

LOCKOUTS INVOLVING REPLACEMENT WORKERS: AN EMPIRICAL PUBLIC POLICY ANALYSIS AND PROPOSAL TO BALANCE ECONOMIC WEAPONS UNDER THE NLRA

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The greatest harm caused by the cancellation of the 1995-96 NBA season as a result of the lockout will be the loss of NBA basketball for . . . fans, and all the cities, concession workers, broadcasting employees and others who depend on the game for their livelihood.

—Locked-out NBA Guard, Michael Jordan¹

It's almost like the reason is they don't want us around.

—Locked-out Trailmobile worker, Gary Collins (president, United Paperworkers Int'l Union Local 7591)²

When we deal with the lockout and strike, we are dealing with weapons of industrial warfare.

—Justice Arthur Goldberg, *American Ship Building Co. v. NLRB*³

1. *Jordan Claims Loss of Season Would Erode Skills*, STAR-TRIB. (Minneapolis-St. Paul), Sept. 8, 1995, at 8C (omission in original), available in 1995 WL 3678450.

2. *Trailmobile Could Become Another Long Labor Dispute*, THE PANTAGRAPH (Bloomington, Ill.), Feb. 22, 1996, at C6, available in 1996 WL 5650138.

3. 380 U.S. 300, 338 (1965) (Goldberg, J., concurring).

I. INTRODUCTION

American jurisprudence has long recognized that employers and workers have, to a considerable degree, competing economic interests.⁴ Congress drafted the National Labor Relations Act (“NLRA”),⁵ premised upon this idea,⁶ to establish a collective bargaining process driven by a set of economic weapons available to workers and employers.⁷ Federal labor law envisioned that the free play of economic forces—sometimes favoring workers, sometimes favoring employers—would determine the provisions of collective bargaining agreements.⁸ Government would merely be a referee in this

4. *See* *Iron Molders’ Union No. 125 v. Allis-Chalmers Co.*, 166 F. 45, 50-51 (7th Cir. 1908). Dividends and wages must both come from the joint product of capital and labor. And in the struggle wherein each is seeking to hold or enlarge his ground, we believe it is fundamental that one and the same set of rules should govern the action of both contestants. . . . In contests between capital and labor the only means of injuring each other that are lawful are those that operate directly and immediately upon the control and supply of work to be done and of labor to do it, and thus directly affect the apportionment of the common fund, for only at this point exists the competition, the evils of which organized society will endure rather than suppress the freedom and initiative of the individual.

Id.

5. Ch. 372, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-169 (1994)).

6. Sen. Robert Wagner offered the following insight when he introduced the bill that eventually became the NLRA.

The law has long refused to recognize contracts secured through physical compulsion or duress. The actualities of present-day life impel us to recognize economic duress as well. We are forced to recognize the futility of pretending that there is equality of freedom when a single workman, with only his job between his family and ruin, sits down to draw a contract of employment with a representative of a tremendous organization having thousands of workers at its call. Thus the right to collective bargaining, guaranteed to labor by section 7(a) of the Recovery Act, is a veritable charter of freedom of contract; without it, there would be slavery by contract.

78 CONG. REC. 3678 (1934), *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935, at 20 (1959).

7. The Supreme Court has on numerous occasions offered this assessment. *See* *NLRB v. Insurance Agents’ Int’l Union*, 361 U.S. 477, 489 (1960) (“The presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized.”). In examining the workers’ main weapon, the Court has said that the “right to strike is predicated upon the conclusion that a strike when legitimately employed is an economic weapon which in great measure implements and supports the principles of the collective bargaining system.” *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 234 (1963). The Court has taken a similar view concerning an employer’s main offensive weapon, a lockout, in stating that an employer “may in various circumstances use the lockout as a legitimate economic weapon.” *NLRB v. Brown (Brown Food Store)*, 380 U.S. 278, 283 (1965).

8. *See* *Lodge 76, Int’l Ass’n of Machinists v. Wisconsin Employment Relations Comm’n*, 427 U.S. 132, 144 (1972) (noting that the NLRA protects the “free play of economic forces” from intrusive state regulation); *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 183 (1941) (“[T]he present Act . . . leaves the adjustment of industrial relations to the free play of economic forces but seeks to assure that

economic struggle.⁹

Thus, federal labor law gave workers the right to strike¹⁰—the right to withhold in concert their labor, so as to maximize the inconvenience¹¹ and even the economic injury to their employer.¹² It gave employers a countervailing right to lock out their workers—i.e., the right to withhold the

the play of these forces be truly free.”); *International Paper Co. v. Inhabitants of Jay*, 736 F. Supp. 359, 365 (D. Me. 1990) (“Congress intended that economic weapons, not explicitly outlawed by the NLRA, be left to the free play of economic forces.”) (quoting *Lodge 76, Int’l Ass’n of Machinists*, 427 U.S. at 140).

9. From 1935-1947, Congress tilted the NLRA in favor of employees and unions, but after the Taft-Hartley Act amended the NLRA, it assumed a more neutral role. See HARRY A. MILLIS & EMILY C. BROWN, *FROM THE WAGNER ACT TO TAFT-HARTLEY* 655 (1950).

First, Taft-Hartley did a few things which were much needed, in “equalizing” the Wagner Act and imposing restraints on certain unjustifiable actions of unions—thus approaching a balanced code of labor relations. Second, it included a rather long list of provisions, most of these also in the name of “equalizing the Act,” which gave an appearance of increased fairness and met some of the attacks upon the old Act; these had a desirable psychological effect and perhaps promoted greater acceptance of the Act by employers, as well as increased acceptance of their responsibility by some unions.

Id.

10. Section 13 of the NLRA provides: “Nothing in this [Act] . . . shall be construed so as either to interfere with or impede or diminish in any way the right to strike” 29 U.S.C. § 163 (1994).

11. In an early and influential labor law decision, *Toledo, A.A. & N.M. Ry. v. Pennsylvania Co.*, 54 F. 730, 731 (N.D. Ohio 1893), a union of rail employees went on strike to persuade their employer to pay higher wages. In support of this action, the president of the national rail union ordered his 35,000 members, employed by nonstruck companies, to avoid handling any freight that the struck railroad delivered. *Id.* at 731. The court enjoined this action, and in doing so, summarized the common law on the right to strike:

Herein is found the difference between the act of the employes of the complainant company in combining to withhold the benefit of their labor from it and the act of the employes of the defendant companies in combining to withhold their labor from them; that is, the difference between the strike and the boycott. The one combination, so far as its character is shown in the evidence, as lawful, because it was for the law purpose of selling the labor of those engaged in it for the highest price obtainable, and on the best terms. The probable inconvenience or loss which its employees might impose on the complainant company by withholding their labor would, under ordinary circumstances, be a legitimate means available to them for inducing a compliance with their demands. But the employes of defendant companies are not dissatisfied with the terms of their employment. So far as appears, those terms work a mutual benefit to employer and employed. What the employes threaten to do is to deprive the defendant companies of the benefit thus accruing from their labor, in order to induce, procure, and compel the companies and their managing officers to consent to do a criminal and unlawful injury to the complainant. Neither law nor morals can give a man the right to labor or withhold his labor for such a purpose.

Id. at 738.

12. For recent examples of such injury, see Nichole M. Christian, *Auto Workers Warn GM Not to Underestimate Union*, WALL ST. J., May 3, 1996, at B3 (United Auto Workers’ (“UAW”) 17-day strike of GM cost the company \$900 million); and Jeff Cole, *Shrontz Turns over Controls at Boeing As Rivals Rev Up*, WALL ST. J., Apr. 29, 1996, at B4 (machinists’ 1995 strike against Boeing reduced the company’s first-quarter 1996 earnings from 53 to 45 cents per share).

furnishing of work. This right permitted employers to control the timing of a work stoppage in a way that increased economic injury to workers, while minimizing their own injury.¹³

Recent events suggest that current labor policy is not necessarily neutral in this economic struggle. In 1981, President Reagan broke a strike by 11,000 air traffic controllers by firing the strikers and permanently replacing them.¹⁴ Observers contend that more and more private employers have adopted this hardball approach to strikes.¹⁵ And, in fact, strikes plummeted very sharply thereafter.¹⁶ Secretary of Labor Robert Reich added that employer willingness to hire permanent striker replacements seriously hampered cooperation between labor and management.¹⁷ His analysis is borne out by numerous

13. The NLRB, in *Betts Cadillac Olds, Inc.*, 96 N.L.R.B. 268, 286 (1951), explained:

An employer is not prohibited from taking reasonable measures, including closing down his plant, where such measures are, under the circumstances, necessary for the avoidance of economic loss or business disruption attendant upon a strike. . . . The pedestrian need not wait to be struck before leaping from the curb. The nature of the measures taken, the objective, the timing, the reality of the strike threat, the nature and extent of the anticipated disruption, and the degree of resultant restriction on the effectiveness of the concerted activity, are all matters to be weighed in determining the reasonableness under the circumstances, and the ultimate legality, of the employer's action.

14. For a complete factual summary of the PATCO strike, see Herbert R. Northrup, *The Rise and Demise of PATCO*, 37 INDUS. & LAB. REL. REV. 167 (1984).

15. E.g., John Liscio, *The 15-Year Bull Market Began with the PATCO Strike*, BARRON'S, June 3, 1996, at 12 (attributing the stock market's 15-year bull run to President Reagan's replacement of PATCO strikers); Jon Talton, *Strikes Becoming Labor Suicide*, TULSA TRIB., March 14, 1990, at 11A (Striker replacement strategy "has gained wide use over the past decade, especially after President Reagan broke the air traffic controllers strike in 1981 by hiring replacements.), available in 1990 WL 8251567; see also Michael K. Burns, *10 Years After PATCO Strike, A Legacy of Labor Bitterness*, BALTIMORE SUN, Aug. 4, 1991, at 4E, available in 1991 WL 5891560.

When PATCO controllers walked out on Aug. 3, 1981, Reagan's swift, tough response was seen as a turning point in U.S. labor relations. Employers viewed the decision as a green light from the White House to fire strikers and replace them, unions claim. Over the next 10 years, replacement of striking workers became more common, as the number of major strikes dropped.

Id. This practice has even been recognized by the Secretary of labor. Robert B. Reich, *Handful of Senators Strangling Labor Bill*, PLAIN DEALER (Cleveland, Ohio), July 16, 1994, at 9B, available in 1994 WL 7210879.

Since President Reagan replaced striking PATCO members in 1981, a small but ominously growing number of companies have locked themselves into this . . . route by hiring new workers to permanently replace striking employees. Some of these companies even advertise for permanent replacements before labor-management negotiations begin, stockpiling potential new employees like raw materials.

Id.

16. See *infra* note 65 and accompanying text.

17. *Statement of Robert B. Reich, Secretary of Labor Before the Subcommittee on Labor, Committee on Labor and Human Resources, United States Senate Tuesday, March 30, 1993*, FED. NEWS SERV. WASH. PACKAGE, March 30, 1993, available in 1993 WL 9426245.

accounts of permanent replacement strikes that engendered violence and public disorder.¹⁸

If hiring permanent replacements was the weapon of choice for employers in the 1980s, it appears that the lockout has become their main weapon in the 1990s. To date, however, this development has received little recognition, even though employers visibly brandished this weapon in professional basketball,¹⁹ hockey,²⁰ and baseball,²¹ as well as in large industry settings.²²

At its best, collective bargaining is a win-win process. But without a viable right to strike, employers have less incentive to engage in serious bargaining with their unions . . . And unions see no point in trying to work cooperatively with management when there is no real avenue for dialogue.

In the changed climate of labor relations, more employers have been willing to choose intimidation over serious negotiation.

Id.

18. See, e.g., *International Union, United Mine Workers v. Bagwell*, 114 S. Ct. 2552, 2563 (1994) (overturning \$52 million civil coercive contempt fines against the union for littering county highways with jackrocks); *United Steelworkers v. Phelps Dodge Corp.*, 833 F.2d 804, 807 (9th Cir. 1987) (Noonan, J., dissenting) (replacements attacked strikers by slashing their tires, breaking a striker's jaw with a rifle butt, and making threatening calls to a striker's wife); *International Ass'n of Machinists v. Eastern Air Lines, Inc.*, 121 B.R. 428, 431 (S.D.N.Y. 1990) (Replaced "strikers called passengers 'scab' and 'cheap ass' while telling them to have a 'shit flight,' that they would be 'killed' and not to forget their 'body bag'."); *Diamond Walnut Growers, Inc.*, 312 N.L.R.B. 61, 64 tbl. (1993) (a replacement worker was "severely beaten" by two to three men, who were probably replaced strikers); *Gibson Greetings, Inc.*, 310 N.L.R.B. 1286, 1303 (1993) (replaced striker tries to force replacement worker's car off road); *Domsey Trading Corp.*, 310 N.L.R.B. 777, 778 (1993) (replaced strikers blockade bus carrying replacement workers); *International Paper Co.*, 309 N.L.R.B. 31, 40 (1992) (nonstriker attacks replaced striker with baseball bat); *Mohawk Liqueur Co.*, 300 N.L.R.B. 1075, 1091 (1990) (replaced strikers sprayed replacements' cars with paint solvent as vehicles drove past picket line); *Keco Indus., Inc.*, 276 N.L.R.B. 1469, 1474 (1985) (Striker smashed replacement employee's car with a rock and yelled, "I'll blow your fucking heads off."); *Mine Workers Chief Says Pittston Strike Underscores Need for Overhaul of Labor Law*, Daily Lab. Rep. (BNA) No. 160, at A-9, A-11 (Aug. 21, 1989) (company claims that jackrocks placed by strikers punctured over 3000 tires since the dispute began); *Two Striking Greyhound Drivers Arrested on Federal Firearms Charges*, Daily Lab. Rep. (BNA) No. 72, at A-4, A-5 (Apr. 13, 1990) (two replaced strikers arrested on federal charges in connection with two shooting incidents near St. Louis); *Williams Calls for Quick Legal Action in Picket Line Deaths*, Daily Lab. Rep. (BNA) No. 173, at A-5, A-6 (Sept. 9, 1993) (two strikers killed by a tractor-trailer that crossed their picket line at a high rate of speed); *Hormel Reports Hiring Completed at Strikebound Minnesota Plant*, N.Y. TIMES, FEB. 13, 1986, at B16 (hundreds of replaced strikers and supporters riot in Austin, Minnesota); *Hormel Strikers Close Plant Again*, N.Y. TIMES, Feb. 1, 1986, at 54 (same); *Shots Fired at Cook's, No Injuries Reported*, GRAYSON J.-ENQUIRER (Ky.), Dec. 22, 1993, at 1 (on file with author).

19. *NBA Owners Ratify Contract Agreement with Players Association Through 2002*, Daily Lab. Rep. (BNA) No. 180, at A-18 (Sept. 18, 1995) (the NBA locked out its' players from July 1 through September 18); Tim Povtak, *Frustrations Should Wane as Referees Return*, ORLANDO SENTINEL, Dec. 12, 1995, at D6 (reporting NBA's six-week referee lockout ends), available in 1995 WL 9730633.

20. For a summary of the 103-day lockout in 1994-1995, see *Discontent Still Lingers Among Many Players*, ROCKY MTN. NEWS, Jan. 12, 1995, at 5B, available in 1995 WL 3173467.

21. See Ross Newhan, *Baseball Players Offer to End 232-Day Strike: Owners Consider Lockout*

Visibility of lockouts has also been obscured simply because the federal government collects no specific data about them.²³

This Article breaks new ground in several respects. It renews an important scholarly tradition of analyzing lockouts; a tradition neglected after achieving prominence in the 1950s and 1960s.²⁴ That tradition flourished when several

Vote, L.A. TIMES, Apr. 1, 1995, at 1A (reporting that major league owners considered locking out players and opening the season with replacement players). Although they decided against using replacements, the owners locked out umpires in 1995 and began the regular season with replacements. Rick Hummel, *Replacement Umps Will Be Targets of Leather Lungs*, ST. LOUIS POST-DISPATCH, Apr. 16, 1995, at 5F; *Umps Nix Offer, Subs Ready for Tonight*, ARIZ. REPUBLIC, Apr. 25, 1995, at E8, available in 1995 WL 2787695.

For background on the intertwined issues of antitrust and labor law in the 1994-1995 baseball strike, see Christopher D. Cameron and J. Michael Echevarria, *The Ploys of Summer: Antitrust, Industrial Distrust, and the Case Against A Salary Cap for Major League Baseball*, 22 FLA. ST. U. L. REV. 827 (1995); and J. Jordan Lippner, Note, *Replacement Players for the Toronto Bluejays?: Striking the Appropriate Balance Between Replacement Worker Law in Ontario, Canada and the United States*, 18 FORDHAM INT'L L.J. 2026 (1995).

22. See *Cat Ends Layoff, Wants New Strike Talks*, CHI. SUN-TIMES, Feb. 8, 1992, at 30 (Caterpillar locked out 5600 workers for three months in 1991-1992); *Tentative Pact Reached in Deere Strike*, ATLANTA J., Jan. 28, 1987, at A14 (Deere & Co. locked out 13,000 workers for six months in 1986-1987), available in 1987 WL 5262114; *USX Vows to Regain Top Spot*, STAR TRIB. (Minneapolis-St. Paul), March 10, 1987, at 9B (USX locked out 22,000 workers for six months in 1986), available in 1987 WL 4928841.

23. See Bob Baker, *Negotiations Taking Optimistic Turn; Labor: Aggressive Move by Baseball Owners Reflects a Trend in American Management's Negotiating Tactics*, L.A. TIMES, Feb. 17, 1990, at 1 (Bureau of National Affairs ("BNA"), a private research firm, estimated that 160 lockouts occurred between 1983 and 1988).

24. The best scholarship on lockouts was published a generation ago, when unions were a much more potent force in the American industrial relations system. Although union strength has diminished substantially since then, the lockout has grown in importance. The best research includes Walter E. Oberer, *Lockouts and the Law: The Impact of American Ship Building and Brown Food*, 51 CORNELL L.Q. 193, 220-23 (1966) (arguing that such a practice is unlawful); and Recent Case, *Employers' Lockout with Temporary Replacements Is An Unfair Labor Practice*, 85 HARV. L. REV. 680 (1972) (arguing that it is not an unfair labor practice for employers to hire temporary replacements when locking out workers). Other insightful publications include: James Baird, *Lockout Law, The Supreme Court and the NLRB*, 38 GEO. WASH. L. REV. 396 (1970); Robert P. Duvin, *The Bargaining Lockout: An Impatient Warrior*, 40 NOTRE DAME L. REV. 137 (1965); William Feldesman & Robert F. Koretz, *Lockouts*, 46 B.U. L. REV. 329 (1966); Dell B. Johannesen, *Lockouts: Past, Present, and Future*, 1964 DUKE L.J. 257 (1964); Bernard D. Meltzer, *Lockouts Under the LMRA: New Shadows on an Old Terrain*, 28 U. CHI. L. REV. 614 (1961); Bernard D. Meltzer, *Single-Employer and Multi-Employer Lockouts Under the Taft-Hartley Act*, 24 U. CHI. L. REV. 70 (1956); George Schatski, *The Employer's Unilateral Act—A Per Se Violation—Sometimes*, 44 TEX. L. REV. 470 (1966); Earle K. Shawe, *The Regenerated Status of the Employer's Lockout: A Comment on American Ship Building*, 41 N.Y.U. L. REV. 1124 (1966); Note, *The Offensive Bargaining Lockout*, 52 VA. L. REV. 464 (1966); Note, *Permissibility of Lock-Outs, Shut-Downs and Plant Removals*, 50 COLUM. L. REV. 1123 (1950); Note, *Replacement of Workers During Strikes*, 75 YALE L.J. 630, 634-36 (1966); and Note, *The Unanswered Questions of American Ship*, 64 MICH. L. REV. 910 (1966).

By contrast, there are few recent publications on lockouts. See Julius G. Getman & F. Ray Marshall, *Industrial Relations in Transition: The Paper Industry Example*, 102 YALE L.J. 1803, 1847

important Supreme Court decisions in the period coincided with greater employer willingness to use lockouts in support of their bargaining proposals.

This Article makes a new contribution to this literature by conducting empirical research on replacement lockouts. It finds that evidence of increased competition in U.S. labor markets since the early 1980s is an important factor in these disputes. Section II.A provides an overview of factors contributing to this competition, including the North American Free Trade Agreement (“NAFTA”),²⁵ the General Agreement on Tariffs and Trade (“GATT”),²⁶ deregulation of large industries, rapidly improving technology, and massive layoffs resulting from corporate restructuring. Section II.B discusses specific instances where employers who locked out workers appeared to benefit from these changes in their relevant labor markets.

Labor market changes relate to the expansion of the replacement lockout doctrine under the NLRA. Section III.A reviews early lockout doctrines that permitted employers to use this weapon only defensively in order to protect themselves from injuries such as sabotage of their equipment or poor production by workers. Section III.B shows how the Supreme Court expanded the use of the lockout in its 1957 *NLRB v. Truck Drivers Local Union No. 449* (“*Buffalo Linen*”)²⁷ decision, by permitting an employer in a multiemployer bargaining group to lock out its workers in aid of a fellow employer whose employees went on strike, even though the first employer was neither struck nor harmed financially by its workers.

The Court continued this expansion in two 1965 decisions, *American Ship Building Co. v. NLRB*²⁸ and *NLRB v. Brown* (“*Brown Food Store*”).²⁹ Section III.C analyzes how *American Ship Building* permitted a single employer—someone who was not part of a multiemployer bargaining group, and therefore was not subject to the potential of a whipsaw strike³⁰—to lock out

(1993) (providing a thorough treatment of the context in which lockouts tend now to occur, but only discusses lockouts in passing); see also Susan L. Dolin, *Lockouts in Evolutionary Perspective: The Changing Balance of Power in American Industrial Relations*, 12 VT. L. REV. 335 (1987); Barbara J. Fick, *Inherently Discriminatory Conduct Revisited: Do We Know It When We See It?*, 8 HOFSTRA LAB. L.J. 275 (1991); Peter C. Verrochi, Comment, *Solely as a Means of Pressuring the Union into Settling a Contract Dispute on Terms Favorable to the Employer*, 18 RUTGERS L.J. 961 (1987).

25. North American Free Trade Agreement Implementation Act, Pub. L. No. 103-182, 107 Stat. 2057 (1993); see *infra* note 40.

26. Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4809 (1994).

27. *Buffalo Linen*, 353 U.S. 87 (1957).

28. 380 U.S. 300 (1965).

29. *Brown Food Store*, 380 U.S. 278 (1965).

30. A multiemployer bargaining group is an association of employers in a common industry or

workers to advantageously control the timing of a labor dispute. *Brown Food Store*, discussed in Section III.D, created the leading precedent for an employer in a multiemployer group to conduct a lockout and to continue operations with replacement workers. Section III.E examines the National Labor Relations Board's ("NLRB" or "Board") extension of this precedent, in *Harter Equipment, Inc.*,³¹ to an employer who negotiates as an individual (i.e., not as a member of a multiemployer bargaining group). Section III.F explores two important doctrinal developments that occurred after *Harter Equipment, Inc.*

Section IV presents this study's research findings. Section IV.A discusses how this research was conducted. The study focuses on a particular kind of lockout, those in which employers lock out employees, and then continue operations with replacements. For the purposes of this Article, this will be referred to as a replacement lockout. In this practice, an employer hires temporary replacements³² and uses management and other non-bargaining unit personnel to continue operations.³³ It sharply contrasts with a more traditional and less confrontational lockout, in which employers cease operations for the duration of the lockout.³⁴

Section IV.B presents original quantitative evidence of trends in replacement lockouts. *Finding 1* shows that replacement lockouts occurred nearly continuously from 1970 to 1991.³⁵ This implies the replacement lockout has become a regular part of the economic arsenal used by employers in labor disputes. *Finding 2* shows that before the Board decided *Harter Equipment, Inc.* in 1986, thirty-one percent of replacement lockouts lasted more than a year, but after the decision this figure grew to seventy-five percent.³⁶ This suggests that the Board's decision contributed to substantial

geographic area, that negotiates a uniform or pattern labor agreement with one union, or a coalition of unions, representing the employees of these employers. When a whipsaw strike occurs, it often involves a multiemployer bargaining group. A union singles out one employer for a strike, hoping to pressure that employer into agreeing to its demands. This tactic minimizes strike costs to employees because it involves only a limited number of workers. A whipsaw strike succeeds when all other employers in the group agree to the union's terms. For related information, see *infra* note 90.

31. 280 N.L.R.B. 597 (1986).

32. *Infra* notes 69-71, 74 and accompanying text.

33. *E.g., Merck, Unions Agree on Proposed Contract for 4,000 Employees*, WALL ST. J., Sept. 11, 1984 (Merck continued production at all of its facilities where it had locked out 4000 union-represented workers).

34. See *Tentative Pact Reached in Deere Strike*, *supra* note 22, and *USX Vows to Regain Top Spot*, *supra* note 22, for examples of these lockouts.

35. See *infra* Section IV.B.1.

36. See *infra* Section IV.B.2.

prolonging of replacement lockouts. *Finding 3* shows that an almost equal percentage of replacement lockouts lasted under four months (39.5%), or over one year (44.7%), but only a small percentage were of medium duration (15.8% lasted between four and twelve months).³⁷ This implies that replacement lockouts fall into essentially two categories: those where employer use of economic pressure leads to a short-lived labor dispute with a conclusive settlement, and those where such pressure results in intractable, indefinite disputes. *Finding 4* shows that the average length of replacement lockouts was at its highest level in the most recent period measured. In addition, the length of these lockouts grew sharply in this period.³⁸ Lockouts that began in 1987 had an average duration of 652 days while in 1988 this figure dropped slightly to 612 days. But, lockouts beginning in 1989 lasted 778 days and lockouts beginning in 1990 and 1991 lasted, respectively, 1087 days and 1010 days. This shows that the duration of replacement lockouts has trended upward since 1981.

Section IV.C examines qualitative evidence of replacement lockouts in the wake of *Harter Equipment, Inc.* and identifies three possible trends. Replacement lockouts (1) are aggressive employer initiatives, and differ from the defensive replacement lockouts of a generation ago; (2) cluster in industry and regional patterns; (3) undermine union representation; and involve occasional hiring of permanent replacements, or equivalent forms of permanent labor substitution. The last trend is significant because there is virtually no legal precedent for it.

The main conclusion suggested by these research findings is that changes in the replacement lockout doctrine emboldened employers to use this weapon even more aggressively than it was used a generation ago. Accordingly, Section V presents a public policy proposal to curtail the pernicious use of replacement lockouts.

As a backdrop to this proposal, Section V.A explains why Congress intended that economic weapons held by employers and employees should be in balance, while Section V.B shows that these weapons are now tilted substantially in favor of employers. Section V.C proposes an amendment to the NLRA to address this imbalance by limiting an employer's use of replacements during lockouts to one year. This would ameliorate the worst manifestations of employer misconduct, such as severing its bargaining

37. See *infra* Section IV.B.3.

38. See *infra* Section IV.B.4.

relationship with a union, during replacement lockouts. It would also create a reasonable and limited inducement for employers to avoid the indefinite prolonging of these disputes, without shifting the balance of economic power in favor of unions.

Section VI generally concludes that the replacement lockout doctrine originated when unions had superior bargaining power, but paradoxically, it was expanded in the 1980s, just as union bargaining power significantly deteriorated because of intensifying competition in many labor markets. The replacement lockout, therefore, should be curtailed to account for these market changes. Ultimately, the NLRA has a policy goal of balancing bargaining power between employers and employees; but, the widening disparity in wage growth and corporate profits suggests that the NLRA is not achieving this aim.

II. LABOR MARKET CONTEXTS FOR LOCKOUTS IN THE 1990S

Whenever you have competition, it's incredibly more difficult for unions to negotiate significant increases.

—Professor Ronald Schmidt³⁹

A. Labor Market Competition Increased in the 1980s and 1990s

American workers compete in an increasingly global economy. Well before the Senate ratified NAFTA⁴⁰ and GATT,⁴¹ many U.S. firms relocated production to other nations, particularly Mexico.⁴² Others remained here only

39. Mary Morgan, *Growing Telecom Competition Squeezes Union*, ROCHESTER BUS. J., Feb. 9, 1996, at 1 (quoting Prof. Ronald Schmidt, Univ. of Rochester, William E. Simon Graduate School of Bus. Admin.), available in 1996 WL 8554277.

40. North American Free Trade Agreement Implementation Act, Pub. L. No. 103-182, 107 Stat. 2057 (1993). The treaty appears to have resulted in a net loss of American jobs, although this loss is much less than unions feared. See *Net Job Loss of up to 10,000 May Be Due to More Mexican Imports*, JEC Analysis Says, Daily Lab. Rep. (BNA) No. 230, at D-13 (Dec. 2, 1994) (Joint Economic Committee analysis reported that from January through September 1994 net exports to Mexico fell \$483 million). Thus, while U.S. exports created 127,000 new jobs in the period, Mexican imports eliminated 137,000 jobs in this period, prompting Sen. Dorgan to say that "NAFTA and GATT are trade agreements that make it easier for American jobs to go where labor is cheap." *Id.*

41. Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4809, (1994).

42. Before the Senate ratified NAFTA, Mexico and the United States agreed that goods manufactured in a 13-mile strip, extending from the U.S.-Mexico border into Mexico, would be free from tariffs if the United States imported those goods. Dan Koeppe, *Mexico, USA*, BRANDWEEK, Feb. 17, 1992, at 18 (444,000 Mexicans work in these maquiladora plants earning \$50 per month), available in 1992 WL 3386248. As of 1990, the United States imported \$14 billion in goods from

after threatening to move.⁴³

Product and service deregulation of vital industries has also increased labor competition. Deregulation in telecommunications⁴⁴ has lowered pay and the number of jobs for operators and technicians.⁴⁵ Similar reforms in air transportation,⁴⁶ electric power generation,⁴⁷ and trucking⁴⁸ have adversely affected airline⁴⁹ and utility workers⁵⁰ and truck drivers, respectively.⁵¹

Mexico, but only exported \$13 billion to that nation. *Id.*; Kimberly Blanton, *Texas Clawed Its Way Back: Can We?*, BOSTON GLOBE, Sept. 22, 1991, at 33 (describing this complicated, symbiotic trade relationship), available in 1991 WL 7436354. The U.S. and Mexican governments operated "maquilladora" plants to provide "an entree for the world's manufacturers to exploit extraordinarily cheap Mexican labor." *Id.* This arrangement helped to resuscitate a Texas economy that, in the 1980s, was ravaged by bank failures, speculative real estate development, and declining oil prices. *Id.*; see also Bob Yarbrough, *Klingler Ushering Manufacturing to Mexico*, MISS. BUS. J., Sept. 2, 1991, at 1 (providing a detailed breakdown of the cost-savings one company estimated it would save by substituting Mexican for Mississippi labor), available in 1991 WL 2898515.

Mississippi labor, including benefits, is calculated at an average of \$7.08 an hour (roughly a pay scale of \$5.25 an hour). Mexican labor, including benefits comes in at \$1.81 per hour, fixed costs at \$1.28 per hour and shelter program costs are \$1.25 an hour. The total comes to \$4.14 an hour.

Factored by 2,470 annual hours, the maquilladora would generate \$450, 472 more in gross profit than a comparable Mississippi-based firm . . .

Id.

43. *E.g.*, Hugh Dellios, *Danville's Recovery Is Put on Hold*, CHI. TRIB., Mar. 1, 1992, at 1 (Valmont Industries, Inc., a manufacturer of electrical devices, threatened to move 300 jobs from Danville, Illinois to Mexico.); Merrill Goozner, *Tentative Contract for Brach, Teamsters*, CHI. TRIB., Aug. 3, 1990, at 1 (Large candy company threatened to move 3000 jobs to Mexico or Canada without union concessions.); Patricia Moore, *Fine Tuning a Turnaround Zenith Gets the Picture*, CHI. SUN-TIMES, Mar. 29, 1987, at 3 (Union workers agreed to an 8.1% pay cut after Zenith threatened to move 600 jobs to Mexico.); Chris O'Malley, *Union Says Workers Face Layoff at Thomson's Bloomington Plant*, INDIANAPOLIS STAR, Nov. 1, 1995, at E2 (Thomson Consumer Electronics threatened to take jobs for the manufacture of 31- and 35-inch television sets to Mexico unless the union granted concessions.), available in WL 3090386.

44. The most recent legislation that deregulated this industry is the Telecommunications Act of 1996, Pub. L. No. 104-104, 100 Stat. 56.

45. *E.g.*, Aaron Bernstein & Peter Burrows, *Bell Atlantic: Playing Chicken on the I-Way*, BUS. WK., Sept. 4, 1995, at 36 (noting deregulation and a more competitive industry has led Bell Atlantic to trim 4000 union jobs); Sharon Cohen, *Technology's Victims*, ATLANTA J., Feb. 22, 1994, at A1 (deregulation and automation have combined to cut AT&T's employment of operators from 44,000 in 1984 to 15,000 in 1994, with hourly pay falling from \$11.83 to \$10.01), available in 1994 WL 4489459; Morgan, *supra* note 39 (As a result of deregulation in the telecommunications industry, "rivals—from cable companies to long-distance giants—are tumbling into the local telecom arena, [and] firms like Rochester Tel are forced to vie with companies that can pay lower wages to nonunion workers.").

46. Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705.

47. Public Utility Regulatory Policies Act of 1978, Pub. L. No. 95-617, 92 Stat. 3117.

48. Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793; Surface Freight Forwarder Deregulation Act of 1986, Pub. L. No. 99-521, 100 Stat. 2993.

49. *E.g.*, Martha Brannigan & Eleena de Lisser, *Cost Cutting at Delta Raises the Stock Price but Lowers the Service*, WALL ST. J., June 20, 1996, at A1 (competition brought on by airline deregulation

Technological advances have also created surpluses in certain labor markets. Telephone operators have lost jobs not only to deregulation, but also to automated voice systems.⁵² Although the service sector is generally touted as a large generator of jobs, automated machines are phasing out some ordinary jobs, e.g., hotel clerks.⁵³ Sophisticated computers and specialized software are de-skilling jobs that previously required advanced training, such as architects⁵⁴ and commercial jet pilots.⁵⁵

Competition among workers has grown so prevalent, particularly for minorities,⁵⁶ that some argue for a repeal of the minimum wage to create jobs

caused Delta Air Lines to eliminate over 11,000 employees through buyouts, early retirements, and layoffs).

50. *E.g.*, Tom Andreoli, *The Crisis at ComEd*, CRAIN'S CHI. BUS., Feb. 12, 1996, at 1 (Commonwealth Edison identified over 1000 union jobs for elimination in response to industry deregulation.); Edward Byrd, *Downsizing General Key To Corporate Restructuring*, DENV. BUS. J., at 6 (Public Service Co. of Colorado quickly downsized from 6500 to 4800 jobs in 1994-95.), available in 1995 WL 7908497.

51. *E.g.*, Jon Bigness & Martin du Bois, *Driving Force: In Today's Economy, There Is Big Money to Be Made in Logistics*, WALL ST. J. EUR., Sept. 12, 1995, at 1 (widespread employment ramifications of U.S. trucking deregulation), available in 1995 WL-WSJE 9087748; Peter Bradley, *An Uncivil War*, TRAFFIC MGMT., Jan. 1, 1996, at 36 (noting industry deregulation has led to more nonunion carriers who pay less than union counterparts); Charles T. Jones, *Judge OKs U.S. Law on Trucking, Harm Acknowledged in In-State Deregulation*, SATURDAY OKLAHOMAN, Dec. 31, 1994, at 1 (Between 1980 and 1994, deregulation resulted in the loss of 160,000 to 180,000 union jobs, many of which were replaced by part-time and lower paying jobs.), available in 1994 WL 4148472; see also Frederick Rose, *Los Angeles Port Boycott Hits Key Economic Link*, WALL ST. J., May 3, 1996, at A2 (major boycott of Los Angeles shipping ports by 6500 poorly-paid truckers).

Mostly independent owners and operators of often-battered trucks, these drivers have been a low-paid and often-pressured link in a system that moved as many as 10,000 containers a day . . . The drivers are a largely immigrant, Hispanic group. Their numbers have grown with cargo volume. Competition kept haul rates low. And pay has effectively further declined in many cases . . . as truckers . . . have been slowed by traffic with the growing cargo volume.

Id.

52. G. Pascal Zachary, *High Tech Explains Widening Wage Gaps*, WALL ST. J., Apr. 22, 1996, at 1.

53. Jon Bigness, *Impersonal Touch: More Hotels Automate Front Desk*, WALL ST. J., June 18, 1996, at B1 ("If customers accept them, the systems should let hotels cut back on the number of front-desk employees and recoup the \$15,000 to \$20,000 cost of a kiosk within six months.").

54. Mitchell Pacelle, *Design: Architects Fret as Computers Supplant Pencils*, WALL ST. J., Apr. 29, 1996, at B1 (building design is changing from hand-drawn to computer drawn models, with potentially adverse implications for the profession).

55. William M. Carley, *Fair Warning: Airlines Rush To Install 'Breakthrough' System to Prevent Crashes*, WALL ST. J., June 19, 1996, at A1 (Allied Signal, Inc. programmed topography into a navigation device that gives pilots a 60-second warning to avoid crashes caused by controlled flight into terrain.).

56. See, e.g., Jonathan Kaufman, *Hiring Line: How One Recruiter Uses His Street Smarts to Size Up Job-Seekers*, WALL ST. J., May 7, 1996, at A1 (describing the job screening process for bicycle messengers in New York City for Airborne Express).

for significant numbers of the unemployed.⁵⁷ This competition is likely to intensify as welfare programs incorporate work requirements, thereby putting new entrants into competition with other workers.⁵⁸

As these forces influence American labor markets, many employers are restructuring by downsizing.⁵⁹ Typically, they cut many full-time jobs, and at least occasionally, contract that work to the same people whom they layoff.⁶⁰ However, this process severs long-term employment.

The recent, explosive growth of temporary employment mirrors this development. In the United States, temporary workers hold 1.9% of all jobs and analysts expect this percentage to rise to 2.9% by the end of the decade.⁶¹ The globalization of trade also extends to temporary workers, as evidenced by a 1995 contract sending aircraft engineers from the Netherlands to temporary

Competition is fierce. By the end of the day, more than 80 people will come, drawn by word of mouth since the company doesn't need to advertise for bike messengers. Only six will land jobs. The dozens who are turned down return to bleak prospects. In New York's black neighborhoods, many fast-food jobs have 14 people applying for every opening . . .

Id.

57. *Repeal the Minimum Wage*, WALL ST. J., Apr. 29, 1996, at A22 (A law that establishes "the minimum wage [of \$4.25] hurts poor people, killing jobs on the first rung of the career ladder for the most vulnerable members of society.").

58. For example, Wisconsin's W-2 workfare program will put 53,000 unemployed, welfare mothers into the workforce if these women want to continue to receive health care, child care, and other state-provided benefits. Jeff Mayers, *Thomson Signs Welfare Bill Today*, WIS. ST. J., Apr. 25, 1996, at 1B. *But see* Mike Flaherty, *Critics Decry Welfare Bill's Vetoes*, WIS. ST. J., Apr. 26, 1996, at 1C. State representative David Travis "predicted that the program will have 'enormous economic consequences' for working people and for the poor. The program will flood the low-wage job market with state-subsidized, entry-level workers . . ." *Id.* They will make a training wage of only \$2.98 to \$3.19 an hour. *Id.*

59. *Announced Layoffs Up: 230,350 Job Cuts So Far in '96*, CHI. TRIB., June 11, 1996, at 3. Companies cut 230,350 jobs in the United States during the first five months of 1996, compared to the 171,924 jobs cut in the first five months of 1995 and the 216,209 jobs cut in the first five months of 1993. *Id.* In 1993, companies cut 615,186 jobs over the full year. *Id.*

Examples of job-cutting abound. *E.g.*, Jeff Bailey & Richard Gibson, *ConAgra to Cut 6,500 Jobs, Close Plants*, WALL ST. J., May 15, 1996, at A3; Scott McCartney, *Back on Course: Piloted by Bethune, Continental Air Lifts Its Workers' Morale*, WALL ST. J., May 15, 1996, at A1 (Continental cut 7000 jobs since late 1994); *From Fire to Hire: Boeing Joins Four Other Big Companies in U-Turn*, SEATTLE POST-INTELLIGENCER, June 3, 1996, at B3 (reporting that in the past three years five companies—Sears, AT&T, Boeing, IBM, and Xerox—cut 250,000 jobs).

60. Alex Markels & Matt Murray, *Call It Dumbsizing: Why Some Companies Regret Cost-Cutting*, WALL ST. J., May 14, 1996, at A1 (observing that "many companies continue to make flawed decisions—hasty, across-the-board cuts—that come back to haunt them . . ."). Kodak, for example, laid off Maryellen Ford, a 17-year employee, in March 1996, and then contracted her work through an outside firm where she was employed with better pay but no benefits. *Id.*

61. Robert L. Rose & Martin du Boise, *Temporary-Help Firms Start New Game: Going Global*, WALL ST. J., May 16, 1996, at B4.

jobs in Seattle, Washington.⁶²

The profound change in American labor-management relations⁶³ reflects this basic fact: unions no longer monopolize or even control labor supply. Even during hostile labor disputes, employers are able to find more than enough applicants to fill positions held by striking or locked-out workers.⁶⁴ Unions in the 1940s through the 1970s often went on strike, but after 1980, strike activity plummeted by as much as ninety percent.⁶⁵

Much of this decline has been attributed to increased employer willingness

62. *Id.*

63. The most authoritative analysis of this change is THOMAS A. KOCHAN ET AL., *THE TRANSFORMATION OF AMERICAN INDUSTRIAL RELATIONS* (1994).

[T]he emergence of a large nonunion sector in the United States since 1960 was a function of a changing environment, deep-seated managerial values opposed to unions, and increased opportunities and incentives to avoid unions resulting from changing competitive and cost conditions. Management responded by shifting power away from its staff experts most deeply committed to working within the union-management relationship. Line and staff managers who were willing and able to introduce innovative new systems of human resource management gained power and were successful in helping to develop and stabilize a new nonunion system.

Id. at 79.

64. *Plant Halts Applications As 2,500 Seek Jobs*, HARRISBURG PATRIOT, July 20, 1987, at B12 (International Paper received 300 job applications daily to fill striker replacement positions), available in 1987 WL 2765044.

65. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, COMPENSATION & WORKING CONDITIONS 151 tbl.D-1 ("Work Stoppages Involving 1,000 Workers or More, 1947-1996") (Feb. 1996).

Year	Strikes	Year	Strikes	Year	Strikes
1947	270	1964	246	1981	145
1948	245	1965	268	1982	96
1949	262	1966	321	1983	81
1950	424	1967	381	1984	62
1951	415	1968	392	1985	54
1952	470	1969	412	1986	69
1953	437	1970	381	1987	46
1954	265	1971	298	1988	40
1955	363	1972	250	1989	51
1956	287	1973	317	1990	44
1957	279	1974	424	1991	40
1958	332	1975	235	1992	35
1959	245	1976	231	1993	35
1960	222	1977	298	1994	45
1961	195	1978	219	1995	35
1962	211	1979	235	1996	6
1963	181	1980	187		

Id. (1996 is current through February).

to hire striker replacements.⁶⁶ This observation is borne out by a noticeable trend in the 1980s and 1990s, in which employers hired temporary⁶⁷ and permanent⁶⁸ striker replacements during large strikes.

B. Increased Labor Market Competition Aided Employers Who Locked Out Workers

Increased labor market competition appeared to benefit employers who locked out workers in the 1980s and 1990s. While no known studies of this phenomenon exist, anecdotal evidence suggests that employers exploited this competition during replacement lockouts. For example:

- A.E. Staley did not lock out and replace over 800 workers until a large, area utility showed that it could continue operations with replacements while locking out 1500 workers⁶⁹ and after it ran help-wanted ads in nearby communities affected by layoffs.⁷⁰

66. Fran Gardner, *1980s Dealt Big Blow to Strike*, THE OREGONIAN (Portland), Aug. 19, 1994, at C1 (Prof. Marcus Widenor observed that in the 1980s “there were so many disastrous strikes that workers stopped using it as a tool.”), available in 1994 WL 452640; Carl T. Hall, *Hard Times for American Unions: Recession Threatens to Wipe out Raises, Discourage Strikes*, S.F. CHRON., Feb. 11, 1991, at D1 (Fewer strikes have occurred because of management’s increased willingness to hire striker replacements.), available in 1991 WL 4174278; Patricia Moore, *Replacement Trend Grows*, CHI. SUN-TIMES, Jan. 10, 1995, at 37 (striker replacement strategy had a chilling effect on the right to strike).

67. E.g., Jeff Cole, *McDonnell Douglas to Replace Strikers*, WALL ST. J., June 13, 1996, at A3 (McDonnell Douglas’ plan to use 5000 temporary striker replacements); Robert L. Rose & Carl Quintanilla, *McDonnell Takes Caterpillar Strike Path*, WALL ST. J., June 14, 1996, at A2 (Caterpillar used 5600 temporary replacements for 8700 strikers.).

68. E.g., *TWA v. Independent Fed’n of Flight Attendants*, 489 U.S. 426 (1989) (TWA hired more than 1200 replacements for striking flight attendants.); *In re Continental Airlines Corp.*, 901 F.2d 1259 (5th Cir. 1990) (Continental hired over 2,000 replacements for striking pilots.); *Diamond Walnut Growers, Inc.*, 316 N.L.R.B. 36 (1995) (Employer hired 500-600 striker replacements.); *Diamond Walnut Growers*, 312 N.L.R.B. 61 (1993) (same); DAVE HAGE & PAUL KLAUDA, *NO RETREAT, NO SURRENDER: LABOR’S WAR AT HORMEL* (1989) (Hormel’s hiring of more than 1000 permanent striker replacements resulted in riots in Austin, Minnesota.); Nichole M. Christian, *Some Staffers Return to Detroit Paper After Permanent-Replacement Threat*, WALL ST. J., Aug. 11, 1995, at B3 (Detroit Free Press intended to permanently replace 2500 striking newsroom, truck, mail, and press employees.); Donald P. Baker, *Bitter Coal Strike Settled*, WASH. POST, Dec. 22, 1985, at A3 (involving strike of 2500 coal miners who were replaced and then allowed to return after charge of unfair labor practice conceded).

69. See Kevin McDermott, *Staley, Union Appear to Be at Stalemate*, ST. LOUIS POST-DISPATCH, July 22, 1993, at 1; Sally McKee, *NLRB’s Answer to Labor Dispute Worth \$12 Million*, PEORIA J. STAR, Aug. 24, 1993, at B1, available in 1993 WL 5565096.

70. Kristin Matz, *Staley Seeks Workers for Decatur*, LAFAYETTE BUS. DIG., March 28, 1994, at 3 (Staley advertised for replacements and appeared to be targeting workers who had been laid off or released from Aluminum Co. of America, Lox Equipment Co., and Fairfield Manufacturing Co.),

- Trailmobile did not lock out and replace over 1000 workers until shortly after A.E. Staley ended its labor dispute and terminated the employment of some of its replacements.⁷¹
- Whitehall Packing Company, a meat processor, did not lock out 225 employees until it found an idle slaughterhouse and laid-off work force forty miles away.⁷² It then refused to hire locked-out applicants.⁷³
- Burwood Products locked out 166 workers represented by the United Auto Workers (“UAW”) and replaced them with workers who earned the minimum wage, suggesting that intense labor market competition undercut the union’s bargaining position.⁷⁴

III. EXPANSION OF EMPLOYER RIGHTS DURING LOCKOUTS

Today, the Board answers an important, recurring, and troubling Federal labor law question: whether any employer who lawfully locks out his employees to support a bargaining position may go further and hire temporary replacements to continue normal operations. It is a question on which the Supreme Court has expressly declined to pass, though it had the opportunity to do so, and over which previous Boards, courts of appeals, and academic commentators have sharply divided.

—NLRB Member Patricia Diaz Dennis, Harter Equipment Inc.⁷⁵

A. Early Lockout Doctrines

Common law recognized the employer’s right to lock out workers before Congress enacted the NLRA.⁷⁶ The Wagner Act, the original legislation for

available in 1994 WL 3029742.

71. Carl Quintanilla & Robert L. Rose, *Work Week: A Special news Report About Life on the Job and Trends Taking Shape There*, WALL ST. J., Apr. 16, 1996, at A1 (“Trailmobile is using temporary replacement workers after locking some 1000 union members out of their jobs in January. . . . Some of the replacement workers gained experience crossing the picket lines in the Caterpillar and Staley disputes . . .”).

72. Whitehall Packing Co., 257 N.L.R.B. 193, 196 (1981).

73. *Id.*

74. Janice Castro, *Labor Draws an Empty Gun: Striking Workers at Greyhound and Elsewhere Learn That Those Who Walk Out May Not Be Welcome Back*, TIME, March 26, 1990, at 56.

75. Harter Equip., Inc., 280 N.L.R.B. 597, 601 (1986) (Member Dennis, dissenting) (footnotes omitted).

76. See *Iron Molder’s Union No. 125 v. Allis-Chalmers, Co.*, 166 F. 5 (7th Cir. 1908); Restful

the NLRA, did not mention lockouts.⁷⁷ When the Taft-Hartley Act amended the Wagner Act in 1947, it did not specifically provide for an employer's right to lock out employees, but it regulated this right nonetheless.⁷⁸ In addition, the NLRA appears to equate lockouts with strikes by using these terms in conjunction with each other. However, the Supreme Court declined to find that a lockout is an employer's corollary to an employee's right to strike.⁷⁹ Even though courts occasionally confuse the terms,⁸⁰ these terms

Slipper Co. v. United Shoe & Leather Union, 174 A. 543 (N.J. Ch. 1934); Moran v. Lasette, 223 N.Y.S. 283 (App. Div. 1927).

77. Sen. Wagner's original bill made lockouts an unfair labor practice. S.2926, 73d Cong., 2d Sess. § 5 (1934). Numerous objections were raised, however, because this proposal would have left employers defenseless against strikes. *To Create a National Labor Board, Hearings on S.2926 Before Senate Comm. on Educ. and Labor*, 73d Cong., 2d Sess. 372, 511, 908 (1934), reprinted in 1 NLRB, *supra* note 6, at 406, 545, 946. Consequently, the common-law rule permitting lockouts was not repealed.

Because more multiemployer bargaining groups joined together and exerted economic pressure on workers, Congress considered banning this organizational form. However, Congress rejected this idea on the ground that blunting this employer tool would undermine collective bargaining. *See Hearings on S.55 Before the Senate Comm. on Labor and Pub. Serv.*, 80th Cong., 1st Sess. 427-28, 1012-17, 1032-37, 1055-57, 1162-65, 2018-19, 2370-72 (1947); *Hearings on H.R.8 Before the House Comm. on Educ. and Labor*, 80th Cong., 1st Sess. 552-53, 1552-54, 3024-26 (1947); S. REP. NO. 105, 80th Cong., 1st Sess., pt. 2, at 6-8 (1947) (minority view), reprinted in 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 468-70 (1948); 93 CONG. REC. 1834-44, 4030-31, 4443-44, 4581-87, 4674-76 (1947).

Although the Taft-Hartley Act, Labor Management Relations Act, ch. 120, 61 Stat. 140 (1947), substantially amended the NLRA in 1947, and the Landrum-Griffin Act, Labor-Management Reporting and Disclosure Act of 1959, Pub. L. No. 86-257, 73 Stat. 519, amended the law again in 1959, the NLRA still has no specific provisions for lockouts. Thus, the NLRB and federal courts, instead of Congress, have defined the legal contours of lockouts.

78. Section 8(d)(4) prohibits strikes or lockouts for the purpose of modifying a labor agreement unless the parties satisfy certain procedural requirements. National Labor Relations Act, ch. 120, § 8(d)(4), 61 Stat. 142 (1947) (current version at 29 U.S.C. § 158(d)(4) (1994)). Section 203(c) directs the Federal Mediation and Conciliation Service to seek a settlement in a labor dispute before resort to strikes or lockouts. *Id.* § 203, 61 Stat. at 154 (current version at 29 U.S.C. § 173 (1994)). Sections 206 and 208 provide the President with emergency powers to deal with strikes or lockouts. *Id.* §§ 206, 208, 61 Stat. at 155 (current versions at 29 U.S.C. §§ 176, 178(a) (1994)).

79. *See* NLRB v. Truck Drivers Local Union No. 449 (*Buffalo Linen*), 353 U.S. 87, 93 n.19 (1957). The Court said, "We thus find it unnecessary to pass upon the question of whether, as a general proposition, the employer lockout is a corollary of the employees' statutory right to strike." *Id.* Instead, the Court has found that an agreement to arbitrate contract disputes, which almost always involve a no-strike promise by a union, is an employer's corollary to the right to strike. *See* *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 567 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 (1960); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 599 (1960).

80. *E.g.*, *Morand Bros. Beverage Co. v. NLRB*, 190 F.2d 576, 582 (7th Cir. 1951). After holding that employers in a multiemployer bargaining group had a right to lockout nonstriking employees, the court stated:

We so hold, not merely on the basis of the implied recognition, in the 1947 Amendment to the Act,

differ in that the employer's rights are more limited during a lockout. An employer may hire permanent replacements for strikers,⁸¹ but may only hire temporary replacements during a lockout.⁸²

The NLRB and courts have recognized, however, an employer's right to lock out employees in certain situations, such as the defense of property against destruction by workers.⁸³ In its early experience, the Board carefully ensured a narrow construction of its defensive lockout doctrine. The Board did not extend the doctrine when employers used lockouts to frustrate legitimate employee interests, such as forming a union⁸⁴ or bargaining collectively with an employer.⁸⁵

B. The Defensive Multiemployer Lockout Doctrine: Buffalo Linen

In the 1950s, unions represented about one in three private sector workers.⁸⁶ Thus, in highly unionized labor markets, workers had considerable bargaining power. Occasionally, they exerted this power in the form of a whipsaw strike,⁸⁷ a "process of striking one at a time the employer members

Section 8(d)(4), of the existence of such a right, but because the lockout should be recognized for what it actually is, i.e., *the employer's means of exerting economic pressure on the union, a corollary of the union's right to strike.*

Id. (emphasis added).

81. *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333, 345-46 (1938).

[An employer] is not bound to discharge those hired to fill the places of strikers, upon the election of the latter to resume their employment, in order to create places for them. The assurance by [the employer] to those who accepted employment during the strike that if they so desired their places might be permanent was not an unfair labor practice nor was it such to reinstate only so many of the strikers as there were vacant places to be filled.

Id.

82. *See, e.g., infra* notes 255-60 and accompanying text.

83. *See International Shoe Co.*, 93 N.L.R.B. 907 (1951); *Lengel-Fencil Co.*, 8 N.L.R.B. 988 (1938); *Hopwood Retinning Co.*, 4 N.L.R.B. 922 (1938).

84. *Guard Serv., Inc.*, 134 N.L.R.B. 1753 (1961); *Somerset Classics, Inc.*, 90 N.L.R.B. 1676 (1960); *Perry Coal Co.*, 125 N.L.R.B. 1256 (1959).

85. *NLRB v. Norma Mining Corp.*, 206 F.2d 38 (4th Cir. 1953); *Olin Indus., Inc. v. NLRB*, 191 F.2d 613 (5th Cir. 1951); *NLRB v. Cowell Portland Cement Co.*, 148 F.2d 237 (9th Cir. 1945); *NLRB v. Stremel*, 141 F.2d 317 (10th Cir. 1944); *NLRB v. Cape County Milling Co.*, 140 F.2d 543 (8th Cir. 1944); *NLRB v. Electric Vacuum Cleaner Co.*, 315 U.S. 685 (1942); *NLRB v. Mall Tool Co.*, 119 F.2d 700 (7th Cir. 1941); *NLRB v. National Motor Bearing Co.*, 105 F.2d 652 (9th Cir. 1939); *NLRB v. Lund*, 103 F.2d 815 (8th Cir. 1939); *NLRB v. Hopwood Retinning Co.*, 98 F.2d 97 (2d Cir. 1938).

86. THOMAS A. KOCHAN, *COLLECTIVE BARGAINING AND INDUSTRIAL RELATIONS* 128 tbl.5-1 (1980) (showing that in 1956, 17,490,000 out of 52,408,000 employees, or 33.4%, were union members).

87. *E.g., NLRB v. Spalding Avery Lumber Co.*, 220 F.2d 673 (8th Cir. 1955).

of a multi-employer association.”⁸⁸ Unions aimed to get all employers in an area or industry to agree to a uniform labor agreement. They hoped to remove labor costs from competition between employers, and thus insulate themselves from making concessions.

This practice tended to minimize union strike costs because only some members lost work by striking, while many others earned paychecks as they worked at non-struck employers. Often, employers would agree to the standard contract to avoid being struck. Consequently, workers who did not strike benefitted from the temporary sacrifice made by strikers. The union kept a strike fund, a cash reserve for such economic warfare, to mitigate strikers’ costs.⁸⁹

Some employers fought back by banding together in multiemployer bargaining groups.⁹⁰ They agreed that a strike against one member was a strike against all, and pledged to lockout all workers involved in the negotiations. Even though this strategy tended to increase strike costs for a union by increasing claims on the strike fund while diminishing assessments from working members, the NLRB ruled that such employer coordination was legal.⁹¹

88. NLRB v. Truck Drivers Local Union No. 449 (*Buffalo Linen*), 353 U.S. 87, 90 n.7 (1957).

89. See Edgar L. Warren, *Mediation and Fact Finding*, in INDUSTRIAL CONFLICT 292, 294 (Arthur Kornhauser et al. eds., 1954). Generalizing about strike funds in the 1950s, Warren said, “Workers on strike can live for a while on their savings and on contributions from their union’s strike fund, but these sources are not inexhaustible.” *Id.* Warren then proceeded to give an educated guess about the ability of striking workers to hold-out on their savings and their union’s strike-subsidy:

The greatest economic pressure working on the union for a settlement is the actual loss of pay by employees Each day the strike continues or seems likely to continue, this pressure becomes greater. The first week of a strike is kind of a holiday, but the ninth or tenth week may bring real hardship and, eventually, catastrophe.

Id. at 295.

90. By 1947, labor agreements negotiated by multiemployer groups covered between 80% and 100% of all union employees in men’s and women’s clothing, coal mining, laundry cleaning, longshoring, maritime, and shipbuilding. BUREAU OF LABOR STATISTICS, U.S. DEP’T OF LABOR, BULL. NO. 897, COLLECTIVE BARGAINING WITH ASSOCIATIONS AND GROUPS OF EMPLOYERS 3 tbl.1 (“Percent of All Workers Under Agreement Who Are Covered by Agreements with Associations and Groups of Employers, by Industry”) (1947). Labor agreements negotiated by employer groups also covered between 60% and 79% of union employees in baking, book and job printing, canning and preserving, construction, textile dyeing and finishing, glass and glassware, malt liquors, pottery, and trucking and warehousing. *Id.* Multiemployer bargaining is still prevalent, accounting today for more than 40% of all major collective bargaining agreements. *Brown v. Pro Football, Inc.*, 116 S. Ct. 2116 (1996).

91. See *Duluth Bottling Ass’n*, 48 N.L.R.B. 1335, 1336 (1943) (The Board ruled that this lockout was not unlawful because it “was intended merely to synchronize with, and not precipitate, economic conflict.”).

By the mid-1950s, appeals courts reviewing defensive lockout cases rendered conflicting rulings.⁹² The Supreme Court resolved this conflict in *NLRB v. Truck Drivers Local Union No. 449* (“*Buffalo Linen*”)⁹³ by endorsing the Board’s view.

In *Buffalo Linen*, a union went on strike against one employer who was a member of a multiemployer bargaining group.⁹⁴ Anticipating the union’s whipsaw plan, all the non-struck employers locked out their workers and advised them that they would be recalled only after the strike ended.⁹⁵ Negotiations between the union and the multiemployer group continued for a week, culminating in an agreement that recalled all of the workers.⁹⁶

The union complained that this lockout interfered with their members’ right under the NLRA to engage in concerted activity, and a trial examiner ruled in the union’s favor.⁹⁷ The Board reversed, however, stating that

“the more reasonable inference is that, although not specifically announced by the Union, the strike against the one employer necessarily carried with it an implicit threat of future strike action against any or all of the other members of the Association,” with the “calculated purpose” of causing “successive and individual employer capitulations.”⁹⁸

The Court approved the Board’s doctrine, but on narrow grounds. “[C]ongress intended ‘that the Board should continue its established administrative practice of certifying multi-employer units, and intended to leave to the Board’s specialized judgment the inevitable questions concerning multi-employer bargaining bound to arise in the future.’”⁹⁹ The Court concluded that the “ultimate problem is the balancing of conflicting legitimate interests. The function of striking that balance . . . is often a difficult and

92. Compare *NLRB v. Continental Baking Co.*, 221 F.2d 427 (8th Cir. 1955) and *NLRB v. Spalding Avery Lumber Co.*, 220 F.2d 673 (8th Cir. 1955) with *Leonard v. NLRB*, 205 F.2d 355 (9th Cir. 1953) and *Morand Bros. Beverage Co. v. NLRB*, 190 F.2d 576 (7th Cir. 1951).

93. *NLRB v. Truck Drivers Local Union No. 449* (*Buffalo Linen*), 353 U.S. 87 (1957).

94. *Id.* at 90.

95. *Id.*

96. *Buffalo Linen*, 353 U.S. at 90.

97. *Id.*

98. *Id.* at 90-91 (quoting *Buffalo Linen Supply Co.*, 109 N.L.R.B. at 447, 448 (1954)).

99. *Id.* at 96 (quoting *Truck Drivers Local Union No. 449 v. NLRB*, 231 F.2d 110, 121 (1956) (Waterman, J., dissenting)).

delicate responsibility, which the Congress committed primarily to the National Labor Relations Board, subject to limited judicial review.”¹⁰⁰

C. *The Bargaining or Offensive Lockout: American Ship Building*

Recent labor disputes in professional sports show the importance of timing in distributing the costs of the dispute between employers and employees. Baseball players picked an obvious time to strike in 1994.¹⁰¹ With their season about two-thirds over, they were able to save salaries in anticipation of a strike. By timing their strike to begin just as fan attendance began to peak, and, with the revenue-producing playoffs approaching, the players hoped to increase economic pressure on the owners.

Learning from the Major League Baseball (“MLB”) strike, the National Basketball Association (“NBA”) and National Hockey League (“NHL”) owners controlled the timing of their imminent labor disputes by locking out players before the season began.¹⁰² This effectively reversed the economic pressure because players were at the beginning of their earning periods, while owners had little to lose by foregoing pre- and early-season games.

The Supreme Court, in its 1965 *American Ship Building* decision, legitimized this practice.¹⁰³ Like professional sports teams, The American Ship Building Company operated a seasonal business.¹⁰⁴ The ship-repairing business peaked when the Great Lakes froze, ending the shipping season.¹⁰⁵ After recognition of a group of eight unions in 1952, workers struck the company each time a labor agreement expired.¹⁰⁶ Determined to avoid a sixth

100. *Id.*

101. The timing of the strike cannot be fully appreciated without knowing the chronology of past strikes and lockouts in baseball. Athelia Knight & Richard Justice, *With History Against Them, Talks Dwindle Down; Work Stoppages a Part of Baseball*, WASH. POST, Aug. 11, 1994, at D1 (summarizing this history: strike in 1971, Apr. 1-12; lockout in 1973, delaying spring training until Feb. 25; lockout in 1976, delaying spring training until Mar. 17; strike in 1980, Apr. 1-6; strike in 1981, June 12-Aug. 9; strike in 1985, Aug. 6-7; lockout in 1990, delaying spring training until Mar. 18).

102. For evidence of this advantage, see Sandy Burgin, *NHL's Owners Blew It*, SUNDAY TELEGRAM (Worcester, Mass.), Oct. 2, 1994, at D3 (“The owners couldn’t wait to play the exhibition games so they could beef up their wallets before any possible lockout. The players aren’t scheduled to receive their first paychecks until mid-October.”), available in 1994 WL 9983713; and Jody Goldstein, *NBA Begins First Work Stoppage*, HOUSTON CHRON., July 1, 1995, at 1 (reporting NBA guard, Kenny Smith’s lament, “But now there are guys who aren’t getting paychecks. If everything shuts down, if buildings close, there’s no paychecks to go out.”), available in 1995 WL 5912702.

103. *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300 (1965).

104. *Id.* at 302.

105. *Id.*

106. *Id.*

strike in 1961, the company took a firmer position in negotiations.¹⁰⁷ It offered to hold wages constant, but when the union rejected this proposal, it informed workers on August 11 that “[b]ecause of the labor dispute which has been unresolved since August 1, 1961, you are laid off until further notice.”¹⁰⁸

Like the NHL and NBA lockouts in 1994 and 1995, this lockout occurred at the end of the workers’ lengthy off-season and well before business reached its traditional peak period.¹⁰⁹ The parties reached an agreement on October 27,¹¹⁰ about the same time seasonal work typically increased.

The NLRB found that the employer was not motivated by antiunion animus, nor a desire to evade its duty to bargain; rather, the company intended only to put economic pressure on the union to secure a more favorable agreement.¹¹¹ Nevertheless, the Board concluded that American Ship Building committed an unfair labor practice because the lockout “coerced employees in the exercise of their bargaining rights.”¹¹²

The Supreme Court rejected the Board’s reasoning and legal conclusion and emphasized the particular facts involved in the case.¹¹³ It reasoned that the lockout did not interfere with the collective bargaining rights of employees, because the employer only intended “to resist the demands made of it in the negotiations and to secure modification of these demands.”¹¹⁴ The fact that the lockout preempted a strike at a later and more propitious time for employees did not deprive employees of their rights under the NLRA.¹¹⁵ The Court found “nothing in the statute which would imply that the right to strike ‘carries with it’ the right exclusively to determine the timing and duration of all work stoppages.”¹¹⁶

The Court’s expansion of the lockout doctrine is made clear in two portions of the majority opinion. First, the NLRB had claimed that, in light of

107. *Id.*

108. *Id.* at 304 (quoting employer’s notice to employees).

109. *Id.*

110. *Id.*

111. *Id.* at 305.

112. *Id.* (quoting American Ship Bldg. Co., 142 N.L.R.B. 1362, 1365 (1963)).

113. *Id.* at 308. The Court stated: “What we are here concerned with is the use of a temporary layoff of employees solely as a means to bring economic pressure to bear in support of the employer’s bargaining position, after an impasse has been reached. This is the only issue before us, and all that we decide.” *Id.*

114. *Id.* at 309.

115. *Id.* at 309-10.

116. *Id.* at 310.

its special expertise to weigh the competing economic interests of employers and employees, it acted within its authority to proscribe lockouts in support of employer bargaining demands. The Court rejected this view, however, stating that Congress did not authorize the NLRB to be an arbiter of economic interests.¹¹⁷

In this case the Board has, in essence, denied the use of the bargaining lockout to the employer because of its conviction that use of this device would give the employer "too much power." . . . "[T]his amounts to the Board's entrance into the substantive aspects of the bargaining process to an extent Congress has not countenanced."¹¹⁸

This statement appeared to withdraw the Board's previously exercised authority to allocate economic weapons.¹¹⁹ Previously, Congress had entrusted the Board to a considerable degree to adjust economic weapons between employers and their workers.¹²⁰ Consistent with its long-held principle that "lockouts are permissible to safeguard against . . . loss where there is reasonable ground for believing that a strike was threatened or imminent,"¹²¹ the Board, over time, expanded the circumstances which warrant lockouts. For example, an employer could now lock out employees if a union threatened to seize a plant¹²² or if an employer anticipated a strike meant to disrupt an employer's operations¹²³ or to coincide with the storage of perishable inventory.¹²⁴

The Board illustrated its willingness to adjust economic weapons, when it reversed its earlier position that a lockout is unlawful if it maintains the solidarity of a multiemployer bargaining unit in the face of an anticipated whipsaw strike.¹²⁵ Thus, the Board increased the weapons available in an

117. *Id.* at 317.

118. *Id.* at 317-18 (quoting *NLRB v. Insurance Agents' Int'l Union*, 361 U.S. 477, 497-98 (1960)).

119. Justice White's concurring opinion explains the significance of the majority's new approach.

This Court has long recognized that the Labor Relations Act did not undertake the impossible task of specifying in precise and unmistakable language each incident which would constitute an unfair labor practice, but left to the Board the work of applying the Act's general prohibitory language in the light of the infinite combinations of events which might be charged as violative of its terms.

Id. at 322-23 (White, J., concurring) (citations omitted).

120. *Id.* at 340 (Goldberg, J., concurring).

121. *E.g.*, *Quaker State Oil Ref. Corp.*, 121 N.L.R.B. 334, 337 (1958).

122. *Link-Belt Co.*, 26 N.L.R.B. 227 (1940).

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

124. *Duluth Bottling Ass'n*, 48 N.L.R.B. 1335 (1943).

125. *E.g.*, *Morand Bros. Beverage v. NLRB*, 190 F.2d 576 (7th Cir. 1951); *Buffalo Linen Supply*

employer's arsenal in response to the steady accretion of union economic power.

The *American Ship Building* majority also rejected the Board's reasoning that employers already had sufficient economic weapons to confront actual or threatened strikes. These weapons included the right to hire permanent striker replacements and thereby continue operations,¹²⁶ to subcontract work,¹²⁷ and the unregulated ability to stockpile inventory in advance of a strike.¹²⁸ The Court, in depriving the Board authority to differentiate weapons that induce fruitful negotiations, and those that proliferate disputes, expanded the employer arsenal to include the bargaining lockout.

The majority tried to limit its holding by stating that "we intimate no view whatever as to the consequences which would follow had the employer replaced its employees with permanent replacements or even temporary help."¹²⁹ However, Justice White saw this as an invitation for further expansion of the lockout doctrine.

I would have thought it apparent that loss of jobs for an indefinite period, and the threatened loss of jobs, which the Court's decision assuredly sanctions . . . hardly encourage affiliation with a union.

If the Court means what it says today, an employer may not only lock out after impasse consistent with §§ 8(a)(1) and (3), but replace his locked-out employees with temporary help . . . or perhaps permanent replacements . . .¹³⁰

Justice Goldberg expressed similar concerns.

The Court should be chary of sweeping generalizations in this complex area. . . .

The Court not only overlooks the factual diversity among different types of lockout, but its statement of the rules . . . does not give proper recognition to the fact that "[t]he ultimate problem [in this area] is the balancing of the conflicting legitimate interests."¹³¹

Co., 109 N.L.R.B. 447 (1954).

126. NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333 (1938); see *supra* note 81 and accompanying text.

127. Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203 (1964).

128. NLRB v. Brown (*Brown Food Store*), 380 U.S. 273, 283 (1965).

129. American Ship Bldg. Co. v. NLRB, 380 U.S. 300, 308 n.8 (1965).

130. *Id.* at 324 (White, J., concurring).

131. *Id.* at 338-39 (Goldberg, J., concurring) (alterations in original) (quoting NLRB v. Truck

His approach “would confine our decision to the simple holding, supported by both the record and the actualities of industrial relations, that the employer’s fear of a strike was reasonable, and therefore, . . . the lockout of its employees was justified.”¹³²

D. The Defensive Lockout and Hiring of Replacement Workers: Brown Food Store

The Supreme Court permitted an employer’s defensive use of lockouts in *NLRB v. Brown Food Store* (“*Brown Food Store*”).¹³³ Five of the six grocery stores in Carlsbad, New Mexico bargained as a multiemployer coalition with the retail clerks’ union in early 1960.¹³⁴ When the union went on strike against one store on March 16, all stores in the coalition locked out the union’s employees, continuing operations with temporary replacement workers.¹³⁵ Once the union and employer association reached agreement on a new contract on April 22, the employers released the replacements and reinstated all the locked-out workers.¹³⁶

The Board found that the employer group had a right under *Buffalo Linen* to lock out workers who were not on strike, but ruled that the employer group violated the NLRA by continuing operations with replacements.¹³⁷ The Board distinguished *Buffalo Linen*, where the purpose of the lockout was to protect the employer group,¹³⁸ from these facts, where the lockout was motivated by unlawful intent in “inhibiting a lawful strike,” an inherently coercive practice.¹³⁹ The Tenth Circuit Court of Appeals reversed and denied enforcement of the Board’s order.¹⁴⁰

The Supreme Court affirmed the appeals court and further expanded lockout theory by permitting an employer to strengthen its bargaining position by locking out and replacing employees.¹⁴¹ It repeated its view in

Drivers Union No. 449, 353 U.S. 87, 96 (1957)).

132. *Id.* at 342 (Goldberg, J., concurring).

133. *Brown Food Store*, 380 U.S. 278, 283 (1965).

134. *Id.* at 280.

135. *Id.* at 281.

136. *Id.*

137. *Id.* at 281-82 (citing *NLRB v. Truck Drivers Local Union No. 449 (Buffalo Linen)*, 353 U.S. 87 (1957)).

138. *Id.* at 282.

139. *Id.*

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

141. *Brown Food Store*, 380 U.S. at 283.

American Ship Building that the NLRB was not empowered to be an arbiter of economic weapons under the NLRA.¹⁴² The majority emphasized an employer's "legitimate business purpose" in hiring replacements and found that the present facts supported this purpose.¹⁴³ Hiring was "part and parcel of [the employer's] defensive measure to preserve the multiemployer group in the face of the whipsaw strike."¹⁴⁴ Without resort to this weapon, the union's strike "enjoy[ed] an almost inescapable prospect of success."¹⁴⁵

In addition, the Court held that by hiring replacements, the group did not intend "to prejudice the employees' position because of their membership in the union" because there was no showing of antiunion animus.¹⁴⁶ In this vein, the majority stated that its reasoning reflected the fact that "Congress clearly intended the employer's purpose in discriminating to be controlling."¹⁴⁷

The majority carefully limited this business justification from becoming an indiscriminate basis for locking out, and then replacing, union members. They reasoned that "when an employer practice is inherently destructive of employee rights and is not justified by the service of important business ends, no specific evidence of intent to discourage union membership is necessary" to prove the existence of an unfair labor practice.¹⁴⁸ The majority found proof of an "inherently destructive"¹⁴⁹ practice to be easy; it required only "an application of the common-law rule that a man is held to intend the foreseeable consequences of his conduct."¹⁵⁰

Applying this theory, the majority found that hiring of replacements was not inherently destructive of employee rights.¹⁵¹ Thus, the majority believed it established firm boundaries on this offensive weapon. The first boundary was that "the replacements were expressly used for the duration of the labor dispute only; thus, the displaced employee could not have looked upon the

142. *Brown Food Store* and *American Ship Building* were decided by the Court on the same day. In *American Ship Building*, the Court repeated its assertion from *Brown Food Store* that the NLRB is not given the authority under the NLRA "to assess the relative economic power[s]" of the bargaining parties. *American Ship Bldg. Co. v. NLRB*, 380 U.S. 200, 317 (1965). In both cases, the Court relies on its prior decision in *NLRB v. Insurance Agents' Int'l Union*, 361 U.S. 477, 497-98 (1960). See *American Ship Building*, 380 U.S. at 317-18; *Brown Food Store*, 380 U.S. at 283.

143. *Brown Food Store*, 380 U.S. at 285.

144. *Id.* at 284.

145. *Id.* at 285 (quoting 319 F.2d 7, 11 (10th Cir. 1963)).

146. *Id.* at 286.

147. *Id.* at 287 (citing *Radio Officers' Union v. NLRB*, 347 U.S. 17, 44 (1954)).

148. *Id.*

149. *Id.*

150. *Id.* (quoting *Radio Officers' Union*, 347 U.S. at 45).

151. *Id.* at 289.

replacements as threatening their jobs.”¹⁵² The second boundary was that “the membership, through its control of union policy, could end the dispute and terminate the lockout at any time simply by agreeing to the employers’ terms and returning to work on a regular basis.”¹⁵³ In addition, the majority noted that “in light of the union-shop provision that has been carried forward into the new contract from the old collective-bargaining agreement, it would appear that a union member would have nothing to gain, and much to lose, by quitting the union.”¹⁵⁴ The Court reasoned that an employer’s continuation of a union security clause strongly implied its intention to continue the union-management relationship. Finally, the majority considered this employer group’s history with the union and found that “the relationship had always been more than amicable.”¹⁵⁵

E. The Bargaining Lockout with Replacement Workers: Harter Equipment, Inc.

The lockout then evolved from a defensive response to a union’s use of economic weapons to an offensive action by the employer in support of its bargaining position. By legitimizing employer hiring of replacements when no strike occurs or is threatened, the decision in *Harter Equipment, Inc.* completed this evolution by significantly expanding the offensive lockout doctrine.¹⁵⁶

The *Ruberoid Co.*¹⁵⁷ decision by the NLRB showed how *Buffalo Linen*, *American Ship Building*, and *Brown Food Store* expanded employer lockout options. The Ruberoid Company instituted an offensive lockout permitted by *American Ship Building*. The employer had union plants in Savannah, Georgia and Mobile, Alabama and until 1965, a nonunion plant in Tampa, Florida.¹⁵⁸ When the newly certified union in Tampa proposed more expensive contract terms than provided at the other plants, the company locked out these workers¹⁵⁹ and relocated their work to the Georgia and

152. *Id.* at 288.

153. *Id.* at 289.

154. *Id.*

155. *Id.* at 289-90 (citing union-shop provisions in previous collective bargaining agreements and indications that “store owners . . . had no bone to pick with the Local . . . [and] thought that unions were a good thing . . .”).

156. See *infra* notes 194-212 and accompanying text.

157. 167 N.L.R.B. 987 (1967).

158. *Id.* at 988.

159. *Id.* at 988-89.

Alabama plants.¹⁶⁰

The NLRB's General Counsel contended that "transferring Tampa work to Mobile and Savannah . . . [was] analog[ous] to locking the Tampa employees out and continuing operations with new replacements . . ." ¹⁶¹ The Administrative Law Judge ("ALJ") rejected this argument, finding that the employer's relocation of work to other plants was "perfectly consistent with the supplying of Tampa area customers out of the normal inventory of those other plants, or out of their normal production, without hiring additional employees . . . in order to use those plants as a weapon to beat down the employees' demands . . ." ¹⁶²

*Inland Trucking Co.*¹⁶³ was the first significant decision to follow *Brown Food Store* because it and presented the Board with a fundamentally different replacement lockout. Three competitive concrete companies coordinated a complete lockout of bargaining unit workers to pressure the union to accept a more modest wage increase than the union proposed.¹⁶⁴ The timing of the lockout, May 1, 1968, was critical because the employers considered themselves most vulnerable to a strike from July through September, their busy season.¹⁶⁵

Unlike *Brown Food Store*, where the union struck one of the employers in the multiemployer group before the other employers instituted a lockout and hired replacements, the union here advised the employers that it had no intention of striking once the contract expired on May 2 and promised one week notice before striking.¹⁶⁶ Nevertheless, the employers hired replacements to continue operations during the lockout, which lasted from early May until mid-July.¹⁶⁷ On that date, the employers reinstated the locked out workers under terms of the expired agreement and at wage rates that the employers determined.¹⁶⁸

The Board merely affirmed the ALJ's ruling¹⁶⁹ that these employers, "by employing and using replacements to perform the work of employees whom

160. *Id.* at 992.

161. *Id.*

162. *Id.* at 993.

163. 179 N.L.R.B. 350 (1969).

164. *Id.* at 352.

165. *Id.* at 351.

166. *Id.* at 352.

167. *Id.*

168. *Id.* at 353. This ended the dispute at two of the companies, but at a third company, the union went on strike two days later, keeping the company out of this matter. *Id.*

169. *Id.* at 350.

[they] had locked out . . . seriously interfered with, restrained, and coerced their employees in the exercise of rights under the Act."¹⁷⁰ It did not set forth a doctrine to explain how this replacement lockout differed from the precedent-setting lockout in *Brown Food Store*.

The Seventh Circuit Court of Appeals not only enforced the Board's ruling,¹⁷¹ but also stated a theory to differentiate this type of lockout from the *Brown Food Store* lockout. The court reasoned that the employers' "suggested symmetry of permitting operation with replacement employees to accompany an offensive as well as a defensive lockout is deceptive."¹⁷² Then, it limited the replacement worker lockout doctrine to special situations in which the employer stands in a defensive posture during negotiations.

These situations seem to us to be special ones in which the replacement measures taken by the employers were not considered by the [*Brown Food Store*] Court in terms of an economic weapon legitimately used in the course of collective bargaining, but were deemed justified by particular circumstances as fair defensive responses to a situation precipitated by a strike.¹⁷³

The court concluded that "the bargaining lockout, which was held in *American Ship [Building]* not to be inconsistent with protected employee rights, does become so if the employer does not shut down, but continues operation with temporary replacements."¹⁷⁴ To make this doctrine consistent with a then-recently decided Supreme Court case dealing with permanently replaced strikers, the court stated that "if the adverse effect of the discriminatory conduct on employee rights is 'comparatively slight,' . . . [then] the burden is upon the employer to establish that he was motivated by legitimate objectives since proof of motivation is most accessible to him."¹⁷⁵

170. *Id.* at 359.

171. *Inland Trucking Co. v. NLRB*, 440 F.2d 562 (7th Cir. 1971).

172. *Id.* at 564.

173. *Id.*

174. *Id.*

175. *Id.* at 565 (quoting *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 34 (1967)). In that case the Supreme Court said:

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

The court reasoned that this type of lockout would not merely pit the employer's ability to withstand a shut down of its business against the employees' ability to endure cessation of their jobs, but would permit the employer to impose on his employees the pressure of being out of work while obtaining for himself the returns of continued operation.¹⁷⁶

Underscoring the offensive nature of this action, the court continued:

Employees would be forced, at the initiative of the employer, not only to forego their job earnings, but, in addition, to watch other workers enjoy the earning opportunities over which the locked out employees were endeavoring to bargain. Permitting an employer to impose this additional price on the protected right to collective bargaining would . . . conflict with the intended scope and content of that right as protected by the [NLRA].¹⁷⁷

*Ottawa Silica Co.*¹⁷⁸ marked a pivotal turn in the evolution of the NLRB's doctrine on replacement lockouts. In the course of renegotiating a labor agreement with Ottawa Silica, the union threatened to strike.¹⁷⁹ In response, the company notified all seventy-two bargaining-unit employees that they would be locked out until further notice.¹⁸⁰ The company, responding to a major customer's concern about its ability to fill a supply contract, continued operations with twenty-three replacements who were reassigned from their supervisory or sales jobs with the company.¹⁸¹ The company "utilized only its own nonunit personnel in carrying on its operations during the lockout"¹⁸² without hiring new employees as replacements.

A plurality of Board members disagreed with *Inland Trucking's* doctrine that disapproved of employer use of replacements during offensive lockouts.¹⁸³ This development presaged the Board's more recent expansion of the replacement lockout doctrine. In addition, a third Board member joined the plurality's ruling that the company did not violate the NLRA when it used

business justifications for the conduct

Id. (quoting *Great Dane Trailers*, 388 U.S. at 34).

176. *Id.* at 564.

177. *Id.*

178. 197 N.L.R.B. 449 (1972).

179. *Id.* at 452.

180. *Id.*

181. *Id.*

182. *Id.* at 451 (Chairman Miller, concurring).

183. *Id.* at 451.

replacements to support its bargaining position during a lockout.¹⁸⁴

The plurality reasoned that an employer is generally free under *American Ship Building* to use replacements after locking out workers.¹⁸⁵ “[W]here the purpose and effect of the lockout are only to bring pressure upon the union to modify its demands its use does not carry with it any necessary implication that the employer acted to discourage union membership or otherwise to discriminate against union members as such.”¹⁸⁶ The plurality also interpreted *Brown Food Store* as approving employer hiring of replacements during an offensive lockout.¹⁸⁷ “[T]he [*Brown Food Store*] Court stated that it did not see how the continued operations of the employers there involved and their use of temporary replacements implied hostile motivations any more than the lockout itself; nor could the Court see how they were inherently more destructive of employee rights.”¹⁸⁸ The plurality concluded that the employer’s conduct here was not motivated by antiunion animus, and was not intended to discourage union membership.¹⁸⁹ The Board plurality further concluded that “the resulting harm to employee rights by the lockout and continued operation by use of temporary replacements was comparatively slight.”¹⁹⁰

Some Board members disagreed with this reasoning. Although concurring in the ruling, Chairman Miller stated, “I wish particularly to note that I do not intend my conclusions in this case to be understood as sanctioning the utilization of temporary replacements, particularly when hired from the outside, in all permissible lockout situations.”¹⁹¹ Dissenting Board members systematically attacked the plurality’s reasoning by distinguishing the defensive lockouts approved in *American Ship Building* and *Brown Food Store* and the offensive lockout that Ottawa Silica used here.¹⁹² This led them

184. *Id.*

185. *Id.* at 449.

186. *Id.* at 450 (quoting *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 309 (1965)).

187. *Id.*

188. *Id.* (quoting *NLRB v. Brown (Brown Food Store)*, 380 U.S. 278 (1965)).

189. *Id.* at 451.

190. *Id.*

191. *Id.* at 451 (Chairman Miller, concurring). He continued: “Thus to the extent that my colleagues intend, by their readiness to overrule *Inland Trucking Co.*, to indicate a contrary view, I would dissociate myself from their rationale.” *Id.* at 451-52 (citation omitted).

192. *Id.* at 454 (Members Fanning & Jenkins, concurring in part and dissenting in part).

[Members Kennedy and Penello] improperly rely on *American Ship Building* and *Brown Food Stores* which . . . respectively deal only with a simple lockout, i.e., a complete shutdown, and a special case involving a defensive response to a situation precipitated by a whipsaw strike. They make the unwarranted leap from those decisions to the entirely different situation presented in the

to conclude that Ottawa Silica's "conduct was not only inherently destructive of protected employee rights but was also without sufficient economic justification."¹⁹³

Fourteen years later, in *Harter Equipment, Inc.*,¹⁹⁴ the Board relied upon this plurality's reasoning in setting forth the current replacement lockout doctrine. The employer, in negotiating to replace a labor agreement that expired on December 1, 1981, sought concessions because of financial hardship.¹⁹⁵ The union, however, counter proposed a six month contract extension with no changes.¹⁹⁶ The employer rejected this offer and stood firm, stating that no employees would be allowed to work without a contract.¹⁹⁷ The union presented the company's offer to its membership, who rejected it.¹⁹⁸ On December 3, the company locked out employees "to put pressure on the union to agree" to its terms.¹⁹⁹ The company based its bargaining position and conduct on financial considerations only; there was no evidence that the company was unlawfully motivated by antiunion animus.²⁰⁰

In finding that the employer did not commit any unfair labor practice by locking out and replacing workers, the majority stated that "the use of temporary employees reasonably serves precisely the same purpose served by the lockout, i.e., bringing economic pressure to bear in support of a legitimate bargaining position."²⁰¹ By the majority's reasoning, the fact that the employer was the aggressor was irrelevant.²⁰² This, in turn, led the majority to the significant conclusion that "[i]n light of *American Ship Building*, there no longer exists any meaningful distinction as to effects between lawful

instant case without adequate supporting reasoning even though, as our colleagues themselves concede, the Supreme Court explicitly stated in *American Ship Building*, with full awareness of its *Brown Food Stores* decision, that it was limiting its holding to a classic lockout situation and was expressing no view as to the legal propriety of continued operation with replacements of locked-out employees.

Id.

193. *Id.*

194. 280 N.L.R.B. 597 (1986).

195. *Id.*

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.* at 599.

202. *Id.* at 599-600. "The fact that the Respondent here was the protagonist in locking out employees does not warrant inferring any greater impact on employee rights from the subsequent use of temporary employees." *Id.*

'offensive' and lawful 'defensive' economic weaponry."²⁰³ At bottom, "[t]he Union or its individual members have the ability to relieve their adversity by accepting the employer's less favorable bargaining terms and returning to work."²⁰⁴

This expansion of the offensive lockout doctrine²⁰⁵ mitigated an employer's burden of proof for a business justification for hiring replacements²⁰⁶ and required the Board, if it finds such hiring to be unlawful, to prove that this practice resulted from an employer's antiunion animus.²⁰⁷ In hindsight, this view proved naïve because later the company supported efforts by its replacement workers to decertify the union.²⁰⁸

Board Member Dennis, in a forceful dissent, showed how the majority expanded this doctrine far beyond *American Ship Building*²⁰⁹ and *Brown*

203. *Id.* at 600.

204. *Id.*

205. The doctrine states: "[U]sing temporary employees after a lawful lockout in order to bring economic pressure to bear in support of legitimate bargaining demands (1) is a measure reasonably adapted to the achievement of a legitimate employer interest and (2) has only comparatively slight adverse effect on protected employee rights." *Id.*

206. *Id.* "We reject the argument that the Board should require more proof of an employer's legitimate purpose in such a case or should engage in balancing employer interests against employee rights to determine whether the Act has been violated . . ." *Id.*

207. *Id.*

Where . . . the employer's conduct falls into the category of cases . . . as those in which the adverse effect on employee rights is "comparatively slight" and the employer has come forward with evidence of "legitimate and substantial business justification," the Board must regard the conduct as prima facie lawful. . . . [A]n employer does not violate Section 8(a)(3) and (1), absent specific proof of antiunion motivation, by using temporary employees to engage in business operations

Id.

Proof of unlawful motivation is virtually impossible where an employer simply tells locked out employees and their union that replacements are being hired only for economic reasons. *See infra* note 299 and accompanying text.

208. *Harter Equip., Inc.*, 293 N.L.R.B. 647 (1989).

209. She correctly observed that the *American Ship Building* majority "explicitly limited its holding to approving an economically motivated lockout unaccompanied by the use of replacements, saying, 'This is the only issue before us, and all that we decide.'" *Harter Equip.*, 280 N.L.R.B. at 601 (quoting *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300 (1965)). To emphasize her point, she recounted the dialogue between the *American Ship Building* majority and the concurring Justice White, who expressed concern that this decision might be expanded to permit the hiring of replacements during lockouts. *Id.* Member Dennis recounted that the majority answered this, stating: "Contrary to the views expressed in a concurring opinion . . . we intimate no view whatever concerning the consequences which would follow had the employer replaced its employees with permanent replacements or even temporary help." *Id.* at 601-02 (quoting *American Ship Bldg.*, 380 U.S. at 308 n.8).

Food Store.²¹⁰ She concluded that the “use of replacements under the instant facts is . . . inherently destructive of employee rights”²¹¹ She reasoned that “[u]nlike *Brown [Food Store]*, all the [company’s] employees desired to continue working. In such a case . . . [t]o deny them work which is then offered to nonunion replacements, solely because of their collective bargaining efforts, would seem clearly discriminatory and in the nature of a reprisal for section 7 activities.”²¹²

F. The Bargaining Lockout with Replacement Workers: Developments After Harter Equipment, Inc.

The Board has had two occasions to clarify its expansive holding in *Harter Equipment, Inc.* In *Eads Transfer, Inc.*, after an employer and union bargained for two years following the expiration of a collective-bargaining agreement, the union proceeded to strike.²¹³ The employer hired temporary replacements and continued operations for ten months before several strikers offered unconditionally to return to work.²¹⁴ Ordinarily, they would be entitled to immediate reinstatement,²¹⁵ but the employer did not respond to the strikers between June 2 and August 23, 1988.²¹⁶ The company stated it would not reinstate the strikers until it concluded negotiations with the union for a new collective-bargaining agreement.²¹⁷

The ALJ concluded that this was a lawful bargaining lockout under *Harter Equipment, Inc.*, but the Board overturned his decision, stating: “[W]e find that the judge’s decision finding lawful the Respondent’s failure to

210. Member Dennis noted that the *Brown Food Store* Court “addressed the temporary replacement issue . . . within the confines of a narrowly delineated set of circumstances and eschewed any general rule approving temporary replacement use.” *Id.* at 602. She correctly observed that the *Harter Equipment, Inc.* majority “overlooks the key to the Court’s decision in *Brown [Food Store]*, which is its emphasis upon the defensive nature of engaging temporary help in connection with a lockout where the union has already struck a member of a multiemployer bargaining group.” *Id.* at 603.

211. *Id.* at 603.

212. *Id.* (quoting Oberer, *supra* note 23, at 221-22).

213. 304 N.L.R.B. 711, 714-15 (1991).

214. *Id.*

215. See *Laidlaw Corp.*, 171 N.L.R.B. 1366, 1369-70 (1968), *enforced*, 414 F.2d 99 (7th Cir. 1969), *cert. denied*, 397 U.S. 920 (1970). *Laidlaw* provides that replaced strikers who “unconditionally apply for reinstatement” are still employees and “are entitled to full reinstatement” when the replacements leave unless they have found substantially equivalent, regular employment or the employer has substantial, legitimate business reasons for failing to reinstate them. *Id.*

216. *Eads Transfer*, 304 N.L.R.B. at 718.

217. *Id.* at 719.

reinstate economic strikers in the context of an unannounced lockout represents not simply an application of *Harter* [*Equipment, Inc.*], but a considerable and unwarranted extension of that decision that substantially impairs economic strikers' *Laidlaw* rights."²¹⁸ It concluded that "an employer can only justify its failure to reinstate economic strikers 'for legitimate and substantial business reasons' based on a 'lockout' by its timely announcement to the strikers that it is locking them out in support of its bargaining position."²¹⁹ The Board based this reasoning on the fact that "only after the employer has informed the strikers of the lockout can the strikers knowingly reevaluate their position and decide whether to accept the employer's terms and end the strike or to take other appropriate action."²²⁰

In *International Paper Co.*,²²¹ the issue before the Board was whether

an employer that has lawfully locked out its bargaining unit employees and has lawfully subcontracted their work on a temporary basis take the further step of subcontracting their work on a permanent basis in order to bring economic pressure to bear in support of its bargaining position in contract negotiations?²²²

In this case of first impression, the employer stated during negotiations that it was adamant about permanently subcontracting maintenance work at its Mobile, Alabama plant.²²³ However, the union responded: "Do you think that we are going to give up 280 jobs? We want to stay alive. You're going to get us killed."²²⁴ This mutual intransigence continued throughout negotiations preceding the lockout, and the Board concluded that these exchanges demonstrated "that the parties were engaged in lawful hard bargaining."²²⁵ Further, the Board concluded that the company's arrangement with a labor contractor to supply temporary workers for the duration of the lockout was also lawful.²²⁶

It was only after the company made this temporary worker arrangement permanent that the Board drew a new line. It found this arrangement

218. *Id.* at 713. For a description of *Laidlaw* rights, see *supra* note 217.

219. *Eads Transfer*, 304 N.L.R.B. at 712.

220. *Id.*

221. 319 N.L.R.B. No. 150 (Dec. 18, 1995).

222. *Id.* at 1.

223. *Id.* at 3.

224. *Id.* at 5.

225. *Id.* at 13.

226. *Id.* at 18.

“imposed the most severe penalty unit maintenance employees could have suffered: permanent loss of employment and employee status.”²²⁷ Also, in contrast to *Harter Equipment’s* use of temporary replacements to pressure locked-out employees to accept its economic proposals, this arrangement subverted the ability of locked-out workers to continue bargaining.²²⁸ Moreover, the Board found that this arrangement “had far reaching pernicious effects which impaired the parties’ *process* of collective bargaining and therefore may be labeled ‘inherently destructive.’”²²⁹

IV. RESEARCH FINDINGS OF REPLACEMENT LOCKOUTS

What this [lockout] means is that during times of high unemployment, an employer can demand any concessions he wants, then lock out his workers and replace them.

—Robert Willis, President of the American Federation of Grain Millers²³⁰

A. Research Methodology

Lockouts are rare, according to conventional wisdom.²³¹ A review of pertinent law review and industrial relations literature seems to confirm this view because no statistical analysis of lockouts appears to exist. Union and management attorneys tell a different story, however. They believe lockouts

227. *Id.*

228. *Id.* International Paper’s “permanent subcontracting rendered nugatory the exercise of these statutory rights by those unit employees faced with permanent loss of employment and employee status. There can, of course, be no greater obstacle to the exercise of employee rights than permanent loss of employment and employee status.” *Id.*

229. *Id.* at 19. Analyzing the overall effect of International Paper’s permanent subcontracting position, the Board concluded that “the Respondent’s conduct was destructive not only of the ongoing bargaining process but also was likely to hinder the parties’ future collective bargaining. The altered composition of the bargaining unit would come into play regarding future layoffs and other employer action implicating employee seniority” *Id.* at 21.

230. Dave Hage, *Employers’ “Right” to Lock Workers Out Faces Test*, STAR TRIB. (Minneapolis-St. Paul), June 1, 1986, at 1D (quoting Robert Willis, president of the American Fed’n of Grain Millers, a union whose members in Keokuk, Iowa were locked out and replaced after refusing to approve a contract proposal), available in 1986 WL 4797236.

231. See CHARLES R. PERRY ET AL., OPERATING DURING STRIKES 63-64 (1982); James T. Madore, *Oldman Boiler Settles Dispute, Ending 15-Month Lockout*, BUFFALO NEWS, Aug. 15, 1995, at A10 (comments by Lou Jean Fleron, Director, Cornell Univ. Inst. for Indus. Studies), available in 1995 WL 5495203.

have become more prevalent and accepted as a part of union-management negotiations.²³²

This study examines lockouts that involved the use of replacement workers. In addition, it examines only replacement lockouts that were litigated before the NLRB. These decisions have some desirable characteristics for extracting research data. They usually report important information that can be quantified, including the dates that lockouts started and ended.²³³ Thus, basic information about replacement lockout trends can be developed, including frequency distributions of lockouts over a period of years and the duration of lockouts.

Second, the NLRB is the ultimate arbiter of whether an employer action is actually a lockout. This is not a small matter. Given the complexity surrounding strikes and lockouts, it is possible that newspapers or other potential sources of information could erroneously report a lockout as a strike, a mass layoff, or a mass discharge. In short, the term lockout is a legal characterization that the NLRB is best qualified to make. Therefore, it is the most reliable source for data about these employer actions.

Third, these decisions report important contextual information that adds to the quantitative portrait of these lockouts. This information includes the industries in which these disputes occur, negotiating histories preceding a lockout, employer justifications for locking out employees, and so forth.

There are important limitations in using only NLRB decisions. This method excludes replacement lockouts that were not litigated at all or that

232. E.g., Bob Baker, *Negotiations Take Optimistic Turn*, L.A. TIMES, Feb. 17, 1990, at 1. Robert Cantore, a union lawyer, said, "I've seen a lot more threats of lockout lately. I've been practicing 16 years and the first eight I rarely heard of the threat of a lockout. In the last eight it's happened a lot more often than I can remember." *Id.* Joel Kelly, a management lawyer, agreed: "Lawyers are more willing to advise it as a remedy if things aren't moving." *Id.*

233. In many cases, the Board reported that the lockout was still in progress, or ordered a remedy, such as reinstatement of all locked-out employees, that necessarily implied the continuation of a lockout. In these cases, the Board's decision date marked the lockout's ending point.

There are two shortcomings, however, in this methodology. First, the length of these lockouts becomes a function of how long it takes for the Board to decide these cases. It is also true, however, that employers who use the replacement lockout strategy are generally familiar with this aspect of unfair labor practice litigation and incorporate this delay in their strategy. Also, whatever the cause of this delay, the delay is material to workers who remain locked out until the Board renders a decision. Obviously, in a lockout where the employer continues operations with replacements, these employees bear most of the joint-costs of the labor dispute.

The second shortcoming is that this method actually undercounts the length of these unsettled lockouts because recalcitrant employers often appeal adverse Board decisions. Consequently, they prolong the lockout and increase costs to locked-out employees, until they completely exhaust all federal court appeals.

were settled before the NLRB made a ruling. This, in turn, can bias the sample so that it contains only the most intractable cases. Also, this method almost certainly leads to undercounting the actual occurrence of replacement lockouts.

In addition, this database has a lag effect, meaning that cases do not enter the database until some time after the lockout occurred. Often, the lag is lengthy. To illustrate, the lone case reported in 1995, *International Paper Co.*,²³⁴ involved a lockout that began in 1987 and ended in 1989. Thus, the most current research is unlikely to include a lockout occurring this year, because the Board typically does not decide unfair labor practice cases until two or more years after a party files a complaint.²³⁵

Several considerations tend to offset these limitations. An undercount of replacement lockouts is a considerable improvement over no count at all, particularly because academic study of this practice has not kept pace with its use. In addition, cases listed in the research in Appendix I give these lockouts an identity. Because these lockouts have important consequences for collective bargaining in the United States, Appendix I provides a useful starting point for continued research on lockouts.

I identified these cases by two methods. First, I read every NLRB case listed in Shepard's electronic database for two seminal lockout decisions, *American Ship Building* and *Brown Food Store*. I selected only those cases involving a replacement lockout and then shepardized each of these cases. I repeated the process until I found no new replacement lockout cases. In addition, I used a second method involving a keyword search in the NLRB database of Westlaw to find additional cases not disclosed by the iterative shepardization method.²³⁶

These searches produced forty-two NLRB unduplicated decisions involving a replacement lockouts.²³⁷ These cases comprised the database for the statistical analysis appearing in Section IV.B. In most of these cases, the

234. 319 N.L.R.B. No. 150 (Dec. 18, 1995).

235. The five-member Board in Washington, D.C. generally decides appeals from an ALJ's ruling. It acts as an appellate body, and this accounts for at least some of the delay.

236. I used two combinations of keyword searches. One was "LOCKOUT or 'LOCK! OUT' and REPLACE! or SUBSTITUTE!". A second combination was "BROWN or 'AMERICAN SHIP' and LOCKOUT or 'LOCK! OUT.'" The searches were done between April and August of 1996.

237. See *infra* Appendix I.

employer actually hired temporary replacements, but in a few, the employer continued operations by transferring employees from another location to do the bargaining-unit's work²³⁸ or using supervisory personnel for this purpose.²³⁹ Some cases also involved employers who hired permanent replacements²⁴⁰ or who engaged contractors during a lockout to permanently perform the bargaining-unit's work.²⁴¹

I also supplemented this database by performing a keyword search in Westlaw's ALLNEWSPLUS database. This search, in addition to providing more context information about some of the lockouts listed in Appendix I,²⁴² also produced news reports of other replacement lockouts.

The main limitation in these electronic documents is that news reporters, rather than the NLRB, characterized a labor dispute as a lockout. This may have biased my research by erroneously including cases that were actually strikes or mass layoffs and not lockouts. Accordingly, I did not include these cases in my quantitative analysis.

In carefully reading these reports, I looked for strong extrinsic evidence that these disputes were, in fact, lockouts before I referenced them in the preliminary findings in Section IV.C. For instance, if management and union officials both characterized the dispute as a lockout, or if they disputed this characterization²⁴³ and a state unemployment insurance agency ruled that the dispute was a lockout, I treated the report as one that I could reference.²⁴⁴

238. *E.g.*, WGN of Colo., Inc., 199 N.L.R.B. 1053 (1972).

239. *E.g.*, Ozark Steel Fabricators, Inc., 199 N.L.R.B. 847 (1972).

240. *E.g.*, Kelly-Goodwin Hardwood Co., 269 N.L.R.B. 33 (1984); Johns-Manville Prods. Corp., 223 N.L.R.B. 1317 (1976); *see also* Whitehall Packing Co., 257 N.L.R.B. 193 (1981) (employer locked out meatpacking plant employees, and simultaneously acquired and operated another plant 40 miles away, using different employees).

241. *See* International Paper Co., 319 N.L.R.B. No. 150 (Dec. 18, 1995).

242. I did not quantify this information, but I used it as evidence in Section IV.C.

243. Sometimes an employer is reluctant to characterize a dispute as a lockout because its employees may be eligible for unemployment compensation. This, in turn, may increase an employer's unemployment insurance costs. So, it is not uncommon for an employer to say that a union's refusal to agree to a contract amounted to a strike, permitting the employer to close the plant to these workers as a defensive measure. For an example, see Raymond L. Smith, *Lockout or Strike?*, TRIB. CHRON. (Warren, Ohio), Oct. 10, 1995, at 1 (hearing before the Ohio Bureau of Employment Servs. to determine if a labor dispute was a lockout or a strike), available in 1995 WL 8340950.

244. *E.g.*, William Casey, *Union Claim of Lockout at Reading Tube Upheld*, READING TIMES & EAGLE, Nov. 24, 1987, at 31 (Pennsylvania Dep't of Labor and Indus. found that the labor dispute at Reading Tube Corporation was a lockout and not a strike), available in 1987 WL 5826588.

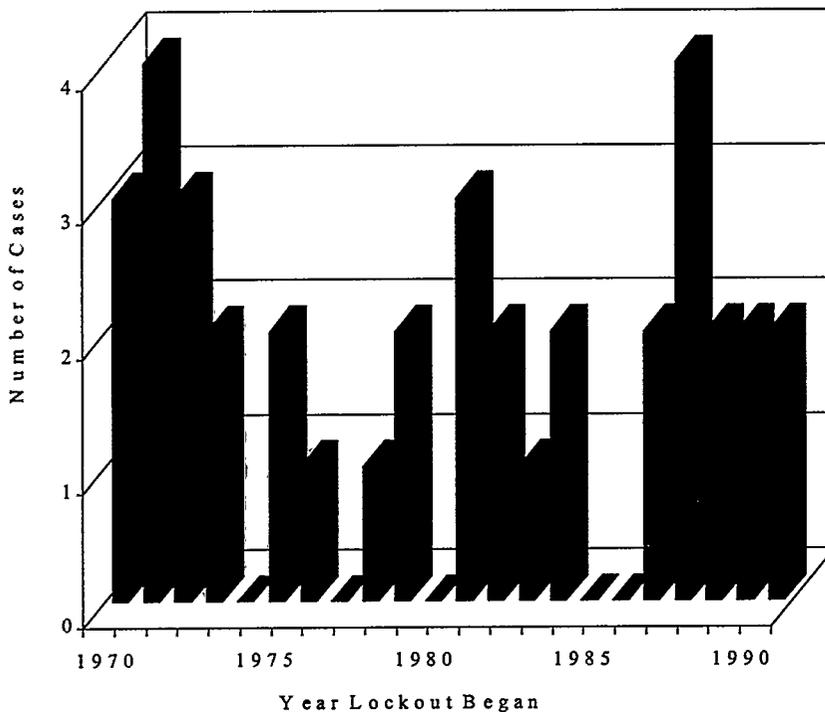
B. Quantitative Evidence of Trends in Replacement Lockouts: Findings and Implications

1. Finding 1: Replacement lockouts have occurred nearly continuously from 1970 to 1991.²⁴⁵

Although annual exceptions occurred during 1974, 1977, 1980, 1985, and 1986, this finding implies that the replacement lockout appears to have become an accepted part of the employers' economic arsenal for use during labor negotiations. These small frequencies in Figure A, with a mode of two per year, are only a portion—the appellate litigation portion—of those instances in which employers have used lockouts.

NLRB Cases of Replacement Lockouts

Figure A



245. See *infra* Section IV.B.1, fig.A.

There are several reasons to believe that the count in Figure A substantially understates the actual phenomenon. The discussion in Section IV.C identifies numerous replacement lockouts that are either in the process of being appealed to the NLRB and are therefore not reported, or that were settled without being litigated before the Board. Presumably, in addition to these reported replacement lockouts, more replacement lockouts occurred but were not reported in either the NLRB decisions or the Westlaw database.

Second, the discussion in Section IV.C shows certain industry patterns in the use of lockouts. This evidence, when viewed with the results in Figure A, strongly suggests that some employers used these reported cases to threaten unions with the possibility of a replacement lockout.²⁴⁶ This implies that each case in Appendix I has some exemplary value, although my research can neither prove this, nor estimate the magnitude of this effect. This view is supported by evidence in a national survey of employers showing that eighty percent of them would consider hiring replacements during a labor-management dispute.²⁴⁷

Third, given the continuous evolution of the lockout doctrine since the 1950s, it appears that at least some of the forty-two cases listed in Appendix I were instrumental in developing this area of labor law. Considering the expansion of the replacement lockout doctrine from *Brown Food Store* to *Harter Equipment, Inc.* in light of the results presented in Figure A, more replacement lockouts are likely to occur. *Harter Equipment, Inc.*, the most recent lead case on lockouts, removed uncertainty about the use of replacements during lockouts to increase economic pressure on unions.

Harter Equipment, Inc. is only one precedent, however. Subsequent cases based directly on *Harter Equipment, Inc.*'s reasoning²⁴⁸ have added weight to this lead case. These more recent cases offer employers improved guidance in the use, and threatened use, of replacement lockouts. Also, with each reported case, this controversial practice acquires additional legitimacy.

246. See *supra* note 232 (lawyers' comments).

247. *Combination of Many Factors Seen Contributing to Decline in Strikes*, Daily Lab. Report (BNA) No. 62, at C-1 (Apr. 3, 1989) (reporting that "35% of employers in 1988 said they would hire replacement workers if struck and another 45% said they would consider doing so").

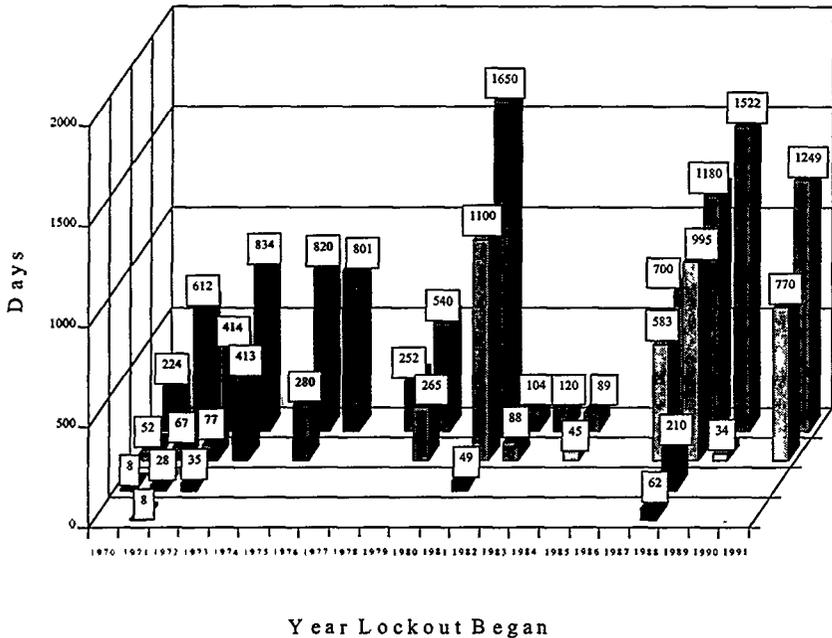
248. E.g., *General Portland, Inc.*, 283 N.L.R.B. 826 (1987); *Birkenwald, Inc.*, 282 N.L.R.B. 954 (1987); *National Gypsum Co.*, 281 N.L.R.B. 593 (1986).

2. Finding 2: The percentage of lockouts lasting longer than a year increased dramatically after Harter Equipment, Inc.

Before the court decided *Harter Equipment, Inc.* in 1986, thirty-one percent of replacement lockouts lasted more than a year,²⁴⁹ but after *Harter Equipment, Inc.*, this statistic grew to seventy-five percent.²⁵⁰ Figure B graphically illustrates this change. Thus, *Harter Equipment, Inc.* marked a substantial increase in the proportion of replacement lockouts lasting more than a year.

Length of Replacement Lockouts

Figure B



249. Only 8 of the 26 lockouts occurring before 1986 lasted over a year. See *infra* Section IV.B.2, fig.B.

250. On the other hand, 9 of the 12 lockouts occurring after 1986 lasted over a year. See *infra* Section IV.B.2, fig.B.

These annual statistics are significant because the NLRA treats as important the first anniversary of milestone events, such as union representation elections and the commencement of replacement strikes. Following a union representation election, no other representation election can occur within one year.²⁵¹ Thus, where a union wins a representation election, neither a competing union nor an employer interested in defeating such representation can change this result for one year. In addition, where a majority of employees elect to have no union representation, they may not conduct another election for at least one year. The rationale for this policy is to define a minimum period for preserving the outcome of these elections.²⁵²

The NLRA also preserves the right of replaced strikers to vote in decertification election for one year following commencement of their strike, after one year, the replaced strikers cannot vote.²⁵³ This policy, enacted as a result of the Landrum-Griffin Act in 1959, changed the Taft-Hartley Act policy that completely disenfranchised replaced strikers in decertification elections.²⁵⁴ Because so many employers exploited this policy by hiring permanent replacements and then petitioning for decertification elections, which barred replaced strikers from voting, President Dwight Eisenhower, the nation's leading Republican, spoke out against it on several occasions.²⁵⁵ The

251. The Taft-Hartley Act amended the NLRA by providing in section 9(c)(3): "No election shall be directed in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held." Labor Management Relations Act, 1947, ch. 120, sec. 101, § 9(c)(3), 61 Stat. 136, 144 (codified at 29 U.S.C. § 159(c)(3) (1994)).

252. When the Senate considered this policy, Sen. Taft explained: "The bill also provides that elections shall be held only once a year, so that there shall not be a constant stirring up of excitement by continual elections." 93 CONG. REC. 3838 (1947), reprinted in 2 NLRB, *supra* note 77, at 1013.

253. 29 U.S.C. § 159(c)(3) (1994) (expressly preserving the right of economic strikers to vote in any election conducted within a year of the strike beginning).

254. Compare Labor Management Relations Act, 1947, ch. 120, sec. 101, § 9(c)(3), 61 Stat. 136, 144 ("Employees on strike who are not entitled to reinstatement shall not be eligible to vote.") with Labor-Management Reporting and Disclosure Act of 1959, Pub. L. No. 86-257, § 702, 73 Stat. 519, 542 ("Employees engaged in an economic strike who are not entitled to reinstatement shall be eligible to vote under such regulations as the Board shall find are consistent with the purposes and provisions of this Act in any election conducted within twelve months after the commencement of the strike.").

255. He actually campaigned against this provision during his 1952 presidential campaign. S. REP. NO. 187, 86th Cong., 1st Sess. 32 (1959), reprinted in 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING & DISCLOSURE ACT OF 1959, at 397, 428 (1959). In a special message to unions in 1954, President Eisenhower said:

As the act is now written, employees who are engaged in an economic strike are prohibited from voting in representation elections. In order to make it impossible for an employer to use this provision to destroy a union of his employees, I recommend that, in the event of an economic strike, the National Labor Relations Board be prohibited from considering a petition on the part of the employer which challenges the representation rights of a striking union.

resulting one-year voter eligibility policy, while still controversial,²⁵⁶ furthered the idea that replaced strikers retain an interest in their struck job for a limited period before deciding to find other permanent employment.²⁵⁷

These first-anniversary benchmarks and their rationales are relevant in considering *Finding 2*. In replacement lockouts lasting over a year, it is reasonable to suppose that many locked out employees will lose interest in their job and find new employment. The key difference between replaced, locked-out employees and replaced strikers is that the former did not use its economic weapon, while the latter did, thereby assuming the risk of replacement. In other words, the former group was put out of work, not as a result of their own miscalculated aggression, but because of an aggressive action initiated by an employer. This seems antithetical to the purposes of the NLRA because its likely effect in causing attrition in the bargaining unit later gives an employer grounds to question continuing support for the union.²⁵⁸

Id. He then repeated this appeal in a special labor message to the 85th Congress in 1958. *Id.*

256. Sen. John F. Kennedy submitted the Senate Report arguing that the policy was still unfair to unions and their supporters:

The unfairness of the rule can be demonstrated by many hypothetical examples. But one recent dramatic instance is that involving O'Sullivan Rubber Corp.'s Winchester, Va., plant. In April 1956 the United Rubber Workers AFL-CIO was certified to represent the production employees after a Board-conducted election in which the union polled a majority 343 to 2. Thereafter O'Sullivan and the union commenced negotiations. After more than a month of fruitless negotiations, the union called a strike and all but 8 of the 420 employees in the plant failed to report to work. Thereafter while some number of strikers returned to work, the company undertook to recruit replacements. By July the company had a total of 345 employees on the job, of whom 265 were new employees and 72 returned strikers. Under these circumstances, normal production was resumed. Picketing continued and so did fruitless negotiations; the union indeed was in no position to exert any bargaining strength since the plant was in full production. On April 27, 1957, approximately 1 year after the first election the company filed for a new election. This election was held in October 1957 and the results showed that 288 votes were cast against the union and but 5 in its favor. The strikers were not permitted to vote pursuant to the rule under section 9(c)(3).

Id. at 428-29.

257. See *Jeld-Wen of Everett, Inc.*, 285 N.L.R.B. 118, 119-20 (1987) (quoting 105 CONG. REC. 5731, 5732 (1959), reprinted in 2 NLRB, *supra* note 255, at 1064-65). Sen. Case had suggested that there should be a time limit for a replaced striker's eligibility to vote in a union decertification election and that this limit should be prescribed by the Board in the absence of any statutory authority. *Id.* Sen. Javits objected by arguing for a limit reflecting the fact that replaced strikers eventually abandon interest in their struck job: "Ultimately we may be receptive to some limitation of time, but the problem of time has not risen practically. *What has happened practically is that when an unreasonable time has elapsed, people float away, and as a practical matter, are not sufficiently interested to come forward and vote.*" *Id.* (emphasis added).

258. E.g., Bert Hill, *Nestle Workers Reject Latest Offer*, OTTAWA CITIZEN, Apr. 28, 1993, at B3 (employer supports union decertification petition put forward by replacement worker during lockout), available in 1993 WL 6836785. As an alternative to a decertification election, an employer may withdraw recognition from a union if it has proof that a majority in the bargaining unit (defined as

Thus, if replacement lockouts normally last over a year, one has to seriously consider the validity of *Harter Equipment, Inc.*'s presumption that such a lockout has only a "comparatively slight effect" on employees' collective bargaining rights.²⁵⁹ *Finding 2* appears to present empirical evidence in support of Dennis's dissent in *Harter Equipment, Inc.*, where she concluded that this decision would have an inherently discriminatory effect on employee rights under the NLRA.²⁶⁰

3. *Finding 3: The duration of most lockouts is either less than four months or greater than one year.*

An almost equal percentage of replacement lockouts lasted under four months (39.5%),²⁶¹ or over one year (44.7%),²⁶² but only a small percentage were of medium duration (15.8% lasted between four and twelve months).²⁶³ This finding implies that replacement lockouts fall into essentially two categories: those where economic pressure leads to a short-lived labor dispute that has a conclusive settlement, and those where economic pressure produces a long and often inconclusive labor dispute. The short-term disputes are the type that the Supreme Court had in mind in approving a replacement lockout in *Brown Food Store*.²⁶⁴

replaced workers plus their replacements) do not want union representation. *See* NLRB v. Curtin Matheson, 494 U.S. 775 (1990) (upholding the NLRB's no-presumption policy in *Buckley Broadcasting Corp.*, 284 N.L.R.B. 1339 (1987)).

259. *Supra* notes 194-208 and accompanying text.

260. *Supra* notes 211-12 and accompanying text.

261. These percentages are based on results in Figure B.

The duration of these 15 replacement lockouts were 8 and 52 days for lockouts beginning in 1970; 8, 28, and 67 days for lockouts beginning in 1971; 35 and 77 days for lockouts beginning in 1972; 49 days for lockouts beginning in 1981; 88 and 104 days for lockouts beginning in 1982; 120 days for lockouts beginning in 1983; 45 and 89 days for lockouts beginning in 1984; 62 days for lockouts beginning in 1988; and 34 days for lockouts beginning in 1989. *See supra* Section IV.B.2, fig.B.

262. The duration of these 17 replacement lockouts were 612 days for lockouts beginning in 1971; 413 and 834 days in for lockouts beginning in 1973; 820 days for lockouts beginning in 1975; 801 days for lockouts beginning in 1976; 540 days for lockouts beginning in 1979; 1100 and 1650 days for lockouts beginning in 1981; 583 and 752 days for lockouts beginning in 1987; 995 and 1180 days for lockouts beginning in 1988; 1522 days for lockouts beginning in 1989; and 770 and 1249 days for lockouts beginning in 1991. *See supra* Section IV.B.2, fig.B.

263. The duration of these six replacement lockouts were 224 days for lockouts beginning in 1970; 330 days for lockouts beginning in 1972; 280 days for lockouts beginning in 1975; 252 days for lockouts beginning in 1978; 265 days for lockouts beginning in 1979; and 210 days for lockouts beginning in 1988. *See supra* Section IV.B.2, fig.B.

264. The lockout lasted from March 16 to April 22, 1960. NLRB v. Brown (*Brown Food Store*), 380 U.S. 278, 281 (1965).

It is doubtful, however, that the *Brown Food Store* Court would have approved any replacement lockout doctrine if presented with a case in which an employer locked out and replaced for several years employees who had not initiated or threatened a strike, but merely turned down a contract offer.

The Court found that a short replacement lockout, precipitated by a whipsaw strike, served a legitimate business end,²⁶⁵ but the more typical lockout today, involving no threat of a whipsaw strike and sometimes lasting years, lacks that justification. The Court said that short-term temporary replacements posed no threat of actual replacement to locked-out employees,²⁶⁶ but that conclusion is not warranted where a temporary replacement holds a replaced worker's job for several years. *Finding 3*, presenting empirical evidence showing that approximately two in five replacement lockouts last over a year, clearly suggests that the *Brown Food Store* doctrine is unworkable in light of more recent developments in labor-management relations.

4. *Finding 4: The average duration of replacement lockouts is longest during the latest time period measured.*

Figure B also shows that the average duration of replacement lockouts was at its highest level in the most recent period measured. Moreover, the trend toward longer lockouts grew sharply in this period. Lockouts beginning in 1987 had an average duration of 652 days and in 1988 this figure dropped slightly to 612 days. But, for lockouts that began in 1989, this figure jumped to 778 days and continued to soar for lockouts that began in 1990 (1087 days) and 1991 (1010 days).

Thus, the duration of replacement lockouts has been in an unhealthy upward trend since 1981. Lockouts beginning that year had an average duration of 933 days, but lockouts beginning in 1982, 1983, and 1984 had average durations of 96, 120, and 67 days, respectively. While replacement lockouts began in 1985 and 1986,²⁶⁷ thereafter, the average duration increased

265. *Id.* at 133-34.

266. *Id.* at 133.

267. One possible explanation for the drop in replacement lockouts between the years of 1982 to 1986 is that many employers were taking a wait-and-see approach while observing the outcome of those replacement lockouts which began in 1981. Because the average lockout starting in 1981 lasted nearly three years, this could have contributed to the shorter durations during 1982-1984. Moreover, the lack of replacement lockouts in both 1985 and 1986 might be attributable to union fears of instigating protracted lockouts such as those which had recently ended.

five- to ten-fold.

C. *Qualitative Evidence of Trends in Replacement Lockouts: Preliminary Indications*

Although not all the “lockouts” found during my research²⁶⁸ were included in my quantitative analysis for various reasons, the research did provide sufficient information for the identification of several possible trends, or preliminary indications, regarding the future of replacement lockouts. A few isolated cases cannot be used as proof to establish a trend or central tendency. Arguably, the following cases became newsworthy only because they had unusual features. Alternatively, in the absence of any current literature on lockouts, it makes little sense to dismiss these events simply because reporters discussed them in the news. The fact that they were newsworthy suggests that these disputes have important consequences for communities, industries, and the U.S. economy.

Therefore, I looked for patterns in these accounts of replacement lockouts. Because I did not analyze these accounts statistically, I treated these results as preliminary indications. Although they have quite limited value, and were arrived at with caution, they improve current knowledge of replacement lockouts.

First, these qualitative impressions can be compared to the characteristics of replacement lockouts in seminal cases such as *American Ship Building*, *Brown Food Store*, and *Harter Equipment, Inc.* The information reported in these more recent cases usually has enough detail to make these comparisons. This, in turn, could lead a future Board or court to question *Harter Equipment, Inc.*'s unsupported assertion that replacement lockouts have little or no discriminatory effect on union-represented employees. In addition, these more recent lockouts suggest research questions for future studies.

1. *Preliminary Indication 1: Replacement lockouts result from aggressive employer initiatives.*

In lead cases, companies locked out employees because unions put them in vulnerable financial positions. The American Ship Building Company had already experienced five strikes during earlier busy seasons, and sensing that the union was stalling in negotiations and angling to repeat this pattern, the

268. See *supra* Section IV.A.

company attempted to control the timing of a nearly inevitable dispute by locking out employees during slow work periods.²⁶⁹ The employer in *Brown Food Store* was part of a multiemployer group, one of whose members was already being struck.²⁷⁰ Vulnerable to a whipsaw strike, this employer initiated a lockout in response to a union's first-use of economic weapons.²⁷¹ *Harter Equipment, Inc.* did not involve a whipsaw or busy-season strike; instead, the employer supported its lockout by claiming "grave financial difficulties," and the union's rejection of a contract coupled with the possibility of a strike.²⁷²

Recent large-scale industrial disputes offer examples of much more aggressive employer initiation of labor disputes. The common element in these disputes is that employers have exploited their superior bargaining power in initiating replacement lockouts. This sharply contrasts with earlier lockouts aimed at responding to a union's actual or threatened use of economic weapons.

For example, two large employers, Staley and Dial Corporation, locked out employees after their workers refused to agree to concessions replacing consistently-scheduled, eight-hour work shifts with rotating twelve-hour shifts.²⁷³ Another large employer, Trailmobile, locked out and replaced workers after they rejected a company offer to freeze their wages for seven years.²⁷⁴ Commonwealth Gas in Massachusetts locked out 375 employees

269. *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 302 (1965).

270. *Brown Food Store*, 380 U.S. at 281.

271. *Id.* at 279-80.

272. *Harter Equip., Inc.*, 280 N.L.R.B. 597, 597 (1986).

273. See Donald E. Franklin, *Dial Locks Out 386 Workers at Local Plant*, ST. LOUIS POST-DISPATCH, July 2, 1993, at 7A; *57% of Staley Union Workers Reject Contract Offer Including Lump Sum for Quitting*, PEORIA J. STAR, July 11, 1995, at C7, available in 1995 WL 3247702. Many workers preferred this scheduling consistency because they could make family and leisure-time commitments during their regularly scheduled off-hours. Franklin, *supra*. Also, research shows that working all night is unhealthy; even people who regularly work through the night fail to adapt to the late hours. Lynne Lamberg, *Sleepworking*, AM. MED. NEWS, Nov. 6, 1995 at 19 (Dr. Timothy Monk, Director, Human Chronobiology Research Program, Univ. of Pittsburgh School of Medicine, observed that people who work permanently on the night shift never fully adapt to the disruption in their natural sleep cycle), available in 1995 WL 10600107. In addition, the eight-hour schedule, when implemented as part of a three-shift daily operation, is advantageous for employees, because it requires more people to staff compared to compressed work schedules resulting in two shifts. E.g., L.M. Sixel, *Feeling Compressed; Workers Split over Long Days*, HOUS. CHRON., June 14, 1996, at 1 (reporting a union officer's account that when his workplace changed from an 8-hour to a 12-hour shift, his employer reduced the workforce by 20%), available in 1996 WL 5604229.

274. *Trailmobile, Locked-Out Union Fail to Reach Agreement in Charleston*, ST. J. REG. (Springfield, Ill.), Jan. 27, 1996, at 10 (reporting that the company's final offer would extend for three years a wage freeze that had already been in effect for four years), available in 1996 WL 5787225. If

when they refused to accept a contract that would enable their employer to outsource more of their work to contractors.²⁷⁵ Indiana Gas locked out 500 employees to compel them to pay more for their health insurance.²⁷⁶ The Safeway grocery chain and member-employers in their bargaining group locked out 18,000 workers in an effort to cut employee benefits.²⁷⁷

Cases in my NLRB database also evidenced this tendency. For example, in *Association of D.C. Liquor Wholesalers*, employers locked out employees after proposing large wage reductions in various job classifications.²⁷⁸ The ALJ's reasoning for finding this lockout unlawful suggests the apparent difference between the current and earlier replacement lockouts.²⁷⁹

The economic pressure brought by Respondents by the lockout was not in support of a legitimate bargaining position but, rather, was in support of coercing the Union to accept its unlawfully implemented last offer. The lockout and hiring of replacements formed an integral, if impromptu, part of a preconceived bad-faith plan to arrive at an apparent bargaining impasse, given the refusal of employees to strike.²⁸⁰

Contemporary replacement lockouts also differ from *Brown Food Store* in terms of the economic injury that the replaced workers suffer. The *Brown Food Store* majority characterized the injury of being temporarily replaced as minimal, stating that “[a]t most, the union would be forced to capitulate and return its members to work which, while not as desirable as hoped for, were still better than under the old contract.”²⁸¹ However, recent replacement lockouts contradict this conclusion because the economic injury suffered is likely not minimal.

For example, in the Staley lockout, only 181 of 558 eligible union

one assumed that the cost-of-living would increase by 3% per year during this period—a realistic assumption—workers' hourly wages would depreciate over 20% during this period.

275. Lisa Eckelbecker, *Commonwealth Gas Locks Out Union*, TELEGRAM & GAZETTE (Worcester, Mass.), Apr. 2, 1996, at E1, available in 1996 WL 2385672.

276. Peter Key, *Indiana Gas, Unions Resume Contract Talks*, INDIANAPOLIS STAR, Dec. 17, 1994, at D4, available in 1994 WL 8092105.

277. Jim H. Zamora & Keay Davidson, *Unions Aim to Divide Stores' Brass*, S.F. EXAMINER, Apr. 9, 1995, at C1, available in 1995 WL 4919279.

278. 292 N.L.R.B. 1234, 1252 (1989).

279. *Id.* at 1258.

280. *Id.*

281. NLRB v. Brown (*Brown Food Store*), 380 U.S. 278, 288 (1965).

members returned to work.²⁸² More than 250 members opted for a severance package and most of the remaining workers chose to enter a retirement bridge program.²⁸³ They made these "choices" after being locked out over two-and-a-half years.²⁸⁴

Several other examples exist. In 1984, BASF Corp. locked out 370 union-represented workers, hired replacements, and continued the lockout for five-and-a-half years at a Louisiana refinery.²⁸⁵ International Paper locked out and replaced 1200 workers in Mobile, Alabama for sixteen months,²⁸⁶ and Ravenswood Aluminum locked out 1700 workers for nineteen months, continuing production with replacements.²⁸⁷

These lockouts contradict the economic assumption in *Brown Food Store* in two respects. First, these very lengthy lockouts suggest that employers did not present unions with terms "not as desirable as hoped for,"²⁸⁸ but rather, with terms that were impossible to accept.²⁸⁹ For example, International Paper, presented the union with a demand to eliminate 280 bargaining-unit jobs, a proposition that left virtually no room for real negotiating.²⁹⁰ This offer does not even compare to the one in *Brown Food Store* that involved a smaller pay raise, but with the bargaining unit to remain fully intact.

The aggressive nature of more recent lockouts can also be seen in the unsavory employer justifications for using this weapon. Long ago, the NLRB established the principle that an employer is privileged to use a lockout where it responds to actual or threatened sabotage or similar economic injury.²⁹¹

282. *Staley Workers: Fewer Than a Third of Force to Return*, ST. J. REG. (Springfield, Ill.), Jan. 13, 1996, at 10, available in 1996 WL 5786113.

283. *Id.*

284. Margaret Doyle, *Staley Ends Lockout at American Factory*, DAILY TELEGRAPH (London), Dec. 28, 1995, at 23, available in 1995 WL 13556205.

285. *BASF, Union To Open Talks*, BATON ROUGE ADVOC., Nov. 1, 1995, at 12A, available in 1995 WL 6347206.

286. *International Paper Says Lengthy Strike Ends at Three Mills*, WALL ST. J., Oct. 11, 1988, available in 1988 WL-WSJ 436245.

287. Michael H. Cimini & Susan L. Behrman, *Lengthy Dispute Ends at Ravenswood*, MONTHLY LAB. REV., Sept. 1, 1992, at 44.

288. *NLRB v. Brown (Brown Food Store)*, 380 U.S. 278, 288 (1965).

289. Very lengthy lockouts also occurred in cases in my NLRB database. See *America's Best Quality Coating Corp.*, 313 N.L.R.B. 470 (1993) (lockout lasted at least until NLRB ruled in case, or 1249 days); *Goldsmith Motors Corp.*, 310 N.L.R.B. 1279 (1993) (lockout lasted at least until NLRB ruled in case, or 1194 days); *Branch Int'l Servs., Inc.*, 310 N.L.R.B. 1092 (1993) (lockout lasted at least until NLRB ruled in case, or 770 days).

290. *International Paper Co.*, 319 N.L.R.B. No. 150, at 3 (Dec. 18, 1995).

291. See *supra* notes 122-24 and accompanying text.

Such threat or injury must be real, however.²⁹²

Yet some employers have instituted replacement lockouts on the basis of exaggerated claims of sabotage or union involvement in such activity. In *America's Best Quality Coating Corp.*, an employer who resisted a union organizing campaign experienced an acid spill at its production plant.²⁹³ Even though it conducted an investigation and discharged two perpetrators, the company overreacted by indefinitely locking out everyone on the entire shift when the spill occurred.²⁹⁴

The Johns-Manville lockout shows how employers stretch the sabotage justification to undermine employees' collective-bargaining rights. During contract negotiations, some workers sabotaged the company's roofing-paper production, causing a very costly loss in sales.²⁹⁵ When a company officer asked the local union president to try to stop this sabotage, the latter said that there was a group of "radicals" in the local who could not be controlled.²⁹⁶ Even though the sabotage here was real and was very costly, the company went beyond temporarily replacing employees. After initially locking out all employees and temporarily replacing them, which the NLRB determined was a lawful response,²⁹⁷ it then converted the status of the replacements from temporary to permanent, which the NLRB ruled was unlawful.²⁹⁸ The facts show that the company intended to end its bargaining relationship with the union²⁹⁹ and found that sabotage a convenient pretext for doing so.³⁰⁰

292. See *supra* note 121 and accompanying text.

293. 313 N.L.R.B. 470, 476 (1993).

294. *Id.* at 476-77.

295. *Johns-Manville Prods. Corp.*, 223 N.L.R.B. 1317, 1324 (1976), *rev'd*, 557 F.2d 1126 (5th Cir. 1977).

296. *Id.* at 1324-25.

297. *Id.* at 1331-32.

298. *Id.* at 1332.

299. The ALJ found that "the permanent replacement of the employees herein constituted not only an illegal discharge of the employees but also, for all practical purposes, a withdrawal of recognition of their duly elected collective-bargaining representative." *Id.*

300. The Fifth Circuit Court of Appeals reversed this ruling on the grounds that sabotage justifies an employer's hiring of permanent replacements during a lockout. *Johns-Manville*, 557 F.2d 1126. This appears to be the only ruling to permit an employer to hire permanent replacements for locked out employees. Interestingly, nothing in the NLRA prevents an employer from discharging employees, provided that such action is not unlawfully motivated. As a result, Johns-Manville had a right, not to permanently replace, but to discharge workers who damaged its property or otherwise violated its rules. In contrast, the Fifth Circuit created a dangerous precedent when it stated:

We agree with the factual findings of the Administrative Law Judge and the Board, but not with the conclusions they reached.

Based on the facts as discussed above, this Court finds that, as a matter of law, the employees

Finally, employers occasionally reveal their aggressive intentions in their strategic use of labor contractors to supply replacement workers. The financial success of one employment firm who specializes in supplying replacement workers during labor disputes suggests that some companies simply plan on the likelihood that employers will have replacement-worker disputes. As a provider of replacement workers, BE&K has been routinely engaged in replacement strikes and lockouts since 1972.³⁰¹ Its earnings for 1988, \$1.3 billion,³⁰² shows that there is a lucrative market for this form of union-avoidance.³⁰³ The presence of this aggressively antiunion labor contractor has provoked confrontation, however.³⁰⁴ For example, International Paper entered into a labor-supply agreement with this contractor,³⁰⁵ and this arrangement permitted it to lock out 1200 employees, while putting forward a proposal to permanently subcontract 280 jobs.³⁰⁶

were involved in what amounted to an in-plant strike. The employees' conduct was so severe that we cannot help but find that their behavior was tantamount to a strike and forced the Company to lock them out. . . . Although employees and employers are permitted to choose their own weapons in the bargaining battle, the employees in the instant case went too far.

Id. at 1133.

In dissent, Judge Wisdom insightfully responded:

In this case the Court has given employers a lethal new tool to combat future unionization and to avoid the process of collective bargaining. By permitting the employer to imply the existence of a strike without identifying any participant and on, what appears to me, to be a flimsy factual basis, the Court in effect denies workers their livelihoods because they joined a union and engaged in collective bargaining. The message will not be lost on workers or management. When a worker joins a union and attempts to bargain about the terms of his employment, he may now lose his job if at his plant any disruptions of production occur which may be laid at the door of a few malcontents or overreacting union workers. Even though he produces a normal output and puts no economic pressure on the company, management may replace him with impunity; the Court of Appeals will infer that he created the disruptions, because the disruptions coincided with his union's negotiations for a new contract. Conversely, when a company tires of its unionized workforce, it can highlight a few production disruptions during contract negotiations, infer an in-plant strike, and replace its workers with non-unionized employees.

Id. at 1141 (Wisdom, J., dissenting).

301. John Gever, *BE&K: The Company That Unions Love to Hate*, BIRMINGHAM BUS. J., May 1, 1989, at 10, available in 1989 WL 2519174.

302. *Id.*

303. *Id.*

304. When Boise-Cascade contracted with BE&K to help in a \$500 million renovation of a paper mill, union workers went on strike. Iron Workers Local No. 783, 311 N.L.R.B. 734, 736 (1993), *rev'd*, BE&K Constr. Co. v. NLRB, 23 F.3d 1459 (8th Cir. 1994), *cert. denied*, 115 S. Ct. 721 (1995), *supplemented*, Iron Workers Local No. 783, 316 N.L.R.B. 1306 (1995). When the mill turned to BE&K to hire striker replacements, union workers rioted and destroyed the man-camp housing BE&K workers. *Id.* at 736-37.

305. International Paper Co., 316 N.L.R.B. No. 150, at 6 (Dec. 18, 1995).

306. *Id.* at 6-7.

Another large employer, Caterpillar, successfully worked through a UAW strike by operating its plants with temporary replacements supplied by labor contractors from the South.³⁰⁷ Although this was not a lockout, it nevertheless illustrates the important role that labor contractors can play in these disputes.

Use of replacements is likely to increase in labor disputes simply because the market for replacement workers is rapidly growing. A 1996 *Wall Street Journal* article explained:

Temporary employment agencies are also profiting from the outsourcing trend. Hoping to keep their permanent staffs as lean as possible after downsizing, many companies rely on outside employment agencies to provide “temps” when they need extra help. The average daily employment of temporary employment services was 2,162,000 last year, nearly double from the 1990 level³⁰⁸

The temporary worker industry is rapidly changing, so that contractors now “become the work force’s employer or co-employer and ‘lease’ the employees, primarily permanent workers, back to the client company.”³⁰⁹

There is nothing unlawful about this practice. Its legality in a replacement lockout is, however, highly doubtful because the Supreme Court pointedly refused to extend the *Mackay Radio* doctrine providing for permanent striker replacements to lockouts.³¹⁰

In sum, the courts in *Brown Food Store* and *Harter Equipment, Inc.* reasoned that use of temporary replacements has only a comparatively slight effect on the collective bargaining rights of locked-out employees. But, these decisions were made before employee leasing, contracted on an indefinite basis, became commonplace. Because worker rentals blur the line between

307. See Robert L. Rose, *Caterpillar Continues To Stand Tough As Strikers Return*, WALL ST. J., Dec. 8, 1995, at B1 (reporting that in 1994 Caterpillar made record profits while employing 5600 temporary striker replacements and 4100 UAW crossovers); Robert L. Rose, *Workplace: Temporary Heaven: A Job at Struck Caterpillar*, WALL ST. J., Nov. 29, 1994, at B1 (describing Caterpillar’s use of labor contractors to hire replacement workers from Mississippi to work for strikers in Illinois factories).

308. Roger Ricklefs, *Worker Staffing Becomes a Hot Entrepreneurial Field*, WALL ST. J., June 4, 1996, at B2.

309. *Id.*

310. *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 308 n.8 (1965); *NLRB v. Brown (Brown Food Store)*, 380 U.S. 278, 292 n.6 (1965). In *Brown Food Store*, the Court stated,

We do not here decide whether the struck employer exercised its prerogative to hire permanent replacements for the strikers under our rule in [*NLRB*] v. *Mackay Radio & Telegraph Co.*, . . . and the nonstruck employers had then hired permanent replacements for their locked-out employees.

Id.

temporary and permanent employment—and perhaps not coincidentally, now that many replacement lockouts last over a year—this legal conclusion must be reexamined.

2. *Preliminary Indication 2: Replacement lockouts spread in particular industries or regions.*

I have observed certain industry and regional patterns occur in replacement lockouts. The most visible industry pattern is in professional sports.³¹¹ Recent lockouts by the NBA and NHL may reflect lessons that team owners learned from professional baseball and football strikes. The most recent baseball strike ended badly for the owners because the court enjoined them from abolishing free agency.³¹² In football, even after the strike settled on terms agreeable to the players,³¹³ the owners lost suits resulting in two separate thirty million dollar judgments.³¹⁴

In contrast, NBA owners commanded their negotiations by controlling the timing of their inevitable dispute with the players' union. By locking out players in July 1995, they preempted the union from calling a late-season strike. This shifted more of the dispute costs to players for failing to reach a new agreement. Owners increased pressure on players by threatening to open the season with replacement players.³¹⁵

This strategy succeeded for the owners, who negotiated an agreement that contained numerous player givebacks.³¹⁶ The concessions were so significant,

311. An insightful discussion of the context of sports lockouts appears in Mark T. Doyle, Casenote, *National Basketball Association v. Williams: A Look Into the Future of Professional Sports Labor Disputes*, 11 SANTA CLARA COMPUTER & HIGH TECH. L.J. 403 (1995).

312. See *Silverman v. Major League Baseball Player Relations Comm.*, 67 F.3d 1054, 1062 (2d Cir. 1995) (affirming a district court injunction, noting: "The [owners] decided to settle the original unfair labor practice charges while embarking on a course of action based on a fallacious view of the duty to bargain. We see no reason to relieve it of the consequences of that course.").

313. For details of this complex settlement, see Michael H. Cimini & Susan L. Behrman, *Five-Year Impasse Ends in Football*, MONTHLY LAB. REV., March 1, 1993, at 50. Part of the agreement included that team owners pay \$195 million in damages to compensate about 2000 players involved in various lawsuits against the league. *Id.*

314. *Brown v. Pro Football, Inc.*, 116 S. Ct. 2116 (1996) (involving a \$30 million antitrust judgment growing out of the 1987 strike); *NFL Players Chief Welcomes Back Pay Settlement*, Daily Lab. Rep. (BNA) No. 176, at D-8 (Sept. 14, 1994) (NFL owners settled unfair labor practice charges before the NLRB by paying 1987 strikers \$30 million).

315. Rory Glynn, *Pro Basketball Dealt from the Bottom of the Deck*, CINCINNATI ENQUIRER, Aug. 31, 1995, at D5 (reporting that the NBA season might open with replacement players from European teams and the Continental Basketball Ass'n), available in 1995 WL 6981243.

316. See Lacy J. Banks, *Like Mike, I'd Veto New Contract*, CHI. SUN-TIMES, Sept. 7, 1995, at 89.

and the pressure of being locked out was so great, that owners successfully drove a wedge between journeyman players, such as Olden Polynice, and superstars such as Michael Jordan and Patrick Ewing.³¹⁷ The split between players culminated in a nearly-successful effort by some superstars to decertify the union.³¹⁸

Other patterns in replacement lockouts are discernible. Some electric and gas utilities³¹⁹ and meatpackers³²⁰ have used the NBA owners' strategy. Replacement lockouts for MLB umpires and NBA referees occurred in the same year.³²¹ In addition, although replacement lockouts are still uncommon, some have occurred at approximately the same time and proximity in Illinois,³²² New York,³²³ and Washington.³²⁴ In addition, when one large

The apparent givebacks included elimination of slot exceptions and the one-year escape clause, as well as greater restriction in balloon payments. *Id.* "These mechanisms enable owners to correct the mistake of paying a player below his market value." *Id.* The agreement also contained a highly uncompetitive provision, a new restriction prohibiting players and their agents from sharing salary information. *Id.* "Owners prefer to keep players ignorant about how much each is earning. This way, Player A can't complain that he is twice as productive as Player B, but earning only one-fifth of Player B's salary." *Id.*

317. See Marc Stein, *NBA Union Vote Draws Big Turnout in Westwood*, L.A. DAILY NEWS, Aug. 31, 1995, at S1, available in 1995 WL 5417073. One NBA player said:

I hope everyone comes to the realization that we can't afford a work stoppage. . . . [W]e have so many guys who don't know what's going on. They're just following Michael [Jordan], Patrick [Ewing] and Alonzo [Mourning].

. . . To hell with them. Michael can afford a work stoppage. Michael doesn't need to play sports again. We're not in the same position.

Id. (quoting Olden Polynice) (bracketed material and second omission in original).

318. *NBA Players Vote 226-134 to Keep Union*, CHI. TRIB., Sept. 12, 1995, at 1. A lawyer who led the dissident players' decertification campaign offered this assessment: "A lot of the players got intimidated by the threat of the owners that the season was going to end. The strategy the NBA carried out was effective." *Id.* (quoting Jeffrey Kessler, lawyer for players wishing to decertify the union).

319. Eckelbecker, *supra* note 275; Frank Fisher, *Lockout by Utility Idles 1,500*, ST. LOUIS POST-DISPATCH, May 21, 1993, at 7A (Central Illinois Public Service locked out 1500 union workers and continued operations with managers, supervisors, and nonunion employees.); Key, *supra* note 276.

320. Whitehall Packing Co., 257 N.L.R.B. 193 (1981); John Taylor, *Union to Vote on Plan*, OMAHA WORLD-HERALD, July 25, 1987 (IBP locked out and replaced 2800 meatpackers in December 1986), available in 1987 WL 4524636; James Warren, *Oscar Mayer Begins Lockout*, CHI. TRIB., July 22, 1986, at 7 (Oscar Mayer locked out and replaced 700 workers after they rejected a contract proposal that would tie their wages with that of lower paying competitors.).

321. See Hummel, *supra* note 21 (baseball umpires); Povtak, *supra* note 19 (NBA referees).

322. In Decatur, Illinois, Staley, a large corn processor, locked out employees on June 27, 1993, in a contract dispute that overlapped with the Caterpillar dispute. *Police Put Down Union Protest*, CHI. SUN-TIMES, June 26, 1994, at 27. Staley then continued operations by hiring replacement workers. Kevin McDermott, *Staley, Union Appear to be at Stalemate*, ST. LOUIS POST-DISPATCH, July 22, 1993, at 1. One month earlier, a nearby electrical utility, Central Illinois Public Service Co., locked out 1500 employees in a contract dispute. Sally McKee, *NLRB's Answer to Labor Dispute Worth \$12 Million*, PEORIA J. STAR, Aug. 24, 1993, at B1, available in 1993 WL 5565096. While the Staley

replacement lockout concluded in Decatur, Illinois (A.E. Staley), another began almost simultaneously in nearby Charleston (Trailmobile) with replacements from the first lockout working in the second.³²⁵

One multinational corporation's repeated use of replacement lockouts suggests another pattern. In 1993, Nestle's Canadian division locked out workers in support of its bargaining demand that workers give up overtime premiums for weekend work.³²⁶ Two years later, in an apparently unrelated dispute, Nestle USA locked out ninety employees in Lathrop, California in support of its bargaining position and then hired replacements.³²⁷ These events may be a coincidence, but they might instead reflect one multinational firm's global strategy to confront unions more aggressively.

Ironically, there is potential now for large employers to use replacement lockouts to whipsaw one union against another.³²⁸ As human resource management strategies take on global dimensions, labor relations practices in one country may impinge unions and employers in other nations.³²⁹ It is worth noting, therefore, that replacement lockouts have occurred with some frequency in Canada³³⁰ and to a less reported extent in Korea³³¹ and

dispute was still in progress in 1994, Caterpillar hired thousands of replacement workers, some of whom worked in its large Decatur factory. Robert L. Rose, *Caterpillar Continues To Stand Tough As Strikers Return*, WALL ST. J., Dec. 8, 1995, at B1 (reporting that in 1994 Caterpillar made record profits while employing 5600 temporary striker replacements and 4100 UAW crossovers). Bridgestone-Firestone, another employer with a large manufacturing plant in Decatur, responded to a 1994 strike by the United Rubber Workers by hiring permanent replacements. Raju Narisetti, *Bridgestone/Firestone Begins to Hire Permanent Replacements for Strikers*, WALL ST. J., Jan. 5, 1995, at A3. Then, 40 miles away, in Charleston, Illinois, Trailmobile locked out over 1000 workers and hired replacements for them. *Trailmobile Could Become Another Long Labor Dispute*, *supra* note 2.

323. James T. Madore, *Lockout Seen As Hostile Labor Relations Act*, BUFFALO NEWS, Aug. 14, 1994, at B13 (separate replacement lockouts occurring simultaneously in Buffalo at Oldman Boiler and Buffalo Color), available in 1994 WL 4983302.

324. Jack Broom, *Locked-Out Employees Team Up*, SEATTLE TIMES, Feb. 7, 1987, at A1 (separate replacement lockouts occurring at same time in Seattle area at poultry processing plant and shipyard), available in 1987 WL 5341267.

325. See *supra* note 71 and accompanying text.

326. Hill, *supra* note 258.

327. Cathleen Ferraro, *Nestle USA Locks Out 90 Workers in Lathrop*, SACRAMENTO BEE, July 18, 1995, at G1, available in 1995 WL 4129467.

328. The irony, of course, is that the replacement lockout doctrine developed when unions had superior bargaining power and used this power against employers in actual or threatened whipsaw strikes. See *supra* notes 144-45. The Supreme Court expanded the replacement lockout doctrine to enable employers to cope with this inequality of bargaining power.

329. Rebecca Blumenstein, *UAW Delegates Endorse Pact with GM*, WALL ST. J., Nov. 7, 1996, at A2 (describing separate but concurrent and related negotiations between GM and the United Auto Workers (a U.S. Union) and the Canadian Auto Workers (a Canadian union)).

330. See, e.g., Jim Farrell, *Tempers Flare on Picket Line*, EDMONTON J., March 29, 1994, at B1

Sweden.³³² In addition, 80,000 miners recently marched against a constitutional proposal in South Africa to permit employers to lockout employees.³³³

3. *Preliminary Indication 3: Replacement lockouts seriously undermine union representation.*

Developing evidence suggests that some employers use replacement lockouts as an additional tool to break unions. Harter Equipment Company is a primary example. When the NLRB ruled that this company's lockout was lawful, it accepted the employer's argument that the lockout was necessary to put economic pressure on the union because of grave financial difficulties.³³⁴ This led the Board to conclude that the company harbored no antiunion intentions.³³⁵

The company made a mockery of this analysis by immediately supporting a decertification petition.³³⁶ Shortly after the Board ruled in the first case, a replacement worker petitioned the NLRB for an election to decertify the union as a bargaining representative.³³⁷ Not only was he interested in decertifying the union, but the company openly supported him.³³⁸ Its president stated that the "only employees that I recognize now are those employees that are there, that are working at the company . . . nobody from

(picket line violence followed when Engine Rebuilders Ltd. locked out union workers and continued operations with nonunion workers), available in 1994 WL 8495390; Gordon Jaremko & Rick Mofina, *Workers Vote to Accept Offer from Lafarge Plant*, EDMONTON J., Aug. 3, 1994, at A12 (replacement lockout lasted seven months and deeply divided a community in Alberta), available in 1994 WL 8481960; Mike Lamb & Alan Boras, *Mine Buyer Faces Labor Turmoil*, CALGARY HERALD, Nov. 3, 1992, at C8 (Westar Mining locked out about 2000 miners and then its bankruptcy trustee operated one of its mines with 800 replacement workers), available in 1992 WL 6414949.

331. *30,000 Workers March in Korea, Escalating Strife*, WALL ST. J., Aug. 18, 1987 (riots erupted with thousands of protesters battering down factory gates after Hyundai locked out workers at six of its subsidiaries), available in 1987 WL-WSJ 307252.

332. *New Wage Offer Proposed, Union Response Negative*, Associated Press, Feb. 1, 1988 (Swedish employers locked out 40,000 workers in a spiraling labor dispute), available in 1988 WL 3766201.

333. For background, see Terry Bell, *Protest Triggers Fears of New Instability in S. Africa*, AM. METAL MARKET, June 8, 1995, at 1; and Laura Cohn, *Rand Gains Despite South Africa Strike*, WALL ST. J., May 1, 1996, at C32.

334. Harter Equip., Inc., 280 N.L.R.B. 597, 599 (1986).

335. *Id.* at 600.

336. Harter Equip., Inc. (*Harter Equipment II*), 293 N.L.R.B. 647 (1989).

337. The Board decided the lockout case on June 24, 1986 and George Zatrinski filed his decertification petition on November 15, 1986. *Id.*

338. *Id.*

five years ago.”³³⁹ The Board rejected this petition, finding the seventeen replacements ineligible to vote.³⁴⁰ But this was a Pyrrhic victory for the union, whose members were locked out on December 3, 1981 and who were still lawfully locked out on April 12, 1989, when the Board decided the decertification case.³⁴¹

The Harter Equipment Company succeeded in cloaking its intentions in neutral-sounding negotiating that emphasized the economic need for concessions. Of course, the danger in a doctrine that permits this negotiating tactic is that any careful employer can disguise its unlawful intentions. The *Harter Equipment, Inc.* doctrine not only provides cover for unlawful behavior; it also encourages a calculated form of lying during contract negotiations *and pleadings* in NLRB litigation.³⁴² Considering that some employers already bend the truth in threatening to lock out employees,³⁴³ it is

339. *Id.* at 647 (omission in original) (quoting the company president).

340. *Id.*

341. *Id.*

342. A critical analysis of lying in negotiations appears in Gerald B. Wetlaufer, *The Ethics of Lying in Negotiations*, 75 IOWA L. REV. 1219 (1990). It is difficult to conceive that an attorney representing an employer would advise her client to be truthful in stating that its strategy is to discourage union representation (an unlawful act), even when this intention is clear to her. In this connection, Wetlaufer notes:

[W]e might admit that, in a wide range of circumstances, lying works. . . . [W]e might become more critical of our self-serving claims about what is not a lie and about what lies are ethically permissible. This involves acknowledging, for instance, that many lies are ethically impermissible even though they effectively serve our interests and those of our clients—and even though they are forbidden either by law or by our codes of professional self-regulation.

Id. at 1272.

343. In *J.R. Wood, Inc.*, 228 N.L.R.B. 593 (1977), the Board overruled an NLRB Regional Director, who sustained a union’s objections to a representation election in which the union lost. During the campaign, the employer sent all employees a letter that falsified the law on lockouts. *See id.* at 594 (Member Fanning, dissenting). *But see id.* at 593-94 (majority opinion) (finding language of letter acceptable). It stated:

YOU COULD BE LOCKED OUT

Did you know that if this Union is unable to reach agreement with us, we are entitled to lock out employees. Have the Teamsters been honest enough to tell you about this? *Did you know that such a lock-out could permanently cost you your job?*

Id. at 595 (emphasis added). The employer’s assertion that it had a right to permanently replace locked-out employees was a gross misrepresentation of the law. *See id.* at 594 (Member Fanning, dissenting); *supra* note 300; *cf.* *Johns-Manville Prods. Corp. v. NLRB*, 557 F.2d 1126, 1133 (5th Cir. 1977) (holding as a matter of law that the employees struck first, then the lockout occurred, and thus the hiring of permanent replacements did not violate the NLRA). *But see J.R. Wood*, 228 N.L.R.B. at 593-94 (majority opinion). The distortion was material, however. Member Fanning noted in his dissent that the “employer’s message to his employees is clear: if the Teamsters makes demands that we do not like or refuses to accede to our demands, we will not only lock you out but also permanently replace you.” *Id.* at 594 (Member Fanning, dissenting). *But see id.* at 593-94 (majority opinion). He

hard to defend a doctrine that gives an employer the benefit of the doubt by shifting the burden of proof to a union to prove unlawful intent, when an employer deceitfully represents to the NLRB its true motivations during negotiations.³⁴⁴

Other employers have used lockouts to end bargaining relationships with unions. McCreary Tire Company used a replacement lockout to oust a union.³⁴⁵ After 200 union members rejected the company's offer to freeze wages, eliminate paid holidays, and make changes in health and pension plans, the company locked out and replaced them.³⁴⁶ This intensified the dispute. For example, a union member died while trying to plant a bomb on a nearby electrical transformer, and a replacement worker struck and seriously injured a locked-out employee by driving recklessly through a picket line.³⁴⁷ The lockout continued until March 1988, when replacements voted to decertify the union.³⁴⁸

Burwood Products, in December 1988, locked out 166 workers represented by the UAW, following eleven months of negotiations in which the employer proposed to cut wages twenty-one percent.³⁴⁹ Two months later, employees agreed to the pay cut, but the employer refused to reinstate them.³⁵⁰ Upon hearing that the employer was paying her replacement the minimum wage, one worker remarked: "They were just looking for a way to get rid of the union."³⁵¹ Only after issuance of an NLRB complaint twenty-one months later did the employer restore the bargaining relationship.³⁵²

More often than finding its bargaining relationship severed, a union finds itself terribly divided, and therefore weakened, by a replacement lockout. In 1987, after Reading Tube Corporation locked out and permanently replaced 234 workers, the Pennsylvania Department of Labor and Industry

concluded that "the coercive impact of this statement is indisputable; the policy announced therein would effectively destroy the Section 7 rights to bargain collectively." *Id.* at 595 (Member Fanning, dissenting).

344. See *Harter Equip., Inc.*, 280 N.L.R.B. 597, 600 (1986).

345. *Bitter Lockout Turns Deadly*, Associated Press, June 10, 1986, available in 1986 WL 3060408.

346. *Id.*

347. *Id.*

348. Michael K. Burns, *Decertification: Militant Employers Find Weapon to End Strikes*, L.A. TIMES, Mar. 12, 1989, at 25.

349. Castro, *supra* note 74.

350. *Id.*

351. *Id.* (quoting ex-employee Sharon Newberry).

352. Kelley Root, *New Contract Ends Lengthy Dispute*, GRAND RAPIDS PRESS (Michigan), Sept. 17, 1990, at A11, available in 1990 WL 4271231.

characterized this dispute as a lockout.³⁵³ Although the union prevailed in the administrative hearing, a bitter internal dispute ensued when the international union agreed to a contract with the company over the local union's ninety-eight to fifty vote to reject the contract.³⁵⁴ A local union officer bitterly denounced his own union, claiming that "[i]t's hurting us what the international did to us. We were sold down the river."³⁵⁵

The lockout at A.E. Staley similarly divided the union. Thirty months into the lockout, the president of the United Paperworkers International Union ordered the local union to vote on the company's lockout offer, even though local union leaders characterized it as "very detrimental to the future of jobs out there."³⁵⁶ A serious collateral dispute engulfed the local and international union and culminated when the local union ousted its president in the midst of the lockout.³⁵⁷

The 1995 NBA lockout, which involved employer preparations for continuing with replacements, showed the intense pressure that this employer action puts on a union. The resulting split in the players' association led dissident players to organize a decertification campaign.³⁵⁸ The most remarkable aspect was the similarity between this intraunion conflict, involving millionaire players, and the internal strife in unions representing hourly wage-earners.

The hiring of permanent replacements for locked out employees also implies an employer's intention to sever or seriously disrupt a bargaining relationship. Several employers listed in Appendix I committed this serious transgression, including International Paper,³⁵⁹ Johns-Manville,³⁶⁰ Kelly-Goodwin Hardwood Company,³⁶¹ and Charles D. Bonanno Linen Service.³⁶² Whitehall Packing Company achieved the same effect by locking out 225

353. Casey, *supra* note 244.

354. Jim Homan, *International Ends Tube Work Stoppage*, READING TIMES & EAGLE, Dec. 5, 1987, at 1, available in 1987 WL 5827658. The international union representative said, "We talked to members of [Local Union] 3885 for more than an hour. I don't know what their reason for rejection was. I don't know what they wanted." *Id.*

355. William Casey, *Local Says Top Union "Sold Out,"* READING TIMES & EAGLE, Dec. 7, 1987, at 1, available in 1987 WL 5827861.

356. *Union Head Orders Vote on Staley Offer*, ST. LOUIS POST-DISPATCH, Dec. 15, 1995 at 1F (quoting Local 7837 President David Watts).

357. *Id.*

358. Stein, *supra* note 317.

359. 319 N.L.R.B. No. 150 (Dec. 18, 1995).

360. 223 N.L.R.B. 1317 (1976).

361. 269 N.L.R.B. 33 (1984).

362. 229 N.L.R.B. 629 (1977).

employees, shuttering the plant, and reopening with new employees at another facility forty miles away.³⁶³ The company then refused to hire locked-out employees from the shutdown plant who applied.³⁶⁴

V. A PUBLIC POLICY PROPOSAL TO BALANCE ECONOMIC WEAPONS UNDER THE NLRA

A. Why Economic Weapons Under the NLRA Should Be Balanced

Congress enacted the NLRA after a lengthy period of bitter union-management relations. Prior to federal labor legislation, courts defined the rights of employees, unions, and employers. In an influential 1842 decision, the Massachusetts Supreme Court recognized the right of workers to associate for collective economic interests and to collectively withhold their labor.³⁶⁵ On the other hand, courts granted employers the powerful right to continue operations—unmolested by strikers—with replacement workers.³⁶⁶

By the end of the nineteenth century, a rising tide of strikes swept the nation,³⁶⁷ prompting courts to intrude further in labor disputes. At the crux of these disputes was labor's desire to limit competition by replacements for the jobs they left while on strike. American courts repeatedly sided with employers, no matter how mildly a union communicated its deterrent message to potential replacements.

An English case on striker replacements transformed American common law. In *Springhead Spinning Co. v. Riley*,³⁶⁸ an employer accused two officers of the Cotton Spinners union of financially harming it when they published

363. 257 N.L.R.B. 193 (1981).

364. *Id.* at 196.

365. In *Commonwealth v. Hunt*, 45 Mass. (4 Met.) 111 (1842), the court dismissed a criminal complaint against workers who agreed not to work for any employer who did not hire members of their bootmakers' association. The court thereby recognized the right of employees to withhold, in concert, their labor—a precursor to the right to strike.

366. Early courts did not use the term "striker replacement," but they had this concept clearly in mind. *State v. Stewart*, 9 A. 559 (Vt. 1887). The court upheld an indictment alleging criminal conspiracy when striking stonecutters conspired "to prevent, hinder, and deter by violence, threats, and intimidations, the Ryegate Granite-Works . . . from retaining and taking into its employment James O'Rourke, William Goodfellow and other persons . . ." *Id.* at 560 (quoting the indictment).

367. The most authoritative strike data for the period appears in BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, BULL. NO. 651, STRIKES IN THE UNITED STATES, 1880-1936, at 21 tbl.1 ("Number of Strikes and Workers Involved, 1881-1936"), showing that strikes rose from 477 in 1881, 476 in 1882, 506 in 1883, 485 in 1884, and 695 in 1885 to 1572 in 1886, 1503 in 1887, 946 in 1888, 1111 in 1889, and 1897 in 1890.

368. 6 L.R.-Eq. 551 (V.C. 1868).

this appeal to potential striker replacements in the *Manchester Guardian*: "Wanted all well-wishers to the *Operative Cotton Spinners &c. Association* not to trouble or cause any annoyance to the *Springhead Spinning Company, Lees*, by knocking at the door of their office until the dispute between them and the self-actor minders is finally terminated."³⁶⁹ The court believed that this advertisement communicated an intimidating threat to would-be replacements, thus injuring the employer.³⁷⁰

Leading American courts followed this precedent. *Sherry v. Perkins*³⁷¹ involved the first American injunction against replaced strikers. Other state³⁷² and federal³⁷³ injunctions followed. These included the celebrated case, *Vegeahn v. Gunter*,³⁷⁴ where an employer sued to enjoin strikers from picketing at its door, directing social pressure, and threatening replacements.³⁷⁵ The Massachusetts Supreme Court upheld an injunction prohibiting this conduct, over Justice Oliver Wendell Holmes' compelling

369. *Id.* at 552. "Minders" refers to the trade on strike. *See id.*

370. The court fancifully analogized:

If the Defendants . . . had carried on a manufactory in the neighbourhood of the Plaintiffs' works, and had by any process poured noxious vapours into the Plaintiffs' works to such an extent as to render it impossible for them to procure workmen to carry on their operations, that would have been a nuisance tending to the destruction of the Plaintiffs' property which this Court would have restrained by injunction

Id. at 559.

371. 17 N.E. 307 (Mass. 1888). A shoe manufacturer filed a bill in equity claiming that his employees left their jobs after being intimidated by members of the Lasters Union, who paraded a banner in front of his factory stating: "Lasters on a strike; all lasters are requested to keep away from P.P. Sherry's until the present trouble is settled. Per order L.P.U." *Id.* at 307. Sherry's bill further alleged that "the effect of [the banner] was to deter persons from continuing to work for or engaging with plaintiff, and the latter's business was thereby injured." *Id.*

372. *Rice, Barton & Fales Machine & Iron Co. v. Willard*, 136 N.E. 629 (Mass. 1922); *United Shoe Mach. Corp. v. Fitzgerald*, 130 N.E. 86 (Mass. 1921); *Martin v. Francke*, 116 N.E. 404 (Mass. 1917); *Cornellier v. Haverhill Shoe Mfrs. Ass'n*, 109 N.E. 643 (Mass. 1915); *Burnham v. Dowd*, 104 N.E. 841 (Mass. 1914); *Herzog v. Fitzgerald*, 77 N.Y.S. 366 (App. Div. 1902); *Kerbs v. Rosenstein*, 67 N.Y.S. 385 (App. Div. 1900); *Sun Printing & Publishing Ass'n v. Delaney*, 62 N.Y.S.750 (App. Div. 1900) (per curiam); *Butterick Publishing Co. v. Typographers Union No. 6*, 100 N.Y.S. 292 (Sup. Ct. 1906).

373. *Kolley v. Robinson*, 187 F. 415 (8th Cir. 1911); *Goldfield Consol. Mines Co. v. Goldfield Miners' Union No. 220*, 159 F. 500 (D. Nev. 1908); *Pope Motor Car Co. v. Keegan*, 150 F. 148 (N.D. Ohio 1906); *United States v. Debs*, 64 F. 724 (N.D. Ill. 1894); *Thomas v. Cincinnati, N.O. & T.P. Ry.*, 62 F. 803 (S.D. Ohio 1894); *Farmers' Loan & Trust Co. v. Northern Pac. R.R.*, 60 F. 803 (E.D. Wis. 1894); *Toledo, A.A. & N.M. Ry. v. Pennsylvania Co.*, 54 F. 730 (N.D. Ohio 1893); *United States v. Workingmen's Amalgamated Council*, 54 F. 994 (E.D. La. 1893); *Casey v. Cincinnati Typographical Union No. 3*, 45 F. 135 (S.D. Ohio 1891).

374. 44 N.E. 1077 (Mass. 1896).

375. *Id.* at 1077.

dissent.³⁷⁶ Holmes objected to the overbroad character of the court order, finding that it prohibited lawful striker conduct such as “social intercourse and even organized peaceful persuasion.”³⁷⁷ He rejected the notion that “two men, walking together up and down a sidewalk, and speaking to those who enter a certain shop, do necessarily and always thereby convey a threat of force.”³⁷⁸

Holmes was in a distinct minority, however. The judge in *Couer d’Alene Consolidated & Mining Co. v. Miners’ Union*³⁷⁹ offered the most representative rationale for federal jurisdiction in these disputes.

Unfortunately, combinations of labor are met by associations of employers, each trying to baffle what it deems the aggressions of the other. It is to be regretted that these opposing forces have in late years gone so far in their efforts for supremacy that they now operate upon the principle that their interests are antagonistic. It is when these contests become so heated that violations of the law, the peace of the community, and the destruction of life and property are threatened, that the courts are compelled to intervene.³⁸⁰

By 1932, many in Congress believed that federal courts were too biased in labor disputes.³⁸¹ This led to the enactment of the Norris-LaGuardia Act,³⁸²

376. *Id.* at 1078.

377. *Id.* at 1080 (Holmes, J., dissenting).

378. *Id.*

379. 51 F. 260 (D. Idaho 1892).

380. *Id.* at 263-64.

381. *See, e.g.*, 75 CONG. REC. 5478 (1932) (Rep. LaGuardia’s speech on the House floor). Rep. LaGuardia said:

Gentlemen, there is one reason why this legislation is before Congress, and that one reason is disobedience of the law on the part of whom? On the part of organized labor? No. Disobedience of the law on the part of a few Federal judges. If the courts had been satisfied to construe the law as enacted by Congress, there would not be any need of legislation of this kind. If the courts had administered even justice to both employers and employees, there would be no need of considering a bill of this kind now. If the courts had not emasculated and purposely misconstrued the Clayton Act, we would not today be discussing an anti-injunction bill.

Id.

382. Ch. 90, 47 Stat. 70 (1932) (codified as amended at 29 U.S.C. §§ 101-115 (1994)); *see also* ARCHIBALD COX ET AL., LABOR LAW 50 (1996). Events like the following led to the Act’s enactment:

What seemed particularly unfair to the workers was the practice of citing those engaged in violence for contempt of court instead of prosecuting them for breaches of peace or other violations of the criminal law. The respondent was tried by the same judge who issued the injunction and was not entitled to the benefit of a jury of his peers. Consequently, not only did one person seem to be acting as prosecutor and judge, but the strikers lost the protection of a trial before a body which might have been more sympathetic towards their cause and more understanding of the emotional

legislation that greatly reduced federal court jurisdiction to issue so-called labor injunctions.

By the depths of the Great Depression, in 1935, Senator Wagner broadened this view of reducing federal court jurisdiction to issue labor injunctions and equalizing bargaining power when he stated that economic power was too concentrated in the hands of employers.³⁸³ Although he supported this view with economic statistics, his view was rooted in a strong conception of economic justice and morality.

Since the turn of the century this country has been prolific in the production of goods. Wealth has poured forth from factory and mine and field in unequal abundance. If our social organization had kept pace with our mechanical inventiveness, the paradox of progress and poverty would have vanished completely. Instead, the paradox is more glaring. . . .

. . .

. . . Our efforts should be directed, first toward providing the worker with an income sufficient for comfortable living, and then toward assuring him an equitable share in our national wealth.³⁸⁴

Although Wagner started with an idealistic premise, he succeeded in connecting this view to a pragmatic policy goal of reducing industrial strife.³⁸⁵ He did this by showing that too many labor disputes beset the American economy.³⁸⁶ Thus, in legislation that provided for the right of employees to

tensions of a labor dispute.

Id.

383. 78 CONG. REC. 3678 (1934), *reprinted in* 1 NLRB, *supra* note 6, at 18 (speech by Sen. Wagner).

384. *Id.* at 18-19.

385. The following colloquy between Sen. La Follette and Sen. Wagner made this concern clear:

Sen. La Follette: If legislation of this character is not passed at this session, what is your view as to the probability of increasing or decreasing labor difficulties and strikes during the balance of this year?

Sen. Wagner: I am afraid we shall have tremendous difficulties. I was going to say, almost so much that we shall not be able to cope with them. . . .

Hearings Before the Comm. on Educ. and Labor on S.2926, 73d Cong., 2d Sess. 12 (1934), reprinted in 1 NLRB, *supra* note 6, at 42.

386. During an early hearing into this bill, Sen. Wagner provided statistical evidence showing that since the National Labor Board (a weak precursor to the NLRB under the National Industrial Recovery Act) began its work on August 5, 1934 and continuing through February 1, 1935, 132 national strikes and 467 regional strikes occurred. *Id.* at 41, 47.

strike,³⁸⁷ Wagner and supporters of his bill aimed for a balance of economic weapons that would induce employers and employees to settle their differences through collective negotiations.³⁸⁸

Their conception was not that altruistic employers would enter into meaningful bargaining with workers. Instead, this view held that “[t]he primary requirement for cooperation is that employers and employees should possess equality of bargaining power.”³⁸⁹

By 1947, this law overshot its goal as unions achieved superiority in bargaining power over employers. Strike activity not only climbed after World War II,³⁹⁰ but some unions arrogantly exercised this economic power.³⁹¹

The American public realized this and elected a Republican Congress to curb union power. Representative Hoffman stated a view, still influential today, that the rights of strikers should be sharply curbed by enlarging employer rights in hiring striker replacements.

Some people say you cannot make a man work. . . . If the employees of the telephone company, the railroad company, for instance, or any

387. *Supra* note 10 and accompanying text.

388. Sen. Wagner explained the public policy rationale for providing employees the right to strike:

It has been urged that the bill places a premium on discord by declaring that none of its provisions shall impair the right to strike. On the contrary, nothing would do more to alienate employee cooperation and to promote unrest than a law which did not make it clear that employees could refrain from working if that should become their only redress. But this bill will prevent strikes by the only feasible and just method; that is, by insuring fair treatment to all parties and by establishing a powerful and trustworthy agency for the settlement of disputes.

Hearings Before the Comm. on Educ. and Labor on S.2926, 73d Cong., 2d Sess. 10-11 (1934), reprinted in 1 NLRB, *supra* note 6, at 40-41.

389. 78 CONG. REC. 3679 (1934), reprinted in 1 NLRB, *supra* note 6, at 20.

390. Rep. Owens' remarks on the House floor during consideration of the Taft-Hartley Act summarized this trend.

[I]n the 6 years which preceded the passage of the [NLRA] . . . there were approximately 750 labor disputes a year, involving about 300,000 employees. In the 6 years after the passage of the act there was an average of 2,500 disputes a year involving over a million workers. In the 6 years which followed that the strikes jumped to 3,500 a year, involving over 1,500,000 workers.

In 1945 it jumped to 38,000,000 mandays lost, and in 1946 to 119,000,000 mandays lost . . .

93 CONG. REC. 3529 (1947), reprinted in 1 NLRB, *supra* note 77, at 696.

391. *See, e.g., United States v. United Mine Workers*, 330 U.S. 258 (1947) (involving a national strike by coal miners as winter approached). The threat posed by this strike was so great that the Federal Government seized and operated mines. *Id.* at 263. But, when union miners refused to end their strike, the Supreme Court enforced a strike injunction reasoning that “in a case such as this, where the Government has seized actual possession of the mines . . . and the relationship between the Government and the workers is that of employer and employee, the Norris-LaGuardia Act does not apply.” *Id.* at 289.

public utility want to quit, refuse to work, let them quit. . . . Then what happens? The bill provides that the company may and that it shall be its duty to hire someone else. Why? Because you and I must have water to drink, we must have food to eat, we must have light, we must have heat, and all of those things which are necessary if we would live.³⁹²

Senator Robert Taft took an even wider aim at the power of unions under the NLRA.³⁹³ He did not advocate repeal of the NLRA, but he said it needed sweeping reform to restore equality of bargaining power between workers and employers.

It seems to me that our aim should be to get back to the point where, when an employer meets with his employees, they have substantially equal bargaining power, so that neither side feels that it can make an unreasonable demand and get away with it. . . . If there is reasonable equality at the bargaining table, I believe that there is much more hope for labor peace.³⁹⁴

Although they answered to very different constituencies, Senators Wagner and Taft expressed a common view that federal law must equalize bargaining power between employees and employers.³⁹⁵ Nominally, this conception continues to be reflected in the NLRA.

Two fundamental changes have occurred, however, since enactment of the Taft-Hartley Act. First, the balance of bargaining power has shifted decidedly in favor of employers again. Evidence of this abounds. The proportion of the

392. 93 CONG. REC. 3124 (1947), *reprinted in* 1 NLRB, *supra* note 77, at 587.

393. Sen. Taft's critique applied to the NLRA and supporting laws, such as the Clayton Act and the Norris-LaGuardia Act.

They practically eliminated all legal remedy against unions for any action taken by them. In effect they provide as construed by the courts, at least—that any action by a union taken in order to advance its own interests is proper, and there is no legal recourse against the union. The laws referred to do not discriminate between strikes for justifiable purposes and strikes for wholly illegal and improper purposes. They do not distinguish between strikes for higher wages and hours and better working conditions, which are entirely proper and which throughout this bill are recognized as completely proper strikes, and strikes in the nature of secondary boycotts, jurisdictional strikes, and strikes of the racketeering variety.

93 CONG. REC. 3834 (1947), *reprinted in* 2 NLRB, *supra* note 77, at 1005-06.

394. *Id.* at 1007.

395. *Compare id.* (Sen. Taft's view) *with supra* notes 6, 388 (Sen. Wagner's view). Each advocated equality of bargaining power when the broad interest group he represented had inferior power.

workforce that is unionized has dropped precipitously,³⁹⁶ so that union employers, who generally pay better wages and benefits compared to nonunion competitors,³⁹⁷ can demand concessions from unions.³⁹⁸ Increasingly, employers have adopted strategies aimed at reducing the strength of the unions with whom they negotiate, such as shifting internal investments from union- to nonunion-plants in regions where unions have difficulty organizing.³⁹⁹

The most direct evidence of the unions' diminished bargaining power appears during negotiations for new labor agreements. Unions are much less inclined to strike⁴⁰⁰ because they fear that employers will permanently replace⁴⁰¹ their members and they realize that the public increasingly will

396. See KOCHAN, *supra* note 86 (long-term historical view of this decline, showing that union membership fell from 31.4% of the nonagricultural workforce in 1960, to 28.9% in 1964, to 27.8% in 1968, to 27.3% in 1970, to 26.4% in 1972, to 25.8% in 1974, to 24.8% in 1976). For more recent trends, see Gary N. Chaison & Joseph B. Rose, *The Macrodeterminants of Union Growth and Decline*, in THE STATE OF THE UNIONS 3, 15 tbl.1 (George Strauss et al. eds., 1991); Gary N. Chaison & Dilcep G. Dhavale, *A Note on the Severity of the Decline in Union Organizing Activity*, 43 INDUS. & LAB. REL. REV. 366, 369 tbl.1 (1990) (showing that union representation elections for new units fell from 7093 in 1975, 8054 in 1976, and 8212 in 1977, to 3582 in 1985, 3429 in 1986, and 3331 in 1987). Additional evidence of this decline appears in *Union Membership: Data for 1994 Shows Membership Held Steady at 16.7 Million*, Daily Lab. Rep. (BNA) No. 27, at D-1 (Feb. 9, 1995). The Bureau of Labor Statistics conducted a survey showing that union membership as a proportion of the labor force continued to decline from 15.8% in 1993 to 15.5% in 1994. *Id.* Prof. Leo Troy has also observed that "[in] the private sector, there has been an uninterrupted decline since 1953 in the percentage of workers organized." *Id.*

397. See H. GREGG LEWIS, *UNION RELATIVE WAGE EFFECTS: A SURVEY* (1986); Richard Edwards & Paul Swaim, *Union-Nonunion Earnings Differentials and the Decline of Private Sector Unionism*, 76 AM. ECON. REV. 97 (1986); Peter D. Linneman et al., *Evaluating the Evidence on Union Employment and Wages*, 44 INDUS. & LAB. REL. REV. 34 (1990).

398. *E.g.*, *AMF Bowling Co. v. NLRB*, 63 F.3d 1293, 1295 (4th Cir. 1995) (involving an employer who entered negotiations with the objective of reducing wage rates from an average of \$9.00 per hour to between \$7.50 and \$8.00 per hour). During negotiations, the company explained "that it was not claiming inability to pay. . . . Rather, the company claimed that the wages it was then paying were too high and had to be cut for the company to be competitive." *Id.* at 1296. After the union rejected AMF's proposal to reduce average wage rates to \$7.34, it filed an unfair labor practice charge against AMF. *Id.* at 1297; see also *United Steelworkers, Local Union 14534 v. NLRB*, 983 F.2d 240, 242 (D.C. Cir. 1993) (involving an employer who bargained to impasse over a proposal to reduce wages 30% and health insurance benefits 50%). This employer also based its demand on its unwillingness, rather than inability, to pay the union's requested wage rate. *Id.*

399. See KOCHAN, *supra* note 86; JOHN J. LAWLER, *UNIONIZATION AND DEUNIONIZATION: STRATEGY, TACTICS AND OUTCOMES* 74-77 (1990).

400. See *supra* note 65 (showing that strikes involving large bargaining units have generally fallen since 1980).

401. See *Prohibiting Discrimination Against Economic Strikers, 1991: Hearing on S.55 Before the Subcomm. on Labor of the Senate Comm. on Labor and Human Resources*, 102d Cong., 1st Sess. 67 (1991) (testimony of replaced striker Karen Behnke). "During the negotiations Curtis Industries

ignore their picket lines.⁴⁰² Employers feed this fear by credibly threatening to hire replacements.⁴⁰³

Judicial views (including the view of the Board, an adjudicatory agency) of equality of bargaining power between employers and employees under the NLRA have also fundamentally changed. This change is evident in Board and court interpretations of the lockout doctrine.⁴⁰⁴ As recently as the 1970s and early 1980s, the prevailing view was that the hiring of replacements, in the absence of a whipsaw strike initiated by a union, had a harmful effect upon employees' collective bargaining rights. Thus, employer recourse to this economic weapon upsets the balance of bargaining power. *Harter Equipment, Inc.* essentially rejected the NLRA's policy aim of balancing the economic power by concluding that hiring replacements during lockouts had only a slight effect on bargaining rights.

repeatedly threatened that if the UAW did not accept these concessions the company would permanently replace all the workers. To back up this threat the company ran newspaper advertisements and began taking job applications for replacement workers prior to expiration of the contract." *Id.*; *Prohibiting Permanent Replacement of Striking Workers, 1991: Hearing on H.R.5 before the Subcomm. on Aviation of the House Comm. on Pub. Works and Transp.*, 102d Cong., 1st Sess. 39 (1991) (statement of Juliette Lenoir, Vice President, Ass'n of Flight Attendants).

In 1976, our members at Alaska Airlines were forced to go on strike, then 23 days into the strike, flight attendants received their first letter from management threatening that striking flight attendants would be permanently replaced.

... When we learned that it was legal to replace people permanently, we quickly signed a back to work agreement. ... [C]learly we had been punished for striking and had to accept some less than desirable provisions.

Id.

402. See Stephanie N. Mehta, *Declining Power of Picket Line Blunts New York Maintenance Workers' Strike*, WALL ST. J., Jan. 17, 1996, at B1 (reporting that picket lines remain effective in only a handful of towns, such as Pittsburgh, Detroit, and Milwaukee). In many places, the picket line "appears to be losing its legs." *Id.* Prof. Kate Bronfenbrenner, director of labor education at Cornell University, observed: "There used to be families that grew up believing that crossing a picket line is the equivalent of pushing an old lady off a curb. . . . But there's been a change in our culture." *Id.*

403. See *1996 Employer Bargaining Objectives*, Daily Lab. Rep. (BNA) No. 186, at 3 (Sept. 28, 1995) (Special Supp.) (reporting on a national survey of employer intentions).

The willingness of employers to replace strikers remained strong. While only 18% of respondents said they would not replace their workers if struck, 37% said they would do so and 43% said they would consider doing so. The 37% of employers who said they would replace workers during a walkout is the highest percentage in the eight years CBNC has asked this question.

Id.

404. The Supreme Court reached an important turning point when it said that the NLRB does not have "general authority to assess the relative economic power of the adversaries in the bargaining process and to deny weapons to one party or the other because of its assessment of that party's bargaining power." *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 317 (1965).

As a result of these two changes, employees and their unions are substantially exposed to the fiercely competitive pressure of domestic and global labor markets. Certainly, this contributes to the vigor and competitiveness of the American economy. Nevertheless, there is an inherent conflict between doctrinal interpretations that facilitate this exposure to extreme labor market competition and the stated policy of the NLRA which provides that

The inequality of bargaining power between employees who do not possess full freedom of association . . . and employers . . . tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.⁴⁰⁵

The findings presented here add to accumulating evidence that inequality of bargaining power is present and is often associated with employers reducing their employees' living standards.⁴⁰⁶ Apart from this evidence, some courts have suggested that the NLRA no longer balances bargaining power between workers and employers.⁴⁰⁷ In sum, the policy aims of the NLRA and current employer use of replacement lockouts are fundamentally at odds.

B. Proposal to Balance Economic Weapons Under the NLRA

My empirical research on replacement lockouts shows that they are lasting too long, sometimes interminably. Often, such duration effectively nullifies collective bargaining because employers are able to use their ultimate economic weapon in support of take-it-or-leave-it proposals that force workers to accept difficult changes. The fact that employers may lawfully initiate a bargaining lockout even before reaching an impasse aggravates this condition.⁴⁰⁸

There are several ways to address this problem. One is to overhaul the

405. 29 U.S.C. § 151 (1994).

406. See, e.g., *supra* notes 353-58 and accompanying text.

407. See *Midwest Motor Express, Inc. v. International Bhd. of Teamsters, Local Union 120*, 512 N.W.2d 881, 890 (Minn. 1994) (“[T]he scales have once again become somewhat unbalanced and that in consideration of changes in the economic climate and the escalation of violence in our society, it is time for Congress to revisit the regulation of the use of economic weapons.”).

408. E.g., *Stokely-Van Camp, Inc.*, 186 N.L.R.B. 440 (1970); *Darling & Co.*, 171 N.L.R.B. 801 (1968); *The Evening News Ass’n*, 166 N.L.R.B. 219 (1967).

NLRA systematically as the Taft-Hartley Act did. The logic in this is that a variety of factors determines bargaining power and not simply one element in an employer's arsenal of economic weapons. For example, if reforms aimed at promoting union organizing actually increased the percentage of employees covered by collective-bargaining agreements, the balance of economic power would probably begin to shift away from employers by decreasing the supply of nonunion workers who currently compete with union workers. Congress considered broad labor law reform in 1978, but this effort failed.⁴⁰⁹ Because it is generally acknowledged that union political power has decreased since that effort,⁴¹⁰ attempting another broad reform appears impractical.

Legislative repeal of all or parts of the replacement lockout doctrine—including *American Ship Building*, *Brown Food Store*, and *Harter Equipment, Inc.*—would be a more limited approach to this problem because it would address only bargaining, or offensive, lockouts. Such an approach could be reasonably supported by contrasting the much more defensive lockouts in *American Ship Building* and *Brown Food Store* with more aggressive, recent lockouts based on their authority.⁴¹¹ Showing how Harter Equipment Company duped the NLRB in 1986 into believing that it did not have an antiunion motivation in locking out its workers would also support this approach.

Furthermore, this approach would leave employers ample economic weapons. They could continue to lockout workers where workers sabotaged the employer, caused goods to perish, or threatened such acts. If the court left *American Ship Building* intact and repealed the two decisions pertaining to continuing operations with replacements, employers would still be free to control the timing of labor disputes. The change would not affect seasonal businesses, such as major league sports. In addition, none of these changes would diminish an employer's right to hire or threaten to hire permanent striker replacements. This would surely constrain union bargaining demands.

Although this proposal is quite limited in scope, even a Democratic Congress would find it difficult to enact. Replacement lockouts differ greatly

409. Analysis of this failed attempt appears in *Union Survival Strategies for the Twenty-First Century*, Daily Lab. Rep. (BNA) No. 44, at D-26 (March 6, 1996) (AFL-CIO General Counsel blames the failed labor law reform in 1978 for current woes that low-wage, low-skilled workers experience).

410. John T. Delaney & Marrick F. Masters, *Unions and Political Action, in THE STATE OF THE UNIONS*, *supra* note 396, at 313, 331.

411. See generally *supra* Section II.

from replacement strikes, because in the former, employers are usually the aggressor. One can readily envision opponents to such legislation equating a ban on employer hiring of replacements during lockouts with a ban on employer hiring of striker replacements. The significant distinction between lockouts and strikes would probably be lost on the American public. While making this erroneous connection, opponents might make the same arguments that were successfully used in defeating striker replacement bills in 1992 and 1994.⁴¹² Furthermore, because a determined minority defeated striker replacement legislation,⁴¹³ the same outcome would likely result from a proposal to ban replacement lockouts.

I offer the following proposal because it would address the most egregious aspects of replacement lockouts—and therefore, would partially re-balance economic weapons under the NLRA—while avoiding the arguments that

412. See 140 CONG. REC. S8537 (daily ed. July 12, 1994) (statement of Sen. Dole) (“Without the prospect of permanent striker replacement, unions will resort to the strike weapon more and more frequently. Consumer prices will rise, jobs will be lost, communities will plunge into chaos.”); *Preventing Replacement of Economic Strikers 1990: Hearing on S.2112 Before the Subcomm. on Labor of the Senate Comm. on Human Resources*, 101st Cong., 2d Sess. 126 (1990) (statement of James P. Melican, Senior Vice President of International Paper) (“Why does an employer hire permanent replacements? Usually it is because the only alternative is to shut down the operation. Very few employers can keep an operation running for any sustained period of time using supervisory personnel, and temporary replacements are frequently impossible to come by.”). Melican’s comments were disingenuous in light of his company’s experience in finding ample temporary replacements for locked out employees. See *supra* note 305.

For the effect that banning hiring of replacements can have on business investments, see *Colt Industries Unit to Move Out of Quebec Due To Labor Law*, DOW JONES NEWS SERV., Aug. 30, 1983, available in Westlaw, DJNS Database. Menasco Canada, a unit of Colt Industries, made a business decision to discontinue operations solely because of a new Quebec law that outlawed employer hiring of replacements during labor disputes. *Id.* The company said that the law “accentuates an intolerable imbalance in the negotiating process.” *Id.* U.S. employers also made similar statements when Congress considered a bill that would have made such hiring unlawful.

413. At the AFL-CIO’s (national federation of unions) strong urging, Democrats introduced the Workplace Fairness Act in 1992 and 1993. H.R. 5, S.55, 103d Cong., 1st Sess. (1993). The bill proposed to amend the NLRA by making it an unfair labor practice for an employer “to offer, or to grant, the status of permanent replacement employee to an individual for performing bargaining unit work for the employer during a labor dispute. . . .” *Id.* President Clinton’s election raised unions’ hopes that this bill would pass. *Labor’s Agenda Seen Rising Under Clinton; Family Leave Legislation Tops the List*, Daily Lab. Rep. (BNA) No. 11, at A-6 (Jan. 19, 1993). This would have reversed the bill’s 1992 misfortunes, *Senate Vote Kills Bill to Restrict Use of Permanent Striker Replacements*, Daily Lab. Rep. (BNA) No. 117, at A-9 (June 17, 1992), resulting from President Bush’s threatened veto, *Administration Policy Statement on S 55 Workplace Fairness Act*, Daily Lab. Rep. (BNA) No. 112, at F-1 (June 10, 1992). But the bill failed on a Senate vote to cutoff a threatened filibuster. *Defeat of Striker Replacement Bill a Victory for Business Coalition*, Daily Lab. Rep. (BNA) No. 133, at D-4 (July 14, 1994); *Senate Vote to End Filibuster on Striker Replacement Fails 53-47*, Daily Lab. Rep. (BNA) No. 132, at D-3 (July 13, 1994).

defeated striker replacement legislation.

The proposal is to amend the NLRA to make it an unfair labor practice for an employer to employ replacements after one year from commencing a lockout.⁴¹⁴ This would address the worst manifestations of replacement lockouts uncovered by this research. For example, under this proposal, Harter Equipment could lawfully lock out its workers and employ replacements for up to one year. Because a lawful impasse preceded this lockout,⁴¹⁵ Harter Equipment would have the right to implement terms and conditions of its final contract offer to the union. After one year, compliance with the proposed amendment would require the company to reinstate locked-out workers and, just as the law presently requires, to continue negotiations with the union. Workers would have a right to retaliate by going out on strike, but, offsetting this weapon, Harter Equipment would continue to have a right to rehire its replacement workers and then confer permanent status on them. If, after a year, the workers engaged in sabotage instead of striking, Harter Equipment would have the right to discharge the perpetrators, if the event was isolated, or to renew its lockout on a defensive basis, if evidence showed that the sabotage was the product of widespread concerted activity.

If Harter Equipment's business experienced seasonal fluctuations, it could still use a lockout to preempt the timing of an anticipated strike, continue its operations with replacements for one year, and in the process, impose substantial costs on union workers who refused to agree to their terms.

Some things would change, however. Harter Equipment could not walk away from its union-represented workers and attempt to decertify their bargaining representative. As the one-year mark approached, the employer might feel some pressure to modify its bargaining position to improve the morale of returning workers. In short, the one-year rule would tend to induce some compromise and thus, settlement of a labor dispute.

Opponents would have difficulty arguing that such a rule forces employers to capitulate to union demands. By the one-year mark, workers would have incurred much greater costs than their employer, who, presumably, has operated with replacements. Workers would therefore be pressured to lessen their bargaining demands. Given the prospect of being reinstated in a year under their employer's implemented terms, it is unlikely that these workers would suddenly feel empowered to inflate their bargaining

414. This would follow section 8(a)(5) and become section 8(a)(6).

415. *Supra* notes 196-98 and accompanying text.

demands. Furthermore, employers would continue to limit employees' bargaining power because, by striking, employees would induce their employer to hire permanent replacements.⁴¹⁶

Apart from helping to redress the current imbalance of economic weapons, this proposal is consistent with the NLRA's current public policy assumptions. Section 9(c)(3) disqualifies replaced strikers from voting in a decertification election one year after a strike commences on the theory that these strikers lose interest in their jobs after being absent for a year.⁴¹⁷ The NLRA also protects employees from discharge for engaging in concerted activity.⁴¹⁸

Without limiting the duration of a replacement lockout, employers are now able to continue a lockout as long as is necessary to constructively discharge workers.⁴¹⁹ If, however, Congress imposed a one-year limit on replacement lockouts, greater consistency would result. Employees would return to their jobs at a time which the law now presumes that the employees' interest in continuing employment wanes. This new limit would help to preserve the protected status of employees under the NLRA.

VI. CONCLUSION

The basic premise underlying our national labor policy is that unregulated competition among employees and applicants for employment produces wage levels that are lower than they should be. Whether or not that premise is true in fact, it is surely the basis for the statutes that encourage and protect the collective bargaining process.

— Justice John Paul Stevens, *Brown v. Pro Football, Inc.*⁴²⁰

416. See *supra* note 351 and accompanying text.

417. *Supra* note 253-59 and accompanying text.

418. This is provided in section 8(a)(3), making it unlawful for an employer "by discrimination in regard to hire or tenure of employment or any term and condition of employment to encourage or discourage membership in any labor organization . . ." National Labor Relations Act, ch. 120, § 8(a)(3), 61 Stat. 142 (1947) (codified as amended at 29 U.S.C. § 158(a)(3) (1994)). Ironically, one of the leading cases in this area is *Mackay Radio*, which stated in dictum: "The Board found, and we cannot say that its finding is unsupported, that, in taking back six of the eleven men and excluding five who were active union men, the [employer's] officials discriminated against the latter on account of their union activities." *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333, 347 (1938).

419. For example, an overwhelming number of locked-out workers at Staley chose to terminate their employment, once the lockout ended after two years. See *Staley Workers: Fewer Than a Third of Force to Return*, *supra* note 282.

420. 116 S. Ct. 2116 (1996) (Stevens, J., dissenting).

The replacement lockout doctrine originated when unions had superior bargaining power and engaged in whipsaw strikes to pressure employers to agree to their bargaining demands. Originally, the NLRB permitted employers to lockout employees "merely to synchronize with and not precipitate economic conflict."⁴²¹

In the 1980s, the courts significantly expanded the lockout doctrine; paradoxically, at a time when unions were no longer able to use their economic weapons. The specter of replacements for strikers or locked-out workers further diminished union bargaining power. This effect intensified as the centralized structure of bargaining, which facilitated the whipsaw strike in the 1950s and 1960s, gave way to more decentralized negotiations.⁴²² This pitted more isolated unions against stronger employers.

Wage inequalities between rich and poor grew much larger during this period.⁴²³ Falling real wages⁴²⁴ combined with surging profits⁴²⁵ rekindled the perception that American capitalism was losing its ability to improve the fortunes of ordinary workers.⁴²⁶ Ironically, some elite financial

421. Duluth Bottling Ass'n, 48 N.L.R.B. 1335, 1336 (1943).

422. For an overview of research on this, see Harry C. Katz, *The Decentralization of Collective Bargaining: A Literature Review and Comparative Analysis*, 47 INDUS. & LAB. REL. REV. 3 (1993).

423. See Alan Murray, *Income Inequality Grows Amid Recovery*, WALL ST. J., July 1, 1996, at A1 (showing a graph of aggregate income that went to families in the nation's top 5% income bracket). In 1981, about 15% of the national income went to these families. *Id.* The percentage steadily increased, with a particularly sharp rise in 1992 and 1993, so that now this share has grown to about 20%. *Id.*

424. See Melvin M. Brodsky, *Labor Market Flexibility: A Changing International Perspective*, MONTHLY LAB. REV., Nov. 1994, at 53, 57 ("Real hourly earnings of production or nonsupervisory workers on private nonfarm payrolls, which peaked in 1973 at \$8.55 per hour and have been headed downward since, were \$7.64 by 1989 and \$7.39 in 1993.").

425. *Business—Redefined 'Fortune' 500 Sets '94 Profits*, FACTS ON FILE WORLD NEWS DIG., May 11, 1995. Profits at the nation's largest 500 companies soared 54% in 1994, to \$215 billion, compared to year-earlier figures. *Id.* Downsizing and tight controls on employment caused part of this increase, as total employment at Fortune 500 firms increased by only 2.6% in this period. *Id.* Deregulation and widespread use of outsourcing labor also helped to improve profits. *Id.*; see also Roger Lowenstein, *Intrinsic Value: The '20% Club' No Longer Is Exclusive*, WALL ST. J., May 4, 1995, at C1 (The first quarter 1995 return-on-equity for Standard & Poor's 500 companies averaged 20.12%. This figure "represents the highest level of corporate profitability in the postwar era . . .").

426. See *Remarks by Labor Secretary Robert Reich at Labor Department Low-Wage Workers Conference Labor Department*, FED. NEWS SERV. WASH. PACKAGE, Feb. 16, 1995, available in 1995 WL 6621937. Reich explained that "[I]n the late 1970s, about 7 1/2 percent of working families . . . were below the poverty line. . . . Right now, 1995, 11.5 percent of working American families are under the poverty line." *Id.* He continued:

[T]he problem is not that some people are getting rich. . . . It's good news that some people are getting rich. The problem is that most of us are getting nowhere. We're hurtling toward a two-tiered society composed of a minority who are profiting from economic growth and a majority who are not.

policymakers⁴²⁷ and advisors⁴²⁸ now warn of the kind of social and economic instability that motivated Senator Wagner to introduce the original labor act.⁴²⁹

No one, not even conservative judges, has challenged the redistributive aim of the NLRA. Richard Posner and Frank Easterbrook have stated that “[t]he main purpose of labor unions is to raise wages by suppressing competition among workers.”⁴³⁰ Justice Goldberg, regarded as a liberal jurist, came to the same conclusion when he wrote that the “very purpose and effect

Id.

427. David Wessel, *Greenspan Predicts Revival of Growth Without Any Acceleration of Inflation*, WALL ST. J., July 20, 1995 (Federal Reserve Board Chairman Greenspan testified that the increasingly unequal distribution of income in the United States “could be major threat to our society.”). On January 25, 1995, in testimony before the Senate Finance Committee, Greenspan testified that “most all analysts of income distributions have been very acutely aware that since the late 1970s, that there’s been a fairly pronounced increasing dispersion of incomes, and that . . . the rich get richer and the poor get poorer.” *Hearing of the Senate Finance Committee Subject: Economic Outlook*, FED. NEWS SERV. WASH. PACKAGE, Jan. 25, 1995, available in 1995 WL 6623933; see also *Prepared Testimony of Robert E. Rubin of the Treasury Before the House Appropriations Committee*, FED. NEWS SERV. WASH. PACKAGE, Feb. 14, 1995, available in 1995 WL 6621829 (testimony by Secretary of Treasury Robert Rubin).

This slow growth in average wages has been accompanied by an unequal distribution of income gains. As you can see from the attached chart, in the past fifteen years, those with incomes in the lowest fifth of American households have seen their real incomes fall below the levels attained by their counterparts in 1980; those in the top fifth have seen their incomes rise by 21 percent; and the middle has stood still.

The unequal distribution of income gains over the past fifteen years has put very real pressure on middle-class families. Their standards of living have failed to match their legitimate expectations.

Id.

428. *E.g., Roach Trap*, WALL ST. J., June 17, 1996, at A14 (criticizing Morgan Stanley’s chief economist, Stephen Roach, for warning against a “worker backlash” that may result from the fact that “the so-called productivity resurgence of recent years has been built on the back of slash-and-burn restructuring strategies that have put extraordinary pressures on the work force.”); see also Steven Rattner, *U.S. Income Gap Is Getting Riskier*, PLAIN DEALER (Cleveland, Ohio), Sept. 2, 1995, at 11B (statement by a managing partner of Lazard Freres & Co.), available in 1995 WL 7128486. “Since 1973, annual earnings of the bottom 10 percent of workers have dropped by 24 percent—after adjustment for inflation—while those of the top 20 percent have increased by 10 percent. As a result, the United States . . . has the widest income disparity of any modern democratic nation.” *Id.* Roach pleaded for workers to “receive a just reward for their productivity contributions.” *Roach Trap, supra.*

429. In a speech introducing the NLRA, Senator Wagner observed that

[s]ince the turn of the century this country has been prolific in the production of goods. Wealth has poured forth from factory and mine in unequalled abundance. . . . If our social organization had kept pace with our mechanical inventiveness, the paradox of progress and poverty would have vanished completely. Instead, the paradox has become more glaring.

78 CONG. REC. 3678 (1934), reprinted in 1 NLRB, *supra* note 6, at 18.

430. RICHARD A. POSNER & FRANK H. EASTERBROOK, ANTITRUST: CASES, ECONOMIC NOTES, AND OTHER MATERIALS 31 (2d ed., 1981).

of a labor union is to limit the power of an employer to use competition among workmen to drive down wage rates and enforce substandard conditions of employment."⁴³¹ More generally, the Supreme Court stated in *Connell Construction Co. v. Plumbers Local Union No. 100* that the United States has a "strong labor policy favoring the association of employees to eliminate competition over wages and working conditions."⁴³² In another case, it stated that Congress enacted labor laws to channel economic forces pitting labor against employers "into special processes intended to compromise them."⁴³³

The research in this paper does not comprehensively address this inequality issue. Far from that, it examines only one employer practice that reveals the gross imbalance of competition between employees and employers. If the government allows employers to exploit this imbalance to the extent that labor markets permit, then the institution of collective bargaining is consigned to a bleak future. The potential demise of the NLRA threatens not only unions, but it also raises troubling questions about what institution will mediate the widening gulf between employers who seek to maximize profits, and employees who confront fiercely competitive labor markets that compel them to work harder and longer, but for less pay and less security.

431. *Local Union No. 189, Amalgamated Meat Cutters v. Jewel Tea Co.*, 381 U.S. 696, 723 (1965) (Goldberg, J., dissenting).

432. 421 U.S. 616, 622 (1975).

433. *Brotherhood of R.R. Trainmen v. Chicago River & Ind. R.R.*, 353 U.S. 30, 40-41 (1957).

APPENDIX I

NLRB REPLACEMENT LOCKOUT CASES

YEAR OF DECISION	CASES
1969	Inland Trucking Co., 179 N.L.R.B. 350. O'Daniel Oldsmobile, Inc., 179 N.L.R.B. 398.
1970	No decisions.
1971	No decisions.
1972	Inter Collegiate Press, 199 N.L.R.B. 177. Ottawa Silica Co., 197 N.L.R.B. 449. Ozark Steel Fabricators, Inc., 199 N.L.R.B. 847. Barnsider, Inc., 195 N.L.R.B. 754. WGN of Colo., Inc., 199 N.L.R.B. 1053. Wire Prods. Mfg. Corp., 198 N.L.R.B. 652.
1973	Hess Oil Virgin Islands Corp., 205 N.L.R.B. 23. McGwier Co., 204 N.L.R.B. 492. Ralston Purina Co., 204 N.L.R.B. 366.
1974	Martin A. Gleason, Inc., 215 N.L.R.B. 340. Sargent-Welch Scientific Co., 208 N.L.R.B. 811.
1975	No decisions.
1976	Johns-Manville Prods. Corp., 223 N.L.R.B. 1317.
1977	Charles D. Bonanno Linen Serv., Inc., 229 N.L.R.B. 629.
1978	American Cyanamid Co., 235 N.L.R.B. 1316. Loomis Courier Serv., Inc., 235 N.L.R.B. 534.
1979	No decisions.
1980	No decisions.
1981	Vore Cinema Corp., 254 N.L.R.B. 1288. Whitehall Packing Co., 257 N.L.R.B. 193.
1982	No decisions.
1983	No decisions.
1984	Kelly-Goodwin Hardwood Co., 269 N.L.R.B. 33.
1985	No decisions.
1986	B-Bar-B, Inc., 281 N.L.R.B. 250. Georgia-Pacific Corp., 281 N.L.R.B. 1. Harter Equip., Inc., 280 N.L.R.B. 597. National Gypsum Co., 281 N.L.R.B. 593.

YEAR OF DECISION	CASES
1987	Birkenwald, Inc., 282 N.L.R.B. 954. General Portland Inc., 283 N.L.R.B. 826. Marquette Co., 285 N.L.R.B. 774. Union Terminal Warehouse, Inc., 286 N.L.R.B. 851.
1988	Clemson Bros., 290 N.L.R.B. 944. United Chrome Prods., Inc., 288 N.L.R.B. 1176.
1989	Association of D.C. Liquor Wholesalers, 292 N.L.R.B. 1234.
1990	No decisions.
1991	Brewery Prods., Inc., 302 N.L.R.B. 98. Eads Transfer, Inc., 304 N.L.R.B. 711. Schenk Packing Co., 301 N.L.R.B. 487.
1992	Field Bridge Assocs., 306 N.L.R.B. 322.
1993	America's Best Quality Coatings Corp., 313 N.L.R.B. 470. Branch Int'l Servs., Inc., 310 N.L.R.B. 1092. Goldsmith Motors Corp., 310 N.L.R.B. 1279. Greensburg Coca-Cola Bottling Co., 311 N.L.R.B. 1022. R.E. Dietz Co., 311 N.L.R.B. 1259. Silver Bros. Co., 312 N.L.R.B. 1060.
1994	No decisions.
1995	International Paper Co., 319 N.L.R.B. No. 150.

