The Key to Unlocking the Partial Lockout: A Discussion of the NLRB's Decisions in *Midwest Generation* and *Bunting Bearings*

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I. Introduction

Collective bargaining consists of negotiations between an employer and a group of employees,[1] who are usually represented by a labor union, in an effort to determine the conditions of employment.[2] Collective bargaining is governed by the National Labor Relations Act (NLRA or the Act), which sets forth guidelines permitting and proscribing certain activity.[3] In other words, when an employer and labor union sit down to negotiate a new collective bargaining agreement—the final covenant reached between the employer and the employees—employers and employees are justified in taking some actions but not others.[4] For instance, while collective bargaining, a labor union must bargain in good

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1. *See generally* HAROLD W. DAVEY ET AL., CONTEMPORARY COLLECTIVE BARGAINING 3-4 (4th ed. 1982) (discussing the parties in collective bargaining).

2. *See* 29 U.S.C. § 158(d) (2006) ("[T]o bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment. . . ."); *see also* DAVEY, *supra* note 1, at 2.

> Collective bargaining is defined as a continuing institutional relationship between an employer . . . and a labor organization . . . representing exclusively a defined group of employees . . . concerned with the negotiation, administration, interpretation, and enforcement of written agreements covering joint understandings as to wages or salaries, rates of pay, hours of work, and other conditions of employment.

Id.

3. *See* 29 U.S.C. § 158 (2006).

4. *Id.*

faith and an employer may not discourage union membership; that is, an employer cannot make advantages such as work, health benefits, overtime, and other benefits available to non-union members while not making the same advantages available to union members.[5] To do so not only would discourage union membership but also is an unfair labor practice.[6]

In Fall 2004, the National Labor Relations Board (NLRB or the Board) upheld in *Midwest Generation*[7] and *Bunting Bearings*[8] the conduct of two employers who locked out its union employees while allowing its non-union employees to work.[9] In effect, these decisions held that the employers were justified in adversely treating its union-member employees while favorably treating non-union-member employees.[10] So, what is the significance of the holdings in *Midwest Generation* and *Bunting Bearings* to the employer that employs union-represented workers? Surprisingly, the decisions mean nothing because, appropriately, federal courts in the D.C. and Seventh Circuits overturned the Board's rulings.[11]

Although the courts reversed these partial lockout cases, the state of the lockout and partial lockout doctrine is far from clear. Thus, this Comment will explain the evolution of the lockout and partial lockout doctrine as well as their current function in the realm of labor bargaining. In addition, this Comment will examine Board's decisions in these NLRB decisions that left many employers confused as to the application, if any, of the partial lockout in the collective bargaining process. While these two decisions were ultimately reversed by the federal circuit courts, their examination is important for two reasons. First, they provide insight into the Board's inconsistent application of the partial lockout doctrine and second, they illustrate the pitfalls of expanding the partial lockout doctrine. Fortunately, the circuit courts recognized and corrected these pitfalls before they affected more than just the parties in *Midwest Generation* and *Bunting Bearings.*

II. Background

The following sections depict a brief overview of the evolution of

5. *See* National Labor Relations Act, 29 U.S.C. § 158(a)(3) (2006).
6. *See id.*
7. Midwest Generation, 343 N.L.R.B. 69 (Sept. 30, 2004).
8. Bunting Bearings Corp., 343 N.L.R.B. 479 (Oct. 29, 2004).
9. *See generally Midwest Generation,* 343 N.L.R.B. 69; *Bunting Bearings Corp.*, 343 N.L.R.B. 479.
10. *See id.*
11. *See generally* Local 15, Int'l Bhd. of Elec. Workers v. NLRB, 429 F.3d 651 (7th Cir. 2005), *cert. denied*, 127 S.Ct. 42 (2006); United Steel, Paper and Forestry v. NLRB, No. 04-1435, 2006 U.S. App. LEXIS 11221, at *5 (D.C. Cir. Apr. 28, 2006).

the lockout doctrine. The first part will set out the sections of the NLRA and NLRB Rules and Regulations that are important to understanding this Comment. Also included within this section are cases that helped shape the lockout and partial lockout doctrines, as they exist today. Of course this synopsis does not include all the complexities, or cases, interpreting the NLRA, the Board, or the lockout doctrine, but hopefully it will provide sufficient background to follow along with the Comment.

A. The National Labor Relations Act

The NLRA governs labor relations between employers and employees.[12] Section 7 of the Act grants employees the right to engage in concerted activity when assisting labor unions in collective bargaining.[13] Section 8 of the Act protects this right.[14] Section 8(a)(1) makes it unlawful for an employer to interfere with an employee's section 7 rights,[15] and section 8(a)(3) proscribes any discrimination intended to encourage or discourage union membership "in regard to hire or tenure of employment or any term or condition of employment."[16]

A basic tenet of the NLRA requires good-faith bargaining; in other words, once a union is recognized as the collective bargaining representative of the employees, the union and the employer must bargain in "good faith."[17] This good-faith standard has changed over the

12. *See* 29 U.S.C. §§ 151-169 (2006). *See also* Windward Shipping (London) Ltd. v. Am. Radio Ass'n, 415 U.S. 104, 118 n.4 (1974) (Brennan, J., dissenting) (stating that the NLRA's objective is to protect employers, employees and the public); Int'l Longshoremen's Local 1416 v. Ariadne Shipping Co., 397 U.S. 195, 198-99 (1970) (stating that the NLRA primarily concerns strife between American employers and employees).

13. 29 U.S.C. § 157 (2006).

14. *Id.* § 158(a)(1).

15. *Id.*

16. *Id.* § 158(a)(3) (2006). In 1934, Senator Wagner introduced the NLRA, formerly known as the Wagner Act, for the purpose of obtaining federal support for "employee organizing and collective bargaining." 1 THE DEVELOPING LABOR LAW 25-27 (Patrick Hardin & John E. Higgins, Jr. eds., 4th ed. 2001). Among the most important rights promoted by Senator Wagner, and later adopted by the NLRA, afford employees: (1) "the right to organize"; (2) "the right to bargain collectively"; and (3) the right to engage in concerted activity such as strikes and picketing. *Id.* at 27. According to Senator Wagner, affording employees these rights would equalize the bargaining power between employers and employees. *Id.*

17. *See* 29 U.S.C. § 158(d) (2006). *See also* Archibald Cox, *The Duty to Bargain in Good Faith*, 71 HARV. L. REV. 1401, 1410 (1958) (noting that in the days following the enactment of the Wagner Act, employers politely met with the union representatives, listened to their demands and the supporting arguments and then rejected them). Finding such conduct reprehensible, the NLRB responded in *NLRB v. George P. Pilling & Son Co.*, 119 F.2d 32, 37 (3d Cir. 1941). Setting discernible boundaries for the meaning of "good-faith" bargaining, the *George P. Pilling* Board ruled that "[t]here must be a common willingness among the parties to discuss freely and fully their respective claims

years. Initially, the Ninth Circuit in *NLRB v. Montgomery Ward & Co.*,[18] defined the duty of good faith as "the obligation of the parties to participate actively in the deliberations so as to indicate a present intention to find a basis for agreement, and a sincere effort must be made to reach a common ground."[19] In furtherance of this principle, the Ninth Circuit, citing *NLRB v. Reed & Price Mfg. Co.*,[20] stated that bargaining in good faith implies a duty to bargain with "an open mind and a sincere desire to reach an agreement."[21] Congress thought, however, that an employer complied with this duty only when it was "willing to make reasonable concessions."[22] Accordingly, in 1947, Congress amended the NLRA to provide that the obligation to bargain in good faith "does not compel either party to agree to a proposal or require the making of a concession."[23]

Thereafter, the Board and courts understood Congress's amendment to mean that the parties were obligated to bargain in good faith, and when bargaining was futile, "each had a right to resort to economic warfare."[24] For the union, "economic warfare" meant striking, picketing, or boycotting the employer; for the employer, economic warfare meant locking out its employees or temporarily shutting down the business.[25]

When a union or employer believes that its adversary has violated the NLRA by committing an unfair labor practice in the course of bargaining—for instance, by breaching its duty to bargain in good faith—it may file a charge against the party with the NLRB alleging an unfair labor practice.[26]

B. Filing a Charge for an Unfair Labor Practice

Filing a charge with the NLRB is akin to filing a complaint with a court. Anybody—an individual, an employer, or a labor organization—

and demands and, when these are opposed, to justify them on reason." *Id.* at 37.

18. NLRB v. Montgomery Ward & Co., 133 F.2d 676, 686 (9th Cir. 1943).

19. *Montgomery Ward & Co.*, 133 F.2d at 686.

20. NLRB v. Reed & Price Mfg. Co., 118 F.2d 874, 885 (1st Cir. 1941).

21. *Reed & Price Mfg. Co.*, 118 F.2d at 875.

22. Cox, *supra* note 17, at 1415.

23. *Id.*

24. *New NLRB Rulings on Management Lockouts*, Federal Employment Law Insider, Dec. 2004, *available at* 2 NO. 4 Fed. Emp. L. Insider 6 on Westlaw.

25. *Id. See also* 2 THE DEVELOPING LABOR LAW 1513-14 (Patrick Hardin & John E. Higgins, Jr. eds., 4th ed. 2001) (noting that the NLRA, in its original form, proscribed the use of lockouts as it was considered to be an unfair labor practice when used to obstruct protected activity. This provision, however, was subsequently rejected by Congress because Congress thought it was unfair to prohibit the lockout while protecting the strike.).

26. *See* 29 U.S.C. § 160(b) (2006).

may file a charge alleging an unfair labor practice.[27] Federal regulations supplementing the NLRA require that the charge be filed with the regional director in which the alleged unfair labor practices have occurred[28] within six months of the unfair labor practice.[29] The charging party should be prepared to submit a written statement of the relevant facts, which includes the name and address of the person or organization against whom the charge is made.[30] Thereafter, the regional director will serve copies of the charge upon the charged parties.[31] After the charged party files an answer, the NLRB commences an investigation that includes interviews with parties and witnesses.[32] After the investigation is completed, if the case cannot be disposed of informally, the regional office may institute a proceeding before the Board.[33]

C. The National Labor Relations Board

The NLRA created the NLRB to enforce the substantive provisions of the Act.[34] Section 160(c) of the NLRA expressly delegates to the Board the primary responsibility of crafting remedial decisions that manifest the policies of the Act.[35] Such a delegation affords the Board wide discretion to fashion remedies for violations of the NLRA,[36] although Board discretion is subject to judicial review.[37] That said, although Article III courts may review Board decisions,[38] the Board's unique expertise in labor disputes entitles it to a significant degree of deference in its choice of remedy.[39] Specifically, the Board's discretion to animate remedies can neither be arbitrary nor capricious.[40]

27. *See id.*
28. *See* NLRB Rules and Regulations, 29 C.F.R. § 102.10 (2006).
29. *See* 29 U.S.C. § 160(b) (2006).
30. 29 C.F.R. § 102.12 (2006).
31. *Id.*
32. *Id.*
33. KENNETH MCGUINESS, HOW TO TAKE A CASE BEFORE THE NATIONAL LABOR RELATIONS BOARD 238 (4th ed. 1976). If an investigation reveals merit in a charge, the more favored practice is for the NLRB agent to remedy the unfair labor practices, thereby eliminating the necessity for further proceedings. *Id*. at 243.
34. *See* 29 U.S.C. § 160(a) (2006).
35. *See id.* § 160(c).
36. NLRB v. Coca-Cola Bottling Co., 191 F.3d 316, 323 (2d Cir. 1999).
37. *Id.* at 324.
38. Hoffman Plastic Compounds v. NLRB, 535 U.S. 137, 142-143 (2002).
39. *Coca-Cola Bottling Co.*, 191 F.3d at 323-24; *see also* NLRB v. Gissel Packing Co., 395 U.S. 575, 612 n.32 (1969) ("In fashioning its remedies under the . . . [NLRA], the Board draws on a fund of knowledge and expertise and all its own, and its choice of remedy must therefore be given special respect by reviewing courts.").
40. Shaw Coll. at Detroit, Inc. v. NLRB, 623 F.2d 488, 489 (6th Cir. 1980).

D. Judicial Review of Board Decisions

When a court reviews the Board's decision in a labor dispute, it reviews the administrative record to determine whether the Board has based its decision on sensible explanations and "whether the decision is adequately supported by the facts."[41] A reviewing court will adopt the Board's decision only if it is supported by "substantial evidence on the record."[42] Reviewing courts will reverse Board decisions only when circumstances indicate that the Board has committed a clear error in judgment or has failed to consider factors relevant to the case.[43]

E. Exploring the Lockout

Labor law jurisprudence has long recognized that employers and workers have competing interests.[44] In governing these competing interests, the NLRA establishes a collective bargaining process in which economic weapons are made available to employers and employees.[45] Specifically, the NLRA armed workers with the right to strike[46]—which exists when a group of employees cease work in order to secure compliance with a demand regarding employment conditions.[47] Conversely, courts carved out an economic weapon for employers that permitted them to lockout their employees.[48] An employer's ability to use a lockout, however, is not statutorily protected like its counter-

41. Nat'l Ass'n of Gov't Employees v. Fed. Labor Relations Auth., 363 F.3d 468, 474 (D.C. Cir. 2004) (quoting Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43) (1983) ("Under [the arbitrary and capricious standard], we look to whether the [Board] has offered a rational explanation for its decision, whether its decision is based on consideration of the relevant factors, and whether the decision is adequately supported by the facts found.").

42. 5 U.S.C. § 7123(c) (2006).

43. NLRB v. Sch. Bus Servs., Inc., No. 93-70936, 1995 U.S. App. LEXIS 439, at *3 (9th Cir. Jan. 9, 1995) (stating that a rational connection between the facts found and the choice made must exist).

44. *See* Michael H. Leroy, *Lockouts Involving Replacement Workers: An Empirical Analysis and Proposal to Balance Economic Weapons Under the NLRA*, 74 WASH. U. L. Q. 981, 983 (1996).

45. *See id.*; *see also* NLRB v. Ins. Agents' Int'l Union, 361 U.S. 477, 489 (1960) ("The presence of economic weapons in reserve, and their actual resistance on occasion by the parties, is part and parcel of the system that the Wagner and Taft-Harley Acts [now the NLRA] have recognized.").

46. Section 163 of the NLRA provides: "Nothing in this [Act] . . . shall be construed so as to either interfere with or impede or diminish in any way the right to strike. . . ." 29 U.S.C. § 163 (2006).

47. *See* Am. Mfg. Concern, 7 N.L.R.B. 753, 759 (1938).

48. *See* Ellen Dannin, *From Dictator Game to Ultimatum Game . . . and Back Again: The Judicial Impasse Amendments*, 6 U. PA. J. LAB. & EMP. L. 241, 250-52 (2004) (discussing how courts have come to recognize and shape the legality of employers' use of the lockout).

weapon, the strike.[49]

At common law, a lockout was defined as a "cessation of the furnishings of work to employees in an effort to get the employer more desirable terms."[50] Currently, labor law lacks a succinct definition of the term.[51] With this in mind, and relying on the Board's unique expertise in labor law,[52] Congress thought it would be best for the Board to define what circumstances constitute a lockout.[53] However, the Board only made matters worse by its inconsistent application of the conditions necessary to find a lockout.[54] Nevertheless, the Board and courts broadly define the term "lockout" as the "withholding of employment by an employer from its employees for the purpose of either resisting their demands or gaining a concession from them."[55] In other words, an employer institutes a lockout when it uses only a portion of its employees to maintain its operation.[56] Defining "lockout" has proven to be the easy part, while the difficult task—the task with which the Board and courts continue to wrestle—is determining the scope of its application.[57]

F. The Scope of the Lockout

As noted above, the NLRA institutes a collective bargaining process established by a set of countervailing economic weapons available to employees and employers,[58] *i.e.*, employees may strike to defend their

49. *Id.* at 251 ("No statute protects an employer's right to lockout employees.").

50. Iron Molders Local 125 v. Allis-Chalmers Co., 166 F.45, 52 (7th Cir. 1908).

51. *See* 2 THE DEVELOPING LABOR LAW, *supra* note 25, at 1512.

52. *See Coca-Cola Bottling Co.*, 191 F.3d at 323-24.

53. *See* Inter-Collegiate Press, Graphic Arts Div. v. NLRB, 486 F.2d 837, 842 n.8 (8th Cir. 1973) (noting that the lockout and its use is restricted by the Board to defined circumstances).

54. *See* Duluth Bottling Ass'n, 48 N.L.R.B. 1335, 1359 (1943) (referring to a situation as a lockout where an employer locked out its employees in anticipation of a strike that would have caused spoilage of syrup to be used in the manufacture of soft drinks); Int'l Shoe Co., 93 N.L.R.B. 907, 909 (1951) (justifying an employer for locking out its employees to defend against intermittent walk-outs by its employees); Lengel-Fencil Co., 8 N.L.R.B. 988, 995 (1938) (concluding that the employer's closing of the plant was a direct result of an argument between the employer and union representative). *But see* Link-Belt Co., 26 N.L.R.B. 227, 261-65 (1940) (justifying the employer's lockout because of economic considerations).

55. Dayton Newspapers, Inc. v. NLRB, 402 F.3d 651, 664 (6th Cir. 2005) (citing 2 THE DEVELOPING LABOR LAW, *supra* note 25, at 1512).

56. ROBERT A. GORMAN & MATTHEW W. FINKIN, BASIC TEXT ON LABOR LAW: UNIONIZING AND COLLECTIVE BARGAINING 482 (2nd ed. 2004); *see also* Associated Gen. Contractors, Ga. Branch, 138 N.L.R.B. 1432, 1442 (1962) ("The term 'lockout' has been used in more recent years to denote a temporary layoff of employees as distinguished from a discharge of severance of the employment relationship.").

57. *See* discussion *infra* Part III.A-B.

58. *See supra* notes 45-50 and accompanying text.

bargaining position; employers may lockout their employees.[59] Incident to this quasi-equalization of employer rights and union rights is both the obligation of both the employer and the union to adhere to the policies of the NLRA—"to promote [peaceful] settlement[s] of labor disputes through collective bargaining."[60] Consequently, employers, in particular, must make "meaningful" decisions regarding what, when, and how to defend against union-represented employees exercising their § 7 rights.[61] For example, if the employer chooses to defend against a strike by locking out its employees, the employer is obliged to decide when the lockout is implemented and who the lockout effects. More importantly, the employer must have a reasonable and well-founded purpose for locking out only some of its employees.[62] In the absence of a well-founded reason, the employer would be walking a fine line for having implemented a partial lockout for a wrongful purpose.[63]

The Board has long insisted that lockouts for wrongful purposes are unlawful.[64] For instance, in *Joseph Weinstein Elec. Corp.*, the Board found that a lockout used to defeat union organizing efforts as a means of evading the duty to bargain was unlawful.[65] Likewise, in *Am. Cyanamid Co.*, the Board found a lockout unlawful where its purpose was to compel acceptance of an agreement that would have condoned an unfair labor practice and required the union to relinquish statutory rights.[66] On the other hand, the Board has upheld lockouts that were motivated by legitimate business reasons.[67]

59. *See* Dannin, *supra* note 48, at 250-52.

60. NLRB v. Laney & Duke Storage Warehouse Co., 424 F.2d 109, 113 (5th Cir. 1970); *see also* 29 U.S.C. 151 (declaring the policy of the NLRA).

61. I. HERBERT ROTHENBERG & STEVEN B. SILVERMAN, LABOR UNIONS: HOW TO: AVERT THEM, BEAT THEM, OUT-NEGOTIATE THEM, LIVE WITH THEM, UNLOAD THEM 244 (Management Relations, Inc. 1973) (1979) (asserting that this quasi-equalization of employer and union rights forces the employer to make many meaningful decisions); *see also* 29 U.S.C. § 157 (2006) (stating that employees have the right to engage in concerted activity, including assisting labor unions in collective bargaining).

62. *See Local 15, Int'l Bhd. of Elec. Workers*, 429 F.3d at 659 (stating that an employer must provide a legal and reasonable basis for implementing a partial lockout).

63. *See* discussion *infra* Part III.F.

64. *See* 2 THE DEVELOPING LABOR LAW, *supra* note 25, at 1514-16 (reviewing, at length, cases where the employer's lockout was instituted for an unlawful purpose); *see also id.* at 1514 ("From the earliest days to the present the Board has declared lockouts to be unlawful where they have an unlawful purpose.").

65. *See generally* Joseph Weinstein Elec. Corp., 152 N.L.R.B. 25, 37 (1965); *see also* Bagel Bakers Council of Greater N.Y., 174 N.L.R.B. 622, 627, 632 (1969) (finding a lockout unlawful where the employer, motivated by antiunion animus, transferred work from union employees to non-union employees).

66. Am. Cyanamid Co. v. NLRB, 592 F.2d 356, 363 (7th Cir. 1979).

67. *See* Betts Cadillac Olds, Inc., 96 N.L.R.B. 269 (1951) (holding that a lockout was lawful where an anticipated strike among automobile service and repair personnel would have left customers' cars disassembled); *see also* Chicago Local No. 458-3M,

Three types of lockouts exist.[68] The first lockout is used to frustrate organizational efforts, subvert the bargaining representative, or sidestep the duty to bargain.[69] The second type of lockout, referred to as the "bargaining lockout," is used during bargaining negotiations.[70] Employers use this lockout as economic counterweapon "to the union's right to strike."[71] Finally, the third lockout, the "economic lockout," occurs when the employer's objective is to "minimize economic or operational losses threatened by an imminent strike."[72]

G. Not Once but Twice: In Two Cases Decided on the Same Day, the Supreme Court Interprets the Scope of the Lockout

On one day in March 1965, the Supreme Court handed down two holdings that, for the first time, set discernible parameters for courts, employers, and unions to assess the legality and reasonableness of the lockout as a weapon in collective bargaining.[73] Validating the lockout as an offensive weapon in collective bargaining, the Supreme Court decided *Am. Ship Bldg. v. NLRB* and *NLRB v. Brown*.[74]

1. *Am. Ship Bldg. v. NLRB*: The Landmark Case Interpreting the Permissible Use of the Lockout

In *Am. Ship Bldg.*, in order to secure a new collective bargaining agreement, the employer and the unions entered into negotiations.[75] On the eve of the current contract's expiration, the employer made a proposal that was countered by a proposal from the unions.[76] Thereafter, multiple negotiations ensued between the employer and union, but no terms were agreed upon, causing the parties to separate "without setting a

Graphic Commc'n Int'l Union, AFL-CIO v. NLRB, 206 F.3d 22, 24 (D.C. Cir. 2000) (holding that the employer's eleven month lockout, which the employer ceased after entering into a new collective bargaining agreement, was lawful because its purpose was to apply economic pressure on the employees in support of its legitimate bargaining position).

68. *See Associated Gen. Contractors, Ga. Branch*, 138 N.L.R.B. at 1442.

69. *See id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *See* 2 THE DEVELOPING LABOR LAW, *supra* note 25, at 1520; *see also* Am. Ship Bldg. *v.* NLRB, 380 U.S. 300 (1965); NLRB v. Brown, 380 U.S. 278 (1965).

74. *Am. Ship Bldg.*, 380 U.S. 300; *Brown*, 380 U.S. 278; *see* Leroy, *supra* note 44, at 1002 (stating that the Supreme Court legitimized the use of the lockout); *see also* 2 THE DEVELOPING LABOR LAW, *supra* note 25, at 1520 (noting that the lockout gained new significance in the year *Am. Ship Bldg.* and *Brown* were decided).

75. *Am. Ship Bldg.*, 380 U.S. at 303.

76. *Id.*

date for further meetings."[77] The parties had reached a bargaining impasse.[78] Fearing that the union would strike as it had in the past, the employer temporarily closed down one yard and laid off employees at others.[79] Subsequently, the union filed claims alleging violations of the NLRA.[80] The Board held that the lockout was unlawful because it infringed on employees' rights to strike and bargain collectively.[81]

The Supreme Court, however, disagreed with the Board's conclusion.[82] The Court held that, because the union failed to allege that the employer used the lockout adversely to the collective bargaining process and because the record was devoid of any findings the employer was hostile to its employees' right to strike, it was inaccurate for the Board to hold that the employer's intention was to destroy or frustrate the process of collective bargaining.[83]

The rule extracted from the Court's decision was that an employer may lawfully lockout out its union employees temporarily for the sole purpose of applying economic pressure to support its bargaining position.[84] Setting the parameters for assessing the legality of an employer's use of the lockout, the Court opined that a proper determination of a lockout requires a distinction to be drawn between the employer's intention to support its bargaining position and the employer's hostility toward the collective bargaining process—hostility which could suffice to render a lockout unlawful.[85] Moreover, the Court distinguished the facts of *Am. Ship Bldg.* from the situation where an employer uses a lockout to "destroy the unions' capacity for effective and responsive representation."[86]

77. *Id.*

78. 1 THE DEVELOPING LABOR LAW, *supra* note 16, at 25-27 ("Where there are irreconcilable differences in the parties' positions after full good faith negotiations, the law recognizes the existence of an impasse.").

79. *Am. Ship Bldg.*, 380 U.S. at 304.

80. *Id.*

81. Am. Ship Bldg., Co. v. NLRB, 142 N.L.R.B. 1362, 1365 (1963).

82. *See Am. Ship Bldg.*, 380 U.S. at 312-14. The issue before the Court in *Am. Ship Bdlg.* was whether it was lawful for an employer, after an impasse had been reached, to lockout some employees by temporarily laying them off as means of applying economic pressure on the union in support of the employer's bargaining position. *See id.* at 308.

83. *Id.* at 308-10.

84. *Am. Ship Bldg.*, 380 U.S. at 318.

85. *Id.*

86. *Id.* at 309. The Court also found that the lockout used by the employer in *Am. Ship Bldg.* was not "one of those acts which are demonstrably so destructive of collective bargaining that the Board need not inquire into employer motivation. . . ." *Id.*

2. Earlier That Afternoon . . . *NLRB v. Brown*: Establishing the Standard of Review in Determining the Lawfulness of a Lockout

The *Brown* decision set the stage for the application of the lockout doctrine as it is enforced today.[87] Holding that, in response to a whipsaw strike, members of multi-member bargaining unit were justified in hiring temporary employees,[88] the Court advanced the "inherently-destructive-conduct standard," which is the foundation of the model that courts use today to evaluate employer conduct in the context of asserted NLRA violations.[89]

Analogously to *Am. Ship Bldg.*, the facts of *Brown* lacked specific evidence of the employer's intent to discourage union participation.[90] Thus, the Court had to consider whether unlawful intent could be inferred from employer's use of the lockout.[91] In finding that the use of a defensive lockout with temporary replacements was lawful, the Court set forth the inherently-destructive-conduct standard.[92] The Court stated that "when an employer practice is so inherently destructive of employee rights and is not justified by the service of important business ends, no specific evidence of intent to discourage union membership is necessary to establish a violation of section 8(a)(3)."[93] In such instances, the Court

87. *See* NLRB v. Great Dane Trailers, 388 U.S. 26, 33-34 (citing *Brown*, 380 U.S. at 287). Relying on *Brown*, the Court in *Great Dane* went one step further in establishing and defining the application of the "comparatively slight" and "inherently destructive" conduct. *Great Dane Trailers*, 388 U.S. at 33-34.

88. *Brown*, 380 U.S. at 285.

89. *Id.* at 287. The issue in *Brown* was whether an employer that was a member of a multi-employer bargaining unit could hire temporary workers to replace locked out employees when faced with a whipsaw strike. *See id.* at 282. A whipsaw strike is a tactic used by a union to maximize its bargaining leverage when bargaining against multiple employers that comprise a single bargaining unit. Paul M. Secunda, *Politics Not As Usual: Inherently Destructive Conduct, Institutional Collegiality, and the National Labor Relations Board*, 32 FLA. ST. U.L. REV. 51, 68, 106 n. 101 (2004). It usually involves a union striking each employer consecutively. *See id.* Unions use this type of strike as a means of inducing a settlement because it gives unstruck employers an unfair advantage causing the struck members to acquiesce to the union's terms. *See id.*; *see also NLRB v. Truck Drivers Local (Buffalo Linen)*, 353 U.S. 87, 89-91 (1957) (discussing the lockout doctrine with respect to the whipsaw strike).

90. *Id.*

91. *Id.* at 282.

92. *Id.* at 287.

93. *Id. See Inter-Collegiate Press*, 486 F.2d at 844-45 ("The phrase 'inherently destructive' is not easily susceptible of precise definition. [Nonetheless,] 'inherently destructive' conduct is that which creates visible and continuing obstacles to the future exercise of employee rights."); *see also* Nat'l Fabricators, Inc. v. NLRB, 903 F.2d 396, 399 (5th Cir. 1990) (asserting that inherently destructive conduct falls into two categories: (1) that which creates visible and continuing obstacles to the future exercise of employee rights and (2) that which directly and unambiguously penalizes or deters protected activity).

found that "conduct so inherently destructive could not be saved from illegality by an asserted overriding business purpose pursued in good faith."[94] On the other hand, when the employer's conduct is comparatively slight and used to achieve a legitimate business end or to accommodate business exigencies, the Court found that antiunion motivation of the employers must be established by independent evidence.[95]

After the *Brown* holding, two categories of discriminatory employer conduct emerged: (1) employer conduct that is inherently destructive of employee rights and (2) employer conduct that has a comparatively slight effect on employee rights.[96] Despite the seemingly clear opinion that categorized employer conduct into two groups, the *Brown* opinion was further interpreted only two years later by the Supreme Court in *Great Dane Trailers.*[97]

H. Great Dane Trailers*: The Current Standard of Determining the Lawfulness of a Lockout*

In *Great Dane Trailers*, the Supreme Court of the United States established guidelines for evaluating employer conduct in the context of asserted NLRA violations.[98] Specifically, the *Great Dane* Court divided discriminatory conduct directed at union employees into two categories that require different analyses of review depending on the conduct's impact on employee rights.[99] The Supreme Court's decision in *Great Dane Trailers*, to date, is the final word on some kinds of conduct necessary for an employer to violate § 8(a)(3).[100]

Sustaining the Board's holding that an employer violates the NLRA when the employer's conduct constitutes discrimination that would discourage union membership and interfere with employees' protected rights,[101] the Supreme Court further expounded the "inherently destructive" and "comparatively slight" standards of conduct.[102]

94. *Brown*, 380 U.S. at 287. "The Board need not inquire into employer motivation to support a finding of an unfair labor practice where the employer conduct is demonstrably destructive of employee rights and is not justified by the service of significant or important business ends." *Id.* at 282.

95. *Id.* at 287-88.

96. *Id.*

97. *Great Dane Trailers, Inc.*, 388 U.S. 26.

98. *See* Bud Antle, Inc., 347 N.L.R.B. No. 9, at 11 (May 30, 2006).

99. *See id.* (discussing *Great Dane*).

100. *See* Sociedad Espanola de Auxilio Mutuo, 342 NL.R.B. 458, 460 (July 13, 2004) (stating that the employer's lockout must be determined using the *Great Dane* impact test).

101. *See* Great Dane Trailers, Inc., 150 N.L.R.B. 438, 443-45 (1964).

102. *See Great Dane Trailers, Inc.*, 388 U.S. at 34.

Specifically, the Court stated:

> First, if it can reasonably be concluded that the employer's conduct was "inherently destructive" of important employee rights, no proof of an antiunion motivation is needed and the Board can find an unfair labor practice even if the employer introduces evidence that the conduct was motivated by business considerations. Second, if the adverse effect of the discriminatory conduct on employee rights is "comparatively slight," an antiunion motivation must be proved to sustain the charge if the employer has come forward with evidence of legitimate and substantial business justifications for the conduct.[103]

Under *Great Dane Trailers*, the legality of a lockout is determined by first categorizing the employer's conduct as having either an inherently destructive or comparatively slight adverse impact on employee rights.[104] Where the Board determines that the employer's conduct was inherently destructive of employee rights, the inquiry ends, and the Board can find an unfair labor practice.[105] If, however, it is determined that the employer's conduct had a comparatively slight impact on employee rights, then the union most show that the employer was motivated by anti-union animus after the employer has proffered evidence of a legitimate and substantial business justification for the conduct.[106]

III. Analysis

An employer engages in a partial lockout when it locks out some but not all of its employees.[107] Although this doctrine is very narrow in scope, partial lockouts are lawful[108] unless they are intended to "chill

103. *Id.* at 34.
104. *See id.*
105. *Id.*
106. *Great Dane Trailers, Inc.*, 388 U.S. at 34.
107. *See* GORMAN & FINKIN, *supra* note 56, at 490 (stating that during negotiations, in an effort to exert pressure on the union while at the same time maintain plant operation, an employer might choose to lock out part of the workforce); *see* Laclede Gas Co., 187 N.L.R.B. 243 (1970). *Laclede Gas Co.* involved an employer and union who had a long bargaining relationship. *Id.* at 244. However, at the time the parties were negotiating a new contract, prior to the termination of the current contract, the employer, in anticipation of a strike, began to consolidate its street crews. *Id.* Accordingly, after the contract expired, it made temporary reassignments of some of its employees so that it could complete a job assignment before the expiration date with as little excavation exposed as possible. *Id.* Subsequently, the employer and the union reached an impasse and all street department employees who were working on construction crews were locked out, while employees engaged in other work elsewhere were not. *Id.* No allegations, nor any evidence, of unlawful motivation in its selection of which employees to lockout was found. *Id.*
108. *See Laclede Gas Co.*, 187 N.L.R.B. at 244. The Board found a partial lockout

unionism."[109] In such instances, a partial lockout is deemed discriminatory, and thus an unfair labor practice.[110] The Board, however, muddied the waters regarding the legality of partial lockouts in a pair of cases decided in 2004.[111]

A. Midwest Generation *and* Bunting Bearings*: The Board Decisions that Nearly Re-shaped the Partial Lockout Doctrine*

The *Midwest Generation* saga begins just like every other case mentioned within this Comment—with the employer and the union meeting to negotiate a new collective-bargaining agreement.[112] In *Midwest*, after a month of negotiating, the parties had yet to reach an agreement.[113] Subsequently, the union commenced a strike in support of its bargaining position.[114] Approximately 1150 employees participated in the strike, and eight employees continued working.[115] After a month of striking, the union made an unconditional offer to return to work because it had yet to reach on agreement with the employer.[116] The employer declined the offer and instituted a lockout of all employees who were on strike.[117] In a letter to the union, the employer indicated that it "will not allow striking employees to return to work until a new contract is agreed to. . . ."[118] The letter also stated that the employees who returned to work prior to the date of the union's offer to return would be allowed to continue to work.[119] Thereafter, the union filed charges with the Board alleging that the employer's use of a partial

lawful where it "was motivated by a desire . . . to protect the [employer] from over-extending itself at a critical moment." *Id.* Given the circumstances, there was no interference with employees' rights. *Id. See also* Bali Blinds Midwest, 292 N.L.R.B. 243 (1989) (holding an employer's partial lockout lawful where its selection of which employees to layoff, i.e., lockout, was not based on whether to layoff strikers or non-strikers).

109. *See* Textile Workers Union of Am. v. Darlington Mfg. Co., 380 U.S. 263, 275 (1965) ("[A] partial closing is an unfair labor practice under [§] 8(a)(3) if motivated by a purpose to chill unionism. . . .").

110. *Id.*

111. *See Midwest Generation*, 343 N.L.R.B. 69 (2004); *Bunting Bearings Corp.*, 343 N.L.R.B. 479 (2004).

112. *Midwest Generation*, 343 N.L.R.B. at 69.

113. *Id.*

114. *Id.* at 69.

115. *Id.*

116. *Id.* Between June 28 and August 31, 2001, approximately 47 employees offered to return to work and the employer accepted them back without regard to their union membership (these employers are hereafter referred to as crossover employees). *Id.*

117. *Midwest Generation*, 343 N.L.R.B. at 70.

118. *Id.*

119. *Id.* Eventually a new collective-bargaining agreement was reached between the parties and the employer ended the lockout. *Id.* at 70. All locked out employees who opted to do so, returned to work. *Id.*

lockout violated §§ 8(a)(1) and (3) of the NLRA.[120]

In *Bunting Bearings*, an employer and union were parties to a collective bargaining agreement.[121] The existing collective bargaining agreement required newly hired employees to serve a ninety-day probationary period after which they were required to join the union.[122] With the existing contract set to expire, the employer and union commenced negotiations.[123] After negotiations continued for almost a month without any terms for a new agreement in place, an impasse had been reached.[124] Thereafter, the employer submitted its final offer, which the union rejected.[125] The next day, the employer locked out the non-probationary employees while continuing its operation with the probationary employees, supervisors, and employees from other plants.[126] Following the termination of the lockout, the union filed a complaint with the Board alleging that the employer violated §§ 8(a)(1) and (3) of the NLRA.[127] The union asserted that the employer violated the NLRA by implementing a partial lockout of the non-probationary employees, who were also union members, but not probationary employees, who were not union members.[128]

The Board in *Bunting Bearings* concluded that employer was legally justified in locking out the non-probationary employees because it was necessary in order to sustain business operations.[129] Similarly, in *Midwest Generation*, the Board held that the employer's partial lockout was fair because it was not motivated by antiunion animus.[130]

B. Midwest Generation *and* Bunting Bearings *Are Inconsistent with Precedent*

Although significant deference is ordinarily given to the Board in fashioning remedies for violations of the NLRA, a decision cannot be upheld when it is arbitrary and capricious,[131] unsupported by the facts,[132]

120. *See id.* at 70.
121. *Bunting Bearings Corp.*, 343 N.L.R.B. at 479.
122. *Id.* Probationary employees did not have seniority which limited their contractual rights. *Id.* Thus, the contractual provisions pertaining to the employer's selection of employee for layoff, recall, filling of vacancies, and shift preference did not apply to them. *Id.*
123. *Id.*
124. *Id.*
125. *Id.* at 479-80.
126. *Bunting Bearings Corp.*, 343 N.L.R.B. at 480.
127. *Id.*
128. *Id.*
129. *Id.* at 485.
130. *See Midwest Generation*, 343 N.L.R.B. at 72-73.
131. *See supra* Part II.D.
132. *See id.*

or inconsistent with controlling precedent.[133] In the sections that follow, observe how *Midwest Generation* and *Bunting Bearings* are at odds with existing case law.

1. *Bunting Bearings*: A Comparison of the Facts in *Schenk Packing Co*. and *Bunting Bearings*

In order to demonstrate the error in the Board's decision in *Bunting Bearings*, this Comment will first analogize the facts of that case to *Schenk Packing Co.*,[134] a case where the Board ruled that a partial lockout was unlawful.[135] To reiterate the facts of *Bunting Bearings*, this is the case where, in the midst of reaching a new collective bargaining agreement, and after a bargaining impasse had been reached, the employer locked out non-probationary employees who were also union members, but did not lockout probationary employees who were not union members.[136]

In *Schenk Packing Co.*, after the employer and union were unable to negotiate a new agreement, the employer initiated a partial lockout by laying off some of its employees but not others.[137] During the course of the partial lockout, the employer distributed a memorandum to employees expressly indicating that the lock out would affect all union members.[138] The memorandum also provided that non-union employees would be employed as replacements and that locked-out union employees would only be considered for reinstatement if they relinquished their union membership.[139]

Honoring its word, the employer initiated a lockout of all union employees,[140] causing ten union-employees to resign their union status; these employees were permitted to return to work.[141] The Board found

133. *United Steel, Paper and Forestry*, 2006 U.S. App. LEXIS 11221, at *5 (stating that a Board decision that conflicts with precedent is not entitled to deference).

134. Schenk Packing Co., 301 N.L.R.B. 487 (1991).

135. *Id.* at 488.

136. *Bunting Bearings Corp.*, 343 N.L.R.B. at 480.

137. *Schenk Packing Co.*, 301 N.L.R.B. at 487.

138. *Id.* at 488.

139. *Id.* The memorandum also stated:

> [I]t is important to understand that we cannot and are not by this letter encouraging you one way or the other with respect to resigning from the Union. . . . The question as to whether you remain members of the Union or resign is totally yours to make and we are not taking a position one way or another.

Id.

140. *Schenk Packing Co.*, 301 N.L.R.B. at 488.

141. *Id.*

the lockout unlawful.[142] The Board concluded that the "unstated purpose of the lockout" was to discourage union membership by denying employment to those who refused to renounce their status as union members.[143]

In comparing the facts of *Schenk Packing Co.* to *Bunting Bearings*, it is difficult to see how facts so similar could yield such opposite conclusions.[144] Although *Schenk Packing Co.* involved a more explicit form of antiunion animus, *i.e.*, a memorandum indicating the employer's intent to lock out only union employees, *Bunting Bearings* is far from indistinguishable.[145] In *Bunting Bearings*, the employer locked out non-probationary employees who, by *happenstance*, were also union members.[146] The employer did allow, however, probationary employees to work.[147] The common thread between the two cases is that in both cases, whether intended or not, the employer's conduct discouraged union membership. Bolstering the inherent error in the decision by the *Bunting Bearings* Board is that such conduct was red flagged by the Supreme Court in *Am. Ship Bldg.*[148]

In discussing the import of examining the employer's motivation for establishing its lockout, the *Am. Ship Bldg.* Court postulated as an unfair labor practice the situation when an employer locks out only union members, or employees simply because they were union members.[149]

Coincidentally, the situation that the Supreme Court classified as discriminatory in *Am. Ship Bldg.* is the same situation that was before the Board in *Bunting Bearings*.[150] Yet, the Board found that the employer in *Bunting Bearings* did not select who it would lockout on the basis of

142. *Id.*

143. *Id.* at 490.

144. *Compare Schenk Packing Co.*, 301 N.L.R.B. at 488 (holding that the lockout was unlawful), *with Bunting Bearings Corp.*, 343 N.L.R.B. at 483 (holding that the partial lockout union members was legally justified).

145. *See Schenk Packing Co.* 301 N.L.R.B. at 488.

146. *Bunting Bearings Corp.*, 343 N.L.R.B. at 480.

147. *Id.*

148. *See Am. Ship Bldg.*, 380 U.S. at 312.

149. *See id.* In distinguishing the facts of *Am. Ship Bldg.* from circumstances where the partial lockout would be unlawful, the Court stated:

> The purpose and effect of the lockout were only to bring pressure upon the union. . . . [I]t does not appear that the natural tendency of the lockout is severely to discourage union membership while serving no significant employer interest. . . . [Additionally], [t]here is no claim that the employer locked out only union members, or locked out any employee simply because he was a union member; nor is it alleged that the employer conditioned rehiring upon resignation from the union.

Id.

150. *See Schenk Packing Co.*, 301 N.L.R.B. at 491.

union membership;[151] rather, the Board based its holding on the distinction between probationary employees and non-probationary employees.[152] Conversely, as pointed out by the dissent in *Bunting Bearings*, "the obvious basis for deciding which bargaining-unit employees were locked out was union-membership status. Every non-probationary employee, and thus every union member, was locked out. Every probationary employee . . . whom the [e]mployer believed to be [a non-union member] . . . [was] instructed to report to work."[153]

In sum, the facts presented by both cases demonstrate an employer who indicated its intent to lockout only union members. The Board in *Schenk Packing Co.* concluded that the employer's conduct violated the NLRA because it discouraged union membership.[154] Thus, it logically follows that the Board in *Bunting Bearings* would conclude similarly. The Board, however, ruled to the contrary.[155]

2. *Midwest Generation*: A Comparison of the Facts in *Erie Resistor* and *Midwest Generation*

In switching the focus to *Midwest Generation*,[156] a close review of its facts will reveal a strikingly close resemblance to those presented in *Erie Resistor*.[157] In *Erie Resistor*, after the employer and the union were unable to reach an agreement on a successive contract, the union implemented a strike.[158] To counter the strike, the employer decided to use non-striking members in order to maintain its business production.[159] After doing such, the employer notified the union that it was going to give some form of super-seniority to replacements, but not to union members.[160] Following implementation of the plan, the strike collapsed.[161]

Thereafter, the union filed a charge with the Board alleging that awarding super-seniority status during the course of the strike constituted

151. *Bunting Bearings Corp.*, 343 N.L.R.B. at 480-81.
152. *Id.* at 481.
153. *Id.* at 485.
154. *See Schenk Packing Co.*, 301 N.L.R.B. at 488.
155. *See Bunting Bearings Corp.*, 343 N.L.R.B. at 480.
156. *Midwest Generation* was the case where the union initiated a strike in support of its bargaining position. *Midwest Generation*, 343 N.L.R.B. at 69. Subsequently, the employer expressed in a letter to the union that it was going to allow only non-striking employees to return to work but not striking employees. *Id.* at 70.
157. NLRB v. Erie Resistor, 373 U.S. 221 (1963).
158. *See id.* at 222.
159. *See id.* at 223.
160. *See id.*
161. *See id.* at 224.

an unfair labor practice.[162] The Board ruled in favor of the union, holding that the super-seniority award to temporary replacements, in this context, was an unfair labor practice.[163] The Third Circuit reversed the Board's holding.[164] The Supreme Court, however, agreed with the Board's finding that the employer's conduct was axiomatic and that "whatever the claimed overriding justification may be," it is discriminatory and it does discourage union membership.[165]

Despite the Board's expansive adjudicatory discretion, it is still bound by *stare decisis*.[166] Although "[s]tare decisis is not an inexorable command,"[167] the Board cannot depart from precedent "without some explanation of what it is doing and why."[168] With this in mind, the union in *Midwest Generation* thought it had a slam-dunk case. After all, note the extent to which facts of *Erie Resistor* and *Midwest Generation* are analogous.[169] The employer's conduct in both cases was detrimental to striking employees, yet benefited non-striking employees.[170] And both employers defended their actions by advancing *so-called* legitimate business justifications. In *Erie Resistor*, the employer asserted that it retained employees that would enable it to maintain its manufacturing plant; and in *Midwest Generation*, the employer asserted that it directed the lockout only at striking employees in order pressure them to abandon the Union's bargaining demands.[171] Despite the similarities between both cases, the Board in *Erie Resistor* concluded that the employer violated the Act;[172] yet, in *Midwest Generation*, the Board ruled that

162. *Erie Resistor*, 373 U.S. at 224.

163. *Id.* at 225.

164. *See* Int'l Union of Elec., Radio & Mach. Workers, Local 613 v. NLRB, 303 F.2d 359 (3d Cir. 1962).

165. *See Erie Resistor*, 373 U.S. at 228.

166. *See* Int'l Union, United Auto., Aerospace and Agric. Implement Workers of Am. v. NLRB, 802 F.2d 969, 974 (7th Cir. 1986).

167. Helvering v. Hallock, 309 U.S. 106, 119 (1940).

168. *See Int'l Union, United Auto., Aerospace and Agric. Implement Workers of Am.*, 802 F.2d at 974 ("[A]n administrative agency is not allowed to change direction without some explanation of what it is doing and why.").

169. For further discussion of Erie Resistor, *see* 3-20 National Labor Relations Act: Law & Practice § 20.03 at 19 (LEXIS 2006).

170. *Compare* Erie *Resistor*, 373 U.S. at 223 (noting that it was going to give some form of super-seniority to replacements, but not union members), *with Midwest Generation*, 343 N.L.R.B. at 70 (stating in a letter to the union that it was going to allow only non-striking employees to return to work but not striking employees). *See* National Labor Relations Act, *supra* note 169, at 19 (LEXIS 2006).

171. C*ompare Erie Resistor*, 373 U.S. at 226-27 (insisting that its overriding purpose was to keep its plant open and that business necessity justified its conduct), *with Midwest Generation*, 343 N.L.R.B. at 70 (explaining that its lockout was in furtherance of securing its lawful bargaining proposals).

172. *See* Erie Resistor, 373 U.S. at 225.

there had been no violation.[173]

3. *Midwest Generation*: A Comparison of the Facts in *Allen Storage & Moving Co*. and *Midwest Generation*

In *Allen Storage & Moving Co.*,[174] union employees instituted a strike after the employer and union could not agree to terms of a new contract.[175] Only one union member refused to strike, and the employer allowed him to continue working.[176] Subsequently, the union filed for alleged violations of §§ 8(a)(1) and (3).[177] The Administrative Law Judge (ALJ) found the evidence conclusive that by permitting one union employee, who had not participated in the strike, to continue working, while banning all other strikers,[178] the employer's lockout was motivated by an unlawful discriminatory purpose.[179] The Board adopted and affirmed the ALJ's reasoning.[180]

"The obligation to follow precedent begins with necessity. . . . No judicial system could do society's work if it eyed each issue afresh in every case that raised it."[181] In other words, tribunals are obligated to use prior holdings to decide similar issues. That said, how does one reconcile the holdings in *Allen Storage* and *Midwest Generation*? While the Board in *Allen Storage* held that the employer's conduct was driven by an unlawful discriminatory intent, the *Midwest Generation* Board concluded to the contrary.[182]

Recall that *Midwest Generation* is the case where the employer allowed all non-striking employees, and all striking employees who stopped striking, to continue working during a lockout, but refused to allow striking employees to return work.[183] In identifying the similarities between both cases, both employers were engaged in futile collective bargaining.[184] In response to such futile bargaining efforts, the union in both cases instituted a strike in support of its bargaining position, a right

173. *See Midwest Generation*, 343 N.L.R.B. at 72-73.
174. Allen Storage & Moving Co., 342 N.L.R.B. No. 44 (July 16, 2004) (Westlaw).
175. *Id.* at 508.
176. *See id.*
177. *See id.* at 501.
178. *Id.* at 501.
179. *Allen Storage & Moving Co.*, 342 N.L.R.B. No. 44 at 501.
180. *Id.* at 516.
181. Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 854 (1992).
182. *See Midwest Generation*, 343 N.L.R.B. at 73 (refusing to make a finding that the employer's lockout was unlawfully motivated).
183. *Id.* at 70.
184. *Compare Allen Storage & Moving Co.*, 342 N.L.R.B. No. 44 at 506 (stating that a collective bargaining agreement had not been reached), *with Midwest Generation*, 343 N.L.R.B. at 70 (noting that as of Aug. 31, 2001, the employer and union had yet to reach an agreement).

that is granted under § 7 and protected by § 8 of the NLRA.[185] In both cases, the employer favorably treated the non-striking employees.[186] The Board in *Allen Storage* found the partial lockout unlawful because it was motivated by an unlawful discriminatory purpose.[187] Conversely, the Board in *Midwest Generation* found the partial lockout lawful despite an unlawful discriminatory purpose.[188]

Comparable to both *Midwest Generation* and *Allen Storage*, the General Counsel of the NLRB stated in an advisory letter that an employer committed an unfair labor practice when it locked out only former striking employees.[189] The General Counsel concluded that the partial lockout was discriminatorily motivated because it was not exercised in accord with business needs.[190] Furthermore, the General Counsel determined that the only basis the employer had for locking out the employees was because they had exercised their § 7 right to strike.[191]

Although *Midwest Generation and Bunting Bearings* were overturned, the purpose of this section was to illustrate the scrutiny under which partial lockouts have been reviewed in the past. The cases serve to identify the fine line between lawful and unlawful labor practices, especially when the employer uses the partial lockout. Consequently, by including this section, the employer is given examples of *what not to do* when executing a partial lockout. After reading the next section the employer will have an idea of *what to do* when using a partial lockout and an economic weapon.

C. Lawful Partial Lockouts

By now, the employer is probably questioning the lawfulness of the partial lockout and when can it be used without violating the NLRA.

185. *Compare Allen Storage & Moving Co.*, 342 N.L.R.B. No. 44 at 508 (stating that after giving notice of intention to strike the strike commenced), *with Midwest Generation*, 343 N.L.R.B. at 69 (stating that the union commenced a strike in support of its bargaining position).

186. *Compare Allen Storage & Moving Co.*, 342 N.L.R.B. No. 44 at 508 (noting that one employee was the only union employee who did not participate in the strike and the only union employee whom the employer did not include in the lockout), *with Midwest Generation*, 343 N.L.R.B. at 70 (noting that the employer instituted a lockout of only those individuals on strike).

187. *See Allen Storage & Moving Co.*, 342 N.L.R.B. No. 44 at 516; *see also* McGwier Co., Inc., 204 N.L.R.B. 492, 496 (1973) (affirming the ALJ's conclusion that an employer had discriminated against employees for striking, in violation of § 8(a)(1) and (3), where the employer locked out only those employees who joined the strike).

188. *See Midwest Generation*, 343 N.L.R.B. at 712-13.

189. Gainey Ceramics, Inc., 1993 WL 735833, at *2 (N.L.R.B.G.C. February 5, 1993) (Advisory Memorandum).

190. *Id.*

191. *Id.*

According to Developing Labor Law's 2006 Midwinter Meeting of the Committee on the Development of the Law under the NLRA, partial lockouts must be considered with two major guidelines in mind: (1) First, an employer will usually be required to show that it has a legitimate reason for the lockout; and (2) the purpose of locking out union employees cannot be driven by anti-union animus nor can it be an act of retaliation against union employees for engaging in protected activities.[192] Furthermore, the Board has validated partial lockouts in instances where evidence demonstrates that an employer is using the partial lockout to protect itself in areas with strike sensitive employees, and not to undermine the union.[193] The authority for the legality of the latter partial lockout is found in *Bali Blinds*.

In anticipation of a repetition of a prior strike, the employer in *Bali Blinds* partially locked out certain employees in strike sensitive positions but did not lockout employees in less vulnerable areas.[194] The employer asserted that by locking out certain employees, it was able to reduce the workforce to a stable and operable condition while maintaining its business production.[195] The Board held this to be a valid partial lockout.[196]

In adopting the ALJ's reasoning, and relying on *Am. Ship Bldg.*, the Board concluded that the partial lockout was lawful because the employer had a substantial and legitimate business justification sufficient to demonstrate its actions were in furtherance of an economic objective.[197]

Similar to *Bali Blinds*, in *Laclede Gas Co.*, in anticipating the chance of a strike after the current collective bargaining agreement expired, the employer began to consolidate some of its employees and temporarily reassign its personnel in order to complete construction jobs and reduce public hazards.[198] Consequently, the employer locked out

192. LOUISE A. FERNANDEZ, DEVELOPING LABOR LAW: 2006 MIDWINTER MEETING OF THE COMMITTEE ON THE DEVELOPMENT OF THE LAW UNDER THE NLRA, Feb. 27, 2006, www.bna.com/bnabooks/ababna/nlra/2006/fernandez.pdf.

193. *See generally Laclede Gas Co.*, 187 N.L.R.B. 243; *Bali Blinds Midwest*, 292 N.L.R.B. 243.

194. *Bali Blinds Midwest*, 292 N.L.R.B. at 246.

195. *Id.*

196. *See id.*

197. *Id.* at 244 (stating that the employer's economic justification for the lockout of some employees and not others was based on a reasonable fear of recurring strikes that would disrupt its production and delivery schedules to the extent that the employer would face a serious loss of customers).

198. *Laclede Gas Co.*, 187 N.L.R.B. at 243. *See also* Wayne Distributing Co. 1988 WL 228528, at *2 (N.L.R.B.G.C. April 28, 1988) (Advisory Memorandum) (applying the principles from *Laclede Gas Co.*, a partial lockout is lawful where there is a lack of evidence to prove that an unlawful motive for allowing some but not all of its employees

some employees while allowing others to work.[199] The Board found the lockout lawful because evidence was lacking that the employer's selection of employees was driven by unlawful motivation.[200] The Board concluded that the lock out of some employees but not others was "necessitated by the exigencies of the business operation" and was motivated by a desire to protect itself from over-extending itself at a critical moment.[201]

In sum, a review of the foregoing cases demonstrates several points. Among them is the limited scope of the partial lockout; this is readily shown by the paucity of cases that have found the partial lockout lawful.[202] Also apparent is that in both *Bali Blinds* and *Laclede Gas*, the employer used its business judgment to assess who it would retain and who it would lockout;[203] and perhaps most important, in both cases the Board was unable to find any evidence of discriminatory conduct toward union members.[204]

D. Expansion of the Partial Lockout Doctrine

Absent the reversal of *Midwest Generation* and *Bunting Bearings*, the countervailing economic weapons split between the employer and employee would have tipped in favor of the employer. As noted above, an employer engages in a partial lockout when it locks out some but not all of its employees in support of its bargaining position.[205] Partial

to work during the lockout).

199. *See Laclede Gas Co.*, 187 N.L.R.B. at 243.

200. *Id.* at 243-44.

201. *Id.* at 243.

202. *See Bali Blinds Midwest*, 292 N.L.R.B. at 246; *Laclede Gas Co.*, 187 N.L.R.B. at 243-44.

203. *See Bali Blinds Midwest*, 292 N.L.R.B. at 246 (stating that it was the employer's position to temporarily reduce the workforce to a stable base that would enable the company to continue production and delivery); *Laclede Gas Co.*, 187 N.L.R.B. at 244 (noting that the layoffs were based solely on the [employer's] work assignment at the time).

204. *See Bali Blinds Midwest*, 292 N.L.R.B. at 246 (stating that the employer's method of selection was nondiscriminatory); *Laclede Gas Co.*, 187 N.L.R.B. at 244 (noting that the layoffs were without regard to union membership status of any individual). One commentator observed that the Board's decisions in *Midwest Generation* and *Bunting Bearings* indicate that, despite what the evidence may or may not show, the Board has a propensity "to find that lockouts generally have only a comparatively slight impact on protected rights absent specific proof of anti-union animus." Melinda S. Hensel, *"If I Only Had a Heard. . . ." How Many of My Employees Would I Lock Out? The Board's Heartless Attack on the Fundamental Section 7 Rights to Engage in Protected Concerted Activity*, 2006 MID-WINTER MEETING ON THE DEVELOPMENT OF THE LAW UNDER THE NATIONAL LABOR RELATIONS ACT 17.

205. *See* GORMAN & FINKIN, *supra* note 56, at 490 (during negotiations, in an effort to exert pressure on the union while at the same time maintain plant operation, an employer might choose to lock out part of the workforce).

lockouts are lawful unless an employer engages in the conduct in order to chill unionism, in which case a partial lockout is deemed a discriminatory, unfair labor practice.[206]

Based upon the forgoing case law, courts have upheld lawful partial lockouts in situations where the employer anticipated a strike or had a legitimate business justification, such as maintaining business operations.[207] The Board decisions in *Midwest Generation* and *Bunting Bearings*, however, would have effectively broadened both the circumstances in which an employer may rationally resort to a partial lockout and the conduct employers may engage in when instituting a partial lockout.[208] For example, in order to show how the *Bunting Bearings* decision has expanded the partial lockout application, refer back to *Bali Blinds* and *Laclede Gas Co.* In *Bali Blinds*, the employer's partial lockout was justified because there was evidence that it ensured that repeated work stoppages would not delay production and would not result in a loss of customers.[209] Similarly, in *Laclede Gas Co.*, the Board found that the need to ensure continuing business operations and avoid public hazards justified the employer's partial lockout.[210] In *Bunting Bearings*, however, the employer asserted that retaining the probationary employees was necessary in order to maintain its business, but failed to substantiate its assertion with any evidence.[211] In fact, by selecting probationary employees over non-probationary employees, the employer chose the least-trained workers;[212] therefore, the only basis for its selection of who to lockout, *i.e.*, non-probationary employees (or union members), was instigated by antiunion animus rather than by business exigencies.[213] Consequently, if the federal appellate court failed to overturn *Bunting Bearings*, the Board would have extended the utility of the lockout beyond a "specialized need to maintain business operation."[214]

Another ramification of the Board's holdings in *Midwest Generation* and *Bunting Bearings* is that the partial lockout would have

206. *See Textile Workers Union of Am.*, 380 U.S. at 275 (stating that a partial closing is an unfair labor practice under 8(a)(3) if motivated by a purpose to chill unionism).

207. *See generally Bali Blinds*, 292 N.L.R.B. 243; *Laclede Gas Co.*, 187 N.L.R.B. 243.

208. Ellen Dannin, *Expanding the Partial Lockout*, LABOR AND THE LAW: NEWS AND CURRENT EVENTS FROM THE IRRA SECTION ON LABOR AND EMPLOYMENT LAW, Nov. 2004, *available at* http://www.lera.uiuc.edu/Pubs/newsletters/LELNewsletters/2004/2004-11.htm.

209. *Bali Blinds*, 292 N.L.R.B. at 246-47.

210. *See Laclede Gas Co.*, 187 N.L.R.B. at 243-44.

211. *Bunting Bearings Corp.*, 343 N.L.R.B. at 486.

212. *See id.* at 486.

213. *See id.*

214. *See* Dannin, *supra* note 208.

been shifted to the status of a standard, rather than special, economic weapon that can be prompted whenever employees vote against an employer's offer for a new contract.[215] Notably, this expansion would have prompted an imbalance in the quasi-equal bargaining power between the employer and labor union in favor of employers; it would have allowed the employer to use the partial lockout as a bargaining weapon, while partial strikes would have long been a forbidden economic weapon for union employees.[216]

A partial strike occurs when employees attempt to simultaneously work and strike as a means of applying economic pressure on their employer.[217] Courts have found that employees perform a partial strike by, for instance, refusing to work overtime[218] or accepting some tasks and refusing to perform others.[219] A partial strike is not protected by the Act; therefore, an employer may punish its employees for engaging in this type of conduct without violating the Act.[220]

Consequently, if the decisions in *Bunting Bearings* and *Midwest Generation* were to stand, and the expansion of the partial lockout were valid, Congress would be obliged to reconsider the legality of the partial strike because courts have often used one party's rights to use economic weapons to determine the rights of the other party.[221]

215. *See Local 15, Int'l Bhd. of Elec. Workers*, 429 F.3d at 661 ("Under the Board's analysis, an employer could choose to lock out union leaders or only employees it believes voted against a proposed contract."); *see also* Dannin, *supra* note 208.

216. *See* Dannin, *supra* note 208; *see also* Vencare Ancillary Serv., Inc., v. NLRB, 353 F.3d 318, 323-24 (6th Cir. 2003) (acknowledging that the Board and courts have repeatedly condemned partial strikes); Audobon Health Care Ctr., 268 N.L.R.B. 135, 137 (1983) ("While employees may protest and ultimately seek to change any term or condition of their employment by striking or engaging in a work stoppage, the strike or stoppage must be complete, that is, the employees must withhold all their services from their employer [to be protected]."). For further discussion on the legality of the partial lockout, *see* 2 THE DEVELOPING LABOR LAW, *supra* note 25, at 1486-90.

217. *See* NLRB v. Local Union No. 1229, 346 U.S. 464, 476 n. 12 (1953) ("An employee can not work and strike at the same time. He can not continue in his employment and openly or secretly refuse to do his work. He can not collect wages for his employment, and, at the same time, engage in activities to injure his or destroy his employer's business.").

218. *See, e.g.*, C.G. Conn, Ltd. v. NLRB, 108 F.2d 390 (7th Cir. 1939) (noting that employees' refusal to accept work overtime is not protected by the Act).

219. *See, e.g.*, Yale Univ., No. 34-CA-7347, 1997 N.L.R.B. LEXIS 619, at *38-41 (holding that performing some tasks while refusing to perform others is a partial strike that is unprotected by the Act).

220. *Blades Mfg. Corp.*, 344 F.2d at 1005 ("[Partial strikes] by the employees to exert pressure on the employer to accept the union's bargaining demands were unprotected concerted activities, and the employer was free to discharge the participating employees for their unlawful . . . tactics.").

221. *See Am. Ship Bldg.*, 380 U.S. at 316-17 ("[The primary purpose of the Act was to] redress the perceived imbalance of economic power between labor and management. . . ."). In order to reconcile the imbalance, the Act conferred certain

E. With Some Help from the Federal Circuit Courts, theLaw Regarding the Partial Lockout is Ascertainable.

Cognizant of the Board's arbitrary decisions in *Midwest Generation* and *Bunting Bearings*, circuit courts of appeal were left with only one choice: to reverse the Board's decisions.[222] Evident in the language of the Seventh Circuit's review of *Midwest Generation* is a level of urgency to return the partial lockout doctrine to its pre-*Midwest Generation* state.[223] Consequently, the Seventh Circuit's opinion was motivated by a concern that if the Board's decision in *Midwest Generation* were to stand, the partial lockout doctrine would suffer an expansion.[224] Absent a reversal by the Seventh Circuit, employers, acting under the facade of maintaining business operations, would have Board approval to engage in exactly the type of action Midwest undertook—punishing those who stood with the Union and rewarding those who did not.[225] Accordingly, the court was obliged to recoil the doctrine to its narrowly-construed state.[226]

Through the decisions in *Midwest Generation* and *Bunting Bearings*, the Board instituted a new standard for measuring the lawfulness of a partial lockout;[227] the Board, however, neglected to set forth any apparent limitations that would preclude the employer from exceeding the scope of its rights afforded by the NLRA.[228] Nevertheless, in reversing the Board's decision in *Midwest Generation*, the Seventh Circuit stated that when an employer engages in a partial lockout, it must provide a reason beyond economic effectiveness.[229] Also, in order to substantiate a partial lockout's lawfulness on the basis of operational

affirmative rights on employees and placed certain restrictions on the activities of employers. *Id.* Moreover, the Act protected employee organization by countervailing employee organization to the employers' bargaining power. *Id.*

222. *See Local 15, Int'l Bhd. of Elec. Workers*, 429 F.3d at 662; *United Steel, Paper and Forestry*, 2006 U.S. App. LEXIS 11221, at *5. In a brief opinion, the D.C. Circuit found that the Board's ruling in *Bunting Bearings Corp.* was at odds with precedent. Accordingly, the D.C. Circuit remanded the case back to the Board. *Id.*

223. *See Local 15, Int'l Bhd. of Elec. Workers*, 429 F.3d at 660 (discussing how the Board embarked on a new approach to reviewing the legality of lockouts).

224. *See id.* at 661 (noting that, under the Board's analysis, an employer could choose to lock out only union employees that it believes voted against a proposed contract).

225. *See id.* at 659.

226. *Local 15, Int'l Bhd. of Elec. Workers*, 429 F.3d at 662 (upholding that the Board's analysis in *Midwest Generation* would be in derogation of nearly four decades of employee protection).

227. *See id.* at 660 ("[U]nder the Board's analysis, an employer could choose to lockout only union leaders or only employees it believes voted against a proposed contract."). *Id.* at 661.

228. *See* 29 U.S.C. §§ 151-169 (2006).

229. *Id.*

need, "an employer must provide a reasonable basis for finding some employees necessary to continue . . . and others unnecessary."[230]

F. The Convenient Truth: The Guide to Implementing a Successful Partial Lockout

Having read the foregoing sections, the employer that negotiates with a labor union should be fully aware that union members who exercise their right to strike do not in any way disable the employer's right under the law to continue its business operations.[231] Since nothing in the law requires the employer to choose between conceding to the union and going out of business, the employer is guaranteed the right to continue to operate and do business inasmuch as the union is guaranteed the right to strike;[232] therefore, when the employer decides to use only some of its employees to maintain business, the employer should take several considerations into account.

First, the employer must be equipped to carry on business.[233] In other words, prior to implementing the partial lockout, the employer should consider in advance how, when, and where to store and secure certain supplies.[234] In addition, the employer should consider trivial, yet logistical matters, such as financial emergencies, transportation for personnel, and, in some instances, the season and weather.[235]

Second, the employer should prepare to step up production in advance of starting the partial lockout so that it can maximize its inventory.[236] Such a production increase will help the employer bridge the gap in production that will occur once the employer decides to implement the partial lockout.[237]

Third, the employer should give thorough consideration to which employees it intends to keep and which employees it intends to

230. *Id.* at 659.

231. *See* discussion *supra* Part II.E.

232. ROTHENBERG & SILVERMAN, *supra* note 61, at 239.

233. *See id.* at 245.

234. *See Duluth Bottling Ass'n*, 48 N.L.R.B. 1335 (discussing a lockout where an employer locked out it employees in anticipation of strike that would have caused spoilage of syrup to be used in the manufacture of soft drinks).

235. ROTHENBERG & SILVERMAN, *supra* note 61, at 247.

> The authors recall one such employer who had done a fantastic job of advance preparation. He was completely convinced that nothing had been overlooked . . . [until a] spell of freezing weather violently disabused him when the plant's fuel oil tanks ran dry, forcing a plant-shut down. . . .

Id.

236. *See id.* at 247.

237. *See id.*

lockout.[238] The employer would implement a much sounder partial lockout if it can rationally ascertain and justify which, and how many, employees it needs during the partial lockout in order to maintain its business operation.[239] The employer can do this by inquiring from the employees, in advance of the partial lockout, who would consider working during the lockout.

Finally, and perhaps more significant than the aforementioned considerations, is the notion that the employer must be able to supply a legitimate reason for retaining some employees and not others during the partial lockout.[240] Thus, in choosing its employees, the employer should be cognizant of the type of actions that may propel its conduct into the realm of an unfair labor practice.[241] Stated differently, under no circumstances should the employer discriminate or make threats of discrimination against employees exercising their § 7 rights;[242] nor should the employer determine the workers it will employ during the partial lockout on the basis of union membership.[243] Any of these acts would convert an otherwise lawful "partial lockout" into an unfair labor practice with a possibility of all of the consequences attaching thereto.[244]

IV. Conclusion

The National Labor Relations Act is the median between the parties to collective bargaining.[245] Thus an employer's right to lockout is a corollary of the union's right to strike.[246] The Act's only limitation on both parties is that the weapons must be used for legitimate bargaining

238. *See id.* at 252.

239. ROTHENBERG & SILVERMAN, *supra* note 61, at 253.

240. *See Local 15, Int'l Bhd. of Elec. Workers*, 429 F.3d at 659 ("[When implementing a partial lockout,] an employer must provide a reasonable basis for finding some employees necessary to continue and operations and others unnecessary.").

241. ROTHENBERG & SILVERMAN, *supra* note 61, at 254 ("[T]here are several cautions which should be . . . observed: (1) no discrimination or threats of discrimination of any kind should be visited or made against the strikers; nor should there by any "coercion" or an "interference" of any kind. . . .").

242. *See* 29 U.S.C. § 157 (2006).

243. *See Local 15, Int'l Bhd. of Elec. Workers*, 429 F.3d at 661 ("Under the Board's analysis, an employer could choose to lockout only union [employees]. . . . This type of discrimination cannot be a legitimate and substantial business justification for a partial lockout."); *United Steel*, 2006 U.S. App. LEXIS 11221, at *4 (holding that a partial lockout is unlawful where there is a perfect correlation between union membership and which employees were locked out).

244. *See* NLRB v. Express Publ'g Co. 312 U.S. 426 (1941). Upon the finding of unfair labor practice, the Board is free to restrain the conduct and other like or related unlawful acts. *Id.* at 436. However, the breadth of the order must depend on the circumstances of each case. *Id.*

245. *See* 29 U.S.C. §§ 151-169.

246. *See* discussion *supra* Part II.E.

purposes.[247] For employers, that means that they may not use lockouts deliberately to steer employees from the union or to subvert employee rights procured by the NLRA.[248]

To the extent that the directives set forth in the Seventh Circuit's decision reversing *Midwest Generation* represent an accurate assessment of the law, those principles appear to establish the parameters regarding the partial lockout doctrine. And while partial lockouts are more risky than total lockouts, the future of the partial lockout as a lawful economic weapon in collective bargaining depends on how prepared employers are to face the challenges inventoried in this Comment.

Consequently, to keep from crossing the line into the unfair-labor-practice danger zone, employers should (1) not distinguish between union members and union non-members, (2) verify the partial lockout's reasonableness in the context of bargaining, and (3) clearly disclose its bargaining goals for the lockout.[249] While these guidelines do not guarantee the maintenance of a lawful partial lockout, they will help counteract any claim alleging an unfair labor practice pursuant to a partial lockout.

247. *See* Terry E. Thomason, *Court Upholds Employer Right to 'Lock Out' Employees During Bargaining*, PACIFIC EMPLOYMENT LAW LETTER, June 2000, *available at* 4 No. 12 SMPACEMPLL 1 (Westlaw).

248. *See* discussion *supra* Part III.C.

249. *See* Thomason, *supra* note 247.