Florida Law Review

Volume 18 | Issue 3 Article 5

December 1965

The Employer's Right to Halt Operation Permanently or Temporarily

Leo P. Rock Jr.

Shifting the burden of proof appears to this writer to offer a simple path to a more just and consistent treatment of the slip-and-fall case. Admittedly, shifting any portion of the burden of proof is not a simple step. Yet, it has been done in the past through various devices, including statutory reform.[80]

Whether this particular solution is adopted is not the main issue, however. The larger issue is whether outdated concepts of liability and proof will be allowed to continue in the supermarket setting. In Justice Terrell's words: "In light of the disparity between the modern food market and the old time grocery, it is out of the question to contend that they are governed by the same rules of care."[81]

ROBERT J. CARROLL

THE EMPLOYER'S RIGHT TO HALT OPERATIONS PERMANENTLY OR TEMPORARILY

In three recent cases decided by the United States Supreme Court, *Textile Workers Union of America v. Darlington Manufacturing Co.*,[1] *American Ship Building Co. v. NLRB*,[2] and *NLRB v. Brown*,[3] the employer's right to shut down his plant has, purportedly, been clarified and strengthened. *Darlington* dealt with a complete termination and liquidation of plant assets after a union had won an election. *American Ship* pertained to an employer's ability to discontinue operations temporarily as a bargaining wedge against a union, which had been certified and was seeking to renew its contract. *Brown* is

80. See, *e.g.*, FLA. STAT. §768.05 (1963); FLA. STAT. §769.02 (1963); FLA. STAT. §§674.01-676.54 (1963).

81. Carl's Mkts., Inc. v. De Feo, 55 So. 2d 182, 185 (Fla. 1951).

1. 85 Sup. Ct. 994 (1965).
2. 85 Sup. Ct. 955 (1965).
3. 85 Sup. Ct. 980 (1965).

similar to *American Ship* in that employees were locked out during contract renewal negotiations, but the case involved a multiemployer bargaining unit, which locked out the employees when one of the members had been struck. All members of the unit continued to operate with temporary replacements. The lockout in *American Ship* occurred after a bargaining impasse, but before a strike by the union. As a result of these three recent decisions, the employer can exert stronger economic pressure to support his bargaining position, provided he falls within the guidelines set out and heeds the caveats contained therein.

The purpose of this note is to discuss the ramifications and ancillary labor problems and answers each presents, centering on the employer's right to cease work. The primary concern is the relationship and balance between the preservation of the union and economic self help measures available to the employer. The employer has other tactics of an economic nature,[4] but none are as dramatic or as effective as the cessation of work. The process of collective bargaining contemplates negotiation without resort to measures that may impose economic hardship.[5] The collective bargaining process has nevertheless been recognized as "industrial warfare."[6] Thus, the question of permissible measures and of balancing respective interests is all important without escalation to the level where either party runs afoul of the strictures imposed by the National Labor Relations Act (NLRA).[7]

THE *Darlington* CASE

Darlington Manufacturing Company employed over 500 individuals. It was something of the typical textile plant located in the Carolinas, with the town built around it. In 1956, the union began organizational activity. A majority of the Darlington Manufacturing Company stock was held by Deering Milliken & Company which Roger Milliken controlled. The Milliken family, through this parent corporation, operated a vast textile enterprise and marketed

4. NLRB v. Brown, 85 Sup. Ct. 980, 984 (1965) (dictum) (stockpiling inventories, readjusting contract schedules, or transferring work to another plant); NLRB v. Crompton-Highland Mills, 337 U.S. 217, 224 (1949) (dictum) (unilateral changes in employment terms after impasse reached); NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333 (1938) (right to fire and replace economic strikers); NLRB v. Tex-Tan, Inc., 318 F.2d 472, 479-82 (5th Cir. 1963) (allowing unilateral imposition of terms); Comment, 76 HARV. L. REV. 1494, 1497 (1963) (filling advance orders or speedup in concluding days of contract).

5. Duvin, *The Bargaining Lockout: An Impatient Warrior*, 40 NOTRE DAME LAW. 137, 139 (1965).

6. American Ship Bldg. Co. v. NLRB, 85 Sup. Ct. 955, 977 (1965).

7. 61 Stat. 136 (1947), 29 U.S.C. §158 (1958).

the products of twenty-seven mills. This corporate control structure becomes relevant in later developments in the case.

The union was successful in the representation election. On learning the outcome of the election, Roger Milliken called a meeting of the board of directors. The directors voted to liquidate the corporation, and shareholder approval was obtained five weeks later. Two months after the election all operations ceased, and one month later all machinery and equipment were sold. Darlington Manufacturing Company was no longer a going concern. The union filed charges alleging discriminating activity in the closing and a refusal to bargain.[8] The company advanced eight reasons[9] for the closing of the plant, but during the NLRB proceedings evidence was adduced that Roger Milliken had admitted the unionization of the employees was the dominant factor.[10] The National Labor Relations Board found the closing to be an unfair labor practice[11] because of Roger Milliken's antiunion animus. The court of appeals set aside the Board's order.[12] On review in the Supreme Court, it was declared that an individual employer has the absolute right to go out of business, regardless of his reason.[13] The case was remanded, however, for a factual determination of the purpose and effect of the closing in relation to the employees in the other plants comprising the Deering-Milliken group.

The closing will be a discriminatory unfair labor practice if two elements are found. First, Roger Milliken must have closed down the Darlington plant with an intent to discourage unionization in the other plants in which he had a substantial interest; further he must have anticipated realizing some benefit from this discouragement.[14] Second, he must have reasonably foreseen that the employees of the other plants would fear losing their jobs if they persisted in union organizational activity. The Darlington Manufacturing Company controversy arose in 1956, and it may be years before it is finally resolved. Its significance at this point, however, is the pronouncement of an individual employer's absolute right to liquidate:[15]

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8. National Labor Relations Act §§8(a)(1), (3), (5), as amended, 61 Stat. 140 (1947); 29 U.S.C. §§158(a)(1), (3), (5) (1958).

9. Darlington Mfg. Co., 139 N.L.R.B. 241, 245 (1962).

10. *Id.* at 244.

11. Darlington Mfg. Co., 139 N.L.R.B. 241 (1962).

12. Darlington Mfg. Co. v. NLRB, 325 F.2d 682 (4th Cir. 1963).

13. Textile Workers Union v. Darlington Mfg. Co., 85 Sup. Ct. 994, 998 (1965).

14. *Id.* at 1002. The Board has ordered a reopening of the record for the presentation of evidence on the purpose and effect of the closing; 60 LAB. REL. REP. No. 17, 139, *News & Background Information* (Nov. 1, 1965).

15. *Id.* at 999.

> A proposition that a single businessman cannot choose to go out of business if he wants to would represent such a startling innovation that it should not be entertained without the clearest manifestation of legislative intent or unequivocal judicial precedent so construing the Labor Act. We find neither.

The employer's right to completely liquidate and go out of business, regardless of his motivation, was a question of first impression for the Supreme Court in *Darlington*.[16] The Board found no case clearly supporting Milliken's claim,[17] but there had been dicta in decisions of some courts of appeals.[18] An article by a former general counsel of the NLRB pointed out that the Board had required substantial evidence of economic justification before it could be persuaded that the closing of a plant was not for discriminatory reasons.[19] As long as the employer was not trying to avoid his obligations under the NLRA, the Board would not critically analyze the soundness of the employer's reasoning. It was a matter of quanta of evidence for economically justifying a shutdown. Thus, when a preponderance of the evidence established that the employer would not have shut down but for unionization of his employees, then the closing was a sections 8(a)(1) and (3) violation.[20] The Board approach must now be modified because the Court in *Darlington* said a single employer may now discontinue his entire business for any reason he pleases.[21] This decree may be weakened if on remand it is found that Milliken fits the new test[22] because the statement will then be only dictum, with the Darlington Manufacturing Company shutdown amounting to a partial closing to discourage unionization.

The Court reaffirmed the status of the law that a single employer cannot cease a portion of his operations for the purpose of "chilling unionism."[23] This will not disturb the cases that have found employer unfair labor practices when the employer was hostile to unionization because he had, for example, eliminated the messenger-delivery service

16. *Ibid.*

17. Darlington Mfg. Co., 139 N.L.R.B. 241, 250 (1962).

18. NLRB v. New Madrid Mfg. Co., 215 F.2d 908, 914 (8th Cir. 1954); Morand Bros. Beverage Co. v. NLRB, 190 F.2d 576, 582 (7th Cir. 1951).

19. Rothman, *The Right To Go Out of Business Together With a Consideration of Plant Removal, Subcontracting, and the Duty To Bargain*, 6 BOSTON COLLEGE INDUSTRIAL & COMMERCIAL L. REV. 1, 6 (1964).

20. See, *e.g.*, Freda Redmond, 149 N.L.R.B. No. 100 (1964); Nevada Tank & Casing Co., 131 N.L.R.B. 1352 (1961); Barbers Iron Foundry, 126 N.L.R.B. 30 (1960).

21. Textile Workers Union v. Darlington Mfg. Co., 85 Sup. Ct. 994, 998 (1965).

22. *Id.* at 1002.

23. *Ibid.*

in a bank,[24] discontinued the body and fender repair section in an automotive dealership,[25] or laid off carpenters in a home construction business,[26] after the employees in the respective sections had elected a union to represent them. Nor will *Darlington* affect the outcome of cases in which, in the face of organizational activity, an employer that is not openly antiunion violates the NLRA by discontinuing intrastate bus service but retaining the interstate operation[27] or by stopping the wholesale and continuing the retail aspect of a laundry service.[28]

The prior Board decisions and cases that have allowed the severance of a department did so only when there was no antiunion bias shown and there were compelling business reasons. Lacking a motive to "chill unionism," these cases are unaffected. An employer has been able to sell five of his six stores,[29] or cancel a night shift[30] without invoking the sanctions of the NLRA. In this context, it is still unclear if the mere fact of unionization, with its economic ramifications, can be a valid factor to consider if the employer wants to eliminate or subcontract out that function. Are not potentially increased labor costs an economic factor in determining the future profitability of a division of one's operations? It would be unrealistic and contrary to "industrial realities" not to allow unionization to be a legitimate economic consideration, although the ceasing of that operation may inhibit organizational activity. Unionization has been recognized as a valid economic factor to consider, if coupled with other business reasons, when it has also been shown that the employer was not hostile to unions.[31] The rationale of a partial closing to "chill unionism" should not be extended to alter this.

The *Darlington* case has caught the eye or raised the ire of many commentators.[32] But outside of after-dinner discussion or Bar Committee mention, what practical value will the decision have for those

24. NLRB v. Bank of America, 130 F.2d 624 (9th Cir.), *cert. denied*, 318 U.S. 791 (1942).

25. Williams Motor Co. v. NLRB, 128 F.2d 960 (8th Cir. 1942).

26. NLRB v. Kelly & Picerne, Inc., 298 F.2d 895 (1st Cir. 1962).

27. NLRB v. Missouri Transit Co., 250 F.2d 261 (8th Cir. 1957).

28. NLRB v. Savoy Laundry, Inc., 327 F.2d 370 (2d Cir. 1964).

29. Weingarten Food Center of Tenn., Inc., 140 N.L.R.B. 256 (1962) (decision to sell comes under §8 (a) (5)).

30. NLRB v. Piedmont Cotton Mills, 179 F.2d 345 (5th Cir. 1950) (decision to cancel comes under §8 (a) (5)).

31. See, *e.g.*, Jays Food, Inc. v. NLRB, 292 F.2d 317 (7th Cir. 1961); NLRB v. Lassing, 284 F.2d 781 (6th Cir. 1960); NLRB v. R. C. Mahon Co., 269 F.2d 44 (6th Cir. 1959); NLRB v. Adkins Transfer Co., 226 F.2d 324 (6th Cir. 1955); NLRB v. Houston Chronicle Publishing Co., 211 F.2d 848 (5th Cir. 1954).

32. Johannesen, *Case of The Runaway Mills: Darling Manufacturing Company*, 12 LAB. L.J. 1189 (1961); Schoener, *Case of the Runaway Author: Professor*

deeply involved in day-to-day labor relations? Few truly "single" employers would contemplate complete liquidation just to avoid dealing with a union. To stop everything and start anew in a different locale or line of work seems rather drastic and unduly expensive, but this is about what one would have to do to escape liability under the NLRA.[33] If the closing is found violative of the NLRA and a remedy of back pay is ordered, which extends beyond the closing date,[34] considerable liability can be imposed. This liability would take precedence over the distribution of assets to the shareholders who in an individual employer situation are most probably the officers and directors of the corporation. The individual employer may be unable to sell his assets, or he may have to unload them at a loss. He most probably has no outside income to tide him over until the new business is under way. Suppose he exercises his absolute right under *Darlington* but, after he is set up in a new business, a union begins organizational activity. Will he want to go through liquidation and run the complete cycle again? The utility of the exercise of the right conferred in *Darlington* is questionable, at best.[35]

Johannesen's Article on The Darlington Case, 13 LAB. L.J. 356 (1962); Segal, *Comments on the Right of an Employer To Go Out of Business: The Darlington Case, The Restriction*, 4 BOSTON COLLEGE INDUSTRIAL & COMMERCIAL L. REV. 581 (1963); Comments on Board decision: 48 CORNELL L.Q. 572 (1962); 1963 DUKE L.J. 786; 51 GEO. L.J. 633 (1963); 51 ILL. B.J. 588 (1962); 16 STAN. L. REV. 209 (1963); 111 U. PA. L. REV. 672 (1962); 49 VA. L. REV. 616 (1963). Comments on circuit court decision: 325 F.2d 682 (4th Cir. 1963); 32 FORDHAM L. REV. 598 (1964); 32 GEO. WASH. L. REV. 904 (1964); 42 TEXAS L. REV. 735 (1964); 25 U. PITT. L. REV. 616 (1964).

33. The purchaser, if related to the seller, of the business may be held liable for carrying out the Board's order under the "successor corporation" doctrine that operates if there is a change in ownership that is merely a disguised continuance. Southport Petroleum Co. v. NLRB, 315 U.S. 100 (1942). Continuity is the crucial question. See NLRB v. Auto Ventshade Inc., 276 F.2d 303 (5th Cir. 1960); NLRB v. Part Gibson Veneer & Box Co., 167 F.2d 144 (5th Cir.), *cert. denied*, 335 U.S. 819 (1948).

34. The Board has recently imposed back-pay liability beyond the date of total closing or partial discontinuance up to the point where the employee obtains substantially equivalent employment. See, *e.g.*, Savoy Laundry, Inc., 137 N.L.R.B. 306 (1962); Barbers Iron Foundry, 126 N.L.R.B. 30 (1960); Bonnie Lass Knitting Mills, Inc., 126 N.L.R.B. 1396 (1960).

35. *Darlington* raises other questions that are beyond the scope of this note. Is going out of business a mandatory bargaining subject under §8(a)(5)? A footnote implied that it would not be. Textile Workers Union v. Darlington Mfg. Co. 85 Sup. Ct. 994, 998, n.5 (1965). *Compare* Fibreboard Paper Prods. v. Steelworkers, Local 1304, 85 Sup. Ct. 398 (1964) (requiring bargaining, regardless of the employer's motivation, where there was partial discontinuance of a plant function), *with* the reasoning advanced in Note, *Mandatory Subjects of Bargaining — Operational Changes*, 17 U. FLA. L. REV. 109, 120 (1964). The other questions that are prompted by *Darlington*, which cannot be answered but generate speculation are:

THE *American Ship* CASE

American Ship is the most significant of the three decisions in that it will have the most far reaching impact on labor-management relations. The case involved the question whether the lockout[36] is the corollary of the strike.[37]

The company operated four shipyards on the Great Lakes and had negotiated contracts with the unions on five prior occasions. At the point of renewing the contract, the unions demanded increased fringe benefits and wages, but the company contended that competition in the industry was so intense it could not afford to increase compensation. After several unproductive meetings, the Federal Mediation and Conciliation Service was called in. Two months after bargaining had begun, the parties separated without reaching agreement. An impasse had been reached. The company was apprehensive of strikes because of the union's past history of "quickie" strikes. The company then laid off some employees, shut down one plant, substantially reduced another's work force, and left skeletal crews as work in progress was completed in the other two plants. As a result, the company and the unions resumed negotiations, obtaining a settlement about two months later.

The union filed unfair labor practice charges and the Board found the company's activity to be discriminatory.[38] The court of appeals agreed,[39] but it was reversed by the Supreme Court, which expressly held:[40]

> An employer violates neither section 8(a)(1) nor section 8(a)(3) when after a bargaining impasse has been reached, he temporarily shuts down his plant and lays off his employees for the sole purpose of bringing economic pressure to bear in support of his legitimate bargaining position.

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(1) could a Board order require resumption of the plant operations, (2) will partial closing be more strictly viewed than before, and (3) if the activity in *Darlington* is found to be violative of the Act because of its purpose and effect on other employees in the Deering-Milliken complex, will the declaration of one's absolute right to liquidate be merely dictum?

36. The lockout, as defined at common law, was the shutting down of the plant, whether there was work to do or not, for the purpose of obtaining some tactical advantage from the employees. Iron Moulders Union v. Allis-Chalmers Co., 166 Fed. 45, 52 (7th Cir. 1908).

37. The question presented in Brief for Appellee, p. 2, American Ship Bldg. Co. v. NLRB, 85 Sup. Ct. 955 (1965).

38. American Ship Bldg. Co., 142 N.L.R.B. 1362 (1963).

39. Local 374, International Bhd. of Boilermakers v. NLRB, 331 F.2d 839 (D.C. Cir. 1964).

40. American Ship Bldg. Co. v. NLRB, 85 Sup. Ct. 955, 967 (1965).

Taken literally, this is a considerable extension of the employer's rights in collective bargaining,[41] and arguably supports the contention that the lockout is the corollary of the strike. Thus the employer appears to be able to lockout in an offensive manner, that is, he can determine the time to apply economic pressure. The Board's view had been that it was solely within the union's power to affect the timing of exerting economic pressure by exercising its right to strike.[42] There have been cases in which the employer was permitted to lockout, for example, to prevent plant seizure threatened by a sit-down strike,[43] to avert further severe economic loss to an already marginal business,[44] and to forestall repetitive disruptions of an integrated operation by "quickie" strikes.[45] Some of these cases occurred in a contract renewal context while others have recognized the employer's right to temporarily modify or shutdown operations for legitimate business reasons unconnected with employee union activities protected by the NLRA.[46]

Lest one be caught up in the throes of amazement over this new ammunition in the employer's armory, close attention must be paid to the facts in *American Ship*. Specific findings showed an absence of hostility toward the unions, both in the past and at the time of this dispute. The employees were rehired on the reaching of an agreement. No business was conducted during the lockout. There had been several strikes in the past, some of which were wildcat, that is, unauthorized by the union. The employer's business was highly seasonal, and a strike during his busy winter months would have crippled him.[47] The employer bargained in good faith throughout the negotiations, making proposals and counter proposals. The Court was aware of the acute effect of a strike that would immobilize ships in a vital industry. Each of these factors played an important part in the result of this case, creating favorable equities in behalf

41. See generally Forkosch, *Bargaining and Economic Pressure — The New Trilogy*, 16 LAB. L.J. 323 (1965); Mintz, *The Status of the Bargaining Lockout*, 39 FLA. B.J. 1073 (1965); Comment, 51 A.B.A.J. 577, 578, 579 (1965).

42. See Utah Plumbing & Heating Contractors Ass'n, 126 N.L.R.B. 973 (1960); Quaker State Oil Refining Co., 121 N.L.R.B. 334 (1958), which deprived the employer of the right to affect the timing.

43. Link Belt Co., 26 N.L.R.B. 227 (1940).

44. NLRB v. Dalton Brick & Tile Corp., 301 F.2d 886 (5th Cir. 1962).

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

46. See Houston Chronicle Publishing Co., 211 F.2d 848 (5th Cir. 1954) (elimination of circulation department and subsequent use of independent contractors); NLRB v. Goodyear Footwear Corp., 186 F.2d 913 (7th Cir. 1951) (adverse economic, climatic, and physical conditions leading to suspension of training); Pepsi Cola Bottling Co., 145 N.L.R.B. 785 (1964) (lack of heating, lighting, and toilet facilities lead to shutdown).

47. American Ship Bldg. Co. v. NLRB, 85 Sup. Ct. 955, 960 (1965).

of the employer. To conclude that the lockout is the corollary of the strike as a result of this case, is to ignore these important factors. The presence of strong economic justification more nearly puts *American Ship* in the category of activity that the Board has previously approved.[48] Although the Court's holding does not specifically require the presence of strong economic justification, the facts allow the case to be cited for this point. The facts also support an argument that the use of the lockout in a bargaining context should be limited to a situation in which there exists a past history of wildcat strikes and severe potential harm. The lockout can now play a bigger role in labor-management relations, but it is yet to share equal billing on the theatre marquee with the strike.

THE *Brown* CASE

Brown involved a multiemployer bargaining unit that consisted of five operators of six retail food stores who collectively bargained on a group basis with the union that represented their respective employees.[49] It was at the stage of contract renewal negotiations that the dispute arose. Agreement could not be reached on the amount and effective date of a wage increase. The union voted to strike, to which the employers responded in a three-musketeer fashion that a strike against one of the operators would be deemed a strike against all. The union struck one of the store operators.[50] All the employers

48. See Tidewater Express Lines, Inc., 142 N.L.R.B. 1111 (1963); Packard Bell Electronic Corp., 130 N.L.R.B. 1122 (1961); International Shoe Co., 93 N.L.R.B. 907 (1951); Link Belt Co., 26 N.L.R.B. 227 (1940); Duluth Bottling Ass'n, 48 N.L.R.B. 1335 (1943).

49. In 88 Monthly Labor Review, No. 4, April 1965, the advantages of multiemployer bargaining units for both management and labor are stated as: (1) convenience — enables savings in manpower for both sides rather than bargaining individually; (2) standardized labor costs — eliminates a single employer having a competitive advantage plus it inhibits wage cuts by a single employer; (3) stability — encourages joint effort and teamwork between the parties; (4) uniformity in contract negotiation and interpretation; and (5) better benefits — allows for an accumulation of funds and the pooling of resources. Multiemployer bargaining is most prevalent in industries such as retail food, construction, food processing, apparel, printing, trucking, warehousing, stevedoring, and hotels. There is a high degree of mobility in the work force in many of these industries, but the rapid turnover is cushioned to an extent through the use of multiemployer bargaining.

50. This is termed a "whipsaw" strike that is effective for the union seeking capitulation by management. Usually the weakest employer is struck first. He is the one that can least afford loss of revenue because of hampered operations. Successive employers are struck individually until they have acceded. The "whipsaw" strike is particularly effective when competition is heavy, and the profit margin slim, within that industry.

then locked out the union employees. But rather than close down, the five operators continued operations using managerial personnel, relatives, and a few temporary replacements. Five weeks after the initial strike, bargaining resumed and agreement was reached.

Thereafter, the union filed discriminatory unfair labor practice charges. The Board held that it was permissible for the struck employer to operate with temporary replacements during the dispute, but that the other four nonstruck operators could not.[51] The court of appeals disagreed with the Board.[52] The Supreme Court affirmed on the basis that the activity of all the operators was "a measure reasonably adapted to achievement of a legitimate end — preserving the integrity of the multi-employer bargaining unit."[53]

NLRB v. Truck Drivers' Union, Local 449,[54] referred to as the *Buffalo Linen* case, established the permissibility of a lockout by a multiemployer unit to preserve the unit. In *Buffalo Linen*, however, the employers did not continue to carry on their business. Thus, *Brown* is an enlargement of the practical value of a lockout, that is, maintaining some income to the employer while at the same time exerting some economic pressure on the union to accede to company proposals. In this context, the lockout is primarily a defensive tactic, employed only after a "whipsaw" strike has begun. If the multiemployer unit acted in a retaliatory rather than defensive manner, the Board has held the lockout to be discriminatory.[55] The Board found that the employers were trying to enhance their bargaining position rather than to preserve the unit, and it is doubtful that *Brown* would alter that outcome if a similar case were to arise now.[56] Nor has the Board allowed the multiemployer unit to use the lockout as a threat simply to increase the unit's bargaining power.[57] The lockout has been used in nonbargaining situations, but with little success, unless convincing economic justification was shown.[58] *Brown* will not significantly affect these cases, either.

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51. John Brown, 137 N.L.R.B. 73 (1962).

52. NLRB v. Brown, 319 F.2d 7 (10th Cir. 1963).

53. NLRB v. Brown, 85 Sup. Ct. 980, 987 (1965).

54. 353 U.S. 87 (1957).

55. Bagdad Bowling Alley, 147 NLRB 851 (1964); Kroger Co., 145 NLRB 235 (1963). See Retail Clerks, Local 692 v. Food Fair Stores, Inc., 1964 CCH Lab. Cas. ¶18,992 in which a state court refused an injunction to open stores when employers had shut down and locked out employees.

56. *But see* text accompanying notes 106-107 *infra*.

57. American Stores Packing, 142 N.L.R.B. 711 (1963), *enforced*, NLRB v. American Stores Packing Co., 58 L.R.R.M. 2635 (10th Cir. 1965). *But see* NLRB v. Continental Baking Co., 221 F.2d 427 (8th Cir. 1955).

58. See, *e.g.*, NLRB v. Great Atl. & Pac. Tea Co., 340 F.2d 690 (2d Cir. 1965); Philadelphia Marine Trade Ass'n v. NLRB, 330 F.2d 492 (3d Cir. 1964), *cert. denied*, 379 U.S. 841 (1965); New York Mailers Union No. 6 v. NLRB, 327 F.2d

The *Brown* case is second in importance to *American Ship* as far as practical application to current labor relations. But again the holding must be viewed with caution. There were significant factors at play in *Brown*. It was firmly established that the employers were friendly toward unions. The temporary replacements were specifically told that their services would not be needed after the whipsaw strike was ended. The business was highly competitive with repetitive patronage essential to profitability. Although not mentioned by the Court, there also was a problem with spoilage of perishables. The effect of the use of temporary replacements was negligible on union security because the striking employees knew that the replacements were only temporary. The union employees had it within their power to terminate the whipsaw strike. The union shop provision had been carried over to the new contract. A further fact which bolstered the multiemployer unit's position before the Court was the struck employer's use of temporary rather than permanent replacements. He could have discharged his employees, but he did not.[59] The alteration of any of these facts may cause the Court to find a multiemployer lockout an unfair labor practice.

EFFECT ON THE ELEMENTS OF SECTION 8 (A) (1) AND SECTION 8 (A) (3)

Section 8 (a) (1)[60] is aimed at employer activity, which impinges on the employees' rights to organize, to engage in protected concerted activity, and to bargain collectively with the employer as secured in section 7 of the Act. Employer activity, which interferes with the exercise of these rights, is prohibited. The *Darlington, American Ship,* and *Brown* cases cast light on the elements of sections 8 (a) (1) and 8 (a) (3) violations, but each opinion was written by a different justice.[61] There were two concurring opinions by former Mr. Justice Goldberg, joined by Mr. Chief Justice Warren. Mr. Justice White dissented in *Brown* and gave a separate concurring opinion in *American Ship.* Light has been shed on the area, but in varying degrees of illumination.

In consolidating the three majority opinions, it appears that employer activity, which may be subject to scrutiny under the NLRA, can be classified as:

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292 (2d Cir. 1964); NLRB v. Anchorage Businessmen's Ass'n, 289 F.2d 619 (9th Cir. 1961).

59. NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333 (1938) (right to replace economic strikers permanently).

60. National Labor Relations Act §8 (a) (1), as amended, 61 Stat. 140 (1947), 29 U.S.C. §158 (a) (1) (1958).

61. The majority opinions were delivered by Mr. Justice Harlan in *Darlington,* Mr. Justice Stewart in *American Ship,* and Mr. Justice Brennan in *Brown.*

(1) inherently destructive of employee rights, which cannot be justified regardless of motive,

(2) harmful to employee rights, prompted by legitimate business reasons, but where antiunion bias is present, or

(3) harmful to employee rights, prompted by legitimate business reasons, in the absence of antiunion bias.

Activity of the first and second character is violative of section 8 (a) (1), but activity in the third category is permissible. Two main factors affect the classification: the actual or potential severity of the action, and the presence or absence of antiunion bias. The existence of antiunion bias is a fact question evidenced by prior or contemporaneous actions and statements by the employer. Actual harm may be apparent from the facts of the case. The Board, however, may assess the potential harm to the exercise of employee rights in the absence of actual evidence, utilizing its expertise as an administrative tribunal.

Recent examples of activity in the "inherently destructive" category, as established by Supreme Court cases finding section 8 (a) (1) violations are:

(1) awarding twenty-year superseniority to employees who worked during a strike,[62]

(2) discharging an employee who was an active union organizer on the basis of hearsay that the employee threatened to use dynamite, when no damage in fact occurred,[63]

(3) discharging of unionized staff with replacement by employees known to be possessed of violent antiunion animus,[64] and

(4) discharging only union leaders when many employees have broken the shop rule.[65]

In this first category, the Supreme Court has applied the common law rule that an individual is held to intend the foreseeable consequences of his acts. Thus, specific evidence of employer motivation is not necessary to establish a violation.[66] Even if the employer can show some valid economic justification, a violation still remains when the activity is bad enough to be deemed "inherently destructive or prejudicial." An asserted honest belief in the necessity to discharge a union organizer to protect persons and property did not overcome a violation even though it was alleged that the union organizer

62. NLRB v. Erie Resistor Corp., 373 U.S. 221 (1963).

63. NLRB v. Burnup & Sims, Inc., 379 U.S. 21 (1964).

64. *Cf.* NLRB v. Erie Resistor Corp., 373 U.S. 221 (1963).

65. American Ship Bldg. Co. v. NLRB, 85 Sup. Ct. 955, 964 (1965) (this example was stated in the opinion, but is unrelated to the facts of that case).

66. NLRB v. Erie Resistor Corp., 373 U.S. 221 (1963).

threatened to use dynamite. This rejection of an honest belief as a defense arose in a section 8 (a) (3) context.[67] For inherently prejudicial activity, the defense is not available in determining if there existed a section 8 (a) (1) violation, either.[68]

Employer activity, which is harmful to employee section 7 rights, is permissible only if the employer lacks antiunion bias.[69] Antiunion bias is unlawful motivation in the eyes of the Court. An inconsistency exists, however, regarding the degree of antiunion bias which must be shown to establish a section 8 (a) (1) violation. One statement by the Court in *Brown* is rather clear, to the effect that the existence of bias, per se, will make the activity violative.[70] Another statement by the Court in *Darlington* implies a preponderance of the evidence test, balancing section 7 interference with business justification.[71] With the emphasis in *American Ship* on the lack of antiunion hostility,[72] it appears that existence of antiunion bias, regardless of degree, will establish a violation although the Second Circuit had applied a preponderating motive test prior to these cases.[73]

The dividing line will be a fact question based on an examination of all attendant circumstances. A scintilla could be enough to arrive at an outcome that will effectuate the policy of the Act. The caveat is clear to the advisor in labor-management affairs.

Section 8 (a) (3)[74] makes it an unfair labor practice for the employer to discriminate against his employees because of union activities. The discrimination may affect hiring, terms or conditions of employment, and it may encourage or discourage membership in a labor organization. The employer's purpose for engaging in discriminatory activity is controlling.[75] When a section 8 (a) (3) discriminating violation is found, a section 8 (a) (1) interfering violation is usually present because of its broader scope. The sections are not mutually inclusive, however. Interference with employee rights is not necessarily discrimination against the employees.

Employer activity could again be categorized as inherently prejudicial or harmful, either with or without antiunion bias. The pri-

67. Radio Officers Union v. NLRB, 347 U.S. 17, 45 (1954) (employer's intent rejected in light of natural and probable consequences of his acts).

68. NLRB v. Brown, 85 Sup. Ct. 980, 986 (1965).

69. *Id.* at 984.

70. *Id.* at 986.

71. Textile Workers Union v. Darlington Mfg. Co., 85 Sup. Ct. 994, 999 (1965).

72. American Ship Bldg. Co. v. NLRB, 85 Sup. Ct. 955, 962 (1965).

73. NLRB v. Neiderman, 334 F.2d 601, 604 (2d Cir. 1964); NLRB v. Rapid Bindry, Inc., 293 F.2d 170, 175 (2d Cir. 1961); see 1963 DUKE L.J. 786, 791.

74. National Labor Relations Act §8 (a) (3), as amended, 61 Stat. 140 (1947), 29 U.S.C. §148 (a) (3) (1958).

75. NLRB v. Brown, 85 Sup. Ct. 980, 986 (1965).

mary inquiry is into the employer's motivation for acting,[76] so the classification is not fully determinative of a section 8 (a) (3) violation. He may act with antiunion bias and still be protected as in *Darlington*.[77] The activity may be deemed inherently prejudicial and the Court will apply the common law rule of the employer intending the foreseeable consequences of his act,[78] which will supply the motivation and intent. In this area it appears that intent is equated with motive, a notion that a prosecuting attorney would not accept. But this is nothing more than a recognition that if the activity is nasty enough, it will discourage union membership, and thereby discriminate against union participants. Sections 8 (a) (1) and 8 (a) (3) have similar tests for activity of this character. For the less severe activity, the scope of section 8 (a) (3) looks more to why it came about, whereas 8 (a) (1) looks to the effect of it. For a section 8 (a) (3) violation in the second or third category there must be "both discrimination and a resulting discouragement of union membership,"[79] with the "added element of unlawful intent."[80]

Mr. Justice White, in his concurring opinion in *American Ship* rejected the motivation test[81] in favor of the balancing test advocated by former Mr. Justice Goldberg. Mr. Justice White dissented in *Brown*,[82] his view being that the employer's activity did not outweigh the interference with the employee's rights. In the opinions of these three Justices, the effect, rather than the cause, will determine a violation in the absence of antiunion bias.[83] The *Brown* majority opinion stated that antiunion bias will convert an otherwise ordinary business act into an unfair labor practice[84] when speaking of harmful type activity, but cited a prior Supreme Court case[85] that dealt with inherently prejudicial activity. For section 8 (a) (3) violations, no indication is given if the bias must preponderate because in *Brown*

76. American Ship Bldg. Co. v. NLRB, 85 Sup. Ct. 955, 962 (1965); Local 347, Teamsters Union v. NLRB, 365 U.S. 667, 675 (1960); Radio Officers Union v. NLRB, 347 U.S. 17, 43 (1954).

77. Textile Workers Union v. Darlington Mfg. Co., 85 Sup. Ct. 994 (1965).

78. Local 357, Teamsters Union v. NLRB, 365 U.S. 667, 775 (1960); Radio Officers Union v. NLRB, 347 U.S. 17, 45 (1954).

79. American Ship Bldg. Co. v. NLRB, 85 Sup. Ct. 955, 963 (1965).

80. NLRB v. Brown, 85 Sup. Ct. 980, 985 (1965).

81. American Ship Bldg. Co. v. NLRB, 85 Sup. Ct. 955, 971 (1965).

82. NLRB v. Brown, 85 Sup. Ct. 980, 992 (1965).

83. Mr. Justice Goldberg, concurring in *American Ship* said, however: "[T]he correct test . . . is whether the business justification for the employer's action outweighs the interference with §7 rights involved." His statement pertained to §8 (a) (1) violation, but he also said: "A similar test is applicable in §8 (a) (3) cases where no antiunion motive is shown." American Ship Bldg. Co. v. NLRB, 85 Sup. Ct. 955, 978 (1965).

84. NLRB v. Brown, 85 Sup. Ct. 980, 986 (1965).

85. NLRB v. Erie Resistor Corp. 373 U.S. 221 (1963).

and *American Ship* the employer's intent for acting was found to be devoid of hostility toward unions and the collective bargaining process.[86] It appears that the existence of bias will establish a violation, unless the activity is fundamentally a management prerogative in the extreme category such as complete liquidation, found permissible in *Darlington*. Thus, a close relationship exists between the tests for sections 8 (a) (1) and 8 (a) (3) concerning harmful attitude and antiunion bias. This question of the degree of antiunion bias is important to the practitioner when comparing prior cases and Board decisions to predict permissible activity.

A literal application of these newly formulated tests may expand the scope of sections 8 (a) (1) and (3). The general reaction to the three recent cases has been that they have strengthened the employer's rights,[87] but it is conceivable that this expansion will be limited to these specific factual situations and some formerly permissible activity will now be violative. The presumption in favor of an employer having a lawful motive,[88] may be overcome by an application of the common law rule of one intending the foreseeable consequences of his action, which discourages unionization. A violation may result in the absence of specific evidence of intent, regardless of the employer's honest belief in his need for acting or the amount of business justification he can put forth.

Cases Directly Affected By *Darlington, American Ship,* and *Brown*

No case involving a single employer who liquidated his entire operations in response to union organizational activity because he disliked unions has appeared subsequent to *Darlington*. There have been, however, Board decisions[89] concerning employers with two or more plants who sold or closed down a portion of their operations. The situations fell under the "partial closing to chill unionism" portion of *Darlington* because there was a desire to thwart unionism. The activity violated the NLRA.[90]

In *Joseph Weinstein Electric Corporation*,[91] a single employer locked out his employees during contract renewal negotiations. The

86. NLRB v. Brown, 85 Sup. Ct. 980, 985 (1965); American Ship Bldg. Co. v. NLRB, 85 Sup. Ct. 955, 962 (1965).

87. See authorities cited, note 41 *supra*.

88. NLRB v. Huber & Huber Motor Express, Inc., 223 F.2d 748, 749 (5th Cir. 1955).

89. Boro Motors, Inc., 153 N.L.R.B. No. 25 (1965); Valley Forge Flag Co., 152 N.L.R.B. No. 150 (1965); Royal Plating & Polishing Co., 152 N.L.R.B. No. 76 (1965).

90. *Ibid.*

91. 152 N.L.R.B. No. 3 (1965).

Board decision was rendered nearly a month after the *American Ship* decision. The Board found antiunion bias because the employer tried to get his employees to switch unions. The lockout, lasting only two days, was classified as a "strong economic wedge to force the employees into a new contract." *American Ship* had recognized the utility of a lockout as a bargaining wedge. Although the employer's interference arguably falls within sections 8 (a) (1) and 8 (a) (2), he did not dislike unions, per se, but was trying to bring pressure so that the contract could be modified to enable expansion of his business. The Board's holding of a section 8 (a) (3) violation does not seem warranted on the facts that appear in the decision. In *Body & Tank Corporation v. NLRB*,[92] the Second Circuit set aside a Board order that had found the employer's use of a lockout to further his bargaining position violative of the NLRA, *American Ship* clearly controlled on the facts of that case.

The Board has followed *Brown* by dismissing a complaint that also involved a multiemployer unit in the retail food industry.[93]

In the multiemployer situation, however, an inconsistency has developed. A group of druggists locked out their employees after the union had struck. They continued operations. The District of Columbia Circuit Court had reserved[94] decision pending the *Brown* outcome. After the *Brown* decision the court deleted that portion of the order that required the employer to cease and desist from the lockout but did not disturb that part of the order that required back pay to the employees during the lockout that lasted almost two months.[95] *Brown* grants the right to defensively lockout and continue operations. Why must the employer be held liable for back pay, an 8 (a) (3) remedy, for exercising a valid right? If this is so, then the right to lock out is purely illusory. The union is certainly not responsible to the employer for lost profits when it engages in protected activity.

Conclusion

The three cases, *Darlington*, *Brown*, and *American Ship*, have expanded the permissible self-help economic measures for the employer.[96] This new ammunition is more of the .22 caliber variety

92. 344 F.2d 330 (2d Cir. 1965).

93. Food Giant Super Mkts., 154 N.L.R.B. No. 8 (1965).

94. Retail Clerks Local 381 v. NLRB, 327 F.2d 888 (D.C. Cir. 1963).

95. Retail Clerks Local 381 v. NLRB, 348 F.2d 64 (D.C. Cir. 1965).

96. While this point has been alluded to earlier, three recent commentaries on the lockout cases, *American Ship* and *Brown*, mutually agree that the important questions to be resolved in future cases for a single employer are: can he lock out before an impasse and, if so, can he then operate with temporary replace-

than the .357 magnum, however. The cases have their limitations and, in view of their factual background, they are susceptible to distinction and manipulation. The Board has applied these cases strictly and will most probably continue to do so.[97] The guides that have been set out for sections 8 (a) (1) and 8 (a) (3) violations are heavily subjective, limiting the degree of predictability for future cases. Anti-union bias may be found as the result of one casual statement by a supervisor. The distinction between antiunion bias and whether the advent of unionization may be a valid economic factor for the employer to consider could turn on one utterance.

The replacement of employees during a temporary shutdown is apparently going to be limited to temporary replacement.[98] The employer may recall his employees, however, and then permanently replace those who do not return.[99] Replacement is a vital issue to the unions. Loss of seniority and other attendant rights is feared more than a temporary layoff. Union strike funds cushion the latter. The contention that a lockout would reduce all employees to the status of economic strikers, subject to permanent replacement, was seriously questioned by the Tenth Circuit in *Brown*.[100] The Supreme Court affirmed the Tenth Circuit's opinion without specifically passing on that contention. Activity that is initially contemplated as economic may well be converted into unfair labor practice activity, which would bar the right of replacement.[101] An employer's attempt to permanently replace the employees he has locked out may be enough to classify the activity as discriminatory.[102]

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ments? Other questions are raised, some pertinent, but some are too speculative or represent employer wishful thinking. Compare Mintz, *The Status of the Bargaining Lockout*, 39 FLA. B.J. 1073, 1075 (1965); Address by NLRB Chairman McColloch, Annual Conference of Texas Industry, 60 LAB. REL. REP. No. 17, 145, 149, *News & Background Information* (Nov. 1, 1965); Address by Prof. Oberer, 12th Annual Inst. on Labor Law, 60 LAB. REL. REP. No. 19, 159, 160, *News & Background Information* (Nov. 8, 1965).

97. See cases cited note 89, *supra*; Joseph Weinstein Elec. Corp., 152 N.L.R.B. No. 3 (1965).

98. Mr. Justice White, dissenting in *Brown*, feared that the majority opinion opened the door for the allowance of permanent replacement of the locked out employees, but a clear implication to the contrary can be found in a footnote in the majority opinion. NLRB v. Brown, 85 Sup. Ct. 980, 989 n.6 (1965). See American Ship Bldg. Co. v. NLRB, 955, 962 n.8 (1965) in which another caveat is implied should an employer attempt to utilize the *Mackay Radio* doctrine in a lockout context.

99. Packard Bell Electronics, 130 N.L.R.B. 1122 (1961) (dictum).

100. NLRB v. Brown, 319 F.2d 7, 11 (10th Cir. 1963).

101. See Rothman, *The Right To Go Out of Business Together With a Consideration of Plant Removal, Subcontracting, and the Duty To Bargain*, 6 BOSTON COLLEGE, INDUSTRIAL & COMMERCIAL L. REV. 1, 20 (1964).

102. See Comment, 76 HARV. L. REV. 1494, 1497 (1963).

Although some circuit courts have regarded the lockout as the corollary of the strike,[103] that is far from the truth. One of the questions in the brief for certiorari by American Ship Building Company was whether the right to lock out was the corollary of the right to strike,[104] but this question was not specifically answered by the Supreme Court. The Court did say that the "use of the lockout solely in support of a legitimate bargaining position"[105] is not inconsistent with the right to strike. In this narrow application it may be the corollary, but the existence of antiunion hostility will destroy the equability of the right to lockout.[106]

Merging the reasoning of *Brown* and *American Ship,* multiemployer bargaining units should also be allowed the right to use the lockout as a bargaining tactic in an offensive manner, without waiting for the union to strike. Also, the single employer should be able to operate with temporary replacements, at least, after he has begun the lockout to strengthen his bargaining position. Neither application would distort or jeopardize labor and management rights. The Supreme Court, however, recently reiterated the goal of the NLRA to be the resolution of issues through peaceful negotiation.[107] Work stoppages by strikes and lockouts are not desirable from a nationwide point of view because of their deterrent effect on the economy; witness the longshoremen and steel industry situations. The New York newspaper strikes have inconvenienced the inhabitants of that city.

History has shown that work stoppages are inevitable. Negotiation alone cannot resolve all disputes. Management should not be denied the right to use equivalent tactics because in the long run both sides would benefit. Without our trained armed forces and world trade influence, could the United States presume to effect settlements with, much less approach Soviet Russia in international matters? The question answers itself, yet is illustrative of the necessity for bargaining entities to have in reserve effective options to encourage settlement.

LEO P. ROCK, JR.

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103. Leonard v. NLRB, 197 F.2d 435 (9th Cir. 1952); Morand Bros. Beverage Co., 204 F.2d 529 (7th Cir.), *cert. denied,* 346 U.S. 909 (1953); see generally Denbo, *Is the Lockout the Corollary of the Strike?,* 14 LAB. L.J. 400 (1963).

104. Brief for Appellant, p. 2, American Ship Bldg. Co. v. NLRB, 85 Sup. Ct. 955 (1965).

105. American Ship Bldg. Co. v. NLRB, 85 Sup. Ct. 955, 963 (1965).

106. *Id.* at 963, 977-79. This qualification is important, and a statement of the pure holding without it may be misleading. See Mintz, *The Status of the Bargaining Lockout,* 39 FLA. B.J. 1073, 1074 (1965).

107. Fibreboard Paper Prods. v. Steelworkers, Local 1304, 85 Sup. Ct. 398, 403 (1964).