

INTRODUCTION

THE CHANGING FACE OF LABOR-MANAGEMENT CONFRONTATION IN THE LATE 1980s†

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I. INTRODUCTION

The 1987–88 *Annual Survey of Labor Relations and Employment Discrimination Law* discusses and analyzes a number of important decisions in the area of labor and employment law. To fully understand the legal environment in which labor-management relations function in the late 1980s, however, it is necessary to look beyond the impact of individual decisions of courts and agencies. The patterns and trends of decisions must be evaluated against the backdrop of a changing economic and political environment. One such pattern, the primary subject of this article, is a series of 1987–88 decisions of the National Labor Relations Board¹ which, when read together, change the balance of economic weapons in a strike situation.

The labor-management bargaining relationship of the late 1980s is subject to a number of economic, social, and political pressures. The internationalization of at least parts of the economy and an increasing focus on “bottom line” concerns by business have caused managers to take a tougher stance at the bargaining table.² On the union side, short-term means of avoiding confrontation over management demands for reductions, such as two-tier wage plans, have proved unpopular with the membership and are less available.³

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¹ The National Labor Relations Board (NLRB or Board) is an adjudicative body heading the federal agency bearing the same name. Section 3(a) of the National Labor Relations Act, as amended, provides that the Board shall consist of five members “appointed by the President by and with the advice and consent of the Senate.” 29 U.S.C. § 153(a) (1982).

² See *infra* notes 12–15 and accompanying text.

³ See *infra* notes 17–19 and accompanying text.

Further, employers in the 1980s have seemed more resistant to union organization, more willing to replace striking workers with others during a strike, and less willing to recall strikers at the end of the strike.⁴ At the same time, there is a call for increased cooperation in the workplace and for a new cooperative era in labor relations.⁵

It is against this backdrop that recent decisions of the National Labor Relations Board, which seem to limit and undercut the effectiveness of the strike weapon, must be evaluated. The strike weapon is at the core of Section 7 employee rights.⁶ A private sector labor union's ability to bargain effectively depends on its perceived willingness to strike and management's perceived ability and willingness to sustain a strike. Thus, an effective strike weapon is the engine that provides power to achieve a union's bargaining objectives. Although the legally required processes of bargaining provide an incentive for both parties to communicate and settle, often the perceived bargaining power of each side generates the final concessions that lead to settlement. For the union, that bargaining power is the threat of a strike.

This article begins by examining the economic and political developments that will put increasing pressure on the bargaining environment.⁷ Against this backdrop, the article then evaluates current changes in the law that adversely affect strikers' job security and undercut striking unions' strength.⁸ Finally, this article discusses ways in which unions and society may be expected to deal with these developments.⁹

II. THE CHANGING ECONOMIC AND POLITICAL ENVIRONMENT

The labor relations environment of the 1980s has been affected by both economic and political changes that cannot be ignored. As

⁴ See *infra* notes 21-23 and accompanying text.

⁵ See *infra* note 24 and accompanying text.

⁶ Section 7 of the National Labor Relations Act, 29 U.S.C. § 157 (1982), provides: Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3) of this title.

⁷ See *infra* notes 10-27 and accompanying text.

⁸ See *infra* notes 28-132 and accompanying text.

⁹ See *infra* notes 133-43 and accompanying text.

Professor and former Secretary of Labor John T. Dunlop notes, macroeconomic policies have had a great impact.¹⁰ He suggests that tax reductions and expanded defense expenditures have combined to create "unprecedented budget deficits" and that tight money and high interest rates created "a severe recession and an over-valued dollar and unprecedented trade deficits," making the United States the "largest debtor nation."¹¹ These changes, Professor Dunlop reasons, make the labor relations parties increasingly subject to international competition. The move to floating exchange rates, the relocation of United States production facilities abroad, and the establishment of foreign-owned manufacturing plants in the United States accentuate this trend toward an international marketplace.

Consequently, management and labor in the United States no longer bargain in a closed environment. A company cannot always agree to match an industry standard for wages and benefits, secure in the knowledge that the union will impose the same standard on the competition. Much of the competition is not domestic. Even among domestic competitors, many operate in a non-union environment. Both employers and unions must be alert to competitive changes that may cost a company its market share and, consequently, cost the union jobs.

The degree to which current economic pressures have affected or will affect the industrial relations atmosphere and the labor management relationship is the subject of much debate. Audrey Freedman of the Conference Board argues that external forces in the form of foreign competition, deregulation, and non-union companies have wrought "profound changes" in the 1980s.¹² She suggests that these external forces pressure employers to consider competitive wage costs at the product-line level.¹³ New wage techniques designed to make wages more flexibly responsive to competitive pressures include two-tier plans, which specify that new hires will receive lower rates of pay than those received by senior employees, annual lump sum wage payments in lieu of permanent hourly wage raises, and means by which some wages are linked to profit or output. She suggests, too, that management is under pressure to make employment levels more flexible by contracting out work

¹⁰ Dunlop, *Have the 1980's Changed U.S. Industrial Relations?*, MONTHLY LAB. REV., May 1988, at 29, 30.

¹¹ *Id.*

¹² Freedman, *How the 1980's Have Changed Industrial Relations*, MONTHLY LAB. REV., May 1988, at 35.

¹³ *Id.* at 37.

more often and using more part-time, independent or free-lance workers.¹⁴ She sees the pressures from the outside business world as unlikely to relent and thus predicts that the changes of the 1980s are unlikely to be reversed.¹⁵

Professor Dunlop agrees that new international pressures, demographic changes, technological changes, and deregulation have affected the labor relations environment.¹⁶ He believes, however, that reactions of the early 1980s, such as two tier wage systems and lump sum payments in lieu of wage increases, are "reversible and are passing."¹⁷ Thus, Professor Dunlop views many of the changes of the 1980s as temporary and believes that basic industrial relations in this country have not changed. In his view, "[t]he labor movement in the United States is here to stay" and is changing to meet new conditions.¹⁸

The issues raised in this debate are important because they help define future pressures on the system. As Professor Dunlop has suggested, two-tier wage plans have become increasingly unpopular with unions, and, since 1986, have been included or retained in fewer and fewer collective bargaining agreements.¹⁹ Without such compromises to deflect, albeit temporarily, management pressures for reduced wages and benefits, we can expect more direct confrontations between labor and management over economic issues.

On the political and social front, there are growing perceptions that the current system fails to protect employees. Northwestern University President Arnold Weber, a labor economist and arbitrator, argues that a dramatic change in American industrial relations has occurred, marked by a "precipitate decline in the relative strength of trade unions," adoption by management of alternate means by which to structure the work force, and a shift in emphasis

¹⁴ *Id.*

¹⁵ *Id.* at 38.

¹⁶ Dunlop, *supra* note 10, at 33.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Two-Tier Wage Plans*, 127 Lab. Rel. Rep. (BNA) 305, 305 (March 7, 1988); see also Wall Street Journal, June 29, 1988, at 17, col. 2:

One modest success for labor is that two-tier wage schemes, which set lower pay for new employees, are less in vogue this year. In the face of strong union opposition, many companies are trying other ways to hold down labor costs. What they are pushing is elimination or weakening of cost-of-living clauses, greater links between compensation and corporate performance, and more emphasis on lump-sum payments that don't step up the wage base.

from "industrial relations" to "human resources."²⁰ He suggests, too, that the "rules of the game" have changed, with the federal government no longer perceived as an advocate of stable collective bargaining relationships and employers increasingly willing to undermine bargaining arrangements through use of bankruptcy laws, contracting out, and continuing operations during strikes.²¹

In an opening statement at the March 9, 1988 House oversight hearings on the National Labor Relations Board, Representative William L. Clay, a Democrat from Missouri, stated that the National Labor Relations Act is being used to frustrate collective bargaining: "In spite of the Act's stated intention, those who support unions do so at considerable risk and with little confidence that their efforts will result in a bargaining agreement."²² Hearings will focus on cases where employers have refused to reach agreement or have sought to end longstanding bargaining relationships. Representative Clay has expressed concern over the difficulties caused employees by the increasing number of employers that either refuse to enter into contracts with newly elected unions or find "a variety of new ways to walk away from longstanding collective bargaining relationships."²³

At the same time as some authorities are pointing to potential "polarization" in labor-management relations, others see a more cooperative workplace developing in which cooperation is replacing confrontation.²⁴ To those who suggest an end to the adversarial

²⁰ *Criticism of Failure to Anticipate IR Changes*, 127 Lab. Rel. Rep. (BNA) 54, 54 (Jan. 11, 1988).

²¹ *Id.* at 55.

²² *House Hearings on Labor Board*, 127 Lab. Rel. Rep. (BNA) 370, 370 (Mar. 21, 1988).

²³ *Id.* at 370-71. Professor Thomas Kochan has described the 1980s as a period of "increasing polarization" in labor management relations because of "more bitter" labor stoppages, increased employer resistance to unions, and a hostile relationship between the federal government and unions. *Labor's Polarization*, 127 Lab. Rel. Rep. (BNA) 381, 381 (Mar. 21, 1988). He suggests that we cannot continue to build a more competitive industrial relations system through greater employee participation and flexibility unless something is done to prevent the system from becoming more adversarial. Professor Kochan recommends that management "examine long-term business strategies and basic values" and "back off from a deep resistance to unions." *Id.* To oppose unionization in one part of the company and expect cooperation in a unionized sector is, according to Kochan, "no longer tenable." *Id.* Union leaders "cannot afford to sit on the fence," he added. *Id.*

²⁴ The twenty two member Collective Bargaining Forum, chaired by Steelworkers President Lynn Williams and Ameritech Chairman William Weiss, has recommended, in a report published by the United States Department of Labor, a new and more constructive relationship between labor and management "which places greater value on the contributions that unions can make to achieving the basic goals of a democratic society and to the competitiveness of the firms in which their members are employed." The forum calls upon management

relationship, however, Professor Dunlop responds that cooperation is not new and that it is not likely to supplant the current system of representation.²⁵ First, he notes that labor-management committees have a long history in this country and England and have arisen at "times when economic difficulties threatened the viability of both parties . . . [and] collective bargaining alone had proved to be an inadequate forum for addressing each and every pressing issue."²⁶ Second, Professor Dunlop suggests that once the crisis has passed, the committee may disappear because of personnel changes, management concerns over sharing information, difficulties inherent in participatory management, and concerns of union leaders that they not seem too collaborative to their constituents.²⁷

These changes in the business environment, in employers' attitudes toward unions, and in society's expectations of the bargaining relationship place new pressures on the labor laws. If the internationalization of the economy and other competitive factors press the company to demand wage reductions in the future, such stop-gap measures as two-tier systems will no longer be available. This means that the union's ability to withstand pressures at the bargaining table will be directly tested. Therefore, the degree of legal protection afforded the union and its members at the bargaining table and on the picket line will be most important.

Moreover, if ours is to evolve into the cooperative and competitive workplace and economy that many say is necessary, management, too, must have incentives or pressures to surrender both information and autonomy. If the union is weakened and if the strike is no longer a viable weapon, management will have less

to "take a long-run view of its interests and broaden its goals to include the need for employment security and a rising standard of living for America's workers." *New Ideas For Labor Relations*, 127 Lab. Rel. Rep. (BNA) 465, 465 (Apr. 11, 1988). Others are less sanguine about the effectiveness and value of such cooperative programs as participatory management and quality circles. In a speech opening the International Association of Machinists Centennial Convention, Machinists President William Winpisinger attacked management's failure to give unions a say in important decisions like the investment of capital and development of equipment and jobs: "If our employers want our cooperation and a love-in on the shop floor, then why do they rape us on the fainting couch of job blackmail and concessions, and make book with the Reaganites outside in the political economy-at-large? Why do they?" *Machinists Hold Centennial Convention*, 127 Lab. Rel. Rep. (BNA) 45, 45 (May 9, 1988); see also Grenier, *Quality Circles in a Corporate Antiunion Strategy: A Case Study*, 13 LAB. STUD. J. 5 (1988).

²⁵ Dunlop, *supra* note 10, at 32-33.

²⁶ *Id.* at 32 (quoting LABOR MANAGEMENT SERVICES ADMINISTRATION, U.S. DEPARTMENT OF LABOR, *THE OPERATION OF AREA LABOR-MANAGEMENT COMMITTEES* 25 (1981)).

²⁷ *Id.* at 33.

incentive to surrender any of its prerogatives. This could lead many managers to press their advantage to create a less cooperative workplace.

Finally, the survival of union representation in an anti-union environment is at stake. If, in response to initial union refusals to agree to management demands, management is easily allowed to avoid agreement, replace union workers with those willing to cross picket lines, and ultimately withdraw recognition from the union, then employees' Section 7 rights to representation will be damaged.

III. DEVELOPMENTS AT THE NLRB

When management and labor cannot agree at the bargaining table, the primary means by which a union can exert pressure is the strike. Decisions of the National Labor Relations Board in the 1987-88 *Survey* period, when read together, undercut the effectiveness of the strike weapon. Management has been allowed to increase and toughen its demands at the bargaining table, seemingly in retaliation for a strike.²⁸ Management has also been allowed to discharge strikers for an ever broadening range of picket line activities,²⁹ and to retain permanent replacements despite union claims that strikes were precipitated and prolonged by employer unfair labor practices.³⁰ In addition, management has been allowed to recall laid off replacement workers even where strikers had already unconditionally offered to return to work.³¹ Finally, employers have been allowed to withdraw recognition from unions in situations where employee disaffection may well have been caused by the employer's refusal to bargain at reasonable times.³² In this legal environment, the rights of a striking employee and his or her union are increasingly vulnerable.

A. Post-Strike Bargaining Strategy

Two recent cases, *Hendrick Manufacturing Co.*³³ and *Cook Brothers Enterprises*,³⁴ address the issue of an employer's post-strike bargaining strategy and seem to suggest that a union's strike gives an

²⁸ See *infra* notes 33-61 and accompanying text.

²⁹ See *infra* notes 62-78 and accompanying text.

³⁰ See *infra* notes 79-94 and accompanying text.

³¹ See *infra* notes 95-111 and accompanying text.

³² See *infra* notes 123-32 and accompanying text.

³³ 287 N.L.R.B. No. 33, slip op., 127 L.R.R.M. 1097 (1987).

³⁴ 288 N.L.R.B. No. 46, slip op., 128 L.R.R.M. 1074 (1988).

employer an opportunity to "harden its approach" in response. In *Hendrick Manufacturing* the union and employer, parties with a forty year bargaining relationship, began negotiating for a new collective bargaining agreement to replace one due to expire in September, 1984. Between July, 1984 and December, 1985, the parties met twenty-one times for bargaining and exchanged numerous proposals. A strike began in November, 1984.³⁵ The administrative law judge found that from March, 1985 through the parties' last meeting in December, 1985, the employer bargained in bad faith with a fixed intention of avoiding agreement and by taking positions "calculated to impede the union's effectiveness as an employee representative."³⁶ The employer proposals eliminated superseniority for union stewards, narrowed access to the grievance procedure and arbitration, limited the access of union representatives to the premises, and withdrew union security.³⁷ The administrative law judge specifically found that employer proposals became more regressive whenever the union indicated it was prepared to make concessions and that the bloc of proposals limiting union rights went beyond the employer's alleged economic reasons and were "contrived in bad faith for the purpose of perpetuating nonagreement by inflaming the union negotiators."³⁸ Despite these explicit findings supported by a lengthy and detailed opinion, the National Labor Relations Board ruled that the employer had met its bargaining obligation by meeting regularly, presenting proposals, explaining its position, agreeing to the presence of federal mediators, and otherwise meeting its procedural obligations.³⁹ Rather than finding vindictiveness, the Board held that "any toughening or regression in [the employer's] bargaining posture was a direct result of its improved economic condition and its ability to survive the Union's strike."⁴⁰

In a similar case, *Cook Brothers*, the parties, who had a forty year bargaining relationship, negotiated for a new collective bargaining agreement after the former agreement expired on September 1, 1979.⁴¹ The parties were unable to agree. Management of-

³⁵ 287 N.L.R.B. No. 33, slip op. at 2, 127 L.R.R.M. at 1097.

³⁶ *Id.* at 2-3, 127 L.R.R.M. at 1097.

³⁷ 287 N.L.R.B. No. 33, slip op. at 3 (opinion of Wilks, A.L.J.).

³⁸ *Id.* at 32.

³⁹ *Id.* at 5, 127 L.R.R.M. at 1098.

⁴⁰ *Id.* at 3, 127 L.R.R.M. at 1097.

⁴¹ 288 N.L.R.B. No. 46, slip op. at 2, 128 L.R.R.M. 1074, 1075 (1988).

ferred the same wages and conditions as under the last contract, but did not meet the union's request that area wage rates be maintained as they had been in the past. On January 21, 1980, a strike began. On February 5, 1980, the parties met, and the company announced its adherence to its prior offer with two exceptions. The company withdrew its offer of retroactivity on wages and pension contributions and stated that it wanted to eliminate the union-security clause. It also stated that it intended to hire permanent replacements. Management hired replacements while the strike continued, and did not retreat from its position through the last meeting of the parties in July, 1980.⁴² After an unfair labor practice charge was filed, a hearing was held. The administrative law judge found that there was no evidence of bad faith before February 5, but that after February 5, the company demonstrated an intent to frustrate bargaining by rigidly insisting on elimination of the long-established union-security provision. The judge concluded that the totality of the employer's conduct demonstrated it had engaged in bad-faith surface bargaining.⁴³

The Board reversed the judge's finding of unlawful bargaining conduct. The Board noted that the employer had economic reasons for failing to adopt the area wage rate and further stated that it was "only after the Union took this hardened stance" — the strike — that the company, "in turn, hardened its approach" by maintaining its economic approach, withdrawing retroactivity on pay and pension contributions, proposing elimination of union-security, and announcing its intent to use replacements.⁴⁴

Because the employer was financially troubled, the Board found the elimination of retroactivity not to be regressive or baseless because the strike created additional economic pressure.⁴⁵ With respect to the elimination of union-security, the Board noted, first, that the existence of a clause in previous contracts does not require the parties to include it in further contracts⁴⁶ and that a party is free to modify its bargaining proposals during the course of nego-

⁴² *Id.* at 2-4, 128 L.R.R.M. at 1075.

⁴³ *Id.* at 4-5, 128 L.R.R.M. at 1075.

⁴⁴ *Id.* at 5-6, 128 L.R.R.M. at 1075-76.

⁴⁵ *Id.* at 6, 128 L.R.R.M. at 1076.

⁴⁶ *Id.* (citing *H.K. Porter v. NLRB*, 397 U.S. 99, 103-09, 73 L.R.R.M. 2561, 2562-65 (1970); *Frontier Dodge, Inc.*, 272 N.L.R.B. 722, 730 n.24, 117 L.R.R.M. 1411 (1984) (opinion of Kennedy, A.L.J.); *American Thread Co.*, 274 N.L.R.B. 1112, 1112-13, 118 L.R.R.M. 1499, 1500 (1985)).

tiations. The Board relied on the decision by the United States Court of Appeals for the Seventh Circuit in *Atlas Metal Parts Co. v. NLRB*,⁴⁷ and stated that "the employer had countered the Union's show of strength (the strike) . . . by seeking to curtail an aspect of the Union's strength (the union-security clause)," as well as by expanding its economic position and strengthening its position by use of replacement workers. These steps were viewed as "reasonable, if not predictable, reactions of management facing difficult economic conditions and a tough union counterpart."⁴⁸

Finally, the Board rejected the administrative law judge's reliance on the employer's continued adherence to its demand to drop the union-security clause as proof of a desire to frustrate bargaining. The Board stated that a party may hold to a legitimate bargaining proposal and concluded that the General Counsel had failed to produce sufficient evidence to show that the employer "asserted its proposal disingenuously or was unwilling to discuss it with the Union."⁴⁹ The Board held the employer's adherence to eliminating union-security to be a reasonable bargaining stance under all the circumstances.⁵⁰ As a consequence of the Board's ruling that the employer had not bargained in bad faith, the strike was not deemed to have become an unfair labor practice strike by the March 10, 1980 date that permanent replacements were hired.⁵¹ Replaced employees were held entitled only to preferential rehiring rights for openings that did not develop until February, 1981.⁵² The strike later was converted to an unfair labor practice strike when the employer unlawfully interrogated strike replacements and unlawfully withdrew recognition from the union.⁵³

⁴⁷ 660 F.2d 304, 108 L.R.R.M. 2474 (7th Cir. 1981). The *Atlas Metal Parts* court stated that:

[a]n employer is entitled to advance a position sincerely held, notwithstanding the employer's having taken a different position at an earlier time Union security . . . [is a] mandatory [subject] of bargaining, and "[a] party . . . is entitled to stand firm on a position if he [or she] reasonably believes that it is fair and proper or that he has sufficient bargaining strength to force agreement by the other party."

Id. at 308, 108 L.R.R.M. at 2477 (citations omitted).

⁴⁸ 288 N.L.R.B. No. 46, slip op. at 7, 128 L.R.R.M. at 1076.

⁴⁹ *Id.* at 8, 128 L.R.R.M. at 1076.

⁵⁰ *Id.* (citing *Atlas Metal Parts Co. v. NLRB*, 660 F.2d 304, 308, 108 L.R.R.M. 2474, 2477-78 (7th Cir. 1981); *Atlanta Hilton & Tower*, 271 N.L.R.B. 1600, 1603, 117 L.R.R.M. 1224, 1227 (1984)).

⁵¹ *Id.* at 10, 128 L.R.R.M. at 1076.

⁵² *Id.* at 11, 128 L.R.R.M. at 1077.

⁵³ *Id.* at 10-11, 128 L.R.R.M. at 1077.

These two cases are troubling because they seem to open the door for employers to engage in regressive bargaining after a strike, because they overrule factual findings by administrative law judges with little apparent basis, and because they change precedent to allow punitive bargaining. Although there is precedent for the proposition that withdrawing a union-security clause is not necessarily bad faith bargaining, the *Cook Brothers Enterprises* and *Hendrick Manufacturing Co.* decisions go beyond such precedent. In its 1980 *Olin Corp.* decision, for example, the Board held that the employer did not unlawfully withdraw a union-security clause after hiring replacements and learning of their concern over joining the union where the employer gave its reasons to the union and was willing to discuss the matter in bargaining.⁵⁴ Both *Hendrick Manufacturing* and *Cook Brothers*, however, go beyond the Board's decision in *Olin*.

In *Hendrick Manufacturing*, the administrative law judge found the company president to have misrepresented the truth when he testified that he withdrew union-security because the sixty employees who crossed the picket line told him they did not want to join the union and asked whether they could be so compelled.⁵⁵ When the employer made its proposal, only thirty, not sixty, replacements had been hired. Because these hirings had been gradual, the judge found it unlikely that even all thirty would have communicated with the employer on this subject.⁵⁶ Further, the president did not testify as to the circumstances of such conversations nor provide the name of even one person who allegedly made such a remark. In the circumstances, and in light of the judge's conclusions as to the overall bad faith of the employer's bargaining conduct, the judge concluded that the statements about replacements were a mere pretext for regressive bargaining.⁵⁷

In *Cook Brothers*, the gap between prior precedent and the Board's ruling is even more obvious. The administrative law judge found that the employer had not even hired replacement workers when it announced its intent to withdraw the union-security clause and that the employer provided no explanation nor evidenced a willingness to discuss the matter.⁵⁸ Thus, the judge concluded that the employer's withdrawal of the union-security clause was in bad faith.

⁵⁴ 248 N.L.R.B. 1137, 1141, 104 L.R.R.M. 1017, 1018 (1980).

⁵⁵ 287 N.L.R.B. No. 33, slip op. at 25, 30 (opinion of Wilks, A.L.J.).

⁵⁶ *Id.*

⁵⁷ *Id.* at 31.

⁵⁸ 288 N.L.R.B. No. 46, slip op. at 16 (1987).

Although the current Board does protect the union's role at the bargaining table in some cases,⁵⁹ *Hendrick Manufacturing and Cook Brothers* may be dangerous precedent if employers decide to test their limits by regressively bargaining after a strike is declared. The stakes are high. The job status of strikers replaced after such regressive bargaining depends on whether the bargaining was unlawful and, if so, whether it prolonged the strike.⁶⁰ As in *Cook Brothers*, the toughened bargaining stance may be a prelude to an attempt to withdraw recognition from the union.⁶¹

B. Picket Line Activity

Recent decisions of the National Labor Relations Board seem to expand the range of picket line activities that the Board will deem unprotected and for which an employee may be discharged. In the

⁵⁹ In *Armored Transport of California, Inc.*, 288 N.L.R.B. No. 70, slip op., 128 L.R.R.M. 1081 (1988), the union struck after the employer implemented its proposals to reduce employee wages. When the reductions were implemented, the employer sent all employees a letter justifying the step due to customer losses and decreased revenues and increased costs. The letter stated, "[w]hat this all adds up to is that Armored Transport can no longer pay its employees from two to seven dollars more per hour than the competitors who are taking our business and your jobs." *Id.* at 2-3, 128 L.R.R.M. at 1081. The union later requested the employer to provide information in order that it "may be able to bargain intelligently for collective bargaining agreements." *Id.* at 3, 128 L.R.R.M. at 1081. Although certain items were provided, the employer refused to furnish the following items: copies of correspondence with customers regarding rate changes necessitated by employee wage rates; profit-and-loss statements for all facilities for recent years; compensation records for officers, directors, shareholders, and management employees; and information regarding investments made in all facilities. The employer explained its refusal by stating that it "is not now nor has it ever claimed an inability to pay" and added that its bargaining posture was driven by a need to "bring its wage costs per truck in line with the competition in order to remain competitive." *Id.*

The Board found that under *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 38 L.R.R.M. 2042 (1956), the employer had a duty to provide the financial information requested. 288 N.L.R.B. No. 70, slip op. at 4, 128 L.R.R.M. at 1082. Although noting that "a mere assertion of such competitive pressures is not necessarily a claim of inability to pay . . .", the Board held that the employer had gone beyond such an assertion and that references to the competition, the "no longer can pay" language, and discussion of substantial financial losses, made the letter, in its entirety, a claim of inability to pay. *Id.* at 6-7, 128 L.R.R.M. at 1082. Thus, held the Board, good faith bargaining required the employer to provide the union with information relevant to its financial status so that the union could assess, for itself, the true financial status of the employer's operations. *Id.* at 7, 128 L.R.R.M. at 1083.

⁶⁰ In *Cook Brothers Enterprises*, the Board's ruling meant that the strike was not an unfair labor practice strike by the time permanent replacements were hired. 288 N.L.R.B. No. 46, slip op. at 10, 128 L.R.R.M. 1074, 1077. Thus, replaced employees were entitled only to preferential rehiring as vacancies developed. *Id.* at 11, 128 L.R.R.M. at 1077.

⁶¹ For a discussion of withdrawal of recognition, see *infra* notes 123-32 and accompanying text.

Board's 1984 decision in *Clear Pine Mouldings, Inc.*, both the plurality and the concurring opinion adopted as the standard for striker misconduct serious enough to permit the employer to refuse reinstatement, that which "under the circumstances existing . . . may reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act."⁶² In the 1987 decision in *G.S.M., Inc.*, this standard was interpreted to allow discharge of employees for kicking and slapping vehicles crossing the picket line.⁶³ Later decisions have further expanded the reach of *Clear Pine Mouldings*.

In *Gem Urethane Corp.*, a case important for its allocation of the burden of proof, the Board ruled that the strike misconduct of five strikers exceeded the scope of protected strike activity and was sufficient to allow the employer to refuse them reinstatement.⁶⁴ One striker allegedly blocked an exit gate with his car and held a baseball bat in a threatening manner as non-strikers attempted to use the gate. Another allegedly blocked a non-striker's entrance to the plant, moving only when approached by the employer's vice president. A third striker allegedly pounded on a car being driven by a non-striker. A fourth allegedly helped surround a non-striker's car, beat on the car and screamed "I'll kill you," as well as allegedly threatening another non-striker that he would be beaten up. The fifth striker allegedly told one non-striker that if he went to work the strikers would "blow up the plant" or that he was "going to get a visit at his house," and allegedly told another non-striker that they would burn her car.⁶⁵ The conduct of another striker who allegedly, while in a drunken state, told a non-striker he was "going to kick [his] ass" was found insufficient to deny the striker reinstatement because it was "common banter" and had "no necessarily violent connotation."⁶⁶

The *Gem Urethane* Board defined the order and allocation of proof in striker misconduct cases by stating that an employer that refuses reinstatement of a worker on the grounds of strike misconduct must show that it had an "honest belief" that the striker had committed serious strike misconduct. If the employer meets this standard, then the General Counsel is to come forward with evidence showing that the striker did not engage in the misconduct in

⁶² 268 N.L.R.B. 1044, 1046, 1048, 115 L.R.R.M. 1113, 1114-15, 1118 (1984) (quoting *NLRB v. W.C. McQuaide, Inc.*, 552 F.2d 519, 528, 94 L.R.R.M. 2950, 2955 (3d Cir. 1977)).

⁶³ 284 N.L.R.B. No. 22, slip op. at 3-4, 125 L.R.R.M. 1133, 1134-35 (1987).

⁶⁴ 284 N.L.R.B. No. 122, slip op. at 14-15, 126 L.R.R.M. 1092, 1097-98 (1987).

⁶⁵ *Id.*

⁶⁶ *Id.* at 15 n.21, 126 L.R.R.M. at 1098 n.21.

question or that such misconduct was not serious enough to prevent reinstatement. "At all times, the burden of proving discrimination is that of the General Counsel."⁶⁷ Applying this standard, the Board held that the administrative law judge had misallocated the burden of proof by requiring the employer to prove the alleged strike misconduct on which the refusal to reinstate twelve strikers was based.⁶⁸ The Board found that the employer had met its burden by showing "a valid basis for an honest belief that the strikers were responsible for strike misconduct serious enough" for the employer to deny reinstatement even though there was no direct evidence of misconduct introduced into evidence.⁶⁹ The Board held that the issuance of an NLRB complaint against the union alleging striker misconduct by the named strikers was sufficient to give the employer a valid basis for its belief because "the Acting Regional Director would not have issued the complaint without a prior administrative determination that the alleged unfair labor practices set forth in the complaint had been committed."⁷⁰ Because the General Counsel failed to show that the alleged misconduct did not occur or that any misconduct that did occur was not serious enough for denial of reinstatement, the Board concluded that the employer's refusal to reinstate the strikers was not illegal.⁷¹

Another case extending an employer's ability to discharge strikers was *Tube Craft, Inc.*, in which the Board held that five strikers engaged in picket line misconduct that went beyond the limits of protected concerted activity in January, 1985, and thus could be legally discharged by the employer in December, 1985.⁷² On January 2, a picketing striker was found to have stopped walking back and forth and to have stood still in front of the driveway entrance to the plant while a truckdriver was attempting to back his truck in. The truck did not enter until police instructed picketers to move. The next day a group of picketers occupied the driveway until police arrived. On January 9, an exiting truck "was delayed for approximately 2-1/2 minutes" as picketers coordinated their patrolling to ensure that at least one of them was in the truck's path. On January 10, a truck was delayed approximately fifteen minutes and, later that day, another truck was delayed until police officers

⁶⁷ *Id.* at 11-12, 126 L.R.R.M. at 1096.

⁶⁸ *Id.* at 12, 126 L.R.R.M. at 1096-97.

⁶⁹ *Id.* at 13, 126 L.R.R.M. at 1097.

⁷⁰ *Id.* at 12-13, 126 L.R.R.M. at 1097.

⁷¹ *Id.* at 13, 126 L.R.R.M. at 1097.

⁷² 287 N.L.R.B. No. 51, slip op. at 8-9, 127 L.R.R.M. 1234, 1237 (1987).

arrived and talked with the strikers.⁷³ The Board majority in *Tube Craft* read *Clear Pine Mouldings* to reach the conduct of the strikers here. The Board stated that whether or not blocking access is, *per se*, the type of conduct for which reinstatement may be denied, the conduct at issue was sufficiently coercive and intimidating to the truck-drivers involved to justify discharge. The Board stated that: "[a]lthough peaceful picketing unquestionably includes the right to make nonthreatening appeals to those who are about to cross a picket line, the decision of such persons to ignore such appeals must be respected," and noted that the obstructions in question took place after the truckdrivers had decided to cross the picket line.⁷⁴ The Board found that all the discharged strikers except one had participated in at least two obstructions and that the other had stood in the path of a truck at one point during a fifty minute obstruction. On these grounds, the Board ruled that they had thus engaged in a pattern of conduct justifying discharge. Although the administrative law judge had inferred from the delay of almost one year between conduct and discharge that the asserted misconduct was only a pretext, the Board disagreed. It found that because the strikers' positions had been filled by permanent replacements, the employer had no need to take action in January. The Board found further that in December when the strikers renewed their offer to return to work, it had reason to clarify its position.⁷⁵ The Board ruled that the employer had reserved its rights by telling the union on January 9 that the fact it was treating strikers "as permanently replaced does not constitute a waiver of any of Tube Craft's legal rights with regard to picket line misconduct."⁷⁶

Cases like *Gem Urethane Corp.* and *Tube Craft* go beyond *Clear Pine Mouldings* and make it yet easier to discharge strikers. The allocation of the burden of proof in *Gem Urethane* is curious. No evidence of misconduct was submitted at hearing. Allowing an employer to satisfy a "reasonable belief" test in such a situation does not create confidence in the process of adjudication.

Also, the discharges for blocking access in *Tube Craft* may fail to recognize that at least some confrontation is part of picket line activity. To hold that employees can be fired for delaying a truck 2-1/2 minutes by coordinating their picket line patrolling is to in-

⁷³ *Id.* at 3-6, 127 L.R.R.M. at 1235-36.

⁷⁴ *Id.* at 6-8, 127 L.R.R.M. at 1236.

⁷⁵ *Id.* at 8-9, 127 L.R.R.M. at 1237.

⁷⁶ *Id.* at 2, 8, 127 L.R.R.M. at 1235, 1237.

terfere with the right to strike. The Board concluded the activity was "threatening" even though employees complied with police instructions and delays were not generally long. Employers often deal with problems of mass picketing or blocking access to a plant by obtaining state court injunctive relief prohibiting such conduct.⁷⁷ The United States Supreme Court has ruled that states have a valid interest in preventing violence and that federal labor law does not preempt state court jurisdiction in such cases.⁷⁸ Thus, an employer possesses the means to protect its valid interests without discharging every employee who temporarily blocks access. To uphold discharge for all the incidents involved in *Tube Craft*, especially where the employer delayed eleven months before announcing the discharges, is to invite employers to discharge more and more strikers. The discharge of workers under uncertain standards subjects both employer and employee to years of delay awaiting the outcome of unfair labor practice litigation. There is admittedly a fine line between protected confrontation and other types of unprotected activity. The Board needs to define this line more precisely, rather than assume that otherwise peaceful activity is "threatening" merely because it inconveniences the employer.

C. *Unfair Labor Practice Strikes*

Recent decisions of the Board also affect the important question of whether a strike can be designated an "unfair labor practice strike." It is well settled that the standard for determining whether a strike is an unfair labor practice strike is whether it is caused "in whole or in part" by an unfair labor practice on the part of the employer.⁷⁹ The rule was recently restated by the Board in *L.A. Water Treatment, Division of Chromalloy American Corp.*:

Employees are unfair labor practice strikers if an employer's unlawful conduct contributed in part to their decision to strike, even though their decision also may have been influenced by economic issues. However, the Board has long recognized that unfair labor practices may precede a strike without being a cause of the strike. A causal con-

⁷⁷ See Gordon, *Preemption and Mass Picketing — Recent Cases and Developments*, 4 LAB. LAW. 45, 49-52 (Winter 1988).

⁷⁸ *United Auto., Aircraft & Agricultural Implement Workers of Am. v. Wisconsin Employment Relations Bd.*, 351 U.S. 266, 274-75, 38 L.R.R.M. 2165, 2168 (1956).

⁷⁹ E.g., *Citizens Nat'l Bank of Willmar*, 245 N.L.R.B. 389, 391, 102 L.R.R.M. 1467, 1469 (1979); *Tufts Bros.*, 235 N.L.R.B. 808, 810, 98 L.R.R.M. 1204, 1206 (1978).

nection between the unfair labor practices and the strike must be demonstrated in order to establish that employees are unfair labor practice strikers.⁸⁰

The issue is a critical one because if a strike is labelled an "unfair labor practice strike," an employer must reinstate strikers upon their unconditional offer to return to work. If a strike is not deemed to have been caused, at least in part, by employer unfair practices, an employer may retain permanent replacements and not recall strikers until vacancies occur.⁸¹

If an employer commits a single glaring unfair labor practice, the issue of causation is not too difficult. In *Michigan Ladder Co.*, for example, the Board found that the cause of a strike was the employer's unlawful unilateral subcontracting of work.⁸² In concluding that the strike was caused by the unfair labor practice, the Board gave substantial weight to the union's continuous and vigorous objections to the subcontracting throughout the course of bargaining.⁸³

In cases where numerous unfair labor practices have been alleged, however, unions have faced more difficulty in establishing causation. In *Sunbelt Enterprises*, employees struck from September 23 to November 22, 1983.⁸⁴ The administrative law judge found that the strike had been an unfair labor practice strike and that, therefore, the employer had unlawfully refused to reinstate certain strikers.⁸⁵ The National Labor Relations Board overturned this ruling. At the outset of the strike, an employee told the employer that the strike was "due to unfair labor practices" and picketers carried signs identifying the strike as an unfair labor practice strike. At a hearing, the same employee testified that the strike was precipitated by the company's failure to reinstate one employee, Borders, and the slowness of negotiations. Another employee testified that the failure to reinstate Borders and the issuance of written disciplinary warnings to leading union supporters caused the strike. The warnings were issued to one employee on September 6 and 21, to another

⁸⁰ 286 N.L.R.B. No. 88, slip op. at 15-16, 126 L.R.R.M. 1307, 1312 (1987).

⁸¹ *NLRB v. MacKay Radio & Tel. Co.*, 304 U.S. 333, 345-46 (1938); see also *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 379, 66 L.R.R.M. 2737, 2738 (1967); *Laidlaw Corp.*, 171 N.L.R.B. 1366, 1369-70, 68 L.R.R.M. 1252, 1258 (1968), *enforced*, 414 F.2d 99, 103, 71 L.R.R.M. 3054, 3058 (7th Cir. 1969), *cert. denied*, 397 U.S. 920, 73 L.R.R.M. 2537 (1970).

⁸² 286 N.L.R.B. No. 4, slip op. at 3-4, 127 L.R.R.M. 1092, 1093 (1987).

⁸³ *Id.* at 3, 127 L.R.R.M. at 1093.

⁸⁴ 285 N.L.R.B. No. 144, slip op. at 7, 126 L.R.R.M. 1363, 1366 (1987).

⁸⁵ *Id.*

employee on September 21, and to two other employees on September 23.⁸⁶

The National Labor Relations Board concluded that because it found the failure to reinstate Borders to be legal, and because the slowness of negotiations had not been due to employer unfair labor practices, the strike was not an unfair labor practice strike. Although the Board agreed with the administrative law judge that the disciplinary warnings had been illegal, it concluded that the General Counsel had failed to sufficiently prove a causal relationship between the warnings and the strike.⁸⁷ The Board relied on the fact that an employee made no mention of the warnings when he spoke to the plant manager on the day the strike started and testimony of the two employees that Borders' discharge, which was found to be lawful by the Board, was a cause of the strike.⁸⁸

Similarly, in *Chromalloy American Corp.*, the union struck after the layoff of fifteen union supporters and the discharge of two union supporters.⁸⁹ The administrative law judge found both the layoffs and discharges to have been discriminatorily motivated and concluded that the strike was an unfair labor practice strike. Consequently, the judge ruled that the employer was not within its rights to hire permanent replacements.⁹⁰ The National Labor Relations Board disagreed with the judge as to the legality of the layoffs and ruled that the employer would have implemented the layoff for economic reasons even in the absence of the employees' union activity.⁹¹ The Board then determined that the strike was based on the layoffs and, thus, had not been an unfair labor practice strike. The Board noted that the two illegal discharges took place on January 14 and April 8, 1980, well before the April 22, 1981, strike but the layoff occurred immediately before the strike.⁹² In addition,

⁸⁶ *Id.*

⁸⁷ *Id.* at 7-8, 126 L.R.R.M. at 1366.

⁸⁸ *Id.* at 8, 126 L.R.R.M. at 1366. Compare *American Gypsum Co.*, 285 N.L.R.B. No. 16, slip op., 128 L.R.R.M. 1105 (1987). In *American Gypsum*, the Board concluded that the strike was an unfair labor practice strike despite finding that protracted refusal to arbitrate was not illegal. *Id.* at 4, 6, 128 L.R.R.M. at 1107, 1108. The administrative law judge had found the refusal to arbitrate an unfair labor practice that contributed to causing the strike. *Id.* at 5, 128 L.R.R.M. at 1107-08. The Board relied on the fact that union officers had told employees about the employer's unlawful scheduling changes and refusal to process grievances as well as the lawful refusal to arbitrate. *Id.* at 6, 128 L.R.R.M. at 1108.

⁸⁹ 286 N.L.R.B. No. 88, slip op. at 3-4, 126 L.R.R.M. 1307, 1308 (1987).

⁹⁰ *Id.* at 15-17, 128 L.R.R.M. at 1312-13.

⁹¹ *Id.* at 10, 126 L.R.R.M. at 1310.

⁹² *Id.* at 16-17, 126 L.R.R.M. at 1312.

the Board found persuasive several pieces of evidence: soon after picketing began, the general manager asked striking employees what they wanted, and one replied that the layoff was "unfair" and that the employees should be reinstated; one employee testified that a union meeting had discussed picketing in connection with the layoffs; and two employees testified that the layoff was the basis of their decision to participate in the strike and that they thought the layoff was "unfair" or an "unfair labor practice."⁹³ Based on the timing of the strike, and the fact that the strikers failed to mention the discharges, the Board held that the strike was caused by the layoff, not by the earlier discharges. The Board reached this decision even though leaflets distributed by the strikers stated that the strikers would return to work when the employer reinstated the laid-off employees *and* the two employees who had been illegally discharged the previous year.

These cases demonstrate the potential difficulty a union may face where it asserts a number of unfair labor practices. If one of the challenged employer actions is ultimately held not to have been an unfair labor practice, there is a danger that the Board will find the strike to have been caused by that action and not the others. Thus, a union must be careful to communicate the message that the strike is in protest of each and every alleged unfair labor practice. To focus on one is to run the risk of the employees in *Sunbelt Enterprises* and *Chromalloy American Corp.* Further, the Board's reliance on what employees said to a supervisor on the picket line during the strike and on their testimony at a hearing creates an additional risk for the union. The employees no doubt thought that they were establishing the strike as an unfair labor practice strike by their statements and testimony, inasmuch as they thought the layoffs were illegal, as, indeed, did the administrative law judge. If the Board continues to give such weight to statements made by striking employees, unions will, in effect, have to give strikers a script with which to protect themselves from leading and self-serving employer questions.

These cases also raise a question as to the basis for, and importance of, an employer's "right" to hire permanent replacements. If an employer has committed unfair labor practices prior to or during a strike, should the benefit of the doubt as to whether such unfair labor practices caused or prolonged the strike always go to the

⁹³ *Id.*

wrongdoing employer, as it seems to in *Sunbelt Enterprises* and *Chromalloy American*, or should it go to the employees who will otherwise lose their right to reinstatement?⁹⁴

D. *Rights of Employees During a Strike*

Recent decisions of the National Labor Relations Board also deal with the rights of replaced strikers and with the rights of employees disabled at the time the strike begins.

I. Rights of Replaced Strikers

With regard to replaced strikers, the Board has recognized that although economic strikers may be permanently replaced, they retain the right to make unconditional offers of reinstatement, to be reinstated upon such offers if positions are available, and to be placed on a preferential hiring list upon such offers if positions are not available at the time of the offer.⁹⁵ Thus, in *Hilton Hotels Corp.*, the Board determined that the employer had failed to establish that two strikers' positions had been occupied by permanent replacements when they made their unconditional offer to return.⁹⁶ For this reason, the employer was held to have violated the National Labor Relations Act in refusing to reinstate them.

Whether an employer violates the law by threatening strikers with replacement will turn on the legality of the threat and the accuracy of the representation. In *Chromalloy American Corp.*, the Board held that the employer did not violate the Act when it sent letters to economic strikers telling them that if they did not return to work by a certain date, management would permanently replace those who had not returned to their jobs. The Board reasoned that

⁹⁴ Indeed, if an employer is allowed to rest a "reasonable belief" of striker misconduct sufficient for discharge on the mere issuance of an unfair labor practice *complaint* by the General Counsel, *Gem Urethane Corp.*, 284 N.L.R.B. No. 122, slip op., 128 L.R.R.M. 1092 (1987), why should not the union be able to premise an unfair labor practice strike on conduct that is the subject of both an unfair labor practice complaint and a finding by an administrative law judge that such conduct has occurred, was an unfair labor practice, and caused the strike? Although a reasonable belief test would admittedly be a change in the law, it might better comport with the protection Congress intended for strike activity and serve to deter employer bargaining conduct close to the line of illegality.

⁹⁵ *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 380-81, 66 L.R.R.M. 2737, 2739 (1967); *Laidlaw Corp.*, 171 N.L.R.B. 1366, 1369-70, 68 L.R.R.M. 1252, 1258 (1968), *enforced*, 414 F.2d 99, 103-06, 71 L.R.R.M. 3054, 3058-60 (7th Cir. 1969), *cert. denied*, 397 U.S. 920, 73 L.R.R.M. 2537-38 (1970).

⁹⁶ 287 N.L.R.B. No. 56, slip op., 127 L.R.R.M. 1158 (1987) (supplementing 272 N.L.R.B. 488, 488-89, 117 L.R.R.M. 1298 (1984)).

the letters "lawfully informed the strikers that they were subject to permanent replacement."⁹⁷ Subsequent letters that advised employees they had been permanently replaced and thus were "no longer employed" by the employer were found illegal.⁹⁸ These letters went further than merely advising employees they had been replaced. The "no longer employed" language misstated the law by seemingly indicating to employees that they had been discharged for their strike activity.⁹⁹ Then Chairman Dotson dissented, arguing that the letters were not illegal and that, in light of earlier letters stating that the employer recognized employees' right to strike and discussed only permanent replacement, the employees would not reasonably have believed themselves discharged.¹⁰⁰ The majority responded: "'Permanent replacement' and 'permanently replaced' are, after all, terms of art; their meanings are well understood by labor law practitioners, but perhaps not by most employees."¹⁰¹ Thus, the majority concluded that the employer had illegally discharged the eleven strikers to whom the "no longer employed" letters had been sent.

Finally, in June, 1988, the National Labor Relations Board issued a decision that seems to expand an employer's use of replacements and further limit the rights of replaced economic strikers. In *Aqua-Chem, Inc.*, the Board held that an economic striker who has been permanently replaced and who unconditionally offers to return to work is entitled to do so *only* if the General Counsel establishes a *prima facie* case that the permanent replacement has departed without a reasonable expectancy of recall.¹⁰² In *Aqua-Chem*, fifteen employees were laid off for an indefinite period and told to look for other jobs and apply for unemployment compensation. Fourteen of the fifteen laid off were permanent replacements. When the employer began recalling employees, it took the position that the layoff of replacements did not create vacancies and that replacements could be recalled over replaced strikers.¹⁰³

⁹⁷ 286 N.L.R.B. No. 88, slip op. at 11, 126 L.R.R.M. 1307, 1310 (1987).

⁹⁸ *Id.* at 12-13, 126 L.R.R.M. at 1311. The Board quoted Eagle Comtronics, Inc., 263 N.L.R.B. 515, 516, 111 L.R.R.M. 1005, 1006 (1982), for the proposition that an "employer may address the subject of striker replacement without fully detailing the protections" enjoyed by economic strikers, and that an employer's statements on job status are not coercive as long as they are consistent with the law. 286 N.L.R.B. No. 88, slip op. at 12, 126 L.R.R.M. at 1311.

⁹⁹ 286 N.L.R.B. No. 88, slip op. at 13-14, 126 L.R.R.M. at 1311-12.

¹⁰⁰ *Id.* at 22-24, 126 L.R.R.M. at 1313-14.

¹⁰¹ *Id.* at 14, 126 L.R.R.M. at 1311.

¹⁰² 288 N.L.R.B. No. 121, slip op. at 7, 128 L.R.R.M. 1237, 1239 (1988).

¹⁰³ *Id.* at 3-4, 128 L.R.R.M. at 1238.

The administrative law judge reasoned that an economic layoff of permanent replacements for a prolonged indefinite period was *per se* a vacancy triggering the reinstatement rights of unreinstated strikers.¹⁰⁴ The Board panel majority disagreed with this analysis, ruling that it "fails to satisfactorily take into account the employer's right to permanently replace economic strikers and to assure the replacements of the permanency of their positions."¹⁰⁵ The Board panel majority stated that economic layoff of replacements did not necessarily create a vacancy triggering the rights of replaced strikers. The majority purported to balance the employer's rights to replace economic strikers with the rights of replaced strikers. The Board held that whether a vacancy is created is to be tested by the reasonableness of the laid off replacements' expectation of recall. This expectation is to be measured by objective standards including the employer's business history, future plans, the length and circumstances of the layoff, and what employees were told by the employer concerning recall.¹⁰⁶ In the circumstances of this case, held the Board, a vacancy was created because of the prolonged and indefinite nature of the layoff. Thus, the employer violated the National Labor Relations Act by recalling laid off replacements instead of economic strikers who had unconditionally offered to return to work.¹⁰⁷

The rule announced in *Aqua-Chem* is inconsistent with prior Board law that has allowed an employer to recall from layoff permanent replacements ahead of unreinstated strikers only in such narrow circumstances as a temporary layoff of very short duration. In *Bancroft Cap Co.*, for example, the Board found no violation of law where the employer recalled permanent strike replacements ahead of unreinstated strikers because the permanent strike replacements had been laid off for only a few days due to a shortage of materials.¹⁰⁸ In *Giddings & Lewis, Inc.*, the Board clearly limited *Bancroft* in rejecting the administrative law judge's holding that, under *Bancroft*, unreinstated strikers do not have a statutory right of recall ahead of laid off replacements who have a "reasonable

¹⁰⁴ *Id.* at 4-5, 128 L.R.R.M. at 1238-39.

¹⁰⁵ *Id.* at 5, 128 L.R.R.M. at 1238.

¹⁰⁶ *Id.* at 6-7, 128 L.R.R.M. at 1239.

¹⁰⁷ *Id.* at 8-9, 128 L.R.R.M. at 1240. Member Johansen concurred as to the illegality of the employer's actions, but disagreed with the majority's rule that the General Counsel has the burden of proving vacancies, information that is uniquely within the employer's purview. *Id.* at 13, 128 L.R.R.M. at 1240 (Johansen, Member, concurring).

¹⁰⁸ 245 N.L.R.B. 547, 547, 550-53, 102 L.R.R.M. 1461, 1462 (1979).

expectancy of recall."¹⁰⁹ The Board in *Giddings & Lewis* specifically noted that the layoffs in *Bancroft* were for periods of two to seven days and described *Bancroft* as permitting the recall of laid-off employees before unreinstated strikers *only* in situations involving "lay-offs of relatively short duration such as would occur from acts of God, brief parts or materials shortages, or relatively short-term loss of business."¹¹⁰ The rule of *Aqua-Chem*, however, is not necessarily limited to layoffs of short duration caused by factors beyond an employer's control.

Further, *Aqua-Chem* may place strikers' reinstatement rights within the control of an employer, who can determine to hire so many permanent replacements as to require a later layoff and who controls what laid off replacements are told about recall. The employer, too, can determine the length and circumstances of layoff. Finally, as Member Johansen noted, the General Counsel should not have the burden of proving vacancies when the existence of vacancies is an issue uniquely within the employer's knowledge, not the General Counsel's.¹¹¹ At some point, one must ask when the replacement of strikers and retention of replacements, even after layoff, becomes inherently destructive of employee rights. One must also ask whether the employer's "right" to hire replacements should be placed on the same footing via a balancing test as the employee's Section 7 right to strike, which is the basis for his or her right to reinstatement.

2. Benefits Paid to Disabled Employees

In *Texaco, Inc.*,¹¹² the National Labor Relations Board considered the issue of whether an employer may end payments to disabled employees when a strike begins. In *Texaco*, the Board overruled the coercive effects test of *Emerson Electric*¹¹³ and applied the *Great Dane* test¹¹⁴ in finding that the struck employer failed to es-

¹⁰⁹ 255 N.L.R.B. 742, 744, 106 L.R.R.M. 1391, 1393 (1981), *enforcement denied*, 675 F.2d 926, 110 L.R.R.M. 2121 (7th Cir. 1982).

¹¹⁰ *Id.*

¹¹¹ 288 N.L.R.B. No. 121, slip op. at 13-15, 128 L.R.R.M. at 1239-40.

¹¹² 285 N.L.R.B. No. 45, slip op., 126 L.R.R.M. 1001 (1987).

¹¹³ E.L. Wiegand Div., Emerson Elec. Co., 246 N.L.R.B. 1143, 103 L.R.R.M. 1073 (1979), *enforced in part*, 650 F.2d 463, 107 L.R.R.M. 2112 (3d Cir. 1981), *cert. denied*, 455 U.S. 939, 109 L.R.R.M. 2778 (1982).

¹¹⁴ *NLRB v. Great Dane Trailers*, 388 U.S. 26, 65 L.R.R.M. 2465 (1967). The Court in *Great Dane* set forth the following test for violations turning on unlawful motivation:

First, if it can reasonably be concluded that the employer's discriminatory conduct was "inherently destructive" of important employees rights, no proof of

establish a legitimate and substantial business justification for terminating the accident and sickness benefits of three disabled employees and for terminating pension credits to one disabled employee.¹¹⁵ In the same case the Board held legal the employer's refusal to continue paying employee health insurance premiums during the strike.¹¹⁶ Accident and sickness benefits as well as pension credits were viewed as accrued benefits, the denial of which during a strike created an inference of unlawful conduct that was not rebutted by the employer.¹¹⁷ By contrast, the employer's continued payment of health insurance premiums was not perceived to be an accrued benefit.¹¹⁸

The significance of the change in analysis was demonstrated in five cases involving Amoco Oil Co.,¹¹⁹ in which the Board applied the principles set forth in *Texaco*. It concluded that the employer had come forward with sufficient business reasons to justify the discontinuance of sickness and disability payments as well as occupational illness and injury benefits during a strike and that the discontinuance of benefits was lawful.¹²⁰ The company had maintained a "closed gate" policy during the strike under which no member of the bargaining unit was permitted to work, whether he or she wished to or not. The benefits had been uniformly provided only to employees who were (1) sick and disabled and (2) prevented by reason of such sickness or disability from working a shift *they*

an antiunion motivation is needed and the Board can find an unfair labor practice even if the employer introduces evidence that the conduct was motivated by business consideration. Second, if the adverse effect of the discriminatory conduct on employee rights is "comparatively slight," an antiunion motivation must be proved to sustain the charge if the employer has come forward with evidence of legitimate and substantial business justifications for the conduct. Thus, in either situation, once it has been proved that the employer engaged in discriminatory conduct which could have adversely affected employee rights to *some* extent, the burden is on the employer to establish that it was motivated by legitimate objectives since proof of motivation is most accessible to him.

Id. at 34, 65 L.R.R.M. at 2469 (emphasis in original).

¹¹⁵ *Texaco, Inc.*, 285 N.L.R.B. No. 45, slip op. at 18, 126 L.R.R.M. at 1007.

¹¹⁶ *Id.* at 19, 126 L.R.R.M. at 1007.

¹¹⁷ *Id.* at 16-18, 126 L.R.R.M. at 1006-07.

¹¹⁸ *Id.* at 19, 126 L.R.R.M. at 1007.

¹¹⁹ *Amoco Oil Co.*, 285 N.L.R.B. No. 117, slip op., 126 L.R.R.M. 1265 (1987); *Amoco Oil Co.*, 286 N.L.R.B. No. 80, slip op., 126 L.R.R.M. 1268 (1987); *Amoco Oil Co.*, 286 N.L.R.B. No. 38, slip op., 126 L.R.R.M. 1269 (1987); *Amoco Oil Co.*, 286 N.L.R.B. No. 40, slip op., 126 L.R.R.M. 1271 (1987); *Amoco Oil Co.*, 286 N.L.R.B. No. 39, slip op., 126 L.R.R.M. 1273 (1987).

¹²⁰ 285 N.L.R.B. No. 117, slip op. at 6-9, 126 L.R.R.M. 1265, 1267-68.

otherwise would be scheduled to work. Because sick and disabled employees would not have been scheduled to work because of the closed gate policy, they were deemed ineligible for the benefits. Because the policy had been uniformly applied in non-strike situations, the Board found it non-discriminatory.¹²¹ Finally, the Board ruled that there was no evidence that the company's conduct was inherently destructive of employee's rights.¹²² The risk to strikers and unions, of course, is that employers reading *Texaco* and *Amoco* may attempt to restructure their benefit plans to make it more difficult for employees to collect benefits during a strike.

E. *Withdrawal of Recognition*

The issue of withdrawal of recognition after a strike is tied to all of the above subjects. The National Labor Relations Board recently restated what it considers the controlling principles of law in *Station KKHI*:

Absent unusual circumstances, there is an irrebuttable presumption that a union enjoys majority status during the first year following its certification. On expiration of the certification year, the presumption of majority status continues but may be rebutted. An employer who wishes to withdraw recognition after a year may do so in one of two ways: (1) by showing that on the date recognition was withdrawn the union did not in fact enjoy majority status, or (2) by presenting evidence of a sufficient objective basis for a reasonable doubt of the union's majority status at the time the employer refused to bargain.¹²³

Cases arising during the 1987-88 *Survey* period have, for the most part, recognized that the test is not an easy one to meet.¹²⁴ In *Curtin Matheson Scientific, Inc.*, the employer's evidence in support of its doubt of the union's majority status consisted of (1) the fact that five of the twenty-seven original unit employees crossed the picket line at the beginning of the strike; (2) the resignation of two employees; (3) the hiring of twenty-nine replacement workers who crossed the picket line; and (4) statements by seven employees.¹²⁵

¹²¹ *Id.* at 7, 126 L.R.R.M. at 1267.

¹²² *Id.* at 8, 126 L.R.R.M. at 1267.

¹²³ 284 N.L.R.B. No. 113, slip op. at 4, 125 L.R.R.M. 1281, 1282 (1987).

¹²⁴ For a general treatment of the subject of withdrawal of recognition, see Ray, *Withdrawal of Recognition from an Incumbent Union Under the National Labor Relations Act: An Appraisal*, 28 VILL. L. REV. 869 (1983).

¹²⁵ 287 N.L.R.B. No. 35, slip op. at 7-8, 127 L.R.R.M. 1114, 1116 (1987).

In holding the employer to have acted unlawfully, the Board noted that failure to join a strike does not necessarily constitute a repudiation of union representation, that statements critical of how a union conducts the strike do not necessarily constitute repudiation, and that no presumption could be made as to the union sentiments of the replacements.¹²⁶

Withdrawal of recognition cannot be valid if the loss of support is due to employer unfair labor practices.¹²⁷ Thus, the determination of whether pre-strike and post-strike bargaining has been conducted in good faith can be crucial. The link is demonstrated in *Gulf States Manufacturers, Inc.*, a case in which the employer was accused of unlawful surface bargaining and unlawful withdrawal of recognition.¹²⁸ A majority of the Board panel found lawful both the employer's bargaining activity and its withdrawal of recognition after it received a petition signed by ninety-two of the 120 unit employees stating that said employees no longer wished to be represented by the union. Consequently, the majority held that the employer did not violate the National Labor Relations Act when it unilaterally implemented post withdrawal changes in wages and benefits and layoffs.¹²⁹

In dissent, Member Johansen argued that the employer had engaged in dilatory bargaining and had unlawfully withdrawn recognition. He pointed out that from October 24, 1980, to November 11, 1981, the parties met for only twelve bargaining sessions and one informal discussion despite union efforts to meet far more often.¹³⁰ Member Johansen's dissenting opinion chronicled numerous occasions on which management representatives failed to keep promises to set up bargaining sessions and were unavailable for bargaining for weeks at a time.¹³¹ He argued that the company's insistence on infrequent bargaining sessions combined with its refusal to provide information relevant to negotiations constituted a refusal to meet at reasonable times and evidenced a desire to avoid

¹²⁶ *Id.* at 8-9, 127 L.R.R.M. at 1116-17; see also *Station KKHI*, 284 N.L.R.B. No. 113, slip op., 125 L.R.R.M. 1281 (1987) (no presumption with regard to strike replacements); *Century Papers, Inc.*, 284 N.L.R.B. No. 126, slip op., 126 L.R.R.M. 1360 (1987) (withdrawal of recognition unlawful where employees' alleged dissatisfaction with union consisted of criticism but not repudiation of union).

¹²⁷ See Ray, *supra* note 124, at 883.

¹²⁸ 287 N.L.R.B. No. 4, slip op., 127 L.R.R.M. 1182 (1987).

¹²⁹ *Id.* at 2, 127 L.R.R.M. at 1182.

¹³⁰ *Id.* at 9, 127 L.R.R.M. at 1184 (Johansen, Member, dissenting in part).

¹³¹ *Id.* at 7-9, 127 L.R.R.M. at 1183-84 (Johansen, Member, dissenting in part).

reaching agreement. Thus, in Member Johansens's view, the employer was not free to withdraw recognition.¹³²

The *Gulf States* case demonstrates the consequences of relaxing restrictions on employers at the bargaining table and during the strike. If an employer bargains without a good faith desire to reach agreement or bargains regressively after a strike, settlement is unlikely. Delays can create disaffection among some bargaining unit members and cause others to permanently leave the bargaining unit. Disaffection and defections can make it easier for an employer to withdraw recognition. Further, and more importantly, if employer bargaining behavior that is regressive, disruptive, or in bad faith is not deemed an unfair labor practice, a strike caused by such activity will not be an unfair labor practice strike and the employer may hire and retain permanent replacements. Persons who have crossed a union's picket line to take strikers' jobs are far more likely to be willing to provide the employer a basis for withdrawal by openly rejecting the union than are employees who have been union members under past contracts.

IV. CONCLUSION

Many of the decisions discussed above protect employee and union rights in a strike setting to a lesser degree than the decisions of prior National Labor Relations Boards. It is the effect of these decisions when read together, however, that defines their real impact because the effect of each is related to and enhances the impact of the others. Allowing management, after a strike begins, to take almost retaliatory measures at the bargaining table without defining such conduct as unlawful,¹³³ and broadening the range of activities for which strikers can be discharged,¹³⁴ means that strikes prolonged by such bargaining practices and discharges will not be unfair labor practice strikes and replaced strikers will not be entitled to reinstatement at the end of the strike. Making it more difficult for unions to prove that strikes were precipitated by even proven unfair labor practices¹³⁵ has the same effect of reducing the reinstatement rights of strikers and enhancing an employer's ability to permanently replace strikers. The job security of replaced strikers is further diminished by a decision that provides that, even after

¹³² *Id.* at 9-10, 127 L.R.R.M. at 1184 (Johansen, Member, dissenting in part).

¹³³ See *supra* notes 33-61 and accompanying text.

¹³⁴ See *supra* notes 62-78 and accompanying text.

¹³⁵ See *supra* notes 79-94 and accompanying text.

being laid off, a strike replacement can have greater reinstatement rights than a replaced striker despite the fact that such striker has unconditionally offered to return to work and has substantially more seniority than the replacement.¹³⁶ Read together, these decisions indicate that striking employees are increasingly vulnerable, through replacement, to what is almost the functional equivalent of discharge. Finally, if regressive post-strike bargaining, discharge of strikers, and maintaining employment of replacements even after layoff are not illegal, then striking employee disaffection or defection caused by these acts, as well as the natural antipathy of replacements for the union that is trying to get them out, can help the employer to build a case, under the current state of the law, for withdrawing recognition.¹³⁷ If withdrawal succeeds, employees are left without a union. It is not cynical to suggest that at least some employers plan their post-strike strategy with this end in mind. In summary, the law provides less protection than it did to unions and those they represent.

With the strike weapon less effective and the possibility of replacement greater, unions may have to explore other means of pressuring the employer. Publicity and product boycotts will become more important. Other means may be explored as well. The United Paperworkers International Union, for example, is reported to have waged its strike against International Paper with new tactics including targeting firms that share board directors to urge settlement or resign from the board. Major stockholders are asked to sell their stock and a caravan of fifty strikers travels from town to town publicizing the strike and seeking aid from other labor supporters.¹³⁸

In addition, unions that are strong enough may decide to protect themselves at the bargaining table from the deterioration of legal protection. In *Chicago Typographical Unions, No. 16 v. Chicago Tribune Co.*, a federal district court enforced a "Supplemental Agreement" that provided for permanent employment for union members subject only to discharge for cause and provided that while the agreement was suspended by a strike, it resumed immediately upon settlement of the strike.¹³⁹ The court read the agreement to

¹³⁶ See *supra* notes 95-111 and accompanying text.

¹³⁷ See *supra* notes 123-32 and accompanying text.

¹³⁸ *New Strike Tactics Against International Paper*, 127 Lab. Rel. Rep. (BNA) 154 (Feb. 1, 1988).

¹³⁹ 648 F. Supp. 592, 593-94, 124 L.R.R.M. 2771, 2773 (N.D. Ill. 1986).

require the employer to return strikers to their jobs when the unions made an unconditional offer to return to work even though replacements had been hired.¹⁴⁰ Even more explicit agreements are possible.

With the devaluation of the strike weapon for unionized workers and the growing resistance of employers to further organization, unions may turn to Congress for benefits and protections employees have been unable to achieve at the bargaining table. In some cases, Congress will be asked to help unions be more effective by amending the National Labor Relations Act. On May 10, 1988, for example, Representative Joseph Brennan, a Democrat from Maine, introduced a bill, H.R. 4552, to restrict an employer's right to hire permanent replacements during a strike.¹⁴¹ The bill would amend the Taft-Hartley Act to make it an unfair labor practice for an employer to hire or threaten to hire permanent replacements for striking workers during the first ten weeks of a strike. Brennan stated that the proposed legislation was necessary to "restore the spirit of the collective-bargaining process" and that the legislation "will give the workers involved in the labor dispute 10 weeks of protection before they can in effect be fired by management by the hiring of permanent replacements."¹⁴²

Congress will also be asked to provide benefits and protections directly. Representative Howard Berman has referred, for example, to a "growing perception" in Congress that the National Labor Relations Act has failed to guarantee employees relatively equal power with their employers, and in light of the low level of union representation in the workforce "has become increasingly insignificant."¹⁴³ For this reason, he sees the polygraph, high-risk notification, and family and medical leave bills as responsive to the increasing need to regulate the workplace directly.

Finally, one must wonder how calls for increased labor management cooperation will fare if unions are perceived to be of decreasing influence and power, even at the bargaining table. For cooperative endeavors to succeed, managers must surrender both autonomy and information, sacrifices that may more easily be obtained by a bargaining partner perceived to be strong.

¹⁴⁰ *Id.* at 595, 124 L.R.R.M. at 2773.

¹⁴¹ See *Protection for Strikers*, 128 Lab. Rel. Rep. (BNA) 126 (May 23, 1988).

¹⁴² *Id.*

¹⁴³ Berman, *Labor Legislation Before the 100th Congress*, 10 INDUS. REL. L.J. 51, 57 (1988).