Section 8 of the National Labor Relations Act is designed "to insulate employees' jobs from their organizational rights," and provides the primary statutory protection for employee organizational activities. The keystone to the statutory plan is section 8(a)(3), which makes it an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." Because of both the legislative history of the provision and the interpretive gloss placed upon it by the National Labor Relations Board and the courts, proof of discriminatory motive has become the pivotal element of the offense—even though "motive" is not even mentioned in the act. It has been extremely difficult, however, to determine what sort of proof is necessary to establish a section 8(a)(3) violation. This Comment will address itself to this problem in light of the history of the provision and the evolving case law in the Supreme Court. Specific consideration will be given to plant closings and subcontracting, strike replacements, bonus procedures, discharges and lockouts.

I. How Motive Got Into the Act

Section 7(a) of the National Industrial Recovery Act was the predecessor of section 8 of the National Labor Relations Act. To prove a violation of section 7(a), it was necessary to demonstrate that an employer had discriminated against the complaining employees because of their union activities or affiliations. Thus the National Labor Board, the agency responsible for the administration of the section, insisted that "the Statute

4 Every code of fair competition, agreement, and license approved, prescribed, or issued under this title shall contain the following conditions: (1) that employees shall have the right to organize and bargain collectively through representatives of their own choosing, and shall be free from interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

6 See, e.g., Transcontinental & Western Air, Inc., 1 N.L.R.B. 14 (1933); Fifth Ave. Coach Co., 2 N.L.R.B. 8 (1934).

(866)
does not impair the privilege of the employer to discharge an employee for infractions of company rules or for other reasons; it requires only that in such discharges the employer shall not be motivated by the employee's union membership or activity." Proof of the employer's motive to break up union organization and collective bargaining was therefore essential in every allegation of discriminatory discharge or similar offense and such proof became sufficient to establish guilt under section 7(a). Once this discriminatory motive or anti-union animus was proven, the employer was ordered to reinstate the employees to their former positions. Employers soon found that they could successfully defend against claims under section 7(a) by providing persuasive evidence of a general economic cutback, employee misconduct, breach of company rules, poor workmanship, incompetence or the like. In situations where an employer established such a legitimate cause for his act, the Board found it impossible to conclude that the discharges were motivated by a desire to interfere with self-organization or to destroy the union in derogation of protected employee rights under section 7(a).

Section 8(3) of the NLRA was the culmination of congressional concern with employer discrimination against union activity and adherents; thus it "rounded out the idea expressed in section 7(a) of the [NIRA]..." The new provision was intended to delineate more precisely than section 7(a) the types of employer conduct which would constitute anti-union discrimination. Congressional debate on the new section emphasized that it was necessary to establish anti-union animus as the motivating factor for the employer's conduct in order to prove a violation, thus continuing the rule which had developed under section 7(a) of the previous statute.

As a result of these clear expressions of legislative intent and historical precedent, the NLRB immediately began to include discriminatory motive in the allegation and proof of section 8(3) violations. In the first case decided by the Board, the discharge of five employees was held to be a violation because the "motivating cause" of the firings was discouragement.

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7 Jersey City & Lyndhurst Bus Co., 2 N.L.B. 48, 49-50 (1934).
8 See cases cited note 6 supra.
10 See, e.g., Calcasieu Sulphate Paper Co., 2 N.L.B. 22 (1934); American Stores, 2 N.L.B. 69 (1934).
13 Id. at 3066; Meltzer, The Lockout Cases, 1965 Supreme Court Rev. 112 [hereinafter cited as Meltzer].
14 [A]nything that is in motive discrimination, either as to promotion, reduction of force, or discharge is unlawful. This interpretation has been followed consistently by the National Labor Board from the time of its establishment, August 5, 1933, and by its successor, the National Labor Relations Board, down to the present time.
of union membership. Two employees, similarly fired, were held to have no remedy because their "union membership or activity was not the effective cause" for their discharge, and thus the requisite unlawful motive was absent. The first case to reach the Supreme Court which was decided under the new act upheld the constitutionality of the legislation which created the Board and affirmed the Board's determination of the employer's "true purpose" in violating his employees' protected rights. Investigation into the employer's motive for his actions was held to be central to the Board's case.

To carry its burden of proof more easily, the NLRB soon began to employ a weighing of the evidence test whereby the employer's discriminatory motive could be established on the strength of a general background of anti-union hostility. Toward the same end the Board began to make use of a presumption of illegal motive; once a prima facie case of disparate treatment between union and non-union adherents was demonstrated, the resulting discouragement of union membership carried with it its own proof of employer motive. The burden was then shifted to the employer to explain and justify his actions.

Employers soon began to challenge the presumptive approach, especially after the Supreme Court in several cases refused to accept the.

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18 The Act does not interfere with the normal exercise of the right of the employer to select its employees or to discharge them. The employer may not, under cover of that right, intimidate or coerce its employees with respect to their self-organization and representation, and, on the other hand, the Board is not entitled to make its authority a pretext for interference with the right of discharge when that right is exercised for other reasons than such intimidation and coercion. Id. at 45-46; see 1 NLRB ANN. REP. 79-80 (1936).
19 "Any antiunion activity by the employer tends to show that the employer discriminated against particular employees on that ground." 3 NLRB ANN. REP. 81 (1939). See Kentucky Firebrick Co., 3 N.L.R.B. 455, 462-68 (1937), enforced, 99 F.2d 89 (6th Cir. 1938); 1 NLRB ANN. REP. 78-80 (1936); Ward, Proof of "Discrimination" Under the National Labor Relations Act, 7 GEO. WASH. L. REV. 797, 809-14 (1939). Such a loose proof of the violation has become increasingly unsatisfactory to the courts. Evidence of general hostility and a showing of past anti-union animus no longer supply the required proof of unlawful motive as to a specific discharge. See, e.g., Beaver Valley Canning Co. v. NLRB, 332 F.2d 429, 432-33 (8th Cir. 1964). However, the Board has the authority to draw reasonable inferences of discriminatory motive from evidence of anti-union hostility by the employer when it clearly demonstrates the specific acts and conduct upon which it bases its inferences and when these supply substantial evidence of the unlawful motive. See, e.g., NLRB v. Schill Steel Prods., Inc., 340 F.2d 568, 572-73 (5th Cir. 1965); Wonder State Mfg. Co. v. NLRB, 331 F.2d 737 (6th Cir. 1964).
20 For example: "The Board has frequently found persuasive evidence of discrimination in an unduly high percentage of union members or union leaders in a series of discharges." 1 NLRB ANN. REP. 79 n.1 (1936).
22 See Associated Press v. NLRB, 301 U.S. 103, 132 (1937) (dictum); 1 NLRB ANN. REP. 78-80 (1937).
Board tests, and reversed on the basis of faulty fact finding. The employers advanced evidence of excuse, just cause, and lack of unlawful motive for their disparate treatment of union adherents. In cases where these defenses were raised, motive grew to be a matter for more direct evidence. The Board introduced evidence of anti-union animus which included past discriminatory acts, statements by the employer betraying his motives, disparity of treatment of other employees having similar work records, failure to give warning before discharge, absence of economic justification for the action, and credibility findings. Allegations of proper cause became the sine qua non of an effective defense, with economic justification to establish lawful motivation most frequently advanced. Gradually, the NLRB expanded the coverage of section 8(3) beyond outright discharge to include "lay-off[s], refusal to reinstate, demotion, transfer, and refusal to re-employ, among the other classifications of frequent conduct which, when coupled with anti-union motivation, constitutes discrimination." Proof of discriminatory motive, therefore, was believed to be a necessary element in proof of section 8(3) violations by its framers, the NLRB, the courts, and the parties to actions brought under that section. Direct and circumstantial evidence of motive were consistently produced by the Board as the major part of its proof. Employers countered with explanations of their conduct which would disprove any anti-union motives. This remained the state of the law until 1954 when the first of a decade-long line of crucial section 8(a)(3) cases reached the Supreme Court. These cases provide a fuller and more intense examination of the ingredients of an offense under that section.

A. Section 8(a)(3), Motive and the Supreme Court: 1954-1963

A trilogy of cases consolidated under the name Radio Officers' Union v. NLRB began this analysis of section 8(a)(3). In the first case, the employer concurred in the union's reduction of seniority for a member delinquent in dues payments. As a result, the employee was denied driving

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24 See Burk Bros. v. NLRB, 117 F.2d 686 (3rd Cir.), cert. denied, 313 U.S. 588 (1941); 3 NLRB ANN. REP. 81-88 (1939).
26 Id. at 1172. Section 10(c), 49 Stat. 454 (1935), as amended, 29 U.S.C. § 160(c) (1964), was amended by the Taft-Hartley Act in 1947, 61 Stat. 147. The provision states that the Board shall not require the reinstatement of any employee who has been suspended for "cause." Such an amendment further indicates the central position of proof of motive in the discharge situation. See Cox, Some Aspects of the Labor Management Relations Act, 61 HARV. L. REV. 1, 20-21 (1947).
27 In 1947, § 8 of the NLRA became § 8(a) and (b), with the introduction of employee and union unfair labor practices in part (b) of the section. Section 8(3) is now § 8(a)(3). 61 Stat. 140 (1947), as amended, 29 U.S.C. § 158(a)(3) (1964).
29 International Bhd. of Teamsters, 94 N.L.R.B. 1494 (1951).
assignments he otherwise would have received. The Board found that both the union and the employer violated the act, but was reversed by the appellate court, which reasoned that although the employer was caused to discriminate against the employee, the evidence was insufficient to support a conclusion that union activity or membership would be encouraged or discouraged by this conduct.

In the second case, the union had caused the employer to replace a radio operator because he had not been referred through the union's hiring hall. The collective bargaining agreement permitted the employer a right of free selection in hiring so long as the applicant was a union member in good standing. The Board found unfair labor practices against both the union and the employer since, in causing the employee to be discharged, they had discriminated against him and interfered with his right to refrain from union participation. The Second Circuit granted enforcement.

Finally, in the last of the three decisions, the Board found that the employer violated sections 8(a)(1) and (3) by granting certain retroactive wage increases and vacation benefits to employees who were union members, while denying those benefits to nonunion employees. Although there was no direct evidence of prounion motive, the Board held that such disparate treatment was inherently discriminatory and encouraged union adherence; thus it carried its own proof of unlawful motive. With slight modifications not relevant here, the Second Circuit granted enforcement.

In upholding the Board's decision in each case, the Supreme Court defined crucial terms of the section and reaffirmed the necessity, in most cases, of proving motive as an element of the offense. "Discrimination" was broadly defined as disparate treatment; "involuntary reduction of seniority, refusal to hire for available job, and disparate wage treatment" based on union adherence were held to be discriminatory. "Encouragement" became tendency to encourage, which could easily be inferred from the conduct itself: "Subjective evidence of employee response . . . is not required where encouragement . . . can reasonably be inferred from the nature of the discrimination." Such an inferential approach makes the burden of proving the effect of the employer's conduct almost nonexistent as an element of a section 8(a)(3) violation. Finally, "union membership" was defined as any "participation in union activities" within the protected concerted conduct of section 7.

30 NLRB v. International Bhd. of Teamsters, 196 F.2d 1 (8th Cir. 1952).
31 Radio Officers' Union, 93 N.L.R.B. 1523 (1951).
32 Radio Officers' Union v. NLRB, 196 F.2d 960 (2d Cir. 1952).
33 Gaynor News Co., 93 N.L.R.B. 299 (1952), enforced as modified, 197 F.2d 719 (2d Cir. 1952).
35 NLRB v. Gaynor News Co., 197 F.2d 719 (2d Cir. 1952).
36 347 U.S. at 39.
37 Id. at 50-51.
While specific evidence of intent to encourage or discourage membership in a labor organization was held unnecessary where the employer's conduct inherently encouraged or discouraged protected activity, the Court permitted the Board to apply a presumption of unlawful intent or motive—based on the traditional rule that one intends the natural and foreseeable consequences of one's acts—only in situations where the discrimination was based solely upon union activity. This presumption was apparently rebuttable, but where the differential treatment was clearly based on union adherence, a rebuttal would be virtually impossible. However, when the union leader was discharged and the employer claimed that his work was unsatisfactory, there would remain the problem of determining upon which factor the employer based his action. In virtually every case, a complex of motives stimulates the employer and explains his actions. Discrimination which is based solely upon union activity is rare.

Radio Officers' has been interpreted as saying that, in order to take advantage of the virtually conclusive presumption of violation offered by the Court, the Board must demonstrate that encouragement or discouragement of union membership is the natural and foreseeable consequence of the employer's decision to discharge and that the sole criterion for discrimination was union membership. By implication, therefore, in all other cases involving section 8(a)(3), the Board must establish the true intent or real motive of the employer as an element of the offense. Under the

39 Over the years, use of the word "intent" has become interchangeable with "motive" when used in § 8(a)(3) cases. It is too late to attempt to disentangle them, and this Comment makes no attempt to do so. See Meltzer 93 n.23; Comment, 32 U. CHI. L. REV. 124, 128-29 (1964).

40 347 U.S. at 45. In a much later application of this standard, NLRB v. Great Atl. & Pac. Tea Co., 340 F.2d 690 (2d Cir. 1965), a showing of foreseeability was rejected when it replaced a showing of motive, which was held necessary for proof of a violation in a lockout case. "Foreseeability is not the equivalent of discriminatory motivation." Id. at 694.

41 347 U.S. at 44-46; see, e.g., Pittsburgh-Des Moines Steel Co. v. NLRB, 284 F.2d 74, 82-83 (9th Cir. 1960).

42 347 U.S. at 55-57 (Frankfurter, J., concurring).

43 Such a defense was attempted in NLRB v. Star Publishing Co., 97 F.2d 465 (9th Cir. 1938), and was rejected. The employer claimed that having union and nonunion men working side by side created friction and impaired production.

44 In Miranda Fuel Co., 140 N.L.R.B. 181, 186-87 (1962), enforcement denied, 326 F.2d 172 (2d Cir. 1963), the natural and foreseeable inference and the presumption of intent were applied to enable the Board to make a finding of § 8(a)(3) violation. The appellate court required proof of discrimination based upon union membership and insisted upon a showing that such discrimination was deliberately designed to encourage union membership, refusing to accept the Board's use of the Radio Officers' approach. Because the employer was motivated by a complex of motives, including in this situation a desire to preserve amicable relationships with the union whose demands forced the employer to violate § 8(a)(3), the court required firm proof of motive. See Comment, 65 Colum. L. Rev. 273, 277-79 (1965); Comment, 32 U. Chi. L. Rev. 124, 131-34 (1964). When there are mixed motives and dual grounds for apparent discrimination, existence of a lawful basis for the act is no defense to proof of unlawful motive, unless the discharge or conduct was based solely on the lawful ground. See NLRB v. Symons Mfg. Co., 328 F.2d 835, 837 (7th Cir. 1964); Sunshine Biscuits, Inc. v. NLRB, 274 F.2d 738, 742 (7th Cir. 1960). "To have a perfectly good motive genuinely followed is not enough if, on the facts, the motivation was twofold, with one being a purpose to eliminate the union." NLRB v. American Mfg. Co., 351 F.2d 74 (5th Cir. 1965).
Radio Officers' analysis, there are three separate steps in proving a violation. The first is the proof of the employer's act and the determination that the conduct discriminates for or against union adherents or those contemplating union affiliation. Second, the Board may infer from these facts, using its expertise, whether or not this act naturally encourages or discourages union membership or other protected activity. Third, if the Board so infers, it may then presume the existence of unlawful motive, on the theory that one intends the natural and probable consequences of his acts.

Because the Court prohibited conduct which foreseeably or inherently discouraged union activity without prescribing guidelines for determining when such conduct occurs and without explaining the basis for abandoning the requirement of proof of unlawful motive, "the Radio Officers' decision has been cited both for the proposition that a finding of improper motive is necessary under section 8(a)(3) and for the proposition that it is not." 45

Section 8(a)(3) received its second extensive examination in Local 357, Int'l Bhd. of Teamsters v. NLRB. 46 An association of employers had agreed by contract with the union to hire casual employees only through the union's hiring hall. The agreement specified that referral would be on the basis of seniority and without regard to an applicant's union membership. Despite this, the Board held that the arrangement lacked certain specified safeguards, 47 and that the exclusive hiring hall was therefore per se discriminatory, with the required unlawful motive implicit in the plan. The circuit court affirmed, but refused to enforce the Board's order for dues reimbursement by the union. 48

The Supreme Court first searched the legislative history of the act to determine if Congress had condemned hiring halls. Finding no such condemnation, the Court reasoned that exclusive hiring halls could not judicially be declared a per se unfair labor practice. 49 Thus, there could be no inherently discriminatory motive attributed to an employer who set up such an arrangement. The Court further concluded that, despite the natural encouragement of union membership which the Board held inhered to this plan, it was the "true purpose" or "real motive" which controlled the case. The Court therefore denied the Board the use of the Radio Officers' presumption, which the Board had assumed applied to this situation. Most crucial to the Court's holding, however, was its finding that the contract specifically forbade discrimination against nonmembers; for since the NLRB failed to produce substantial evidence of unlawful motive, the fact that there was no discrimination compelled reversal of the Board's

45 Getman, Section 8(a)(3) of the NLRA and the Effort To Insulate Free Employee Choice, 32 U. Chi. L. Rev. 735, 745 (1965) [hereinafter cited as Getman].
49 365 U.S. at 673-74.
PROVING AN 8(a)(3) VIOLATION

No amount of encouragement or discouragement could turn a nondiscriminatory action into a violation of the section. Discrimination does not have to be narrowly defined as differential treatment between nonunion and union employees. Rather, a broader definition designed to encompass situations where employer action was taken in response to union activity, as differentiation without sufficient reason or arbitrary and invidious disparate treatment, has long been accepted by the courts.\(^5\)

If, under one of these definitions, discrimination had been found, Mr. Justice Harlan's concurring opinion would have correctly stated the holding of the case: an employer can make business decisions which foreseeably and naturally discourage union membership so long as they are "unmotivated by an intent to discourage union membership or protected concerted activities. . . ."\(^6\)

Certainly the Court should not have stopped its examination where it did; the actual administration of the hiring hall should have been examined for evidence of discrimination and discriminatory motive.\(^5\) The balancing approach advocated in this Comment would then have been appropriate. Under this analysis, the finding of a violation turns upon an evaluation of the disputed conduct in terms of legitimate employer or union purposes. The hiring hall could be justified by the employer and union because of the nature of the industry and the workers needed, the improved efficiency of hiring, and similar arguments. The injury to employee interests and their right to refrain from union activities supply the countervailing considerations. Such frank and exposed evaluation of legitimate economic weapons in terms of the interests and necessities at issue is a particularly appropriate function for an expert body

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\(^5\) See, e.g., Republic Aviation Corp. v. NLRB, 324 U.S. 793, 805 (1945). The controversy as to the position and definition of "discrimination" in the section is still very much alive. Some commentators argue that a finding of discrimination is the central element in proof of a § 8(a)(3) violation, with motive being secondary or inferrible from such a finding. See Meltzer 100; Comment, 32 U. Chi. L. Rev. 124, 142-43 (1964).

\(^6\) 365 U.S. at 679; see NLRB v. Industrial Cotton Mills, 208 F.2d 87 (4th Cir. 1953); Cusano v. NLRB, 190 F.2d 898 (3d Cir. 1951); Allis-Chalmers Mfg. Co. v. NLRB, 162 F.2d 435 (7th Cir. 1947).

\(^5\) In his concurring opinion, Mr. Justice Harlan recognized the validity of this argument, but narrowed the applicability of the Radio Officers' presumption. 365 U.S. at 677-85. He denied that the act authorized the Board to interfere significantly with conduct justified by nondiscriminatory economic considerations and searched the legislative history to determine the balance struck between protection of employees' welfare with respect to union activity and the employer's privilege to make nondiscriminatory business decisions which discourage union membership. With the requirement that discriminatory treatment be shown, the legislators struck the balance in favor of the employer's prerogatives. In Mr. Justice Harlan's view, to make out an offense, the Board must show discrimination in addition to encouragement or discouragement of union membership. This analysis is not very helpful for this is what the act clearly directs. It would be unreasonable to find a § 8(a)(3) violation in the absence of both unlawful motive and disparate treatment. But when such discriminatory conduct is shown, the act directs the Board to investigate the conduct for evidence of a violation. It is here that the balancing analysis is relevant and appropriate for an analysis of reasonable and available alternatives open to the employer which would fulfill the legitimate business purposes contemplated, yet insulate employees from the detrimental effects of discouragement of union participation.
operating in a limited field like the NLRB. Thus an absence of significant business justification for the employer's actions which, as determined by the Board, foreseeably and in fact did discourage union membership, should carry the Board's burden of proof of a section 8(a)(3) violation and dispense with proof of motive. For example, in Local 357, the balance would fall in favor of the employees' protected rights. Similarly, where the fact finder made a determination that the employer had evaluated alternative means of reaching his legitimate ends and found evidence of the employer's business interest in an act which damaged protected activity and discouraged union membership, proof of improper motive would be necessary to support a finding of an 8(a)(3) violation.

Lest the Board feel that it had to find actual evidence of discriminatory motive as a result of the majority opinion in Local 357, the Court permitted and affirmed the Board's function of balancing the value of a particular economic weapon against its impact on protected concerted activities in NLRB v. Erie Resistor Corp. in 1963. In that case, the union had struck over a dispute on the terms of a new contract. Seeking to maintain operations, as it had the right to do, the employer had promised all strike replacements twenty years seniority in the plant. When the strike ended, the union returned to work and signed a contract recognizing the replacements' twenty year seniority. After several months, the company reduced the number of its employees; the first to be laid off were the former strikers and union adherents since their comparative seniority was much less than the replacements' new tenure. The union filed section 8(a)(3) charges which were sustained by the NLRB. The Board reasoned that, regardless of the employer's motives or legitimate business needs in granting superseniority to the replacements and then laying off the former strikers, the grant of such superseniority unlawfully discriminated against strikers who had exercised their right of concerted activity and affected the future vitality of the union. Thus, on balance, the Board felt that this economic weapon should not be available to the employer.

The Third Circuit denied enforcement, citing Radio Officers' and Local 357 for the proposition that the Board must make specific findings of the employer's discriminatory motive to sustain a section 8(a)(3) violation. The court held that, lacking substantial evidence of such a motive, the Board could not successfully request enforcement of its order.

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63 The NLRB handles over 15,000 unfair labor practice charges each year. See 29 NLRB ANN. REP. 7 (1965). Possessing such first hand and continuous contact with labor problems and relationships, the agency is particularly sensitive to the effects of certain labor practices and weapons.

64 For other examples cited by Mr. Justice Harlan as applying the balancing test, see cases cited at 365 U.S. 680. See also NLRB v. Erie Resistor Corp., 373 U.S. 221, 229 (1963).


59 UEW v. NLRB, 303 F.2d 359 (3d Cir. 1962).
conceding the Board's authority to draw inferences from circumstantial evidence of anti-union animus and motivation, the court maintained that the legitimate purpose served by the employer's tactic of offering superseniority to strike replacements—to maintain production during the strike—could not be declared illegal despite the injury to union activity. Thus, absent evidence of the employer's desire to discourage union membership, the Board could not hold that such conduct violated section 8(a)(3), even if it foreseeably accomplished that end.

The Supreme Court reversed, agreeing with the Board's reasoning. The fact that the employer was motivated by clearly legitimate business reasons was found not to be dispositive of the case. In a detailed analysis of the Board's assessment of the values and effects of superseniority, the Supreme Court gave explicit approval to the Board's use of a balancing test, permitting it to "weigh . . . the interests of employees in concerted activity against the interest of the employer in operating his business in a particular manner and [to balance] . . . in the light of the Act and its policy the intended consequences upon employee rights against the business ends to be served by the employer's conduct." In the specific case of superseniority, the process was clearly articulated:

Because the employer's interest [in maintaining operations] must be deemed to outweigh the damage to concerted activities caused by permanently replacing strikers does not mean it also outweighs the far greater encroachment resulting from superseniority in addition to permanent replacement. . . . [To extend the holding of NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333 (1938), permitting replacements, to the present case] would require us to set aside the Board's considered judgment that the Act and its underlying policy require, in the present context, giving more weight to the harm wrought by superseniority than to the interest of the employer in operating its plant during the strike by utilizing this particular means of attracting replacements.

B. Scope of Judicial Review

The use of a balancing approach raises interesting questions of the scope of judicial review. While these problems are more sharply focussed by the Court's most recent handling of section 8(a)(3) cases, it is ap-

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60 373 U.S. at 228-30.
61 The Court thoroughly explored the depth of the NLRB's investigation and its conclusions about the use of superseniority as an employer weapon. Ibid.
62 Id. at 228.
63 Id. at 232. See also id. at 235-36.
64 Compare American Ship Bldg. Co. v. NLRB, 331 F.2d 839 (D.C. Cir. 1964) (Board's role as balancer summarily approved), with 380 U.S. 300 (1965) (Supreme Court opinion in the same case emphatically rejected the Board's function of arbiter.
propriate to raise the issue here. If the Board finds that the employer's interest in his choice of action is legitimately motivated and leads to reasonable business ends, but that it is outweighed by the substantial damage done to union membership by the conduct, does a reviewing court have the authority to make a fresh evaluation, using its own scales to strike a contrary balance? Normally, if the Board's factual findings are supported by substantial evidence on the whole record, if its rationale is not arbitrary, and if it articulates its reasoning, its findings may not be disturbed and its decision will be enforced. On questions of law, the courts' responsibility similarly involves a decision on "whether the Board's decision has 'warrant in the record' and 'a reasonable basis in law.'"  


66 See, e.g., NLRB v. Erie Resistor Corp., 373 U.S. 221, 236 (1963); Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 196-97 (1941).  

67 See Buffalo Linen Supply Co., 109 N.L.R.B. 447 (1954), rev'd sub nom. Truck Drivers Local 449 v. NLRB, 231 F.2d 110 (2d Cir. 1956), rev'd, 353 U.S. 89, 96 (1957). In this case, the Supreme Court recognized the limited judicial review permissible when the NLRB had exercised the function of evaluating conflicting legitimate interests, a function which Congress committed primarily to the Board. 353 U.S. at 96-97. When the Board approved lockouts by the nonstruck members of a multi-employer bargaining unit in response to a strike against one of its members, the Court deferred to the Board's evaluation of the tactic and its determination that the employer's strong interest in the integrity of the unit outweighed the harm naturally accomplished to the employees' union adherence by its use. Less deference and more judicial scrutiny were evident in a bargaining context just three years later, however, when a union engaged in such harassing tactics in support of its bargaining demands as slowdowns, quickie strikes, misconduct and the like. NLRB v. Insurance Agents' Union, 361 U.S. 477 (1960). The Board had balanced the interests and looked to the "relative effectiveness of the parties' economic weapons and defined their legality to prevent what it judges would create an imbalance of power." Summers, Labor Law in the Supreme Court; 1964 Term, 75 YALE L.J. 59, 73 (1965) [hereinafter cited as Summers]. Where in Buffalo Linen, the Court had accepted the Board's balancing judgment and limited judicial review, now it broadened its inquiry and conducted its own analysis on its own scales, criticizing the Board for "assuming a general power to regulate weapons available to the employer and unions in a bargaining context." 361 U.S. at 490. See also id. at 492, 497-98. The Court here declared that Congress intended no such role for the Board. Three years later, in Erie Resistor Corp. v. NLRB, 373 U.S. 221 (1963), the Court apparently had second thoughts and once again approved such a role and balancing function for the NLRB. See text accompanying notes 57-58 infra.  

68 Local 9735, UMW v. NLRB, 258 F.2d 146, 151 n.4 (D.C. Cir. 1958) (Burger, J., dissenting), citing NLRB v. Hearst Publications, Inc., 322 U.S. 111, 130-31 (1941). Admittedly, questions of law, if the decision to apply the balancing analysis is such a question, are susceptible to broader judicial scrutiny than questions of fact, for, according to § 10 of the APA, "the reviewing court shall decide all relevant questions of law." The act excepts from such broad review actions "committed to agency discretion" and limits review to "abuse of discretion" in such situations. Administrative Procedure Act § 10, 60 Stat. 243 (1946), 5 U.S.C. § 1009 (1964).  

Professor Jaffe cogently argues: "A court, therefore, must decide as a 'question of law' whether there is 'discretion' in the premises, and once the discretion is established, its exercise if 'reasonable' is free of control." JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 570 (1965). See generally, id. at 546-92.  

Before the recent lockout cases where the Court apparently determined that the decision to apply the balancing analysis to § 8(a)(3) cases and results obtained from its use were neither limited by review under standards for questions of fact nor questions of law, see note 64, infra, the use of the balancing test was deemed well within the NLRB's discretionary function and conclusions drawn from such application narrowly
The limited judicial review sanctioned under these standards was not followed where the Board began to tread on the toes of "management prerogatives" such as subcontracting, plant closings, bargaining lockouts, and replacement of striking or locked-out employees. When the Board found violations of section 8(a)(3) in these areas, the courts undertook an independent evaluation and balancing analysis of their own. An illustration of this development was provided in NLRB v. Lassing. When the employer considered that the union's organization of his employees would lead to increased costs, he eliminated three jobs, whose former occupants brought 8(a)(3) charges. Denying enforcement of the NLRB's determination of violation, the court reasoned:

[The advent of the union was a new economic factor which necessarily had to be evaluated by the respondent [employer] as a part of the overall picture pertaining to cost of operations. . . . There is no evidence [of] . . . anti-union background. . . . The change was made because of reasonably anticipated increased costs, regardless of whether this increased cost was caused by the advent of the Union or by some other factor entering into the picture.]

Certainly the employer's discharge of the union adherents had the requisite effect here, which, when coupled with the discriminatory nature of the action, offered sufficient support for the Board's conclusion to warrant affirmance. Instead, finding insufficient proof of anti-union motive, the Court reversed the balance struck by the Board; it could have affirmed just as easily.

reviewable under the traditional tests of reasonableness. NLRB v. Erie Resistor Corp., 373 U.S. 221, 236 (1963). Cf. NLRB v. Coca-Cola Bottling Co., 350 U.S. 264, 269 (1956); Brooks v. NLRB, 348 U.S. 96, 104 (1954); Republic Aviation Corp. v. NLRB, 324 U.S. 743 (1945); Body & Tank Corp. v. NLRB, 339 F.2d 76 (2d Cir. 1964). The courts should limit their review to applying the Hearst standard of "warrant in the record" and "a reasonable basis in law."

Perhaps application of the balancing equation is not susceptible to the law-fact review dichotomy, but is, instead, a different type of finding. The Supreme Court has maintained, in NLRB v. Brown Food Store, 380 U.S. 278, 290-92 (1965), and in American Ship Bldg. Co. v. NLRB, 380 U.S. 300, 315-18 (1965), that the review is not of a question of fact, but of a judgment as to the proper balance to be struck between conflicting interests and thus one of interpreting the fundamental policy of the act. Therefore, the Board's analysis in support of its conclusion has been subjected to full, independent judicial review. See Meltzer 103 & nn.71-72. This analysis, enabling the fullest possible judicial review could be made in virtually all types of Board decisions. Its judgment here is no different from the usual fact-law type of analysis.

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70 See note 59 supra.


72 284 F.2d at 783.

C. The Court Attempts an End Run

Intervening between Erie Resistor and the most recent Supreme Court attempts to clarify the elements necessary for a section 8(a)(3) finding was NLRB v. Burnup & Sims,74 a case having potentially broad implications for the area. In that case, two employees began to organize the employees in the plant in which they were working. A superintendent was told by another employee that the organizers had threatened to dynamite the plant if the union was not recognized. Because of these alleged statements, the employer discharged the two union adherents. In fact the statements were never made, and the Board held that the employer's honest belief that there were such threats was no defense. The Board found that the discharges, even if unmotivated by a desire to discourage union activity, were discriminatory and therefore violated section 8(a)(3) and, derivatively, section 8(a)(1).75 The appellate court disagreed that section 8(a)(3) could be violated without proof of the employer's improper motive, and held that the employer's honestly mistaken belief was a complete defense to the section 8(a)(3) charges. Nevertheless, the court ordered backpay for the period between the date that the employees were laid off and the date that they were finally discharged.

In a two page explanation, the Supreme Court reversed both the Board and the lower court. Recognizing the danger of a flat affirmance of the Board's opinion without a full investigation into the ramifications of its approach, the Court declined to reach the section 8(a)(3) issue. Instead the Court moved directly to an independent examination of the discharges under section 8(a)(1), and held that that section can be transgressed, regardless of the employer's defenses and motives, when the employer's conduct interferes with the concerted activity protected by section 7 of the act.76 Finding a section 8(a)(1) violation under this approach, the Court ordered the traditional section 8(a)(3) remedy of reinstatement with backpay. To limit the impact of the decision, the Court accepted the Board's position and narrowed its application to those cases in which (1) the discharged employee was engaged in a protected activity at the time of the discharge; (2) the employer knew the activity was protected; (3) the basis of the discharge was an alleged act of misconduct in the course of that activity; and (4) the employee was in fact not guilty of that misconduct. It is questionable whether lower courts and the Board will confine the application of this decision within these narrow bounds.

"This decision represents the first case involving an unfair labor practice in which the Supreme Court has imposed liability for backpay on an employer without regard to his intent to perform any element of the

75 137 N.L.R.B. 766 (1962), enforced as modified, 322 F.2d 57 (5th Cir. 1963).
It thus poses serious questions about the future of section 8(a)(1). Under the Burnup & Sims formula, in any situation in which the necessity of proving motive might prove too rigorous a burden to sustain, violation of section 8(a)(1) may be proved simply by showing "interference" with protected activities. Thus the Board could obtain enforcement of a reinstatement with backpay order and section 8(a)(3) would become a dead letter; for "conceivably the Board could proceed under section 8(a)(1) in any case in which a violation of section 8(a)(3) is not clear." This would be of crucial significance, as section 8(a)(1) is a provision under which the Board's balancing tests have gained total acceptance and application.

Instead of applying section 8(a)(1) in conjunction with other subsections of section 8(a) and viewing its violation as a derivative offense in most situations, Burnup & Sims gave the section new dimensions as an independent offense. The Court could and should have avoided this construction by candid acceptance of the balancing approach under section 8(a)(3). Using this approach, the Court could have concluded that the effect of firing two union leaders upon false grounds of good cause outweighed the employer's interest in maintaining discipline and his position of authority in the plant by refusing reinstatement. Instead the Court opened a channel through which the Board could evade the sometimes onerous task of evaluating a complex of motives and excuses in order to establish an unfair labor practice. The Court attempted to narrow this channel by limiting the application of section 8(a)(1) and its backpay remedy to the facts of the case. It would seek to narrow it still further in the lockout cases discussed below.

II. THE IMPACT OF THE COURT'S LATEST WORD

After Burnup & Sims, the following situation existed: where an employer allegedly discriminated against his unionized employees and thereby discouraged the exercise of protected union activity, it was first necessary to examine his motives for the act. If sufficient evidence of anti-union

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77 Note, 65 Colum. L. Rev. 537, 539 (1965).
80 Where a finding of bad faith refusal to bargain is made, the offense necessarily interferes with the employees' rights to collective protected activity under § 7, and thus is a violation of § 8(a)(1) as well. See, e.g., NLRB v. Express Publishing Co., 312 U.S. 426 (1941); Art Metals Constr. Co. v. NLRB, 110 F.2d 148, 150 (2d Cir. 1940). See generally Getman 758-61.
81 A possible means of limiting the ramifications of Burnup & Sims, in addition to limiting its application to the exact factual situation which existed in that case, is to apply the requirement of a finding of discriminatory motive to that section as well as to § 8(a)(3). See American Ship Bldg. Co. v. NLRB, 380 U.S. 300 (1965); NLRB v. D'Armigene, Inc., 353 F.2d 406 (2d Cir. 1965).
82 See Meltzer 113.
motive was adduced, normally legitimate business conduct became violative of section 8(a)(3). If no strong evidence of unlawful motive could be produced, it was still possible that the Board might establish a violation under the section 8(a)(3) balancing equation. Thus if the employer's interest in operating his business in a certain way was found to be outweighed by the tendency of his actions to discourage union membership by the discrimination practiced, the Board might find a section 8(a)(3) violation and order reinstatement with backpay. Moreover, if the Board's order was denied enforcement, either because the reviewing court disagreed with the Board's evaluation under the balancing equation and instead substituted its own scales in an independent evaluation, or because it refused to find a section 8(a)(3) violation absent a finding of employer anti-union motive, or because it judged the conduct at issue not inherently discriminatory and thus presumptively not motivated by anti-union animus, the Board might rely upon section 8(a)(1) to obtain the same remedy.\textsuperscript{83}

This remained the tangled state of the law until the Supreme Court was faced with the results of the Board's application of the balancing approach in \textit{American Ship Bldg. Co. v. NLRB}\textsuperscript{84} and \textit{NLRB v. Brown Food Store}\textsuperscript{85} in 1965.

Following its decisions that certain forms of lockouts must be withdrawn from the employer's arsenal of coercive bargaining weapons in order to preserve some degree of bargaining equality,\textsuperscript{86} the Board in \textit{American Ship Building} held that absent reasonable grounds to fear a strike, a lockout by the employer when his negotiations with the union reached an impasse was an unlawful offensive lockout.\textsuperscript{87} Such bargaining lockouts fell into the prohibited category by interfering with the union's right to bargain collectively and by discouraging union participation. The Board held that evidence of discriminatory motive was not necessary to establish a violation in this situation.\textsuperscript{88} The court of appeals, applying what it considered to be the technique and teachings of the earlier cases, deferred to the Board's primary responsibility for balancing conflicting legitimate interests in the absence of substantial proof of discriminatory motive.\textsuperscript{89} The Supreme Court reversed, concluding that the bargaining lockout "is not demonstrably so destructive of collective bargaining that the Board need not inquire into employer motivation . . . ."\textsuperscript{90} and, instead

\begin{footnotes}
\item[83] See Welch Scientific Co. v. NLRB, 340 F.2d 199 (2d Cir. 1965); Lorben Corp., 146 N.L.R.B. 1507 (1964), \textit{enforcement denied}, 345 F.2d 346 (2d Cir. 1965).
\item[84] 380 U.S. 300 (1965).
\item[85] 380 U.S. 278 (1965).
\item[86] Packard Bell Electronics Corp., 130 N.L.R.B. 1122 (1961); Betts Cadillac Olds, Inc., 96 N.L.R.B. 268 (1951); Duluth Bottling Ass'n, 48 N.L.R.B. 1335 (1943).
\item[89] 331 F.2d 839 (D.C. Cir. 1964) (per curiam).
\item[90] 380 U.S. at 310.
\end{footnotes}
of remanding for the Board's inquiry, made an independent evaluation of the effect of the bargaining lockout. Disapproving the balance struck by the Board, the Court held that use of this weapon by the employer was legitimate and the injury slight. Strongly criticizing the Board for functioning "as an arbiter of the sort of economic weapons the parties may use in seeking to gain acceptance of their bargaining demands," the Court ignored the fact that the NLRB had been fulfilling this role since its inception.

The Board had judged that use of the offensive bargaining lockout would tip the scales too far in the employer's favor and would defeat the act's goal of placing the employer and the union on roughly equal terms at the negotiation table. The Court rejected not only this conclusion but also the position that the Board could attempt such an equation, terming it an "unauthorized assumption by an agency of major policy decisions [which are] properly made by Congress." The Court further stated: "[T]he Act's provisions are not indefinitely elastic, content-free forms to be shaped in whatever manner the Board might think best conforms to the proper balance of bargaining power." Yet the reading given the earlier cases discussed above leads one to the conclusion that it was just such a role under section 8(a) (3) which the Court contemplated for the Board.

In rejecting both the section 8(a) (1) and (3) findings of the Board, the Court maintained that a finding of unlawful motive was required under either section except in situations where the practices ... are inherently so prejudicial to union interests and so devoid of significant economic justification that no specific evidence of intent to discourage union membership or other anti-union animus is required. In some cases it may be that the employer's conduct carries with it an inference of unlawful intention so compelling that it is justifiable to disbelieve the employer's protestations of innocent purposes.

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01 Id. at 317, quoting NLRB v. Insurance Agents' Union, 361 U.S. 477, 497-98 (1960).
02 See Bok, The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act, 78 Harv. L. Rev. 38, 42 (1964). While the preelection context, where the Board's balancing function has been most frankly acknowledged, is distinguishable from the collective bargaining situation, the Board has exercised its balancing functions in both situations. See, e.g., NLRB v. Erie Resistor Corp., 373 U.S. 221, 228-29 (1963). But see NLRB v. Insurance Agents' Union, 361 U.S. 477, 497-500 (1960).
03 380 U.S. at 318.
04 Id. at 310.
06 380 U.S. at 311. See also NLRB v. Brown Food Store, 380 U.S. 278, 286 (1965). The Court thus failed to acknowledge the applicability of Erie Resistor's analysis where the employer's conduct has a degree of economic justification yet causes grave discouragement of union membership. Certainly where the employer's choice of action is "devoid" of economic justification, even the oldest of tests allows the Board to presume unlawful motive and sustain a § 8(a) (3) charge. See Radio Officers' Union v. NLRB, 347 U.S. 17, 46-49 (1954).
Under this interpretation, the Board must make findings of discriminatory motive in all other situations involving allegations of section 8(a)(1) or (3) behavior. Thus, even where the union membership and activity is crippled by the employer’s acts, and this result is both natural and foreseeable, a supportable claim of legitimate business justification will prevent the conduct from being construed as a violation of section 8(a)(3) if there is no proof of motive. If the Board is to function as an effective adjudicatory body utilizing the full range of its expertise, such a confining philosophy must be abandoned for it indisputably prevents that agency from maintaining industrial peace by allocating economic weapons in order to achieve a balance of power between the employer and union.

The Court’s justification for its reaction against loosening the requirements of proof for establishing section 8(a)(3) violations was succinctly set forth: “Such a construction of 8(a)(3) is necessary if due protection is to be accorded to the employer’s right to manage his enterprise.” In their concurring opinion, the Chief Justice and Mr. Justice Goldberg correctly noted that this rule departed substantially from the spirit of the earlier line of cases investigated above. They concurred because there was no substantial evidence (not even a “scintilla”) to support the Board’s finding that the employer’s fear of a strike was unreasonable; thus precedent justified the finding of a lawful defensive lockout here. These Justices submitted that where the Board is unable to bring forth substantial evidence of the employer’s unlawful motive, it must determine whether the legitimate economic interests of the employer justify his interference with the protected activities of his employees. This sophisticated and sensitive balancing process, they concluded, was committed by Congress “primarily to the National Labor Relations Board, subject to limited judicial review.”

This approach also coincides with that taken by Mr. Justice White. In a well-reasoned concurring opinion, he joined in the result, but demonstrated that legitimate interest motivated the employer’s use of this economic weapon. Since the employees were laid off for lack of work, (although the lack of business was directly attributable to the employer’s notification of clients that a strike was likely) no violation could be found. The Board’s function is to evaluate the strengths and effects of the com-

97 “[W]e have consistently construed the section to leave unscathed a wide range of employer actions taken to serve legitimate business interests in some significant fashion, even though the act committed may tend to discourage union membership... [citing Mackay’s replacement rule].” 380 U.S. at 311. Similarly, the decisions in American Ship Building and Brown Food Store indicate the future direction of the section.
98 Id. at 311.
99 Id. at 338-42.
100 Id. at 327-35; see text accompanying notes 170-85 infra.
102 380 U.S. at 318-27. Contrary to the majority, Mr. Justice White found no use of the lockout here since lack of work created the need for the lay off. Thus there was no refusal to furnish available work to the employees, a characteristic of the lockout.
peting interests of the employer and union; when it fails to articulate and display the considerations which moved it to strike the particular balance, the reviewing court may properly reverse and remand. Here, the Board relied on a mechanistic dichotomy between offensive and defensive lockouts instead of a reasoned assessment of the conflicting interests at stake and a rational connection between the facts found and the balance struck. Mr. Justice White recognized that in fact the test is one of choosing among a complex of motives and assigning weights to the strengths of the interests involved. "The balance or accommodation of 'conflicting legitimate interests' in labor relations does not admit of a simple solution and myopic focus on the true intent or motive of the employer . . . ." 104

This is a sophisticated and realistic approach to the actualities of industrial relations. Requiring an employer to examine his prerogatives and interests to determine if he can accomplish his legitimate business goals in alternative ways which are not so damaging to a union and its protected activity is hardly an outrageous burden. Such a reasoned calculation by an employer will often prevent labor disputes before they occur. If he sees no feasible alternatives to his selected conduct and determines that the goal is a necessary one, he should be able to convince the Board of this fact. This approach restores proof of motive to its proper role in finding a section 8(a)(3) violation, expunges the confused evasions of the courts and the Board, and permits an exposed and articulated weighing of the values placed upon the economic weapons of the employer and the union. It also permits the agency and the courts to react flexibly to new labor situations as they occur without being bound by superficial application of settled rules of conduct. 105

Into the balancing equation advocated here must go a determination of the effect of the employer's conduct upon his employees, for if the discouragement or encouragement is relatively slight, it should not shift the scales against the employer's chosen course of action. As Erie Resistor held, when superseniority is added to maintenance of operations during a strike by replacing the striking employees, the cumulative effect is too

103 But cf. Getman 746 n.42.
104 380 U.S. at 325 (concurring opinion).
105 Compare the Court's statement in American Ship Building ("We think that the Board construes its functions too expansively when it claims general authority to define national labor policy by balancing the competing interests of labor and management."") 380 U.S. at 316, with dictum in Brown Food Store, 380 U.S. at 289, to the effect that since the employer's conduct did not have a great tendency to discourage union membership and since preservation of the multi-employer unit was the legitimate end sought, no violation could be found. (The Court stated: "When the resulting harm to employee rights is thus comparatively slight, and a substantial and legitimate business end is served, the employers' conduct is prima facie lawful. Under these circumstances the finding of an unfair labor practice under § 8(a)(3) requires a showing of improper subjective intent") Ibid. To reconcile these views, it appears that it is improper for the Board to utilize the balancing approach but proper for the Court to do so. Who else but the Board is to determine when the injury to employee rights is slight and the business end served substantial by the employer's conduct? The Court's statement quoted above from Brown Food Store is the classic example of the balancing approach. Only a further Supreme Court test can resolve this dilemma.
devastating to union membership to be a permissible employer tactic. In that case the balance thus was thrown in favor of employee protection.\textsuperscript{106} In the lockout situation also, the equation will be crucially affected by the legitimacy of replacements for the locked out employees.

This problem was partially resolved in NLRB \textit{v.} Brown Food Store,\textsuperscript{107} a companion case to \textit{American Ship Building}. Brown Foods was engaged in collective bargaining negotiations as a member of a multi-employer unit. The union struck Brown to obtain its bargaining demands, and the non-striked employers imposed a lockout as a defense against a whipsaw strike. Using temporary replacements, Brown continued to operate during the strike. The other employers, seeing the consequences of Brown's operations while their plants were shut down, also replaced their locked out employees and continued production. The NLRB permitted Brown to use temporary replacements since its employees were striking, but held that the use of such replacements by the nonstruck employers violated both sections 8(a) (1) and (3).\textsuperscript{108} The appellate court denied enforcement on the ground that an employer had virtually an absolute right to maintain production under the circumstances of the case.\textsuperscript{109} Affirming the lower court, the Supreme Court refused to permit the Board to declare the lockout replacement weapon unlawful through application of the balancing analysis. In this situation, unless substantial evidence of unlawful motive was presented, the Board could not deny use of this tactic to the employer. No finding of illegal motive was actually made by the Board, their findings being based upon a balancing of interests and a conclusion that the tactic carried with it its own indicia of unlawful motive. The Court denied this latter proposition, holding that the conduct was not proscribed by the act and carried no inherent proof of discriminatory motive. It then concluded that the employer could, for legitimate business purposes, replace strikers or locked out employees and blunt the effectiveness of an impending strike by transferring work, stockpiling inventories, readjusting contract schedules or even liquidating his operation.\textsuperscript{110}

The Court thus substituted its own judgment of the efficacy and legality of the lockout replacement weapon for that of the Board, an inappropriate function in view of its earlier and apparently conclusive statements of the scope of permissible judicial review.\textsuperscript{111} Denying that the Board was operating within its statutory mandate, the Court held that no balancing could upset the conclusion that this weapon was legitimately

\textsuperscript{106} See text accompanying note 58 \textit{supra.} \\
\textsuperscript{107} 380 U.S. 278 (1965). \\
\textsuperscript{108} 137 N.L.R.B. 73 (1962). \\
\textsuperscript{109} 319 F.2d 7 (10th Cir. 1963). \\

available to employers.\textsuperscript{112} The missing proof of unlawful motive, necessary to violations of both sections 8(a)(1) and (3), rendered the Board's order unenforceable. Thus the Court denied the existence of Board discretion in this area, and reversed on the basis of the Board's "erroneous legal foundation." \textsuperscript{113}

Again writing persuasively, Mr. Justice White dissented because he could not agree with the severe restrictions which the Court imposes on the Board's role in determining the employer conduct banned by sections 8(a)(1) and (3) of the NLRA. \ldots This decision represents a departure from the many decisions in this Court holding that the Board has primary responsibility to weigh the interest of employees in concerted activities against that of the employer in operating his business.\textsuperscript{114}

It has been perceptively recognized that the function of allocating economic weapons calls for the exercise of special expertise and awareness of the goals and policies of the act, the strengths of the parties, the developments and stratagems in labor relations, and plant-level realities.\textsuperscript{115} The Board is uniquely suited for this role, both in terms of its long experience in handling a truly mountainous number of unfair labor practice cases, and in its closeness to the evidence in each individual case.\textsuperscript{116} "The elaborate rationalizations of the Court are calculated to confuse everyone, including the Justices. \ldots The legality of economic weapons depends purely on pragmatic considerations, and the primary consideration has been

\textsuperscript{112} Significantly, the majority and concurring Justices recognized at least one area where the Board may use its expertise in a balancing approach in the lockout situation. This will occur when the Board is called upon to decide if the employer's use of permanent replacements is legitimate; the Court specifically reserved this issue. 380 U.S. at 308 n.8. Here the analysis might be appropriate: the employer had a legitimate interest in locking out and maintaining production during the lockout by use of replacements. His use of permanent replacements had a crushing effect upon union membership and he might well have been able to operate using temporary replacements. If temporary replacements had been used, the economic strikers could have obtained reinstatement upon conclusion of the strike. See Hot Shoppes, Inc., 146 N.L.R.B. 802 (1964). This feasible alternative would have had a less discouraging and deleterious effect upon the protected activity. Therefore use of permanent replacements will be denied to the employer, despite the fact that they were used for a legitimate business purpose.

\textsuperscript{113} See Summers 85.

\textsuperscript{114} 380 U.S. at 294 (dissenting opinion). \textit{But cf.} Meltzer 109 (arguing for the reasonableness of the Court's balancing in the case).

\textsuperscript{115} Summers 72-73.

\textsuperscript{116} The Supreme Court has noted with deference the Board's special function of applying the general provisions of the act to the complexities of industrial life, and has acknowledged that balancing the employer's interest in a particular decision and method of fulfilling that decision against the injury to union membership resulting from that conduct is a function lying "well within the mainstream" of the Board's duties. NLRB v. Erie Resistor Corp., 373 U.S. 221, 236 (1963); NLRB v. Truck Drivers Union, 353 U.S. 87, 96-97 (1957). \textit{But see} NLRB v. Brown Food Store, 380 U.S. 278, 292 (1965); American Ship Bldg. Co. v. NLRB, 380 U.S. 300, 318 (1965).
achieving a rough equality of bargaining power.”117 Once the Board reaches its decision on how best to attain this goal and allocates the weapons, its determination should be subject to normal judicial review with ultimate approval or reversal accomplished by congressional action.118 It cannot be doubted that when the Board moves into these sensitive areas of management weapons and prerogatives, Congress will quickly become aware of developments and engage in closer scrutiny of NLRB findings and decisions. The statute “says nearly nothing about employers' economic weapons in bargaining disputes; the allocation has been made by fiat of the Board and Court.”119 If Congress disapproves of the results of the Board’s balancing processes, it will certainly be moved to redress that balance and to enumerate criteria relating to employer weapons which are as specific as those which it has established for judging union tactics.120

III. Proving an 8(a)(3) Violation in Four Areas of Employer Activity

A. Plant Closings and Subcontracting

In dealing with plant closings and subcontracting, courts have shown the greatest preoccupation with protecting traditional management prerogatives from the encroachment of an expansive interpretation of the act by the NLRB. Section 8(a)(5),121 concerned with refusals to bargain in good faith over items considered mandatory bargaining terms by the Board, is most often the pivotal provision in these areas, but application and consideration of sections 8(a)(1) and (3) frequently occur.

These areas of employer conduct were vitally affected by the decisions of the Supreme Court during the 1964-1965 term.122 In *Fibreboard Paper Prods. Corp. v. NLRB*,123 for example, the Court held that a decision to subcontract maintenance work formerly done by employees of the company is subject to the duty to bargain in good faith. Thus it is a viola-

117 Summers 72-73.
119 Summers 74.
120 It has been argued that “there is no reason why an employer who penalizes his employees for engaging in union activity should be exonerated solely because he was not motivated by the desire to discourage union membership or activity.” Getman 750. This position is internally inconsistent because when an employer penalizes his employees *for engaging* in union activity, his motives are clearly unlawful. Summers has criticized the balancing analysis on the ground that any balance struck by the Board will be changed as an industry or region changes, or when the economy shifts (as when unemployment is high and union treasuries are low). Summers 74 n.64. Then the effects of anti-union acts will be felt more strongly. Yet it is more than effect which enters into the equation. It is the strength of the employer's interest in his weapon that is crucial, as well as how close it lies to the "core of managerial control." Moreover, the criticism fails to consider the higher goal of permitting the Board to react to individual situations with individual responses, balances and remedies. Uniformity is no particular virtue under this analysis.
tion of section 8(a)(5) for an employer unilaterally to replace his unionized employees with those of an independent contractor by subcontracting their work. The Court's opinion gives an instructive analysis of the duty to bargain, but the remedy approved by the Court is a significant aspect of the opinion.

The Board's remedy to redress the effects of this unfair labor practice was an order to reinstate with backpay the employees whose jobs were affected by the decision to subcontract. The Court did not mention any findings under sections 8(a)(1) or (3), but did enforce this section 8(a)(3) remedy for a violation of section 8(a)(5). Of course, this was the only effective remedy possible and the Board does possess the power to fashion an appropriate remedy according to its expertise. The implications of such an approach, however, may be extremely significant. For example, does it mean that if an employer bargains in good faith and decides to subcontract work formerly done at his plant, his decision cannot have the taint of an unfair labor practice under section 8(a)(3) even if layoffs and discharges follow? The reasoning would be that good faith in bargaining is equivalent to good, economic motives for the discharge and precludes the finding of a violation of section 8(a)(3). Thus it would be irrelevant whether union employees were primarily or solely involved, or whether the discharges had the requisite effect to establish a section 8(a)(1) violation. A balancing evaluation might still allow the Board to find a violation of section 8(a)(3) in the absence of unlawful motive— if such a process were permissible. As was pointed out in a concurring opinion, Fiberboard can be read to deny the Board the authority to make such a finding in the subcontracting situation, since that area involves one of those "managerial decisions which lie at the core of entrepreneurial control . . . [and] which are fundamental to the basic direction of a corporate enterprise . . . ." If this approach is accepted, what is to prevent similar categorization and absolution from section 8(a)(3) findings of other conduct such as the decision to close one's business, totally or partially, or to move it to another part of the country and begin anew with nonunion employees? The Court was faced with some of these questions in Textile Workers v. Darlington Mfg. Co., but before discussing that landmark decision, an examination of lower court and Board decisions on plant removals, closings, and subcontracting may prove helpful.

The Board has ruled that section 8(a)(3) is violated even when an employer's decision to move his plant is motivated by business reasons, if it is accelerated by anti-union animus so that it has a crucial and detri-

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124 See Summers 69-63.
127 379 U.S. at 223 (Stewart, J., concurring). See also NLRB v. Royal Plating & Polishing Co., 350 F.2d 191, 196 (3d Cir. 1965).
mental effect upon protected activity. According to the Board, even if the union's demands add economic considerations which are taken into account by the employer in the context of other economic factors, his decision to subcontract or to move must be made solely with reference to the nonunion economic considerations. This view was rejected by the Sixth Circuit in NLRB v. Lassing, but accepted by the Tenth in NLRB v. Brown-Dunkin Co., a subcontracting case. Motive was determinative there, with the court supporting the Board's finding that the union's successful organizational campaign precipitated the employer's decision to subcontract the operation done by the new union adherents. In this context, purely economic motives could not be claimed by the employer.

Similarly, where the employer reclassified all his employees as a result of a union election victory, the court found that this response in retribution for the protected activity violated sections 8(a)(1) and (3) "so long as that action would not have been taken in the absence of such union activity." Some courts place an even heavier burden upon the Board by holding that the employer may consider the advent of the union as one of the factors upon which to base a decision concerning removal of the plant or subcontracting of an operation, and that his "real" or "true" motive must be both discriminatory and designed to discourage union membership to violate section 8(a)(3). In NLRB v. Rapid Bindery, Inc., for example, the employer was considering moving his plant for economic reasons. When the union later gained majority status and demanded collective bargaining after Board certification, the employer made his decision to relocate. Much evidence of anti-union hostility was introduced, and the Board held that regardless of economic necessity, the move was accelerated—thus motivated in some part—by anti-union animus. The appellate court refused to accept this test, and insisted instead upon a showing that anti-union hostility was the preponderant motive for the decision.

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129 See 27 NLRB ANN. REP. 112 (1963). In the Board's view, an employer's conduct is unlawful even if genuine economic factors as well as the employees' union activities contribute motivation for the shutdown. See Star Baby Co., 140 N.L.R.B. 678 (1963); 28 NLRB ANN. REP. 76 (1964).
132 287 F.2d 17 (10th Cir. 1961).
133 Id. at 19-20. See also Bon Hennings Logging Co. v. NLRB, 308 F.2d 548 (9th Cir. 1962); NLRB v. Winchester Electronics, Inc., 295 F.2d 288 (2d Cir. 1961); NLRB v. Wallick, 198 F.2d 477 (3d Cir. 1952); NLRB v. E. C. Brown Co., 184 F.2d 829 (2d Cir. 1950)—in each a finding of anti-union motive for the shutdown or subcontracting was pivotal and determinative.
134 Allis-Chalmers Mfg. Co. v. NLRB, 162 F.2d 435, 440 (7th Cir. 1947). See also Federation of Union Representatives v. NLRB, 339 F.2d 126, 128 (2d Cir. 1964).
135 293 F.2d 170 (2d Cir. 1961).
136 Id. at 175; see NLRB v. Kingsford, 313 F.2d 826, 831 (6th Cir. 1963); NLRB v. New England Web, Inc., 309 F.2d 696, 701 (1st Cir. 1962); Jays Foods, Inc. v. NLRB, 292 F.2d 317, 321 (7th Cir. 1961); NLRB v. Houston Chronicle Pub. Co., 211 F.2d 848, 854 (5th Cir. 1954).
The implications for the plant closing situation of the Supreme Court's decision on subcontracting in *Fibreboard Paper Prods. Corp. v. NLRB* are well illustrated in the *Adams Dairy* case. In 1962, the NLRB trial examiner found violations of sections 8(a)(1), (3) and (5) when the employer decided to substitute an independent contractor and his employees for his own driver-salesmen in this milk distributing business. The Board found it unnecessary to pass upon the section 8(a)(3) charge since the employer clearly violated section 8(a)(5), in the Board's view, by refusing to bargain before he subcontracted the operation. The employer was ordered to reinstate his employees with backpay and to bargain about the decision to subcontract.

The appellate court reversed, holding that the decision was not a mandatory subject of bargaining, and that the refusal to negotiate with the union before taking this step was therefore not violative of the act. The court pointed out, however, that if there had been evidence sufficient to sustain a finding of discriminatory motive it would have affirmed on the basis of a section 8(a)(3) violation. The court admitted that Radio Officers' permits application of the presumption of motive test in the section 8(a)(3) context, but maintained that this applied only when the employer's act is inherently discriminatory and has no rational explanation other than motivation by anti-union animus. Superseniority in *Erie Resistor* was such a situation; subcontracting is not. Thus, since the Board failed to produce evidence of the employer's unlawful motive, the Board applied the wrong standard and was reversed. Had the Board anticipated the Supreme Court's disposition of the *Burnup & Sims* case, it could have found that the employer's conduct interfered with activity protected by section 7 of the act and sustained the finding of a violation with the same remedy under section 8(a)(1).

When ordered by the Supreme Court to rehear the case in light of its *Fibreboard* opinion, the Eighth Circuit affirmed its former decision. Fibreboard's subcontracting of maintenance work was compared to Adams Dairy's replacement of driver-salesmen by independent contractors. The court limited Fibreboard's duty to bargain to those situations in which work contracted out continues to be done as part of the employer's in-plant operation. In *Adams Dairy*, on the other hand, the entire distribution portion of the employer's enterprise was terminated. To require the employer to bargain over such a decision was held improper since it would "significantly abridge his freedom to manage the business," even though his decision would most assuredly terminate employment and discourage union activity discriminatorily.

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137 N.L.R.B. 815 (1962).
138 322 F.2d 553 (8th Cir. 1963).
140 350 F.2d 108 (8th Cir. 1965).
142 Id. at 221-23 (concurring opinion).
It is here that subcontracting and plant closings merge, for both are decisions "which lie at the core of entrepreneurial control." It is in this context that the Supreme Court's decision in *Textile Workers v. Darlington Mfg. Co.* becomes of primary importance. As part of an allegedly single, integrated employer group, Darlington Company was controlled by Deering Milliken, a marketing corporation. When the union organized its plant, Darlington was liquidated and closed. Because the Board found that the closing was due to the employer's anti-union hostility and thus violated section 8(a)(3), it ordered the employer to reinstate the discharged employees if the plant were ever reopened and to continue their wages until they found substantially equivalent employment. The appellate court refused enforcement on the ground that an employer has an absolute right, regardless of his anti-union and discriminatory motivation, to terminate all or part of his operation.

Although it held impermissible a *partial* closing motivated by a discriminatory desire to discourage union organization, the Supreme Court did agree that an employer had an absolute right to close his *entire* operation, even where evidence of discriminatory motive is clear. Writing for the Court, Mr. Justice Harlan insisted that where there is a total liquidation, the employer receives no future benefit from his action in the form of decreased pressure from his employees to exercise their protected rights. Thus such conduct is "not the type of discrimination which is prohibited by the Act." On the other hand, a discriminatory partial closing has repercussions upon the remainder of the employer's business and employees, whether in the same plant or another plant controlled by the same employer. Thus, "a partial closing is an unfair labor practice under § 8(a)(3) if it is motivated by a purpose to chill unionism in any of the remaining plants of the single employer and if the employer may reasonably have foreseen that such a closing would likely have that effect." Apparently the latter clause of the dual test is superfluous, for even the most myopic employer could foresee the effect upon his remaining employees of wholesale or selective discriminatory discharges. But though the employer could foresee this effect, even as the natural consequence of his action, he is not held to have intended this result without proof of unlawful motive. Under the *Radio Officers'* test of intending the natural and foreseeable consequences of the act, the *Erie Resistor* balancing analysis, or the inherently discriminatory approach, a section 8(a)(3) violation might be sustained in the total closing context. Apparently, since this is an area "which trenches so closely upon otherwise legitimate employer prerogative," the Court requires substantial proof of unlawful motive to order enforcement of a Board decision finding the act violated.

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145 325 F.2d 682 (4th Cir. 1963).
146 380 U.S. at 271.
147 Id. at 275.
148 Id. at 276; see Summers 64-66.
Transplanted to the subcontracting cases, the same partial-total dichotomy will apply.\textsuperscript{149} In Adams Dairy, this analysis would require a finding that a termination through subcontracting of a part of the employer's operation had occurred. The employer no longer handled this distribution function from his plant; he did not merely shift the operation to another group of employees still ostensibly connected with him. Thus where the control over a portion of his operation is totally severed, if the employer fulfills the requirement of bargaining in good faith before subcontracting, he will not be guilty of a section 8(a)(3) violation if that good faith suffices to demonstrate lack of unlawful motive. This is so although the effect of this decision on other employees in the plant is naturally and obviously detrimental to union membership and participation.

The Court's approach in Darlington is seriously deficient. In focusing upon the gain to the employer rather than the loss and injury to the employee the Court overlooked its own declaration in Radio Officers' that section 8(a)(3) was intended to insulate employees' jobs from the possible effects of exercising their organizational rights. As one commentator has noted:

We had always supposed that the purpose of the statute was affirmatively to protect employees in the exercise of their rights, not merely to preclude employers from profiting from destruction of those rights. Indeed, the dominant remedial principle, particularly in Section 8(a)(3) violations has always been to make the injured employees whole and not merely to deprive the employer of his ill-gotten gains. \ldots\textsuperscript{150} The mischief in the Court's reasoning is that it ignores the rights of those who have been discriminatorily discharged. \ldots [The Darlington Court's reasoning implied that] discrimination against them is an evil only when it intimidates others \ldots\textsuperscript{151}

Certainly the effect upon the employees in Darlington was devastating—they lost their jobs, they were discriminated against, and their organizational activity protected by the act was discouraged. Should the Darlington total-partial closing approach be applied in the subcontracting context, it would be just as clearly incorrect. The employer could evade his duty to recognize a majority union and could discharge union adherents solely for the purpose of "chilling unionism," if he merely bargained with the union over his subcontracting decision, refused to compromise, and subcontracted a portion of his operation as a warning to other union adherents that they might be next.

\textsuperscript{149} Cf. NLRB v. William J. Burns Int'l Detective Agency, 346 F.2d 897 (8th Cir. 1965) (the employer terminated one portion of his operation).

\textsuperscript{150} To support this contention, the author cites Phelps Dodge Corp. v. NLRB, 313 U.S. 177 (1941); Republic Steel Corp. v. NLRB, 311 U.S. 7 (1940).

\textsuperscript{151} Summers 65, 67.
To analogize the decision to subcontract an operation to the decision to close an entire plant is to misconstrue the act. The decision to subcontract does not approach the magnitude of termination of an entire enterprise, nor is it as difficult to remedy effectively. It is, instead, analogous to a decision to terminate one plant in an integrated chain of plants. A discriminatory partial closing or subcontracting "may have repercussions on what remains of the business, affording employer leverage for discouraging the free exercise of § 7 rights among remaining employees of much the same kind as that found to exist in the 'runaway shop' and 'temporary closing' cases." 152 The employer's decision to subcontract, whether retaining the function in his plant or totally severing control, must be susceptible to the same tests of a section 8(a)(3) violation as are applied to other conduct covered by that section. Remedies which order reinstatement of the discharged employees in the retained portions of the business are available, as is backpay until similar employment is obtained. If solicitude for management prerogatives makes it necessary to declare the balancing test inapplicable in the total closing situation,153 this should be the only freedom from scrutiny allowed the employer, for the act so dictates.

B. Strike Replacements

The use of strike replacements is so far institutionalized and anticipated in industrial relations that it is surprising that any limitation on their use has been imposed by the courts. Long ago, the Board determined that maintenance of operations during a strike was an inalienable employer right;154 in Brown Food Store this right was extended to include the option of an employer to continue operations during his own lockout. "The right to hire permanent replacements for [economic] strikers was based simply on the Board's practical judgment that employers should be allowed this countermeasure to the strike."155 That the Board made such a judgment so early in its history demonstrates that it has long been allocating economic weapons between employer and union. Surely use of permanent replacements effectively discourages concerted activity—the union faces the threat of loss of membership, although its collective bargaining contract may remain in effect, any time it takes to the lines to reinforce bargaining

152 380 U.S. at 274-75.
153 Id. at 275. It would be unreasonable to argue for an across the board application of the balancing analysis. As the opinion in Darlington indicated, in situations of total closings the employer has made a judgment that he wishes to withdraw his capital and entrepreneurial skill completely. The act does not extend the Board's supervisory functions far enough to investigate this decision unless it is like a temporary closing or a runaway shop, in which the employer closes and reopens with non-union employees, in which case violations of § 8(a)(3) should be able to be proved under the tests discussed. See, e.g., NLRB v. Adkins Transfer Co., 226 F.2d 324, 327 (6th Cir. 1955); Sidele Fashions, Inc., 133 N.L.R.B. 547 (1961), enforced per curiam, 305 F.2d 825 (3d Cir. 1962).
154 Mackay Radio & Tel. Co., 1 N.L.R.B. 201 (1936), enforcement denied, 87 F.2d 611, 92 F.2d 761 (9th Cir. 1939), rev'd, 304 U.S. 333 (1938).
155 Summers 73.
or other economic demands. In making its judgment, the Board considered the alternatives available to the employer, the legitimacy and effect of his interest in keeping production lines operating during the strike and determined that the balance lay with the employer.156

This frank balancing approach has pervaded every situation where replacements have been used. According to one analysis, the decisions which grant the employer the right to hire replacements for strikers but not the right to give them superseniority,157 and which afford an opportunity to replace during bargaining, economic or operational lockouts, but apparently deny the replacements permanent status have no internal consistency.158 These decisions can be rationalized, however, on the basis that in drawing these lines the Board and Court “looked to the relative effectiveness of the parties’ economic weapons and defined their legality to prevent what it judged would create an imbalance of power.”159 Allocation of the right to use replacements to maintain operations and of the further right to offer these replacements permanent positions is subject to shifting considerations in varying situations. These considerations might include the context in which the replacements are to be used, the nature of the operation and the skills required to perform it, the sources of new manpower, the geographical location of the business, and the relative strength of the union and the employer.

In *American Ship Building* and *Brown Food Store*, the Court either neglected to consider these factors or failed to expose its analysis; it concluded only that temporarily replacing locked out employees is neither clear evidence of unlawful motive nor such an inherent interference with protected activities that it will support a finding of a section 8(a)(3) violation without proof of discriminatory motive. Under the balancing analysis, the Court might well have come to the same conclusion, for use of temporary replacements is the most minimally destructive action the employer can take once his right to operate during the lockout is accepted. It has been argued that:

> Since the hiring of temporary replacements as a complement to a legitimate bargaining lockout no more violates the act than does the bargaining lockout itself, and since management should be allowed to protect its legitimate interest in maintaining operations, the institution of temporary replacements should not prima facie constitute an unfair labor practice.160

This analysis can be carried a step further. In the Court’s view, not only is the use of temporary replacements not inherently discriminatory, but it

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156 See Mackay Radio & Tel. Co., 1 N.L.R.B. 201 (1936).
158 Summers 72-73.
159 Id. at 73.
cannot place weight on the scales which would enable the Board to find that the lockout-temporary replacement weapon is violative of section 8(a)(3) in some cases. The Court sees the problem as involving another of those "core of managerial control" decisions where actual proof of discriminatory motive is necessary for a finding of violation. It is submitted that this rationale is unacceptable. The threat of temporary replacements, when combined with the crucially effective weapon of the bargaining lockout, cumulatively can cripple union membership and participation. For example, when employees know that their union's bargaining demands can be met by a lockout and discharges, they not only will be less vigorous adherents, but are likely to renounce their membership. Thus the Board should have the authority to balance the countervailing considerations in the context of the individual situation in order to determine the legality of this dual weapon.

Similarly, use of permanent replacements in these situations can serve the same legitimate economic functions and be motivated by the same "core" business considerations as the use of temporary replacements.\(^161\) As yet the Court has not recognized this. In both Brown Food Store and American Ship Building it reserved judgment on this weapon,\(^162\) but the concurring Justices in the former case expressed grave doubts that use of permanent replacements can ever be justified by any argument of legitimate financial interest on the part of nonstruck but locking-out employers. Perhaps the work or location of the plant are so unattractive that only an offer of permanent employment is an effective inducement to an applicant, or the labor supply such that an offer of permanent employment is the only effective method of recruitment. All these legitimate employer concerns must be weighed in the balance. The concurring opinions in Brown Food Store seem to prevent such balancing in the case of a single employer lockout or where the multi-employer unit moves past the conduct needed to preserve the unit's cohesiveness. Such limitations appear unwise, for use of permanent replacements in these situations is neither inherently prejudicial nor so devoid of significant economic justification as to dispense with specific proof of discriminatory motive or to prevent a frank balancing decision on the future use of the weapon.\(^163\) Each plant situation must be examined in its individual context. The result of the balancing may differ with area and operation. When the employer can anticipate that his conduct will be scrutinized if he decides to use the lockout replacement weapon, he will be forced to examine the alternatives available to him to achieve his legitimate objectives. Knowledge of the Board's balancing approach should then lead him to choose the solution which will, consistent with his legitimate needs, inflict the least injury upon protected activities and union membership.

\(^{161}\) See id. at 370 n.40.


\(^{163}\) See id. at 311-12.
C. Bonuses

The problem of bonus treatment of unionized employees often arises in a context of section 8(a)(5) charges. Typically, the union claims that the employer had agreed to continue paying a customary bonus after the union achieved its majority recognitional status, but that it had negotiated a contract which did not specifically require continuance of the bonus.164

The usual bonus situation giving rise to a section 8(a)(3) charge is that in which the employer grants a bonus to his non-union employees but effectively denies it to his union workers on the basis of some apparently nondiscriminatory formula, or refuses to pay a heretofore regular bonus to newly organized employees. The pivotal problem is categorization of the practice.165 Is it like grants of superseniormity, with proof of discriminatory motive not required; is it analogous to plant closings where even proof of discriminatory motive will not support a violation of section 8(a)(3); or is it like those lockouts and discharges in which proof of motive is first sought, but absent such proof, a balancing of interests will determine if there has been a violation?

In Pittsburgh-Des Moines Steel Co. v. NLRB,166 the employer applied a five factor formula for bonus determination to several of his plants. All his employees received a Christmas bonus except the unionized employees at a California plant which had undergone a strike. Since one of the factors in the bonus formula was group productivity, the strike time reduced the productivity of the plant to a point below that which qualified the employees for the bonus. Despite the absence of direct evidence of discriminatory motive, the Board applied the natural and foreseeable consequences test—inferring discouragement and presuming intent—to sustain the section 8(a)(3) allegations. The Board acknowledged the absolute right of an employer to declare or withhold a bonus for business reasons, but insisted that the act was violated if this discretion were exercised in a way which inherently penalized strikers and contained a built in bias against this protected activity.167

The circuit court reversed, holding that even if the action were discriminatory and carried with it a natural and foreseeable effect of discouraging union membership, section 8(a)(3) was not violated unless the employer's action was clearly motivated by a desire to accomplish this result rather than to fulfill a legitimate business function. The Court held the Radio Officers' presumption was inapplicable since the denial of the

165 See NLRB v. Exchange Parts Co. 339 F.2d 829 (5th Cir. 1965) (treated solely as a § 8(a)(5) case); General Tel. Co. v. NLRB, 337 F.2d 452 (5th Cir. 1964) (no allegation of § 8(a)(3) violation); NLRB v. Citizens Hotel Co., 326 F.2d 501 (5th Cir. 1964), (§ 8(a)(3) violation not found because of lack of evidence as to anti-union motive).
166 264 F.2d 74 (9th Cir. 1960), reversing 124 N.L.R.B. 855 (1959).
bonus was not based solely on union membership. Since the employer proved a legitimate business reason for his denial (productivity of his employees), and since he had an absolute right to grant or to withhold the bonus (like the right to close his plant), the balancing equation test was inapplicable; the offense could only be proved through evidence of motive.

Strict application of the American Ship Building and Brown Food Store requirements, apparently anticipated by the appellate court in Pittsburgh-Des Moines Steel, would require the Board to produce substantial evidence of the employer's unlawful motivation from the complex of motives which undoubtedly underlie such a decision, and would run counter to prior Board practice.

An indication that the courts understand this requirement to be the law today is found in the Quality Casting case. There the NLRB held that an employer's profit sharing plan which provided for forfeiture based on a certain percentage of unexcused absences violated the act. (Strike time was considered as unexcused absence.) Certainly the threat of loss of proceeds from their profit sharing plan, like the loss of bonus pay, effectively discouraged participation in concerted activities. However, the reviewing court refused to enforce the Board's order, which was based on a Radio Officers' and balancing analysis, and denied the legitimacy of such a balancing equation based on considerations of the strength of the employer's interest in cutting down on absenteeism by use of this particular method.

The court insisted:

We are of the opinion that when, as in this case, an employer's action is not specifically directed against those who have engaged in protected types of union activity, but is rather directed at a group which is defined by other than union membership or activity criteria, and which clearly includes others who did not engage in the protected, concerted activities, the Board not only must prove discrimination but also it must prove the employer's motivation.

Thus through use of a restrictive reading of "discrimination" and an insistence upon explicit proof of motive, the courts have insulated such conduct from a balancing evaluation by the Board.

168 "The Act has always permitted the employer to infringe on employees' rights when the infringement is motivated by a desire to protect rights which are legitimately the employer's." 284 F.2d at 83.

169 Previously, in situations involving bonuses or participation in profit sharing plans and salary schedules conditioned upon nonunion membership, the Board has made consistent findings of per se violations and inherent discrimination carrying its own proof of motive. See Melville Confections, Inc., 142 N.L.R.B. 1334 (1963), enforced, 327 F.2d 689 (7th Cir. 1964); Toffenetti Restaurant Co., 136 N.L.R.B. 1156, enforced, 311 F.2d 219 (2d Cir. 1962); Jim O'Donnell Inc., 123 N.L.R.B. 1639, 1643 (1959); General Motors Corp., 59 N.L.R.B. 1143, 1155 (1944). 170 Quality Casting Co., 139 N.L.R.B. 982 (1962), enforcement denied, 325 F.2d 36 (6th Cir. 1963).

171 325 F.2d at 41.

172 See, e.g., National Seal Div., 141 N.L.R.B. 661 (1963), enforcement denied, 336 F.2d 781 (9th Cir. 1964); Community Shops, Inc., 130 N.L.R.B. 1522 (1961), enforcement denied, 301 F.2d 263 (7th Cir. 1962).
This analysis and insistence is unsatisfactory. Here there is a clear clash of conflicting legitimate interests—the employer who seeks high productivity and institutes a bonus or profit sharing plan as an incentive, and the employees and union which have a protected right to concerted activity and union membership. Crucially, it is the very exercise of those rights which would disqualify the employees from participating in the extra pay plans. It cannot be said that "the resulting harm to employee rights is thus comparatively slight, and a substantial and legitimate business end is served," so that the employer's conduct is prima facie lawful until proof of his improper motivation is presented. Injury to union membership is substantial; the employer's legitimate interest in productivity may well be substantial also.

Such a situation is particularly appropriate for examination under a balancing analysis. The balancing approach would permit freer inquiry into the usefulness and effect of this employer act in the individual plant context. It would also permit fuller expression of the "special solicitude" which the act has for the right to strike; for in certain situations the desire to protect this concerted conduct may overbalance the right of the employer to apply a formula such as that in Pittsburgh-Des Moines Steel in determining payment of bonus benefits. Finally, use of the balancing test is appropriate because the bonus and profit sharing situations resemble the lockout, superseniority, replacement, and discharge areas, where, it is submitted, the balancing tests are either already in use or are proper situations for the exercise of the Board's functions. Unlike total plant closings, withdrawal of a bonus has a markedly discouraging effect upon the unionized employees who continue to work at the plant, as well as upon non-union employees contemplating union membership. Unless the recent American Ship Building and Brown Food Store decisions are unwisely read to require findings of unlawful motive in all section 8(a) (1) and (3) cases and to foreclose the Board from exercising an "arbitral role" in any situation involving these sections, use of the balancing approach is not foreclosed in these bonus and profit sharing cases.

D. Lockouts

Until the recent Supreme Court decisions in American Ship Building and Brown Food Store, the lockout area provided a notable example of the

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174 Under a Burnup & Sims approach, § 8(a) (1) might be used here since the denial of the bonus is conditioned upon nonparticipation in union activities, and thus has the requisite detrimental effect to warrant findings of a § 8(a) (1) violation. However, there is good reason to anticipate that the usefulness of Burnup & Sims will be severely limited. Not only did the Court indicate that it would limit the case's theory to factual situations like that in Burnup & Sims but in later cases courts have indicated that they would also apply a motive requirement to proof of § 8(a) (1) allegations. See, e.g., NLRB v. D'Armigene, Inc., 353 F.2d 406 (2d Cir. 1965) (relying upon the Brown Food Store-American Ship Building analysis).
Board's use of the balancing approach under section 8(a)(3).176 When the courts examined the history of the act and found that the legislature had no intention of making the lockout a per se violation,177 they began to employ a balancing and motive test in determining whether lockouts constituted violations of the act.178 The legality of the lockout was governed by an offensive-defensive dichotomy. Where an employer feared economic or operative disruption by a reasonable expectation of an impending strike, he could engage in a legitimate defensive lockout.179 Similarly, he could act defensively to protect the integrity of a multi-employer bargaining unit by locking out against a whipsaw strike.180 He could not, however, unreasonably anticipate a strike or difficulty in collective bargaining and offensively lock out the employees so as to exert pressure on them to accept his terms.181

The Buffalo Linen case182 is the primary example of the development of this balancing analysis. Buffalo Linen Company was a member of a multi-employer bargaining group. During negotiations with the union, it was struck. To prevent the union from striking one member company at a time, thus forcing that company to accede to its demands to preserve its position in the market, the members of the association met these whipsawing tactics by locking all their doors. The NLRB held that this was a normal defensive move against the strike of one of their member companies which imperiled the employers' common interest in bargaining on a group basis. The Second Circuit reversed,183 holding that such a determination was for the legislature and that, since it found no justification in the legitimate business and economic interests of the other employers in the lockout, the locking out of nonstriking employees interfered with their right to engage or refrain from engaging in concerted activity. Thus the lockout discriminated against them because of their union's actions. Ordering enforcement of the Board's decision, the Supreme Court indicated that it approved of the Board's balancing of the conflicting interests since there

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176 See, e.g., NLRB v. Truck Drivers Union, 353 U.S. 87, 96 (1957).
180 NLRB v. Brown Food Store, 380 U.S. 278 (1965); Morand Bros. Beverage Co. v. NLRB, 190 F.2d 576 (7th Cir. 1951), reversing 91 N.L.R.B. 409 (1950); Morand Bros. Beverage Co., 99 N.L.R.B. 1448 (1952), enforced, 204 F.2d 529 (7th Cir. 1953).
181 Utah Plumbing & Heating Contractors Ass'n, 126 N.L.R.B. 973 (1960), enforced, 294 F.2d 165 (10th Cir. 1961); Packard Bell Electronics Corp., 130 N.L.R.B. 1122 (1961) (dictum); International Shoe Co., 93 N.L.R.B. 907 (1951) (dictum); Duluth Bottling Ass'n, 48 N.L.R.B. 1335 (1943) (dictum).
183 Truck Drivers Local 449 v. NLRB, 231 F.2d 110 (2d Cir. 1956), rev'd, 353 U.S. 87 (1957).
were legitimate and substantial interests on both sides.\textsuperscript{184} Since there was no finding of unlawful motivation, the Board correctly understood its function and could legitimately hold that the defensive lockout outweighed the union's interest and injury.

The Board had been making similar determinations since 1951, when it recognized in \textit{Betts Cadillac}\textsuperscript{185} that the defensive lookout was a legitimate weapon when "necessary for the avoidance of economic loss or business disruption attendant upon a strike."\textsuperscript{186} Reasonableness under the circumstances became the Board's standard to determine whether a lockout was defensive.\textsuperscript{187} What the Board in fact was doing under this test was balancing the legitimacy and strength of the employer's reasonable interest in the lockout maneuver against the necessarily detrimental effect upon union participation.

The vitality of this approach has been placed in serious doubt by the Supreme Court majorities in \textit{American Ship Building} and \textit{Brown Food Store}. If under these cases it is determined that the Board is injecting itself into management functions in determining the reasonableness of a lockout, so that a finding of discriminatory motive is required to sustain a section 8(a)(3) allegation, the cases in which the Board explored the justification for the employer's expectation of a strike will come under strong attack. Indeed, even before the recent Supreme Court decisions, the motive test was strictly reasserted in several circuit court opinions in the lockout area.\textsuperscript{188}

In \textit{American Ship Building}, the fact that there was no indication "that the lockout . . . [would] necessarily destroy the unions' capacity for effective and responsible representation" weighed heavily in the Court's analysis.\textsuperscript{189} Despite this and other indications in concurring and dissenting opinions that the balancing evaluation is appropriate in this context,\textsuperscript{190} the Court apparently believes that the lockout is an illegitimate tactic only when the Board finds substantial evidence of an "intention to discourage union membership or otherwise discriminate against the union."\textsuperscript{191} Why this form of economic self-help is not always susceptible to a reasonable balancing analysis by the NLRB is explained only by the Court's judgment that "sections 8(a)(1) and (3) do not give the Board a general authority to assess the relative economic power of the adversaries in the

\textsuperscript{184} 353 U.S. at 95-96; NLRB v. Brown Food Store, 380 U.S. 278, 282 (1965).
\textsuperscript{185} \textit{Betts Cadillac Olds, Inc.}, 96 N.L.R.B. 268 (1951).
\textsuperscript{186} \textit{Id.} at 286.
\textsuperscript{187} See 26 NLRB ANN. REP. 96-97 (1962).
\textsuperscript{188} See, \textit{e.g.}, NLRB v. Dalton Brick & Tile Corp., 301 F.2d 886, 897-98 (5th Cir. 1962); Morand Bros. Beverage Co. v. NLRB, 190 F.2d 576, 583-84 (7th Cir. 1951).
\textsuperscript{189} 380 U.S. at 309.
\textsuperscript{190} See NLRB v. Brown Food Store, 380 U.S. 278, 294, 298-99 (1965) (White, J., dissenting); \textit{American Ship Bldg. Co. v. NLRB}, 380 U.S. 300, 323-27 (1965) (White, J., concurring); \textit{Id.} at 338-41 (Goldberg, J., concurring) (all the above passages approve the Board's function in balancing the competing legitimate interests generally, and specifically in the lockout situation).
\textsuperscript{191} 380 U.S. at 313.
bargaining process and to deny weapons to one party or the other because of its assessment of that party's bargaining power."\textsuperscript{192} The Court would limit the Board's functions to "protecting the rights of employee organization and collective bargaining."\textsuperscript{193} This function and the balancing approach are not incompatible. To best fulfill the mandate as interpreted by the Court, the Board should be allowed the balancing method of assessing the legitimacy of the employer's interest in the lockout and the concomitant injury to employee organization and collective bargaining.

\textsuperscript{192} Id. at 317.
\textsuperscript{193} Ibid.