Revisiting the Offensive Bargaining Lockout on the Fiftieth Anniversary of *American Ship Building Company v. NLRB*

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Introduction

In 2011, the American Crystal Sugar Company maintained its position as the largest sugar beet producer in the United States by producing about 17% of the nation's "finest quality sugar."[1] From its five factories in the Red River Valley, straddling Minnesota and North Dakota, the company turned 445,000 acres of sugar beets into approximately $800 million net proceeds from total revenues of over $1.5 billion—up from approximately $526 million in net proceeds from total revenues of over $1.2 billion the year before.[2] In the process, the company set "a new average slice record" by cutting 38,234 tons of beets per day.[3] On the strength of this performance, American Crystal described itself as "a world class agricultural cooperative"[4] and "the most reliable sugar supplier in North America"[5] and concluded that it was "positioned to compete in a profitable, productive, and sustainable way."[6] The company paid its chief executive officer (CEO) an annual compensation package of $2.4 million, an increase of 50% from two years earlier.[7]

Despite its financial success, American Crystal was determined to reduce labor costs. During negotiations for a new collective bargaining

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1. American Crystal Sugar Co., 2011 Annual Report 1 (2011).
2. *Id.* at 13, 15.
3. *Id.* at 7.
4. *Id.* at 1.
5. *Id.* at 11.
6. *Id.* at 2.
7. *See* Dale Kurschner, *American Crystal Sugar: Full Steam Ahead*, Twin Cities Bus. (Feb. 1, 2012), http://tcbmag.com/News/In-Depth/American-Crystal-Sugar-Full-Steam-Ahead?page=1.

agreement with Local 167G of the Bakery, Confectionary, Tobacco Workers and Grain Millers International Union, the company made a final offer to raise wages between 13% and 17% over five years and pay a $2,000 "signing bonus."[8] In exchange, however, employees would have to pay a substantially larger health insurance premium and accept contract language that would weaken job security, seniority rights, and the grievance procedure.[9]

In August 2011, after the union rejected the company's offer without calling a strike, American Crystal locked out its 1,300 unionized workers and hired temporary replacements to operate the five factories.[10] This offensive lockout hit workers hard. Employees, who earned an average of $40,000 per year, lost thousands of dollars in wages each month. Susan Sylvester, a thirty-seven-year veteran of the company's Crookston, Minnesota, plant, said: "Our families, they've really suffered great hardship, especially the ones with little kids. . . . It's a strain on marriages, it's a strain on relationships. Sixteen months with no pay coming in."[11] Becki Jacobson, a thirty-year-veteran of the company's Moorhead, Minnesota, plant, made $810 per week before overtime; a year into the lockout, however, she collected just $489 per week in unemployment benefits.[12] To make up the difference, Jacobson replaced steak with macaroni and cheese and holiday gift shopping with window shopping.[13] Fifty-two weeks into the lockout, Jacobson's unemployment benefits were about to expire.[14]

It was even worse for the North Dakota workers; for most of the lockout, they were ineligible for unemployment benefits. Many of them "were forced to go out and get food stamps, and they were forced to depend on charity of their churches and their local union brothers and sisters."[15] Locked-out workers who looked for new jobs often faced skepticism from prospective employers who feared the newcomers would return to their old jobs as soon as the lockout ended.[16]

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8. *See id.*
9. *See id.*
10. *See id.*
11. Dave Jamieson, *American Crystal Sugar Lockout May End After 16 Hard Months*, HUFFINGTON POST (Nov. 30, 2012, 7:37 AM), http://www.huffingtonpost.com/2012/11/30/american-crystal-sugar-lockout_n_2214743.html.
12. Mike Hughlett, *Hard Choice for Workers in Lengthy Lockout*, STAR TRIB. (June 23, 2012, 6:51 PM), http://www.startribune.com/hard-choice-for-workers-in-lengthy-lockout/160090655/ [hereinafter Hughlett, *Hard Choice*].
13. *Id.*
14. *Id.*
15. Dale Wetzel, *Locked-Out N.D. Workers Seek Jobless Benefits*, BISMARCK TRIB. (Sept. 18, 2012, 10:53 PM), http://bismarcktribune.com/news/state-and-regional/locked-out-n-d-workers-seek-jobless-benefits/article_835e963a-020d-11e2-afa5-0019bb2963f4.html (quoting workers' attorney, Dan Phillips).
16. *See* Kurschner, *supra* note 7.

Although the company's profits dropped substantially, the replacement workers maintained production, and the company had profits of over $500 million when the lockout ended in early 2013.[17] Brian Ingulsrud, the company's Vice President of Administration, said the 2012 fall sugar beet harvest and processing went smoothly, and the replacement employees were "doing a fabulous job."[18] Not surprisingly, the contrast between the company's apparent financial success and the workers' suffering caused bitterness within the affected communities. Marc LaPlante, a thirty-nine-year company veteran, said "[t]his wound will never heal."[19]

In April 2013, the lockout ended when employees voted to accept the company's final offer—the same offer they had soundly rejected in August 2011 and had rejected three more times during the intervening twenty-two months.[20] Just over 400 of the original 1,300 workers returned to work.[21] The rest had retired, quit, found other employment, moved away, or simply became disillusioned.[22] American Crystal had prevailed by waging a lengthy war of attrition. Scott Aubol, a thirty-four-year veteran of the company, put it this way: "There are people who are [economically] broken down, who are at their limit."[23] But the company was not broken down. In its post-lockout Annual Report, American Crystal boasted that the years 2006 to 2013 had "delivered some of the best financial results" in its 122-year history.[24]

The Supreme Court's decision fifty years ago in *American Ship Building Co. v. NLRB*[25] made the American Crystal lockout, and many others like it, possible. *American Ship* held that an employer may lock out union workers in support of its bargaining demands and condition workers' return to work upon agreement with the employer's final contract proposal.[26] Before 1965, employers could only

17. American Crystal Sugar Co., 2013 Annual Report 14 (2013) [hereinafter 2013 Annual Report].

18. Wetzel, *supra* note 15.

19. Hughlett, *Hard Choice*, *supra* note 12; *see also* Mike Hughlett, *American Crystal Sugar Lockout Ends*, Star Trib. (May 28, 2013, 9:11 PM), http://www.startribune.com/american-crystal-sugar-lockout-ends/209279061/ [hereinafter Hughlett, *Lockout Ends*].

20. Hughlett, *Lockout Ends*, *supra* note 19.

21. *Id.*

22. *Id.*

23. Hughlett, *Hard Choice*, *supra* note 12 (alteration in original).

24. 2013 Annual Report, *supra* note 17, at 5.

25. 380 U.S. 300 (1965). For a discussion of the evolution of lockouts, see generally Susan L. Dolin, *Lockouts in Evolutionary Perspective: The Changing Balance of Power in American Industrial Relations*, 12 Vt. L. Rev. 335 (1987); Bernard D. Meltzer, *Lockouts Under the LMRA: New Shadows on an Old Terrain*, 28 U. Chi. L. Rev. 614 (1961); Bernard D. Meltzer, *Single Employer and Multi-Employer Lockouts Under the Taft-Hartley Act*, 24 U. Chi. L. Rev. 70 (1956). For a discussion of the law affecting lockouts today, see generally Douglas E. Ray, William R. Corbett & Christopher David Ruiz Cameron, Labor-Management Relations: Strikes, Lockouts and Boycotts (2014–2015 ed.); Douglas E. Ray, Calvin William Sharpe & Robert N. Strassfeld, Understanding Labor Law (4th ed. 2014).

26. *Am. Ship*, 380 U.S at 318.

lock out employees defensively—that is, in response to slowdowns, sabotage activities, strike threats, or actual strikes designed to "whipsaw" all members of a multi-employer bargaining unit by targeting its weakest members with economic pressure.[27] Since 1965, however, the National Labor Relations Board (NLRB or Board) has permitted employers to lock out employees offensively—that is, to aid legitimate employer bargaining goals, regardless of whether workers have threatened a strike or whether a strike is imminent. In fact, over the past five decades, as a result of NLRB decisions after *American Ship* expanding the rights of employers to use the offensive lockout,[28] it has become a devastating weapon in the employer's bargaining arsenal. In 1968, the Board held that an employer could hire temporary replacements during a lockout;[29] in 1986, the Board ruled that an employer need not wait for impasse to institute a lockout;[30] and two years later, the Board decided that lockouts in which such tactics are deployed are not "inherently destructive" of employees' rights under the National Labor Relations Act (NLRA or Act).[31]

As the American Crystal labor dispute demonstrates, doctrinal expansions of the offensive lockout have turned this economic weapon into a nuclear option that permits the employer to impose great hardship on employees to achieve its own bargaining objectives, even at the expense of national labor policy, which "encourage[es] the practice and procedure of collective bargaining"[32] and requires parties to "exert every reasonable effort to make and maintain" collective bargaining

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27. *See infra* Part I.B.1.

28. *See infra* Part I.B.2.

29. *See* Darling & Co., 171 N.L.R.B. 801, 802–03 (1968); *see also generally* Michael H. LeRoy, *Lockouts Involving Replacement Workers: An Empirical Public Policy Analysis and Proposal to Balance Economic Weapons Under the NLRA*, 74 WASH. U. L.Q. 981 (1996). In other cases, employers can maintain operations by redistributing locked-out workers' duties to managers and non-union employees. *See, e.g.*, John Herzfeld, *Con Edison in New York Locks Out Utility Workers After Negotiations Falter*, Daily Lab. Rep. (BNA) No. 127, at A-13 (July 2, 2012) (5,000 managers took over electrical, gas, and steam maintenance duties for 8,000 locked-out employees in New York City).

30. *See* Harter Equip., Inc. 280 N.L.R.B. 597, 609 n.6 (1986), *enforced sub nom.* Local 825, Int'l Union of Operating Eng'rs v. NLRB, 829 F.2d. 458 (3d Cir. 1987).

31. Int'l Bhd. of Boilermakers, Local 88 v. NLRB, 858 F.2d 756, 769 (D.C. Cir. 1988), *enforcing sub nom*. Nat'l Gypsum Co., 281 N.L.R.B. 593 (1986).

32. National Labor Relations Act (NLRA), 29 U.S.C. § 151 (2012). Similar language is in the Labor Management Relations (Taft-Hartley) Act, which provides:

> It is the policy of the United States that —
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> (a) sound and stable industrial peace and the advancement of the general welfare, health, and safety of the Nation and of the best interest of employers and employees can most satisfactorily be secured by the settlement of issues between employers and employees through the process of conference and collective bargaining between employers and the representatives of their employees. . . .

Id. § 171(a).

agreements.[33] Encouraged by *American Ship* and its progeny, employers are increasingly using the lockout weapon to seek takeaways and give-backs at the bargaining table. In recent years, employers have used or threatened to use bargaining lockouts in a wide range of industries, including the aluminum industry,[34] apartment buildings,[35] auction houses,[36] breakfast cereal plants,[37] corn mills,[38] country clubs,[39] electric

33. *Id.* § 174(a)(1). This section provides:

> (a) In order to prevent or minimize interruptions of the free flow of commerce growing out of labor disputes, employers and employees and their representatives, in any industry affecting commerce, shall—
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> (1) exert every reasonable effort to make and maintain agreements concerning rates of pay, hours, and working conditions. . . .

Id.

34. Michael Rose, *USW, Century Aluminum Reach Pact That Would End Month-Old Lockout*, Daily Lab. Rep. (BNA) No. 111, at A-10 (June 10, 2015) (560 employees locked out for one month) [hereinafter Rose, *Century Aluminum*]; Michael Rose, *NLRB Regional Director Declines to Issue ULP Complaint Against Sherwin Alumina*, Daily Lab. Rep. (BNA) No. 94, at A-14 (May 15, 2015) (450 steelworkers locked out); Krista M. Torralva, *Sherwin Alumina Co. Locks Out Unionized Employees,* CALLER TIMES (Oct. 16, 2014), http://www.caller.com/news/energy-effects/sherwin-alumina-co-locks-out-unionized-employees-ep-669643778.html (same).

35. Lawrence E. Dubé, *NLRB Wins Order Ending New York Lockout; Court Rejects Attack on Recess Appointments*, Daily Lab. Rep. (BNA) No. 60, at A-2 (Mar. 28, 2012) (over seventy porters and maintenance employees locked out for sixteen months).

36. Susan R. Hobbs, *Teamsters Ratify Sotheby's Contract, Ending 10-Month Lockout at Auction House*, Daily Lab. Rep. (BNA) No. 108, at A-13 (June 5, 2012) (forty-two fine art, antiques, and collectibles handlers locked out for ten months).

37. Lawrence E. Dubé, *NLRB Finds Kellogg Lockout Was Unlawful, Orders Bargaining and Back Pay for Workers*, Daily Lab. Rep. (BNA) No. 90, at A-1 (May 11, 2015) (nine-month lockout violated company's duty to bargain and constituted discrimination against workers); Rhonda Smith, *Kellogg's Push to Use "Casual" Employees, New Scheduling Policy Tied to Plant Lockout*, Daily Lab. Rep. (BNA) No. 16, at A-11 (Jan. 24, 2014) (220 cereal plant workers locked out).

38. Mark Wolski, *Iowa Corn Mill Workers to Return to Work as Concession Pact Ends 10-Month Lockout*, Daily Lab. Rep. (BNA) No. 148, at A-8 (Aug. 2, 2011); *see also* Jackie Gabriel, Worker Displacement and Resilience: A Case Study of a Prolonged Lockout Among Grain Processing Workers in America's Heartland 1 (June 5, 2014) (paper presented at Stony Brook University's 2014 "How Class Works" Conference), http://www.stonybrook.edu/workingclass/images/2014conference_papers/gabriel.pdf (six-year lockout of 360 grain mill employees at Grain Processing Corporation in Muscatine, Iowa, was the longest lockout in U.S. history).

39. Castlewood Country Club, No. 32-CA-24980, 2012 WL 3561990 (NLRB Div. of Judges Aug. 17, 2012) (Anderson, A.L.J.) (Pleasanton, California, country club illegally locked out sixty employees for over two years); *see also* Michelle Amber, *California Country Club Maintained Illegal Lockout for Two Years, ALJ Finds*, Daily Lab. Rep. (BNA) No. 163, at A-10 (Aug. 22, 2012) (same); Carolyn Jones, *Picketers Mark Lockout's 100th Day at Country Club*, SFGATE (June 13, 2010, 4:00 AM), http://www.sfgate.com/bayarea/article/Picketers-mark-lockout-s-100th-day-at-country-club-3261827.php (same); Steven Tavares, *Union Workers at Castlewood Country Club Finally Get a New Contract*, E. BAY EXPRESS (Feb. 21, 2013), http://www.eastbayexpress.com/SevenDays/archives/2013/02/21/union-workers-at-castlewood-country-club-finally-get-a-new-contract (same).

utilities,[40] electronic security services,[41] food processing plants,[42] funeral homes,[43] grain shipping,[44] health insurance,[45] hospitals,[46] mining,[47]

40. Pete Brush, *Con Ed Says Regulator Can End Lockout to Protect Public*, LAW360 (July 12, 2012, 6:10 PM), http://www.law360.com/articles/359400/con-ed-union-says-regulator-can-end-lockout-to-guard-public (8,000 utility workers locked out twenty-six days); Lauren Schmoll, *FirstEnergy Lockout Begins This Morning in Pa.*, WKSU (Nov. 25, 2013), http://www.wksu.org/news/story/37503 (142 utility workers locked out); Gerald B. Silverman, *Con Edison Ends 26-Day Lockout of 8,000, Reaches Accord with Utility Workers Union*, Daily Lab. Rep. (BNA) No. 144, at A-6 (July 26, 2012) (utility serving New York City and suburban Westchester County); Press Release, Util. Workers Union of Am., FirstEnergy Ends Penelec Lockout but Continues Unfair Concession Demands (Apr. 8, 2014), http://uwua.net/firstenergy-penelec-lockout/firstenergy-ends-lockout-uwua-members-pennsylvania.html (five-month lockout).

41. Rhonda Smith, *ADT Locks Out IBEW-Represented Workers in North Carolina After Contract Talks Stall*, Daily Lab. Rep. (BNA) No. 40, at A-7 (Mar. 2, 2015) (Winston-Salem security firm locked out seventeen installation and service technicians).

42. Mark Wolski, *American Crystal Workers Will Vote for Fifth Time on Company's Final Offer*, Daily Lab. Rep. (BNA) No. 62, at A-10 (Apr. 1, 2013) (American Crystal locked out 1,300 employees from five sugar refineries in Moorhead, Minnesota, for twenty-two months).

43. Anna Kwidzinski, *Court Prohibits Funeral Home Workers from Making Threats in Post-Lockout Picket Lines*, Daily Lab. Rep. (BNA) No. 184, at A-8 (Sept. 23, 2013) (SCI Illinois Service, Inc. locked out fifty-nine funeral home directors and drivers).

44. Paul Shukovsky, *Columbia Grain Inc. Locks Out ILWU from Portland Elevator, Citing Obstruction*, Daily Lab. Rep. (BNA) No. 89, at A-11 (May 8, 2013) (union estimated fifty to seventy-five grain elevator workers locked out in Portland, Oregon, and Vancouver, Washington) [hereinafter Shukovsky, *Columbia Grain*]; Paul Shukovsky, *United Grain Corp. Locks Out ILWU from Washington Export Terminal*, Daily Lab. Rep. (BNA) No. 39, at A-9 (Feb. 27, 2013) (estimated eight to twenty-two workers locked out); Larry Swisher, *ILWU Reaches Tentative Agreement to End Lockout of 700 Workers by Grain Shippers*, Daily Lab. Rep. (BNA) No. 156, at A-7 (Aug. 13, 2014) (grain shippers locked out 700 workers for eighteen months).

45. Susan R. Hobbs, *OPEIU Members to Return to Work After Ratifying Blue Cross Blue Shield Pact*, Daily Lab. Rep. (BNA) No. 136, at A-3 (July 15, 2011) (Blue Cross Blue Shield of Buffalo, New York, locked out approximately 390 workers for twelve weeks).

46. Martha Kessler, *AFT Members Ratify Contracts After Strike, Lockout at Connecticut Hospital Last Fall*, Daily Lab. Rep. (BNA) No. 23, at A-10 (Feb. 4, 2014); Martha Kessler, *Hospital in Connecticut to Lift Lockout, Despite Parties' Failure to Reach New Deal*, Daily Lab. Rep. (BNA) No. 244, at A-12 (Dec. 18, 2013) (New London hospital locked out 800 registered nurses, licensed nurse practitioners, and health care technicians); John Stucke, *Valley Hospital to Lock Out Strikers for Two Days*, SPOKESMAN REV. (Dec. 5, 2013), http://www.spokesman.com/stories/2013/dec/05/valley-hospital-to-lock-out-strikers-for-two-days/ (Spokane hospital locked out 1,110 nurses and technicians for two days).

47. Harborlite Corp., 357 N.L.R.B. No. 151, slip. op. at 7 (Dec. 22, 2011), *petition for review denied sub nom.* Teamsters Local Union No. 455 v. NLRB, 765 F.3d 1198, 1205 (D.C. Cir. 2014) (twenty-nine production, maintenance, and shipping workers in Antonito, Colorado, and No Agua, New Mexico, locked out for three months and threatened with permanent replacement, which never occurred); *see also, e.g.*, Lawrence E. Dubé, *NLRB 2-1 Determines Lockout Was Lawful Despite Threat of Permanent Replacements*, Daily Lab. Rep. (BNA) No. 248, at A-1 (Dec. 28, 2011).

nuclear fuel facilities,[48] nursing homes,[49] opera,[50] professional sports,[51] refractories,[52] security services,[53] symphony orchestras,[54]

48. Michael Rose, *USW, Honeywell Reach Tentative Pact That Would End Seven-Month Lockout*, Daily Lab. Rep. (BNA) No. 55, at A-5 (Mar. 23, 2015) (135 workers at Metropolis, Illinois, nuclear power plant locked out over seven months—second lockout in four years); Allen Smith, *Honeywell Locks Out Employees at Uranium Conversion Facility*, Soc. for Hum. Resource Mgmt. (Aug. 8, 2014), http://www.shrm.org/legalissues/federalresources/pages/honeywell-lockout.aspx (240 employees locked out of nuclear power plant in Plymouth, Massachusetts); Adrian Walker, *While Pilgrim Nuclear Power Plant Workers Are Locked Out, Plymouth Worries*, UWUA Loc. 369, http://www.uwua369.org/25-news-a-events/press-release/148-while-pilgrim-nuclear-power-plant-workers-are-locked-out-plymouth-worries (last visited Jan. 9, 2016) (same).

49. Damon Stetson, *21 Nursing Homes in City Lock Out Their Employees*, N.Y. Times (Apr. 4, 1984), http://www.nytimes.com/1984/04/04/nyregion/21-nursing-homes-in-city-lock-out-their-employees.html (nurses' aides, orderlies, porters, and maids locked out at twenty-one New York City nursing homes); Matthew Sturdevant & Mara Lee, *Nursing Home Owner: Union Pickets Illegal Despite Lockout*, Hartford Courant (Dec. 14, 2011), http://articles.courant.com/2011-12-14/business/hc-lockout-nursing-home-1214-20111213_1_picketing-replacement-nursing-aides-milford-home (100 employees locked out of nursing center in Milford, Connecticut); *see also, e.g.*, Michelle Amber, *NLRB Issues Fourth Complaint Against Nursing Home Chain for Bad Faith Bargaining*, Daily Lab. Rep. (BNA) No. 42, at A-11 (Mar. 2, 2012).

50. Michael Cooper, *Metropolitan Opera and Two Unions Reach Tentative Deal*, N. Y. Times (Aug. 18, 2014), http://www.nytimes.com/2014/08/19/arts/music/metropolitan-opera-and-two-unions-reach-a-tentative-deal.html (threatened lockout of musicians and chorus singers of Metropolitan Opera in New York City called off due to last-minute settlement).

51. Judy Battista, *As the Lockout Ends, the Scrambling Begins*, N.Y. Times (July 26, 2011), http://www.nytimes.com/2011/07/26/sports/football/NFL-Union-Labor-Deal.html (league owners locked out 1,900 professional football players for 136 days during off-season); Howard Beck, *NBA Reaches a Tentative Deal to Save the Season*, N.Y. Times (Nov. 26, 2011), http://www.nytimes.com/2011/11/27/sports/basketball/nba-and-basketball-players-reach-deal-to-end-lockout.html (430 professional basketball players locked out for 149 days and sixteen regular season games during 2011–12 season); Katie Carrera, *NHL Lockout: Hockey Returns After Four-Month Stalemate*, Wash. Post (Jan. 6, 2013), http://www.washingtonpost.com/sports/capitals/nhl-lockout-hockey-returns-after-four-month-stalemate/2013/01/06/5b1ff920-5811-11e2-9fa9-5fbdc9530eb9_story.html (750 professional hockey players locked out for 113 days and about thirty regular season games during 2012–13 season). For a general discussion of the antitrust implications of professional sports lockouts, see Kenneth G. Dau-Schmidt, Martin H. Malin, Roberto L. Corrada, Christopher David Ruiz Cameron & Catherine L. Fisk, Labor Law in the Contemporary Workplace 1189–91 (2d ed. 2014).

52. Felicia Tackett, *ANH Refractories Lock-Out Continues*, Jackson County Times-J. (May 12, 2015, 9:00 AM), http://www.timesjournal.com/news/article_ef5fc59c-dd96-56df-b836-3cf8f10e927e.html (forty-three employees locked out of refractory in Oak Hill, Ohio, for at least several weeks).

53. Susan R. Hobbs, *Entergy Locks Out Security Employees at Grand Gulf Nuclear Plant in Mississippi*, Daily Lab. Rep. (BNA) No. 194, at A-6 (Oct. 5, 2012).

54. Anne Midgette, *The Latest Orchestra Lockout: The Situation in Atlanta*, Wash. Post (Oct. 6, 2014), http://www.washingtonpost.com/news/style/wp/2014/10/06/the-latest-orchestra-lockout-the-situation-in-atlanta/ (Atlanta Symphony Orchestra locked out 100 musicians—second lockout in two years); *see also* Pamela Espeland, *Buzz About Orchestra Lockouts Is Heating Up*, MinnPost (Nov. 27, 2012), https://www.minnpost.com/artscape/2012/11/buzz-about-orchestra-lockouts-heating (Minnesota Orchestra musicians locked out for fifteen months); Howard Pousner, *With 4-Year Deal, Can Atlanta Symphony Finally Get Back In Tune?*, Atlanta J.-Const. (Nov. 11, 2014), http://artsculture.blog.ajc.com/2014/11/09/with-4-year-deal-can-atlanta-symphony-

tire plants,[55] and several other industries.[56]

Confirming this experience, a 2015 poll conducted by the Bureau of National Affairs revealed that only 43% of employers would *not* consider a lockout if they were unable to reach contract settlement.[57] In manufacturing, only 28% of employers reported they would not consider a lockout.[58] Overall, 6% of employers reported that a lockout was very or somewhat likely, with that number rising to 9% in manufacturing industries.[59] After reviewing recent highly publicized lockouts,[60] the *New York Times* reported in 2012 that lockouts comprise an increasing percentage of the nation's work stoppages in an era when unionized employees are more wary of striking and potentially losing jobs to permanent replacements.[61]

The bargaining lockout coupled with temporary replacements can be, in certain circumstances, a powerful weapon in the employer's arsenal and it is not surprising that employers consider and threaten to use it to gain bargaining leverage. Even so, a number of practical realities limit the usefulness of the bargaining lockout for most employers.

First, the legality of lockouts is often uncertain because good faith bargaining, itself an uncertain concept, is a prerequisite to beginning or continuing a lockout.[62] If the employer has committed unfair labor practices that impeded bargaining, the lockout may be unlawful and

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finally-get-back-in-tune/ (after two-month lockout, drop from eighty-eight to seventy-seven full-time musicians).

55. Mischa Gaus, *After Union Bails Out Cooper Tire, Company Locks Workers Out*, LAB. NOTES (Dec. 16, 2011), http://labornotes.org/2011/12/after-union-bails-out-cooper-tire-company-locks-workers-out (1,050 steelworkers locked out of Findlay, Ohio, plant); Susan R. Hobbs, *USW, Cooper Tire Tentative Contract Would Cover Locked Out Findlay Workers*, Daily Lab. Rep. (BNA) No. 37, at A-10 (Feb. 24, 2012) (three-month lockout).

56. Greg Boozell, *"How Can You Do That to a Community?": Locked Out by Celanese in Illinois*, MONTHLY REV. (Feb. 20, 2006), http://mrzine.monthlyreview.org/2006/boozell200206.html (150 chemical workers locked out of plant in Meredosia, Illinois); Bebe Raupe, *IAM Members Ratify Contract with AK Steel, Ending Year-Long Middleton Works Lockout*, Daily Lab. Rep. (BNA) No. 50, at A-9 (Mar. 15, 2007) (1,800 steelworkers locked out of Middleton, Ohio, plant for one year).

57. *Bargaining Outlook and General Plans*, Daily Lab. Rep. (BNA) No. 75, at S-12 (Apr. 20, 2015).

58. *Id.*

59. *Id.*

60. Steven Greenhouse, *More Lockouts as Companies Battle Unions*, N.Y. TIMES (Jan. 22, 2012), http://www.nytimes.com/2012/01/23/business/lockouts-once-rare-put-workers-on-the-defensive.html?_r=1 (noting recent lockout at American Crystal as well as in the ceiling tile, hospital, nursing home, opera, professional sports, and tire manufacturing industries).

61. The U.S. Bureau of Labor Statistics issues an annual report on "major work stoppages" that documents strikes and lockouts involving 1,000 or more workers and lasting at least one work shift. In 2011, a majority of such work stoppages were lockouts, not strikes. *See* Press Release, U.S. Dep't of Lab., Bureau of Lab. Stat., Major Work Stoppages (Annual): Major Work Stoppages in 2011 (Feb. 8, 2012), http://www.bls.gov/news.release/archives/wkstp_02082012.htm. Most lockouts, however, involve smaller employers for which no official statistics are kept.

62. *See infra* Part II.D.

the employer may be forced to pay back wages to all locked-out employees.[63]

Second, it may not be easy for employers to find replacements who can efficiently perform locked-out employees' work. If jobs are complex and the employer hired and trained well, it may be impossible for employers to find qualified replacements. Unqualified or inexperienced replacements can damage productivity and harm the employer's reputation.[64]

Third, many employers use labor contractors to find replacements.[65] The fees charged by such contractors may cause labor and operational costs to escalate, especially if the employer also hires security forces to maintain operations during a lockout.[66]

Fourth, the employer will experience other non-economic costs. A lockout can cause the employer to lose some of its best employees. As the lockout persists, employees may look for employment elsewhere.[67] Other employers will hire the most highly qualified and productive employees first, leaving the post-lockout workforce weaker than the pre-lockout workforce. Further, workplace friction and disruption are likely to continue if the post-lockout workforce includes employees who served as replacements.

Finally, there are immeasurable costs to employee morale post-lockout. For employers that value a team approach and benefit from positive workplace morale, it can be years or decades before positive attitudes can be restored in the workplace. So it is all the more remarkable that, despite the practical realities that would seem to counsel employers against resorting to the offensive lockout, its use continues to expand.

This Article proposes that, in light of the deleterious impact of bargaining lockouts documented in the five decades since *American Ship*, the NLRB should revisit *American Ship*'s underlying principles and redefine the limited circumstances permitting lawful use of this economic weapon. Fifty years of empirical evidence—at American Crystal and scores, if not hundreds, of other companies—shows that the offensive bargaining lockout can be "inherently discriminatory or destructive"[68]

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63. *See infra* Parts II.C.–D.

64. *See, e.g.*, *Refs Due Back Thursday Night*, ESPN.COM (Sept. 27, 2012), http://espn.go.com/nfl/story/_/id/8429885/nfl-reaches-agreement-officials-end-lockout.

65. *See generally* LeRoy, *supra* note 29.

66. *See* Wolski, *supra* note 38 (employer "hired a security force to protect the replacements").

67. *See* Rose French, *On Fifth Vote, Locked-Out American Crystal Sugar Workers Approve New Contract*, STAR TRIB. (Apr. 13, 2013, 8:41 PM), http://www.startribune.com/on-fifth-vote-locked-out-sugar-workers-approve-new-contract/202874801/ (640 workers quit or retired during Crystal Sugar lockout).

68. NLRB v. Erie Resistor Corp., 373 U.S. 221, 228 (1963); *accord* Am. Ship Bldg. Co. v. NLRB, 380 U.S. 300, 311 (1965) ("[T]here are some practices which are inherently so prejudicial to union interests and so devoid of significant economic justification that

of employees' section 7 rights[69] and, therefore, constitute an unfair labor practice under sections 8(a)(1)[70] and 8(a)(3),[71] even if the employer appears to have a legitimate motive for acting. To this end, the Article proposes that the NLRB limit the offensive lockout with the application of these principles:

- The lockout must support a good faith bargaining position—a principle that reaffirms existing Board doctrine, as recently expressed in *Dresser-Rand Co.*[72]
- Before the employer may deploy a lockout, the parties must have bargained to impasse—a principle that would require overruling the Board's 1968 *Darling & Co.* decision.[73]
- During the lockout, the employer may not use temporary replacements or, at the very least, may only use replacements for a reasonable period, such as three months, if business necessity is shown—a principle that would require overruling the Board's 1986 *Harter Equipment Co.*[74] decision.
- Failure to adhere to these principles should result in finding that a bargaining lockout is unlawful and "inherently destructive" of employees' section 7 rights—a principle that would require repudiation of the D.C. Circuit's reasoning in cases such as *International Brotherhood of Boilermakers, Local 88 v. NLRB*[75] that were decided before the bargaining lockout's destructive impact became so clear.

Part I of this Article places the bargaining lockout in historical and doctrinal perspective. Part II addresses current NLRA limits on employers' use of this economic weapon. Part III revisits *American Ship*, reexamines its underlying principles, and proposes principles

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no specific evidence of intent to discourage union membership or other antiunion animus is required.").

69. 29 U.S.C. § 157 (2012) ("Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.").

70. *Id.* § 158(a)(1) (unfair labor practice for employer to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157").

71. *Id.* § 158(a)(3) (unfair labor practice for 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").

72. 362 N.L.R.B. No. 136, slip op. at 1 (June 26, 2015).

73. 171 N.L.R.B. 801, 802–03 (1968), *enforced sub nom.* Lane v. NLRB, 418 F.2d 1208 (D.C. Cir. 1969).

74. 280 N.L.R.B. 597, 597 (1986), *enforced sub nom.* Local 825, Int'l Union of Operating Eng'rs v. NLRB, 829 F.2d 458 (3d Cir. 1987).

75. 858 F.2d 756 (D.C. Cir. 1988).

limiting use of the offensive lockout to restore balance to the collective bargaining process.

I. The Lockout in Perspective

A. Historical Perspective

For many years, the bargaining lockout was rarely used,[76] but in recent years it has become a powerful employer weapon. Some lockouts occur during bargaining and last only a few days before the parties return to the table.[77] In other cases, strikes develop into lockouts after a striking union makes an unconditional offer on behalf of strikers to return to work and, rather than recalling strikers, the employer announces a lockout and advises the union that the formerly striking employees will not be allowed to return until a new contract agreement is reached and ratified by union members.[78] Whether occurring during bargaining or at the end of a strike, many lockouts last for weeks, months, or years and do not end until the union and employees accede to the employer's demands or are able to negotiate a new agreement.[79]

These lengthy lockouts can have a devastating impact on employees, unions, and surrounding communities.[80] A lockout can cause as much if not more harm to employees than a strike. Like strikers,

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76. Greenhouse, *supra* note 60.

77. *See, e.g.*, Kessler, *supra* note 46 (bargaining resumed following lockout).

78. *See, e.g.*, Midwest Generation, 343 N.L.R.B. 69, 70 (2004), *enforcement denied*, Local 15, Int'l Bhd. of Elec. Workers, 429 F.3d 651 (7th Cir. 2005). If the employer exercises this option, it must declare the lockout before, or in immediate response to, strikers' unconditional offer to return to work. *See* Eads Transfer v. NLRB, 989 F.2d 373, 376 (9th Cir. 1993).

79. Hobbs, *supra* note 36 (forty-two fine art, antiques, and collectibles handlers locked out for ten months before agreement reached); Rose, *Century Aluminum*, *supra* note 34 (560 employees locked out for one month before agreement reached); Press Release, Nw. Labor Press, Steelworkers Union Announces End to Kaiser Lockout (Oct. 6, 2000), http://nwlaborpress.org/2000/10-6-00USWA.html (Kaiser Aluminum locked out employees at five plants in Louisiana, Ohio, and Washington for twenty-two months—longest lockout in United Steelworkers history).

80. Micah Landau, *Employer Lockouts Growing as Tactic Against Workers*, UNITED FED'N OF TEACHERS (June 4, 2014), http://www.uft.org/labor-spotlight/employer-lockouts-growing-tactic-against-workers (226 workers at Kellogg plant in Memphis locked out for seven months). According to union president Kevin Bradshaw, locked-out workers at the Memphis Kellogg plant lost their homes and cars and struggled to pay medical bills after losing health insurance:

> It's heartbreaking. . . . It feels like you've been violated, past the point of being able to recover. We have people who have been here 54 years, people who have given their whole lives to the company. They've never had the company do this to them before, not being able to work while we try to sort things out.

Id.; *see also* Boozell, *supra* note 56; Mike Elk, *The Shock and Slow Bleed of Lockouts*, IN THESE TIMES (Mar. 6, 2012, 11:40 AM), http://inthesetimes.com/working/entry/12815/the_shock_awe_and_slow_bleed_of_lockouts; Greenhouse, *supra* note 60; Wolski, *supra* note 38 (after ten-month lockout, employees agreed to substantial concessions; union's president said lockout worked because company "starved out" employees emotionally and financially and operated with temporary replacements).

locked-out employees earn no wages or benefits during the work stoppage. Both will likely face difficulties finding interim work because potential employers may believe strikers or locked-out employees will return to their original employer at the end of the work stoppage. The locked-out employee, however, is in a worse position. Unlike the striker, the locked-out worker cannot return to work unless the union and a majority of bargaining unit employees agree to the employer's terms. In a strike, employees and the union can, as a group, end the work stoppage and limit their economic hardship by offering unconditionally to return to work while bargaining continues. If they have not been permanently replaced, the employer must reinstate them.[81] In a bargaining lockout, by contrast, the employer controls the timing and duration of the work stoppage. In a strike, an individual striker facing personal hardship can offer to cross the picket line and return to work, even while the union remains on strike.[82] A locked-out employee has no such choice and is entirely at the mercy of the employer and the bargaining process. A locked-out employee can return to work only if the union and a majority of bargaining unit employees agree to the employer's contract terms.

The longer the lockout, the more economic pressure bears on employees and the greater the harmful impact on union representation. In lengthy lockouts, many employees must abandon their original employment to pursue other opportunities and may have to move out of their communities to take other permanent employment.[83] Further, many states deny both strikers and locked-out employees unemployment compensation.[84] In these states, locked-out employees are denied protections they would have received if they were laid off, even though, like laid-off employees, they are unemployed through no choice of their own. Even in states that provide locked-out employees unemployment compensation, benefits may cease before the end of a lengthy lockout.[85]

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81. RAY, CORBETT & CAMERON, *supra* note 25, at 529–38.

82. *What if I Want to Work During a Strike?*, NAT'L RIGHT TO WORK LEGAL DEF. FOUND., http://www.nrtw.org/a/a_7_p.htm (last visited Jan. 8, 2016) (worker must resign from union prior to returning to work during strike).

83. Mike Elk, *supra* note 80.

84. Robert Stern, David Lipsky & Robert Hutchens, *Government Transfer Payments and Strike Activity: Reforming Public Policy*, 41 LAB. L.J. 505, 506 (1990). Unemployment compensation for locked-out employees can become a political contest. For example, the North Dakota Supreme Court ruled that locked-out employees could receive unemployment compensation, *see* Olson v. Job Serv., 827 N.W.2d 36, 42 (N.D. 2013), but only after 230 workers appealed their benefits denials. *See* Wetzel, *supra* note 15. In response, North Dakota enacted legislation prohibiting locked-out workers from receiving such benefits. *See* Mark Wolski, *Locked-Out North Dakota Workers Denied Unemployment Benefits Under New Law*, Daily Lab. Rep. (BNA) No. 83, at A-7 (Apr. 30, 2013).

85. Hughlett, *Lockout Ends*, *supra* note 19 (locked-out Minnesota employees had "a financial cushion until their unemployment benefits ran out in the fall," but lockout continued through following spring).

B. Doctrinal Perspective

The issue of whether an employer violates the NLRA by locking out employees can arise in two contexts: defensive lockouts and offensive or bargaining lockouts.

1. Defensive Lockouts

A "defensive" lockout occurs when an employer locks out employees in anticipation of a threatened strike or as part of a multi-employer bargaining unit responding to a strike against one of its members. For many years, the NLRB has permitted employers to lock out employees to prevent losses in the face of a threatened or imminent strike.[86] For example, if an employer operates a seasonal business and the union delays its strike to coincide with the employer's busy season, a lockout before the busy season can be a lawful defensive lockout.[87] The NLRB has also held lawful defensive lockouts designed to prevent sit-down strikes[88] or repeated quickie strikes[89] and lockouts that respond to other union economic weapons. In *Local 702, International Brotherhood of Electrical Workers v. NLRB*,[90] the U.S. Court of Appeals for the District of Columbia affirmed the Board, holding that a lockout in response to a union's disruptive non-strike tactics was a lawful defensive lockout.[91] Although such "inside game" tactics may constitute protected worker activity,[92] they are not insulated from employers' economic weapons such as a defensive lockout.

In 1957, in *NLRB v. Truck Drivers Local Union No. 449 (Buffalo Linen)*,[93] the Supreme Court authorized a defensive lockout motivated by the employer's desire to maintain the effectiveness of a multi-employer bargaining unit.[94] In *Buffalo Linen*, the union struck only one employer member of a multi-employer association of laundry companies.[95] The association and the union were bargaining for a single collective bargaining agreement that would cover all companies in the association.[96] By pressuring just one employer with a "whipsaw" strike, the union sought to place the struck company in a sufficiently unfavorable competitive position compared to the non-struck members

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

87. *See, e.g.*, Inter-Collegiate Press v. NLRB, 486 F.2d 837, 843, 847 (8th Cir. 1973); Betts Cadillac Olds, Inc., 96 N.L.R.B. 268, 293 (1951).

88. *See* Link-Belt Co., 26 N.L.R.B. 227, 264–65 (1940).

89. *See* Int'l Shoe Co., 93 N.L.R.B. 907, 909 (1951).

90. 215 F.3d 11 (D.C. Cir. 2000).

91. *Id.* at 20 (public utility employees concertedly refused voluntary overtime, observed all regulations and safety rules, did no more than they were instructed, and reported to work precisely on time).

92. RAY, CORBETT & CAMERON, *supra* note 25, at 520–21.

93. 353 U.S. 87 (1957).

94. *Id.* at 97.

95. *Id.* at 89–90.

96. *Id.* at 90.

of the association and thereby compel all the members to agree to a union-favorable contract. The union could increase pressure by using this whipsaw tactic against other members in turn. Rather than accede to this pressure, the non-struck companies locked out their employees to maintain the strength of the multi-employer association. The Court held this temporary lockout lawful because it supported the employers' legitimate interest in maintaining multi-employer bargaining.[97]

Eight years later, in *NLRB v. Brown Food Store*,[98] a companion case decided on the same day as *American Ship*, the Court expanded employer rights in defensive lockouts involving multi-employer bargaining by permitting employers to hire temporary replacements. In *Brown Food Store*, the union had begun a whipsaw strike against one member of a multi-employer group of six retail food stores.[99] The other five stores locked out their employees, but, unlike the *Buffalo Linen* employers, they did not shut down but rather continued operations using temporary replacements.[100] The Court upheld the use of temporary replacements, saying it was neither more destructive of employee rights nor more motivated by hostility than the lockout itself and was part of the employers' legitimate defensive effort to preserve the multi-employer group.[101] The Court noted that the struck employer was entitled to stay open for business during the strike by using replacements, and, if the non-struck employers that locked out their employees were forced to remain closed, the disparity could break up the multi-employer association.[102] Thus, in the view of the Court, using temporary replacements during a defensive lockout and during a multi-employer whipsaw strike was consistent with a legitimate business purpose.

Justice White dissented in *Brown Food Store*. He would have found that using temporary replacements while refusing work to union members violated section 8(a)(3) of the Act, which prohibits dis-

97. *Id.* at 97.
98. 380 U.S. 278 (1965).
99. *Id.* at 279–80.
100. *Id.* at 280.
101. *Id.* at 287–89. The Court upheld the Tenth Circuit's reversal of the Board, which had found that the employer's use of replacements illegally interfered with the employees' right to strike. *Id.* at 286.
102. *Id.* at 284–85. The Court noted the competitive nature of the retail food industry and that a store temporarily closed during a lockout could lose long-term customers to a struck store operating with lawful replacements. *Id.* at 284. This could cause one of the non-struck association members to "bolt the group and come to terms with the Local, thus destroying the common front essential to multiemployer bargaining." *Id.*

crimination for the purpose of discouraging union membership.[103] Justice White would have found such strategies "inherently destructive" of employee interests.[104]

2. Offensive or Bargaining Lockouts

"Offensive" or "bargaining" lockouts occur when the lockout design is to put economic pressure on the union to support the employer's bargaining position. In 1965, the Court held in *American Ship Building Co. v. NLRB*[105] that an employer's temporary lockout for the sole purpose of bringing economic pressure to bear in support of its bargaining position did not necessarily violate section 8(a)(1) or section 8(a)(3) of the Act.[106] This landmark decision minimized the relevance of whether a lockout is "defensive" or "offensive."

In *American Ship*, an impasse arose following expiration of the collective bargaining agreement between the employer, which operated four shipyards on the Great Lakes, and eight unions.[107] Fearing that workers would strike during the winter when shipyards would be busiest,[108] the employer laid off most of its employees in the summer and fall, notifying each that the layoff was due to the unresolved labor dispute.[109] The employer did not hire replacement workers during the layoff—it shut down.[110]

Rather than evaluating whether the lockout was a lawful "defensive" lockout, the Court addressed the legality of "the use of a temporary layoff of employees solely as a means to bring economic pressure to bear in support of the employer's bargaining position, after an impasse has been reached."[111] With Justice Stewart writing for the majority, the Court overturned the Board's unfair labor practice finding and held the lockout lawful.[112] The Court concluded that the right to strike did not carry with it the "right exclusively to determine the timing and duration of all work stoppages."[113]

The Court held that the employer did not use the lockout to harm the employees' bargaining representative, to evade the duty to bar-

103. *Id.* at 297 (White, J., dissenting); *see also* 29 U.S.C. § 158(a)(3) (2012).

104. *Brown Food Store*, 380 U.S. at 298 (White, J., dissenting). Justice White's reasoning also applies to a bargaining lockout involving a single employer whose employees are willing to continue working. *See infra* Part I.B.2.

105. 380 U.S. 300 (1965). Before *American Ship*, the NLRB often had found unlawful offensive lockouts designed to pressure unions to accept the employer's bargaining proposals. *See*, *e.g.*, Quaker State Oil Ref. Co., 121 N.L.R.B. 334, 337 (1958).

106. *Am. Ship*, 380 U.S. at 318.

107. *Id.* at 302–03.

108. *Id.* at 303–04.

109. *Id.* at 304.

110. *Id.*

111. *Id.* at 308.

112. *Id.* at 318.

113. *Id.* at 310.

gain, or to discipline employees for supporting the union.[114] Rather, the employer used the lockout solely to exert economic pressure on the union.[115] The Court determined this did not violate section 8(a)(3) because there was no evidence of an employer motive to discourage union membership or discriminate against union members.[116] The Court noted that many employer strategies, including permanent replacement of strikers, unilateral imposition of terms at impasse, and the refusal to make concessions that could end a strike, may all have a negative impact on employees but do not necessarily violate section 8(a)(3).[117]

As a result of *American Ship*, union lockout cases focus less on the labels of offensive or defensive and more on the facts and circumstances of the bargaining before and during the lockout. Post-*American Ship*, decisions of the NLRB and the Courts of Appeals, taken together, substantially enhance the power of the lockout weapon beyond the somewhat narrow factual context of *American Ship*. Justice Stewart stated that "an employer violates neither § 8(a)(1) nor § 8(a)(3) when, *after a bargaining impasse* has been reached, he *temporarily* shuts down his plant and lays off his employees for the sole purpose of bringing economic pressure to bear in support of his legitimate bargaining position."[118] The lockout weapon today is far broader. Lockouts are now authorized before "a bargaining impasse has been reached." In 1968, in *Darling & Co.*,[119] the NLRB held that although the existence of an impasse was a factor for consideration, "the absence of an impasse does not of itself make a lockout unlawful any more than the mere existence of an impasse automatically renders a lockout lawful."[120]

More important, the law has evolved to permit lawful use of temporary replacements during lockouts. As a consequence, few employers shut down their businesses during bargaining lockouts; instead, they usually continue operations with temporary replacements. In 1986, in *Harter Equipment, Inc.*,[121] the Board resolved an issue left open by *American Ship*[122] by holding that employers can legally hire temporary replacements during an offensive lockout.[123] The Board held that

114. *Id.* at 312.

115. *Id.*

116. *Id.* at 312–13; *see* 29 U.S.C. § 158(a)(3) (2012) (prohibiting employer discrimination on basis of union membership).

117. *Am. Ship*, 380 U.S. at 313. Two years later, the NLRB stated that *American Ship* "obliterated, as a matter of law, the line previously drawn by the Board between offensive and defensive lockouts." Evening News Ass'n, 166 N.L.R.B. 219, 221 (1967).

118. *Am. Ship*, 380 U.S. at 318 (emphasis added).

119. 171 N.L.R.B. 801 (1968).

120. *Id.* at 803.

121. 280 N.L.R.B. 597 (1986), *enforced sub nom.* Local 825, Int'l Union of Operating Engr's v. NLRB, 829 F.2d 458 (3d Cir. 1987).

122. *Am. Ship*, 380 U.S. at 308 n.8.

123. *Harter Equip.*, 280 N.L.R.B. at 597.

use of temporary replacements was reasonably adapted to achieving legitimate employer interests and had "only a comparatively slight adverse effect on protected employee rights."[124]

The federal courts further expanded the permissible boundaries of bargaining lockouts. For example, in 1988, in *International Brotherhood of Boilermakers, Local 88 v. NLRB*,[125] the U.S. Court of Appeals for the District of Columbia upheld the NLRB's decision that hiring temporary replacements during a lawful lockout was not "inherently destructive" of employee rights.[126] Distinguishing *NLRB v. Erie Resistor Corp.*,[127] in which the Supreme Court had held the grant of twenty years' super-seniority to replacements and crossovers during a strike "inherently destructive" of employee rights,[128] the D.C. Circuit found that use of temporary replacements during a bargaining lockout did not have the same destructive impact on future bargaining.[129] The D.C. Circuit held that use of temporary replacements during a bargaining lockout was similar to use of temporary replacements during a defensive lockout designed to defend against a whipsaw strike,[130] which the Supreme Court authorized in *NLRB v. Brown Food Store*.[131]

Rather than finding the employer's conduct "inherently destructive" of employee rights,[132] the D.C. Circuit applied the Supreme Court's burden-shifting framework from *NLRB v. Great Dane Trailers, Inc.*[133] *Great Dane* requires an employer to present "legitimate and substantial business justifications" if the employer's conduct "could have adversely affected employee rights to *some* extent."[134] Under this framework, the D.C. Circuit found that the employer did not violate the NLRA by hiring temporary replacements during the bargaining lockout because it found that putting economic pressure on the union to support the employer's legitimate bargaining demands was a sufficient business justification.[135]

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124. *Id.* at 600. The issue had been a controversial one. *Compare, e.g.*, Inland Trucking Co. v. NLRB, 440 F.2d 562, 565 (7th Cir. 1971) (use of replacements in bargaining lockout "per se" unfair labor practice), *with* Inter-Collegiate Press v. NLRB, 486 F.2d 837, 840–42 (8th Cir. 1973) (hiring temporary replacements not unfair labor practice as used by employer in highly seasonal business threatened with peak-season strike).

125. 858 F.2d 756 (D.C. Cir. 1988), *enforcing sub nom.* Nat'l Gypsum Co., 281 N.L.R.B. 593 (1986).

126. *Id.* at 762.

127. 373 U.S. 221 (1963).

128. *Id.* at 231.

129. *Int'l Bhd. of Boilermakers*, 858 F.2d at 763–64.

130. *Id.* at 764–65.

131. 380 U.S. 278, 283 (1965); *see also supra* notes 98–102 and accompanying text.

132. *Int'l Bhd. of Boilermakers*, 858 F.2d at 767.

133. 388 U.S. 26 (1967).

134. *Id.* at 34.

135. *Int'l Bhd. of Boilermakers*, 858 F.2d at 767–69. The court expressed no opinion whether there was a legitimate business reason to hire *permanent* replacement. *Id.* at 769.

These rulings had dramatic consequences. One empirical analysis of bargaining lockouts involving use of replacements concluded[136] that the Board's liberalization of replacement rules tilted the balance of economic weapons "substantially toward employers,"[137] allowed employers to use lockouts more aggressively, increased the number and length of lockouts,[138] and seriously undermined union representation.[139] Within this legal framework, employers can maintain profitability during lockouts with replacement workers while employees lose pay and benefits.[140] This imbalance is further magnified by employers' use of national labor contractors that specialize in providing replacements who are recruited throughout the country for lockouts.[141] No longer is the employer limited by local workforce availability. This is important, because local strike replacements may be discouraged by the perception that they are taking away jobs from their friends and neighbors. Labor contractors that operate across the country have played a prominent role in several of the lengthiest lockouts.[142]

Some limits on using replacements during a bargaining lockout do remain. An employer may hire temporary replacements for locked-out employees only if the lockout is lawful.[143] In hiring replacements, the employer may not discriminate against applicants because of union membership or sympathies.[144] At the conclusion of the lockout, the employer must reinstate bargaining unit employees with their senior-

136. LeRoy, *supra* note 29.

137. *Id*. at 990.

138. *Id.* at 1023, 1027.

139. *Id.* at 1038.

140. Only twenty-one states permit locked-out employees to receive unemployment compensation benefits. *See* Stern, Lipsky & Hutchens, *supra* note 84. Some state courts in states providing unemployment benefits to locked-out workers adopt broader definitions of "lockout" than federal courts do, which can have the effect of widening unemployment compensation coverage. *See* Sunstar Foods, Inc. v. Uhlendorf, 310 N.W.2d 80, 85 (Minn. 1981) (workers qualified for unemployment compensation benefits because apparent strike was actually a "lockout" precipitated by employer bargaining behavior that left union with no choice but to strike). The absence of this critical part of the social safety net in most states produces an immediate and potentially devastating effect on locked-out workers.

141. LeRoy, *supra* note 29, at 1033.

142. *Id.* (BE&K Construction Company had over $1 billion in earnings in 1988 through its contracting services); *see* Int'l Paper Co., 319 N.L.R.B. 1253, 1255 (1995) (BE&K provided workers to replace 1,200 employees locked out by International Paper); *see also, e.g.*, Hughlett, *Lockout Ends*, *supra* note 19 (replacements provided by Strom Engineering, Inc. of Minnetonka, Minnesota); Shukovsky, *Columbia Grain*, *supra* note 44 (J.R. Gettier & Associates, Inc., a Wilmington, Delaware, replacement contracting company, states on its website that it can "provide as many skilled replacement workers as you need within 96 hours of notification.").

143. *See* Clemson Bros. Inc., 290 N.L.R.B. 944, 951 (1988) (employer could not hire replacements because lockout unlawful); *see also* discussion *infra* Part II.

144. *See* Int'l Union of Operating Eng'rs, Local 147 v. NLRB, 294 F.3d 186, 189–91 (D.C. Cir. 2002).

ity intact, and, upon their return, the employer cannot treat them as temporary or probationary new hires.[145]

In theory, but not in reality, hiring temporary replacements during a lockout should not affect the union's continuing majority status, regardless of how long the lockout continues. In *Harter Equipment, Inc.*,[146] a replacement worker who became a supervisor during a lengthy lockout filed a decertification petition.[147] At the decertification hearing, the employer argued that locked-out employees should not be allowed to vote because they had not worked for the employer for five years.[148] Finding that the locked-out employees had not abandoned their jobs, the Board held that they were entitled to vote and that they were the *only* persons eligible to vote.[149] The Board reasoned:

> [I]t would be inconsistent with the Act and the decision in *Harter* to disenfranchise these employees. Had they been permanently replaced after they called an economic strike, their right to vote would have ended 1 year later or upon an affirmative act by them to end their employment. However, these employees are not strikers. Rather, the Employer locked out the bargaining unit in support of its bargaining demands and they were not, and could not lawfully be, permanently replaced.[150]

The Board held that all replacement workers were necessarily temporary workers and ineligible to vote regardless of how long the lockout continued.[151]

Despite the legal protection of locked-out employees' right to vote in union elections, the practical effects of a lockout do threaten union stability. During a long lockout, locked-out employees often must move on and find other jobs.[152] Replacement workers will not necessarily

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145. *See* United Chrome Prods., Inc., 288 N.L.R.B. 1176, 1177 (1988) (employer may not use lockout to deprive employees of seniority rights); *see also, e.g.*, Hercules Drawn Steel Corp., 352 N.L.R.B. 53, 54 (2008) (selective recall of skilled employees justified by business reasons absent discrimination against union activists); Fresh Fruit & Vegetable Workers Local 1096 v. NLRB, 539 F.3d 1089, 1097–98 (9th Cir. 2008) (one-month delay in reinstating employees after fourteen-year lockout lawful because of need to determine who would return and how long it would take to train them in new packaging procedures).

146. 293 N.L.R.B. 647 (1989). This decision came three years after the Board's 1986 *Harter* decision, which held the employer did not violate the NLRA by hiring replacement workers during a bargaining lockout. *Id.* at 647; *see also supra* notes 121–24.

147. *Harter Equip.*, 293 N.L.R.B at 647.

148. *Id.*

149. *Id.* at 647–48.

150. *Id.*

151. *Id.* at 648. By extension, an employer may not withdraw union recognition based on the union sentiments of replacements.

152. For example, the American Crystal lockout began with 1,300 locked-out employees, but only 400 employees returned to work when the lockout ended. *See supra* text accompanying note 21.

have the same loyalty to the union as locked-out employees, and a post-lockout workforce is more likely to support decertification.[153]

II. NLRA Limits on Employer Lockouts

Although the use of the bargaining lockout has been given a much wider legal berth in the years since *American Ship*, it remains subject to some limits. Employers may incur liability for substantial back pay.[154] Lockouts can cause serious harm to employees and their communities[155] and wreak havoc on the collective bargaining process and the union's representative status.[156] For these reasons, it is important that existing limits be preserved and enforced.

A. Statutory Notice Requirements

Employers that fail to follow statutory notice provisions before commencing a lockout face significant financial costs. Section 8(d) of the NLRA[157] provides:

> [W]here there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—
>
> (1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;
>
> (2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;
>
> (3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within

153. *See, e.g.*, *Harter*, 293 N.L.R.B. at 648 (1989).

154. *See*, *e.g.*, Susan J. McGolrick, *NLRB ALJ Approves $16.2 Million Settlement with Midwest Generation Regarding Lockout*, Daily Lab. Rep. (BNA) No. 228, at A-1 (Nov. 26, 2008).

155. Wolski, *supra* note 38; *see also* THE BAKERY, CONFECTIONARY, TOBACCO WORKERS, AND GRAIN MILLS INT'L UNION LOCAL 167G, A REGION ON THE ROPES: THE ECONOMIC IMPACT OF THE AMERICAN CRYSTAL SUGAR COMPANY LOCKOUT ON THE RED RIVER VALLEY 1 (Nov. 2011), http://www.mnaflcio.org/sites/mnaflcio.advantagelabs.com/files/Economic%20Impact%20ReportFINAL.pdf (in first four months of lockout, region suffered total economic losses of over $30 million, including $12 million in lost wages, benefits, and other direct payments).

156. LeRoy, *supra* note 29, at 1041–42 (listing NLRB cases in which hiring permanent replacement workers implied "an employer's intention to sever or seriously disrupt a bargaining relationship").

157. 29 U.S.C. § 158(d) (2012).

> the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and
>
> (4) continues in full force and effect, without resorting to strike or lockout, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later.[158]

The duty to notify mediation services of a dispute under sections 8(d)(3) and (4) rests on the employer when it is the initiating party—that is, when the employer seeks to reopen the contract or begin negotiations. An employer's failure to provide such notices can invalidate a lockout and result in back-pay damages, even if the union filed the required notices.

In *Bi-County Beverage Distributors*,[159] the employer did not notify state and federal mediation agencies of the dispute until two days after the lockout commenced.[160] The Board held the employer's lockout was unlawful because its notice was untimely, and, because it was the initiating party, its obligation to provide pre-lockout notices was not satisfied by the union's notification letters to state and federal mediation agencies.[161]

B. Contractual Limits

A lockout occurring during the term of a collective bargaining agreement will often violate a no-strike/no-lockout clause. Such clauses exist in most private sector labor contracts.[162] Unions may be able to grieve and arbitrate no-lockout violations to compel employers to provide substantial back pay to locked-out employees.[163]

C. Employer's Improper Motive

Only lockouts in support of legitimate bargaining positions are lawful. The Board and courts will carefully scrutinize how the employer implements the lockout, the employer's communications with employees during the lockout,[164] and the employer's motive. The em-

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158. *Id.*

159. 291 N.L.R.B. 466 (1988).

160. *Id.* at 467.

161. *Id.* at 469–70. Although the employer argued that the shutdown was caused by a lack of work, the Board found the employer acted to pressure the union—and thus the work stoppage was a lockout governed by the notice requirements of section 8(d). *Id.* at 467–68.

162. *See* Richard D. O'Connor & Frederick L. Dorsey, *An Analysis of the "No-Strike Clause" in Contemporary Collective Bargaining Agreements*, 7 WESTERN NEW ENG. L. REV. 147, 147 & n.2 (1984) (no-strike/no-lockout clauses "typical" in contemporary collective bargaining agreements).

163. *See* RAY, CORBETT & CAMERON, *supra* note 25, at 510.

164. *See* Ancor Concepts, Inc., 323 N.L.R.B. 742, 745 (1997) (lockout unlawful because employer told locked-out employees they had been permanently replaced), *enforcement denied on other grounds*, 166 F.3d 55 (2d Cir. 1999); *cf.* Harborlite Corp., 357 N.L.R.B. No. 151, slip op. at 2 (Dec. 22, 2011) (unlawful threat to permanently replace locked-out employees did not affect legality of lockout because threat was quickly withdrawn), *aff'd sub nom.* Teamsters Local Union No. 455 v. NLRB, 765 F.3d 1198 (10th Cir. 2014).

ployer may not discriminate against union members in its lockout or reinstatement procedures.[165] Similarly, the employer may not lock out employees to discourage union activity or to discriminate against those who engage in protected activity.[166] A lockout for the purpose of undermining the union's representative status is also unlawful.[167]

Discriminatory treatment can render an entire lockout unlawful, exposing the employer to substantial back-pay liability. An employer is not permitted to lock out some, but not all, of the employees in the bargaining unit. Such a "partial lockout" can violate sections 8(a)(1)[168] and 8(a)(3)[169] of the Act if protected rights are at issue and the employer cannot show a strong business justification for its conduct. In *Allen Storage & Moving Co.*, the Board held that an employer that permitted only non-strikers to continue working during a subsequent lockout committed unlawful discriminatory treatment based on protected activity.[170] In *Local 15, International Brotherhood of Electrical Workers v. NLRB*,[171] the Seventh Circuit found it unlawful for the employer to lock out union members at the end of a strike while retaining the sixty-one bargaining unit employees who had either returned to work during the strike or offered to return before the union made its unconditional offer to end the strike.[172] The court held that the employer had not established a sufficient business justification for locking out strikers but not crossovers.[173] On remand, the Board accepted this as the law of the case[174] and remanded to an administrative law judge to determine the back pay remedy.[175] The parties ultimately reached a settlement requiring the employer to pay over $16 million in back pay to nearly 1,200 workers.[176]

Post-lockout discriminatory conduct can relate back and invalidate the lockout. In *Dresser-Rand Co.*,[177] the Board ruled that an employer's discriminatory treatment in recalling locked-out employees could be evidence of a bad faith motive rendering the initial lockout unlawful.[178] In *Dresser-Rand Co.*, the union had ended a fourteen-week strike and

165. 29 U.S.C. § 158(a)(3) (2012) ("It shall be 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. . . .").
166. *See id.*
167. *See, e.g.*, RAY, CORBETT & CAMERON, *supra* note 25, at 519.
168. 29 U.S.C. § 158(a)(1).
169. *Id.* § 158(a)(3).
170. *See* Allen Storage & Moving Co., Inc., 342 N.L.R.B. 501, 501 (2004).
171. 429 F.3d 651 (7th Cir. 2005).
172. *Id.* at 655–62.
173. *Id.* at 657–62.
174. Midwest Generation, EME, LLC, 352 N.L.R.B. 243, 243 (2008).
175. *Id.* at 244.
176. McGolrick, *supra* note 154.
177. 362 N.L.R.B. No. 136, slip op. (June 26, 2015).
178. *Id.* at 1.

made an unconditional offer to return to work.[179] In response, the employer locked out strikers and crossovers—employees who had previously crossed the picket line to return to work.[180] Six days later, the employer ended the lockout, declared impasse, and implemented the terms and conditions of its last proposal.[181] The employer then recalled the crossovers but not the former strikers[182] and, a few days later, began to recall strikers based on its own unilaterally created formula.[183] In a two-to-one decision, the Board ruled that, although there was no evidence of pre-lockout bad motive, the employer's subsequent unlawful and discriminatory recall conduct, as well as its post-lockout failure to bargain regarding recall procedures, "shed light" on the employer's anti-union motive for initiating the lockout.[184]

D. Good Faith Bargaining

The employer's obligation to bargain in good faith substantially limits its ability to lock out employees.[185] Just as an employer's unlawful behavior after a strike begins can turn an economic strike into an unfair labor practice strike,[186] employer bad faith bargaining or other illegal activity after a lockout begins can convert a lawful lockout into an unlawful one.[187] Even if an employer does not plan to use a lockout, questionable bargaining behavior can devalue the threat of lockout as an employer bargaining tool.

Because an employer's obligation to bargain in good faith affects the legality of a lockout, the employer has a compelling reason to ensure that its bargaining behavior is within statutory limits. Section 8(a)(5) of the Act makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section [9(a)]."[188] Section 9(a) grants exclusive representation status to a union supported by a majority of employees with "respect to rates of pay, wages, hours of employment, and other conditions of employment."[189] Section 8(d)[190] provides that the employer's

179. *Id.*
180. *Id.*
181. *Id.*
182. *Id.*
183. *Id.* at 2.
184. *Id.* at 2 & n.4. The Board found that the lockout and the employer's unlawful conduct were "all of a piece." *Id.* In dissent, Member Johnson would have held that the employer's subsequent acts were irrelevant to its initial lock-out decision because they were not "intent-based." *Id.* at 4 (Johnson, Member, dissenting).
185. RAY, CORBETT & CAMERON, *supra* note 25, at 522–26.
186. *Id.* at 290–310.
187. *Cf.* Boehringer Ingelheim Vetmedica, Inc., 350 N.L.R.B. 678, 680 (2007) (employer avoided NLRA lockout violation by dealing directly with, instead of bypassing, union).
188. 29 U.S.C. § 158(a)(5) (2012).
189. *Id.* § 159(a).
190. *Id.* § 158(d).

duty to bargain includes the duty "to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached."[191] If the employer's bargaining behavior does not evidence a sincere desire to reach agreement, it risks a finding of bad faith bargaining.[192] There are few bright lines for assessing the legality of bargaining. The Board considers the totality of the employer's conduct, both at and away from the bargaining table, in determining whether the employer has met its statutory duty to bargain in good faith.[193]

Remedies for employer bad faith bargaining, however, are limited. Because section 8(d)[194] provides that the duty to bargain in good faith "does not compel either party to agree to a proposal or require the making of a concession,"[195] the Supreme Court has held that "the Board may not, either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements."[196] Even if the employer unlawfully refuses to bargain, the Board can only prospectively order the employer to bargain. The Board will not attempt to make employees whole by predicting what gains they lost due to the bargaining violation. In *Ex-Cell-O Corp.*,[197] the Board explicitly recognized that "current remedies of the Board designed to cure violations are inadequate" and that a mere bargaining order neither restores employees to the bargaining strength they would have had absent the violation nor protects the union from a loss of majority support that can occur as a consequence of delay.[198] The Board, however, found that section 8(d)'s admonition precluded it from speculatively creating a compensatory remedy based on hypothetical contract provisions on which the parties never agreed.[199] Meaningful consequences for unlawful employer bargaining behavior

191. *Id.*

192. *See, e.g.*, United Bhd. of Carpenters & Joiners, Local 1780, 244 N.L.R.B. 277, 281 (1979); *see also* D.C. Liquor Wholesalers, 292 N.L.R.B. 1234, 1255–57 (1989) (lockout unlawful due to employer's bad faith proposal during twelfth bargaining session to cut wages substantially after eleven bargaining sessions devoted to non-economic issues), *enforced sub nom.* Teamsters Union Local No. 639 v. NLRB, 924 F.3d 1078 (D.C. Cir. 1991).

193. *See, e.g.*, Overnite Transp. Co., 296 N.L.R.B. 669, 671 (1989), *enforced*, 938 F.2d 815 (7th Cir. 1991).

194. 29 U.S.C. § 158(d).

195. *Id.*

196. NLRB v. Am. Nat'l Ins. Co., 343 U.S. 395, 404 (1952); *see also* NLRB v. Ins. Agents' Int'l Union, 361 U.S. 477, 487 (1960) (section 8(d) was "an attempt by Congress to prevent the Board from controlling the settling of the terms of collective bargaining agreements.").

197. 185 N.L.R.B. 107 (1970), *enforced*, 449 F.2d 1058 (D.C. Cir. 1971).

198. *Id.* at 108.

199. *Id.* at 110.

are imposed only in cases of unilateral changes in terms of employment,[200] permanent replacement of strikers,[201] and lockouts.[202]

1. Employer Unilateral Changes

It is a per se violation of the section 8(a)(5) duty to bargain in good faith for an employer unilaterally to change existing wages, hours, or other terms or conditions of employment without first reaching a bargaining impasse.[203] For example, in *NLRB v. Katz*,[204] during collective bargaining negotiations, the employer changed its sick leave policy, implemented an automatic wage increase policy, and awarded merit increases without notice to or consultation with the union.[205] The Supreme Court held that such a unilateral change in conditions of employment was "a circumvention of the duty to negotiate which frustrates the objectives of § 8(a)(5) much as does a flat refusal."[206] Thus, a unilateral change in terms and conditions of employment before impasse has been reached can render a subsequent lockout unlawful.[207]

Another example is *Ass'n of D.C. Liquor Wholesalers*.[208] During the twelfth negotiating session, the employer made a final offer, which included a substantial wage cut and, after the union rejected that offer, declared impasse.[209] The employer locked out bargaining-unit employees

200. *See infra* Part II.D.1.

201. An employer may hire permanent replacements for strikers only if it has bargained in good faith and, if it has not, a refusal to reinstate strikers can lead to court-ordered reinstatement and back pay damages. *See, e.g.*, Dresser-Rand Co., 362 N.L.R.B. No. 136, slip op. at 3 (June 26, 2015) (ordering make-whole remedy, presumably including back pay). Permanent replacement of strikers is beyond the scope of this Article.

202. *See generally infra* Parts II.D.2–4. The employer can face back-pay liability for all employees locked out in support of the employer's bad faith bargaining. This does not mean, however, that affected employees necessarily collect or even seek back pay. *See, e.g.*, Michelle Amber, *UNITE HERE Members Ratify Contract with California Country Club After Lockout*, Daily Lab. Rep. (BNA) No. 35, at A-12 (Feb. 21, 2013) (workers declined two-year back pay award because they "wouldn't have gotten what they lost" and would have been hassled by interviews, earnings would be deducted from award, and they would have to pay back unemployment compensation).

203. RAY, SHARPE & STRASSFELD, *supra* note 25, at 254–55. Impasse exists only if the parties have "exhausted the prospects of concluding an agreement." Taft Broad. Co., 163 N.L.R.B. 475, 478 (1967).

204. 369 U.S. 736 (1962).

205. *Id.* at 741–42.

206. *Id.* at 743.

207. *See, e.g.*, Union Terminal Warehouse, Inc., 286 N.L.R.B. 851, 861 (1987) (lockout violated Act because employer locked out employees after implementing its contract proposal before impasse). However, after reaching a "genuine impasse," an employer's unilateral change implementing proposals consistent with offers the union has rejected do not violate the Act. *See, e.g.*, Hi-Way Billboards, Inc., 206 N.L.R.B. 22, 23 (1973). In these situations, bargaining has had a chance to work and the employer's changes are a form of "economic persuasion." *Id.*; *see also* Chi. Local 458–3M v. NLRB, 206 F.3d 22, 34–35 (D.C. Cir. 2000) (employer used regressive bargaining tactics in good faith, and employer's post-impasse unilateral implementation of its final offer was legitimate).

208. 292 N.L.R.B. 1234 (1989), *enforced sub nom.* Teamsters Local Union No. 639 v. NLRB, 924 F.2d 1078 (D.C. Cir. 1991).

209. *Id.* at 1234–35.

the next day.[210] The Board found the lockout illegal as part of an overall bad faith bargaining attempt "to abort the bargaining process through the false claim of impasse."[211] The employer's failure to give the union notice of the wage cut proposal together with its failure to provide the union time to consider and respond to the proposal were important to the Board's decision.[212]

2. Employer Failure to Provide Relevant Information

Under *NLRB v. Truitt Manufacturing Co.*,[213] the employer must provide the union with information relevant to negotiations.[214] In *Truitt*, the employer claimed that a wage increase "of more than 2½ cents per hour would put it out of business."[215] To assess this claim and fulfill its bargaining duty, the union needed access to the employer's financial records.[216] The Supreme Court held the employer's refusal to provide the information was a per se violation of the duty to bargain.[217] Although the relevance of requested information is generally determined on a case-by-case basis,[218] some requests, such as requests for wage and benefit information, are almost always relevant.[219]

An employer's failure to provide relevant information requested by the union can sabotage bargaining and render a lockout unlawful. In *KLB Industries, Inc. v. NLRB*,[220] the D.C. Circuit upheld the Board's determination that the lockout was unlawful because the employer failed to provide information necessary to enable the union to assess the employer's claim of a competitive disadvantage with Asian manufacturers.[221] In *Clemson Bros. Inc.*,[222] the Board held the employer's lockout illegal because the employer violated its *Truitt* obligation to provide requested information to verify its claims that the business was losing money and unable to pay greater wages.[223] Simi-

210. *Id.* at 1235.

211. *Id.* at 1236.

212. *Id.* at 1236–37; *see also* Dietrich Indus., Inc., 353 N.L.R.B. 57, 60 (2008) (employer must notify union of its bargaining position because union and strikers are entitled to "knowingly reevaluate their position and decide whether to accept the employer's terms"); Union Terminal Warehouse, Inc., 286 N.L.R.B. 851, 860–61 (1987) (pre-impasse unilateral implementation of wage proposal renders subsequent lockout unlawful).

213. 351 U.S. 149 (1956).

214. *Id.* at 152–53.

215. *Id.* at 150.

216. *Id.* at 153.

217. *Id. But see id.* at 154–58 (Frankfurter, J., concurring in part, dissenting in part) (critiquing Court's "per se" ruling and finding that Court should have remanded to Board to determine whether employer bargained in good faith).

218. *See id.* at 153–54.

219. *See*, *e.g.*, Gen. Motors Corp. v. NLRB, 700 F.2d 1083, 1088 (6th Cir. 1983).

220. 700 F.3d 551 (D.C. Cir. 2012), *enforcing* 357 N.L.R.B. No. 8 (July 26, 2011).

221. *Id.* at 558–60. The requested information included customer and former customer lists, price quotes, and outsourced project lists.

222. 290 N.L.R.B. 944 (1988).

223. *Id.* at 950–52.

larly, in *Globe Business Furniture, Inc.*,[224] the Board found that the employer illegally locked out employees because it had refused to provide information on insurance costs and experience data that the union needed to evaluate the employer's insurance proposals.[225]

3. Employer Insistence on Non-Mandatory Bargaining Subjects

In *NLRB v. Wooster Division of Borg-Warner Corp.*,[226] the Supreme Court held that an employer's insistence to the point of impasse that the union agree to a permissive subject of bargaining is a per se violation of the employer's duty to bargain.[227] Such a violation can render a subsequent lockout unlawful. Under this rationale, the Board has held lockouts unlawful when they follow an employer's insistence on a change in the scope of the bargaining unit[228] and on mail ratification of the employer's contract offer.[229]

In a 2015 case, *Kellogg Co.*,[230] the employer locked out more than two hundred employees when negotiations for a new contract stalled over company proposals to increase its use of low-wage "casual" workers.[231] The Board found the nine-month lockout unlawful because the employer's insistence on its casual worker proposal would have forced mid-term changes in employee wages and benefits governed by a master contract already in force.[232] Thus, the employer's bargaining position, seeking bargaining on a non-mandatory subject, was not legitimate—and therefore, not something it "could lawfully pursue through the use of a lockout."[233] Consequently, the Board ordered the employer to bargain, to reinstate locked-out workers, and to make them whole for any lost pay or benefits.[234]

4. Other Bad Faith Bargaining Behavior

Finally, the Board and courts may find an employer has failed to bargain in good faith if it attempts to bypass the union and deal directly with employees,[235] refuses to execute a written contract after agree-

224. 290 N.L.R.B. 841 (1988).
225. *Id.* at 855.
226. 356 U.S. 342 (1958).
227. *Id.* at 349–50.
228. *See* Greensburg Coca-Cola Bottling Co., 311 N.L.R.B. 1022, 1024 (1993), *enforcement denied*, 40 F.3d 669, 675 (3d Cir. 1994) (denying enforcement because employer withdrew its improper demand early in negotiations).
229. *See* Movers & Warehousemen's Ass'n of Metro. Wash., D.C., Inc., 224 N.L.R.B. 356, 357–58 (1976), *enforced*, 550 F.2d 962 (4th Cir. 1977).
230. 362 N.L.R.B. No. 86, slip op. (May 7, 2015); *see also* Dubé, *supra* note 37.
231. *Kellogg*, 362 N.L.R.B., slip op. at 3.
232. *Id.* at 6–7.
233. *Id.*
234. *Id.* at 7.
235. NLRB v. Ins. Agents' Int'l Union, 361 U.S. 477, 484 (1960).

ment has been reached,[236] refuses to meet at reasonable times,[237] or engages in surface or regressive bargaining tactics that suggest no sincere desire to reach an agreement.[238]

III. Revisiting, Reexamining, and Restating the Limits of Offensive Bargaining Lockouts Under *American Ship*

Through the NLRA, Congress sought to protect employees' right to "form, join, or assist labor organizations" and to "engage in . . . concerted activities," such as striking, "for the purpose of collective bargaining or other mutual aid or protection."[239] Congress also aimed to "encourage[] the practice and procedure of collective bargaining."[240] To these ends, Congress requires parties to labor disputes to "exert every reasonable effort to make and maintain agreements concerning rates of pay, hours and working conditions."[241] As this Article demonstrates,[242] bargaining lockouts with replacement workers disrupt employees' job security and compromise their right to engage in collective bargaining through their elected representatives—all at the employer's unilateral discretion.

Unlike a lockout with replacements, a lockout in which the employer ceases operations is self-limiting. Eventually, the employer will need to resume operations to stay in business. A strike is also self-limiting. Eventually, employees need to return to gainful employment and end the strike to pay basic living expenses and support their families. As illustrated by the twenty-two-month labor dispute at American Crystal, however, a bargaining lockout supported by replacement workers has no such limits and can continue for months or years until sufficient numbers of union-represented employees retire, quit, find other employment, move away to pursue other employment, or simply become disillusioned. The NLRB and courts should tolerate neither such wars of attrition nor their devastating consequences for workers.[243]

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236. H. J. Heinz Co. v. NLRB, 311 U.S. 514, 526 (1941).

237. *See* Carbonex Coal Co., 248 N.L.R.B. 779, 799 (1980), *enforced*, 679 F.2d 200 (10th Cir. 1982).

238. *See id.*

239. *Id.* § 157.

240. *See* sources cited *supra* note 32 (similar congressional goal under the Labor Management Relations (Taft-Hartley) Act).

241. Labor Management Relations (Taft-Hartley) Act, 29 U.S.C. § 174(a)(1) (2012).

242. *See supra* text accompanying notes 34–56; *see also, e.g.*, Greenhouse, *supra* note 60 (recent lockouts at American Crystal, as well as in the ceiling tile, hospital, nursing home, opera, professional sports, and tire manufacturing industries).

243. It is beyond the scope of this Article to argue, as some commentators have, that Congress should reform the economic "warfare" model upon which the NLRA is built to ensure more peaceful industrial relations. *See, e.g.*, Ken Matheny & Marion Crain, *Making Labor's Rhetoric Reality*, 5 GREEN BAG 2D, Autumn 2001, at 17, 25 (advocating interest arbitration rather than economic weapons to settle labor disputes). Eco-

The NLRB should revisit the principles of *American Ship*, reexamine the consequences of its misinterpretation of that case, and redefine the limited circumstances under which the Act authorizes this economic weapon. Fifty years of empirical evidence—at American Crystal and scores, if not hundreds, of other companies—shows that the offensive bargaining lockout is "inherently discriminatory or destructive"[244] of employees' section 7 rights, constituting an unfair labor practice under sections 8(a)(1) and 8(a)(3).

A. *Revisiting the Principles of* American Ship

American Ship was neither inevitable nor necessary.[245] Even so, it firmly established in U.S. labor law that an employer may use "a temporary layoff of employees solely as a means to bring economic pressure to bear in support of the employer's bargaining position, after an impasse has been reached."[246] It may be too late in the day to reverse this basic premise, and this Article makes no such proposal. But it is not too late to embrace the limits of *American Ship.* It is largely forgotten that *American Ship* hedged its bet on the offensive lockout. In a footnote, the majority stated "we intimate no view whatever as to the consequences which would follow had the employer replaced its employees with permanent replacements or even temporary

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nomic weapons are here to stay because Congress is unlikely to regulate these weapons in the foreseeable future.

244. NLRB v. Erie Resistor Corp., 373 U.S. 221, 228 (1963); *accord* Am. Ship Bldg. Co. v. NLRB, 380 U.S. 300, 311 (1965) ("[T]here are some practices which 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 antiunion animus is required.").

245. As Justice Goldberg explained in his *American Ship* concurrence:

> My view of this case would make it unnecessary to deal with the broad question of whether an employer may lock out his employees solely to bring economic pressure to bear in support of his bargaining position. The question of which types of lockout are compatible with the labor statute is a complex one . . . .
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> . . . .
>
> In view of the necessity for, and the desirability of, weighing the legitimate conflicting interests in variant lockout situations, there is not and cannot be any simple formula which readily demarks the permissible from the impermissible lockout. This being so, I would not reach out in this case to announce principles which are determinative of the legality of all economically motivated lockouts whether before or after a bargaining impasse has been reached.

Am. Ship, 380 U.S. at 336, 341–42 (Goldberg, J., concurring in the result); *see also* Dell Bush Johannesen, *Lockouts: Past, Present, and Future*, 1964 DUKE L.J. 257, 281 (1964) (bargaining lockouts are inimical to NLRA principles: "There is the distinct possibility that employers in areas traditionally hostile to unions would use the collective bargaining lockout to destroy the union.").

246. *Am. Ship*, 380 U.S. at 308.

help."[247] These carefully chosen words open the door to reexamining the current state of the law with regard to bargaining lockouts and the use of replacements. At least three principles emerge from reexamining *American Ship*.

1. Impasse

Impasse was a critical component of the *American Ship* decision. *American Ship* authorized a bargaining lockout "after an impasse has been reached."[248] This is a sensible limitation. Requiring impasse gives bargaining a chance to work. Allowing the employer to utilize such a devastating weapon before it has even attempted to exhaust every good faith avenue to settlement is inconsistent with the overall purpose and policy of the NLRA, which is to protect "the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment."[249] Consequently, the Board's 1968 *Darling & Co.* decision, which held that impasse is not a prerequisite to a bargaining lockout,[250] should be overruled.

2. Temporary Lockouts

Second, lockouts must be temporary. *American Ship* addressed "a temporary layoff."[251] But due to the Board's 1986 *Harter Equipment* decision authorizing the hiring of temporary replacements during a lockout, employers now can extend lockouts for months or years. The average length of bargaining lockouts has increased substantially since *Harter Equipment*.[252]

The Board and courts can rely on *American Ship*'s reference to "temporary" layoffs to address this development and limit *Harter Equipment*. The Board and courts should prohibit the use of temporary replacements and limit bargaining lockouts to a reasonable period—three to six months. At the very least, the Board and courts should require more searching scrutiny of an employer's business reasons for continuing a bargaining lockout beyond a reasonable period. If an employer has valid concerns about threatened strikes or a union's disruptive tactics during bargaining, it should be free to implement a defensive lockout and, under *Brown Food Store*,[253] hire temporary replacements. When a lockout with replacements is not so obviously

247. *Id.* at 308 n.8.

248. *Id.* at 308.

249. 29 U.S.C. § 151 (2012); *see also supra* text accompanying notes 239–41.

250. Darling & Co., 171 N.L.R.B. 801, 803 (1968).

251. *Am. Ship*, 380 U.S. at 308.

252. LeRoy, *supra* note 29, at 1023 (percentage of lockouts involving replacements and lasting over one year jumped from 31% before to 75% after the 1986 *Harter Equipment* decision).

253. See *supra* text accompanying notes 98–102 for a discussion of *Brown Food Store*.

necessary to protect employer interests, however, the Board should be reluctant to hold lawful the use of replacements.[254] The employer should have to demonstrate why it cannot meet its business needs by permitting employees to continue working without a contract, or, if it seeks concessions, by lawfully implementing its final offer after reaching impasse and permitting employees to work under the new terms while bargaining continues. This burden-shifting scheme is fair. An employer seeking to maintain a lockout while using replacements—a weapon so disruptive of the rights and lives of employees—should have to demonstrate that it has explored every good faith avenue to settlement short of a lockout. The longer the lockout with replacements continues, and the more deleterious the impact on employees' lives, the heavier the employer's burden should be. Because *Harter Equipment* is inconsistent with this approach, it needs to be overruled in whole or in substantial part.

3. Lockouts' Deleterious Effects

Third, the law should be reframed in recognition of the empirical evidence showing the inherently destructive effects of lockouts. *American Ship* explained:

> It is important to note that there is here no allegation that the employer used the lockout in the service of designs *inimical to the process of collective bargaining*. There was no evidence and no finding that the employer was hostile to its employees' banding together for collective bargaining or that the lockout was designed to discipline them for doing so. . . .
>
> Moreover, *there is no indication, either as a general matter or in this specific case, that the lockout will necessarily destroy the unions' capacity for effective and responsible representation*. The unions here involved have vigorously represented the employees since 1952, and there is nothing to show that their ability to do so has been impaired by the lockout. Nor is the lockout one of those acts which are demonstrably so destructive of collective bargaining that the Board need not inquire into employer motivation, as might be the case, for example, if an employer permanently discharged his unionized staff and replaced them with employees known to be possessed of a violent antiunion animus. . . . Proper analysis of the problem demands that the simple intention to support the employer's bargaining position as to compensation and the like be distinguished from a hostility to the process of collective bargaining which could suffice to render a lockout unlawful.[255]

254. Heightened scrutiny is especially appropriate when the lockout is accompanied by aggravating factors, such as lengthy duration. *Cf.* Dresser-Rand Co., 362 N.L.R.B. No. 136, slip op. at 2 (June 26, 2015) (Board examined both pre- and post-lockout conduct as "all of a piece" in shedding light on employer's motive).

255. *Am. Ship*, 380 U.S. at 308–09 (emphasis added).

Perhaps in 1965 it was true that "there is no indication, either as a general matter or in this specific case, that the lockout will necessarily destroy the unions' capacity for effective and responsible representation."[256] At the time, there was no empirical evidence proving that lockouts were "inimical to the process of collective bargaining."[257] In 2016, however, the record is complete. Fifty years of empirical evidence demonstrates that lockouts generally tend to destroy a union's capacity for effective and responsible representation, which is axiomatically inimical to the process of collective bargaining. This record, especially in recent years, includes several reports of employers' nearly routine use of the lockout as a standard bargaining tactic.[258] The lockout, together with employers' use of replacements, has displaced the strike as the primary economic weapon deployed in labor disputes. We now have evidence that:

- lockouts represent the majority of major work stoppages;[259]
- employers are increasingly willing to use lockouts;[260]
- lockouts are growing in length;[261]
- the distinction between temporary and permanent replacements hired during lockouts is blurring;[262]
- lockouts threaten the stability of collective bargaining relationships as unions face decertification petitions and loss of membership in the aftermath of lengthy lockouts;[263]
- unions lose effectiveness during and after lockouts;[264] and
- lockouts have devastating consequences for workers, their families, and their communities, all without apparent economic justification.[265]

B. Reexamining the Consequences of American Ship

The American Crystal lockout, which was discussed at the beginning of this Article, illustrates the deleterious effects of the Board's progeny interpreting and applying *American Ship*.

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256. *Id.* at 309.
257. *Id.* at 308.
258. *See* Greenhouse, *supra* note 60; *see also supra* notes 34–56 and accompanying text.
259. *See supra* note 61.
260. *See Bargaining Outlook and General Plans*, Daily Lab. Rep. (BNA) No. 75, at S-9 (Apr. 20, 2015).
261. *See* LeRoy, *supra* note 29, at 1023, 1027.
262. *See, e.g.*, Ellen Dannin, *From Dictator Game to Ultimatum Game . . . and Back Again: The Judicial Impasse Amendments*, 6 U. PA. J. LAB. & EMP. L. 241, 264 (2004).
263. *See* LeRoy, *supra* note 29, at 1038–42.
264. *Id.*
265. *See supra* notes 1–24 and accompanying text; Part I.A.

Most American Crystal workers voted against the company's final contract offer because they feared it would undermine job security.[266] The lockout made them feel even more vulnerable. A report published after the lockout had been in effect for six months provides vivid examples of the rapid decline in the workers' economic circumstances. The article reported that many families were forced to rely on local food pantries[267] as workers depleted their savings and were unable to pay their debts.[268] Some were only able to survive because another family member worked.[269] Those who looked for other work found potential employers reluctant to hire them out of fear these workers would return to American Crystal once the lockout ended.[270] A "psychological fog" hung over affected communities.[271] Friends and family were forced to choose sides between sugar beet farmers and the locked-out workers.[272] The lockout disrupted a rich tradition of family members "on both sides of the beet" who used to get along in the small communities of northwestern Minnesota and eastern North Dakota.[273]

To union leaders and many rank-and-file workers, the company's stated reasons for the lockout seemed too vague to justify the economic and emotional hardships. Brian Ingulsrud, American Crystal's Vice President of Administration, said:

> For us to be a good employer well into the future, we gotta address some of the problems we have in our union contract that may not be creating problems today, but when the price of sugar gets to be more of a challenge for us, we're going to need to have every last bit of ammunition we have to make sure the company can survive.[274]

So the company was preparing for this future by demanding a substantially larger health insurance premium plus contract language that would weaken job security, seniority, and the grievance procedure. But what were the "problems" in the union contract that needed to be addressed either "today" or "when the price of sugar gets to be more of a challenge to us"? The company refused to be more specific.[275] This left employees feeling even more unsettled with the company's bargaining demands. They could not understand why the company

266. Kurschner, *supra* note 7.
267. *Id.*
268. *Id.*
269. *Id.*
270. *Id.*
271. *Id.*
272. *Id.* A local pastor remarked: "Our economy is not the best in the world right now, and a lot of the people are living hand-to-mouth. And the growers' profits—that's a real sore point. They had good crops, all-time high payments for them, and this adds fuel to the fire." *Id.*
273. *Id.*
274. *Id.*
275. *Id.*

wanted this new language when it had earned high profits and paid its CEO a whopping $2.4 million in 2011 under the old contract.[276] Moreover, employees took issue with the argument that the company sought only a few changes. The employees saw the company's bargaining demands as a "complete overhaul" of the contract "for no apparent reason."[277]

The company's highly-compensated CEO, David Berg, made things worse by equating the old union contract to being sick with cancer. Berg, who was secretly recorded while speaking with sugar beet growers in Grafton, North Dakota, explained his views this way:

> I have a friend in Fargo, he's a 50-something year old man. He didn't feel well for a long time. He couldn't put his finger on it and figure out what it was. Finally he got a CAT scan and they determined there was some sort of growth, and they did surgery. They removed a 21-pound tumor from him. That's a scary deal. He was sick for a long time, he didn't have energy, he couldn't eat. He couldn't digest. And I'm not saying a labor contract is cancer, but it affects you. It will drag you backwards. You can't do what you need to do. And I'm not saying we're trying to get rid of the labor contract. We are not about union busting. Take that one home with you. But we can't let the labor contract make us sick forever, and ever, and ever. We have to treat the disease, and that's what we're doing here.[278]

American Crystal's vague bargaining goals—and Berg's sentiments about them—demonstrate precisely why the Board and courts should restore limits on the use of the bargaining lockout. In American labor relations, management and shareholders determine a private company's entrepreneurial goals. Their goals do not have to make sense to anybody else, including workers. If they choose, the David Bergs of the world may attempt to wring out every last drop of profit by reducing even further their already affordable labor costs. They are entitled to try, but that does not mean they are entitled to have extra help from the law to do so. Bargaining lockouts tend to subvert the statutory bargaining process and upset the careful balance of workplace power struck by the Act. The bargaining lockout reallocates from the employer to its employees the cost of disagreement at the negotiating table. A party who chooses to take a hard-line position should have to bear more of the costs of this tactic and pass along less of those costs to employees who would choose to keep working while negotiations proceed.

276. *Id.*
277. *Id.*
278. *Id.*

C. Restating the Limits of American Ship

This reexamination of *American Ship* and its underlying principles demonstrates that lockout doctrine must be realigned to fulfill rather than undermine the purposes of the Act. There are at least two options to accomplish that end: (1) legislative reform in Congress or (2) a decision by the NLRB to return to the limits of *American Ship* and abandon its erroneous and unwarranted expansion of the lockout doctrine. For the reasons suggested below, the latter course is more promising.

1. Unlikely Legislative Reform

Professor Michael LeRoy, after demonstrating how the use of replacements during lockouts can virtually destroy collective bargaining, proposed a new NLRA provision—section 8(a)(6)—to bar an employer from using replacements in a lockout lasting more than one year.[279] The current political climate in Congress,[280] however, makes statutory reform of any type unlikely. After all, the last substantive reform of the NLRA was enacted in 1959—almost sixty years ago.[281] Even if such reform were possible, it would not solve the problem. Few wage-earning employees can afford a year, or even a few months, without pay.[282]

2. Returning to *American Ship*

The wiser course would be for the NLRB to adhere to the original limits of *American Ship* by rejecting its expansive and destructive progeny. Four necessary and logical steps could accomplish this result.

First, the Board should permit employers to use lockouts only in support of good faith bargaining positions. The Board reaffirmed this basic bargaining principle most recently in *Dresser-Rand Co*. The employer has a duty to bargain in good faith under section 8(d), and breaching this duty violates section 8(a)(5).

Second, the NLRB should require bargaining to impasse before lockouts may be lawfully imposed, a move that would also require overruling the Board's 1968 decision in *Darling & Co.* In a typical labor dispute, reaching impasse permits the employer to implement unilaterally its final contract offer, at least on issues for which impasse was reached. It would not be onerous to require impasse as a pre-

279. LeRoy, *supra* note 29, at 1052–54.

280. *See* Brennan W. Bolt, *House, Senate Propose NLRB Budget Cuts and Policy Limitations*, LAB. REL. TODAY (June 24, 2015), http://www.laborrelationstoday.com/2015/06/articles/senate/house-senate-propose-nlrb-budget-cuts-and-policy-limitations/ ("The House and Senate appropriations committees both advanced bills . . . [in June 2015] seeking to slash the National Labor Relations Board's budget" by 27% and 10% respectively.).

281. Landrum-Griffin Act, Pub. L. No. 86-257, 73 Stat. 519 (1959) (codified in 29 U.S.C. §§ 401–531 (1964) and other scattered sections of 29 U.S.C.).

282. *See* Wolski, *supra* note 38 (ten-month lockout "'starved out' the workers both financially and emotionally").

condition to a lockout. Current lockout doctrine is actually counterintuitive, in that it permits the employer to evade the impasse requirement by bargaining little or perhaps not at all. In the absence of a strike or threatened strike, an employer should have to wait until bargaining has had every chance to work before it can lock out employees in support of its bargaining position.

Third, the Board should limit if not prohibit the use of temporary replacements during a bargaining lockout, a move that would require overruling its 1986 *Harter Equipment* decision. That decision, combined with the rise of large national contractors who can supply replacement workers expeditiously,[283] has created a powerful weapon capable of destroying the fabric of collective bargaining and employee statutory rights. Either the Board should prohibit employers from hiring replacements altogether, or it should impose significant time limitations—such as lockouts of no more than three to six months—together with a requirement that the employer demonstrate, as a condition of hiring replacements, that it cannot maintain operations with current employees who are willing to continue working under the terms of the employer's final offer.[284] Unlike struck employers, employers considering lockouts do not need replacements to preserve their businesses and maintain operations.[285]

Fourth, the Board should announce that failure to adhere to the foregoing principles would cause it to characterize a bargaining lockout as inherently destructive of employees' section 7 rights, a move that would require repudiation of the reasoning in cases such as *International Brotherhood of Boilermakers, Local 88 v. NLRB* that were decided before the bargaining lockout's destructive impact became so clear.

Conclusion

Shortly after *American Ship* was decided, noted labor scholar, Bernard D. Meltzer, observed that permitting employers to hire permanent replacements during a lockout "might too easily become a device

283. *See supra* notes 141–42 and accompanying text.

284. This is admittedly a difficult burden of proof, but it provides an employer an escape in situations resembling a defensive lockout, such as when the employer experiences sabotage or slowdown.

285. One commentator has suggested that, during a strike, "[t]he ability to hire replacements willing to work on the basis of a firm's final offer" provides a "mechanism for testing the reasonableness of the union's demands in the marketplace." Samuel Estreicher, *Collective Bargaining or "Collective Begging"?: Reflections on Antistrikebreaker Legislation*, 93 MICH. L. REV. 577, 602 (1994). This rationale does not apply to lockout replacements. Before an employer imposes a lockout, its employees are already willing to come to work for what the employer offers as the parties continue to discuss the reasonableness of each sides' demands at the bargaining table. Additionally, employers' use of contracting agencies that furnish replacements distorts any economic analysis of the type suggested by Estreicher.

for union busting, successfully disguised as an effort to protect the employer's bargaining position and his legitimate interest in maintaining operations."[286] Five decades of experience at American Crystal and scores, if not hundreds, of other employers have proven the wisdom of Professor Meltzer's prediction. Therefore, the NLRB should restore balance to the bargaining process by re-embracing the limits on lockouts originally contemplated by *American Ship*.

286. Bernard D. Meltzer, *The Lockout Cases*, 1965 SUP. CT. REV. 87, 104 (1965). At the time of Meltzer's prediction, the Court had not yet determined whether employers could legally hire permanent replacements during a lockout. *See* Am. Ship Bldg. Co. v. NLRB, 380 U.S. 300, 308 (1965) ("[W]e intimate no view whatever as to the consequences which would follow had the employer replaced its employees with permanent replacements or even temporary help.").