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Labor Law - An Employer Does Not Commit an Unfair Labor Practice When, Subsequent to an Impasse in Collective Bargaining, He Locks Out His Regular Employees and Operates with Temporary Replacements

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RECENT DEVELOPMENTS

LABOR LAW — AN EMPLOYER DOES NOT COMMIT AN UNFAIR LABOR PRACTICE WHEN, SUBSEQUENT TO AN IMPASSE IN COLLECTIVE BARGAINING, HE LOCKS OUT HIS REGULAR EMPLOYEES AND OPERATES WITH TEMPORARY REPLACEMENTS.

Inter-Collegiate Press v. NLRB (8th Cir. 1973)

After reaching an impasse during collective bargaining with Local No. 60 of the International Brotherhood of Bookbinders, the employer, Inter-Collegiate Press, in an effort to bolster its economic bargaining power, locked out all employees in the bargaining units represented by the union.[1] When no agreement appeared forthcoming, the employer informed the union that it would begin hiring temporary replacements unless a contract were signed or a no-strike commitment given by a specified date antecedent to the company's busy season.[2] Immediately thereafter, the company hired replacements, resumed full production, and continued the lockout until the busy season passed, at which time it offered to reinstate all locked out employees.[3] Responding to charges filed by the union, the General Counsel of the National Labor Relations Board (the Board) issued a complaint charging the employer with violations of sections 8(a)(1)

1. Inter-Collegiate Press v. NLRB, 486 F.2d 837, 841 (8th Cir. 1973), *cert. denied,* 415 U.S. 938 (1974). The impasse was reached after expiration of the existing employment contract, negotiations on the terms of a new agreement having begun two months prior to the scheduled termination of the contract. Fourteen bargaining sessions were held before a federal mediator declared that additional discussion would be futile. When the union rejected the employer's last contract proposal, which offered better terms than those in the expired agreement, but did not make a counterproposal, the management locked out all employees represented by the union. The National Labor Relations Board (the Board) and the parties stipulated that the lockout was legal at its inception. 486 F.2d at 841.

A duty to bargain in good faith is imposed upon both the employer and the union by section 8(a)(5) of the National Labor Relations Act [hereinafter the Act], 29 U.S.C. § 158(a)(5) (1970), and section 8(b)(3) of the Act, 29 U.S.C. § 158(b)(3) (1970). *See, e.g., In re* Truitt Mfg. Co., 351 U.S. 149 (1956). *See also* Cox, *The Duty to Bargain in Good Faith,* 71 HARV. L. REV. 1401 (1958). Because of the unilateral characteristic of a lockout, there exists a question as to whether an impasse in the collective bargaining — the parties refusing in good faith to accede to each other's demands — is a prerequisite to a lawful lockout by an individual employer. In both American Ship Bldg. Co. v. NLRB, 380 U.S. 300 (1965), a leading case in this area wherein the Supreme Court held that an employer's institution of a lockout after a bargaining impasse had been reached was not an unfair labor practice, and the instant case, a bargaining impasse had been reached, making resolution of the question unnecessary. For discussions taking the position that an impasse is not a prerequisite, *see* Lane v. NLRB, 418 F.2d 1208 (D.C. Cir. 1969); Detroit Newspaper Publishers Ass'n v. NLRB, 346 F.2d 527 (6th Cir. 1965).

2. 486 F.2d at 843. The company was engaged in the highly seasonal business of printing scholastic yearbooks and graduation announcements. Consequently, any disruption in production during its peak period would seriously affect the company's ability to meet its guaranteed delivery schedules. *Id.* at 842.

3. *Id.* at 843. The company informed the union and the employees that the substitutes were to be employed only for the duration of the labor dispute, and in any event, the replacements would be discharged at the end of the busy season. *Id.*

and 8(a)(3) of the National Labor Relations Act (the Act).[4] The Board, reversing the administrative law judge, held that the employer's conduct was not proscribed by the Act and dismissed the complaint.[5] The Court of Appeals for the Eighth Circuit enforced the Board's order, *holding* that where a bargaining impasse existed, the employer did not violate the Act by hiring temporary replacements to continue operations during an otherwise lawful lockout. *Inter-Collegiate Press v. NLRB,* 486 F.2d 837 (8th Cir. 1973), *cert. denied,* 415 U.S. 938 (1974).

Section 8(a) of the Taft-Hartley Act[6] provides protection for union employees' section 7 rights[7] from unfair labor practices on the part of the employer. Among those employer practices which could be held illegal under the Act are lockouts accompanied by the use of replacement employees. The history of the Board's treatment of lockouts evidences its reluctance to permit indiscriminate use of the device, as lockouts have been sanctioned only when specific requirements were satisfied. For example, lockouts had been permitted in both multi-employer and individual employer situations, but only as a defensive measure, not a bargaining tactic.[8] However,

4. 29 U.S.C. §§ 158(a)(1), (3) (1970). The Labor Management Relations Act (Taft-Hartley Act) § 8(a), which amended the National Labor Relations Act, 29 U.S.C. §§ 151 *et seq.* (1970), provides in pertinent part:

> It shall be an unfair labor practice for an employer—
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 . . .
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . .

Id.

5. Inter-Collegiate Press, 199 N.L.R.B. No. 35, 81 L.R.R.M. 1508 (1972), *enforced,* 486 F.2d 837 (8th Cir. 1973), *cert. denied,* 415 U.S. 938 (1974).

6. Labor Management Relations Act (Taft-Hartley Act) § 8(a), 29 U.S.C. § 158(a) (1970). For the text of the pertinent provisions of the Act, *see* note 4 *supra.*

7. The employee rights referred to in section 8(a)(1) are those contained in the Labor-Management Relations Act (Taft-Hartley Act) § 7, 29 U.S.C. § 157 (1970), which provides:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection and shall also have the right to refrain from any or all such activities . . . .

Id. The rights afforded by section 7 shall hereinafter be referred to as section 7 rights, employee rights or protected rights.

8. When initially confronted with the issue of the propriety of the lockout, the Board found it unlawful. *See, e.g.,* Continental Baking Co., 104 N.L.R.B. 143 (1953), *enforcement denied,* 221 F.2d 427 (8th Cir. 1955). However, the Board carved out an exception for the case in which not all members of a multi-employer bargaining unit were struck. As a defensive measure to combat the union's attempt to chip away at the cohesiveness of the employers in the bargaining unit, these non-struck employers could lock out their employees. This departure was rationalized on the basis of the employers' interest in maintaining the integrity of the multi-employer bargaining unit. *See* Buffalo Linen Supply Co., 109 N.L.R.B. 447 (1954), *enforcement denied sub nom.* Teamsters Local 449 v. NLRB, 231 F.2d 110 (2d Cir. 1956), *rev'd,* 353 U.S. 87 (1957). Where an individual employer was concerned, a lockout was permissible only as a defensive tactic. Circumstances justifying the single employer's lockout included those in which there validly existed the desire to avoid extraordinary operational or economic losses. *See, e.g.,* Betts Cadillac Olds, Inc., 96 N.L.R.B. 268 (1951); Duluth Bottling Ass'n, 48 N.L.R.B. 1335 (1943).

Whether a member of a multi-employer bargaining unit or an individual employer was involved, an express threat or an implicit one — such as that in a strike against one member of the multi-employer unit — was necessary in order for

in 1965, in *American Ship Building Co. v. NLRB*,[9] the United States Supreme Court held that offensive bargaining lockouts were not prohibited by sections 8(a)(1) and 8(a)(3) of the Act. Nevertheless, the Court left unanswered the question of the propriety of the use of replacement labor during an offensive lockout.[10] Furthermore, in the same year, the Court approved the use of substitute labor in a *defensive* lockout by non-struck members of a multi-employer bargaining unit, in *NLRB v. Brown*.[11]

With respect to the issue left unresolved by both of these decisions — whether the utilization of temporary replacements by a single employer during an offensive lockout constituted an unfair labor practice — the present Board is not in complete internal agreement: two members maintain that such employer conduct is legitimate,[12] two others view the practice as unlawful,[13] while another member prefers to operate on a case-by-case basis, paying particular attention to the interaction of the particular facts.[14] Two courts have indicated agreement with the view held by the first two Board members without discussing the issue extensively.[15] Only

the Board to allow the employer the benefit of the lockout. For a presentation of the Board's attitude toward the lockout as a lawful device only where the employer was the non-aggressor, *see* Meltzer, *Lockouts Under the LMRA: New Shadows on an Old Terrain*, 28 U. CHI. L. REV. 614 (1961).

Even where the Board permitted a lockout, it was unwilling to allow the employer to hire replacements. *See, e.g.*, Brown Food Store, 137 N.L.R.B. 73 (1962), *enforcement denied sub. nom.* NLRB v. Brown, 319 F.2d 7 (10th Cir. 1963), *aff'd*, 380 U.S. 278 (1965). While sanctioning the lockout engaged in by non-struck employers of a multi-employer bargaining unit, the Board denied them the right to hire temporary replacements. *Id.*

9. 380 U.S. 300 (1965).

10. *See id.* at 318. The Court stated:

> [W]e intimate no view whatever as to the consequences which would follow had the employer replaced its employees with permanent replacements or even temporary help.

Id. at 308 n.8 (citation omitted).

11. 380 U.S. 278 (1965).

12. Board Members Kennedy and Penello have found the use of substitutes in the context of an otherwise lawful lockout not violative of the Act. *See* Ozark Steel Fabricators, Inc., 199 N.L.R.B. No. 136, 81 L.R.R.M. 1501, 1504 (1972); Inter-Collegiate Press, 199 N.L.R.B. No. 35, 81 L.R.R.M. 1508 (1972), *enforced*, 486 F.2d 837 (8th Cir. 1973), *cert. denied*, 415 U.S. 938 (1974); Ottawa Silica Co., 197 N.L.R.B. No. 53, 80 L.R.R.M. 1404, 1405–06 (1972), *enforced*, 482 F.2d 945 (6th Cir. 1973), *cert. denied*, 415 U.S. 916 (1974).

13. Adhering to the Seventh Circuit's opinion in Inland Trucking Co. v. NLRB, 440 F.2d 562 (7th Cir.), *cert. denied*, 404 U.S. 858 (1971), Members Fanning and Jenkins have stated that combining the use of substitutes with a lockout violates the Act per se. *See* Ozark Steel Fabricators, Inc., 199 N.L.R.B. No. 136, 81 L.R.R.M. 1501, 1502 (1972) (Fanning & Jenkins, dissenting); Inter-Collegiate Press, 199 N.L.R.B. No. 35, 81 L.R.R.M. 1508, 1512 (1972) (Fanning & Jenkins, dissenting), *enforced*, 486 F.2d 837 (8th Cir. 1973), *cert. denied*, 415 U.S. 938 (1974); Ottawa Silica Co., 197 N.L.R.B. No. 53, 80 L.R.R.M. 1404, 1408 (1972) (Fanning & Jenkins, dissenting), *enforced*, 482 F.2d 945 (6th Cir. 1973), *cert. denied*, 415 U.S. 916 (1974).

14. *See* Ozark Steel Fabricators, Inc., 199 N.L.R.B. No. 136, 81 L.R.R.M. 1501, 1501 n.3 (1972) (Miller, concurring); Inter-Collegiate Press, 199 N.L.R.B. No. 35, 81 L.R.R.M. 1508, 1510 (1972) (Miller, dissenting), *enforced*, 486 F.2d 837 (8th Cir. 1973), *cert. denied*, 415 U.S. 938 (1974); Ottawa Silica Co., 197 N.L.R.B. No. 53, 80 L.R.R.M. 1404, 1408 (1972) (Miller, concurring), *enforced*, 482 F.2d 945 (6th Cir. 1973), *cert. denied*, 415 U.S. 916 (1974). Chairman Miller engages in a balancing test, weighing the impact of the employer's conduct on union membership against the employer's asserted business justification. *See* Inter-Collegiate Press, *supra*, 81 L.R.R.M. at 1510–11.

15. In Ottawa Silica Co. v. NLRB, 482 F.2d 945 (6th Cir. 1973), *cert. denied*, 415 U.S. 916 (1974), the court's opinion contained no discussion of the issue and

the Seventh Circuit, in *Inland Trucking Co. v. NLRB*,[16] has provided a relatively detailed analysis of this question, concluding that the use of replacement labor during an offensive lockout constituted an unfair labor practice per se.[17] The *Inland Trucking* court examined the employer's conduct under both section 8(a)(1) and section 8(a)(3) of the Act. According to that court, the use of temporary replacements violated section 8(a)(1) in that it interfered with the employees' section 7 collective bargaining rights by enabling the employer to remain in business, instead of making the lockout a test of the employer's and employees' respective abilities to withstand the cessation of business.[18] Regarding possible violation of section 8(a)(3), which prohibits conduct by the employer that discourages union membership,[19] the court applied the standard set forth by the Supreme Court in *NLRB v. Great Dane Trailers, Inc.*,[20] concluding that the employer's offensive lockout and use of temporary replacements was "inherently destructive" of employee rights.[21] In addition, even if the resulting harm to such rights had been slight, the employer had failed to furnish a legitimate and substantial business justification.[22] Consequently, the employer's actions constituted an unfair labor practice under the *Great Dane* standard.

Great Dane provided the most helpful statement of the standards to be applied to *any* employer conduct alleged to be in violation of section 8(a)(3),[23] and thus was the appropriate test for determining whether the use of temporary replacements in an offensive lockout was an unfair labor practice under section 8(a)(3). The *Great Dane* test depends upon the characterization of employer conduct as having had either an "inherently destructive" or a "comparatively slight" effect upon important employee rights.[24] Anti-union motivation can be a factor in this determination.[25] In general, the Board's General Counsel has the burden of showing that

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merely enforced the Board's finding that the use of temporary replacements during a lockout was not an unfair labor practice. *Id.* The Ninth Circuit has indicated in dicta that the hiring of temporary replacements was not a violation of the Act. NLRB v. Golden State Bottling Co., 401 F.2d 454, 457 (9th Cir. 1965), *citing* NLRB v. Brown, 380 U.S. 278 (1965).

16. 440 F.2d 562 (7th Cir.), *cert. denied*, 404 U.S. 858 (1971).
17. 440 F.2d at 565.
18. *Id.* at 564.
19. *See* note 4 *supra.*
20. 388 U.S. 26 (1967).
21. 440 F.2d at 565.
22. *Id.*
23. In *Great Dane*, the employer had violated section 8(a)(3) by refusing to pay striking employees vacation benefits accrued after announcing it would pay such benefits to replacements, non-strikers, and any returning strikers. 388 U.S. at 27–30.
24. The *Great Dane* test is as follows:

> First, if it can reasonably be concluded that the employer's discriminatory conduct was "inherently destructive" of important employee rights, no proof of an anti-union 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 anti-union motivation must be proved to sustain the charge *if* the employer has come forward with evidence of legitimate and substantial business justifications for the conduct. Thus, in either situation, once it has been proved that the employer engaged in discriminatory

the employer has engaged in unlawful conduct. The *Great Dane* Court, however, determined the following: Once the Board's General Counsel established that the conduct caused some harm to employee rights, whether "inherently destructive" or lesser in degree, the employer had the burden of justifying his actions by affirmative evidence of the existence of some legitimate and substantial business purpose. If the employer met this burden, then evidence of anti-union motivation, independent of the challenged conduct, would still be material as evidence of a section 8(a)(3) infraction.[26] However, where the employer's conduct resulted in severe harm to employee rights — conduct "inherently destructive" — the Board could readily reject any purported business justification and decide that there had been an unfair labor practice.

Although the *Great Dane* case involved an alleged violation of section 8(a)(3), the Supreme Court has indicated that the *Great Dane* principles are applicable in determining whether section 8(a)(1) has been violated

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conduct which could have adversely affected employee rights to *some* extent, the burden is upon the employer to establish that he was motivated by legitimate objectives since proof of motivation is most accessible to him.

Id. at 34.

25. *Id.* An employer's anti-union motivation, when established by evidence independent of the conduct challenged as objectionable, operates to convert an otherwise ordinary business action into an unfair labor practice. *Id.* The Supreme Court has stated:

> Though the intent necessary for an unfair labor practice may be shown in different ways, proving it in one manner may have far different weight and far different consequences than proving it in another. When specific evidence of a subjective intent to discourage or to discriminate or to encourage or discourage union membership is shown, and found, many otherwise innocent or ambiguous actions which are normally incident to the conduct of a business may without more, be converted into unfair labor practices . . . . Conduct which on its face appears to serve legitimate business ends in these cases is wholly impeached by the showing of intent to encroach upon protected rights. The employer's claim of legitimacy is totally dispelled.

NLRB v. Erie Resistor Corp., 373 U.S. 221, 227–28 (1963) (citations and footnote omitted). In determining whether a lockout is an unfair labor practice, the employer's motive is a relevant topic of inquiry. *See* American Ship Bldg. Co. v. NLRB, 380 U.S. 300, 311–13 (1965).

26. 388 U.S. at 34. *See* note 24 *supra.* While the status of the law of motive — the rule concerning when evidence of the employer's subjective motive must be shown and which party has the burden of proof on the issue — was clarified in American Ship Bldg. Co. v. NLRB, 380 U.S. 300 (1965), and in NLRB v. Brown, 380 U.S. 278 (1965), it was subsequently obfuscated by *Great Dane. See generally* Janofsky, *New Concepts in Interference and Discrimination Under the NLRA: The Legacy of* American Ship Building *and* Great Dane Trailers, 70 COLUM. L. REV. 81 (1970). It should be noted that the statutory language of section 8(a)(1), in contrast to that contained in section 8(a)(3), does not require the existence of scienter before an unfair labor practice can be found. *See* ILGWU v. NLRB, 366 U.S. 731, 739 (1961). *See also* American Ship Bldg. Co. v. NLRB, 380 U.S. 300, 313 (1965); NLRB v. Burnup & Sims, Inc., 379 U.S. 21 (1964). The Court's involvement with the employer's subjective motive in dealing with the section 8(a)(1) charge in both *American Ship Bldg., supra,* and NLRB v. Brown, 380 U.S. 278 (1965), reveals that one could argue that, in this regard, derivative, not independent, section 8(a)(1) violations were alleged. In each of these cases, the Court's inquiry into the possible anti-union motive of the employer shows that in the lockout context, a finding of a section 8(a)(3) violation should result in a derivative violation of section 8(a)(1). Regarding the interplay between sections 8(a)(3) and 8(a)(1); *see generally* Oberer, *The Scienter Factor in Sections 8(a)(1) and (3) of the Labor Act: Of Balancing, Hostile Motive, Dogs and Tails,* 52 CORNELL L.Q. 491 (1967).

as well.[27] Hence, in the instant case, the court relied upon the *Great Dane* test to determine whether either section 8(a)(1) or section 8(a)(3) had been violated. Although the union cited *Inland Trucking* as support for its contention that the employer's use of temporary replacement labor during an otherwise lawful, offensive lockout conclusively constituted an unfair labor practice,[28] the *Inter-Collegiate Press* court expressly rejected the Seventh Circuit's per se approach. Noting the fact that the court's standard for review of the Board's order was the "substantial evidence" test,[29] the court believed it improper to hold that the employer's conduct was absolutely "inherently destructive" of employees' rights, especially since the Board itself had not promulgated a per se rule.[30] Besides, the court wrote, such a strict interpretation would conflict with Justice Goldberg's admonition to the contrary in *American Ship Building*.[31] In addition, the court found no indication of anti-union hostility on the part of the employer,[32] thereby closing one potential avenue by which an unfair labor practice can be proved pursuant to the *Great Dane* test.

In response to the allegation of a section 8(a)(3) violation, the court observed that the probable impact of a lockout would be on the union's bargaining position rather than on the employees' loyalty to the union.[33] Hence, the focus of the court's thinking was on this former effect as well as the possible deterrent to union membership literally proscribed by that section. Viewing the facts of the case, the court found that the evidence indicated neither that the union's position as bargaining representative for the locked out workers had been jeopardized, nor that the union had been damaged in its ability to effectively represent those comprising the bargaining unit as a whole. As further evidence of absence of harm, the court noted that there was no indication that any worker who did return

27. *See* NLRB v. Fleetwood Trailer Co., 389 U.S. 375, 380 (1967).

28. 486 F.2d at 840.

29. *Id.* at 840. The "substantial evidence test" is the epithet used to refer to that scope of review which the federal courts apply to the decisions of administrative agencies, such as the NLRB. Under the substantial evidence test, reviewing courts decide questions of law, but limit themselves in passing on issues of fact to deciding whether there is a rational basis for the administrative body's finding. *See, e.g.*, Richardson v. Perales, 402 U.S. 389, 401 (1971). For a fuller discussion of the judicial scope of review accorded to decisions of administrative agencies, *see* K. DAVIS, ADMINISTRATIVE LAW TEXT 525–44 (3d ed. 1972).

30. 486 F.2d at 840–41.

31. *Id.* at 841, *quoting* American Ship Bldg. Co. v. NLRB, 380 U.S. 300, 337–38 (1965) (Goldberg, J., concurring).

32. 486 F.2d at 845. From the court's opinion it is unclear whether these facts were reviewed as evidence of an unfair labor practice under section 8(a)(1) or section 8(a)(3), or both. One possible cause for this lack of clarity in the court's language might be that the court was tacitly applying the concept of derivative violation of section 8(a)(1), whereby violations of other sections of the Act are held necessarily to impinge upon section 7 rights, and therefore found separate discussion of the two sections unnecessary. The legislative history of section 8(a) justifies such an application of subsection (1), as it indicates that that subsection protects employees' section 7 rights against the same unfair labor practices which subsections (2) through (5) specifically prohibit, while independently providing broader protection against employer conduct not explicitly disallowed by any of these other four subdivisions. *See* H.R. REP. No. 969, 74th Cong., 1st Sess. 15 (1935); S. REP. No. 573, 74th Cong., 1st Sess. 9 (1935).

33. 486 F.2d at 845.

had repudiated his union membership.[34] Thus the use of temporary employees had had a "comparatively slight" effect on section 7 rights.[35] Furthermore, the court found a substantial business justification for the employer's action in that it was engaged in a highly seasonal business. Because of the disruption in operations which had been caused by a strike during the previous busy season and the subsequent dissatisfaction of customers with the interruption, the court was satisfied that the union strategy was to continue to work without a contract until the time when a strike would be most effective.[36]

With respect to the alleged violation of section 8(a)(1), again the court determined in effect that the employer's response to the bargaining impasse was not "inherently destructive" of employee rights.[37] In order to make out a violation of that section's provisions, one must demonstrate that the employer has interfered with, restrained, or coerced employees in their exercise of a protected right.[38] The union's premise was that unlawful coercion is inherent where employees are deprived of their incomes while the company is not shut down.[39] The court acknowledged that coercion is present when an employer prevents its employees from working, and admitted that the coercion may in fact be intensified when the employer hires temporary employees to continue operations.[40] While the presence of employer-induced coercion could not be denied, the court perceived the real issue to be the propriety of the end which the coercion was directed to achieve. In other words, a mere finding of coercion without more was insufficient to make out a section 8(a)(1) violation: the coercion must have inhibited a section 7 right.[41] The instant opinion drew a distinction between conduct aimed at securing sufficient economic advantage to the employer within the collective bargaining framework and conduct pursued to deter the exercise of section 7 rights.[42] Consequently, there

34. *Id.*

35. *Id.* The *Inter-Collegiate Press* court found a combination of three factors influential in determining that the conduct involved resulted in but a slight impact on employee rights. First, the replacements were hired for the duration of the labor dispute only, and in any event, they would be discharged after the culmination of the busy season. The union was made aware of both these facts. Second, the option to resume their positions was available to locked-out employees if they would accede to the employer's terms, which terms were superior to those found in the expired contract. Third, the employer had agreed before the lockout to retain the union-security clause from the former contract. *Id., citing* NLRB v. Brown, 380 U.S. 278, 288–89 (1965).

36. 486 F.2d at 843, 845.

37. Although the court did not use the terms "inherently destructive" or "slight effect" in its discussion of the alleged violation of section 8(a)(1), it is submitted that this was the conclusion reached, especially in view of the fact that the court stated that the *Great Dane* test was applicable to a section 8(a)(1) violation. *See* 486 F.2d at 844. The failure to use those terms, however, might indicate that the court had also been speaking of section 8(a)(1) during its apparent discussion of section 8(a)(3). *See* 486 F.2d at 844–45.

38. 29 U.S.C. § 158(a)(1) (1970). *See* note 4 *supra.*

39. 486 F.2d at 845–46.

40. *Id.* at 846.

41. *See id.* at 846. *See also* American Ship Bldg. Co. v. NLRB, 380 U.S. 300, 308 (1965); NLRB v. Brown, 380 U.S. 278, 283 (1965).

42. 486 F.2d at 846, *quoting* American Ship Bldg. Co. v. NLRB, 380 U.S. 300, 309 (1965).

had been only a slight effect on employee rights, an effect justified in view of the seasonal nature of the employer's business.[43]

The difference in the results reached by the instant court and the *Inland Trucking* court stemmed from their initial categorization of the behavior as having either a slight or a severe impact upon employee rights under sections 8(a)(1) and 8(a)(3). As noted by the *Inter-Collegiate Press* court, "the phrase 'inherently destructive' is not easily susceptible of precise definition."[44] In the context of an employer's awarding seniority credits to replacement employees, the phrase has been described as conduct "which *does* speak for itself — it *is* discriminatory and it *does* discourage union members and whatever the claimed overriding justification may be, it carries with it unavoidable consequences which the employer not only foresaw but which he must have intended."[45] It has been suggested that the proper procedure to follow in deciding whether conduct is "inherently destructive" is that which simultaneously analyzes both the effect upon section 7 rights and the employer's business justification.[46] However, the literal language in *Great Dane* requires the making of a series of determinations dependent upon specified conditions.[47] Applying this sequential test to substantially identical facts, the courts of the Seventh and Eighth Circuits arrived at opposite conclusions on the question whether section 8(a)(1) and section 8(a)(3) had been violated.

With regard to a violation of section 8(a)(3), which prohibits discriminatory employment practices for the purpose of affecting membership in a labor organization, it is arguable that supplanting permanent workers who have been locked out with temporary replacements intentionally discriminates against those replaced employees who are union members.[48] While this argument has a certain logical appeal under the language of this section, it appears inconsistent with the recognized right to fill vacancies created by strikers with permanent replacements.[49] Since both the lockout and the strike are regarded as legitimate economic weapons, the fact that in a lockout the employer precipitates the vacancies should not invariably lead to the conclusion that the employer has engaged in discrimination. In addition, if, as in *Inter-Collegiate Press,* the employer

43. 486 F.2d at 847.
44. *Id.* at 844–45.
45. NLRB v. Erie Resistor Corp., 373 U.S. 221, 228 (1963) (emphasis in original).
46. The argument has been made that where conflicting interests are involved, it is better policy to analyze the effect on employee rights and the justification for the employer's conduct simultaneously, before attempting to characterize the employer's conduct. *See* Janofsky, *supra* note 26, at 99. Before a new procedure was instituted by the Supreme Court in NLRB v. Great Dane Trailers, Inc., 388 U.S. 26, 34 (1967), conduct was not characterized in the abstract, but rather a balancing test was utilized whereby employees' section 7 rights were weighed against the employer's legitimate business interests. *See* NLRB v. Erie Resistor Corp., 373 U.S. 221, 228–29 (1963); NLRB v. Teamsters Local 449, 353 U.S. 87, 96 (1957). *See also* American Ship Bldg. Co. v. NLRB, 380 U.S. 300 (1965).
47. NLRB v. Great Dane Trailers, Inc., 388 U.S. 26, 34 (1967). *See* note 24 *supra.*
48. The employer's conduct in replacing union employees with non-union personnel was the salient factor in the Seventh Circuit's finding that the employer had violated section 8(a)(3). Inland Trucking Co. v. NLRB, 440 F.2d 562, 565 (7th Cir. 1971).
49. *See* NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333 (1938).

uniformly locks out *all* members of the collective bargaining unit, both union and non-union members alike, there is strong objective evidence that the employer was seeking to gain a tactical advantage within the bargaining process and not in derogation of it. Moreover, precedent indicates that the Supreme Court may be willing to hold the hiring of substitutes lawful. As noted at the outset of this discussion, in *American Ship Building Co.,* the Court held that an offensive lockout did not violate section 8(a)(3), and in *Brown* it also approved the defensive lockout with substitutions in the context of a multi-employer bargaining unit's reaction to a whipsaw strike.[50] In the latter case, the Court stated, "[W]e do not see how the continued operations of respondents and their use of temporary replacements imply hostile motivation any more than the lockout itself; nor do we see how they are inherently more destructive of employee rights."[51] However, the question unanswered in both of these decisions, but dealt with in both *Inland Trucking* and *Inter-Collegiate Press,* is that of the appropriateness of the employer's use of substitution as a positive bargaining tool or economic weapon. Such conduct should not be found to be inherently discriminatory because, as was suggested by one Board member, little is gained by retaining the distinction between "offensive" and "defensive" conduct.[52] Even if this distinction is not abandoned, employer conduct should not be viewed as discriminatory where there is inconclusive evidence on the question of whether permitting the employer's use of replacements actually served to improperly influence union membership.[53]

The explanation for the variation between the Seventh and Eighth Circuits' respective reasoning on the issue of a violation of section 8(a)(1) lies in the former court's interpretation in *Inland Trucking* that continued operation after a lockout inescapably gives rise to the inference that the action was intended to damage the employees' abilities to engage in con-

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50. *See* text accompanying notes 9–11 *supra.* A whipsaw strike is a strike directed against fewer than all members of a multi-employer bargaining unit, designed to intensify competitive pressure on the struck member by allowing other members to continue to operate. The goal of the union is to force each member to terms individually by a succession of such strikes. It is thought that terms of the agreements will be more favorable to the union by striking in a sequential manner. *See* International Ass'n of Machinists v. National Ry. Labor Conf., 310 F. Supp. 905, 910 n.5 (D.D.C. 1970), *appeal dismissed,* 463 F.2d 872 (D.C. Cir. 1972). The employers' interest in maintaining the integrity of their bargaining unit has been protected to the extent of allowing non-struck members to lock out their regular employees and continue operations with temporary replacements. *See* NLRB v. Brown, 380 U.S. 278 (1965).

51. 380 U.S. at 284.

52. Board Chairman Miller, in his dissenting opinion in Inter-Collegiate Press, 199 N.L.R.B. No. 35, 81 L.R.R.M. 1508, 1510–12 (1972) (Miller, dissenting), was doubtful whether the Board's use of the traditional terms "offensive" and "defensive" had continued vitality in light of the Supreme Court's recent pronouncements. *Id.* at 1511. This sentiment was endorsed by the Eighth Circuit's recognition of the limited utility of a *pro forma* application of labels. *See* 486 F.2d at 844.

53. Because of the procedural consequences associated with a conclusion that employer conduct is "inherently destructive" (*see* notes 24–26 and accompanying text *supra*), such a conclusion should be made only in the clearest of circumstances. That an employer's use of replacements is ambiguous behavior is a notion buttressed by the dearth of litigation on the issue, as well as by the opposite conclusions reached by the Seventh and Eighth Circuits as to the propriety of the practice.

certed activities.[54] Therefore, no inquiry into the employer's subjective motive need be undertaken by the General Counsel, nor must a business justification be accepted as a vindication of the behavior. In contrast, the Eighth Circuit in *Inter-Collegiate Press* did not construe the coercion as having had a meaningful effect on section 7 rights. While the conduct may have significantly affected the terms of the collective bargaining *agreement* finally reached, it had no more than a slight impact on the collective bargaining *process*.[55] However, prior to either of these decisions, the Supreme Court, in *American Ship Building,* had decided that the use of a lockout in support of a legitimate bargaining position was not inconsistent with either the right to strike or the right to bargain collectively.[56] Within this framework, then, the *Inter-Collegiate Press* court's reasoning that the hiring of substitutes "does no more than increase the pressure upon the employees to settle the dispute, while perhaps easing the pressure on the employer,"[57] is merely a logical extension of the *American Ship Building* doctrine. This amount of pressure is no greater than that resulting from other practices sanctioned during a bargaining lockout; hence, the use of temporary replacements should be viewed as merely an additional weapon in the employer's arsenal with which to confront the union's demands.[58] Under this view, the *Inter-Collegiate Press* court's refusal to find a section 8(a)(1) infraction was correct, because the employer was resisting the union's bargaining demands, not the legitimacy of the collective bargaining process or the employees' opportunity to engage in concerted activity.

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54. *See* 440 F.2d at 565. It is submitted that this viewpoint was the result of the court's interpretation of the manner in which the Act is intended to protect the right to strike. Under the *Inland Trucking* court's view, the union was to be the only judge of the circumstances in which the employer was to be permitted to operate with substitute employees. If the employer were to be permitted to substitute at all, it would be solely for the union, by striking after having considered its tactical position, to create the precondition which would allow the employer to hire replacements pursuant to NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333 (1938). Under such a view, then, because of the Act's protection of the right to strike and the court's interpretation of the scope of that right, the employer would be prohibited from operating its business with substitutes. *Cf.* 440 F.2d at 564.

55. *See* 486 F.2d at 846, *quoting* American Ship Bldg. Co. v. NLRB, 380 U.S. 300, 309. *Cf.* NLRB v. Insurance Agents Union, 361 U.S. 477, 495–96 (1960).

56. Indeed, it was argued to the Eighth Circuit, in a brief filed amicus curiae by the United States Chamber of Commerce, that the lockout is the employer's counterpart to the union's right to strike. The court did not dwell on the question presented, correctly stating that its resolution would not answer the pertinent question of the permissible scope of a lockout. 486 F.2d at 846–47.

57. *Id.* at 846.

58. According to the *Inter-Collegiate Press* court, the use of the lockout with temporary replacements exerted no more pressure than that applied by other valid employer tactics used during a bargaining lockout, such as stockpiling or subcontracting (*see* American Ship Bldg. Co. v. NLRB, 380 U.S. 300, 316 (1965)) or shifting production to alternate plants (*see* Ruberoid Co., 167 N.L.R.B. 987 (1967)). 486 F.2d at 846.

It is submitted that the court should have been far more precise in determining where on the continuum between legitimate conduct and inherently destructive employer conduct the hiring of temporary replacements lies, and should have further articulated the reasoning behind that determination.

Although both courts purported to conform[59] to the Supreme Court's declaration in *American Ship Building* that once an employer's conduct is deemed an economic weapon, its effectiveness should not be balanced against union tactics to determine whether it constitutes an unfair labor practice,[60] each court nonetheless utilized this analysis.[61] The reversion to a balancing approach is not surprising when one considers the difficulty of designating conduct as an unfair labor practice under the nebulous standard of " 'inherently destructive' of section 7 rights."[62] Such a determination cannot be made in a vacuum; some comparison of the employer's and employees' interests is required in each case. Thus, it is submitted, despite the courts' desire to comply with the Supreme Court's warning against balancing bargaining weapons, such balancing in fact occurred, albeit at an earlier stage, that of determining whether the conduct was "inherently destructive" or valid as a bargaining weapon. Hence, if a reviewing court employing this method were to perceive the effect of the challenged tactic upon employees' section 7 rights to be of a magnitude sufficient to render the union members substantially helpless in combatting the tactic and its effect, it would find the employer conduct "inherently destructive" of the right to engage in concerted activities and would not designate the conduct a valid bargaining weapon.[63]

Despite the *Inter-Collegiate Press* court's explicit denial that it was weighing analogous bargaining tactics,[64] and the fact that it specifically

59. *See* 486 F.2d at 847; 440 F.2d at 564.

60. *See* 380 U.S. at 317. *See also* NLRB v. Insurance Agents Union, 361 U.S. 477, 497–98 (1960).

61. It has been suggested that in *Inland Trucking,* the court in so doing did no more than withdraw from the employer an economic weapon thought too potent, in an attempt to thereby equalize the parties' respective bargaining strengths. *See* 85 HARV. L. REV. 680, 685 (1972). This conclusion is supported by the fact that the Seventh Circuit conceded therein that a simple lockout was permissible and that the only apparent effect of the addition of temporary replacements was increased pressure against the union's bargaining demands. 440 F.2d at 563–64. *See* 85 HARV. L. REV. at 685.

62. In denominating employer conduct "inherently destructive," the Supreme Court has been proceeding on an *ad hoc* basis. *See, e.g.,* NLRB v. Erie Resistor Corp., 373 U.S. 221 (1963); Radio Officers Union v. NLRB, 347 U.S. 17 (1954).

63. It has been argued logically that "in those situations where it is inherent in the collective bargaining process that one of the parties is virtually helpless and at the mercy of the other party, the Board is authorized to prohibit conduct that will give one party such overwhelming power if the language of any section of the Act provides a rational vehicle for striking this balance." Schatzki, *The Employer's Unilateral Act — A Per Se Violation — Sometimes,* 44 TEXAS L. REV. 470, 485 (1966). While it may be a valid argument that the Board in this context has the power under the Act to be the arbiter of the use of economic weapons where the balance of power in collective bargaining may be so severely upset, it is submitted that, in this situation also, the determination of the question of whether employer conduct is inherently destructive of employee rights is one to be entrusted to the court for decision as a matter of law. If that were the case, on review of a Board decision, a court would not be confined to applying the substantial evidence test. *See* note 29 *supra. See also* Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951) (application of the substantial evidence test); NLRB v. Insurance Agents Union, 361 U.S. 477 (1960) (misapplication of law by Board).

Additionally, even if the Act were not designed specifically to prevent helplessness, it is the court's duty to ensure that the statute remains viable to carry out its announced purposes. Therefore, balancing of economic power is seemingly demanded by section 8(a)(1) and arguably by section 8(a)(3).

64. 486 F.2d at 847.

did not weigh the lockout against the other weapons at the union's disposal, the court did use this alternative balancing approach to find that the employer's action did not render the union helpless to combat its effect. However, the argument could be made in response that since a lockout with the use of replacements forecloses the opportunity of the workers to earn their wages, and for the most part shifts the cost of the lockout to the employees without inflicting a corresponding detriment — loss of profit — upon the employer,[65] such a tactic has an unacceptable, chilling effect on employees' section 7 rights. Under existing law, the employer has an ability to offset the impact of the union's strike by substituting *either* temporary or permanent replacements.[66] In contrast, if the employer initiates the shutdown via a lockout and is permitted to hire replacements, the union is without a corresponding weapon to combat this employer right. However, this argument ignores the fact that even if there is a technical imbalance in the parties' respective bargaining positions, the union may prevent the employer's realization of its advantage by picketing.[67]

Since the strength of the employer's bargaining position can be tempered by this right of the union to picket, it appears that the employer's ability to use replacements during a lockout does not amount to "inherently destructive" conduct. This conclusion is buttressed by the fact that the intent of the Act is merely to provide a framework within which the parties may freely act in their own interests, and not to disturb the interplay of the bargaining process.[68] Given this interpretation, allowing the employer to hire replacements during a lockout merely tends to equalize the position of the parties. If the employer were not to have this right, the union could stall negotiations so as to choose the point in the bargain-

65. It is obvious, however, that the employer's profits normally will be reduced due to the reduction in efficiency resulting from the lockout of regular employees. *See* 486 F.2d at 846 n.14.

66. NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333 (1938). The employer may secure either temporary or permanent replacements if the work stoppage is union-initiated. *Cf. id.* On the other hand, if the stoppage is employer-initiated, the employer may now, as the instant decision permits, secure temporary replacements. If an employer hires *permanent* replacements for his locked out regular employees, he may be held to have violated sections 8(a)(3) and 8(a)(1) of the Act. *See* Schatzki, *supra* note 63, at 504.

67. While union picketing may or may not directly affect the decision of replacement labor to serve the locking out employer, the ancillary effects of picketing may be sufficient to cause the employer to accede to the union's demands. For a survey of picketing, the forms it has taken, and an implicit indication of their impact, *see* THE DEVELOPING LABOR LAW, ch. 12 (C. Morris ed. 1971). Union picketing, while subject to regulation, has been recognized as a constitutionally protected right. *See* Amalgamated Food Employees Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968). In addition, one of the rights guaranteed to employees by section 7 is the ability "to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ." 29 U.S.C. § 157 (1970). This language can be construed to show a legislative intent on the part of Congress to protect peaceful picketing. *Cf.* NLRB v. Fruit Packers Local 760, 377 U.S. 58, 62-63 (1964); NLRB v. Teamsters Local 639, 362 U.S. 274 (1960).

68. *See* Oberer, *supra* note 26, at 499. The Supreme Court has specifically recognized that sections 8(a)(1) and 8(a)(3) were intended only to provide an environment within which bargaining could exist, not the content of the employment relationship which emerges therefrom. *See, e.g.*, American Ship Bldg. Co. v. NLRB, 380 U.S. 300, 317 (1965).

ing process at which cessation of operations would be most effective, and thereby force the employer to choose instituting a lockout without replacements, agreeing to the union's terms, or waiting until the union actually struck and then using replacements.[69] If the enterprise were a seasonal one, as in the instant case, the union more readily could coerce the employer into acceding to its demands. Such a result appears to be contrary to the intent of the Act because it would substantially adjust the balance of power rather than maintain a neutral framework within which bargaining could take place. If the enterprise involved were not a seasonal one, it would matter little to either the union or the employer when a strike/lockout were called. As a policy matter, there seems to exist no reason why seasonal employers should be more at the mercy of a strike than non-seasonal ones; and, indeed, since the Supreme Court has seen fit to provide employers with the lockout device, they should not be refused its effective use.

The denial by the Supreme Court in *American Ship Building* of the Board's authority to engage in this type of balancing of economic strengths was one part of the trend away from permitting the Board such power.[70] By both limiting the Board's right to balance economic weapons and employing a nebulous test of what is "inherently destructive," the Court has taken power unto itself at the Board's expense. One possible purpose behind this action is that of improving the ability of the Court to keep the Board within the bounds of its statutory delegation of power.[71] If the statement of standards used in gauging whether employer conduct is "inherently destructive" is general, it will be said more easily by a reviewing court that the Board has made an error of law in interpreting the statute it administers. Since courts, rather than administrative agencies, have traditionally performed the judicial functions of interpreting statutes and balancing competing interests in light of underlying statutory policies, there clearly was a rational basis for the Court's pronouncement of broad parameters of law and its leaving to the Board the task of administering the Act within those confines.

Given the fact that in categorizing employer conduct as "inherently destructive," there is actually, if not semantically, a balancing of relative economic powers, as demonstrated in *Inter-Collegiate Press,* the real issue involved, unarticulated if not unrecognized by the courts, is not whether

69. Note that the union as well as the employer is under a duty to bargain in good faith. *See* note 1 *supra.*

70. Balancing had been expressly approved in NLRB v. Teamsters Local 449, 353 U.S. 87, 96 (1957), but was later rejected in NLRB v. Insurance Agents Union, 361 U.S. 477 (1960), wherein the Board was denied the power to "pick . . . and choos[e] which economic devices of labor and management shall be branded as unlawful." *Id.* at 498. *Accord,* Teamsters Local 357 v. NLRB, 365 U.S. 667 (1961). *But see* NLRB v. Great Dane Trailers, Inc., 388 U.S. 26, 39 (Harlan, J., dissenting).

71. As stated by the Supreme Court in NLRB v. Brown, 280 U.S. 278 (1965): Reviewing courts are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute. Such review is always proper within the judicial province, and courts would abdicate their responsibility if they did not fully review such administrative decisions. *Id.* at 291-92.