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Economic Warfare in the 1980's, Strikes, Lockouts, Boycotts and Corporate Campaigns*

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I
PRESENTATION OF HAROLD DATZ

Thank you very much.

It has often been said that our system of free collective bargaining depends importantly on the freedom of parties to bargain and to use economic weapons in support of the bargaining positions that they take.1 In this fashion the collective bargaining process conforms to a free market system. The government merely tells the parties to bargain in good faith. However, the government cannot require a party to make any particular proposal or to make concessions, and it cannot forbid a party from using its economic muscle to obtain the best possible bargain.2 The theory is that the resulting collective bargaining agreement will reflect the relative economic strengths of the parties.3

The issue that I would like to discuss this afternoon is whether there are limits to the use of economic weaponry. That is, notwithstanding our

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2. National Labor Relations Act ("NLRA"), codified as amended at 29 U.S.C. 151-169 (1982). Section 8(d) of the NLRA specifies that the employers' and unions' obligation to bargain collectively "does not compel either party to agree to a proposal or require the making of a concession." Id. § 158(d).
system of free collective bargaining, are there some weapons that are prohibited by law? Before answering the question thus posed, it is well to review those weapons that parties are free to use.

The most traditional weapon is the strike. Notwithstanding the disruptive nature of a strike, the right to strike is sacred to labor, fundamental to a free society and an important protected right under the National Labor Relations Act. A single employee acting alone has little economic power vis-à-vis his employer. But all of the employees, concertedly withholding their labor to extract concessions from their employer, can have substantial economic power. Thus the strike is an important weapon.

An employer who is hit with the strike weapon can fight back, and under our system of free collective bargaining, it has a right to do so. The employer can hire permanent replacements for the strikers; the conditions of the marketplace will determine its capacity to obtain adequate replacements. If there is a plentiful labor supply, it can find those replacements, run the business, and continue making profits while the strikers are out of work. Ultimately strikers in this situation will come to heel and yield to the bargaining position of the employer.

On the other hand, if there is a scarcity of labor, the employer will not be able to find replacements to run its business, capital equipment will lie idle and customers will go elsewhere. In the meantime, due to the market of scarce labor the strikers will be able to find other work. Ultimately the employer will come to heel and yield to the union's bargaining demands.

In this fashion the economic battle is fought. Of course, in any battle, economic or otherwise, it is essential that each side keep its troops in line and discipline those that wish to stray. In a strike situation, the union must be able to keep the employees out on strike. If employees return to work in significant numbers the union's battle will be lost. A traditional measure to prevent this is for the union to fine or otherwise discipline members who wish to go back to work. The threat of a substantial fine is often sufficient to persuade union members to con-

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5. Employees striking to gain higher wages or more favorable employment terms (i.e., "economic" strikers) may be permanently replaced under NLRB v. Mackay Radio and Tel. Co., 304 U.S. 333 (1938), subject to the condition that replaced strikers be given hiring preference should a job opening occur. Laidlaw Corp., 171 N.L.R.B. 1366 (1968), enforced, 414 F.2d 99 (7th Cir. 1969), cert. denied, 397 U.S. 920 (1970). Strikers protesting unfair labor practices cannot be replaced permanently. Mastro Plastics Corp. v. NLRB, 350 U.S. 270 (1956).

6. Although § 8(b)(1)(A) of the Act, 29 U.S.C. § 158(b)(1)(A) (1982), prohibits unions from coercing employees in the exercise of their § 7 rights, including the right not to participate in a strike, that section's proviso, which allows unions to establish rules for retaining union membership, has been construed to permit unions to levy reasonable fines on members crossing picket lines. See NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175 (1967).
continue to support the strike. However, it is well settled that a union can only fine members for crossing the picket line and returning to work. Consequently, if a union member resigns from the union and then crosses the picket line, she can return to work with impunity, that is, she cannot be fined.

In an effort to avoid this scenario, unions developed the strategy of forbidding resignations just before and during a strike. The idea was to prevent the resignation and then fine members who crossed the picket line. However, it was alleged that unions could not lawfully do this, as such prohibitions constituted interference with the employee's statutory right to resign.

In a very significant recent case the Board agreed that a union could not prevent such resignations. Thus, as the law now stands, members can resign from the union and return to work during a strike, and they cannot be disciplined therefor. The union, other than using social pressures, can do nothing to prevent this. In a sense, the union has lost its ability to discipline its troops during an economic war with the employer. The union can use the strike weapon, but it may find that this weapon is a hollow stick.

Of course, to say that a union can strike is not to say that it can resort to strike violence. Clearly strike violence is an economic weapon that can be regulated and condemned as a matter of state and federal law. Indeed, at the federal level, we at the Board are often called in to seek injunctive relief under section 10(j) to halt such misconduct. In general, if state and local authorities are willing and able to control the situation, we usually decline to seek injunctive relief. If the contrary is true, we usually do seek such relief.

Strike misconduct is not only unlawful, it is unprotected. If a striker engages in serious acts of misconduct, the employer can lawfully decline to reinstate that employee. The issue through the years has been what constitutes serious misconduct. The prior Board held in general that mere words would not constitute serious misconduct, that is, if verbal threats or taunts were unaccompanied by physical acts or ges-

8. Id.
12. See infra note 13.
tures, the employer had to reinstate the employee.\textsuperscript{14} The misconduct was not of such a nature as to warrant the discharge of the employee.

In \textit{Clear Pine Mouldings},\textsuperscript{15} the current Board rejected the per se rule that words alone can never warrant a denial of reinstatement. The Board said that in some situations words alone can be coercive and intimidating. The Board applied the following test: if the misconduct is such that under the existing circumstances it may reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act, the employer can refuse to reinstate the offending employee.

On a related point, the prior Board sometimes balanced the extent of the employee's strike misconduct against the employer's conduct, if the employer's conduct was an unfair labor practice giving rise to the strike.\textsuperscript{16} If the employer's unlawful conduct giving rise to the strike was more egregious than the employee's misconduct, the employee's misconduct could not be used as a basis for refusing reinstatement. In \textit{Clear Pine Mouldings} the new Board has reversed this rule as well. It held that it will no longer engage in such balancing.\textsuperscript{17} If the employer's conduct is unlawful, it will be remedied under the National Labor Relations Act, but it cannot be used as a justification for employees to engage in their own misconduct.

Before leaving the topic of strikes I should mention that a union can waive its right to strike with a no-strike clause in the contract. The issue that sometimes arises is whether a no-strike clause covers sympathy strikes, that is, a union's refusal to cross another union's picket line. On the one hand, it can be argued that the no-strike clause in the contract simply means that the union will not strike with respect to disputes that it has with its employer. On the other hand, it could be argued that the phrase in the contract—"there shall be no strikes"—means precisely that: there shall be no strikes of any kind during the life of the contract. In a recent case, the Board has adopted the latter view.\textsuperscript{18} Thus, the Board will read a broad no-strike clause as applying to all strikes, including sympathy strikes, absent extrinsic evidence that the parties intended to permit sympathy strikes.

Having talked a little bit about strikes and sympathy strikes, let me now turn to employer weapons of economic warfare. I said before that an employer can defend against the strike by hiring any replacements it can find if the strike is for economic objectives. In addition, an employer can use offensive weapons of its own. For example, the employer can

\textsuperscript{14} See Georgia Kraft Co., Woodkraft Div. v. NLRB, 696 F.2d 931 (11th Cir. 1983).
\textsuperscript{15} 268 N.L.R.B. 1044 (1984).
\textsuperscript{17} 268 N.L.R.B. at 1047.
\textsuperscript{18} Indianapolis Power and Light Co., 273 N.L.R.B. 1715 (1985).
lock out employees in support of its bargaining position. In a situation where an employer has a busy season and a slow season, the employer could, for example, lock out during the slow season rather than risk a strike during the busy season. The hope is that the employees, deprived of work, will cave in before the busy season begins. However, in situations where there are no particular busy or slow seasons, the lockout itself may be an ineffective employer weapon. Although the lockout deprives employees of work, it also means that the employer cannot operate its business; the equipment lies idle and customers go elsewhere. Hence, employers sometimes resort to locking out and hiring temporary replacements. By doing this, the employer can bring pressure to bear on the employees and the employer can operate its business at the same time. There is a substantial question as to whether this is lawful.

Recently the Board held oral argument in a very important case involving precisely that point. An employer locked out its employees in support of a bargaining position taken in good faith and hired temporary replacements in an effort to pressure the union to accept the employer's bargaining proposals. The issue was whether that conduct, the lockout plus the hiring of replacements, was unlawful. The General Counsel argued before the Board that the employer's conduct was unlawful. I'd like to explain the rationale for the General Counsel's argument to the Board.

In formulating the General Counsel's position on this issue, it should be noted at the outset that the conduct was discriminatory, since the employer drew a line between the union employees who were pressing economic demands and the nonunion applicants from off the street, who were not pressing such demands. The employer refused to permit the former employees to work and allowed the latter employees to work in their stead. Since employees have a section 7 right to press economic demands, the employer was discriminating against employees for exercising a statutory right. However, the fact that conduct is discriminatory does not end the inquiry. Rather, in a very real sense, it only begins the inquiry.

The General Counsel's presentation addressed three major questions. The first question was whether the discriminatory conduct was motivated by a desire to undermine statutory rights. In our view, the evidence was insufficient to establish that the employer's conduct was motivated by a desire to undermine statutory rights. Rather, it appeared that the employer wanted to achieve a collective bargaining agreement

19. In American Ship Bldg. Co. v. NLRB, 380 U.S. 300 (1965), the Supreme Court found that an employer could lawfully lock out in support of a bargaining position after bargaining to impasse. It is generally held that the employer may lock out in support of the bargaining position even if there has been no impasse. See, e.g., Darling & Co., 171 N.L.R.B. 801 (1968).
20. Darling, 171 N.L.R.B. at 802-03.
with the union, albeit on the employer's terms. However, even if discriminatory conduct is not motivated by a desire to undermine statutory rights, it can nonetheless be unlawful, if the employer's conduct is "inherently destructive" of statutory rights.\textsuperscript{21}

Thus the second issue addressed by the General Counsel was whether the employer's conduct was inherently destructive of employee rights. We, that is, the Office of the General Counsel, concluded that it was not. The employees clearly understood that they could have their jobs back if the union would yield to the employer's bargaining position. Employees have a statutory right to press their demands, but they do not have a statutory right to achieve their demands.\textsuperscript{22} Thus the employer's conduct was not inherently destructive of statutory rights, which takes us to the third issue.

Even if the employer's conduct is not inherently destructive of employee rights, it can still be unlawful if it has some impact on statutory rights of employees and the employer has no legitimate and substantial business justification for its conduct.\textsuperscript{23} Hence, the third issue before the General Counsel was whether the employer's conduct was unlawful under this standard. The General Counsel concluded and argued to the Board that the employer's conduct under this standard was unlawful. The employer's conduct clearly had some impact on statutory rights. The employees perceived that they were not allowed to work while others were allowed to do so, and the sole difference between the two groups was that one was pressing economic demands, union demands, and the other was not. In addition, the employer had no legitimate and substantial business justification for its conduct. The employer's sole justification for its conduct was that it wanted to bring pressure to bear in support of its bargaining position. Although this may have been a legitimate business justification, it was not, in our view, a substantial business justification. To hold otherwise would mean that an employer would prevail upon the bare showing that its use of temporary replacements during a lockout was for the end of securing a favorable contract.

It is clear that the decided cases do not go this far. They require the employer to show a legitimate and substantial justification for its conduct. For example, in one case the employer prevailed by showing that its conduct was necessary to prevent a whipsaw strike from destroying the integrity of a multiemployer group.\textsuperscript{24} In other cases, the employer prevailed by showing that its conduct was necessary to prevent a strike

\begin{itemize}
  \item \textsuperscript{21} NLRB v. Great Dane Trailers, Inc., 388 U.S. 26, 34 (1967).
  \item \textsuperscript{22} See supra note 2.
  \item \textsuperscript{23} Great Dane, 388 U.S. at 34. See, e.g., Hess Oil Virgin Islands Corp., 205 N.L.R.B. 23 (1973); Ralston Purina Co., 204 N.L.R.B. 366 (1973).
  \item \textsuperscript{24} NLRB v. Brown Food Store, 380 U.S. 278 (1965).
\end{itemize}
from causing irreparable damage to the product or its business.\textsuperscript{25} In our case, the employer did not meet this burden and hence, in our view, its use of temporary replacements during a lockout was unlawful. We await the Board's decision in this very important case.\textsuperscript{26}

A related issue is whether an employer can use other economic weapons in support of its bargaining position. For example, if an employer threatened to reduce wages by a progressively greater amount each week until the employees agreed to the employer's contract proposal, would such action be unlawful? On the one hand, it can be argued that the employer is retaliating against employees simply because they are exercising their statutory right to press for a higher wage rate. On the other hand, it can be argued that if an employer can lock out its employees in support of its bargaining position, it can take the lesser step of cutting wages in support of its bargaining position. After all, in the latter situation, the employees are at least permitted to work.

Similarly, on the one hand, it can be argued that it simply isn't equitable to give the employer that much economic leverage. On the other hand, the Supreme Court has told the Board that it is not to be the arbiter of economic weapons.\textsuperscript{27} The Board is not to condemn a weapon simply because it gives one party too much bargaining leverage over the other.\textsuperscript{28}

I do not know the answer to the question thus posed. There is one case in which the Board suggests that such employer conduct would be unlawful.\textsuperscript{29} However that decision isn't clear and arguably runs afoul of the Supreme Court teaching that the Board is not to be the arbiter of the economic weapons of warfare. We shall have to await further developments on this important issue.

Let me turn now briefly to some nontraditional weapons that unions

\textsuperscript{25} See, e.g., Inter-Collegiate Press v. NLRB, 486 F.2d 837 (8th Cir. 1973).

\textsuperscript{26} Editor's Note: On June 24, 1986, the NLRB did issue a decision in this case, published at Harter Equip., Inc., 280 N.L.R.B. No. 71, 122 L.R.R.M. (BNA) 1219 (1986). The Board read American Ship Bldg. and Brown Food Store as allowing this single employer to hire temporary replacements during a lockout. In rejecting the General Counsel's argument, the Board majority suggested that the employer's use of temporary employees served the same purpose as the lockout, i.e., "bringing pressure to bear in support of a legitimate bargaining position." 280 N.L.R.B. at 3, 122 L.R.R.M. at 1222. In a vigorous dissent, Member Dennis criticized the majority's analysis of American Ship Bldg. and Brown Food Store as being overbroad. Member Dennis suggested that, rather than being a legitimate economic weapon, the use of temporary replacements during lockout without substantial business justification seriously undercuts employees' § 7 rights. Member Dennis noted that "when an employer not only locks out his employees, but remains in business using replacement personnel, the right to strike has been nullified under the Court's reasoning because no work stoppage has occurred." 280 N.L.R.B. at 16, 122 L.R.R.M. at 1224 (Dennis, Mbr., dissenting).

\textsuperscript{27} See Insurance Agents, 361 U.S. at 437.

\textsuperscript{28} Id. at 495-96.

use in economic warfare. I mentioned earlier that unions may be having some problems with the use of the strike weapon. In these economic times employers often have little difficulty in hiring replacements, and unions have lost the power to discipline their own people who may want to break the strike and return to work. In light of this, some unions have resorted to nontraditional weapons to wage the battle with the employer.

These nontraditional weapons sometimes involve neutral employers, employers who are not engaged in the labor dispute with the union. Under the secondary boycott provisions of the Act, there are restrictions on the use of economic power against neutral employers. Hence, there are statutory issues that arise concerning the union's use of nontraditional weapons.

Let us assume, for example, that a union has a bargaining dispute with Employer A. Rather clearly, the union could not picket a neutral supplier of A in order to force that supplier to cease doing business with A, the primary disputant. On the other hand, there are some actions that the union can take, vis-à-vis the neutral employer. For example, under the proviso to section 8(b)(4)(B), if a union has a dispute with a producer of goods, it can handbill a retail outlet that distributes the goods, asking for a complete boycott of the retail outlet that handles the primary product. But, if there is no producer-distributor relationship between the primary disputant and the neutral employer, the union may not be able to pressure the neutral. Thus, for example, the union may not be able to call for a consumer boycott of a bank in order to get the bank to cease loaning money to the primary employer. A closer issue in my judgment is whether the union could withdraw its own funds from the bank, or ask its members to withdraw their deposits, in order to get the bank to cease doing business with the primary employer.

Similar issues arise when a union seeks to bring pressure by picketing.
ing one company because one of the officers or one of the members of the board of directors of that company is an officer or director of the primary disputant. If the two employers, the picketed employer and the primary disputant, are otherwise separate employers under the Act—and that in itself can be a big question—there is a fair argument that the pressured company enjoys the status of a neutral employer, notwithstanding the fact that one of its officers or one of the members of its board sits on the board of directors or is an officer of the primary disputant. If the two employers are separate employers under the National Labor Relations Act, the union could not picket that employer simply because of the relationship at the top that it has with the primary employer.

These are very important issues. They concern our effort to find a balance between an unfettered free market system in which each party can use the full extent of its economic muscle to achieve its economic goals, on the one hand, and a system of full governmental control of the use of economic weaponry on the other. Somewhere there is a rational and reasonable middle ground. These cases I think reflect our society’s efforts to find it. I do not know how some of the cases will turn out. I would not be so presumptuous as to preach how they should come out. I only know that the resolution of these issues will affect all of us, the way in which we resolve our industrial disputes, and, in a larger sense, our values and goals as a society.

Thank you very much.

II

PRESENTATION OF LEO GEFFNER

It was certainly entertaining and interesting to hear the speakers talk earlier about the peaceful arrangements that are being worked out in some of our national industries. Also it's interesting to talk about some of the major problems hitting our economy and the effects of the labor movement: the shrinking union membership, the reevaluation by the AFL-CIO as to where it’s going in the future, the impact of imports, and the change of our economy from basic industry to service industries.

Most of us representing unions and employers, however, have to face the reality that there are still collective bargaining relationships in spite of the gloom and doom at the national level, and that the bargaining on occasion does fail and collapse, and we still have impasses and strikes. So what I’d like to do is get down to our level, and focus on dealing with one company on strike, or a series of companies or a multiemployer bargaining unit that is localized in one area.
There are several employer types that we from the union side consider when we evaluate our goals in a particular strike. First we have the employer and the union which have had a long-term relationship, where most of their contracts are settled peacefully. There's a live-and-let-live atmosphere that still exists between the employer and the union. And in this relationship every so often in prior days the union wanted increases; now the employer wants some concessions.

Next we have the situation which is becoming more and more common, where an employer looking at the example of the federal government in the PATCO strike and several other industries in the last few years, says, "Well, why do I really need a union? I think this union-free environment that I've been reading about makes a certain amount of sense. I think I'm going to get rid of the union no matter what the cost." In that case, the union has no real alternative. It has to dig the holes, get ready for the long siege and the long fight—which will undoubtedly be bloody and costly and which the union will probably lose in the long run—and hold itself with some sense of martyrdom as a consolation.

Most of our strikes, at least in my experience, are in the third category, the middle ground. This is the situation where the bargaining has broken down because the union wanted some increases because of an inflationary economy or because of improvements in conditions and the employer, because of competitive reasons or because of greed is looking for concessions. This kind of a strike will likely end in a settlement sooner or later with compromises on both sides. There was a school of thought for many years that there is some therapeutic value to having a strike. In our collective bargaining system, a strike is healthy in some respects, unlike the European labor movement system where workers go out on political strikes every month and march and demonstrate and then go back to work. We go through the process of having a short strike and then the hot heads on both sides cool down and the moderates take over and we have a settlement.

The union's weapon to win a strike, or at least to force sufficient compromises, goes back to the basic union slogan of one hundred years ago: "Shut the plant down, shut the place down." That's always been the key to winning a strike. Without that ability it's very difficult for a union to win a strike. That, of course, also depends upon what the employer plans and what its intentions may be in that strike situation.

It's always been my belief that, with very few exceptions, if an employer really wants to foot the bill and accept the costs of a strike, it will win virtually every strike. The employees can stay out just so long without a paycheck, so eventually the employer is going to have the upper hand. It's just a question of costs.
The permanent replacement problem is the most difficult one because where there are replacements the slogan "Shut the place down" is very difficult to accomplish. As an example, recently we had a strike involving a motion picture production crew. Most of them walked off on location. The employer was able to fly in replacements from all over the country and lost maybe a day or two of shooting production, and then was able to continue. It's very difficult for a union to win a strike under those circumstances.

Another example involved a company which was operating with nonunion actors. The Screen Actors' Guild was able to persuade the actors to leave the production right in the middle of production. Since it is very hard to substitute an actor right in the middle of a production—for example, difficult to find somebody to take the place of Sylvester Stallone right in the middle of production for Rocky V—the company signed the contract.

It is my feeling that the law has always been sort of a sideshow to the strike itself. The strike itself revolves around the economic issues, the bargaining, the ability to cost the employer a sufficient amount of money and shut the place down. In the last few years, however, the law appears to be occupying more and more of center stage. I think that is unfortunate because it takes the parties away from the real bargaining that should take place. For example, you've got Board decisions like *Clear Pine Mouldings*[^36] where an employer can fire a striker because of statements made on a picket line, behavior that's not going to affect significantly whether or not a strike is going to be won or lost; it's just an irritant and shows that the Board members have probably never viewed a picket line. If they had been in any picket line during any strike it's hard to see how they could ever come up with that kind of conclusion.

Another example of what I see happening was a large construction industry strike by the carpenters here several years ago. The employers became convinced that there would be an antitrust action because of the subcontracting clause that was involved[^37]. It kept NLRB Regions 21 and 31 very busy. They spent a lot of time in court on antitrust and kept the contractors away from the bargaining table for almost two months.

[^37]: By § 6 of the Clayton Act, labor organizations are normally exempt from federal antitrust laws unless acting in collusion with nonlabor groups. Allen Bradley Co. v. International Bhd. of Elec. Workers, Local 3, 325 U.S. 797 (1945). The exemption has been held inapplicable to union-employer collective bargaining agreements in which a general contractor agrees to subcontract work only to union firms. See Connell Constr. Inc. v. Plumbers & Steamfitters Local No. 100, 421 U.S. 616 (1975). While certain clauses within a multiemployer collective bargaining agreement in the construction industry may be protected by the § 8(e) proviso, that does not mean they are exempt from antitrust examination. See Sun-Land Nurseries Inc. v. Southern Cal. Dist. Council, 769 F.2d 1381, reh'g granted, 779 F.2d 1446 (9th Cir. 1985).
That two months' time was very precious time which the parties could have used to reach a settlement much sooner.

If the strike weapon is becoming less effective because of the ability of employers to obtain replacements, then obviously the unions are looking for alternative weapons. One weapon which is being used more and more is the consumer boycott. The history of the boycott is very strong in this country both within and without the labor movement. The civil rights movement in this country was built on boycotts. Some of the union movement was built on boycotts, for example, the very successful grape boycott by the farmworkers several years ago. The civil rights actions by the NAACP in the South ended up with some strong, effective boycotts. There have also been some very severe failures. It is difficult to say what the effect of boycotts will be over the long run, but the underlying theory is a good one.

The consumer boycott is a weapon that really operates on the same principle as television network polls. That is, if you can get the word out to enough people, by way of leaflets, by way of television ads, by way of newspapers, by way of any vehicle of communications known at the time, a certain percentage of the people will hear the message. There's a certain reservoir of people within this country who still have a feeling about the labor movement and will not buy from or patronize a nonunion establishment. If you can hit enough of those people it could make a substantial difference in the profit of the boycotted employer so as to cause the employer to be more compromising and realistic in the negotiations and settle the strike.

From the legal standpoint, the union has the right to engage in this type of consumer boycott under the first amendment. My favorite case is Cohen v. California, a 1971 United States Supreme Court case, in which the Court overruled a conviction of a student who walked around with a jacket during the 1960's that said "Fuck the Draft." The possibilities for use of that case are endless.

There are endless possibilities in terms of getting the message across by way of consumer boycott with the use of pamphlets even where the union can't picket. There are real problems in picketing because the line between a direct primary boycott and a secondary boycott is almost impossible to draw. The two become almost interchangeable from the union standpoint of getting a message to the consumer not to patronize or purchase a certain product. The problems of Tree Fruits and

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Safeco, which involved the question of when one may picket, become fairly limited. The use of pamphlets, advertising, television, radio, with the resources that are there can really be the only effective method of communication.

It is not clear what kind of impact the NLRB will have on the effectiveness of consumer boycotts. Let me take a few moments to go into more detail. In DeBartolo I, the construction unions were pamphleting a shopping center asking the public not to patronize any of the shops in the shopping center because one department store was constructed with nonunion labor. Contrary to the Board and the court of appeals, the Supreme Court ruled that the conduct was not protected by the publicity proviso of section 8(b)(4), which allows secondary advertising or a secondary boycott having to do with free speech and pamphlets, rather than picketing. The Court remanded the case to the NLRB on the theory that there was no connection between the stores in the shopping center that were not involved in the dispute and the one department store that was constructed nonunion. The producer-distributor connection of Servette was not present in that situation. The Supreme Court remanded to the Board to make a determination whether the pamphleting itself was in fact coercive, because unless you find it coercive under section 8(b)(4), you don’t even have to get down to the publicity proviso. The Board held that it was coercive and it’s been argued in the Eleventh Circuit and I don’t believe there’s been a decision yet.

Another case which is still in litigation is the Delta Airlines case on the use of pamphlets. Here a local union had a dispute with a nonunion maintenance company at the airport many years ago. The union put out a pamphlet all over the city and in front of the Delta offices downtown as well as the airport, describing the dispute with the maintenance company and objecting that Delta was using nonunion maintenance people. The backside of the pamphlet listed Delta safety violations which were taken from federal government records. The pamphlet was perfectly accurate and truthful.

The Board held that the union pamphleting was not protected by the proviso because the safety record of Delta had nothing to do with the primary dispute. The Board also had held that the section 8(b)(4) prohibition was presumptively constitutional. The Ninth Circuit remanded the action to the Board, appearing to uphold the Board’s interpretation of the proviso while asking the Board to make a determination as to

41. NLRB v. Retail Store Employees Union, Local 1001 (Safeco Title Ins. Co.), 447 U.S. 607 (1980).
42. 463 U.S. 147 (1983).
43. 377 U.S. 46 (1964).
44. Hospital & Serv. Employees Union (Delta Airlines) v. NLRB, 743 F.2d 1417 (9th Cir. 1984).
whether the pamphleting had been coercive. The Ninth Circuit did not resolve the constitutional question.

Demonstration is another weapon that is tied in with the use of a boycott and free speech. These weapons also raise the question of libel. Under Linn v. Plant Guard Workers Local 114, however, the standard for finding libel is very high. There has to be a reckless disregard of whether the items are true or false and knowledge of any falsity. You also have the question of attacking public figures and the whole problem of Sullivan v. New York Times in terms of the privilege and what is necessary to be proved in a libel case. I think as long as unions are generally truthful in the method of advertisement, there's no libel.

There's an attack being made on the whole concept of the consumer boycott and again, the employers keep bouncing back with the antitrust theory. The antitrust theory seems to have started against the unions back in 1890, and we've gone through the history of all the legislation including the Norris-La Guardia Act, where unions thought they got away from antitrust problems, then it keeps bouncing right back in our faces some eighty or ninety years later. Here it is again, because now employers are attacking the consumer boycott as being in violation of antitrust laws.

So far there have been a few cases involving the Coors boycott that have held it is not under antitrust and I think the courts probably will uphold the labor exemption that the unions enjoy, even in combination with nonunion groups—with the women's rights groups, with gay rights groups, and other political groups. Even in those situations the courts so far have upheld the labor exemption to the antitrust laws. That's a very important weapon and I think right now it may be one of the most important weapons that the union has in a strike.

Thank you.

45. Id. at 1428.
46. Id.
49. The Sherman Act, now codified at 15 U.S.C. §§ 1-7, was passed in 1890. Perhaps the most famous early case upholding an employer's cause of action alleging that a labor organization had engaged in Sherman Act conspiracy was the Danbury Hatters case, Loewe v. Lawlor, 208 U.S. 274 (1908).
50. Codified as amended at 29 U.S.C. §§ 101-115 (1982). Because the Norris-La Guardia Act prohibited federal courts from enjoining various kinds of labor organization conduct, the Act was also thought to limit unions' liability under antitrust laws.
53. See supra note 51.
54. See, e.g., NAACP v. Claiborne Hardware, 458 U.S. 886 (1982); Bodine Produce, Inc. v. UFW, 494 F.2d 541 (9th Cir. 1974).
Good afternoon, ladies and gentlemen.

How companies and unions get into strikes and how to avoid strikes is not within the scope of my portfolio this afternoon. So we begin with the fact that, for whatever reason, we have a strike. I've been asked to discuss certain topics—the decision to operate, the strike strategy, temporary and permanent replacements, lockouts, state court injunctions, union violence, strike settlement agreements. I will be speaking, of course, from the perspective of an employer representative in connection with this strike.

With respect to the decision to operate, my general rule is this: wherever possible, operate. An employer cannot win a strike while shut down. A shutdown is the object of the union's activity, and if you just shut your plant down or close your store you can't win. Your fixed costs continue.

As with other general propositions, there are exceptions to that. For example, you might have two napkin factories, one in California and the other in Utah. The workers at the California plant go out on strike, but you have excess capacity at your Utah plant and you could just as readily produce napkins in Utah and ship them here to California. In such a situation you might want to shut your California plant down. In some very, very special situations, you might not be able to obtain replacements or sufficient supervisory help to fill in. Apart from these very special situations, my unqualified opinion is that when you have a strike, you operate.

Operating in the face of the strike guarantees high tension, particularly as the strike goes on and the striking union employees see that their tactic isn't working, that there is no end in sight, and that others are crossing picket lines to do what the strikers consider to be their work. The employer who is going to operate in the face of a strike must confront what goes with it: violence, sabotage, and that type of thing.

I have a few observations to relate before I speak in terms of strike strategy. It has been said that a strike is the failure of the collective bargaining process. This isn't completely true. To a large extent, strikes are part and parcel of the collective bargaining process. That's not to say strikes are desirable, but they actually are a part of the process. If strikes didn't occur or if people didn't have reason to anticipate strikes, there would be no threat, there would be no heat, and serious bargaining probably would not take place. And that, of course, in negotiations is the function of the deadline, whether it is "no contract, no work," or whatever the deadline is.

There's another cliché that comes to mind which says, "No one wins
The cliché is only partly true. In a strike, unions, employers, employees, customers and the public perhaps suffer. Strikes disrupt the normal pattern of living, the normal pattern of business. They inflict great financial and also psychic damage on both employees and the employers of those employees. Nevertheless strikes do have winners and losers.

Yet another cliché comes to mind: "if the parties are at the table talking, a settlement will result." Again, that's not necessarily true. In fact, sometimes the best thing you can do in a bargaining situation is, in my opinion, to walk away and not meet with the union. I've been in situations where I've been compelled, for example, to continue meeting with the union when really I'd have preferred not to, not because the employers were weak, but because it sometimes sends the wrong signal to the union.

Prior to a strike, presumably the employer has anticipated the fact that there may be a strike, and the employer has done some preparation and some planning. That preparation and planning is often the very best guarantee that you won't have a strike. You prepare for a strike in the hope, of course, that it won't come about. You don't hire bargainers to get you into strikes, at least not normally. In some instances, preparation for a strike might be said to signal that the employer is looking for some kind of a confrontation. I don't give that notion much credence. An employer should prepare because it often helps prevent the strike. And if the strike occurs, the employer will be better able to handle it.

If the union sees that the employer is preparing for a strike, that it is doing the things that will put it in a position to continue to operate in the face of a work stoppage, then the employer's positions at the bargaining table are more credible. It is not sending wrong signals. If the employer is at the bargaining table and taking a very strong position either in resisting a union demand or, on the other hand, in pressing an employer demand, and if it is not preparing for a strike, the union can recognize that. In that case, the union may have some reasonable basis to doubt the employer's real resolve. So it may test the employer and then may find out it made a mistake.

In our law firm we have prepared and used for many years what we call "strike manuals." Those manuals are tailored to specific industries and types of employers. The particular strike manual I brought today relates to a multiemployer bargaining group and is some fifty pages in length. It covers the following topics: Individual Company Planning; Perishables Planning; Recruiting; Employee Communications; Employment Development Department; Mutual Aid (that's where you have more than one employer); Resignation from the Union; Union Fines and Supervisors; and Memoranda to Store Personnel. The manual is usually
a legal memorandum in simple form, setting out certain parameters with regard to things that might be anticipated to occur at the scene of the activity.

There is a section entitled "In Case Of," covering lockout instructions, lockout notices, and layoffs. There is also a discussion section devoted to strikebreakers, professional strikebreakers, labor code preemption, but not in any great detail. These are not legal manuals, but practical resources that can be of use to people who are on the front line.

Other sections include: Sympathy Strikers; Work Schedules; Arrests; Trespass. Employee Relations Matters addresses issues such as accrued vacation pay, health and welfare eligibility, fact gathering, record keeping, liaison with lawyers, employee communications, and so forth.

I only mention the manual because it illustrates the types of things that an employer has to consider when planning to deal with a strike, although not necessarily looking for one. The employer should also consider its relationship with suppliers and customers, arrangements for getting merchandise in and merchandise out. How will it continue to operate?

In addition to the items I mentioned, the employer has to be concerned with arranging for and training replacements. What use will it make of supervisory staff on hand? What about supervisors from other facilities? What about replacements and their use, depending, once again, on the circumstances? In some instances the employer may have roving teams to do specific jobs. Also, I presume you are all aware that the California Labor Code provides that when an employer is hiring strike replacements it must advise them of the existence of the labor dispute.55

Another major element in strike planning involves security. Usually security is a very big expense item. It's very important to have security in place when the strike starts in order to prevent damage and sabotage and to assist in the obtaining of evidence for court.

An employer should anticipate that if it is going to have a strike and is going to operate, then it is very likely going to need recourse to the courts, usually looking for injunctive relief.56 What it has to do in planning for that strike is train people to help gather evidence for court proceedings. It should tell them about photographs, and train them to do simple things like have cameras on hand, or arrange for video cameras, which in some instances can provide excellent evidence. Depending on

55. CAL. LAB. CODE § 973 (West 1985) states that a person who "advertises for, or seeks employees . . . to work . . . while a strike, lockout, or other trade dispute is still in active progress . . . shall plainly and explicitly mention in such advertisement . . . that a . . . labor disturbance exists."

56. In California, employers facing a strike may try to obtain a temporary restraining order under CAL. CIV. PRO. CODE § 527 (West 1985). CAL. CIV. PRO. CODE § 527.3 limits the cases in which courts may enjoin employee concerted activity.
the size of the situation, the employer may set up a central information collection and analysis facility.

Another element that the employer may have to consider in its planning is public relations. You could hold an entire session on whether PR does any good, but whether it does any good or not there are people who believe in it. Using it often means hiring a public relations firm.

Unions, in my experience, have pretty effective public relations people who are available to them in these situations. Unfortunately, it's very difficult to find a firm that really understands the collective bargaining process or the strike process and can, for want of a better term, "swing with it" for an employer. I've spent thirty years in collective bargaining and strike situations in numerous industries and have been involved with the selection of PR firms and the development of public relations programs in strike and bargaining situations, and I must confess that maybe we haven't done it right, but it has not always been the most happy experience. In any event, the employer has to do the best it can and there are some people with some education who will be able to help.

Suppose an employer has a strike, has done advance planning, is operating, and has replacements at work. With that scenario, it is almost inevitable that the employer is going to be in the state courthouse seeking an injunction to regulate violence or trespass or that type of thing.

Lawyers can also do a certain amount of advance work. What they do is dependent upon the magnitude of the situation. Let's assume that you've got a complicated situation, a situation where you want to be as pre-prepared as you possibly can be. If that's the case, the lawyers can engage in the advance preparation of pleadings. They can put together the names and addresses of union officers and officials to serve. They can get the proper names of parties, and the states of incorporation for corporations. They can prepare points and authorities. They can establish a law firm coordination center.

When the activity is taking place and it's appropriate to seek a restraining order, time is of the essence. You will often find that the employer or employers involved in the situation really do not understand the legal process. As lawyers we know how imperfect the legal process is, and we know that it is not a magic solution to every difficulty. The people you may represent, however, may not understand that. To them it's a very simple process. I mean, here's this chap out here who is beating up on this fellow who tried to cross the picket line and they just blew up a truck and a few other things like that, and why should there be any problem with getting an injunction? As the lawyer, you have to explain potential difficulties ahead of time, because you do not want people's expectations to be unreasonably high. Unless the employer involved is sophisticated, you should make some effort to explain the limitations of the
process in advance and discuss what's going to be involved in obtaining the relief that the employer wishes to obtain.

The type of injunction normally sought in the state court has to do with violence and related things like mass picketing. Upon obtaining an injunction, you must serve it. When you have large groups of people and a number of unions, that service matter has to be attended to immediately, and it can be somewhat involved. Service is not something you can turn your back on; you've got to see that it's done. Without service, you cannot pursue a contempt order, one of the avenues of enforcement of an injunction.

The jurisdiction of the Superior Court in California is statewide, but you may have to tell a judge someday, in seeking an injunction, that it is not limited to the particular county in which he sits and explain to him why that's the case. You may also have problems with service, and you've got to be set up so that you can duplicate. You may have enormous numbers of copies of pleadings and other documents. Also, you can't go to court without having your arrangements made for a bond. When you're seeking a temporary restraining order, it's discretionary with the court as to whether a bond is required, but it is almost always required in connection with the preliminary injunction.

When an injunction is issued and the order is served, sometimes it is absolutely ignored. Sometimes it brings about a significant degree of compliance. If the court order is ignored, you may institute a contempt proceeding, or get assistance from the police. There's a California Penal Code section which provides that willful disobedience of a court order is a misdemeanor. That provision, however, is almost a dead letter because the city attorneys will not enforce it, but I don't have time now to explain why that is so.

Your primary method of enforcement is contempt. Contempt is a quasi-criminal proceeding so you have to gather evidence. The affidavits that support it must be precisely, specifically and clearly drawn, just as the affidavits that support an application for a temporary restraining order have to be precisely drawn.

You'll run into a number of problems once you have your order. People involved may get confused because part of the order is the order to show cause and the other part is a temporary restraining order. These are just some of the problems that you may confront.

Now you may also be involved in NLRB proceedings. If there is a

57. CAL. PENAL CODE § 273.6 (West 1985).
58. See, e.g., McKay v. Retail Auto Salesman's Local 1067, 16 Cal. 2d 311, 106 P.2d 3773 (1940).
59. If the Regional Director believes that an unfair labor practice has been committed by the labor organization, she may petition the district court to enjoin the allegedly unlawful conduct under NLRA §§ 10(j). (t), 29 U.S.C. § 160(j). (t) (1982).
short strike, the NLRB proceedings usually don't do much in terms of bringing any pressure to bear on anybody. On the other hand, if there is a long strike then NLRB charges can become matters of very substantial magnitude.

The seminal case on temporary replacements is *Mackay Radio.* It actually had its factual inception shortly after the effective date of the Wagner Act. In *Mackay Radio* the Supreme Court established the right of employers to hire replacements. In the normal situation, you'll be hiring temporary replacements. When you hire permanent replacements, you do so because either you can't get people on any other basis, or you may be hunkering down for a long pull. Once you start hiring permanent replacements, you may have complicated your opportunities for settlement to some degree.

*Belknap v. Hale* is primarily a preemption case, but it is more than that. In *Belknap* the employer had hired permanent replacements, and the employer had emphasized and reemphasized to those replacements that these jobs were permanent. And so the employer became the object of an unfair labor practice charge filed by the union because it had apparently granted some unlawful, unilateral wage increase. The unfair labor practice was eventually settled with the Board, and as a part of the settlement, the employer agreed to bring the folks back to work who had been replaced. The eleven or twelve replacements who had been told that they were permanent employees brought a lawsuit on two theories: fraud or misrepresentation and breach of contract. These are state causes of action.

The question then came up as to whether or not these state causes of action were precluded because of federal preemption. In a decision joined in by five members of the Court, with Mr. Justice Blackmun concurring only in the judgment, and with three dissenters, the Court held that those state causes of action were not preempted. The case raises questions regarding the hiring of permanent replacements. What is a permanent replacement? What do you tell them? What are the rights and scope of the ability of an employer to hire a permanent replacement?

You heard Harold Datz on the subject of lockouts, and most of what he said relates to the so-called "affirmative" lockout, the *American Ship Building* type of lockout. An affirmative lockout is where the employer decides to put pressure on the union and locks them out, although the union hasn't struck yet. In California when an employer institutes an

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62. Id. at 512.
affirmative lockout, that employer may end up having to pay unemploy-
ment benefits to those employees locked out.

Restrictions on affirmative lockouts do not necessarily apply to the
so-called "defensive" lockout. In the defensive lockout, you have one or
more employers and the union uses the whipsaw tactic. In a whipsaw
strike, the union strikes one employer with the net result that the other
employer, in order to maintain the integrity of the unit, locks out.

With a defensive lockout, there is no question but that the employer
can hire temporary replacements.64 Some years ago, the General Counsel
of the NLRB had taken the position that employers couldn't have tem-
porary replacements in that situation, but fortunately for employers, the
Supreme Court of the United States held in NLRB v. Brown Food Store65
that an employer could hire temporary replacements in the situation of a
defensive lockout.

The struck employer is in a somewhat different position than the
locked out employer. An employer who is struck must rehire strikers,
who have not been replaced, when they come with an unqualified offer to
return to work. Where there is a lockout, on the other hand, the em-
ployer is required to have a nondiscriminatory lockout. This may create
some rather severe morale problems, particularly where there are em-
ployees who have exercised their core membership rights, and maybe are
only peripheral members of the union who simply cannot understand
why they are out there on the bricks.

An affirmative lockout should be rarely used by employers. Affirm-
ative lockouts come about because of very special circumstances. Em-
ployers don't want strikes and they don't normally go around
precipitating them by those types of lockouts.

At the end of the strike there must be significant negotiations relat-
ing to the strike settlement agreement. The strike settlement agreement
is often sought by the employer as well as by the union. The employer,
to the extent that it has been successful in inducing employees to cross
those lines and come to work, wants to protect against the union ex-
tracting fines for that behavior. Typically, the employer wants an am-
nesty agreement which is part of the usual strike settlement agreement.

The unions want amnesty, too, for all those people out there who
may have engaged in strike misconduct. Amnesty for strike misconduct
is usually a rather hotly contested thing because an employer, for ex-
ample, does not want to give amnesty to the guy that tried to burn the store
down.

That these settlement negotiations may involve nonmandatory sub-
jects of bargaining is usually of little moment, because at that point both

64. See NLRB v. Local 449 Int'l Bhd. of Teamsters (Buffalo Linen), 353 U.S. 87 (1957).
sides want to get back to work. The settlement agreement usually contains a general release. The parties usually agree that they will forget about their litigation and nasty claims against each other. The last part of the strike settlement agreement, which may or may not contain all these things, is usually a provision that says that any dispute as to the agreement’s application will be settled by arbitration.

The whole process reminds me of a story. It has to do with a fellow who went to Africa because he wanted to fulfill his lifetime ambition and get a lion. He arrived and he went out to the appropriate region. He had his gun at the ready, he came into a clearing, and there was this lion. He raised his gun and he fired. But the lion had seen him and just as the hunter fired, the lion crouched and sprang at the hunter. The hunter missed. The lion missed as well. For a moment the two of them looked at each other and then each hightailed it in opposite directions.

After that the hunter decided to get that lion; he was determined not to make the mistake of missing again. So he went out the next day and he practiced shooting. After he practiced shooting, he decided to take a walk, and as he did he heard some noise. The hunter looked through the bushes and there was the lion—practicing jumps.

Thank you.

IV

PRESENTATION OF SUSAN KELLOCK

My fellow panelists have commented fairly extensively on what is happening today with strikes and so rather than repeat a number of those comments as was my plan, let me say that I agree basically with what my fellow panelists have said about the effectiveness or lack of effectiveness of strikes today. So I shall talk about what this means in relation to corporate campaigns and how corporate campaigns in many ways are a response to this problem.

I don’t want to talk about why strikes are not working, but about the theory behind the strike. We often have a tendency when we are complaining about strikes to want to throw the whole thing out the window. I think it’s important that we think critically of strikes, about why they have been effective in the past and why they’re not effective today. It’s important to keep in mind that the theory of the strike is still good, that theory being to create economic pressure on an employer.

The problem with strikes is that, today, withholding labor is not necessarily an appropriate way to create that economic pressure. The theory is good, even if the tactic is not necessarily appropriate.

In most situations, strikes are in response to a collective bargaining dispute. The environment of organizing and collective bargaining has changed, and that relates to the problems we’re having with strikes to-
day. Management is bringing more to the bargaining table. Employers are bringing in economic and financial information about their companies; they are doing much more elaborate cost analysis of work rules; they are discussing import problems and the value of the dollar. And I'm not saying that that's necessarily bad. Many of those factors are important in collective bargaining.

What had happened in the past, though, was that the labor movement had been very reluctant to bring that information to the table. But recently, in the last year especially, we've seen more and more of the opposite happening. The most dramatic situation today involves the steel negotiations and the information that the United Steelworkers of America are bringing to the table. They are responding to the company's financial analysis with their own experts and that leads me into the subject of corporate campaigns.

Corporate campaigns are a way to assist the union in developing that information, doing that analysis and bringing that information to the table. The information is used to strengthen their position at the bargaining table, so that the union may adequately respond to the information that the company brings. A lot of what we have learned in corporate campaigns was learned from watching management in its new approach and use of information.

Suppose a union is anticipating a dispute with a company, or the parties are at the negotiating table and the union thinks negotiations will stall without the union being in a position to leverage the situation. The research and analysis phase of the corporate campaign will begin with an extensive analysis of all the company's various links to the community outside of that bargaining table. We do a financial and economic analysis of the company itself. Sometimes we have access to company financial statements, other times we don't. The UAW, for example, often gets access to the company's books on a regular basis in many industries. Most unions aren't in that situation, so we have to rely on SEC documents, or documents which are filed with other regulatory agencies, and which very often contain important financial information about that company.

In all of this research we look for pressure points of the company, that is, the company's vulnerabilities. For example, we assisted an IBEW local when the union called us complaining that they did not know if the company's assertions of lowered profits were true. We looked into that question. We studied the question of why the profits were down and why the unions were being asked to tighten their belts. We discovered through our research that in fact the cost of labor had come down consistently in the last five years at this company. Furthermore, we found that profits were down because two or three very gross
mistakes, none of which had anything to do with labor, had been made by management.

We were not saying that labor should not participate in bringing this company around, but the extent to which this particular company was asking this union to do that was outrageous. The company continually refused to address the problem it was having or the mistakes that had been made by management. When the union began to raise those issues at the table, that situation began to turn around because management was not eager to come to the table and talk about their mistakes. They wished only to talk about the cost of labor.

Unions are becoming more and more curious—suspicious sometimes—as to what management means when they give them these financial figures that say labor has got to give concessions. When unions become curious as to what management means in providing certain information, we do a corporate analysis, which involves developing a corporate profile. Who sits on the board of directors? What are their relationships with financial institutions? Is there leverage there? Do they sit on a presidential commission? Have they taken a pro-labor stance? We contact board members who sometimes do not even know about the dispute or the negotiations going on or the position management is taking. Some board members have been very helpful in contacting management at various companies to intervene on the union's behalf.

We look at every government agency with which the company has contact. Despite deregulation and closing off of a lot of information, a diligent researcher may still obtain much information about publicly held companies. We investigate records at the EPA, OSHA, the Department of Labor, the Federal Energy Regulatory Commission, and any other agency the company may have a contact with where it has had to file some kind of document.

We also investigate the image of the company. We get information going through the newspapers of the particular community in which the company is located. We do NEXIS® and other data base searches to get a sense of what the national picture is with regard to this company. Depending on the company, we may look to see what has been written in international journals, and very often we find that publications in Europe much more elaborately address and challenge the companies we are investigating.

The research is designed to find the company's pressure points, to determine if they exist and if we can use them to develop a strategy to go after this particular employer, which is Phase II of a corporate campaign. We describe it in three phases: research and analysis, developing a strategy, and campaign implementation.
The nature of the strategy phase depends on the situation faced by the union. When time allows it, we develop a much more elaborate strategy. If the union is already in a crisis situation like a strike, it is very difficult to do the research and analysis while designing tactics to maintain the picket line and keep people from crossing. When unions are considering a corporate campaign, it is important that they allow for as much time as possible, anticipate the possible problems that may be coming up in their collective bargaining situation, and begin this kind of homework in advance.

The best strategies are those involving a series of actions designed to intensify pressure on the employer over a particular period of time.

We encourage unions to utilize these techniques prior to getting into a crisis situation, because many of these techniques will help to avoid a strike. By being able to have this kind of information at the negotiating table, the union's position is leveraged. In some cases the circumstances become more equitable and hopefully the parties will be able to resolve the situation at the table and not wind up on strike. Campaigns used as "quick fixes" are the least effective. Campaigns are most effective when done in advance, which raises the question of when to implement the corporate campaign.

Corporate campaigns have been used, although not enough, in organizing drives. Research yielding information on a company's record in terms of how employees are treated, what the record has been in terms of pay increases, prevailing wage situations, and so forth can be very valuable to organizers so that they are no longer just dependent on literature that talks about how great the union is and what kind of benefits they can provide.

Corporate campaigns are also being used a great deal in the collective bargaining situation and they should be used all the time. The kind of research I just described to you involves investigating the kinds of things that every trade unionist should know about their employer at all times. The union should know the company's financial record and should be monitoring those SEC forms. Unions should also be monitoring the newspaper to review the community image of this corporation. When the company issues a quarterly report indicating that profits are up, the union should issue a report talking about the contribution that the employees have made to this company in terms of why the profits are up.

Another very critical component of corporate campaigns is media relations. While a good relationship with the media is not necessarily the essence of a corporate campaign, it is a component. Trade unionists have got to begin to feel more comfortable with media people. They must learn to take the offensive with reporters and to take the initiative by
calling them up to discuss the various community activities the union has been involved in or what they’ve heard about the company. They should be providing that information to the media on a regular basis.

I will describe a campaign to give you an example of what a campaign might look like. Right now we are working in Chicago with the Chicago Building Trades Council. They called us because a Santa Ana low-budget hotel chain, called Sixpence, is using nonunion contractors to build low-budget motels in the Chicago area. In Chicago the Building Trades Council has done an excellent job of maintaining union jobs. Most of the new construction is union construction, but they see the encroachment of nonunion contractors and the development of the Associated Builders & Contractors (“ABC”) in the area. They suspected that this motel chain was connected to the ABC for various reasons, which is why they asked us to research the company. We were able to find a clear and formal connection between the ABC and this company. The company was using nonunion contractors and we found that a pattern was developing. Nonunion contractors begin with small jobs, then on to medium size. Within a matter of time, they are in the Loop, building the skyscrapers.

Because Sixpence is privately held it has been very difficult to obtain their financial information, but we managed to obtain some. We investigated the motel chain’s building record and reputation in the community. My organizer on staff nearly quit his job when I asked him to stay in the Sixpence Motel in Phoenix. He called me the next day and said, “If you ever give me an assignment like that again, you’ve got my resignation.”

This particular motel, as you can imagine, was pretty bad. There were numerous crimes allegedly committed at this motel. We checked the court records and employees’ testimony. One of the employees—the receptionist at the desk—said that in the eighteen months she had worked there, there were only two nights in which she did not call the police; when she had called the police it had usually been for major felony problems.

That information turned out to be very useful with the homeowners association in the area where Sixpence was building their next motel. That association was a little concerned about this low-budget motel coming into the community. We allied with this group and the attorney for the Chicago Building Trades Council agreed to represent the homeowners association for a grand total of five dollars.

We investigated the tax revenue question to determine how much money was going to come into this community from the motel as opposed to other kinds of establishments. We were able to show that the community would make a lot more money on much better respected en-
enterprises in the area. We also checked out the noise and zoning variances.

This campaign for the Chicago Building Trades taught them how they've got to go beyond the original nonunion contractor and look at all those other elements to find those pressure points, to begin to put pressure on these nonunion contractors, and then the ABC. We did, by the way, manage to block the construction by blocking the vote for a zoning variance with the city council. Sixpence did not get the variance and consequently cannot build on this prized site that they were very anxious to get.

This Sixpence/Chicago Building Trades campaign, while not large like the Phelps-Dodge campaign, is a much more common kind of corporate campaign that we see. This campaign involved the building trades rather than a big international union with big bucks. In the process of doing this campaign we taught the union how to do this kind of research. The unions do not necessarily need to hire the Kamber Group to do this kind of research because there is basic information that trade unionists can find and evaluate themselves.

Lawyers can also learn from this. I think that corporate campaigns provide a wonderful opportunity for lawyers to put on a creative hat—not that we're not creative, but it's creativity in a different format. Much of my time is actually spent with lawyers because every time I write a leaflet the union lawyers check it for secondary boycott problems. I find that lawyers not only challenge some of the language on secondary boycott, but also enjoy writing new language in these leaflets and designing the graphics for them. I encourage those of you who are union attorneys to talk to your clients about getting involved in some of these activities, especially because the unions can do many of these themselves.

An important objective of corporate campaigns is to lay the groundwork for the union to maintain activities on an ongoing basis. In corporate campaigns unions very often begin building coalitions with community groups. Many of the unions, however, have been very shy to do that, because they don't think of themselves as members of the community, with corresponding rights and obligations. What we do with these campaigns is begin to lay that groundwork for unions to move their solidarity outside the union halls and into the community, then continue that activity so that when the campaign is over they don't pull back from those coalition activities. Unions must begin to understand the importance of an ongoing coalition program, not only to the union, but to the community as well.

Because it is called a campaign, there is a tendency to think that you either win or lose a corporate campaign. For example in a political campaign, if you're running for an office, you either win or lose. Reporters
frequently ask me, "How many have you won and how many have you lost?" I think winning for corporate campaigns is analogous to winning in collective bargaining: you come out with a contract and both sides can win and both sides can lose although it's usually a combination of both. We may go into a corporate campaign intending to resist concessions all the way, but we know that that's not always going to happen.

I do not recommend corporate campaigns for everyone. There are a number of very good employers out there and we do not advise using the corporate campaign tool against just anyone. Though a union has a dispute with a company and believes there will be problems, that does not automatically warrant a corporate campaign. The decision will be based on how inequitable the situation actually is, the nature of the dispute and whether or not the pressure points are there to raise the position of the union employees.

More and more unions are calling us, and more unions are developing plans to bring these techniques in-house. That is, they are developing their own corporate campaign shops. Some have suggested that the Hormel campaign is going to kill corporate campaigns. Quite frankly, I think the opposite is going to happen. We may see some nervousness in the short run, but in the long term, unions are going to recognize the importance of the role that corporate campaigns can play.

Finally, I would like to add that while they are often referred to as new, corporate campaign techniques are not new. One of my favorite examples is the Flint, Michigan sit-down strike in February, 1937. The wives, mothers and children were bringing the food to the plant and shoving it through the windows to keep the workers fed so that they could keep their sit-down strike going. The state brought in the National Guard which surrounded the plant and prevented the women from being able to get the food to the workers. Obviously the idea was that the workers would start to get real hungry and call off the strike.

The UAW sent a crew to investigate the company's insurance policy. They found out that if there was a fire and the fire equipment inside the plant was not operable, that the insurance company would not be liable. So the guys broke the windows to the plant and since it was February in Flint, Michigan it got pretty cold inside. The idea was to freeze the fire equipment, which would mean that the insurance policy would be cancelled and, hopefully, that would be sufficient pressure to call off the National Guard. That is exactly what happened.

That example is from 1937, and they go back to 5 B.C. with Sun Su who wrote the Art of War. If any of you have ever read that book, it's filled with corporate campaign examples. Flint, Michigan, is simply a notable modern day example of what happens when you go outside of the immediate crisis situation and do research to find out what those other
links are with the company and how you can take advantage of those links to put pressure on the employer.

Thanks.

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QUESTIONS AND ANSWERS

Mr. Datz, is there any prediction on how long it will take the Board to issue the decision in the lockout replacement case you described? Lately the Board has taken two or three or even five years to issue decisions after a hearing.

MR. DATZ: Well, I think the oral argument before the Board was held about two months ago. It’s hard to say. I work on the General Counsel’s side now, not on the Board’s side, but given the fact that the case was orally argued before the Board, and not many of them are, there is a lot of public attention. Also, given the fact that the oral argument was a couple of months ago, I would hope that within a matter of months a Board decision would issue, as distinguished from a matter of years.

Can a consumer boycott run through direct mail advocating a boycott of a store selling a struck product be prohibited, consistent with the first amendment?

MR. GEFFNER: If I understand the question, it has to do with the use of advertising through the mail. Unless there’s some postal regulation I’m not familiar with, it seems to me that would come within the first amendment right. Advertising through the mail is done all the time for political campaigns.

Mr. Mclaughlin, what is your view of the use of a temporary restraining order as a bargaining weapon where there is no intention to pursue contempt charges for noncompliance. Is it effective?

MR. MCLAUGHLIN: I don’t know because I don’t think that would be an appropriate tactic or strategy. First of all, when you go to court you’re going to court presumably because you have some reason to obtain the relief which the court sits to afford. And once you obtain that relief, if the court order is disobeyed, you will of course proceed, probably—if it goes on long enough, anyway—to contempt.

It’s certainly true that when you get down to the amnesty agreement, that is, the strike settlement agreement, very often those contempt charges are wiped out. Now that bothers a lot of people because a court order should have, in the minds of some, a certain sanctity. The fact that people can go out and flout a court order, thumb their nose at it, tear it up and throw it in the street—I’ve actually seen that happen—and then escape some form of retribution because other people want to get a strike over, is perhaps philosophically disturbing.

I can understand that. However, the people who negotiate settle-
ments are usually very practical about wanting to get their dispute over with, and it's a rare case where somebody will hold up a settlement by refusing to dispose of litigation. However, I think it's important to point out that that order is not obtained with that in mind. It comes about later. That's a condition subsequent, so to speak.

Mr. Geffner, are you concerned with the potential product disparagement suits by employers whose unions conduct boycotts against their product lines?

Mr. Geffner: The cases are very clear that the immunity and the privilege is pretty broad if it is a fair comment and it falls within the area, even though they have some commercial speech versus the political or social speech where the courts draw some distinction from time to time. But if it's a fair comment, it's opinion, and I don't see any problem with that.

Ms. Kellock, having heard the description by Mr. Grebey of the situation in the airline industry, would a corporate campaign be a sound strategy to deal with Pan Am, TWA, United, Continental or any number of others?

Ms. Kellock: Actually I don't think I'm familiar enough with the Pan Am situation to comment, but I would like to comment on the concluding remarks of Mr. Grebey's luncheon address about the importance of working together. I really endorse that. I think that is best for both parties. The reality is that's not going to happen in every situation, and I'd like to comment on the TWA situation which I'm very familiar with at this point.

I've been doing the media strategy for the Independent Federation of Flight Attendants on strike. I think this is an example of an employer who has not been willing to take Mr. Grebey's advice. Its contract demand for forty-five percent concessions from flight attendants when it asked for fifteen percent from comparably paid employees on the work-site says one thing. Even if it reduced the forty-five percent to thirty, thirty-five, or forty percent, that's still twice as much as was asked from the other employees. Yes, flight attendant salaries have gone up significantly in the last fifteen, sixteen years, faster than the other employees on the premises. But as you all know, flight attendants suffered some very serious and egregious forms of discrimination which they spent years litigating, and part of the results of that was an increase in their salaries to make them commensurate with those of other employees.

In terms of their present situation, I think Carl Icahn's continual comment is "I have no choice; I need these concessions so that I can be competitive in the environment with the People Expresses and Continentals." Good research, I think, is really, really important in light of such comments. That research has been done, yet it's very difficult to get the media to pay attention to it because all they want to know now is whether the strike is going to be settled.
Solomon Brothers has done a fascinating analysis of flight attendants' contracts and TWA's proposal on the table. Of the seven major carriers that TWA is competitive with, both of those proposals take TWA from number one to number six in terms of cost of flight attendants. It puts them number six out of the seven top route competitors. Carl Icahn's proposal, whether you value it at $88 million or $110 million puts them in that category, six out of seven. The flight attendants' proposals were $76 million; it puts them in the same position.

It's interesting to note that for Carl Icahn to be competitive with the Continentals and People Expresses, which is what his argument is, he has to get $167 million of concessions out of these flight attendants. His proposal on the table doesn't even do that, though that's what he says he has to do. So I think the question is, what is the strike really all about? I think it has a lot more to do with lack of respect for flight attendants who happen to have fourteen years of seniority on the job. He knows that he can get flight attendants for $12,000 a year, many of whom are willing to live in New York City on that kind of salary. I think the strike has a lot more to do with lack of respect for the workforce and Icahn's determination to change the nature of the workforce.

Is peaceful picketing conducted at the personal residence of a management representative a legitimate economic weapon or an unreasonable invasion of privacy?

MR. MCLAUGHLIN: Well, there were some early cases in California, which I do not think are in the appellate reports, which held that picketing of someone's home is not an appropriate thing to do. However, it does take place on occasion.

I would not be too concerned about its legality. I think basically it's a matter of judgment and tactics. In the instances where I've seen it take place it has been useless; it hasn't helped. In fact, I think it has been counterproductive. I don't know whether today you could go up here to the superior court and be sure of getting some injunction against picketing a person's house. This is absent, you know, any blocking of anything and any disruption of the peace. I think you might have some difficulty getting that injunction, at least against the single picket just walking up and down for awhile.

MR. DATZ: I guess from my perspective the only thing I can add is section 8(b)(1)(B) of the Act. Assuming that the picketing is aimed at the representative of the employer, the lawyer or the negotiator, of course under section 8(b)(1)(B) the representative of the employer has the right to be free of constraint or coercion, the philosophy being that management, like the union, should have the right to choose its own representa-
tive and that representative should be free from restraint and coercion, simply because of the manner in which he represents the employer involved. Of course the difficult question is whether that kind of peaceful activity at the private residence of the representative restrains and coerces him.

I can think of one case that was pending before the Office of the General Counsel where I think the spouse of the representative had a nervous condition and the union knew that, and we were able to show that the union picketing at the private residence of the employer representative would have the predictable consequence of making the spouse emotionally ill. It had that consequence and as a result, the management representative quit. Now that was some years ago, but I think in those rare circumstances we issued a complaint which alleged that the union's picketing in those rather unusual circumstances had the foreseeable consequence and therefore the intent of restraining and coercing the employer's representative. But other than those rather unusual circumstances, I think section 8(b)(1)(B) would not apply.

MR. GEFFNER: I agree that under California law there is a right to picket the residence in a peaceful manner. I've seen a lot of it in the public sector where teachers have gone out and picketed members of the board of education or board of supervisors. It's been more prevalent in the public sector and I have always, where I had any influence at all, tried to discourage it. I've seen it happen that you have an adversary who is sitting in a political body turn into an emotional enemy for life against the union. The result has usually been very negative.

Mr. Datz, what is the General Counsel's view of an offensive lockout and the hiring of permanent replacements, number one, without an impasse, and number two, with an impasse?

MR. DATZ: I think, of course, that the case we argued before the Board was the employer's use of temporary replacements, and we argued in the circumstance described that that was not lawful. It would seem to me that almost a fortiori in our view, the use of permanent replacements in support of a lockout would be unlawful. In those circumstances the employees know that they can get their jobs back as soon as they acquiesce to the demands of the employer. Where there are permanent replacements, the employees don't even have the prospect of getting their jobs back if they acquiesce to the demands of the employer, and therefore it would be my view that in essence, they are being wrongfully punished, essentially because they are pressing economic demands.

If there was a whipsaw strike or something like that, it might be different. But if all you're talking about is the single employer and a

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66. A party's failure to recognize the opposition's chosen representatives is an unfair labor practice. See General Elec. v. NLRB, 412 F.2d 512 (2d Cir. 1969).
single union and the employer locks out and permanently replaces, it
would be my opinion that whether pre-impasse or post-impasse, that
would be unlawful.

Under what circumstances may an employer withdraw from a multiem-
ployer group when a strike is in process, and what are the consequences of
doing that if there is a defensive lockout?

MR. MCLAUGHLIN: First of all, the fact that you have a lockout
doesn't have much to do with it, in my opinion, because lockouts can be
ended. There's nothing to say that because you have a lockout you can’t
change your mind.

In another case, you might have a multiemployer group and you can
have, say, four employers. You can have the union strike one employer,
you could have two other employers who locked out defensively—the
Bonanno Linen type lockout—and you could have a fourth employer
who might not choose to lock out at all. That type of thing is not illegal.
So to address the question as far as I understand it, it really is what can
an employer do who is caught in a situation involving a strike, lockout or
not, and he wants to bail out of the bargaining unit. There are certain
types of situations that justify that, but it’s very difficult.

The Bonanno Linen case involved a situation where an employer,
during a strike, had departed from a legal multiemployer bargaining unit,
taking as a justification the fact that there was an impasse in a strike, and
then that employer went out and sought to negotiate its own agreement.
Suffice it to say, the Supreme Court held that that was not sufficient justi-
fication. You have to go back to the basic rule: once you’re in a mul-
tiemployer bargaining unit you cannot get out of it, absent extremely
unusual circumstances, except in a timely fashion. And when is it
timely? Well, it’s timely every three years, or whatever is the length of
the contract. There’s a window period there. To begin with, the mul-
tiemployer arrangement is strictly consensual. So an employer, if it with-
draws on a timely basis, can withdraw from a multiemployer unit
without anybody else’s consent, since that employer no longer “con-
sents” to the arrangement. Nobody can do anything about it so long as
withdrawal is total. If it is attempting to partially withdraw from the
multiemployer unit, then there are some other legal problems that might
exist, but as far as total withdrawal is concerned, it’s entirely up to the
employer.

Once you’re into a negotiation or a strike, the unit is very difficult to
get out of and you have to have some extremely important reasons why.
I suppose a possible reason that might justify withdrawal might be immi-
nent bankruptcy or something like that, but it is not an easy thing to do.
Bear in mind that when you are in a multiemployer group you are bound

by joint action. We have a lot of people who continue to subscribe to membership in a multiemployer group yet do not pay much attention to the negotiations and then want to repudiate the contract that’s negotiated by the people who were at the bargaining table. That doesn’t play very well. Generally, if you’re in the unit once bargaining begins, you’ve bought the resulting contract, whether you’ve paid attention or not.