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ECONOMIC PRESSURE IN COLLECTIVE BARGAINING: LOCKOUT AND PERMANENT REPLACEMENTS IN THE FIFTH CIRCUIT

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Labor disputes are as old as organized society. One of the central purposes of the National Labor Relations Act of 1935[1] (NLRA) was to offset the superior power of employers in collective bargaining with the utilization of strikes and other types of economic pressure by employees.[2] Accordingly, section 7 of the Act was drafted to protect the use of economic pressure by both labor organizations and unorganized employees,[3] while section 8 sought to prohibit an employer's response to such pressure in the form of disciplinary action.[4] The Act contemplates a balance between two conflicting policy arguments which represent, on the one hand, the policy prohibiting management from reprimanding its employees for the application of economic pressure, and on the other, the policy allowing an employer to protect his economic interests for legitimate business reasons.[5]

While the courts traditionally have prohibited certain forms of economic pressure by employees,[6] the ability of employers to utilize economic pressure has been expanded by recent cases.[7] In light of the Fifth Circuit's decision in *Johns-Manville Products Corp. v. NLRB*,[8] however, it is apparent that the extent to which an employer can use lockouts and permanent replacements is currently an important and unresolved question affecting the balance of economic power in labor relations.[9] In order to understand

1. National Labor Relations Act, ch. 372, §§ 1-16, 49 Stat. 449-57 (1935) (current version at 29 U.S.C. §§ 151-68 (1970 & Supp. V 1975)). When the National Industrial Recovery Act was declared unconstitutional, the National Labor Relations Board (NLRB) was created pursuant to the provisions of the National Labor Relations Act of 1935. This Act, popularly known as the Wagner Act, was subsequently amended by the Taft-Hartley Act of 1947 and the Landrum-Griffin Act of 1959. *See generally* 1 J. JENKINS, LABOR LAW § 2.2, at 55 (1968).

2. *See* National Labor Relations Act, ch. 372, § 1, 49 Stat. 449 (1935) (current version at 29 U.S.C. § 151 (1970)). "The Wagner Act became law on the floodtide of belief that the conflicting interests of management and worker can be adjusted only by private negotiations, backed, if necessary, by economic weapons, without the intervention of law." Cox, *The Right to Engage in Concerted Activities*, 26 IND. L.J. 319, 322 (1951).

3. *See* National Labor Relations Act, ch. 372, § 7, 49 Stat. 452 (1935) (current version at 29 U.S.C. § 157 (1970)).

4. *See id.* § 8, 49 Stat. 452 (1935) (current version at 29 U.S.C. § 158 (1970 & Supp. V 1975)).

5. Getman, *The Protection of Economic Pressure by Section 7 of the National Labor Relations Act*, 115 U. PA. L. REV. 1195, 1196 (1967).

6. *See, e.g.*, NLRB v. Insurance Agents' Int'l Union, 361 U.S. 477, 492-94 (1960) (slowdown); NLRB v. Fansteel Metallurgical Corp., 306 U.S. 240, 261 (1939) (sitdown strike); NLRB v. Draper Corp., 145 F.2d 199, 205 (4th Cir. 1944) (wildcat or unauthorized strike).

7. *See, e.g.*, American Ship Bldg. Co. v. NLRB, 380 U.S. 300, 310-11 (1965); NLRB v. Brown, 380 U.S. 278, 285 (1965); Inter-Collegiate Press v. NLRB, 486 F.2d 837, 844 (8th Cir. 1973), *cert. denied*, 416 U.S. 938 (1974).

8. 557 F.2d 1126 (5th Cir. 1977).

the problem adequately, it is necessary to review the history and development of protected concerted activity, and the judicial tests which have been applied to determine the legality of management's reaction to such pressure.

PROTECTED CONCERTED ACTIVITY

Common Law Origins

At common law, a concerted withholding of services by employees for higher wages or better working conditions was deemed a criminal conspiracy.[10] Although American courts adopted the common law doctrine in early decisions,[11] in 1842 the Massachusetts Supreme Court decision of *Commonwealth v. Hunt*[12] rejected the notion that an association of employees was unlawful per se.[13] Subsequently, workmen were allowed to unite for the purpose of improving their terms of employment.[14] Certain concerted activities, however, remained illegal and were held to be actionable in tort on grounds of intentional infliction of harm.[15] Legality of concerted action depended upon the nature of the conduct and the object to which the conduct was directed.[16] Hence, a labor union could implement various forms of concerted action, such as the strike or picket, to pursue an objective closely aligned to a justifiable interest of organized labor. An

9. *See id.* at 1134 n.18.

10. *See, e.g.*, Locust Club v. Hotel & Club Employees Local 568, 155 A.2d 27, 33 (Pa. 1959); Cote v. Murphy, 28 A. 190, 191 (Pa. 1894); Krystad v. Lau, 400 P.2d 72, 76 (Wash. 1965) (en banc). "The common law judges saw no connection between the absence of labor organizations designed to improve the pay and working conditions and the loathsome conditions in which the industrial workingman and his family lived." *Id.* at 77.

11. *See* 2 J. JENKINS, LABOR LAW § 4.1, at 1, 3 (1976).

12. 45 Mass. (4 Met.) 111 (1842).

13. *Id.* at 134; *see* Nelles, *Commonwealth v. Hunt*, 32 COLUM. L. REV. 1128, 1149-50 (1932); Witte, *Early American Labor Cases*, 35 YALE L.J. 825, 825 (1926). "Since *Commonwealth v. Hunt* . . . any serious claim that a labor union constituted a criminal conspiracy vanished from the legal scene and has never revived." Krystad v. Lau, 400 P.2d 72, 78 (Wash. 1965) (en banc).

14. *See* Robinson v. Hotel & Restaurant Employees Local 782, 207 P. 132, 134 (Idaho 1922); Auburn Draying Co. v. Wardell, 124 N.E. 97, 100 (N.Y. 1919).

15. *See, e.g.*, Aikens v. Wisconsin, 195 U.S. 194, 205-06 (1904); Blue Boar Cafeteria Co. v. Hotel & Restaurant Employees & Bartenders Int'l Local 181, 254 S.W.2d 335, 337 (Ky. 1952), *cert. denied*, 346 U.S. 834 (1953); Vegelahn v. Guntner, 44 N.E. 1077, 1077-78 (Mass. 1896); Opera on Tour, Inc. v. Weber, 34 N.E.2d 349, 352 (N.Y.), *cert. denied*, 314 U.S. 615 (1941).

16. RESTATEMENT OF TORTS § 775, Comment a at 97-98 (1939). Section 775 provides:

> Workers are privileged intentionally to cause harm to another by concerted action if the object and the means of their concerted action are proper; they are subject to liability to the other for harm so caused if either the object or the means of their concerted action is improper.

Id. § 775; *see* Fenske Bros., Inc. v. Upholsterers' Int'l Local 18, 193 N.E. 112, 116 (Ill.), *cert. denied*, 295 U.S. 734 (1935).

intentional injury or damage of an employer's business, however, could be enjoined or could render the union liable for damages.[17]

Federal Preemption

Since 1935, the NLRA has preempted much state statutory and common law regulating labor disputes where interstate commerce is affected.[18] Section 7 of the Act gives employees the right to engage in "concerted activities for the purpose of collective bargaining or other mutual aid and protection,"[19] while sections 8(a)(1) and (3) make it an unfair labor practice for an employer to attempt to stifle such activities through interference or discrimination.[20] Concerted activities protected by section 7 clearly include the right to strike, to picket peacefully, and to boycott for purposes and by methods not prohibited by section 8.[21] Today, if management repri-

17. James v. Marinship Corp., 155 P.2d 329, 333-34 (Cal. 1944); Roraback v. Motion Picture Mach. Operator's Local 219, 168 N.W. 766, 766 (Minn. 1918); *see, e.g.*, Fashioncraft v. Halpern, 48 N.E.2d 1, 5 (Mass. 1943) (peaceful picketing in furtherance of unlawful strike for closed shop enjoined); Plant v. Woods, 57 N.E. 1011, 1015 (Mass. 1900) (coercion of incumbent union and employer by members of ousted union enjoined); O'Neil v. Behanna, 37 A. 843, 844 (Pa. 1897) (strikers liable in damages to employer for unlawful intimidation of replacement employees).

18. *See, e.g.*, Linn v. United Plant Guard Workers Local 114, 383 U.S. 53, 59 (1966); San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 243-44 (1959); International Ass'n of Machinists v. Gonzales, 356 U.S. 617, 618 (1958). *See also* Bryson, *A Matter of Wooden Logic: Labor Law Preemption and Individual Rights*, 51 TEXAS L. REV. 1037 (1973); Comment, *Preemption in Labor Relations*, 35 TEXAS L. REV. 555 (1957).

19. 29 U.S.C. § 157 (1970). This section 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 . . . ." *Id.*

20. 29 U.S.C. § 158(a)(1) & (3) (1970). This section provides, in 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 157 of this title; . . .
>
> . . . .
>
> (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. Among the excellent articles dealing generally with "concerted activities" are the following: Cox, *The Right to Engage in Concerted Activities*, 26 IND. L.J. 319 (1951); Getman, *The Protection of Economic Pressure by Section 7 of the National Labor Relations Act*, 115 U. PA. L. REV. 1195 (1967); Schatzki, *Some Observations and Suggestions Concerning a Misnomer—"Protected" Concerted Activities*, 47 TEXAS L. REV. 378 (1969).

21. *See* Street, Elec. Ry. & Motor Coach Employees v. Wisconsin Employment Relations Bd., 340 U.S. 383, 390 (1951); UAW v. O'Brien, 339 U.S. 454, 456-57 (1950). Section 7 does not protect all activity, as, for example, strikes conducted in an unlawful manner for an unlawful purpose. *See, e.g.*, NLRB v. Insurance Agents' Int'l Union, 361 U.S. 477, 492-94 (1960) (slowdown); NLRB v. Fansteel Metallurgical Corp., 306 U.S. 240, 261 (1939) (sitdown strike); NLRB v. Draper Corp., 145 F.2d 199, 205 (4th Cir. 1944) (wildcat or unauthorized strike). Strikes for illegal objectives include jurisdictional strikes, hot cargo disputes, second-

mands its workers for participating in activities protected by section 7, it violates section 8(a)(1), and it also violates section 8(a)(3) if such activity is in conjunction with union organization.[22] An employer, however, is not without recourse. When confronted with the exercise of protected rights, management, acting to protect its business, can respond legitimately with economic pressure to minimize concerted employee activity.[23]

THE *Mackay* Doctrine—Replacement of Striking Employees

Although the right to strike is not included in the United States Constitution,[24] it is expressly guaranteed under the National Labor Relations Act.[25] Strikes fall essentially into two categories: An unfair labor practice strike is one that is caused, at least in part, by an employer's unfair labor practice;[26] while an economic strike is initiated by a union for the purpose

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ary recognitional strikes, secondary boycotts, and featherbedding. *See* 7 FEDERAL REGULATION OF EMPLOYMENT SERVICE § 56.37, at 21 (1977).

22. Getman, *The Protection of Economic Pressure by Section 7 of the National Labor Relations Act,* 115 U. PA. L. REV. 1195, 1198 (1967). Absent a showing of antiunion animus, an employer is free to discharge an employee for any reason. NLRB v. Fansteel Metallurgical Corp., 306 U.S. 240, 254 (1939); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 45-46 (1937); NLRB v. Meinholdt Mfg., Inc., 451 F.2d 737, 739 (10th Cir. 1971). An employer may not, however, intimidate or coerce employees in the exercise of their organizational rights and punish them for engaging in protected concerted activity. NLRB v. Burnup & Sims, Inc., 379 U.S. 21, 23 (1964); NLRB v. Washington Aluminum Co., 370 U.S. 9, 16-17 (1962); *see* Republic Aviation Corp. v. NLRB, 324 U.S. 793, 798 (1945).

23. *See* American Ship Bldg. Co. v. NLRB, 380 U.S. 300, 310-11 (1965) (employer may use lockout in support of legitimate bargaining position after impasse); NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333, 345-46 (1938) (employer may hire permanent replacements in order to continue operations during economic strike); *cf.* NLRB v. Babcock & Wilcox Co., 351 U.S. 105, 112 (1956) (employer may prohibit distribution of union literature on company property). *See also* Getman, *The Protection of Economic Pressure by Section 7 of the National Labor Relations Act,* 115 U. PA. L. REV. 1195, 1199 (1967).

24. *See* Dorchy v. Kansas, 272 U.S. 306, 311 (1926) (right to strike is not protected under fourteenth amendment); 7 T. KHEEL, LABOR LAW § 29.02, at 29-5 (1975); *cf.* American Steel Foundries v. Tri-City Cent. Trades Council, 257 U.S. 184, 209 (1921) (right to strike is lawful instrument in lawful economic struggle); International Ass'n of Machinists & Aerospace Workers v. National Mediation Bd., 425 F.2d 527, 536 (D.C. Cir. 1970) (right to strike possesses constitutional and common law underpinnings).

25. 29 U.S.C. § 163 (1970). This section provides: "Nothing in this subchapter, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right." *Id.* As used in the NLRA, the term "strike" includes "any strike or other concerted stoppage of work by employees (including a stoppage by reason of the expiration of a collective-bargaining agreement) and any concerted slowdown or other concerted interruption of operations by employees." 29 U.S.C. § 142(2) (1970). Generally, however, the word "strike" is construed to mean "a cessation of work by employees, accompanied by picket lines which in combination impair or prevent production in all of the employer's premises." Jones & Laughlin Steel Corp. v. UMW, 519 F.2d 1155, 1158 (3d Cir. 1975).

26. 9 FEDERAL REGULATION OF EMPLOYMENT SERVICE § 68.19, at 16-17 (1977); *see* NLRB v. Wichita Television Corp., 277 F.2d 579, 583-84 (10th Cir.), *cert. denied,* 364 U.S. 871 (1960)

of obtaining higher wages, better working conditions, and reduced hours from an employer.[27] Unfair labor practice strikers possess an absolute right of reinstatement upon the termination of a strike, regardless of whether replacement employees were hired by the employer to enable him to continue business operations during the interim.[28] While economic strikers may not be discharged during the period of the strike, they are entitled to reinstatement at the end of the strike only if they have not been replaced permanently.[29] As a result of the Supreme Court's ruling in *NLRB v. Mackay Radio & Telegraph Co.*,[30] an employer possesses the right to hire permanent replacements for workmen who strike to force compliance with the union's collective bargaining demands.[31]

BARGAINING LOCKOUTS AND THE USE OF TEMPORARY REPLACEMENTS

A lockout has been defined as the "temporary withholding of employment in order to serve some interest of the employer vis-á-vis his employ-

(striking employees entitled to reinstatement due to employer's unfair labor practice in discharging two workers for union activities). For an excellent discussion of the respective rights of economic and unfair labor practice strikers see Comment, *Reconversion of Unfair-Labor-Practice Strikes to Economic Strikes*, 64 GEO. L.J. 1143, 1144-47 (1976).

27. *See* Martin, *The Rights of Economic Strikers to Reinstatement: A Search for Certainty*, 1970 WIS. L. REV. 1062, 1063-64 (lawful strikes, not caused or tainted by unfair labor practices, considered economic). The National Labor Relations Act itself does not assign different rights to economic and unfair labor practice strikers. *See* 29 U.S.C. § 158 (1970 & Supp. V 1975).

28. *E.g.*, NLRB v. Fleetwood Trailer Co., 389 U.S. 375, 379 n.5 (1967); Mastro Plastics Corp. v. NLRB, 350 U.S. 270, 278 (1956); Pulley v. NLRB, 395 F.2d 870, 879 (6th Cir. 1968). It is a well settled rule that a strike may be an unfair labor practice strike even though it is also economically motivated, and employees are entitled to reinstatement with back wages upon its termination. *See, e.g.*, NLRB v. Sea-Land Serv., Inc., 356 F.2d 955, 965-66 (1st Cir.), *cert. denied*, 385 U.S. 900 (1966); NLRB v. Fitzgerald Mills Corp., 313 F.2d 260, 269 (2d Cir.), *cert. denied*, 375 U.S. 834 (1963); NLRB v. A. Sartorius & Co., 140 F.2d 203, 206 (2d Cir. 1944). *See also* Martin, *The Rights of Economic Strikers to Reinstatement: A Search for Certainty*, 1970 WIS. L. REV. 1062, 1064.

29. NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333, 345-46 (1938); Philip Carey Mfg. Co. v. NLRB, 331 F.2d 720, 725 (6th Cir.), *cert. denied*, 379 U.S. 888 (1964); NLRB v. Thayer Co., 213 F.2d 748, 752 (1st Cir.), *cert. denied*, 348 U.S. 883 (1954); *see* Cox, *The Right to Engage in Concerted Activities*, 26 IND. L.J. 319, 319-20 (1951). 29 U.S.C. § 152 (3) (1970) provides, in part:

> (3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer . . . and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment . . . .

Consequently, the discharge of an economic striker prior to termination of the strike is violative of section 7 of the Act. *See* 7 T. KHEEL, LABOR LAW § 29.02, at 29-8 n.18 (1975).

30. 304 U.S. 333 (1938).

31. *See id.* at 345-46; Comment, *Reconversion of Unfair-Labor-Practice Strikes to Economic Strikes*, 64 GEO. L.J. 1143, 1144-47 (1976).

ees . . . ."[32] In recent years it has developed into an effective bargaining weapon for the employer.[33] At common law, the employer could lock out his employees "at will,"[34] unless he had relinquished his right to do so by an express agreement to the contrary.[35] After studying the legislative histories of the Wagner and Taft-Hartley Acts, the United States Supreme Court, in 1957, affirmed the right of an employer to utilize the lockout as an economic weapon in certain situations, concluding that it was not unlawful per se.[36] Nevertheless, the locking out of employees in order to frustrate organizational or recognitional activity has consistently been held violative of sections 8(a)(1) and (3) of the National Labor Relations Act.[37]

Prior to 1965, the NLRB had sustained employee lockouts only in cases involving single-employer economic lockouts that were implemented to prevent unusual economic losses or complications in operation posed by an imminent strike,[38] and as a defensive measure to preserve a multi-employer

32. Oberer, *Lockouts and the Law: The Impact of American Ship Building and Brown Food*, 51 CORNELL L.Q. 193, 194 (1966). At common law, a "lockout" meant an employer's withdrawal of work from his employees in an attempt to acquire for himself more favorable conditions of employment. Jeffery-De Witt Insulator Co. v. NLRB, 91 F.2d 134, 137 (4th Cir.), *cert. denied*, 302 U.S. 731 (1937); Associated Gen. Contractors, 138 N.L.R.B. 1432, 1442 (1962); Betts Cadillac Olds, Inc., 96 N.L.R.B. 268, 282 (1951). Recently the word "lockout" has been identified with a temporary layoff of employees rather than a termination of the employee relationship. *See* Morand Bros. Beverage Co. v. NLRB, 190 F.2d 576, 583 (7th Cir. 1951); Associated Gen. Contractors, 138 N.L.R.B. 1432, 1442 (1962). *See also* Comment, *Lockouts and Replacements in Bargaining—Management on the Offensive*, 9 LOY. L.A.L. REV. 67, 67 n.1 (1975).

33. *See* Comment, *Lockouts and Replacements in Bargaining—Management on the Offensive*, 9 LOY. L.A.L. REV. 67, 68-69 (1975).

34. *See* Iron Molders Union v. Allis-Chalmers Co., 166 F. 45, 50 (7th Cir. 1908).

35. *See, e.g.*, Dubinsky v. Blue Dale Dress Co., 292 N.Y.S. 898, 903 (App. Div. 1936) (injunction against illegal lockout and removal of plant contrary to agreement between employer and union); Goldman v. Cohen, 227 N.Y.S. 311, 313 (App. Div. 1928) (lockout of employees because of union membership enjoined); Moran v. Lasette, 223 N.Y.S. 283, 286 (App. Div. 1927) (right to lockout is corollary of union's right to strike, unless relinquished by agreement between parties).

36. NLRB v. Truck Drivers Local 449, 353 U.S. 87, 92-93 (1957); *see* Bernhardt, *Lockouts: An Analysis of Board and Court Decisions Since Brown and American Ship*, 57 CORNELL L. REV. 211, 213 (1972).

37. *See, e.g.*, NLRB v. Stremel, 141 F.2d 317, 318 (10th Cir. 1944); NLRB v. Mall Tool Co., 119 F.2d 700, 701 (7th Cir. 1941); NLRB v. National Motor Bearing Co., 105 F.2d 652, 657 (9th Cir. 1939). The Board has the burden of proving by substantial evidence that certain employees were discharged because of union membership or organizational activities. NLRB v. Goodyear Footwear Corp., 186 F.2d 913, 916 (7th Cir. 1951). *See generally* Annot., 20 A.L.R.3d 403 (1968).

38. C. MORRIS, THE DEVELOPING LABOR LAW 542-43 (1971); *see, e.g.*, Betts Cadillac Olds, Inc., 96 N.L.R.B. 268, 291-92 (1951) (prevent inconvenience to customers whose automobiles were under repair at time of strike); International Shoe Co., 93 N.L.R.B. 907, 910 (1951) (avoid economic loss from disruption of production at plant due to quickie strike on assembly line); Link-Belt Co., 26 N.L.R.B. 227, 264 (1940) (prevent seizure of plant by sitdown strike). *See generally* 48 AM. JUR. 2d *Labor & Labor Relations* § 742 (1970).

group in the event of a whipsaw strike.[39] Additionally, the lockout of employees as a result of their participation in unprotected concerted activities was held not to constitute an unfair labor practice.[40] In 1965, however, the limited concept of a lockout as a purely defensive weapon was expanded by the Supreme Court's decision in *American Ship Building Co. v. NLRB.*[41] In that case, the Court examined the issue of whether an offensive bargaining lockout was illegal per se, and held that sections 8(a)(1) and (3) did not, in the absence of antiunion hostility, prohibit the use of a lockout to force union acceptance of an employer's bargaining position after a lawful bargaining impasse had been reached.[42] On the same day the Court decided *NLRB v. Brown,*[43] holding that an employer may use temporary replacements to continue operations during a lockout called in response to a whipsaw strike.[44] The Supreme Court, however, expressly re-

39. C. MORRIS, THE DEVELOPING LABOR LAW 543-45 (1971); *see, e.g.*, NLRB v. Brown, 380 U.S. 278, 284 (1965); NLRB v. Truck Drivers Local 449, 353 U.S. 87, 97 (1957); Leonard v. NLRB, 205 F.2d 355, 357-58 (9th Cir. 1953). In his article on lockouts, Professor Bernhardt describes a whipsaw strike as follows:

> In a whipsaw strike, a union strikes one or more, but not all members of a multi-employer unit or uses a similar tactic with a group of employers with whom it bargains individually over the same terms at the same time. Because the employers are usually in competition with each other the struck employer will lose business to the others if they continue to operate. The union is thus able to bring enormous pressure upon the struck employer to settle. To prevent the union from picking them off one at a time, the employers find it advantageous to declare a joint lockout when the union strikes one of them.

Bernhardt, *Lockouts: An Analysis of Board and Court Decisions Since Brown and American Ship,* 57 CORNELL L. REV. 211, 212 n.6 (1972).

40. *See* News Union v. NLRB, 393 F.2d 673, 679-80 (D.C. Cir. 1968) (lockout in response to employee's violation of no-strike clause); NLRB v. Dorsey Trailers, Inc., 179 F.2d 589, 592 (5th Cir. 1950) (employee walkout). *But see* NLRB v. National Motor Bearing Co., 105 F.2d 652, 657 (9th Cir. 1939) (lockout discriminated against hiring of workers and tenure of employment); NLRB v. Hopwood Retinning Co., 98 F.2d 97, 100 (2d Cir. 1938) (lockout for employees' refusal to sign contract denying them right to bargain collectively). In *Hopwood Retinning Co.* the court held that participation by employees in unprotected activities does not give the employer the right to lock them out for an entirely different reason. *Id.* at 100-01.

41. 380 U.S. 300 (1965).

42. *Id.* at 310-11. Prior to *American Ship,* there had been a conflict among the jurisdictions on this question. *Compare* NLRB v. Dalton Brick & Tile Corp., 301 F.2d 886, 894 (5th Cir. 1962) *and* Morand Bros. Beverage Co. v. NLRB, 190 F.2d 576, 582 (7th Cir. 1951) *with* Utah Plumbing & Heating Contractors Ass'n v. NLRB, 294 F.2d 165, 168 (10th Cir. 1961) *and* Quaker State Oil Ref. Corp. v. NLRB, 270 F.2d 40, 45 (3d Cir.), *cert.denied,* 361 U.S. 917 (1959). *See also* Shawe, *The Regenerated Status of the Employer's Lockout: A Comment on American Ship Building,* 41 N.Y.U.L. REV. 1124 (1966).

43. 380 U.S. 278 (1965). The *Brown* case involved an association of food retailers which had bargained with the union successfully as a group in the past. In response to a whipsaw strike, the nonstruck employers in the group declared a lockout and the entire association continued to operate with temporary replacements. When an agreement was reached the following month, the employers immediately released the replacements and restored the strikers and locked out employees to their jobs. *Id.* at 281.

44. *Id.* at 284. For a discussion of the use of the lockout in subsequent cases involving

served the question of the legality of temporary or permanent replacements during an otherwise legitimate offensive bargaining lockout.[45] Thereafter, a divergence of opinion arose within the Board and among the appellate courts in the area of lockouts and temporary replacements, notably with regard to the test of whether an employer's conduct was in violation of sections 8(a)(1) or (3).[46]

Sensitive to the prejudicial effects upon concerted activities caused by extended lockouts, the Seventh Circuit enforced the decision of the Board in *Inland Trucking Co. v. NLRB,*[47] holding for the first time that an offensive lockout combined with temporary replacements was "inherently destructive" of employee rights and a per se violation of sections 8(a)(1) and (3) of the Act.[48] The court maintained that an employer's right to use replacement labor was justified only as a defensive measure to prevent the exigencies created by a pending strike.[49] Later, however, the NLRB departed from its *Inland Trucking* decision, and held in *Ottawa Silica Co.*[50] that during a lockout an employer could continue operations with temporary replacements obtained from within his own plant.[51]

In *Inter-Collegiate Press v. NLRB*[52] the Eighth Circuit ruled that the

multi-employer units see Bernhardt, *Lockouts: An Analysis of Board and Court Decisions Since Brown and American Ship,* 57 CORNELL L. REV. 211, 215 (1972).

45. American Ship Bldg. Co. v. NLRB, 380 U.S. 300, 308 n.8 (1965); *cf.* NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333, 345 (1938) (employer may permanently replace employees involved in economic strike). *See also* Comment, *Lockouts and Replacements in Bargaining—Management on the Offensive,* 9 LOY. L.A.L. REV. 67, 70 (1975).

46. *See* Comment, *Lockouts and Replacements in Bargaining—Management on the Offensive,* 9 LOY. L.A.L. REV. 67, 70-71 (1975); Comment, *Bargaining Lockouts and the Use of Temporary Replacements: A Legitimate Employer Option,* 31 WASH. & LEE L. REV. 772, 780-81 (1974).

47. 440 F.2d 562 (7th Cir.), *cert. denied,* 404 U.S. 858 (1971).

48. *Id.* at 565; *see* Note 85 HARV. L. REV. 680, 680-81 (1972).

49. Inland Trucking Co. v. NLRB, 440 F.2d 562, 564 (7th Cir.), *cert. denied,* 404 U.S. 858 (1971). Such situations would include the preservation of a multi-employer unit in the event of a whipsaw strike, or the continuation of a business during an economic strike. *Id.* at 564.

50. 197 N.L.R.B. 449 (1972), *enforced,* 482 F.2d 945 (6th Cir. 1973), *cert. denied,* 415 U.S. 916 (1974). In *Ottawa Silica* the employer locked out its employees at one of its plants and continued with temporary replacements. Furthermore, the employer refused to award holiday and vacation pay to locked out employees until after the parties had completed negotiations on a new contract. *Id.* at 449.

51. *Id.* at 451. Thus, the view of the NLRB minority, which was expressly accepted by the Seventh Circuit in *Inland Trucking,* was implicitly rejected by the Sixth and Ninth Circuits. *See* Ottawa Silica Co. v. NLRB, 482 F.2d 945, 945 (6th Cir. 1973), *cert. denied,* 415 U.S. 916 (1974) (Board's decision ordered enforced in memorandum opinion); NLRB v. Golden State Bottling Co., 401 F.2d 454, 457 (9th Cir. 1965) (court suggested replacements were legal alternative for employer).

52. 486 F.2d 837 (8th Cir. 1973), *cert. denied,* 416 U.S. 938 (1974). Upon reaching a bargaining impasse with the union, Inter-Collegiate Press locked out all employees in the bargaining units represented by the union. When the union failed to agree to a contract or no-strike commitment prior to a specified date before the company's busy season, Inter-

combined use of a lockout with temporary replacements was not a per se violation of employee's rights where there existed a substantial business justification and a lack of hostility toward the union.[53] Furthermore, it maintained that the legality of an employer's conduct during a lockout should be determined in accordance with the standards enunciated by the Supreme Court in *NLRB v. Great Dane Trailers, Inc.*,[54] thus rejecting the traditional "offensive" and "defensive" distinction.[55]

Great Dane AND THE BALANCING OF INTERESTS TEST

NLRB v. Great Dane Trailers, Inc.[56] involved the refusal of an employer to pay vacation benefits to employees who had gone on strike, while making no such refusal to those who had worked during the strike.[57] While upholding a violation of section 8(a)(3),[58] the Supreme Court established standards by which the conduct of an employer may be tested for antiunion motivation.[59] In contrast to the strict motivational test promulgated in *American Ship,* where the illegality of an employer's action depended upon evidence of hostility toward the union,[60] the Court in *Great Dane* asserted that an employer may be found guilty of an unfair labor practice without proof of antiunion animus if his conduct was "inherently destructive" of employee rights.[61] Where the conduct possessed a "comparatively slight" discriminatory effect, however, the Court maintained that antiunion animus must be shown to sustain an unfair labor practice if the employer establishes that his action was justified by legitimate and substantial business reasons.[62] Hence, the approach adopted in *Great Dane* makes it incumbent upon the employer to establish that the reasons for his conduct outweigh the harm inflicted upon the rights of his employees.[63]

Collegiate hired temporary replacements and resumed full production. At the end of its busy season, it offered reinstatement to its locked out employees. *Id.* at 843.

53. *Id.* at 846; *see* Note, 19 VILL. L. REV. 919, 920 (1974).

54. 388 U.S. 26 (1967).

55. Inter-Collegiate Press v. NLRB, 486 F.2d 837, 844 (8th Cir. 1973), *cert. denied,* 416 U.S. 938 (1974); *accord,* Laclede Gas Co. v. NLRB, 421 F.2d 610, 615 n.11 (8th Cir. 1970); W.G.N. of Colorado, Inc., 199 N.L.R.B. 1053, 1053 n.2 (1972).

56. 388 U.S. 26 (1967).

57. *Id.* at 27.

58. *Id.* at 35.

59. *Id.* at 34.

60. *See* American Ship Bldg. Co. v. NLRB, 380 U.S. 300, 310-11 (1965); Comment, *Lockouts and Replacements in Bargaining—Management on the Offensive,* 9 LOY. L.A.L. REV. 67, 72 (1975).

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

62. *Id.* at 34. If an employer fails to show a legitimate and substantial business justification for his conduct, he can be found guilty of an unfair labor practice without proof of antiunion animus. *See* Lane v. NLRB, 418 F.2d 1208, 1211 (D.C. Cir. 1969). *See also* 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, 91 (1970).

63. *See* Comment, *Bargaining Lockouts and the Use of Temporary Replacements: A*

A failure to meet this burden will result in the determination of an unfair labor practice.[64] Although the *Great Dane* decision primarily concerned an alleged violation of section 8(a)(3), the Supreme Court's subsequent ruling in *NLRB v. Fleetwood Trailer Co.*[65] extended the *Great Dane* test to include the determination of alleged violations of section 8(a)(1).[66]

Notwithstanding the fact that the *American Ship* decision reserved the question of whether an employer has the right to hire permanent replacements after an offensive lockout,[67] it has been argued persuasively that management possesses such a right by comparing an offensive lockout to an economic strike, where permanent replacements may be hired to facilitate the continuation of production for the duration of the strike.[68] Recently the Fifth Circuit squarely faced this issue in its review of the Board's decision in *Johns-Manville Products Corp.*[69]

Johns-Manville Products Corp. v. NLRB: Permanent Replacement of Locked Out Employees

In *Johns-Manville* an employer engaged in the manufacture of dried felt used as a base for asphalt roofing products was charged with violating sections 8(a)(1) and (3) of the Act by locking out employees, operating its New Orleans plant with temporary replacements, and hiring permanent replacements. The hiring of permanent replacements without prior notice to the incumbent union was also alleged as a violation of section 8(a)(5).[70]

The company and the union commenced negotiations on a new collective bargaining agreement on September 13, 1973, but despite several meetings between the parties, a bargaining impasse was encountered in early October. Sabotage of the company's machinery and products during this period caused substantial disruptions in production and endangered lives and property. In order to exert pressure on the employees and break the existing bargaining impasse, the company elected to lay off production workers and shut down the plant on October 31. When a contract still had not been reached by November 14, the company submitted its final contract offer and resumed production with temporary replacements. Subsequently,

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Legitimate Employer Option, 31 Wash. & Lee L. Rev. 772, 783 (1974).

64. *See* NLRB v. Great Dane Trailers, Inc., 388 U.S. 26, 34 (1967); Lane v. NLRB, 418 F.2d 1208, 1211 (D.C. Cir. 1969).

65. 389 U.S. 375 (1967).

66. *Id.* at 380; *see* Inter-Collegiate Press v. NLRB, 486 F.2d 837, 844 (8th Cir. 1973), *cert. denied,* 416 U.S. 938 (1974).

67. American Ship Bldg. Co. v. NLRB, 380 U.S. 300, 308 n.8 (1965); *see* Comment, *Lockouts and Replacements in Bargaining—Management on the Offensive,* 9 Loy. L.A.L. Rev. 67, 70 (1975).

68. 7 T. Kheel, Labor Law § 35.04(3), at 35-84 (1975).

69. 223 N.L.R.B. 1317 (1976), *enforcement denied,* 557 F.2d 1126 (5th Cir. 1977).

70. *Id.* at 1321. It is an unfair labor practice for an employer to refuse to bargain collectively with representatives of his employees. 29 U.S.C. § 158(a)(5) (1970).

however, it realized it could not meet the high demand for roofing materials by operating with temporary replacements. Fearing a loss of its customers, Johns-Manville hired permanent replacements without union notification in March 1974.

In affirming in their entirety the conclusions of the Administrative Law Judge, the NLRB ruled that since a bargaining impasse existed in October 1973, Johns-Manville had the right to lock out its employees and replace them temporarily to continue operations, and that such lockout was initiated for legitimate business reasons untainted by hostility toward the union.[71] It held, however, that the company's unilateral hiring of permanent replacements without notifying the union was inherently discriminatory and destructive of the employees' protected rights in violation of section 8(a)(3).[72] Furthermore, the permanent replacement of all unit employees was found to be in violation of sections 8(a)(1) and (5), since such replacement completely destroyed the bargaining unit.[73] Finally, the Board asserted that the evidence was insufficient to support the employer's contention that its employees were engaged in an in-plant strike or in unprotected concerted activity so as to enable it to replace all of its production workers.[74]

Relying solely on the holding in *Mackay,* the Fifth Circuit denied enforcement of the Board's decision, finding as a matter of law that the employees at the Johns-Manville plant were engaged in an in-plant strike.[75] It therefore reasoned that the lockout and hiring of permanent replacements by the company was not violative of sections 8(a)(1), (3), and (5) of the Act.[76] The court further maintained that its holding precluded the necessity of considering the issue of whether an employer can permanently replace workers following an offensive bargaining lockout.[77]

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71. Johns-Manville Prods. Corp., 223 N.L.R.B. 1317, 1318 (1976), *enforcement denied,* 557 F.2d 1126 (5th Cir. 1977). Member Jenkins dissented to the finding that the employer lawfully locked out employees and hired temporary replacements, in accord with his dissenting opinions in Ottawa Silica Co., 197 N.L.R.B. 449, 452-54 (1972), *enforced,* 482 F.2d 945 (6th Cir. 1973), *cert. denied,* 415 U.S. 916 (1974) and Inter-Collegiate Press, 199 N.L.R.B. 177, 179-80 (1972), *aff'd,* 486 F.2d 837 (8th Cir. 1973), *cert. denied,* 416 U.S. 938 (1974). Johns-Manville Prods. Corp., 223 N.L.R.B. 1317, 1318-19 (1976) (dissenting opinion), *enforcement denied,* 557 F.2d 1126 (5th Cir. 1977).

72. Johns-Manville Prods. Corp., 223 N.L.R.B. 1317, 1317 (1976), *enforcement denied,* 557 F.2d 1126 (5th Cir. 1977).

73. *Id.* at 1317-18.

74. *Id.* at 1318. The Board stated that the evidence failed to identify any employees, or establish that the union actually engaged in sabotage or other unprotected activities, thus distinguishing this case from those in which there was no question as to the identity of the employees or the concerted nature of their conduct. *Id.* at 1330-31; *see* NLRB v. Fansteel Metallurgical Corp., 306 U.S. 240, 260-61 (1939); Raleigh Water Heater Mfg. Co., 136 N.L.R.B. 76, 80 (1962).

75. Johns-Manville Prods. Corp. v. NLRB, 557 F.2d 1126, 1133 (5th Cir. 1977).

76. *Id.* at 1133.

77. *Id.* at 1133-34.

In his dissent, Judge Wisdom argued that the majority decision was "both factually and legally erroneous."[78] Observing that there was substantial evidence to support the Board's finding that no worker had been linked sufficiently to unprotected conduct to justify his replacement, Judge Wisdom maintained that the inference of an in-plant strike by the majority was a mistake, and therefore that the majority's reliance on *Mackay* was misplaced.[79] He also asserted that the implication of an in-plant strike was an unprecedented erosion of section 7 rights in that it would hinder subsequent unionization and collective bargaining.[80] Because he would not have found that a strike had occurred at the Johns-Manville plant, Judge Wisdom stated that the would have confronted the question of whether management could replace locked out workers permanently,[81] concluding that such an action, without notice and absent a strike, amounted to a violation of sections 8(a)(1) and (3) of the Act.[82]

Mackay OR *Great Dane:* WHICH TEST IS APPROPRIATE?

Limited Judicial Review

It is the policy of the NLRA to balance the legitimate economic interests of employers with the protected rights of employees in order to prevent labor disputes which interfere with the flow of interstate commerce.[83] To effectuate this national labor policy, the NLRB is charged by Congress with the basic duty of balancing the conflicting interests of employees and management.[84] Accordingly, a reviewing court must grant enforcement of an NLRB order where the Board has acted within the scope of its congressionally delegated authority, its findings are based on substantial evidence, and the remedy it has ordered is appropriate.[85]

Quoting *NLRB v. Brown,* the majority in *Johns-Manville,* however, stated that as a reviewing court it was "not obliged to stand aside and rubber-stamp their affirmance of administrative decisions they deem inconsistent with a statutory mandate or that frustrate congressional policy . . . ."[86] Nevertheless, as Judge Wisdom expressed in his dissent, the implication of an in-plant strike by the majority was contrary to substantial

78. *Id.* at 1135 (dissenting opinion).
79. *Id.* at 1139-41 (dissenting opinion).
80. *Id.* at 1141 (dissenting opinion).
81. *Id.* at 1142 (dissenting opinion).
82. *Id.* at 1149 (dissenting opinion).
83. 29 U.S.C. § 141(b) (1973).
84. NLRB v. Erie Resistor Corp., 373 U.S. 221, 236 (1963); NLRB v. Truck Drivers Local 449, 353 U.S. 87, 96 (1957).
85. *See* NLRB v. Warren Co., 350 U.S. 107, 112 (1955); NLRB v. Bradford Dyeing Ass'n, 310 U.S. 318, 342-43 (1940). *See generally* 48 AM. JUR. 2d *Labor & Labor Relations* § 1078 (1970).
86. Johns-Manville Prods. Corp. v. NLRB, 557 F.2d 1126, 1132 (5th Cir. 1977) (quoting NLRB v. Brown, 380 U.S. 278, 290-92 (1965)).

precedent in support of the Board's decision.[87] Not only does the ability of an employer to infer an in-plant strike, to react with a lockout, and to install permanent replacements exceed the limits of economic pressure allowed by section 8, such a power inhibits the exercise of section 7 rights and the future of collective bargaining.[88] Hence, the *Johns-Manville* decision appears to be inconsistent with current congressional policy which seeks to balance the legitimate business interests of management with the exercise of protected rights by its workers.[89]

Extension of the Mackay Doctrine

While *Mackay* has remained the undisputed position of the Board since 1935, extensions of that doctrine have not been countenanced in the past by the Supreme Court.[90] In *Mackay* the Court held that an employer's selective replacement of union leaders was discriminatory and violative of section 8(a)(3).[91] Only in dictum did the Supreme Court reason that management had "the right to protect and continue [its] business" by replacing *economic strikers* permanently, and that it was "not bound to discharge those hired to fill the place of strikers . . . ."[92] Furthermore, the NLRB in *Mackay* had restricted its determination to the issue of discrimination, not that of replacement,[93] and only in a reply brief to the Supreme Court did the Board accept Mackay's contention that its status as a public utility necessitated the hiring of permanent replacements to facilitate continuous and uninterrupted operations.[94]

Whereas *Mackay* concerned discriminatory practices which followed a protected economic strike, participation by employees in an in-plant strike, such as the one alleged in *Johns-Manville,* has traditionally been viewed as unprotected concerted activity.[95] Furthermore, it is incumbent upon the employer to establish by substantial evidence the identity of employees who participated in such activity before the *Mackay* doctrine

87. Johns-Manville Prods. Corp. v. NLRB, 557 F.2d 1126, 1141 (5th Cir. 1977) (dissenting opinion).

88. *Id.* at 1141 (dissenting opinion); *see* 29 U.S.C. § 157 (1970).

89. *Compare* Johns-Manville Prods. Corp. v. NLRB, 557 F.2d 1126, 1133 (5th Cir. 1977) (balancing of interests test precluded by implication of in-plant strike under *Mackay*) *with* NLRB v. Erie Resistor Corp., 373 U.S. 221, 236 (1963) (extension of seniority credit to strike replacements did not out outweigh harm to workers' rights under balancing of interests test).

90. *See* NLRB v. Erie Resistor Corp., 373 U.S. 221, 233 (1963), *rev'g,* 303 F.2d 359, 364 (3d Cir. 1962); Schatzki, *Some Observations and Suggestions Concerning a Misnomer—"Protected" Concerted Activities,* 47 TEXAS L. REV. 378, 385 (1969).

91. NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333, 346-47 (1938).

92. *Id.* at 345.

93. *See* Mackay Radio & Tel. Co., 1 N.L.R.B. 201, 234-35 (1936).

94. *See* Comment, *Replacement of Workers During Strikes,* 75 YALE L.J. 630, 632 (1966).

95. *Compare* Johns-Manville Prods. Corp. v. NLRB, 557 F.2d 1126, 1133 (5th Cir. 1977) *with* NLRB v. Fansteel Metallurgical Corp., 306 U.S. 240, 261 (1939). *See also* cases cited note 21 *supra.*

can be invoked to support their permanent replacement.[96] Without linking a single worker to the sabotage of equipment or products in *Johns-Manville,* however, the Fifth Circuit imputed this unprotected conduct to the entire workforce, implied an in-plant strike, and thereby justified permanent replacement of the employees during the bargaining lockout on the basis of *Mackay.*[97] In so doing, the court succeeded in tipping the delicate balance of economic pressure in collective bargaining in favor of management. Henceforth, the *Johns-Manville* decision will allow an employer to circumvent bargaining with the union through replacement of its complement of employees in the event production disruptions coincide with contractual negotiations.[98] As a result, workers could be inhibited from exercising their right to engage in collective bargaining and unionization as guaranteed by section 7 of the Act.[99] Considering the background of the *Mackay* doctrine and its past judicial interpretation, a cogent argument can be advanced for restricting its application to economic strikes, thereby precluding an extension of the permanent replacement rule to include offensive bargaining lockouts.[100]

Balancing of Interests—The Better Approach

Although the *Johns-Manville* court based its argument for the legality of permanent replacements on *Mackay,* case precedent mandates that the guidelines promulgated in *Great Dane* be implemented to determine if the replacement of locked out workers is in violation of section 8 of the Act.[101] Traditionally, the key factor in determining the legality or illegality of a lockout has been employer motivation.[102] Nevertheless, *Great Dane* pur-

96. *See* NLRB v. Mt. Clemens Pottery Co., 147 F.2d 262, 268 (6th Cir. 1945); Stewart Die Casting Corp. v. NLRB, 114 F.2d 849, 856 (7th Cir. 1940), *cert. denied,* 312 U.S. 680 (1941).

97. *Compare* Johns-Manville Prods. Corp. v. NLRB, 557 F.2d 1126, 1140-41 (5th Cir. 1977) (dissenting opinion) *with* NLRB v. Mt. Clemens Pottery Co., 147 F.2d 262, 268 (6th Cir. 1945).

98. Johns-Manville Prods. Corp. v. NLRB, 557 F.2d 1126, 1141 (5th Cir. 1977) (dissenting opinion).

99. *See* 28 U.S.C. § 157 (1970).

100. One commentator, arguing that the permanent replacement of economic strikers is "inherently destructive" of employee rights under *Great Dane,* maintains that the *Mackay* doctrine should be abrogated in the future. Schatzki, *Some Observations and Suggestions Concerning a Misnomer—"Protected" Concerted Activities,* 47 TEXAS L. REV. 378, 392 (1969); *see* Comment, *Replacement of Workers During Strikes,* 75 YALE L.J. 630, 632 (1966) (calling for reconsideration of *Mackay* rule in its entirety).

101. *See* Inter-Collegiate Press v. NLRB, 486 F.2d 837, 846-47 (8th Cir. 1973), *cert. denied,* 416 U.S. 938 (1974); *cf.* Johns-Manville Prods. Corp. v. NLRB, 557 F.2d 1126, 1143 (5th Cir. 1977) (dissenting opinion) (advocating use of *Great Dane* test). *See also* Comment, *Bargaining Lockouts and the Use of Temporary Replacements: A Legitimate Employer Option,* 31 WASH. & LEE L. REV. 772, 783 (1974).

102. *See, e.g.,* American Ship Bldg. Co. v. NLRB, 380 U.S. 300, 308-09 (1965); NLRB v. George J. Roberts & Sons, Inc., 451 F.2d 941, 946 (2d Cir. 1971); NLRB v. Bagel Bakers

ports to dispense with the necessity of establishing antiunion animus in cases of "conduct . . . 'inherently destructive' of important employee rights."[103] Conversely, the Board is obligated to balance the interests in favor of management in cases where the conduct in question is supported by "legitimate and substantial business justifications" and its effect on workers' rights is "comparatively slight."[104] This balancing of interests approach entails the weighing of employer conduct and its influence upon union activity against its importance to his economic affairs.[105] Generally, an employer response that tends to inhibit union activity arguably serves some legitimate business purpose, such as reducing costs or allowing management to continue business operations without interruption.[106] In pursuing a particular course of conduct, however, it is improbable that an employer differentiates between the economic advantages to be earned and its impact on the rights of his employees.[107] Whether an employer's legitimate business interests justify conduct which makes protected activity costly for his workers is a matter for the Board to determine, not the employer.[108]

In *Johns-Manville* management asserted that it had elected to replace the entire workforce without notice to the union, rather than end the lockout, because it feared continued disruptions in production.[109] It further maintained that it possessed a right to exert such economic pressure upon the union in favor of its collective bargaining position, and had a legitimate business interest in obtaining a profit despite its difficulties with the union.[110] Nevertheless, it can be argued that the damage inflicted on the workers' rights as a result of permanent replacement without notification exceeded the *Great Dane* "comparatively slight" standard, giving rise to the inference that it was motivated by antiunion animus.[111] If the company

Council, 434 F.2d 884, 890 (2d Cir. 1970), *cert. denied*, 402 U.S. 908 (1971).

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

104. *Id.* at 34.

105. *See* Getman, *The Protection of Economic Pressure by Section 7 of the National Labor Relations Act*, 115 U. PA. L. REV. 1195, 1201 (1967).

106. *Id.* at 1202.

107. *Id.* at 1202.

108. *Id.* at 1202. *See also* Schatzki, *Some Observations and Suggestions Concerning a Misnomer—"Protected" Concerted Activities*, 47 TEXAS L. REV. 378, 391-92 (1969).

109. Johns-Manville Prods. Corp. v. NLRB, 557 F.2d 1126, 1147 (5th Cir. 1977) (dissenting opinion).

110. *Id.* at 1147 (dissenting opinion).

111. *Id.* at 1147-48 (dissenting opinion). The hiring of permanent replacements has three principal effects on locked out employees: (1) it allows management to continue operations during a shutdown, thus weakening the bargaining position of the union; (2) it inhibits the union's right to strike under section 13 of the NLRA; and (3) it erodes the union's position as bargaining agent due to the right of permanent replacements to vote in a certification election conducted prior to the end of a strike. *See* Comment, *Replacement of Workers During Strikes*, 75 YALE L.J. 630, 634-35 (1966). *See also* Johns-Manville Prods. Corp. v. NLRB, 557 F.2d 1126, 1143 n.20 (5th Cir. 1977) (dissenting opinion).

had notified the union that it was considering permanent replacements to reduce the financial losses incurred while employing temporary substitutes, it would have evidenced a legitimate intention to pressure the union into accepting the company's bargaining position, and thus, would have given the union an opportunity to avoid the damage threatened by permanent replacements.[112] Without evidence of a business justification to rebut this inference of antiunion animus, however, it would appear that under the principles of *Great Dane* such conduct was motivated by hostility toward union activity, and therefore, was in violation of sections 8(a)(1) and (3) of the Act.[113]

CONCLUSION

Although the use of temporary replacements during an offensive bargaining lockout is lawful under the National Labor Relations Act, the question remains as to whether the permanent replacement of locked out employees will be permitted. Notwithstanding the fact that an employer may hire permanent replacements under *Mackay*, the application of that doctrine consistently has been restricted to the replacement of employees engaged in an economic strike. Furthermore, the balancing test enunciated in *Great Dane* as applied to an offensive bargaining lockout by an employer would weigh heavily against permanent replacements, even though the combined use of a lockout with temporary substitutes has been held not to infringe upon the protected rights of employees under section 7. The conflict between the policy of forbidding an employer to discipline its employees for the use of economic pressure, and the policy permitting an employer to defend his own economic interests had developed into a judicial dilemma. When faced with the opportunity, the Supreme Court should rule on the question it reserved in *American Ship*, and apply the tenets of *Great Dane* to the area of lockouts and permanent replacements. Only then will a more stable environment exist to facilitate collective bargaining between management and union.

112. *See* Johns-Manville Prods. Corp. v. NLRB, 557 F.2d 1126, 1148-49 (5th Cir. 1977) (dissenting opinion).

113. *Id.* at 1148-49 (dissenting opinion); *cf.* Lane v. NLRB, 418 F.2d 1208, 1212 (D.C. Cir. 1969) (legitimate business reasons outweighed comparatively slight impact lockout had on employee rights). In his dissent, Judge Wisdom contended that no in-plant strike occurred to justify the replacement of workers at the Johns-Manville plant, and that their replacement without notification violated sections 8(a)(1) and (3) of the Act. Johns-Manville Prods. Corp. v. NLRB, 557 F.2d 1126, 1148-49 (5th Cir. 1977) (dissenting opinion).