves to support, as well as to the married women in the workforce whose health benefits supplement that of their husbands' (or vice versa) who wish simply to have the same benefits as men for doing the same work.

346. *See KANTER, supra*, note 2, at 59; *see also* Ft. Lauderdale News/Sun Sentinel, Dec. 21, 1986, at D-1, col. 2. The News/Sun Sentinel estimates that 5 to 15 million "contingent" workers now are part of the workforce, including those who work at home, those who are temporary employees, and those who involuntarily work part time. Estimates increase that

paid labor force, especially married women with children, focused attention for policy-makers on how work connects with family life and the extent to which work systems make it possible to maintain effective participation in both worlds.<sup>347</sup> Casual and temporary employees are generally excludable from a bargaining unit.<sup>348</sup> Therefore they would have an adverse effect on organizing efforts.<sup>349</sup>

The lack of success which unions have experienced in organizing women is not shared when organizing minority group employees. Although labor unions have traditionally been guilty of discrimination against minority workers,<sup>350</sup> their record of workplace improvements has apparently outweighed any lasting negative effects.<sup>351</sup> Minority employees seem to prefer union organization

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figure by another ten million employees when they account for those who work part time voluntarily. Such relationships give the employer great flexibility in determining its workforce, but most part time employees have little or no job security. For example, part time employees at Motorola (about 30 per cent of its workforce), can be terminated on 24 hours notice. *Id.* at D-11, col. 1. Part time workers are paid less; at least 70 per cent of them have no employer sponsored retirement plans, and 42 per cent of them have no direct employer-sponsored health insurance. Twenty-three per cent have no health insurance whatsoever. *Id.* In addition, part time work pays less, averaging \$4.17 per hour as opposed to full time earnings which average \$7.05 per hour. *Id.* This growth in the voluntary part time labor force is an effect of the boom in the service sector of the economy, which is also manifesting itself in the dramatic growth of home workers, which has quadrupled since 1980. Two-thirds of these home workers are women, "who may be willing to trade some benefits to avoid commuting and day-care expenses." *Id.*

347. KANTER, *supra* note 2, at 59.

348. See, e.g., Sentinel Printing & Publishing Co., 137 N.L.R.B. 1610 (1962); Martinelli & Co., 99 N.L.R.B. 43 (1952). Although the classification and representational rights of these employees are beyond the scope of this paper, suffice it to say that such employees are excludable because of their lack of a community of interest with the employees in the unit. Although regular part-time employees may in fact be includable, employees who voluntarily work part-time with less pay and little or no benefits would be classed as casual employees and not regular part-time employees, since classification as a regular part-time employee depends on "indicia of employee status such as . . . reimbursement for overtime pay, coverage under a health insurance plan, and the scheduling of regular working hours," which many of the "new" part-time workforce does not enjoy. MORRIS, *THE DEVELOPING LABOR LAW* 1484 (1983). Similarly, home workers would be unlikely to share a community of interest with the employer's in-house workforce under the various tests relative to determining the existence of such a relationship. See generally OFFICE OF THE GENERAL COUNSEL, N.L.R.B., *AN OUTLINE OF LAW AND PROCEDURE IN REPRESENTATION CASES* 131 (Government Printing Office, June 1974).

349. See generally Fiorito and Greer, *supra* note 339, at 7.

350. See Craver, *supra* note 1, at 648.

351. See Fiorito and Greer, *supra* note 339, at 4. In any event, title VII of the Civil Rights Act of 1964 prohibits discrimination by a labor organization as well as by an employer. 42 U.S.C. § 2000e-2(c) (1982).

two-to-one over majority group employees.<sup>352</sup> This predominant union preference among minority employees has been attributed to their overrepresentation in the blue-collar jobs.<sup>353</sup> If that premise is correct, then, with the modern decline in the blue-collar sector, unions will lose a substantial base of support as minority employees in that sector are displaced.<sup>354</sup>

Finally, the shift toward white-collar work as opposed to the traditional blue-collar industrial occupations portends both negative and positive effects for organized labor. At first blush, white-collar workers appear to be "off limits" for unions. This is because the traditional white-collar workers

have historically enjoyed an upward mobility which has induced them to identify more with the interests of their employers than with those of their fellow rank-and-file unionized subordinates . . . . Their middle-class socio-economic status has similarly caused many white-collar workers to question the benefits which they might derive from membership in the blue-collar trade unions. . . . Adroit managements have subtly endeavored to convince their white-collar employees to view labor union participation as both unprofessional and demeaning. . . . Union leaders have been portrayed as incompetent or even corrupt.<sup>355</sup>

Yet it has been shown that even white-collar workers want a measure of control and security in their working lives, which includes protection from arbitrary management action.<sup>356</sup> While white-collar workers tend to rely on their upward mobility and management orientation to achieve this goal, it has become increasingly evident that as the white-collar ranks swell in conjunction with the expansion of the service economy that this may simply not be enough. The rapid growth and expansion of high technology in the work-

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352. Fiorito and Greer, *supra* note 339, at 4. See also FREEMAN & MEDOFF, *supra* note 6, at 29-30.

353. In 1977, 61 per cent of minority as opposed to 46 per cent of non-minority employees were in blue-collar occupations. FREEMAN & MEDOFF, *supra* note 6, at 30.

354. See *supra* text accompanying note 332.

355. Craver, *supra* note 1, at 650 (footnotes omitted); see also FREEMAN & MEDOFF, *supra* note 6, at 32 (white-collar workers usually receive higher pay and better benefits, with more job freedom and security; they tend to identify more with their profession than with their employer and seek mobility as opposed to action to obtain improved working conditions and benefits).

356. See generally GINZBERG, HUMAN ECONOMY, *supra* note 19, at 179; see also Osterman, *supra* note 333, at 185 (economic security of white-collar employees threatened); KOCHAN, KATZ, AND MCKERSIE, *supra* note 2, at 209.

place is causing disillusionment and alienation among white-collar workers. A whole new "working class" of white-collar employees who comprise the front lines of the service industries—without the attendant status or benefits—is beginning to emerge.<sup>357</sup> These include paralegals, paramedics, health care technicians and technologists, and the like, who basically are to the service economy what blue-collar laborers were to the industrial economy.<sup>358</sup> Many white-collar workers, both the new technical employees as well as their professional counterparts, are beginning to turn to collective action to realize their goals and aspirations after concluding that upward mobility and professional status would not necessarily yield what they were seeking. There has been a dramatic increase in the unionization of white-collar workers.<sup>359</sup> Even still, proportionate white-collar organization is still greatly lacking, with much of the fault lying with the unions themselves and their failure, or inability, to rally these workers.<sup>360</sup>

### 3. *Other Significant Shifts in Socioeconomic Variables*

#### a. *Regional Movement*

Over the last decade there has been massive growth in the so-called "Sun Belt" states, comprised of the south and southwest.<sup>361</sup> The migration of workers—and employers—to this region is likely to continue.<sup>362</sup>

Considering that more than half of all union members presently reside in California, Illinois, Michigan, New York, Ohio, and Pennsylvania, and that California is the only one of these states expected to experience sustained future growth, organized labor will undoubtedly have to seek converts in other regions.<sup>363</sup>

357. See KANTER, *supra* note 2, at 65.

358. *Id.*

359. See FREEMAN & MEDOFF, *supra* note 6, at 32; Craver, *supra* note 1, at 650; see also Osterman, *supra* note 333, at 189 (union success in organizing white-collar workers depends on changing their attitudes and self-perceptions).

360. KOCHAN, KATZ, AND MCKERSIE, *supra* note 2, at 55. These authors quote Charles McDonald, director of the AFL-CIO Department of Organization, as stating that organizational strategies have not always been "well targeted." *Id.* Indeed, McDonald recognizes that, while service sector representation elections have increased from eight per cent prior to 1974 to about 22 per cent since 1974, unions should actually be holding 70 to 80 per cent of their elections among these workers. *Id.*

361. See Craver, *supra* note 1, at 638.

362. *Id.*

363. *Id.*

Historically, however, the case that unions have encountered serious difficulty organizing workers in the southern and southwestern United States.<sup>364</sup> Part of this difficulty stems from state right-to-work laws in these regions; laws which show no sign of disappearing.<sup>365</sup>

#### b. Employee Educational Levels

As the educational levels of employees rise, a negative impact on union organization results. This is due to many of the same reasons associated with lack of interest in unions among white collar workers.<sup>366</sup> The workforce is becoming more educated; in 1970, 12.9 per cent of the civilian labor force had four or more years of college; by 1975 that number had risen to 15.7 per cent, and in 1979 it was 17.6 per cent.<sup>367</sup> More educated workers, like white-collar workers, generally tend to believe in the merits of their own achievements to gain job advancement, rather than in collective action. "Alternatively, the market for more educated employees has been relatively favorable and employers have tended to exercise greater caution in their dealings with the more educated."<sup>368</sup> Thus, in 1977, only 13 per cent of workers with any post-high school education were members of unions.<sup>369</sup>

The dramatic shift away from the traditional union base of blue-collar industry toward a service economy comprised of worker groups which have traditionally operated beyond the union sphere, has made it clear that unions' bargaining power has suffered a serious decline. While unions suffered defeat at the NLRB polls—both with respect to initial representation elections as well as decertification proceedings which themselves have been on the rise—<sup>370</sup> they have also failed to maintain their advantage in determining

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364. *Id.* at 648 (suggesting that this situation may be changing, as more northern workers follow northern employers to the Sun-Belt); Farber, *supra* note 302, at 16-19; KOCHAN, KATZ, AND MCKERSIE, *supra* note 2, at 53; UNIONS TODAY, *supra* note 6, at 14.

365. See Fiorito and Greer, *supra* note 339, at 9; FREEMAN & MEDOFF, *supra* note 6, at 31.

366. See Fiorito and Greer, *supra* note 339, at 7; FREEMAN & MEDOFF, *supra* note 6, at 27.

367. BUREAU OF LABOR STATISTICS, U.S. DEPT. OF LABOR, BULL. 2070 HANDBOOK OF LABOR STATISTICS 136 (Dec. 1980).

368. Fiorito and Greer, *supra* note 339, at 7.

369. See FREEMAN & MEDOFF, *supra* note 6, at 27.

370. See UNIONS TODAY, *supra* note 6, at 8.

wages and benefits.<sup>371</sup> This loss of power, although partially attributable to shifting socio-economic variables, is also effected by changing legal and political considerations.

*B. A Re-Examination of Legal and Political Considerations*

The use of economic weapons, the power base component of collective bargaining, has become more highly visible in recent years. This has occurred partly as a result of socio-economic changes; one effect of which is to put the employers in a relatively stronger economic position than the unions, which in many cases have been forced into a defensive posture. Additionally, the sweeping changes in the legal propriety of lockouts which occurred during the 1960's and 1970's came full circle in the 1980's. In *Harter Equipment, Inc.*,<sup>372</sup> the NLRB appeared to finally give up its traditional philosophy of attempting to regulate economic weapons by accepting the use of temporary replacements in bargaining lockouts. Chairman Dotson, together with Members Dennis, Johansen and Babson, concluded that the use of temporary replacements serves the same purpose as the bargaining lockout itself; that is, it exerts economic pressure on the union in order to convince it to accept the employer's bargaining terms. The majority had at last come to view the bargaining lockout as the functional corollary of the strike: "[e]xercising the right to lock out in a bargaining dispute does not necessitate foregoing the option to secure business earnings any more than exercising the right to strike requires employees to forego attempts to secure income by temporary alternative employment, strike benefits, or unemployment compensation. . . ."<sup>373</sup> The majority accordingly accepted the bargaining lockout as a legitimate economic weapon to be justifiably wielded in aid of the employer's bargaining position in the same way as the union could wield a strike. The existence of legitimate business justification would then require the Board to inquire into the employer's motive, a standard consideration under section 8(a)(3). As the majority stated:

We reject the argument that the Board should require more proof of an employer's legitimate purpose in such a case or should engage in balancing employer interests against em-

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371. See *infra* text accompanying notes 403-07.

372. 280 N.L.R.B. No. 71 (June 24, 1984), 122 L.R.R.M. 1219 (1986).

373. *Id.*, slip op. at 8, 122 L.R.R.M. at 1222.

ployee rights to determine whether the Act has been violated, even in the absence of independent proof of unlawful motivation. In our view, the Supreme Court's weighing of all relevant rights and interests in *American Ship Building* and *Brown Food Store* has already effectively defined the employer's conduct as less than inherently destructive, has recognized the legitimacy of the business justifications involved, and has thereby struck a fixed balance in favor of permitting the use of temporary employees after an otherwise lawful lockout.<sup>374</sup>

According to the Board, the use of temporary replacements during a bargaining lockout wreaks no more havoc with employee rights than does the lockout itself.<sup>375</sup> Therefore, the continued use of the balancing test would interject the Board into the forbidden role of "arbiter" of the type of economic weapons which parties may utilize.<sup>376</sup> Accordingly, the *Great Dane* balancing test should be reserved for only "exceptional cases" where "the employer's conduct is inherently destructive of employee rights . . ." <sup>377</sup> Generally such a test would not be applicable in the ordinary course of bargaining lockouts wherein the employer keeps its operations going with temporary replacements, "absent specific proof of anti-union motivation" such conduct would not violate the Act.<sup>378</sup>

In *Harter Equipment*, the Board finally moved away from its traditional approach of viewing a lockout as inherently destructive of employee rights under the Act unless the legitimate business justifications for it outweighed its presumed negative impact on employee rights. After *Harter Equipment*, however, the Board firmly took the *laissez-faire* attitude which the Supreme Court said was required by Congress.<sup>379</sup> The bargaining lockout is no longer seen as "inherently destructive." Balancing it against the rights of employees is no longer necessary, except in special circumstances. *Harter Equipment* makes it clear that an employer's use of temporary replacements is not a special circumstance.<sup>380</sup>

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374. *Id.*, slip op. at 10, 122 L.R.R.M. at 1222.

375. *Id.*, slip op. at 9, 122 L.R.R.M. at 1222.

376. *Id.*, slip op at 10-11, 122 L.R.R.M. at 1222.

377. *Id.*, slip op. at 10, 122 L.R.R.M. at 1222.

378. *Id.*, slip op. at 11, 122 L.R.R.M. 1223.

379. See *National Gypsum Co., Inc. Gold Bond Bldg. Prods. Div.*, 281 N.L.R.B. No. 96 (1986); *Birkenwald, Inc.*, 282 N.L.R.B. No. 130 (1987). *But see id.*, slip op. at 5 (Stephens, concurring) (expressing reservations about the applicability of *Harter Equipment*).

380. *But see Harter Equip., Inc.*, 280 N.L.R.B. No. 71 slip op. at 16, 122 L.R.R.M. at

The one remaining issue left open by *Harter Equipment* is whether the employer may utilize permanent replacements in a bargaining lockout. The Board indicated in *Harter Equipment* that it might decide the issue in favor of the employer. Indeed, the majority stated that they did not see "how any effort to remain in operation after a lawful lockout could be 'inherently destructive' of employee rights and per se violative of the Act without inquiry into the employer's motivation."<sup>381</sup> The Board appeared to suggest that even the use of permanent replacements would not be considered inherently destructive of the Act since the employer may well have the legitimate justification for its conduct of simply wishing to remain in operation. With such a legitimate business justification, use of the balancing test to determine illegality based on destruction of employee rights would be impermissible. In the absence of an improper employee motive, use of permanent replacements may well be lawful. Any such determination, however, would clearly have to account for at least the following factors:

(1) *Is there legitimate employer justification?* If one accepts the premise that a bargaining lockout is legitimate even though it may have a chilling effect on union organization, the focus becomes whether the use of permanent replacements is part and parcel of the lockout itself. Given the *Harter Equipment* decision, the answer must be yes. The Supreme Court in *American Ship Building* established the premise that economic hardship caused by the utilization of economic weapons does not necessarily make the conduct illegal. While a strike may well cause losses severe enough to the employer to bring about that employer's surrender, so too may an employer's lockout seriously affect a union. Such an effect—which is of course the sole purpose of the lockout—does not make the lockout unlawful, even though it has the very real potential to discourage the employees from unionizing or perhaps pressing too hard in bargaining.<sup>382</sup> Neither the Supreme Court in *Brown*

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1224 (Dennis, dissenting) (characterizing the majority interpretation of *American Ship Building* as overly broad and potentially self-defeating). Member Dennis opined that, unless the employer is in a defensive posture analogous to that found in *Brown Food*, a prohibition of the employer's using temporary replacement is "inherently destructive of employee rights and violates section 8(a)(1) and (3) of the Act, notwithstanding the absence of improper motive and the presence of what might be viewed as legitimate and substantial business reasons for the conduct." *Id.* at 20-21, 122 L.R.R.M. at 1226 (footnote omitted).

381. *Id.*, slip op. at 9, 122 L.R.R.M. at 1222.

382. Of course, the converse is also true. It may well be that the union is in an advanta-

*Food* nor the Board in *Harter Equipment* viewed the use of temporary replacements with the sole purpose of cutting the employer's losses as any more illegal than the weapon itself, although it might result in strengthening the employer while delivering yet another blow to the union. It is difficult to see why the use of permanent replacements would be any different in this respect. Such use may well have an even greater effect upon the union, but its ostensible purpose remains the same: the continued operation of the business. Without specific proof of anti-union animus—seemingly now required by the *Harter Equipment* decision—the clear existence of such a legitimate purpose would militate in favor of finding the use of permanent replacements lawful.

(2) *Is the use of permanent replacements inherently destructive of employee rights so as to be prima facie evidence of evil motive and thus make such a situation one of the "special cases" described in Harter which requires application of the balancing test?* The answer appears to be that it is not. Clearly the use of permanent replacements has an even greater effect upon the employees' decision to organize; it may be their organization itself that has turned the employees out of their jobs. But such a result would again be simply a calculated effect of the bargaining lockout if the socio-economic variables are in favor of the employer.<sup>383</sup> The Board has already declared that the employer has a legitimate interest in keeping its operations running, a factor that, after *Harter*, is not subject to balancing against employee rights to organize in an attempt to test its legitimacy. The use of permanent replacements during a bargaining lockout seems to be governed by the same considerations obtaining in the *Mackay* doctrine. It is axiomatic that an employer may permanently replace its employees during an economic strike. In such a case, the union has chosen the time and method of the work stoppage. The employer, in replacing the strikers, is thus acting in a defensive, reactive posture. Yet two established precepts make the policy underlying *Mackay* applicable in lockout situations as well: (a) that unions do not have the exclusive right to determine the timing of the work stoppage; and (b) the offensive-defensive dichotomy is no longer a useful tool in

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geous economic position and can bring the employer around to accepting its proposals. See *supra* text accompanying note 26-31.

383. The use of replacements, permanent or otherwise, is not a magical wand to be automatically waved by the employer. See, e.g., PERRY, KRAMER, AND SCHNEIDER, *supra* note 27. See also *Belknap v. Hale*, 463 U.S. 491 (1983).

assessing the legality of a lockout. Even though, depending upon the economic variables, the use of permanent replacements could effectively break the union, the employer's right to wield a legitimate economic weapon can no longer be curtailed because of possible harmful effects on the employees. If the lockout is to be fully viewed in the same way as a strike, the employer ought to be allowed to maximize the lockout—as the union maximizes the strike. That is by being able to bring to bear whatever aspects of the weapon—so long as they are reasonably related to the purpose of maintaining operations and are not the product of anti-union animus—which it has available. These are the teachings of *MacKay*, and they are equally reflected in *American Ship Building*, *Brown Food*, and *Harter*. Accordingly, without abject proof of an evil motive, an employer's use of permanent replacements during an otherwise lawful bargaining lockout ought not to render the lockout unlawful.<sup>384</sup>

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384. In *Johns-Manville Prods.*, 223 N.L.R.B. 1317 (1976), *enforcement denied*, 557 F.2d 1126 (5th Cir. 1977), the NLRB and the Fifth Circuit were ostensibly faced with the issue of a lockout coupled with permanent replacements. The employer locked out and temporarily replaced its employees during contract negotiations because of an inordinate number of breakdowns which caused production to drop off significantly. The company eventually made the replacements permanent.

An Administrative Law Judge found the initial lockout and use of temporary replacements lawful under the principles set forth in *Inter Collegiate Press*, but found that the use of permanent replacements "did in fact tilt the scales out of balance with respect to bargaining power . . ." *Id.* at 1332 (illustrating the inherent conflict in the Board's regulation of economic weapons under the apparent guise of protecting employee interests—notably the right to collectively organize and the right to strike—with the proscription set forth by the Supreme Court expressing the underlying scheme of the Act to leave the parties alone with respect to how they bargain or the economic power which they bring to bear on the bargaining process).

The Board agreed, finding that Manville did indeed have a legitimate business purpose for locking out its employees, citing the disruptions in production. *Id.* at 1318. But the Board held that the "adverse effect upon the employees' protected rights. The resulting from Manville's contemporaneous use of permanent replacements outweighed the legitimate business interests and the replacement of employees were therefore a violation of § 8(a)(3)." *Id.* at 1317.

The Fifth Circuit disagreed with the Board, essentially without reaching the permanent replacement issue. Instead, the court found, as a matter of law, that the employees had been involved in what was tantamount to an in-plant strike, with conduct "so severe that we cannot help but find that . . . [they] . . . forced the Company to lock them out." *Johns-Manville Prods. v. NLRB*, 557 F.2d 1126, 1133 (5th Cir. 1977). That being the case, Manville clearly had a right to replace the strikers pursuant to the *Mackay* doctrine. *Id.* The majority thus did not reach the issue of permanent replacements decided by the Board but did appear to criticize the Board for its finding that Manville's use of permanent replacements violated the Act *per se* as inherently destructive of employee rights. *Id.* at 1134. Judge Fay wrote:

But as long as [the Board and the Administrative Law Judge] attempted to

The implications of the *Harter Equipment* decision's recognition of the Congressional *laissez-faire* attitude toward the use of economic weapons means that the parties, when acting in the realm of collective bargaining, can expect from now on to be left to their own devices.<sup>385</sup> Economic variables, then, become extremely important for they will no longer be offset by governmental assessment and balancing.<sup>386</sup> Instead, collective bargaining will be regulated simply by the requirement of good faith. So long as that re-

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perform the balancing test, we observe the instruction of judicial precedent that neither the Board nor the courts are permitted to choose the weapons or balance the bargaining power of the parties beyond that delineated by Congress in the National Labor Relations Act and other federal and state labor law.

*Id.* at 1134 n.17.

However, in *Harter Equipment*, the Board stripped the lockout of inherent illegality and did away with the balancing test emphasized in *Johns-Manville*. It is accordingly doubtful whether this case would be relevant to a post-*Harter Equipment* consideration of the issue.

385. It could be argued, on the other hand, that the employer ought not to swat a fly with an atomic bomb; that is, if there are likely and viable alternatives to the employer's use of replacements it ought to utilize those rather than resort immediately to the harshest weapon available. If this reasoning is accepted, then immediate resort to the use of permanent replacements, without exploring and/or using alternatives, would constitute *prima facie* evidence of an evil motive. The problems inherent in this approach are readily apparent. Whether there are alternatives requires a subjective value judgment of how the employer ought to wield its economic weapons, something that has been forbidden by the Supreme Court as not within the Board's authority as contemplated by Congress. *But see Johns-Manville Prods. Corp.*, 557 F.2d 1126, 1135 (5th Cir. 1977) (Wisdom, J., dissenting) Such a notion would signify a return to the balancing test, which the Board implicitly rejected in *Harter*.

386. The *Harter Equipment* decision itself represents yet another factor in the weakening of unions' bargaining power; the significant shift of the NLRB away from union paternalism. What some experts have called severe politicization of the agency essentially began in the early 1980's with the appointment of Chairman Dotson and several new Board members by President Reagan. Kemble, *The New Anti-Union Crusade* THE NEW REPUBLIC, Sept. 19-26, 1983, at 18; *Failure of Labor Law*, *supra* note 51, at 14 ("the perception of a neutral and objective N.L.R.B. has been shattered"); UNIONS TODAY, *supra* note 6, at 19. *But see Restoring Balance to the Labor Board*, NATIONS BUSINESS, July 1983, 26-29; *Labor Could Finally Win a Round from Reagan*: BUS. WK., March 25, 1985, 34; *Failure of Labor Law*, *supra* note 51, at 28 (Minority Views). Besides overturning some long established precedents, the Board, as well as the Reagan administration itself, has been viewed as maneuvering administratively so as to promote backlogs and delays in processing cases. *See e.g., Committee on Government Operations, Joint Hearings Before the Subcommittee on Education and Labor and the Manpower and Housing Subcommittee, Oversight on the National Labor Relations Board*, 98th Cong., 1st Sess. 1983; *Failure of Labor Law*, *supra*, note 51, at 11-14; *The N.L.R.B.: Labor's Love Lost*, NEWSWEEK, May 21, 1984, at 70; William H. Wynn, President of the United Food and Commercial Workers Union, commented, "The N.L.R.B. has been reduced to little more than a management tool, whose chief function is to delay, deny, and destroy the right of employees to freely and fairly organize and win union representation." UNIONS TODAY, *supra*, note 6, at 9.

quirement has been met, the parties will be left free to make their own calculated decisions about when to engage in economic warfare as well as to take responsibility for the consequences of their actions.<sup>387</sup>

### C. Modern Times: An Empirical Overview

The shifts in the socio-economic, legal, and political variables discussed in the preceding section have certainly taken their toll with respect to labor's desire and ability to organize. Although union membership has been steadily declining since about 1955, between 1980 and 1982 alone the average membership fell by about 2.6 million workers, to a total of about 19.8 million members.<sup>388</sup> "The combination of an expanding labor force and contracting union membership during this period dropped organized labor's share of the civilian workforce by 3 percentage points from 20.9 percent in 1980 to a new, modern-era low of 17.9 percent in 1982 . . . ."<sup>389</sup> Some industries have been hit harder than others. For instance, in the construction industry which was about 80 per cent union in the early 1960's, only about 45 to 50 per cent of employees were unionized as of 1984.<sup>390</sup> Contemporaneous with the decline in membership, unions have been experiencing severe pub-

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387. Some scholars have argued that in a pure contest of economic power, unions are likely to lose because of concepts like *Mackay*. See Weiler, *Striking A New Balance*, *supra* note 6, at 389-93, 412; see also Gillespie, *The Mackay Doctrine and the Myth of Business Necessity*, TEX. L. REV. 782 (1972). Professor Weiler has even argued in favor of eliminating the prohibition against secondary boycotts. Weiler, *Striking A New Balance*, *supra*, note 6, at 415. However, it is clear that unions and the employees they represent are not helpless in these situations. Replaced workers have the option of finding alternative employment either permanent or temporary. *Id.* at 412; see also PERRY, KRAMER, AND SCHNEIDER, *supra* note 27. In addition, unions have the option of instituting consumer boycotts against a struck employer's products, which may result in what is essentially a secondary boycott. See *NLRB v. Fruit and Vegetable Packers and Warehousemen Local 760*, 377 U.S. 58 (1964). There, the Court stated:

While any diminution in [the secondary's] purchases of [the struck product] due to a drop in consumer demand might be said to be a result which causes [the union's] picketing to fall literally within the statutory prohibition, "it is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit nor within the intention of its makers."

*Id.* at 71-72. The union may also engage in sympathy strikes in response to strikes at different plants of the employer, or engage in coalition bargaining as an assertion of strength. See PERRY, KRAMER, AND SCHNEIDER, *supra* note 27, at 116-17.

388. UNIONS TODAY, *supra* note 6, at 7.

389. *Id.*

390. *Id.* Only in the public sector is such drastic decline in union membership not evident. *Id.*

lic image problems. There has been a 9 per cent decline since 1974 in the number of people who believe that unions help to "check the power of big business," suggesting that unions are not perceived as being as strong as they were in the past.<sup>391</sup> The approval rating of unions has declined miserably since 1936; in 1981, only 55 per cent of the public approved of unions, while 35 per cent disapproved. In 1936, however, 72 per cent of the public approved, while only 20 per cent disapproved.<sup>392</sup> James L. Medoff said in response to these statistics: "During the past fifteen years, the public seems to have attached a much larger weight to the monopoly face of unionism and a much smaller weight to its voice face . . . ."<sup>393</sup>

One effect, or perhaps one cause, of unionism's negative public image has been a decrease in the feeling of union solidarity and a concomitant increase in worker willingness to defy union picket lines, even in traditional union strongholds. This means that unions can no longer count as heavily on the strike as a viable means of achieving their goals, for workers appear willing to break strikes in order to get employment.<sup>394</sup> This was painfully evident during the strikes at Hormel Meat Packing in Minnesota and the Watsonville Cannery, at Watsonville, California.<sup>395</sup> And in Lorain, Ohio, a community with a strong blue-collar union tradition and home to a USX steel mill, violence erupted during a work stoppage<sup>396</sup> over Thanksgiving, 1986. USX, in an attempt to service customers, began shipping stockpiled steel out of the Lorain plant when workers, in violation of a court order, stood upon the railroad tracks on which the steel was being shipped. The workers were forcibly cleared from the tracks by police, who were armed with guns, clubs, and dogs.<sup>397</sup> Perhaps the most telling thing about this entire episode is the reaction of the residents of Lorain, many of whom were milling around the site wearing buttons declaring, "I'm a union busting SOB."<sup>398</sup> Such attitudes make it easier for employers to combat union collective action because, with far fewer worker qualms about crossing picket lines, strike replacements are readily

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391. *Id.* at 9.

392. *Id.* at 10.

393. *Id.*

394. See *CBS Evening News with Dan Rather* (Sept. 22, 1986).

395. *Id.*

396. USX refers to the stoppage as a strike; the United Steelworkers Union refers to it as a lockout. *Cleveland Plain Dealer*, Nov. 29, 1986, at 1. col. 4.

397. *Id.*

398. *WEWS-TV News* (Broadcast Nov. 28, 1986).

available.

Worker disenchantment with unions is also evident in the drastic increase in successful decertification elections. Decertification elections "have increased more than threefold since 1970, and unions are ousted three times out of four."<sup>399</sup> In 1970, for example, the NLRB conducted 301 decertification elections, of which the unions won ninety-one times.<sup>400</sup> However, in 1983, out of 922 decertification elections, the unions won only 232.<sup>401</sup> There appears to be a correlation between the increase in successful decertification elections and the rise in the number of eligible voters in such elections,<sup>402</sup> suggesting once again that the newer employees entering into the labor market are not likely to organize.

Coincident with the decline in their public image and significant losses on both the organizational and decertification fronts, the unions have lost a substantial amount of their ability to obtain and maintain significant wage and benefit differentials as compared with non-union workers. Since 1979, one out of every six union members has suffered either a wage rollback or freeze in negotiated collective bargaining agreements.<sup>403</sup> In 1986 alone, wage gains included in collective bargaining agreements were at record low levels, with about 69 per cent of workers receiving no COLAs. In manufacturing, wages actually declined.<sup>404</sup> There is evidence of a growing gap between union and non-union wage increases, with non-union workers getting the greater increases. For the first three quarters of 1984, for example, union wages increased by .7 per cent, while non-union wages increased by .8 per cent. Over the twelve month period ending in September 1984, the gap was even greater; non-union wages rose 4.5 per cent, while union wages rose only 3.3 per cent.<sup>405</sup> Teamsters President Jackie Presser expressed the view that "unions will continue to negotiate lower new-hire rates and wage progression scales for new hires that stretch out the length of time required to reach the top of the scale."<sup>406</sup> Clearly,

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399. UNIONS TODAY, *supra* note 6, at 8.

400. *Id.*

401. *Id.*

402. *Id.*

403. *Id.* In the construction industry, for example, settlements negotiated through early July, 1984 included an average wage reduction of 1.3 per cent. *Id.* See also Mitchell, *supra* note 307, at 42-44.

404. 124 Lab. Rel. Rep. News & Background Info (BNA) 65, 66 (1987).

405. UNIONS TODAY, *supra* note 6, at 8.

406. *Id.* at 9.

the 20 per cent wage differential enjoyed by union workers in the early 1980's has narrowed significantly and will probably continue to do so.<sup>407</sup>

Loss of the wage differential pales in comparison to the problem of concession bargaining, also a major issue confronting unions in the mid-1980's.

In 1983, 37 percent of the workers covered by agreements affecting 1,000 or more workers had their wages frozen or reduced in the first contract year. In 1984, the second year of the economic recovery, union concessions were still being negotiated. During the January to September 1984 period, 27 percent of unionized workers were affected by negotiated wage freezes or decreases.<sup>408</sup>

Such situations are evident today; for example, Eastern Air Lines, purchased by the owners of Continental Air Lines and Texas Air while on the brink of insolvency, has recently renewed requests for wage and benefit concessions from its three major unions.<sup>409</sup> In some industries, such as meatpacking and construction, "[c]oncession bargaining has become the rule, rather than the exception . . . ."<sup>410</sup> Some of it is a direct result of the new socioeconomic trends. For example, in industries such as automobiles and rubber, on the decline because of the shifting economy and foreign competition, unions are trading off contract concessions for job security provisions.<sup>411</sup> Other provisions such as flexible hours and job sharing may be instituted in lieu of massive layoffs due to economic uncertainty.<sup>412</sup>

Such trade-offs are manifestations of labor and management adapting to the changing world of work. Another such adaptation is the expansion and maturation of a recognized need for labor-management cooperation rather than traditional adversarially no-holds-barred relationship. Advancing a bargaining methodology which came into vogue during the middle years of the Act, full-

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407. *Id.*

408. *Id.* at 8-9.

409. See *Eastern Moves to Slash Labor Costs*, Miami Herald at 1A (Jan. 22, 1987); *Eastern Antagonists Play Out Final Drama*, Miami Herald at 7BM (Jan. 19, 1987); *EAL Looks For Suit, Bryan Says: Warns of Pending Collision Course*, Miami Herald at 8D (Jan. 8, 1987).

410. UNIONS TODAY, *supra* note 6, at 106.

411. *Id.* at 107.

412. *Id.*

fledged labor-management cooperation means the acceptance of worker input in matters shaping the entrepreneurial context of the business enterprise. This is often accomplished by having a union representative sit on the Board of Directors or in some other high-ranking position within the executive, decision-making levels of the business.<sup>413</sup> So far, in the United States, Chrysler Corporation and Pan American Airways are the most prominent examples of businesses which have agreed to union presence on the Board of Directors in exchange for bargaining concessions.<sup>414</sup> Douglas Frazier, former head of the United Automobile Workers, was elected to Chrysler Corporation's Board of Directors in 1980. Owen Bieber, Frazier's successor as head of the UAW, was elected to Chrysler's Board in 1984.<sup>415</sup> Eastern Air Lines followed suit in 1984.<sup>416</sup> It is estimated that some 400 companies now permit some type of worker representation on their corporate boards.<sup>417</sup>

In addition to participation on corporate boards, workers also now enjoy such programs as worker ownership, ranging from cooperatives to employee stock-ownership plans (ESOPs), formalized and protected by the Employee Retirement Income Security Act of 1974.<sup>418</sup> Encouraged at both the federal and state levels,<sup>419</sup> worker ownership or participation encourages both productivity and the maintenance of business operations,<sup>420</sup> and represents a viable *quid pro quo* for the granting of contract concessions by unions.<sup>421</sup>

On a less extreme level than actual worker ownership, other

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413. See generally McKersie, *Union Involvement in Entrepreneurial Decisions of Business*, in CHALLENGES AND CHOICES, *supra* note 275, at 149 (T. Kochan ed. 1985) [hereinafter McKersie]. Worker involvement in the management of the business enterprise is seen extensively in Western Europe, and somewhat less so in Japan. See Hanami, *Workers' Participation in the Workshop and the Enterprise* in COMPARATIVE LABOUR LAW AND INDUSTRIAL RELATIONS 253-54 (R. Blanpain and F. Millard ed. 1982) [hereinafter Hamani]. In the United States, however, it is only seen in "isolated cases." *Id.* See also McKersie, *supra* at 159-60.

414. McKersie, *supra* note 413, at 159.

415. Moberly, *Worker Participation in the Direction of the Enterprise: The American Model of Collective Bargaining* 208 in THE PARK CITY PAPERS (the Labor Law Group 1985) [hereinafter Moberly]. See also UNIONS TODAY, *supra* note 6, at 109.

416. Moberly, *supra* note 415, at 208.

417. UNIONS TODAY, *supra* note 6, at 110.

418. Moberly, *supra* note 415, at 215.

419. *Id.* at 215-20.

420. *Id.* at 215, 220-21.

421. A 1983 report stated that in 35% of the collective bargaining agreements studied which contained wage concessions, some form of employee stock ownership was also included. Mills, *When Employees Make Concessions*, 1983 HARV. BUS. REV. 103 (1983).

forms of worker participation include quality of work life programs, quality circles, productivity gain sharing, and profit sharing.<sup>422</sup> These programs are aimed at giving workers more of a voice in their daily work environments—sometimes coupled with a sharing in the economic gains brought about by their work—in an effort to increase job satisfaction and, as a result, productivity as well.<sup>423</sup>

The maturation of a cooperative model of industrial relations is a relatively recent phenomenon in the United States, and may in fact be particularly well suited to the resolution of some of the problems facing both organized labor and management brought about by a changing economy. The issue is accordingly whether our present industrial relations system is capable of adapting to or accomodating these changes.

### III. CONCLUDING CONSIDERATIONS: OUGHT THE COLLECTIVE BARGAINING SYSTEM SURVIVE?

To assess the validity of the collective bargaining system, we must begin with a portrait of that system as now constituted and decide whether it meets the fundamental needs of the American way of life. It is plain from the foregoing cross-discipline trek through the historical evolution of the collective bargaining process that, as an institutional system of fostering labor peace, that process is dependent upon many forces, both artificial and natural. As a dynamic entity, its primary basis is economic, a natural outgrowth of capitalism. Both sides, if left to their own devices, would be only as strong as their individual economic positions would allow, shaped by such marketplace variables. However, economic forces have never been permitted to operate within the labor relations system in a vacuum: there has always been some type of political-legal interference which has tipped the scales of bargaining power in favor of one party or the other.

Before Congress intervened, government acted through its judicial system to swing the balance of power so much in favor of management that, if a union drive actually survived the organiza-

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422. Moberly, *supra* note 415, at 224-34.

423. *Id.* For a comparative study of worker participation and cooperative efforts in other countries see Blanpain, *Workers' Participation in the Direction of the Enterprise in Other Developed Countries* (Market Economics) 255 in *THE PARK CITY PAPERS* (the Labor Law Group 1985); see generally Hanami, *supra* note 413.

tional stage, any effort to utilize self-help to obtain a collective bargaining agreement was met with the full force of both the employer and the court-ordered injunction. Discerning the need for some type of labor peace and stability if the country were to move ahead economically, government later intervened in labor-management relations, this time with protectionist legislation in favor of organization and collective bargaining. This effectively curtailed the use of the courts in heading off strikes, making more viable the thrust of union self-help in the natural order of the bargaining process.

But while Congress evidently intended that employee organizing was to be staunchly defended, a like intent to safeguard or enhance labor's collective economic strength while curtailing the employer's at the bargaining table itself cannot be gleaned from the language of the Act. Indeed, as the Supreme Court said in *Insurance Agents' International Union*,<sup>424</sup> Congress intended no such thing; government's obligations were meant to end at the bargaining room door, except to ensure that the parties bargained in good faith. Beyond that, the process of bargaining was to be governed by each individual party's inherent strengths and weaknesses, unencumbered by the skewing of the power balance which Congress deemed necessary at the organizing stage.

Any deviation from the Congressionally envisioned scheme of *laissez-faire* bargaining was a creation of the NLRB. Early on, the Board perceived its role as not simply ensuring good faith bargaining. As one means of ensuring good faith bargaining, the Board attempted to achieve a reasonable balance between the bargaining strengths of the parties by regulating their use of economic weapons. The Board spoke in terms of defending employee rights to organize, reasoning that if the employer could soundly defeat employee interests at the bargaining table—most notably the right to strike—then it could effectively defeat the right to organize in the bargaining process.

However, such bootstrap reasoning ran clearly contrary to the Supreme Court's earlier admonition in *Insurance Agents*. The Supreme Court in *American Ship Building* ultimately declared that lockouts were not necessarily inherently destructive of employee rights. This was an implicit rejection of the Board's traditional ra-

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424. See *supra* text accompanying note 56.

tionale that defeat of bargaining power is tantamount to a defeat of organizational rights. Thus, the way was paved for employer self-help to at last gain recognition as not *per se* anti-union animus but rather as the legitimate manifestation of economic strength. It is this that Congress intended solely to govern the bargaining process once the parties met in good faith. *Harter Equipment*, then, represents Board recognition, however tardy, of the *laissez-faire* principle of collective bargaining as Congress meant it to be. Lockouts are to be viewed as legitimate, even where temporary replacements are utilized, except when it can be *proven* rather than assumed that they are the result not of lawful economic considerations but of unlawful anti-union hostility.

Although it is pure speculation to predict how the Board will answer the ultimate question of bargaining lockouts accompanied by the use of permanent replacements, *Harter Equipment* appears at least to represent a step in the direction which Congress intended; that is, a system wherein the parties to collective bargaining are free to maneuver and treat one another at arm's length based simply upon an assessment of their own and the other side's strengths and weaknesses. This is the very essence of free enterprise.<sup>425</sup> The parties are free to work toward industrial peace and stabilization at arm's length. This is based not upon the strengths outside arbiters believe they should possess, but rather upon the strengths they possess because of the free interplay of a market economy.

Collective bargaining is the free market alternative to government imposition of adequate working conditions. It is based on the principle that an employer dealing directly with an organized workforce is the best way to assure not only fair and decent working conditions, but stability as well. . . . As Professor Summers stated, the second rationale for collective bargaining is the extention [sic] of democratic values to the workplace. It brings 'a measure of democracy to economic life.'

. . . Thus, the National Labor Relations Act encourages collective bargaining for reasons of both efficiency and principle. When the system works it has proven to be an efficient and effective means of providing stability and fairness to both em-

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425. Compare Weiler, *Striking a New Balance*, *supra* note 6, at 357 with Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 MINN. L. REV. 265, 266-67, 293 (1978) (freedom of contract is unworkable in labor relations context and defeats goals of organized labor).

ployers and employees.<sup>426</sup>

Strict regulation of the use of economic weapons pits adversaries made uneven through artificial government regulation against one another such that the parties have nothing with which to back up their demands. Bargaining, which by its very nature suggests that the parties must rely on their own power to give and take, would become futile; there would be no consequences for either employer recalcitrance or outrageous union demands. Accordingly, the bargaining process would be stymied. While the American labor relations system is now heavily influenced by government regulation,<sup>427</sup> the removal of *laissez-faire* give and take in collective bargaining leaves the parties with little more than government regulated employment relations; with no incentive to come to terms themselves, the ultimate result would have to be government-prescribed agreements.<sup>428</sup> Although many labor leaders have recently decried the administrative handling of the Act, as it now stands calling for its repeal,<sup>429</sup> it is doubtful that organized labor, subject to political whims, would want government-regulated agreements any more than would management.<sup>430</sup>

Unquestionably, the Act has shortcomings. Economic disparities often dictate adverse bargaining results. Such is the way of a capitalist system,<sup>431</sup> wherein “[b]argaining power is dependent at least as much upon what each party is seeking as upon each party’s coercive ability, and what the parties seek is largely beyond the

426. *The Failure of Labor Law*, *supra* note 51, at 3.

427. Government is responsible for, among other things, setting minimum wages and maximum hours (29 U.S.C. §§ 201-219); occupational health and safety (29 U.S.C. §§ 651-678); safeguarding employee pension funds (29 U.S.C. §§ 1001-1461); and eliminating employment discrimination (42 U.S.C. §§ 2000e-2000e-17).

428. Compare *Ex-Cell-O Corp.*, 185 N.L.R.B. 107 (1970) with *H.K. Porter Co. v. NLRB*, 397 U.S. 99 (1970) (NLRB may not grant substantive contract rights or provisions as bargaining remedy).

429. *Failure of Labor Law*, *supra* note 51, at 2.

430. Labor’s reaction to the Reagan NLRB proves the point. See, e.g., *UNIONS TODAY*, *supra* note 6, at 9; *The N.L.R.B.: Labor’s Love Lost*, *NEWSWEEK*, May 21, 1984, at 70; *Failure of Labor Law*, *supra* note 51, at 2, 4.

431. *But see* Weiler, *Striking a New Balance*, *supra* note 6, at 385-87.

If the statutory commitment to free collective bargaining springs from a sensible mistrust of the competence of the NLRB and judges to write the *terms* of a collective agreement for the parties, it does not follow that the law must adopt a hands-off posture toward the economic *weapons* wielded by the parties—especially when one realizes that one side’s use of a particular weapon may effectively deprive the other of any meaningful say about the contract terms it supposedly “agreed to.”

*Id.* at 386.

control of legislation. . . . Indeed . . . coercive power—the erecting of costs of disagreement—is only relative to the objective being sought.”<sup>432</sup> Collective bargaining reflects the application of basic principles of democracy and capitalism to labor relations; anything else would constitute undue government influence into the private affairs of business. The parties must accordingly be left free to make judgment calls in bargaining, and accept the consequences if their judgment proves wrong.<sup>433</sup>

Operating under a free collective bargaining system, labor and management must now look to the forces of the market economy as the source of their respective needs and goals, as well as the strength with which to achieve them. As demonstrated, one of the significant ways in which they have met this challenge is to accommodate or cooperate with each other through various methods. Faced with the serious impacting variables inherent in the modern economic market, labor and management would be far better off trying to work with each other to overcome the variables than to worsen their situation with hostility and conflict which would ultimately end in the additional economic stress of a strike or a lockout. Simply having these weapons in reserve serves as a basic impetus for the parties to strive for some kind of peaceful co-existence. The acceptance of the employer lockout as the corollary of the strike adds to the equality of the economic threat, such that both sides have just as much at stake should they fail to reach agreement.

Spurred by such economic pressures, which will no doubt increase due to the new-found strength of the employer lockout, labor-management cooperation is likely to be embraced with increasing willingness by both sides. In 1982, at least one-third of the Fortune 500 companies, both union and non-union, had some form of worker involvement which “by and large, resulted in measurably

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432. CHAMBERLAIN & KUHN, *supra* note 24, at 188.

433. Whether tactics which characterize the current practice of preventive labor relations comport with the traditional precepts of labor law is not altogether clear. This is particularly true in the case of heavily involved labor-management cooperation, where the lines between supervisors and the rank and file may blur. Employers can readily take advantage of the management-oriented aspirations of the emerging white-collar class and incorporate these workers into the operational structure such that they will have no need for unionization. See generally KOCHAN, KATZ, AND MCKERSIE, *supra* note 2, at 246-49. Such non-union labor-management relations systems operate generally outside of the collective bargaining scheme established by the Act.

improved employee morale and increased productivity."<sup>434</sup> Concomitantly, in the early 1980's, the frequency of strikes declined to the lowest level since World War II.<sup>435</sup> And those which did occur appeared to be used defensively, as a last resort.<sup>436</sup> Some of these strikes resulted in the imposition of cooperative labor relations programs.<sup>437</sup>

The Department of Labor has taken a strong position in support of labor-management cooperation as an important prerequisite to America's return to preeminence in the world marketplace. Secretary of Labor William E. Brock has said that our country must develop a "solid atmosphere of cooperation, based on the concept of worker dignity and equality and grounded in a mutual respect for collective bargaining, [which] enables both unions and management to maintain individual integrity while working for the good of all."<sup>438</sup>

Although some cooperative programs were won as the result of bitter struggle or as an inducement for the employees to give wage concessions in order to save a failing business, "the programs' achievements have proved [sic] to be so attractive that they have captured the attention of other firms not in financial difficulty. This latter group of companies now embrace [sic] labor-management cooperation because they believe it represents sound management policy."<sup>439</sup>

Despite the traditional reluctance of union leaders to participate in management and the deep managerial resistance to it, the growing importance of the top tier of managerial decision making has led to a significant shift in philosophy among some union leaders and a growing willingness to experiment with new strategies. These leaders appear to be convinced that significant changes in traditional union strategies will be

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434. BUREAU OF LABOR-MANAGEMENT AND COOPERATIVE PROGRAMS, U.S. DEPARTMENT OF LABOR, U.S. LABOR LAW AND THE FUTURE OF LABOR-MANAGEMENT COOPERATION 3 (1986) [hereinafter FUTURE OF COOPERATION].

435. KOCHAN, KATZ, AND MCKERSIE, *supra* note 2, at 134-35. However, those strikes which did occur were often bitter and violent, and reflected increased willingness on the part of management to break the strikes with replacement workers. *Id.*

436. *Id.* at 135.

437. *Id.*

438. FUTURE OF COOPERATION, *supra* note 434, at 2 (quoting Address by W. Brock, Sixteenth Constitutional Convention, AFL-CIO, Anaheim, Ca. (Oct. 30, 1985)).

439. *Id.* at 3. Although a thorough, in-depth discussion of cooperative programs is beyond the scope of this article, the interested reader can pursue such information in KOCHAN, KATZ, AND MCKERSIE, *supra* note 2, at 178; MOBERLY, *supra* note 415, at 208; UNIONS TODAY, *supra* note 6, at 39.

required to stem the decline in union jobs and to enable the labor movement to recapture its former innovative position in industrial relations.<sup>440</sup>

Innovative techniques of labor-management cooperation have evolved far beyond the joint committee stage, where representatives of each side met to discuss matters of mutual interest.<sup>441</sup> Instead, workers are now found on the governing boards of some industries, such as Chrysler, Pan Am, Eastern Airlines, Western Airlines, Wheeling-Pittsburgh Steel Corporation, and Rath Meatpacking.<sup>442</sup> Workers' presence on governing boards has resulted in some staving off of employer insolvency and hence loss of jobs.<sup>443</sup> Some, such as the joint labor-management administrative team at General Motors' Fiero plant, as well as its Saturn Project at Spring Hill, Tennessee, appear to be the result of a joint effort at solving problems involving operational strategy.<sup>444</sup>

Worker participation is a drastic deviation from the traditional model of collective bargaining, and is usually resorted to only under severe extraneous pressures. However, it is a viable option when traditional bargaining proves inadequate. Of course, worker participation is only as effective as labor and management's commitment.

Management commitment needs to be assessed not only on verbal statements of philosophy but on the willingness of management to adjust its strategies and behaviors in ways that support worker participation. . . . The real tests come . . . when hard decisions and trade-offs must be made between maintaining support for the process and pursuing other strategic objectives.<sup>445</sup>

But management commitment to worker participation will depend on the strength of the union to win for itself a place in the man-

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440. KOCHAN, KATZ, AND MCKERSIE, *supra* note 2, at 181.

441. *Id.* at 182-83.

442. *Id.* at 190.

443. At Rath Meatpacking, the local union negotiated an employee buy-out of the company when it was threatened with bankruptcy. By means of an employee stock ownership plan (ESOP), the employees bought 60 per cent of the stock and gained ten of the 16 seats on the Board of Directors. *Id.* At Western Airlines, employee board representation was likewise the response to a financial crisis, where concession bargaining led to both board representation and profit sharing and stock ownership. *Id.*

444. *Id.* at 198-99.

445. Kochan, Katz & Mower, *Worker Participation and American Unions*, in CHALLENGES AND CHOICES, *supra* note 275, at 294.

agement decision-making hierarchy.

Because efforts to engage management in strategic discussions represent a dramatic expansion of the scope of union influence as well as an extension of union influence to new channels above the normal reach of collective bargaining, unions need to bring considerable leverage or bargaining power to bear in order to get employers to participate in these processes. . . . In the cases of Packard and Fiero (and other experiments underway within the major auto companies), this leverage derived from the fact that the industry was completely organized by the UAW and IUE and the unions retained enough national bargaining power to halt any possible effort by the auto companies to pursue a nonunion option.<sup>446</sup>

The underpinnings of economic strength force cooperation between labor and management. Without it there would be no incentive for the two adversaries to attempt to work together to solve mutual problems. Although worker participation projects are relatively new, their growing number "indicate[s] that American labor and management are clearly moving through an important period of experimentation with new strategies in organizational governance—strategies that, if diffused and institutionalized, will represent a fundamental departure from the New Deal model of collective bargaining and industrial relations."<sup>447</sup> Therefore, it is axiomatic that the system of collective bargaining, based on natural economic forces where each side is free to make the best possible choices for its own circumstances, is quite capable of meeting the needs of the actors in the industrial relations system by remaining dynamic and growing to fit the needs of the times.

If the collective bargaining system leads to intensified attempts to reach accord, thus prompting cooperation, then that system needs to be preserved and protected. There is little question that the current federal labor laws create at least some potential conflict with labor-management cooperation. It may well be that the NLRB will have to begin administering the Act within the framework of cooperation rather than hostility, in order to give meaning to a more accommodative base for collective bargaining. This is particularly desirable since the Act's purposes and goals are clearly not incompatible with cooperation.<sup>448</sup> However, Congress

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446. KOCHAN, KATZ, AND MCKERSIE, *supra* note 2, at 203.

447. *Id.* at 204.

448. *Id.*

may ultimately have to rework the Act's more troublesome sections to reflect the goal of cooperation.

Notwithstanding the freedom to utilize economic weapons, government intervention may still be necessary to shape the framework within which the weapons can be used. For example, employers cannot freely lock out employees simply because they *are* union members. Similarly, unions must not be free to embroil neutral employers in their disputes, lest the Act's goals of industrial stability be undermined.<sup>449</sup> Accordingly, although government cannot and should not aspire to dictate either how the parties should bargain or what agreement they should reach, it can and should fashion boundaries within which bargaining should remain.

Moreover, in order to facilitate the bargaining process and bring it to the point where the parties are free to exercise their options, government must protect labor's right to organize. Many of the problems with which unions are beset today are of their own making and are for them to overcome as best they can. However, the dramatic rise in unlawful employer resistance to union organizing must be curbed if the Act is to function as Congress intended.

Employees must be able freely to choose whether to cast their lot with a labor union in hopes of gaining the improvements which they seek, before the relative strengths of that union and the employer take over. In the face of a choice about whether to organize at all, the process of *laissez-faire* collective bargaining can operate in an atmosphere where the only variables are the relative economic incentives of the parties themselves; fear and terror on the part of the workforce should not be among them. Many commentators have criticized at length the inadequacies of the legal remedies available to redress violations of organization-related unfair labor practices.<sup>450</sup> Adequate legal remedies are a dire necessity if the goal of free collective bargaining is to be reached.

Current remedies, which include everything from cease and desist orders and notice postings to bargaining orders,<sup>451</sup> have

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449. *But see* Weiler, *Striking a New Balance*, *supra* note 6, at 415-19. *See also* CHAMBERLAIN & KUHN, *supra* note 24, at 188 ("In a given social context, certain forms of making disagreement costly become inadmissible.").

450. *See, e.g.*, Weiler, *Promises to Keep*, *supra* note 6, at 1769; FREEMAN & MEDOFF, *supra* note 6, at 233.

451. *See* NLRB v. Gissel Packing Co., 395 U.S. 575 (1969).

proven inadequate.<sup>452</sup> The common justification for the ineffectiveness of available remedies for organization-related unfair practices is that the Act is remedial, not punitive.<sup>453</sup> Still, the grant of remedial authority under the Act is broad.<sup>454</sup> Accordingly, the Board has, in extraordinary cases, granted "extraordinary" remedies which perhaps ought to be utilized on a more routine basis as an effective curb against organization-related unfair practices by employers. These include corporate wide imposition of routine remedial measures, public reading of notices, the granting of union access to employer property for organizing purposes, awarding of litigation costs and attorneys' fees to unions, reimbursement to unions of organizational expenses and awarding of attorneys' fees to the NLRB.<sup>455</sup>

Congress might also consider enacting a corollary damage provision for unions undermined or employees injured by serious employer unfair labor practices. This would be similar to the provision for serious union unfair labor practices.<sup>456</sup> This may serve to shift the remedial options more into the punitive category. However, Congress ought to be concerned now with implementing the Act's ultimate goal of industrial peace rather than with avoiding any vestiges of punishment at the expense of sacrificing that goal. In addition, the Board ought to use its statutory authority to seek injunctive relief in the case of organizationally-related unfair labor practices.<sup>457</sup>

It is axiomatic that a refusal to bargain in good faith is equally destructive of free collective bargaining. Here, government does

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452. See, e.g., Weiler, *Promises to Keep*, *supra* note 6, at 1787-97.

453. *Id.* at 1787-89.

454. See 29 U.S.C. § 160(c) (1973). See also *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 188-89 (1941); *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975).

455. See, e.g., *United Steelworkers of America v. NLRB (Florida Steel Corp.)*, 646 F.2d 616 (D.C. Cir. 1981); *Teamsters Local 115 v. NLRB (Haddon House Food Prods., Inc.)*, 640 F.2d 392 (D.C. Cir.), *cert. denied*, 454 U.S. 827 (1981); *J.P. Stevens & Co. v. NLRB*, 612 F.2d 881 (4th Cir.), *cert. denied*, 449 U.S. 918 (1980); *J. P. Stevens & Co. v. NLRB*, 623 F.2d 322 (4th Cir. 1980), *cert. denied*, 449 U.S. 1077 (1981).

456. See, e.g., 29 U.S.C. § 187 (1978). One might argue that backpay serves the same purposes, but its deterrent value is questionable at best. See Weiler, *Promises to Keep*, *supra* note 6, at 1789-91.

457. See 29 U.S.C. § 160 (j) and (l) (1973). For example, in 1978, the year in which the labor law reform act containing new and more severe penalties for unfair labor practices died in Congress (H.R. 8410, 95th Cong., 1st Sess. (1978)), the Board issued 5,320 unfair labor practice complaints, while it sought only 262 injunctions pursuant to sections 10 (j) and (l) (29 U.S.C. §§ 160 (j) and (l)). The Board was successful in 93 per cent of those litigated to final order.

have a role. By ensuring good faith bargaining, government may see the parties to the "office door" where individual strength can take over. Lack of good faith taints the entire bargaining process by destroying the atmosphere of bargaining itself. Like the remedies for organizational-related unfair practices, remedies for bad faith bargaining are insufficient to restore the atmosphere of bargaining equality which is the goal of the Act. In order to achieve this goal, the Act must be given teeth, perhaps in the form of a damage remedy for this type of violation as well.<sup>458</sup>

Through protection of the employees' right to organize, the collective bargaining process is kept free from artificial obstacles and is left to work on the basis of economic principles within a reasonable framework fashioned by government. Once left to its own devices, the system of *laissez-faire* collective bargaining can operate in its rightful manner. By allowing the parties to make their own reasoned choices, the system can nurture and develop cooperation between labor and management, which implements the Act's ultimate goals of maintaining labor stability and furthering the American economy.

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458. See *Ex-Cell-O Corp.*, 185 N.L.R.B. 107 (1970).