Labor Law—An Employer Cannot Continue Business Operations by Hiring Temporary Employees During a Bargaining Lockout. *Inland Trucking Co. v. NLRB*, 440 F.2d 562 (7th Cir. 1971).

Petitioners in *Inland Trucking* were three ready-mix cement contractors. They negotiated in April 1968 with Teamsters Local #126 concerning their employees' contract due to expire on May 1, 1968. After a month of negotiating, an impasse was reached when the union rejected the contractors' final offer.[1] The contractors decided to engage in a bargaining lockout, and they notified their employees not to report for work after the expiration of the contract. The contractors continued partial operation of their businesses by utilizing management and temporary personnel to fill the positions of the locked-out union members.[2] The lockout proved unsatisfactory, however, and the contractors notified their employees that they would be re-instated if they returned to work on July 17. Most of the union members complied, but two days later the union walked out on strike.[3] The union then filed a complaint with the National Labor Relations Board (NLRB) charging the contractors with violations of sections 8(a)(1) and (3) of the Taft-Hartley Act.[4] The purported violations occurred when the contractors continued business operations during the bargaining lockout by hiring temporary non-union personnel. The NLRB held that this conduct violated the Act.[5]

The contractors appealed the NLRB decision to the Court of Appeals for the Seventh Circuit; they sought a "logical extension" of three existing boycott rules.[6] Briefly, these three rules are: (1) an employer can replace striking employees with temporary and permanent help; (2)

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1. Inland Trucking Co. v. Teamsters Local 126, 179 N.L.R.B. No. 56, 72 L.R.R.M. 1487, 1488 (1969).

2. *Id.*

3. *Id.*

4. The Labor-Management Relations Act (Taft-Hartley Act) § 8(a), 29 U.S.C. § 158(a) (1970) states:

> It shall be an unfair labor practice for an employer—
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> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section [7] . . .
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> . . . .
>
> (3) 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: . . . .

5. Inland Trucking Co. v. Teamsters Local 126, 179 N.L.R.B. No. 56, 72 L.R.R.M. 1487 (1969).

6. Inland Trucking Co. v. NLRB, 440 F.2d 562, 563-64 (7th Cir. 1971), *cert. denied*, ___ U.S. ___.

members of a multi-employer bargaining group can temporarily replace employees during a defensive lockout; and (3) an employer can engage in a bargaining lockout. The "logical extension" sought would create a fourth rule—an employer has the right to hire temporary employees during a *bargaining* lockout. The Seventh Circuit did not permit the extension.[7]

The rationale for the previous rules will be examined to determine whether the proposed fourth rule is indeed a "logical extension." The first rule was established in *NLRB v. Mackay Radio & Telegraph Co.*[8] where the Court held that an employer has the right to hire temporary and permanent employees to replace striking employees. Under the Taft-Hartley Act an employer cannot interfere with the employees' right to "engage in concerted activities for the purpose of collective bargaining."[9] But, "it does not follow that an employer . . . has lost the right to protect and continue his business by supplying places left vacant by strikers."[10]

Under the second rule, announced in *NLRB v. Brown*,[11] members of a multi-employer bargaining group have the right to hire temporary employees and to continue business operations during a defensive lockout.[12] In a highly competitive business a single employer is vulnerable in a strike situation. He cannot afford to be closed by a strike while his competitors continue to operate because the loss of steady customers would destroy his business. Thus, if attacked separately, a single employer would probably yield to the union.[13] In order to prevent this result and to provide a united front while bargaining with a union, employers form multi-employer bargaining groups. They agree that if one employer is struck the other employers will lockout. Difficulties arose, however, because *Mackay Radio* had held that the struck employer could continue business operations by replacing the striking employees with temporary help. The unstruck members of the bargaining group were not as willing to lockout if the struck employer could continue business while they could not. The effectiveness of the multi-

7. 440 F.2d at 564.

8. 304 U.S. 333 (1938).

9. Labor-Management Relations Act (Taft-Hartley Act) § 7, 29 U.S.C. § 157 (1970).

10. NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333, 345 (1938).

11. 380 U.S. 278 (1965).

12. Lockouts which occur in a bargaining context have been classified as "defensive" (to maintain the multi-employer bargaining group), "economic" (to avoid peculiar damage from strikes), or "bargaining" (to apply pressure in favor of employer's bargaining demands). Meltzer, *Lockouts Under the LMRA: New Shadows on an Old Terrain*, 28 U. CHI. L. REV. 614 (1961).

13. Bernhardt, *Lockouts: An Analysis of Board and Court Decisions Since Brown and American Ship*, 57 CORNELL L. REV. 211, 212 n.6 (1972).

employer bargaining group was thus destroyed unless all members had the right to hire temporary employees and continue business operations.[14] The Court therefore allowed temporary hiring as "part and parcel of respondents' defensive measure to preserve the multi-employer group in the face of a whipsaw strike."[15]

The third rule, established in *American Ship Building Co. v. NLRB*,[16] is that an employer may engage in a bargaining lockout.[17] The Court held that a lockout, in the absence of anti-union motivation, is not inherently destructive of employees' section 7 rights.[18] The Supreme Court seemed to recognize that the lockout and the strike are basically identical. The distinction is that a lockout is a work stoppage initiated by the employer, while a strike is a work stoppage initiated by the union. The lockout does not interfere with the union's right to strike since a work stoppage, which would have been the object of a strike, occurs during the lockout.[19] The lockout merely prevents the union from controlling the timing of the work stoppage.[20] As construed by the Court, the Taft-Hartley Act does not guarantee the union the right to control the strike's timing.[21]

Although the *American Ship Building* Court expressly refused to comment on the question of hiring during a bargaining lockout,[22] their reasoning at least hinted that this would be allowed. If a lockout and a

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14. NLRB v. Brown, 380 U.S. 278, 284-85 (1965).

15. *Id.* at 284. NLRB v. Truckdrivers Local 449, 353 U.S. 87 (1957) (popularly known as the *Buffalo Linen* case).

16. 380 U.S. 300 (1965).

17. A bargaining lockout occurs when an employer, in an effort to support his bargaining position, locks out his employees before they strike. *Supra* note 12.

18. American Ship Bldg. Co. v. NLRB, 380 U.S. 300, 309, 310, 318 (1965). The Labor-Management Relations Act (Taft-Hartley Act) § 7, 29 U.S.C. § 157 (1970), grants to employees the right, among others, to bargain collectively and to engage in other concerted activities for the purpose of collective bargaining.

19. The Supreme Court said:

> Insofar as this means that once employees are locked out, they are deprived of their right to call a strike against the employer because he is already shut down, the argument is wholly specious, for the work stoppage which would have been the object of the strike has in fact occurred.

American Ship Bldg. Co. v. NLRB, 380 U.S. 300, 310 (1965).

20. This point is illustrated in *Inland Trucking*. The lockout obviously did not interfere with the union's right to strike since, in fact, the union did strike after the lockout ended. Inland Trucking Co. v. Teamsters Local 126, 179 N.L.R.B. No. 56, 72 L.R.R.M. 1487, 1488 (1969).

21. American Ship Bldg. Co. v. NLRB, 380 U.S. 300, 310 (1965); International Molders Local 155 v. NLRB, 442 F.2d 742, 748 (D.C. Cir. 1971).

22. The court stated in a footnote, "[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 [during the bargaining lockout]." 380 U.S. at 308 n.8.

strike are essentially identical,[23] then logically the same rights would be present during either.[24] An employer should be able to replace locked-out employees with temporary personnel during a bargaining lockout just as *Mackay Radio* allows an employer to replace striking employees with temporary personnel.[25] The union is protected during either a strike or a lockout from employer interference (in the instant case, hiring by the employer) by the same Taft-Hartley safeguard—conduct prompted by anti-union sentiments is illegal.[26]

The combination of the *American Ship Building* and *Brown* decisions led several writers to the conclusion that the courts would allow an employer to continue business operations during a bargaining lockout by hiring temporary replacements for the locked-out employees.[27] In fact, the Ninth Circuit stated as dictum in *NLRB v. Golden State Bottling Co.*, a case involving a bargaining lockout, that "[t]he legal course open to [the employer] was to hire temporary replacements for the locked-out employees."[28] Nevertheless, when faced with the prob-

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23. For related discussion see text at note 15 *supra*.

24. Lev, *Suggestions to Management: The Lockout*, 19 LAB. L.J. 80, 109 (1968).

25. It is highly unlikely, however, that the courts would ever condone permanently replacing locked-out employees. This, in effect, would be firing employees for union activity, an action which is illegal. NLRB v. Strong, 393 U.S. 357, 362 (1969); NLRB v. Ra-Rich Mfg. Corp., 276 F.2d 451, 454 (2d Cir. 1960); NLRB v. Jamestown Sterling Corp., 211 F.2d 725, 726 (2d Cir. 1954).

In essence, this means that a full "logical extension" of the *Mackay Radio, Brown,* and *American Ship Building* rules should not be allowed. Theoretically, the full extension should be allowed. That is, if an employer should be able to replace locked-out employees with temporary personnel during a bargaining lockout just as *Mackay Radio* allows an employer to replace striking employees with temporary personnel (as argued in the text), then why not allow the employer to replace locked-out employees with permanent help just as *Mackay Radio* allows an employer to replace striking employees with permanent help. However, the employer's actions would still be subject to the "anti-union motivation" test. For related discussion see text at note 40 *infra*. The employer first must prove that the lockout was not prompted by anti-union sentiments. For related discussion see text at note 18 *supra*. Then the employer would have to prove that the hiring of *permanent* replacements was due to a legitimate business reason and not due to anti-union sentiments. If the employer passes the anti-unionism test, he should be allowed to hire the permanent replacements. Practically, however, it is extremely doubtful that the employer would ever be able to sustain his burden and so the full extension would never be realized.

26. The court in *American Ship Building* stated that, "[t]he central purpose of [the Taft-Hartley Act] was to protect employee self-organization and the process of collective bargaining from *disruptive interferences by employers*." 380 U.S. at 317 (emphasis added).

27. Lev, *supra* note 24, at 109; 54 GEO. L.J. 399 (1965); 44 TEXAS L. REV. 206 (1965).

28. 353 F.2d 667 (9th Cir. 1965). In *Golden State*, the employer was found guilty of violating sections 8(a)(1) and (2) of the Taft-Hartley Act. After an impasse in negotiations had been reached, the employer engaged in a lockout. The court held, citing *American Ship Building*, that the lockout did not violate the employees' rights. *Id.* at 669. The union then split into two groups due to internal problems. The employer advised one of the groups to elect new union officers and accept the new contract offer, which the union did. The court held that the employer violated sections 8(a)(1) and (2) by giving this advice. *Id.* at 670. The court stated that the employer should have left the union

lem, the *Inland Trucking* court did not follow the dictum in *Golden State*, although it does seem to be a logical extension of existing boycott law.

The weakness of the *Inland Trucking* decision is the court's rationale. The court recognized the admonition of the Supreme Court in *American Ship Building* that courts have no authority " 'to assess the relative economic power of the adversaries in the bargaining process and to deny weapons to one party or the other because of its assessment of that party's bargaining power.' "[29] The court maintained that they did have the power, however, to determine the scope of the employees' rights and whether the employer's activities interfered with those rights.[30] Allowing the employer to hire during a bargaining lockout would "permit the employer to impose on his employees the pressure of being out of work while obtaining for himself the returns of continued operation."[31] This "additional price" would cause the employer's activity to "conflict with the intended scope and content of [the collective bargaining] right, as protected in 29 U.S.C. § 157."[32] The court concluded that the employers' conduct was an interference *per se* with protected employee rights.[33]

In finding that the employers' conduct was a *per se* interference, the *Inland Trucking* court used the "inherently destructive" test.[34] Under that test, anti-union motivation need not be found if the employers' conduct is "inherently destructive" of employees' rights.[35] The

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alone, and, if he was intent on continuing business, hired temporary replacements for the locked-out employees. *Id.* at 670.

29. While the original admonition pertained to the National Labor Relations Board's authority, the Seventh Circuit felt that the restriction extended to them also. Inland Trucking Co. v. NLRB, 440 F.2d 562, 564 (7th Cir. 1971), *quoting from* American Ship Bldg. Co. v. NLRB, 380 U.S. 300, 317 (1965).

30. Inland Trucking Co. v. NLRB, 440 F.2d 562, 564 (7th Cir. 1971).

31. *Id.* The "inherently destructive" test used in *Inland Trucking* was obtained from NLRB v. Great Dane Trailers, Inc., 388 U.S. 26 (1967). International Molders Local 155 v. NLRB, 442 F.2d 742, 746 (D.C. Cir. 1971); NLRB v. Ayer Lar Sanitarium, 436 F.2d 45, 49 (9th Cir. 1970).

32. 440 F.2d at 564.

33. *Id.* at 565.

34. *Id.*

35. The *Inland Trucking* court stated the test as follows:

> First, if it can reasonably be concluded that the employer's discriminatory conduct was 'inherently destructive' of important employee rights, no proof of anti-union 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.

440 F.2d at 565, *quoting from* NLRB v. Great Dane Trailers, Inc., 388 U.S. 26, 34 (1967).

The *American Ship Building* decision was instrumental in the establishment of the anti-union motivation test. There the court said, "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 bargain-

Supreme Court has given no guidelines for determining what constitutes "inherently destructive" conduct. It is difficult to understand why allowing an employer to hire temporary help during a single employer lockout would be "inherently destructive" of employee rights. After all, a member of a multi-employer group may hire temporary help during a defensive lockout.[36] The difference in these situations cannot be, as suggested in *Inland Trucking*, that the employer takes the initiative in putting the employees out of work in the bargaining lockout and not in the defensive lockout.[37] In both the single employer lockout and the multi-employer group lockout it is the employer who decides to put the employees out of work. The employer has taken the initiative during the formation of the multi-employer bargaining group when he agrees to lockout in the event the union strikes another member of the group. He is obligated to lockout before the union has taken any action.

Furthermore, the pressure of watching an employer continue business during a bargaining lockout does not seem more "inherently destructive" of employee rights than the pressure of watching an employer continue business during a strike. Watching *permanent* replacements enjoy the fruits of continued business operations is not inherently destructive of the right to strike.[38] Neither should watching *temporary* replacements enjoy the fruits of continued business operations be inherently destructive of the right to collective bargaining.

Assuming that the "inherently destructive" test is inapplicable to the *Inland Trucking* problem, then the court should have used the "anti-

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ing." 380 U.S. at 308. It went on to say at 309:

> . . . 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.

All this indicates the importance the Court placed on a finding of anti-union motivation. In *Brown*, a case decided on the same day as *American Ship Building*, the Supreme Court also placed great importance on the "absence of evidentiary findings of hostile motive . . . ." 380 U.S. at 286. The combination of these two cases has led to the conclusion that the Supreme Court will continue to rely heavily on the anti-unionism test, provided that the conduct is not "inherently destructive." 54 GEO. L.J. 399, 404 (1965); 44 TEXAS L. REV. 206, 210-11 & n.41 (1965). NLRB v. Great Dane Trailers, Inc., 388 U.S. 26 (1967) strengthened that conclusion. For a recent discussion of *American Ship Building, Brown* and related cases see Bernhardt, *Lockouts: An Analysis of Board and Court Decisions Since Brown and American Ship*, 57 CORNELL L. REV. 211 (1972).

36. For the definition of "defensive lockout" see note 12 *supra*.

37. 440 F.2d at 564.

38. NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333, 345 (1938). For related discussion see text at note 8 *supra*.

union motivation" test to determine whether the employer could hire.[39] Under this test, action by an employer would not be illegal unless the motivating force behind the action was a desire to punish the employees for banding together for collective bargaining purposes.[40] The employer however must "come forward with evidence of legitimate and substantial business justifications for his conduct . . . ." before the anti-unionism test becomes applicable.[41] The *Inland Trucking* court, in dictum, found that the employers had not come forward with evidence of legitimate and substantial business justifications for their insistence on continued operation during the bargaining lockout.[42] The court should have based their decision on this failure of proof rather than deciding that the employer's conduct was a *per se* interference.[43] In the next case involving a question similar to *Inland Trucking*, if the employer shows a substantial business justification then the logical extension should be allowed and the decision should turn on the application of the anti-union motivation test.[44]

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39. The anti-union motivation test was stated in *Inland Trucking* as follows:

> [I]f the adverse effect of the discriminatory conduct on employee rights is 'comparatively slight,' an antiunion motivation must be proved to sustain the charge . . . .

440 F.2d at 565, *quoting from* NLRB v. Great Dane Trailers, Inc., 388 U.S. 26, 34 (1967). *Supra* note 35.

40. American Ship Bldg. Co. v. NLRB, 380 U.S. 300, 308-09 (1965).

41. NLRB v. Great Dane Trailers, Inc., 388 U.S. 26, 34 (1967), *quoted in* Inland Trucking Co. v. NLRB, 440 F.2d 562, 565 (7th Cir. 1971).

42. 440 F.2d at 565.

43. Admittedly, as Prof. Bernhardt states in his article, the Board is faced with problems however they resolve the issue. Bernhardt, *supra* note 35, at 249. Nevertheless, the *Inland Trucking* decision does not seem consonant with the trend of the Supreme Court's decisions. Lev, *supra* note 24, at 109.

44. Prof. Bernhardt in his article states:

> The language of *Inland Trucking* is sufficiently flexible to allow the use of temporary replacements in any situation where the Board regards the employer interest involved as sufficiently important to justify some damage to employee rights. Thus temporary replacements might be allowed where the employer had reason to fear a strike or was faced with unusual competitive pressures.

Bernhardt, *supra* note 35, at 229. While this writer does not agree that the language in *Inland Trucking* is flexible enough to allow Prof. Bernhardt's conclusion, his conclusion does seem correct.