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Unfair Labor Practices in a Strike Context: From Balancing Competing Interests to Justifying Business Conduct

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COMMENTS

UNFAIR LABOR PRACTICES IN A STRIKE CONTEXT: FROM BALANCING COMPETING INTERESTS TO JUSTIFYING BUSINESS CONDUCT

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I. INTRODUCTION

> Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.[1]

The restoration of equality of bargaining power was felt necessary because of the inequality that existed between "employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership

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1. National Labor Relations Act § 1, 29 U.S.C. § 151 (1964).

The National Labor Relations Act (Wagner Act), passed in 1935, was comprehensively amended by the Labor Management Relations Act, 1947 (Taft-Hartley Act). Further supplemental amendments occurred with the Labor-Management Reporting and Disclosure Act of 1959 (Landrum-Griffin Act).

association . . . ."[2] Management, in an effort to salvage its share of this bargaining power, continually tests the limits of its freedom to effectively run the business enterprise. Overstepping the boundary usually results in a charge of unfair labor practice.

A labor strike and its aftermath provide a context in which management can react to test the limits of its freedom. The United States Supreme Court, in two recent decisions,[3] considered such reactions by management in light of the policy of the National Labor Relations Act[4] and, more particularly, in light of sections 8(a)(1) and 8(a)(3) of that Act.[5] The methodology and the reasoning of these decisions point to a discernible, perhaps inevitable, trend in the law of labor relations.

II. THE PLACE OF THE STRIKE WITHIN THE LAW

A. *A Traditional Self-help Technique*

The labor movement in this country has sought to achieve certain ultimate objectives for the worker. These objectives include better wages, better working conditions and economic security. In order to attain such objectives, labor has used three basic self-help techniques: the strike, the picket, and the boycott.[6] It should be kept in mind that these techniques are often used simultaneously so as to become conceptually indistinguishable. With minimal risk of real-world inaccuracy, however, only the strike will be examined in this article.

In an early case decided prior to the major labor-relations legislation, it was held that the strike weapon must be related to a legitimate union objective.[7] Justice Brandeis, finding that the strike was not justified because it was not called for a permissible purpose,[8] concluded:

> The right to carry on business—be it called liberty or property—has value. To interfere with this right without cause is unlawful. The fact that the injury was inflicted by a strike is sometimes a justification. But *a strike may be illegal because of its purpose*, however orderly the manner in which it is conducted.[9]

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2. *Id.*

3. NLRB v. Fleetwood Trailer Co., 389 U.S. 375 (1967); NLRB v. Great Dane Trailers, Inc., 388 U.S. 26 (1967).

4. The amended National Labor Relations Act will hereinafter be referred to as NLRA. The Labor Management Relations Act provisions independent of those amending the NLRA will hereinafter be referred to as LMRA. The NLRA, as amended by the LMRA, will be referred to as simply the Act unless clarity requires the full name.

5. NLRA §§ 8(a)(1), 8(a)(3), 29 U.S.C. §§ 158(a)(1), 158(a)(3) (1964).

6. *See generally* 51A C.J.S. *Labor Relations* §§ 273-86 (1967).

7. Dorchy v. Kansas, 272 U.S. 306 (1926).

8. *Id.* at 309:

> [T]here was no trade dispute. There had been no controversy between the company and the union over wages, hours, or conditions of labor; over discipline or the discharge of an employee; concerning the observance of rules; nor over the employment of non-union labor. Nor was the strike ordered as a sympathetic one in aid of others engaged in any such controversy.

9. *Id.* at 311. (Emphasis added.) Here, the collection of a stale claim due a union member formerly employed in the business was held not to be a permissible purpose.

Thus, the legality of a strike depends primarily upon its purpose.

B. *Attributes of a Strike*

A strike is a concerted action by employees to improve their position in the collective bargaining process[10] by a concerted refusal to work.[11] The refusal to work the number of hours required by the employer is sufficient to constitute a strike.[12] However, mere intermittent work stoppage by employees is not within the "concerted activity" definition of a strike.[13] Nor is conduct of employees who refuse to perform certain portions of their work, while continuing to perform others, within the definition.[14]

A broader denotation is given the refusal-to-work attribute by the LMRA section 501(2): "The term 'strike' includes . . . any concerted slowdown or other concerted interruption of operations by employees."[15] This inclusion of slowdowns, however, technically applies *only* where the word "strike" is used in the LMRA.[16] The statute therefore does not contemplate using such a definition to support the language of NLRA sections 7 and 8(a), which merely refer to "concerted activities."[17]

C. *The Right to Strike*

The raised sledge-hammer of employees and unions in the form of the threat of a strike, as well as the blow of the hammer in the form of the strike itself, are legally recognized as economic weapons in the collec-

See also Hotel & Restaurant Employees Int'l Alliance v. Greenwood, 249 Ala. 265, 30 So.2d 696 (1947), for a state court analysis relating the strike technique to labor objectives.

10. This definition is inferred from the language of NLRA § 7, 29 U.S.C. § 157 (1964):

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other *concerted activities for the purpose of collective bargaining or other mutual aid or protection* . . . . (Emphasis added).

11. Under the Labor-Management Reporting and Disclosure Amendents it is no longer necessary, as it was under the NLRA as amended in 1947, to prove that a union induced or encouraged a concerted work stoppage in order to establish a violation of § 8(b)(4), 29 U.S.C. § 158(b)(4) (1964).

See United Mine Workers v. U.S., 177 F.2d 29 (D.C. Cir. 1949), where a simultaneous termination of work by approximately 300,000 union members throughout the nation's mining industry was held a strike.

12. A strike exists when a group of employees cease work in order to secure compliance with a demand for higher wages, shorter hours, or other conditions of employment, the refusal of which by the employer has given rise to a labor dispute. The cessation of work by a group is no less a strike because the group itself may not have considered its action to constitute a strike. . . . [A] refusal to work the number of hours required by an employer is tantamount to an absolute refusal to work.

American Mfg. Concern, 7 N.L.R.B. 753 (1938).

13. Local 232, UAW v. Wisconsin Employment Relations Bd., 250 Wis. 550, 27 N.W.2d 875 (1947), *dissent in* 28 N.W.2d 254 (1947), *aff'd*, 336 U.S. 245 (1949).

14. NLRB v. Montgomery Ward & Co., 157 F.2d 486 (8th Cir. 1946), *rev'g* 64 N.L.R.B. 432 (1945).

15. 29 U.S.C. § 142(2) (1964).

16. NLRA § 8(b)(4), 29 U.S.C. § 158(b)(4) (1964) (strikes declared unfair labor practices); LMRA § 206, 29 U.S.C. § 178 (1964) (strikes imperiling the national health or safety).

17. 29 U.S.C. §§ 157, 158(a) (1964).

tive bargaining process. Except for specific provisions, nothing in the Act "shall be construed so as to either interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.[18] Section 13 operates as a rule of statutory interpretation to preclude the inference of any limitations on the right to strike from provisions of the Act which do not specifically establish such limitations.[19] In the face of the underlying policy of the Act to negotiate in good faith, the United States Supreme Court has approved legitimate use of the strike as an economic weapon.[20]

A strike may be called to protest an unfair labor practice committed by the employer,[21] to protest a refusal to bargain,[22] to protest a company rule,[23] or to gain recognition of a union as the employees' bargaining agent. [24] Although the right to strike is not limited to these instances, neither is it an absolute right, even apart from the specific statutory restrictions. For example, employees who otherwise have the right to strike are not authorized to walk off their jobs where to do so would endanger their employer's property.[25] Furthermore, the right to strike is vitiated where the strike depends on violence for its efficacy or where it occurs in an environment of harm to persons and destruction of property.[26] If the whole strike is unlawful because volence or a sitdown[27] takes place, the strikers are not only subject to the criminal laws for

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18. NLRA § 13, 29 U.S.C. § 163 (1964).

Specific restrictions on the right to strike appear at NLRA § 8(b), 29 U.S.C. § 158(b). Reference is made there to restrictions in cases of secondary boycotts, recognition and organizational picketing, or coercive picketing accompanied by the use of force or violence, jurisdictional disputes, and others.

19. *See* Local 232, UAW v. Wisconsin Employment Relations Bd., 336 U.S. 245 (1949).

20. NLRB v. Insurance Agents Union, 361 U.S. 477 (1960). Fully aware of the logical inconsistency between negotiation and economic weapons, the Court, at 489, stated that:

> at the present statutory stage of our national labor relations policy, the two factors —necessity 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.

21. *E.g.*, NLRB v. Mastro Plastics Corp., 350 U.S. 270 (1956).

22. *E.g.*, NLRB v. Remington Rand, 94 F.2d 862 (2d Cir. 1938), holding that resort to a strike to compel bargaining, instead of filing an unfair labor practice charge with the Board, was a proper exercise of the right to strike.

23. *E.g.*, NLRB v. Delsea Iron Works, Inc., 316 F.2d 231 (3d Cir. 1963), holding that a strike to protest the company's no smoking rule was protected, even though no demand to rescind or modify the rule was given to the employer prior to the walkout.

24. United Mine Workers, Dist. 50 v. Arkansas Oak Flooring Co., 351 U.S. 62 (1956) (recognition strike is limited only by another union's certification).

25. NLRB v. Reynolds & Manley Lumber Co., 212 F.2d 155 (5th Cir. 1954) (employer's property endangered by leaving fires and boiler rooms unattended).

26. *See* Apex Hosiery Co. v. Leader, 310 U.S. 469 (1940).

In this regard, note that the Norris-La Guardia Act (an anti-injunction statute) protects only peaceably conducted labor activities from injunction. Employers, moreover, may discharge strikers who have been guilty of violent conduct even though under NLRA § 8(a), 29 U.S.C. § 158(a) (1964), discharge of strikers is normally an unfair labor practice. *See, e.g.*, Bershire Knitting Mills v. NLRB, 139 F.2d 134 (3d Cir. 1943).

27. In a sitdown strike the strikers simply take possession of the business, barricade it against entry by both management and other employees, and sometimes inflict damage to business property.

damage to property, but they also forfeit whatever rights to which they might otherwise have been entitled under the Act.[28]

D. *Economic or Unfair Labor Practice Strikes*

Assuming that a strike is for a lawful purpose and is not within the prohibitions of the Act, it must be characterized initially as either an economic strike or an unfair labor practice strike. If a strike is characterized as economic, it must then be examined under the "conversion" theory. Such characterization has taken place primarily by court decision, as the Act neither requires categorization nor states the requisites.[29]

An economic strike is generally one called either for better wages and working conditions or for union recognition. Put negatively, it is neither caused nor prolonged by an employer's unfair labor practices, nor is it in breach of a valid existing contract.[30] On the other hand, an unfair labor practice strike is caused, or extended in whole or part, by an employer's unfair labor practices. If an unfair labor practice occurs prior to the strike, a rebuttable presumption is raised that it must have been one of the causes. If the employer can show that it was not a contributing factor, the strike will be characterized as economic.

A strike initially characterized as an economic strike may later be converted into an unfair labor practice strike because the employer committed illegal practices in combatting it.[31] The lapse of time between the commission of the unfair labor practice and the start of the strike may preclude a finding of conversion;[32] furthermore, "an employer's unfair labor practices during an economic strike do not *per se* convert it into an unfair labor practice strike, absent proof of causal relationship between the unfair labor practices and the prolongation of the strike."[33] Nevertheless, the National Labor Relations Board[34] and the courts will find strike conversion *per se* for two unfair practices: (1) refusal to bargain or (2) employer domination and support of a labor organization.[35]

E. *Rights of Employees and Obligations of the Employer*

Characterization of a strike is important because it determines the status of the employees and the union, and the obligations that the em-

28. NLRB v. Fansteel Metallurgical Corp., 306 U.S. 240 (1939).

29. NLRA § 9(c)(3), 29 U.S.C. § 159(c)(3) (1964), indirectly recognizes the characterization requirement when it delineates the voting rights of "employees engaged in an *economic* strike who are not entitled to reinstatement." (Emphasis added).

30. *See generally* 1 B. WERNE, LABOR RELATIONS LAW & PRACTICE ch. 16 (1966, Supp. 1968).

31. *See, e.g.*, Federal Dairy Co., 130 N.L.R.B. 1158 (1961), *aff'd*, 297 F.2d 487 (1st Cir. 1962); DeSoto Hardwood Flooring Co., 96 N.L.R.B. 382 (1951).

32. Jordan Bus Co., 107 N.L.R.B. No. 148 (1954), held that an economic strike which started six weeks after the unfair labor practices retained its character as an economic strike.

33. Harcourt & Co., 98 N.L.R.B. 892, 909 (1952).

34. Hereinafter referred to as the Board.

35. NLRB v. Pecheur Lozenge Co., 209 F.2d 393 (2d Cir. 1953); Crosby Chem., Inc., 85 N.L.R.B. 791 (1949).

ployer owes the striking participants varies according to their status.[36] An employer has the right to keep his business operating, and to this end he may fill the jobs that the strikers leave vacant;[37] that is, where the strike being conducted is characterized as economic, the employer may hire permanent replacements for the strikers.[38] More specifically, an employer has a legal right to replace economic strikers "at will" *regardless of the motive* for the replacement.[39] Consequently, if a permanent replacement is hired, the employer is not legally obligated to reinstate the striker upon termination of the strike.[40] The economic striker, therefore, risks the possibility of job forfeiture in the event of his being permanently replaced. Should the employer fail to permanently replace a striker, however, he is entitled to reinstatement upon his unconditional request.[41] Even though no strikers are permanently replaced, they may not be entitled to reinstatement if they have been guilty of violence or other illegal conduct during the strike.[42]

Unlike economic strikers, the unfair labor practice strikers cannot be replaced permanently unless they have committed prohibited acts during the strike.[43] The employer is obligated to rehire such strikers when they desire to return to their jobs. If the jobs of the unfair practice strikers are abolished during the strike, the employer must grant them the right to preferential hiring.[44] This preference, which is not lost to the striker even when there is a no-strike clause in the contract,[45] has

36. Binder Metal Prod., Inc., 154 N.L.R.B. 1662 (1965).

37. NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333, 345-46 (1938). Giving permanent employee status to a replacement was held to be proper, despite the fact that it was in derogation of the strikers' rights, because it was *reasonably necessary for carrying on his business operations.*

38. *Id.*

Noteworthy is the fact that permanently replaced economic strikers are eligible for unemployment insurance payments. Ruberoid Co. v. California, U.I.A.B. 27 Cal. Rptr. 878, 378 P.2d 102 (1963).

39. Hot Shoppes, Inc., 146 N.L.R.B. 802 (1964). However, such motive must not amount to an independent unlawful purpose.

40. It logically follows that the union risks its status as the employees' bargaining agent. If enough replacements are hired so that the non-union employees outnumber the union strikers, a petition for an election may be filed with the Board to determine whether the union has majority representation. If the Board orders the election, both replaced strikers and replacements are entitled to vote. NLRA § 9(c), 29 U.S.C. § 159(c) (1964).

41. Roure-Dupont Mfg. Co., 93 N.L.R.B. 1240 (1951).

Reinstatement rights are accorded such strikers because strikers retain their status as employees. NLRA § 2(3), 29 U.S.C. § 152(3) (1964).

42. NLRB v. Fansteel Metallurgical Co., 306 U.S. 240 (1939); American Tool Works Co., 116 N.L.R.B. 1681 (1956) (denial of reinstatement where economic strikers used profanity to non-striking employees; also where striker stepped in front of truck trying to enter employer's plant). *But cf.* Schott Metal Products Co., 131 N.L.R.B. 310 (1961); Stewart Hog Ring Co., 128 N.L.R.B. 415 (1960).

43. NLRB v. Jones & Laughlin Steel Co., 301 U.S. 1 (1937); Maurice Embroidery Works, 111 N.L.R.B. 1143 (1955).

44. J. H. Rutter-Rex Mfg. Co., 115 N.L.R.B. 388 (1956), *enforced*, 245 F.2d 594 (5th Cir. 1957).

45. Mastro Plastics Corp. v. NLRB, 350 U.S. 270 (1956), holding that unfair labor practice strikers could not be discharged for violating the contract.

been extended to include their reinstatement to "substantially equivalent" jobs.[46]

An employer may, however, refuse to reinstate unfair labor practice strikers on the grounds of violent activity which had as its purpose the intimidation of nonstriking employees or the creation of dangerous situations for them.[47] On the other hand, although economic factors may have added to the decision to strike, if there is a causal connection between the employer's unfair labor practices and the strike the employer may not refuse reinstatement to the strikers.[48]

III. The Policy of the Act with Respect to Protection of Employees

A. *Rights of and Status as Employees*

The employees' right to use the strike weapon is afforded direct protection by section 7 of the NLRA,[49] which guarantees that employees shall have the right to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ." Since the essential attribute of a strike is a *concerted* refusal to work,[50] it is most certainly within the guaranteed rights of section 7. The right to engage in a strike, however, would be an empty one unless the striker retained his status as an employee. To this end, section 2(3) defines "employee" as including "any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who had not obtained any other regular and substantially equivalent employment . . . ."[51] From the status of the striker as an employee stems his right to reinstatement, absent violent or unlawful misconduct on his part, unless he is permanently replaced as an economic striker.[52]

B. *Employer Unfair Labor Practices under Sections 8(a)(1) and 8(a)(3)*

The guarantees of section 7 (and section 13) are implemented by the unfair labor practice definitions of section 8(a).[53] Acts of employer interference and discrimination against employee rights constitute unfair

46. Elmire Mach. & Specialty Works, Inc., 148 N.L.R.B. 1695 (1964). *But cf.* American Mfg. Co., 98 N.L.R.B. 226 (1952), *rev'd*, 203 F.2d 212 (5th Cir. 1953), which held that an offer of reinstatement to the same job on another shift was no violation.

47. Oneita Knitting Mills, Inc. v. NLRB, 64 L.R.R.M. 2724 (4th Cir. 1967) (egg-throwing at cars). This rule does not encompass trivial or isolated incidents.

48. Winter Garden Citrus Prods. Coop., 114 N.L.R.B. 1048 (1955), *modified*, 238 F.2d 128 (5th Cir. 1956).

49. 29 U.S.C. § 157 (1964).

50. *See* text at notes 10-17 *supra*.

51. NLRA § 2(3), 29 U.S.C. § 152(3) (1964).

52. *See* Mackay Radio & Tel. Co., 304 U.S. 333 (1938) and text discussion at note 35 *supra*.

53. NLRA § 8(a), 29 U.S.C. § 158(a) (1964).

labor practices. Thus, section 8(a)(1) provides that it is unfair for an employer to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7"; section 8(a)(3) declares that it is unfair for an employer to "discourage membership in any labor organization" by acts of discrimination. These sections often have interchanging and overlapping roles in the context of a strike. Thus, their interrelationship[54] is vital to a thorough understanding of the reasoning of the United States Supreme Court in recent cases.[55]

Section 8(a)(1) prohibits all forms of interference with section 7 rights, whereas section 8(a)(3) applies only to discrimination that discourages or encourages membership in a labor organization. Thus section 8(a)(1) is broader, encompassing both the means used by the employer as well as the employee rights affected. The test of discrimination requires either (1) an intent to discourage (or encourage) union membership or (2) an intent to do an act which naturally tends to discourage (or encourage) union membership.[56] It becomes a question of fact as to whether the employer's act has a rational basis or whether it is a mere sham for anti-union bias.

C. *The Relationship Between the Subsections*

Discrimination in retaliation for a strike has a natural tendency to discourage union membership in a labor organization; therefore, the narrow test of section 8(a)(3) is met.[57] However, since the discrimination is also an interference with protected concerted activity, a violation of the broader interference test under section 8(a)(1) is made out even though it does not discourage membership in a labor organization.[58] The same discriminatory act may therefore constitute a violation of both sections. As a result, the Board may find it more convenient to proceed under section 8(a)(1) rather than prove a case under section 8(a)(3), which might be more difficult.

The propriety of this course of action is questionable in light of the original concept of the relationship between the subsections; 8(a)(2) through 8(a)(5) were considered specifically-described instances of unfair labor practices, whereas 8(a)(1) was considered the generic "catch-all" unfair labor practice.[59] This is not to say, however, that one of the specific practice subsections would govern, in a particular case, to the

54. *See generally* Pate, *Effect of Strike Misconduct on Reinstatement Rights of Employees*, 15 J. PUB. L. 150, 151-53 (1966), for the relationship between the discrimination test of § 8(a)(3) and the interference test of § 8(a)(1) in the context of strike misconduct.

55. NLRB v. Fleetwood Trailer Co., 389 U.S. 375 (1967); NLRB v. Great Dane Trailers, Inc., 388 U.S. 26 (1967).

56. *Cf.* Radio Officers' Union v. NLRB, 347 U.S. 17 (1954).

57. *E.g.*, European Cars Ypsilanti, Inc., 136 N.L.R.B. 1595 (1962).

58. *E.g.*, Sherry Mfg. Co., 128 N.L.R.B. 739 (1960).

59. Art Metals Constr. Co. v. NLRB, 110 F.2d 148, 150 (2d Cir. 1940).

exclusion of 8(a)(1); rather, the specific practice subsections were not intended to limit the application of the generic section.[60]

The categorization of the subsections, coupled with the congressional conception of their relationship, led to independent significance for the language of each subsection and, in turn, to separate judicial tests for each subsection. Particular fact situations were analyzed exclusively in terms of the language of one of the specific practice subsections. When one of these subsections was violated, the courts always found an additional violation of section 8(a)(1). Such a finding, however, was implicitly dependent upon the finding of a violation of a specific practice subsection.[61] In effect, then, what constituted an interference with an employee's rights under section 7 was to be determined by the language and tests of the other subsections.[62]

D. *Intertwining Subsections 8(a)(1) and 8(a)(3)*

In some cases involving discriminatory conduct, and therefore a construction of section 8(a)(3), it is found that the employer's conduct does not violate the LMRA if it does not violate the discrimination test of section 8(a)(3) of the Act.[63] The discrimination test depends primarily upon the employer's intent to discriminate or to do the act which discriminates; his unlawful conduct in discouraging a strike will result in an unfair labor practice under section 8(a)(3).[64] Moreover, in a strike context, almost any active response by an employer to strike activities will have a tendency to discourage (or encourage) membership in a labor organization. In this context, therefore, application of section 8(a)(3) requires the additional consideration of two distinct interests: (1) the employee's interest in the freedom to engage in union activity, and (2) the employer's interest in operating his business.[65] Thus, the

60. The House Committee Report on the Wagner Act succinctly makes this point:

> The succeeding unfair labor practices are intended to amplify and state more specifically certain types of interference and restraint that experience has proved require such amplification and specification. These specific practices, as enumerated in subsections (2), (3), (4) and (5), are not intended to limit in any way the interpretation of the general provisions of subsection (1).

H.R. REP. No. 969, 74th Cong., 1st Sess. 15 (1935). *See also* S. REP. No. 573, 74th Cong., 1st Sess. 9 (1935).

61. *See, e.g.*, NLRB v. Express Publishing Co., 312 U.S. 426 (1941).

62. *See, e.g.*, NLRB v. American Nat'l Ins. Co., 343 U.S. 395 (1952). The Supreme Court in effect held that where (in a bargaining context) the employer does not violate his duty to bargain collectively under § 8(a)(5), he does not interfere with protected § 7 rights.

63. Thus, in Textile Workers v. Darlington Mfg. Co., 380 U.S. 263, 269 (1965), the Supreme Court explicitly stated the dependency: "some employer decisions . . . would never constitute violations of § 8(a)(1) . . . unless they also violated § 8(a)(3)."

See also Local 357, Teamsters Union v. NLRB, 365 U.S. 667 (1961), where the Court, finding no violation of §§ 8(a)(1) and 8(a)(3), framed its analysis solely in the terms of the language of § 8(a)(3).

64. *E.g.*, Rubin Bros. Footwear v. NLRB, 203 F.2d 486 (5th Cir. 1953).

65. *See, e.g.*, NLRB v. Babcock & Wilcox Co., 351 U.S. 105 (1956); NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333 (1938).

See generally Getman, *Section 8(a)(3) of the NLRA and the Effort to Insulate Free*

conduct of the employer in operating his business is weighed against its effect in discouraging or encouraging membership in a labor organization.[66]

The basic criteria used in the interference test of section 8(a)(1), which depends predominantly upon the protected character of the employee's activity, stands at an opposite pole. More specifically, if the employee engages in a protected activity, an employer's act of interference, even if in good faith, may constitute an unfair labor practice. On the one hand, therefore, the discrimination test requires that the employer act according to his good-faith beliefs, while on the other hand, the interference test requires that he act correctly and sufficiently, regardless of his beliefs.

In cases that involve application of both subsections, the Board intertwines the two tests and gives greater emphasis to the rights of employees in their protected activity than to the employer's good faith beliefs.[67] In some cases, the courts determine the applicability of each of the two subsections separately, but, nevertheless, intertwine the criteria used for the tests employed under each subsection.[68] The Supreme Court has applied criteria normally used under the interference test of section 8(a)(1) to determine the applicability of section 8(a)(3).[69] In another case where both subsections might have been applied, the Supreme Court held that where section 8(a)(1) is "plainly violated," the employer's intent and good faith beliefs (under the discrimination test) are ignored so that reliance may be placed entirely on the criteria of the interference test.[70]

Employee Choice, 32 U. CHI. L. REV. 735 (1965), for a full discussion of the standards which have been developed to govern the application of § 8(a)(3). His analysis led him to find that the Board's liberal and mechanical interpretations in applying § 8(a)(3) resulted in the courts' unduly limiting its application by requiring a showing of improper motive even where the employer admittedly used union activity as the basis for his action.

66. *See, e.g.*, NLRB v. Erie Resistor Corp., 373 U.S. 221, 228-29 (1963).

67. *E.g.*, Industrial Cotton Mills, 102 N.L.R.B. 1265 (1953); Rubin Bros. Footwear, 99 N.L.R.B. 610 (1952).

68. *See* NLRB v. Express Publishing Co., 312 U.S. 426 (1941); Art Metals Constr. Co. v. NLRB, 110 F.2d 148 (2d Cir. 1940).

69. *See* NLRB v. Erie Resistor Corp., 373 U.S. 221 (1963).

70. NLRB v. Burnup & Sims, 379 U.S. 21 (1964) (where the employer discharged two employees after being erroneously advised that they had threatened to dynamite company property). The Supreme Court reasoned at 22-23:

> We find it unnecessary to reach the questions raised under § 8(a)(3) for we are of the view that in the context of this record § 8(a)(1) was plainly violated, whatever the employer's motive. . . . Defeat of [§ 7] rights by employer action does not necessarily depend on the existence of an anti-union bias. . . . In sum, § 8(a)(1) is violated if it is shown that the discharged employee was at the time engaged in a protected activity, that the employer knew it was such, that the basis of discharge was an alleged act of misconduct in the course of that activity, and that the employee was not, in fact, guilty of that misconduct.

Although the decision purported to deal only with cases of mistaken belief by the employer, the reasoning would apply with equal force in many cases where proceeding under § 8(a)(3) would be doubtful.

IV. Disentanglement of the Criteria

A. *The Role of Employer Motive*

Disentanglement of the criteria used for the discrimination and interference tests centers on the role of "employer motive." A case study analysis is required in order to show the relevancy of employer motive to a finding of an unfair labor practice under section 8(a)(3). Requiring that the employer be motivated by a desire to discourage membership in a labor organization would naturally tend to restrict the application of section 8(a)(3). Conversely, requiring that the employer be motivated by a proper business purpose would tend to broaden its application. The employer's *proper* motive may be used to show either (1) that the act was based not on union activities, but rather on a separate and distinct business reason,[71] or (2) that the act was a reaction to union activity, taken to serve a proper business purpose.[72]

In *Republic Aviation Corp. v. NLRB*[73] the Supreme Court held the employer guilty of an unfair labor practice without a finding of improper motive. The Court noted that the employer's acts were not motivated by opposition to unionism since there was no union bias in enforcing the company's "no solicitation" rules.[74] It did not matter that the employer did not intend to discourage union membership, since such enforcement was a "foreseeable result."[75] The Court, however, obscured the significance of the role of the employer's motive under section 8(a)(3) by its paramount finding that the rules were invalid under section 8(a)(1) because they interfered with protected section 7 rights when applied to union solicitation.[76]

In part II of its opinion in *Radio Officers' Union v. NLRB*[77] the Supreme Court engaged in a full discussion of the necessity for proof of the employer's motive. The Court, at the outset, limited the proscription of 8(a)(3) to encouragement or discouragement of membership in a labor organization by *means of discrimination.* The motivation of the employer in such discrimination was recognized as a required element

71. *See, e.g.*, NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937), where union membership did not insulate an employee from discipline for poor work or misconduct.

72. *See, e.g.*, American Ship Bldg. Co. v. NLRB, 380 U.S. 300 (1965), where in response to an impasse in negotiations the employer closed down a plant and laid off employees.

73. 324 U.S. 793 (1945). The text discussion refers only to the *Republic Aviation* portion of the case.

74. *Id.* at 805.

75. *Id.* The phrase "foreseeable result" was not used in the cited case but arose in the Court's subsequent analysis of *Republic Aviation* in Radio Officers' Union v. NLRB, 347 U.S. 17, 45-46 (1954).

76. The discussion of § 8(a)(3) was brief and ambiguous.

77. 347 U.S. 17, 42 (1954). Involved in this case were discriminating acts of *encouragement* of union membership by employers, such as refusing to hire an employee for failure to meet his union obligations.

of proof.[78] Moreover, it was stated that Congress intended the employer's motive in discriminating to be controlling.[79]

Such logic, based on these judicial and congressional premises, would no doubt lead to irrefutable results when applied in cases arising under section 8(a)(3). But, at this juncture of the reasoning in *Radio Officer's Union*, the Court took a step on to a path leading to a Pandora's box, by stating that "specific evidence of intent to encourage or discourage is not an indispensable element of proof of violation of § 8 (a)(3)."[80] The box was reached when the Supreme Court used as its basis the conclusions of the Board and lower federal courts that "proof of certain types of discrimination satisfies the intent requirement."[81] Finally, by dispensing with the specific proof of intent "where employer conduct *inherently encourages or discourages* union membership," the Pandora's box was opened.[82] Confusion climbed out here because the Court, first, did not explain the basis for accepting the premise that conduct which inherently encourages or discourages union membership is proof of improper motive; second, did not define—even in general terms —what constitutes conduct which inherently encourages or discourages membership; and, third, did not allow for the going forward with evidence to rebut the presumption of improper motive.[83]

B. *The Balancing Process*

Some clarity emerged from *NLRB v. Erie Resistor Corp.*,[84] where the Court found that an employer commits an unfair labor practice under section 8(a) when he extends a twenty-year seniority credit to strike replacements and strikers who leave the strike and return to work.[85]

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78. *Id.* at 43. Two prior cases are cited by the Court for this proposition: Associated Press v. NLRB, 301 U.S. 103, 132 (1937) (where the employer's *real motive* was decisive); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 46 (1937) (where the employer's *true purpose* was the subject of investigation).

79. *Id.* at 44. The Court points out that with consistent congressional reports preceding it, Congress chose to retain the identical language in its 1947 amendments.

80. *Id.*

81. *Id.* at 45.

82. *Id.* The Court blandly stated:

> This recognition that specific proof of intent is unnecessary where employer conduct inherently encourages or discourages union membership is but an application of the common-law rule that a man is held to intend the foreseeable consequences of his conduct.

83. Confusion arises in this third area because the improper motive is at once a presumption and a conclusion by the trier of fact. The Supreme Court explicitly evidences its own confusion thusly: "Concluding that encouragement or discouragement will result, it is presumed that he intended such consequence." *Id.*

84. 373 U.S. 221 (1963).

85. *Id.* at 221-22.

The employer argued before the Board that since super-seniority was granted to insure a supply of replacements, it served the valid business purpose of hiring permanent replacements under the *Mackay Radio* doctrine and therefore should not constitute a violation. Although the Board recognized the valid business purpose, it pointed out that coupling the *Mackay Radio* doctrine with super-seniority will more likely discourage participation in

Although the Court proceeded on a basis of balancing of interests, it also carved out a niche for the role of employer motive.[86] The *Radio Officer's* case was used to recognize both the relevance and the dispensability of employer motive in cases involving discriminatory conduct.[87] The use of such criteria requires an examination of business decisions and actions taken which involve "a complex of motives."[88] From this point, the Court described the two-part weighing and balancing test:

> [P]referring one motive to another is in reality the far more delicate task . . . [1] of *weighing* the interest of employees in concerted activity against the interest of the employer in operating his business in a particular manner and [2] of *balancing* in the light of the Act and its policy the intended consequences upon employee rights against the business ends to be served by the employer's conduct.[89]

Implicit in the weighing and balancing process is a two-step consideration of employer motive. First, when *improper* motive is found there is no need to engage in the balancing process, for proof of improper motive is sufficient "to destroy the employer's claim of a legitimate business purpose, if one is made, and provides strong support for a finding that there is interference with union rights or that union membership will be discouraged."[90] Second, where proof of improper motive is not required because the discriminatory conduct inherently discourages or encourages union membership, it becomes necessary to balance the intended consequences of the conduct upon employee rights against the employer's *proper* business purpose.[91]

C. *Separate Testing Under the Subsections*

The first step deals with the case where proof of employer motive is present, while the latter deals with the case where the conduct by its

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strike activity than serve to supply replacements. Erie Resistor Corp., 132 N.L.R.B. 621, 625-30 (1961).

86. Note that the employer was charged under § 8(a)(1) and § 8(a)(3). See text discussion about intertwining subsections 8(a)(1) and 8(a)(3) commencing at note 62 *supra*.

87. 373 U.S. at 227. Also cited was Local 357, Teamsters Union v. NLRB, 365 U.S. 667, 675 (1961), in which the court said, "Some conduct may by its very nature contain the implications of the required intent . . . ."

88. 373 U.S. at 228.

89. *Id.* at 228-29. (Emphasis added).

90. *Id.* at 227-28.

91. In Erie Resistor it was felt that "the Board was entitled to treat this case as involving conduct which carried its own indicia of intent and which is barred by the Act unless saved from illegality by an overriding business purpose justifying the invasion of union rights." *Id.* at 231.

The Court concluded at 236-37:

> Consequently, because the Board's judgment was that the claimed business purpose would not outweigh the necessary harm to employee rights—a judgment which we sustain—it could properly put aside evidence of [employer's] motive and decline to find whether the conduct was or was not prompted by the claimed business purpose.

nature affords proof of employer motive. Thus *Erie Resistor* does not purport to cover the situation where there is neither proof of improper motive nor conduct which inherently encourages or discourages union membership. This void is filled by the two lockout cases of *American Ship Bldg. Co. v. NLRB*[92] and *NLRB v. Brown*,[93] both decided the same day by the Supreme Court. Even though the facts of the two cases are different,[94] they cover the same type of situation and consequently do not deserve the utterly dissimilar approaches taken.

In *American Ship Bldg.* separate treatment was accorded sections 8(a)(1) and 8(a)(3) in considering the charges under each. No violation was found under section 8(a)(1), because the employer's use of the lockout solely as economic pressure 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.[95] In its discussion of the charge under section 8(a)(3) the Court correctly ruled out the possibilities covered in *Erie Resistor*; that is, proof of improper motive was not present and the employer's conduct was not inherently "prejudicial to union interests" and not "devoid of significant economic justification."[96] Without such proof or such a determination, section 8(a)(3) leaves "unscathed a wide range of employer actions taken to serve legitimate business interests in some significant fashion, even though the act committed may tend to discourage union membership."[97] The lockout served the legitimate purpose of bringing pressure upon the union to modify its demands.[98] The approach taken by Mr. Justice Stewart is simply one of judicial construction of a statute to reach a pre-conceived result.[99] Except for its broad language, the approach offers no guidelines for future decisions; the opinion serves, rather, as an example of misuse of the balancing test by the Board.[100]

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92. 380 U.S. 300 (1965).

93. 380 U.S. 278 (1965).

94. The American Ship Bldg. case involved an impasse in bargaining which was reached during negotiations to secure a new agreement for a current contract soon to expire. The employer closed down one of four yards and laid off employees at others.

The Brown case involved a multi-employer bargaining group which locked out their employees in response to a whipsaw strike against another member of the group. They and the struck employer operated with temporary replacements.

95. 380 U.S. 300, 308 (1965).

96. *Id.* at 311.

No proof of improper motive was offered, apparently because of the Board's mechanical position that normally a bargaining lockout improperly penalizes employees for engaging in collective bargaining. *See, e.g.*, Quaker State Oil Ref. Co., 121 N.L.R.B. 334 (1958).

The employer's conduct did not fall into the "inherently prejudicial" category because of the Court's holding under § 8(a)(1) that the use of the lockout was legitimate.

97. 380 U.S. at 311.

98. *Id.* at 312.

99. "Such a construction of § 8(a)(3) is essential if due protection is to be accorded the employer's right to manage his enterprise." *Id.* at 311.

100. [T]he Board construes its functions too expansively when it claims general authority to define national labor policy by balancing the competing interests of labor and management.

. . . §§ 8(a)(1) and (3) do not give the Board a general authority to assess the

The approach taken in *Brown* reaches the same result—namely, the requirement of proof of improper motive in this type of situation —[101] but offers guidelines built upon the balancing process clarified in *Erie Resistor*. In its separate treatment of sections 8(a)(1) and 8(a)(3), the Court weighed the competing interests of the unions and management. In considering the charge under 8(a)(1), the pressures on the union were weighed against the employers' interests in operating their businesses during the lockout period.[102] In finding no violation of section 8(a)(1), the Court noted that although "continued operations with the use of temporary replacements may result in the failure of the whipsaw strike," the employers' conduct serves a legitimate business end consistent with the Act.[103]

The balancing principles, "analogous to the determination of unfair practices under § 8(a)(1),"[104] were then used to consider the charge under section 8(a)(3). Aside from a case in which improper employer motive is proven, the balancing process is required in order to weigh the consequences of the employers' conduct upon the union's rights as against the employers' legitimate and substantial business purpose. If the balancing process is resolved against the employer, it means his conduct is so inherently destructive of employee rights that the conduct by its nature shows the improper motive. Conversely, when the process is resolved in the employer's favor so that

> the *tendency to discourage union membership is comparatively slight, and the employers' conduct is reasonably adapted to achieve legitimte business ends* or to deal with business exigencies, we enter into an area where the improper motivation must be established by independent evidence.[105]

The employers' conduct was held to be *prima facie* lawful because the Court found both that the discouragement of membership was comparatively remote and that the conduct of staying open with temporary replacements was reasonably adapted to the legitimate end of preserving the multi-employer bargaining unit.[106] Only a showing of improper subjective motive can convert such conduct into an unfair labor practice under section 8(a)(3).

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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.

Id. at 316-17.

101. 380 U.S. 278, 289 (1965). The court said: "Under these circumstances the finding of an unfair labor practice under § 8(a)(3) requires a showing of improper subjective intent."

102. *Id.* at 286.

103. *Id.*

104. *Id.* at 287.

105. *Id.* at 287-88. (Emphasis added).

106. *Id.* at 289.

V. RE-EVALUATION OF THE POLICY OF THE ACT

A. *Assigning the Burden of Proof*

In *NLRB v. Great Dane Trailers, Inc.*,[107] the Supreme Court elaborated upon the balancing process in a situation where the adverse effect of the employer's discriminatory conduct upon employee rights is comparatively slight. The employer refused to pay striking employees vacation benefits which had accrued under a terminated collective bargaining agreement, on the ground that all contractual obligations had been terminated by the strike. Shortly thereafter, the employer announced an intention to pay vacation benefits to striker replacements, returning strikers, and nonstrikers who had been at work on a specified date during the strike. No proof of improper motive of the employer was offered. The Board held that the refusal to pay vacation benefits to strikers, coupled with the payments to nonstrikers, constituted an unfair labor practice under section 8(a)(3).[108] Reviewing the Board's decision, the Court of Appeals found that the tendency of the conduct to discourage union membership was comparatively slight and that there had been no affirmative showing of improper motive. To comply with the other part of the balancing test—that is, that the employer's conduct be reasonably adapted to achieve legitimate business ends—the Court of Appeals, due to the lack of employer's evidence, inferred several possible business justifications for the employer's conduct. Thereupon the Board's order was denied enforcement.[109]

The Supreme Court relied heavily on its three recent opinions involving employer motivation in the context of asserted section 8(a)(3) violations: *American Ship Bldg.*, *Brown*, and *Erie Resistor*.[110] From the review of these decisions, the Court "distilled" several principles of controlling importance:

> First, if it can reasonably be concluded that the employer's discriminatory conduct was "inherently destructive" of important employee rights, no proof of an antiunion motivation is needed and the Board can find an unfair labor practice even if the employer introduces evidence that the conduct was motivated by business considerations. Second, if the adverse effect of the discriminatory conduct on employee rights is "comparatively slight," an antiunion motivation must be proved to sustain the charge *if* the employer has come forward with evidence of legitimate and substantial business justifications for the conduct.[111]

These controlling principles, however, are in reality more than mere dis-

107. 388 U.S. 26 (1967).
108. Great Dane Trailers, Inc., 150 N.L.R.B. 438 (1966).
109. NLRB v. Great Dane Trailers, Inc., 363 F.2d 130 (5th Cir. 1966).
110. 388 U.S. at 32-34.
111. *Id.* at 34. (Emphasis by the Court.)

tillations; they enlarge and clarify the rules of the prior decisions to the extent that they specifically assign the burden of proof. Thus, whether the conduct is "inherently destructive" or the effect is "comparatively slight," the burden is upon the employer to establish that he was motivated by legitimate business objectives because proof of motivation is more available to him.[112] Since the employer failed to meet this burden of proof, the Court found it unnecessary to decide which of the two situations governed, and held that the employer's discriminatory conduct was an unfair labor practice.

The balancing process of weighing the intended consequences upon employee rights against the business ends to be served by the employer's conduct thus becomes subject to the prerequisite that the employer meet his burden of proof. Only when the employer shows "legitimate and substantial business justifications" will it be necessary for the union to show improper employer motives (by the conduct itself, if inherently destructive, or by evidentiary proof, if the effect is comparatively slight). Lamenting this alteration of the burden, Mr. Justice Harlan in his dissenting opinion stated that it may either be "a rule of convenience important to the resolution of this case alone or may, more unfortunately, portend an important shift in the manner of deciding employer unfair labor practice cases under § 8(a)(3)."[113] Harlan concluded that the majority opinion beclouds sound prior interpretations of section 8(a)(3) in order to reach a seemingly sympathetic result.[114]

B. *Legitimate and Substantial Business Justification*

In the *Great Dane Trailer* case, legitimate and substantial business justifications are cast in the form of an aspect of the burden of proof within the overall balancing process. Although cast as such, the form solidifies into a test quite separate and apart from the balancing process in *NLRB v. Fleetwood Trailer Co.*[115] When former strikers applied for work two days after the end of an economic strike and continued to make known their availability and desire for reinstatement, the employer explained he had no need for their services because of the cutback in production. Nonetheless the employer at all times intended to resume full production and to reactivate the jobs left vacant by the former strikers. Upon such resumption the employer filled the jobs with new employees, and unfair labor practice charges were brought by the former

112. *Id.*

113. *Id.* at 38.

If the result merely requires the employer to come forward in order to make operative the requirement of proof of improper motive, "then the Court has merely penalized [the employer] for not anticipating this requirement . . . ." On the other hand, the Board may use the word "substantial" in the burden of proof formulation to evaluate the employer's business purposes and weigh them against the harm to employee interests, thereby exceeding its function in the balancing process under the Act. *Id.* at 38-39.

114. *Id.* at 40.

115. 389 U.S. 375 (1967).

strikers. The Supreme Court, in upholding the decision of the Board, held that "because the employer here has not shown 'legitimate and substantial business justifications,' the discriminatory conduct constitutes an unfair labor practice *without reference to intent.*"[116]

The decision briefly mentions the obvious relevancy of sections 2(3), 7 and 13 of the NLRA.[117] Thereafter the reasoning is almost entirely based on the legitimate and substantial business justifications test of *Great Dane*. The Court managed to give lip service to the balancing process in noting that the Board, and not the courts, has the primary responsibility to balance the business justifications against the invasion of employee rights.[118] But the course taken in the opinion ignores the role of the *Great Dane* test as one factor in the balancing process; the legitimate and substantial business justifications test becomes an absolute standard to be met by the employer in order to avoid an unfair labor practice violation.[119] The Court cited two reinstatement situations in which the justifications had been both legitimate and substantial: (1) permanent replacement of economic strikers under the *Mackay Radio* case[120] and (2) job elimination to adapt to changes in business conditions or to improve efficiency.[121] Since neither these nor any other justifications were shown by the employer, and since the employer's conduct could have adversely affected employee rights to *some* extent, it was unnecessary to inquire into improper employer motive in order to find an unfair labor practice. The right to reinstatement "can be defeated only if the employer can show 'legitimate and substantial business justifications.' "[122] Thus the Court's approach clearly made it unnecessary to enter the balancing process in this situation.

C. *The Impact of Great Dane and Fleetwood*

The practical effect of the *Great Dane* and *Fleetwood* decisions need not be exaggerated. In a recent case,[123] the Board applied their holdings and underlying principles in order to overturn previous Board rulings to the effect that, if a permanent replacement occupies an economic striker's job at the time application for reinstatement is made, the striker is thereafter entitled only to non-discriminatory consideration as an applicant for new employment.[124] The case involved economic

116. *Id.* at 380. (Emphasis added).

117. 29 U.S.C. §§ 152(3), 157 and 163 (1964), respectively.

118. 389 U.S. at 378.

119. "[U]nless the employer who refuses to reinstate strikers can show that his action was due to 'legitimate and substantial business justifications' he is guilty of an unfair labor practice." *Id.*

120. 304 U.S. 333 (1938).

121. 389 U.S. at 379-80.

122. *Id.* at 381.

123. Laidlaw Corp., 171 N.L.R.B. No. 175, 68 L.R.R.M. 1252 (June 13, 1968).

124. Brown & Root, Inc., 132 N.L.R.B. 486 (1961), *enforced*, 311 F.2d 447 (8th Cir.

strikers who were permanently replaced, who made unconditional application for reinstatement, and who continued to make known their availability for employment. The strikers charged the employer with unfair labor practices in the face of his conduct in hiring new employees, rather than the strikers, to fill positions left by the departure of the permanent replacements. The Board held that such economic strikers are entitled to full reinstatement upon departure of the replacements, unless they have in the meantime acquired regular and substantially equivalent employment, or unless the employer can sustain his burden of proof that the failure to offer full reinstatement was for legitimate and substantial business reasons.[125]

Thus the Board has considerably dampened the long-standing holding of the Supreme Court in *Mackay Radio*.[126] The economic striker no longer risks the possibility of *ultimate* job forfeiture in the event of his having been permanently replaced. Viewed in light of the economic and social realities of the strike environment, it becomes apparent that many permanent replacements in fact leave their employment upon termination of the strike. The economic striker must, therefore, merely pass time by earning compensation elsewhere or otherwise, save only that he must not find regular and substantially equivalent employment.

Although the Board ruling cannot be ignored by employers, it may be scrutinized for defects. The principle that the right to the job does not depend on its availability at the precise moment of application is coupled by the Board with another principle—that "strikers retain their status as employees who are *entitled to reinstatement* absent substantial business justification, and regardless of anti-union animus."[127] The former principle, however, was applied by the Supreme Court in *Fleetwood* in a more limited context, both from the standpoints of the factual situation and of consistency with its prior decision in *Mackay Radio*. *Fleetwood* dealt with a situation where the employer permanently replaced a portion of the work force during the strike and simply had no available jobs at the precise time the strike ended due to his cutback in production. The jobs sought by the strikers were not filled by permanent replacements during the strike.[128] The Board, on the other hand, was involved with strikers who had been permanently replaced during the strike. The Supreme Court, fully aware of the risk of the economic striker, applied the principle consistently with the *Mackay Radio* doctrine so as to look past lack

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1963); Atlas Storage Division, 112 N.L.R.B. 1175 (1955); Bartlett-Collins Co., 110 N.L.R.B. 395 (1954), *aff'd*, 230 F.2d 212 (D.C. Cir. 1956), *cert. denied*, 351 U.S. 988 (1956).

These Board Rulings followed in the aftermath of NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333 (1938), discussed in text accompanying note 36 *supra* and note 125 *infra*.

125. 171 N.L.R.B. No. 175, 68 L.R.R.M. at 1258.

126. 304 U.S. 333 (1938).

127. 171 N.L.R.B. No. 175, 68 L.R.R.M. at 1257 (emphasis by the Board). The Board labels these principles as holdings of *Fleetwood* and *Great Dane*. The *Great Dane* decision nowhere mentions reinstatement rights of strikers.

128. 389 U.S. at 376-78.

of job availability at the time of application to the real issue: whether or not the striker had been permanently replaced during the strike.

What is more invidious is the Board's mis-application of the legitimate and substantial business justifications test to a construction of section 2(3) of the NLRA.[129] Although *Fleetwood* transforms the test into an absolute standard to be met in order to avoid an unfair labor practice under section 8(a), this transformation does not warrant its use to clothe the striker with the status of an employee under section 2(3), with an absolute right to reinstatement unless the test is met by the employer.

The Board, however, in its subsequent discussion in the opinion,[130] does show some recognition of the relation of business justifications to employer conduct. Nevertheless, the employer need not meet his burden, until it is shown that the employer's conduct could have adversely affected employee rights.[131] The Board commits its most serious mistake in drawing a parallel between the failure to fill unreplaced employees' positions with strikers and the failure to fill permanently replaced employees' positions with strikers.[132] The latter conduct does not in any way discourage membership in a labor organization; its adverse effect is that borne by any job applicant who, considered in a non-discriminatory manner, simply did not get the job.

VI. CONCLUSION

It is submitted that the Supreme Court must retreat somewhat from the positions taken in *Great Dane* and *Fleetwood* if it is to adhere to the underlying policy of the Act. Section 8(a) sets out the nature of prohibited employer conduct. Because of the language used in subsections 8(a)(1) and 8(a)(3), there is a built-in tendency to intertwine the specific elements of the latter with the generic terms of the former. Application of these sections by the Board and the courts affords protection of employee rights to engage in concerted activity. The right to engage in concerted activity, however, is not an end in itself; rather, it is an integral part of the overall bargaining process between labor and management. Thus the need arises to weigh, in light of the Act and its policy, "the interests of employees in concerted activity against the interest of the employer in operating his business in a particular manner. . . ."[133] Apart from the rare instance where the employer's improper motive can be proven, the balancing process offers the most practical method of giving full and equitable consideration to both competing interests. Only then will it be possible to comply with the Supreme Court's recognition that:

129. 29 U.S.C. § 152(3) (1964). The Board did not specifically cite the statute, but rather referred to it indirectly. See quote in text accompanying note 126 *supra*.

130. 171 N.L.R.B. No. 175, 68 L.R.R.M. at 1257.

131. NLRB v. Great Dane Trailers, Inc., 388 U.S. 26, 34 (1967).

132. 171 N.L.R.B. No. 175, 68 L.R.R.M. at 1257.

133. NLRB v. Erie Resistor Corp., 373 U.S. 221, 228-29 (1963). For a full description of the weighing and balancing test, see text discussion accompanying note 88 *supra*.

> at the present statutory stage of our national labor relations policy, the two factors—necessity 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.[134]

The far-reaching effect of the *Great Dane* and *Fleetwood* decisions—that of truncating the balancing process into a one-sided consideration of legitimate and substantial business justifications—does injustice to the underlying policy of the Act by resulting in an imbalance favoring employee and union interests. Either the Supreme Court must retreat by reaffirming the necessity for the balancing process, or the Act must be amended to ensure that result.

134. NLRB v. Insurance Agents Union, 361 U.S. 477, 489 (1960).