Striking a Happy Medium: The Conversion of Unfair Labor Practice Strikes to Economic Strikes†

Michael D. Moberly††

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† To “strike a happy medium” means to “arrive at a position halfway between two . . . extremes.” Richard A. Spears, NTC’s American Idioms Dictionary 311 (1991). As used here, the expression reflects the fact that strikes which change character through conversion have been referred to as “hybrid” or “in-between” strikes. See, e.g., Frank H. Stewart, Conversion of Strikes: Economic to Unfair Labor Practice, 45 Va. L. Rev. 1322, 1322-23 (1959) (quoting Charles O. Gregory, Labor and the Law 372 (2d ed. 1958)).

†† B.B.A., J.D., University of Iowa; Shareholder, Ryley, Carlock & Applewhite, Phoenix, Arizona; Chairman, Arizona Agricultural Employment Relations Board; Editor, THE ARIZONA LABOR LETTER.
I. INTRODUCTION

Title I of the Labor Management Relations Act ("LMRA"), originally enacted and still commonly known as the National Labor Relations Act ("NLRA") or Wagner Act, is the most significant and comprehensive labor management legislation ever enacted in this country. Reflecting Congress's recognition of the fact that the economic problems underlying the Great Depression were partially attributable to industrial strife, the NLRA (which is also referred to in this article as the "Act") established the

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2. 29 U.S.C. §§ 151-69 (1994). The NLRA was the nation's first comprehensive labor management legislation. See Sheet Metal Workers Local Union No. 20 v. Baylor Heating & Air Conditioning, 877 F.2d 547, 548 n.1 (7th Cir. 1989); Palm Beach Co. v. Journeymen's & Prod. Allied Servs. Int'l Union, Local 157, 519 F. Supp. 705, 708 n.6 (S.D.N.Y. 1981). It was subsequently incorporated into, and effectively became Title I of, the LMRA. See Crilly v. Southeastern Pa. Transp. Auth., 529 F.2d 1355, 1358 (3d Cir. 1976); Isbrandtsen Co. v. District 2, Marine Eng'rs Beneficial Ass'n, 256 F. Supp. 68, 71 (E.D.N.Y. 1966); Pasillas v. Agricultural Labor Relations Bd., 202 Cal. Rptr. 739, 745 n.8 (Cal. App. 1984). However, "the term NLRA is still frequently used to describe those portions of the original NLRA still having force and effect." Wallace v. Ryan-Walsh Stevedoring Co., 708 F. Supp. 144, 156 n.27 (E.D. Tex. 1989); see also Crilly, 529 F.2d at 1358 ("Title I of the Taft-Hartley Act is still commonly referred to as the National Labor Relations Act . . ."); Isbrandtsen Co., 256 F. Supp. at 71-72 ("When one refers to the 'National Labor Relations Act,' . . . he is referring to Title I of the Labor Management Relations Act . . .").


4. See Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co., 394 U.S. 369, 383 (1969) (describing the NLRA as "our most comprehensive national labor scheme"); Midwest Motor Express v. International Bhd. of Teamsters, Local 120, 512 N.W.2d 881, 884 (Minn. 1994) (indicating that the NLRA has been the "principal expression of federal labor law . . . since 1935"); Falls Stamping & Welding Co. v. International Union, 485 F. Supp. 1097, 1135 n.13 (N.D. Ohio 1979) (describing the NLRA as "the primary federal statute regulating labor-management relations").

5. See Fafnir Bearing Co. v. NLRB, 362 F.2d 716, 717 (2d Cir. 1966) (observing that the NLRA was "conceived during the Great Depression and founded upon a frank recognition that our boom-and-bust economy was attributable in part to labor-management unrest"); Bald v. RCA Alascom, 569 P.2d 1328, 1335 (Alaska 1977) (stating that the NLRA was enacted "in response to one of the most monumental social crises of the century" to "alleviate industrial strife and improve the lot of workers").
right of workers to organize and bargain collectively for the purpose of negotiating the terms and conditions of their employment or for other mutual aid or protection. In enacting the NLRA, Congress elected to regulate some aspects of labor relations, while leaving others to "the free play of economic forces." This dichotomy has created a sphere of "labor combat" in which the parties to a labor dispute are free to use self-help weapons to advance their respective interests. The fact that the NLRA prohibits some economic weapons while permitting others reflects Congress's effort to balance the competing interests of unions, employees and employers in the collective bargaining process.  

6. See Crilly, 529 F.2d at 1358 ("The Wagner Act ... guaranteed employees the right to organize and bargain collectively ... "); NLRB v. U.S. Sonics Corp., 312 F.2d 610, 615 (1st Cir. 1963) (observing that "the basic philosophy of the Act ... is the encouragement of collective—as opposed to individual—bargaining"). In this context, collective bargaining refers to "bargaining by an organization or group of workmen on behalf of its members with the employer" Thomas v. LTV Corp., 39 F.3d 611, 618 (5th Cir. 1994) (citation omitted). See also 29 U.S.C. § 158(d) (1994):  

[T]o bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party ....  


10. See Belknap, Inc. v. Hale, 463 U.S. 491, 499 (1983) (discussing the "self-help remedies left to the combatants in labor disputes"); Midwest Motor Express v. International Bhd. of Teamsters, Local 120, 512 N.W.2d 881, 889 (Minn. 1994) (observing that "federal labor law intends to permit the use of economic weapons by both sides of a labor dispute"). See generally NLRB v. Insurance Agents Int'l Union, 361 U.S. 477, 489 (1960) ("The presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized.").  

A strike is one of the self-help weapons available to further the employees' interest in collective bargaining. Not only is the right to strike expressly provided for in the NLRA, it "lies at the core of the Congressional scheme for promoting collective bargaining." Absent such a right, the ability of employees to bargain effectively would be seriously undermined. As one commentator has stated:

The strike (and the credible threat of a strike) is an essential component of the collective bargaining system. There are, obviously, other costs of disagreement that disgruntled workers can impose upon an employer: they may quit, producing higher turnover and increased training costs; they may slow down; they may produce bad work; and, even without resort to sabotage, they may merely withhold important information, such as the need for maintenance, that results in excessive wear, increased repair costs, and lost production. But, in the context of the negotiation of a collective bargaining agreement, the strike has been thought of as virtually indispensable to the "agreement-making process." There are two principal types of strikes—economic strikes and unfair

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12. A strike exists "when employees withhold their services in a manner that interferes with their employer's production with the object of pressuring the employer into granting a work-related concession or of protesting any of their employer's employment policies." Service Elec. Co., 281 N.L.R.B. 633, 636 (1986).


15. NLRB v. Gould, Inc., 638 F.2d 159, 166 (10th Cir. 1980) (internal quotation marks and citations omitted); see also NLRB v. United States Postal Serv., 833 F.2d 1195, 1199 (6th Cir. 1987) (describing the right to strike as "the cornerstone of the Congressional scheme under the NLRA"). See generally McClatchy Newspapers v. NLRB, 131 F.3d 1026, 1031 (D.C. Cir. 1997) (indicating that "the right to strike is fundamental") (internal quotation marks omitted) (citing Gary-Hobart Water Corp., 210 N.L.R.B. 742, 744 (1974)).

16. See McClatchy Newspapers, 131 F.3d at 1031 ("[W]ithout the right to strike, the union's... bargaining position would be devastated."); County Sanitation Dist. No. 2 v. Los Angeles County Employees Ass'n, Local 660, 699 P.2d 835, 847 (Cal. 1985) ("[W]ithout the right to strike, or at least a credible strike threat, ... employees have little negotiating strength."); United Bhd. of Carpenters v. Pascagoula Veneer Co., 89 So.2d 711, 714 (Miss. 1956) ("Without the right to strike, collective bargaining would be of no consequence whatever.").


18. A third type of strike, known as a "sympathy" strike, occurs "when one union honors picket lines established by another union, and stops work itself" in order to demonstrate support for the other
labor practice strikes. While most (if not all) strikes are motivated, at least to some degree, by economic issues, that fact does not prevent a strike from being characterized as an unfair labor practice strike if there was also a causal relationship between the employer's unfair labor practices and the strike. Nor is it essential to a finding of an unfair labor practice strike that the strike would not have occurred (or continued) but for the employer's unfair labor practices. Thus, the National Labor Relations Board ("NLRB" or the "Board") has defined an unfair labor practice strike as


19. See General Indus. Employees Union, Local 42 v. NLRB, 951 F.2d 1308, 1311 (D.C. Cir. 1991) ("Strikes by employees covered by the NLRA are either economic or unfair labor practice strikes."); Gatiff Bus. Prods., 276 N.L.R.B. 543, 563 (1985) (discussing "two types of strike activity, one of which is called an 'economic strike,' and the other of which is termed an 'unfair labor practice strike'"); Crossroads Chevrolet, Inc., 233 N.L.R.B. 728, 729 n.4 (1977) ("In law, strikes are either economic strikes or unfair labor practice strikes."); Masdon Indus., 212 N.L.R.B. 505, 509 (1974) (referring to "two kinds of strikes, economic and unfair labor practice strikes").

20. See Casino Operations, Inc., 169 N.L.R.B. 328, 341 (1968) (observing that "most strikes . . . [are] precipitated, at least in part, by economic considerations"); cf. Berkshire Knitting Mills v. NLRB, 139 F.2d 134, 137 (3d Cir. 1943) ("Fundamentally, unfair labor practices have their roots in economic strife between employer and employees.").

21. See Mosher Steel Co., 220 N.L.R.B. 336, 348 (1975); see also Marlene Indus. Corp., 255 N.L.R.B. 1446, 1463 n.59 (1981) ("Assuming that the strike had dual objects, both economic and unfair labor practice, it is nevertheless treated for remedial purposes as an unfair labor practice strike."); Stewart, supra note †, at 1326 ("That the union also strikes for economic gains does not rid the unfair labor practice strike of its illegal taint.").

22. An employer's potential unfair labor practices are delineated in Section 8(a) of the Act. 29 U.S.C. § 158(a) (1994). Section 8(b), on the other hand, sets forth "the proscribed union unfair labor practices." Oregon Teamsters' Sec. Plan Office, 113 N.L.R.B. 987, 993 (1955) (Murdock J., concurring) (discussing 29 U.S.C. § 158(b)), aff'd, 235 F.2d 832 (D.C. Cir. 1956), rev'd, 353 U.S. 313 (1957); see also Linn v. United Plant Guard Workers of America, Local 114, 383 U.S. 53, 59 n.3 (1966) ("In §§ 8(a), Congress has made it an unfair labor practice for an employer to restrain or coerce employees in the exercise of § 7 rights. Likewise, § 8(b) protects these rights against interference by a labor organization or its agents.").

23. See Casino Operations, 169 N.L.R.B. at 341. See generally Berkshire Knitting Mills, 139 F.2d at 137 ("Where the causes contributing to a strike consist of unfair labor practices and employee desires for wage betterments, the latter should not excuse the employer from the legal consequences that flow from its conduct which transcends the permissible bounds under the [NLRA].").

24. See Decker Coal Co., 301 N.L.R.B. 729, 746 (1991); see also Head Div., AMF, Inc. v. NLRB, 593 F.2d 972, 982 n.19 (10th Cir. 1979):

Exclusive adherence to a "but for" test as the only method of analyzing causation would likely prove as unsatisfactory in the labor field as it has in the torts field, where the "but for" test has been supplemented by doctrines such as the "substantial factor" test, for analyzing the issue of causation in complex cases where multiple causal factors are present.

Id.

25. The Board is the federal agency with responsibility for administering the NLRA. See 29 U.S.C. §§ 153-56, 159-61, 164(c) (1994); Rochester Joint Bd. v. NLRB, 896 F.2d 24, 28 (2d Cir. 1990); ITT Lamp Div. v. Minter, 435 F.2d 989, 992 (1st Cir. 1970). For academic discussions of the Board's role in the statutory scheme, see William P. Murphy, The National Labor Relations Board - An Appraisal, 52 MINN. L. REV. 819 (1968), and Robert Douglas Brownstone, The National Labor
one "initiated or prolonged, in whole or in part, in response to unfair labor practices committed by the employer."\(^{26}\)

Economic strikes, on the other hand, are often described in negative terms\(^ {27}\) as those "neither prohibited by law nor by collective bargaining agreement nor caused by employer unfair labor practices."\(^{28}\) They are typically called for the purpose of bringing economic pressure upon the employer in order to secure better wages or working conditions,\(^ {29}\) although they can also be used for other purposes.\(^ {30}\) Common examples include strikes "over wages, hours, working conditions, or other conditions of employment."\(^ {31}\)

A strike that begins as an economic strike may be converted to an unfair labor practice strike,\(^ {32}\) "notwithstanding the continuation of the

\(\text{Relations Board at 50: Politicization Creates Crisis, 52 Brooklyn L. Rev. 229 (1986).}\)

26. Gatliff Bus. Prods., 276 N.L.R.B. 543, 563 (1985); see also Teamsters Local Union No. 515 v. NLRB, 906 F.2d 719, 723 (D.C. Cir. 1990) ("The dispositive question is whether the employees, in deciding to go on strike, were motivated in part by the unfair labor practices committed by their employer . . . .") (internal quotation marks and citation omitted); NLRB v. Moore Bus. Forms, 574 F.2d 835, 840 (5th Cir. 1978) (to find an unfair labor practice strike, "[i]t is necessary that the employer's unfair labor practice prolong the strike."). \(\text{But see Concord Metal, Inc., 298 N.L.R.B. 1096, 1101, 1104 (1990) (finding that a strike was an economic strike despite "evidence supporting the contention that the strike was at least in part a response to . . . unfair labor practices").}\)

27. \(\text{See Gatliff Bus. Prods., 276 N.L.R.B. at 563 (noting that economic strikes "are frequently defined upon a negative"). See generally Stewart, supra note 1, at 1322-23 ("The unfair labor practice strike protests an employer's violation of . . . the [NLRA]; all others are economic strikes.").}\)

28. NLRB v. Transport Co. of Tex. 438 F.2d 258, 262 n.6 (5th Cir. 1971); see also Rose Printing Co., 289 N.L.R.B. 252, 275 (1989) (observing that an economic strike is one "not caused by an employer's unfair labor practices.").

29. \(\text{See Houston County Elec. Corp., 285 N.L.R.B. 1213, 1217-18 (1987); see also Frank H. Stewart, Conversion of Strikes: Economic to Unfair Labor Practice: II, 49 Va. L. Rev. 1297, 1298 (1963) [hereinafter Stewart II] ("An economic strike is called and carried out to make the employer come to his knees on economic terms.").}\)

30. \(\text{See, e.g., Crossroads Chevrolet, Inc., 233 N.L.R.B. 728, 729-30 n.4 (1977) (noting that a strike in which "the employees' objective was to have the . . . Company recognize the Union as the bargaining agent . . . was an economic strike"); Philanz Oldsmobile, Inc., 137 N.L.R.B. 867, 869-70 & n.5 (1962) (finding no distinction between a strike called to "exert pressure on an employer to agree to a consent election" and one seeking to "compel economic concessions"). See generally James M. Rabbitt, Comment, Reconversion of Unfair-Labor-Practice Strikes to Economic Strikes, 64 Geo. L.J. 1143, 1144 n.11 (1978) ("Employees also engage in economic strikes for reasons other than forcing concessions from their employers . . . .")}\)

31. NLRB v. Herman Wilson Lumber Co., 355 F.2d 426, 430 (8th Cir. 1966); see also Stewart II, supra note 29, at 1298-99 ("Economic is a broad term. It means wages, union shop, fringe benefits, or any of the myriad items that crop up in collective bargaining.").

32. \(\text{See, e.g., Sunol Valley Golf Club, 310 N.L.R.B. 357, 371 (1993) ("It is settled . . . that if an employer's unfair labor practice prolongs an economic strike, it converts the strike into an unfair labor practice strike."); enforced sub nom. Ivaldi v. NLRB, 48 F.3d 444 (9th Cir. 1995); Trumbull Memorial Hosp., 288 N.L.R.B. 1429, 1449 (1988) ("[E]ven where a strike has been held not to be an unfair labor practice strike at its inception, an employer's unlawful actions that prolong the strike may convert the strike into an unfair labor practice strike."); Michael H. LeRoy, Institutional Signals and Implicit Bargains in the ULP Strike Doctrine: Empirical Evidence of Law as Equilibrium, 51 Hastings L.J. 171, 219 (1999) ("The Board may . . . rule that an economic strike convert[ed] to [an unfair labor}
economic issues that constituted the original basis for the strike," and even if the economic issues are "more important than the unfair labor practice activity." However, "[a]n unfair labor practice does not convert an economic strike to an unfair labor practice strike unless a causal connection is established between the unlawful conduct and the prolongation of the strike." The dispositive question is whether the employees, in deciding to remain on strike, "were motivated in part by the unfair labor practices committed by their employer, not whether, without that motivation, the employees might have [continued to strike] for some other reason."

The reinstatement rights of striking workers depend largely upon the nature of the strike in which they are engaged. An economic striker who was permanently replaced is entitled to reinstatement if there is a vacancy in the striker's former position, or in another substantially equivalent position for which the striker is qualified. An employer also must recall

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33. *Rose Printing Co.*, 289 N.L.R.B. at 275; see also Superior Nat'l Bank & Trust Co., 246 N.L.R.B. 721, 724 (1979) (indicating that a strike is converted "if the unfair labor practices can be shown to have been a factor in prolonging the strike, even if there were still economic goals"). See generally *Burns Int'l Sec. Servs.*, 324 N.L.R.B. 485, 492 (1997) (observing that "dual motivation does not deprive employees of the status of unfair labor practice strikers"), enforcement denied, 146 F.3d 873 (D.C. Cir. 1998).

34. *Burns*, 324 N.L.R.B. at 492; see also *Head Div., AMF, Inc.*, 228 N.L.R.B. 1406, 1417 (1977) (stating that "a strike's being 'primarily' economic does not preclude its having unfair labor practice implications.") (quoting Larand Leisuribles, Inc., 213 N.L.R.B. 197, 197 (1974)), enforcement, 593 F.2d 972 (10th Cir. 1979). See generally *Domsey Trading Corp.*, 310 N.L.R.B. 777, 791 (1993) ("Board law is firmly established that a strike is an unfair labor practice strike if the employer's unfair labor practice had anything to do with causing the strike."). enforcement, 16 F.3d 517 (2d Cir. 1994).

35. *Robbins Co.*, 233 N.L.R.B. 549, 549 (1977); see also *C-Line Express*, 292 N.L.R.B. 638, 638 (1989) ("The Board has long held that an employer's unfair labor practices during an economic strike do not ipso facto convert it into an unfair labor practice strike.").

36. *Northern Wire Corp.* v. NLRB, 887 F.2d 1313, 1319-20 (7th Cir. 1989); see also *Decker Coal Co.*, 301 N.L.R.B. 729, 746 (1991) (quoting *Northern Wire* with approval). In this regard, the Board has indicated that "[t]he usual effect of an unfair labor practice committed during a strike is not to prolong [the] strike but to shorten it . . . ." *Mackay Radio & Tel. Co.*, 96 N.L.R.B. 740, 762 (1951).

37. *See NLRB v. Harding Glass Co.*, 80 F.3d 7, 10 n.3 (1st Cir. 1996) ("The nature of the strike determines the reinstatement rights of striking employees once the work stoppage ends."); *Harowe Servo Controls*, 250 N.L.R.B. 958, 962 (1980) (referring to the "distinction" between reinstatement rights accorded employees, depending upon the nature of the strike).

38. *See Midwest Motor Express* v. *International Bhd. of Teamsters*, Local 120, 494 N.W.2d 895, 899 n.4 (Minn. Ct. App. 1993) (observing that "permanent replacements are employees whom the employer need not discharge even if the strikers offer to return to work unconditionally.") (internal quotation marks and citation omitted), rev'd, 512 N.W.2d 881 (Minn. 1994); *Gloversville Embossing Corp.*, 297 N.L.R.B. 182, 182 (1989) (observing that "an employer may permanently replace economic strikers").

39. *See Keller Mfg. Co.*, 272 N.L.R.B. 763, 786 (1984) ("Economic strikers are entitled to reinstatement upon application and if their prestrike positions are filled at the time of application, they retain the right to their former position when it becomes vacant.") (emphasis omitted).

40. *See Medite of N.M., Inc.*, 314 N.L.R.B. 1145, 1148 (1994) (indicating that economic strikers "are entitled to . . . a substantially equivalent position" that is "left vacant by the departure of permanent
all qualified economic strikers who have made unconditional requests for reinstatement before it can hire new employees.\textsuperscript{41} However, the employer is not required to terminate permanent replacements to make room for economic strikers who request reinstatement.\textsuperscript{42} Unlike economic strikers, unfair labor practice strikers have a substantially unqualified right to reinstatement upon making an unconditional offer to return to work.\textsuperscript{43} Thus, unfair labor practice strikers must be reinstated even if the employer purports to have hired permanent replacements\textsuperscript{44} who would need to be discharged to make room for the strikers.\textsuperscript{45} In \textit{Covington Furniture Manufacturing Corp.},\textsuperscript{46} for example, the Board stated:

\begin{quote}
The law is settled that a strike in response to an employer's violations of the
\end{quote}
Act is an unfair labor practice strike, and the striking employees are entitled to full reinstatement to their former or substantially equivalent jobs immediately upon their unconditional offer to return to work, even if permanent replacements for them have been made and discharge of such replacements is necessitated.47

Unfair labor practice strikers who were denied reinstatement after offering to return to work are also entitled to back pay and benefits from the date they were denied reinstatement48 "notwithstanding the fact that the nature of the strike [was] still a matter of dispute at the time."49 Thus, an employer that hires replacements during what it believes to be an economic strike, but subsequently is found to have been (or become) an unfair labor practice strike,50 may incur significant liability to strikers it refuses to reinstate.51 As one commentator has noted:

Suppose an employer, concluding that it lawfully could hire permanent replacements and that it in fact has done so, denies reinstatement to striking employees who offer to return to work. If the employer’s conclusions are later determined to be incorrect by the NLRB (and perhaps a court of appeals), the employer will be held liable for potentially large back pay and other make-whole relief.52

47. *Id.* at 219; see also Belknap, Inc. v. Hale, 463 U.S. 491, 493 (1983) ("Where employees have engaged in an economic strike, the employer may hire permanent replacements whom it need not discharge even if strikers offer to return to work unconditionally. If the work stoppage is an unfair labor practice strike, the employer must discharge any replacements in order to accommodate returning strikers."); Houston County Elec. Coop., 285 N.L.R.B. 1213, 1300 (1987) (noting that "unfair labor practice strikers . . . [are] entitled to reinstatement to their former positions even if permanent replacements had to be discharged to make room for them").

48. *See* General Indus. Employees Union, Local 42 v. NLRB, 951 F.2d 1308, 1311 (D.C. Cir. 1991) ("[U]nfair labor practice strikers are entitled to reinstatement if they wish to return to work and, if denied reemployment, are also entitled to back pay from the date of denial."); LeRoy, *supra* note 32, at 174 ("[W]hen a strike is ruled to be an unfair labor practice strike, not only do replaced employees enjoy a right of immediate reinstatement at the expense of their replacements, they also are entitled to backpay.") (footnotes omitted); Rabbitt, *supra* note 30, at 1146 ("If the employee offers to return and the employer refuses to reinstate him, the employer is liable for backpay from the date of the offer.").


50. *See, e.g.*, Heads & Threads Co., 261 N.L.R.B. 800, 812-13 (1982) (discussing an employer who hired "permanent" replacements for strikers it mistakenly believed "were economic strikes"); Atlas Metal Parts Co., 252 N.L.R.B. 205, 205 (1980) (discussing an employer that "at the time the striking employees unconditionally requested reinstatement, . . . was of the [mistaken] view that the strike had been an economic strike"). *See generally* Molded Fiber Glass Body Co., 182 N.L.R.B. 400, 403 (1970) (referring to cases in which strikers "once believed permanently replaced, are held entitled to reinstatement").

51. *See* Gatliff Bus. Prods., 276 N.L.R.B. 543, 563 (1985) ("The economic consequences to the parties on account of a determination as to the nature of a strike can be substantial."); Stewart, *supra* note 1, at 1329-30 ("A finding of strike conversion can make the employer pay, and pay well . . ."). *See generally* Monolith Portland Cement Co., 94 N.L.R.B. 1358, 1393 (1951) (noting that the employer "assume[s] the risk that . . . a strike would [not] be found to be an economic strike").

52. Corbett, *supra* note 9, at 1521 n.48; see also Douglas E. Ray, *Some Overlooked Aspects of the
Such an employer could also be contractually liable to any replacement workers it ultimately elects (or is forced) to terminate in order to make room for the returning strikers. This potential “double” exposure is exacerbated by the fact that an economic strike’s character frequently cannot be determined, and indeed can change, while the strike is occurring.

On the other hand, employees who strike in protest of what they mistakenly believe to be unfair labor practices run the risk of being permanently replaced. Thus, uncertainty concerning a strike’s character is equally threatening to the union, which “may strike over what it thinks is

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Strike Replacement Issue, 41 Kan. L. Rev. 363, 375 (1992) (“An employer who improperly fails to reinstate one hundred strikers after they request reinstatement can easily be exposed to millions of dollars in liability.”).

53. The Board routinely directs that replacements be discharged if necessary to make room for returning unfair labor practice strikers. See, e.g., Schaub ex rel. NLRB v. Detroit Newspaper Agency, 154 F.3d 276, 278 (6th Cir. 1998) (characterizing a Board order “directing the [employer] . . . to reinstate all of the strikers and discharge the permanent replacements if necessary” as “relief that would be available, under the governing law, if the strike was an ‘unfair labor practice strike’”); NLRB v. Charles D. Bonanno Linen Serv., 782 F.2d 7, 10-11 (1st Cir. 1986) (“It is well settled Board law that the conversion of a strike into an unfair labor practice strike . . . give[s] the strikers the right to force the dismissal of any replacement hired after conversion, upon an unconditional request for reinstatement.”); Stephenson-Yost Steel, 294 N.L.R.B. 395, 406 (1989) (ordering employer to “dismiss[, if necessary, any [replacement] employees hired on or after [the date on which] the unfair labor practice strike began”), enforced, 904 F.2d 1180 (7th Cir. 1990).

54. See Eastern Air Lines v. Air Line Pilots Ass’n Int’l, 744 F. Supp. 1140, 1144 (S.D. Fla. 1990) (observing that an employee “may be liable in contract to ousted replacement [workers], even though forced to reinstate strikers in an unfair labor practices dispute”); Independent Fed’n of Flight Attendants v. Trans World Airlines, 132 L.R.R.M. (BNA) 2422, 2423 (W.D. Mo. 1989) (“A promise made in the context of a strike exposes the employer to a breach of contract suit if later repudiated to accommodate returning strikers . . . .”); DeGraff Mem’l Hosp., Nos. 3-CA-14257 & 3-CB-5253, 1988 NLRB GCM LEXIS 41, at *3 n.4 (May 25, 1988) (“Of course, if the replacement employees were promised that they would not be ousted by the strikers at the end of the strike, they may have a private cause of action against the [employer].”); Rabbitt, supra note 30, at 1146 n.20 (predicting that “any replacement who had been promised a permanent position and then was discharged to accommodate a returning . . . striker would have a contract remedy against the employer”).

55. See General Indus. Employees Union, Local 42 v. NLRB, 951 F.2d 1308, 1311 (D.C. Cir. 1991) (“The causes of a strike can, of course, change over time.”); cf. Rabbitt, supra note 30, at 1143 (“The [Board] may alter the rights of the parties during a strike by reclassification.”).

56. See Belknap, Inc. v. Hale, 463 U.S. 491, 530 n.2 (1983) (Brennan, J., dissenting) (“Whether a particular strike is an economic strike or an unfair labor practice strike . . . is often unclear until the strike has ended. Where the character of a strike is contested, it is often necessary to resolve in an unfair labor practice proceeding before the Board.”) (quoting the Board’s amicus brief); Dow Chem. Co., 244 N.L.R.B. 1060, 1077 (1979) (Truesdale, concurring) (“[I]t is often extremely difficult for either an employer or a union to predict whether borderline conduct by the employer is on the right or wrong side of the Act.”), enforcement denied, 636 F.2d 1352 (3d Cir. 1980). But see Colonial Press, Inc., 207 N.L.R.B. 673, 677 (1973) (suggesting that a strike’s character “could” be litigated while the strike is “still current”).

57. See Concord Metal, Inc., 298 N.L.R.B. 1096, 1102 (1990); Gatilff Bus. Prods., 276 N.L.R.B. 543, 563-64 (1985); Stewart, supra note †, at 1326.

58. In Northern Wire Corp., 291 N.L.R.B. 727, 739 n.19 (1988), enforced, 887 F.2d 1313 (7th Cir. 1989), for example, the administrative law judge noted that the union has as great an interest in a finding
an unfair labor practice only to be told years later by the Board and the courts that no violation occurred."59 As discussed above, such a determination would have "a significant impact upon the claimed rights of the strikers to reinstatement."60

The inherent uncertainty concerning the character of a strike undoubtedly creates a disincentive for employees to strike.61 However, it also creates an incentive for an employer who has committed an unfair labor practice that may have converted an economic strike to an unfair labor practice strike62 to rectify its conduct,63 and thus perhaps convert the strike back to an economic one64 before the strikers make an unconditional offer to return.65

This article discusses the Board's view of such reconversions,66 with a

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59. Stewart, supra note 4, at 1326. See generally Rabbitt, supra note 30, at 1145 ("[W]here it is unclear whether the employer’s conduct precipitating or prolonging a strike is unfair, the parties must act according to their own best estimate of the situation since they cannot predict the [Board's] classification.").

60. NLRB v. Colonial Haven Nursing Home, 542 F.2d 691, 703 (7th Cir. 1976).

61. See Chamber of Commerce v. Reich, 74 F.3d 1322, 1337 (D.C. Cir. 1996) (suggesting as a possibility that "the prospect of permanent replacement deters strikes"); American Home Sys., 200 N.L.R.B. 1151, 1155 (1972) ("[E]mployees often cut a strike off for fear of losing their jobs to permanent replacements."); cf LeRoy, supra note 32, at 176 ("An employer’s threat to hire replacements is often enough to deter workers from striking.").

62. See General Indus. Employees Union, Local 42 v. NLRB, 951 F.2d 1308, 1311 (D.C. Cir. 1991) ("Sometimes a strike that starts for economic reasons is prolonged by the employer’s subsequent unlawful conduct and is thereby 'converted' from an economic to an unfair labor practice strike."); Challenge-Cook Bros., 288 N.L.R.B. 387, 403 (1988) (observing that "an economic strike may be converted to an unfair labor practice strike if the [employer] subsequently commits unfair labor violations, that have the effect of prolonging the strike").

63. See Rabbitt, supra note 30, at 1152 (observing that "it is to [the employer's] advantage to terminate unfair labor practices during a strike"); cf Stewart, supra note 3, at 1330 (discussing the employer's "interest in convincing all concerned that [its] independent unfair labor practices did not prolong the strike"). But see Rabbitt, supra note 30, at 1151 n.57 (noting that employers "may be unwilling to admit voluntarily to unfair labor practices").

64. See General Indus. Employees Union, 951 F.2d at 1312 (observing that "uneconomic labor practice strike can be converted to an economic strike if the illegal acts that originally caused the dispute fade in significance and the employees continue to strike solely to enforce their economic demands"); Burns Int'l Sec. Servs., 324 N.L.R.B. 485, 493 (1997) (discussing cases in which "the Board found that an unfair labor practice strike was converted to an economic strike"), enforcement denied, 146 F.3d 873 (D.C. Cir. 1998); LeRoy, supra note 32, at 219 ("The Board may... rule that an... [unfair labor practice] strike... convert[ed] to an economic strike.").

65. As a practical matter, the character of a strike becomes fixed once the strikers request reinstatement. See, e.g., Outdoor Venture Corp., 160 L.R.R.M. (BNA) 1178, 1182 (1999) (indicating that the critical issue in assessing the character of a strike is whether it "had reconverted to an economic strike at the time of the [strikers'] offer to return").

66. One previous commentator, recognizing that most strike "conversion" cases involve economic strikes that are transformed into unfair labor practice strikes, has characterized the conversion of an
particular focus on whether the employer seeking to reconvert the strike is required to satisfy the stringent standards for curing unfair labor practices set forth in *Passavant Memorial Area Hospital*67 and its progeny.68 The Board's own view of this question has wavered,69 and the only significant prior academic discussions of reconversion predate the Board's decision in *Passavant*70 and, arguably, the Board's actual recognition of an employer's right to convert an unfair labor practice strike to an economic one.71

The article ultimately concludes that employers should not be required to comply with *Passavant* in order to convert an unfair labor practice strike to an economic strike.72 *Passavant* established the standards for determining whether unfair labor practices have been "entirely" cured,73 while an unfair labor practice strike is properly deemed to have been converted to an economic strike whenever unfair labor practices are no longer a motivating factor for the strike.74 Because an unfair labor practice could cease to be the motivation for a strike even when there has been no

unfair labor practice strike to an economic strike as "reconversion." See Rabbitt, *supra* note 30, at 1143 n.6. That terminology is also used in this article. See also Stewart, *supra* note †, at 1349 (discussing whether unfair labor practice strikes can be "reconverted").

70. Reconversion was also occasionally discussed by the courts before *Passavant* was decided. See, e.g., NLRB v. Schweigers, Inc., 453 F.2d 255, 259 (8th Cir. 1971) (indicating that employees engaged in an unfair labor practice strike would "retain only those rights that are generally available to economic strikers" once the employer "completely purged[ed] itself of its unfair labor practices"); NLRB v. Kobritz, 193 F.2d 8, 17 (1st Cir. 1951) (implying that an unfair labor practice strike might be "converted into an economic strike" if the employer "offer[ed] to undo the . . . unfair labor practice which had partly caused the strike").
71. See Rabbitt, *supra* note 30, at 1143 (asserting that "neither the NLRB nor the courts [had] explicitly accepted this reconversion theory"); Stewart, *supra* note †, at 1349 (observing that "the case [had] not yet arisen where the employer offered complete retraction of unfair labor practices during an economic strike"). But see Nelson B. Allen, 149 N.L.R.B. 229, 245 (1964) (holding that an employer's offer to reinstate unlawfully discharged strikers changed their status "from unfair labor practice strikers, to economic strikers"); Pleasant View Rest Home, 194 N.L.R.B. 426, 430 n.8 (1971) (holding that an employer's rescission of unlawful discharges that were, "up to that point, [its] sole unfair labor practice," caused its striking employees "to revert to the status of economic strikers, not unfair labor practice strikers").
72. See infra notes 341-63 and accompanying text.
effort to cure it, there should be no per se requirement that the unfair labor practice be fully cured before the strike will be found to have been converted. A strike instead should be deemed to have been reconverted if the employer made a substantial (or perhaps even just "some") effort to reconvert it, and as a result the unfair labor practice ceased to be a motivating factor for the strike.

II.
THE EMPLOYER’S RIGHT TO CURE ITS UNFAIR LABOR PRACTICES:
PASSAVANT MEMORIAL AREA HOSPITAL

Passavant Memorial Area Hospital is the seminal Board decision addressing an employer’s right to cure its unfair labor practices by voluntarily repudiating them without Board intervention. The case involved an employer’s attempt to disavow its previous unlawful threat to discharge economic strikers. While concluding that the attempted disavowal did not eliminate the need for a Board remedy, the Board acknowledged that, under certain circumstances, employers can avoid

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75. See General Indus. Employees Union, 951 F.2d at 1313 (noting that “a strike’s coexistence in time with even an unfair labor practice that the [employer] has made no effort to repudiate does not ineluctably lead to a determination that the unlawful practice is a contributing cause of the strike”).

76. See id. (rejecting the contention “the contemporaneous existence of an incompletely cured unfair labor practice and a strike requires a determination that the two are causally connected”) (emphasis omitted); cf. Concord Metal, Inc., 298 N.L.R.B. 1096, 1101 (1990) (finding that an unfair labor practice that was “nearly cured” had “no impact on the employees’ . . . decision to strike”).


79. See Allied Mechanical Servs., 320 N.L.R.B. at 39.


83. Passavant, 237 N.L.R.B. at 139. Among other things, the Board concluded that the disavowal was “neither sufficiently clear nor sufficiently specific” to “obviate the need for further remedial action.” Id.; see also Red Arrow Freight Lines, 289 N.L.R.B. 227, 247 (1988) (noting that Passavant requires that an employer’s repudiation of its unfair labor practices be “clear and specific in nature”) (quoting Passavant, 237 N.L.R.B. at 138) (internal quotation marks omitted).
liability by voluntarily repudiating their unfair labor practices.\textsuperscript{84}

In order to claim the benefit of \textit{Passavant}'s "repudiation doctrine,"\textsuperscript{85} the employer’s disavowal of its unfair labor practice not only must be timely\textsuperscript{86} but also "unambiguous, specific in nature to the [unlawful] conduct, free from other proscribed conduct, adequately published to the employees involved, accompanied by assurances that the employer will not interfere with the employees’ Section 7 rights in the future and not followed by [any] additional illegal conduct."\textsuperscript{87} If these requirements are met,\textsuperscript{88} the Board presumes that the unfair labor practice has been adequately remedied, and that there is no need for further Board intervention.\textsuperscript{89}

The \textit{Passavant} standards are stringent,\textsuperscript{90} and difficult for employers to meet.\textsuperscript{91} If they must be satisfied before an unfair labor practice strike can

\textsuperscript{84.} \textit{Passavant}, 237 N.L.R.B. at 138 (citing, \textit{inter alia}, Fashion Fair, Inc., 159 N.L.R.B. 1435 (1966)); see also NLRB v. Intertherm, Inc., 596 F.2d 267, 276 (8th Cir. 1979) (asserting that \textit{Fashion Fair} had established "the general procedure an employer must follow to remedy an unfair labor practice") (citing \textit{Fashion Fair}, 159 NLRB at 1444). \textit{See generally} NLRB v. Saint Vincent’s Hosp., 729 F.2d 730, 732 (11th Cir. 1984) (citing \textit{Passavant} for the proposition that "under some circumstances an employer may repudiate its unlawful conduct and thereby relieve itself from liability").


\textsuperscript{86.} \textit{See International Automated Machs.}, 285 N.L.R.B. at 1133. Compliance with \textit{Passavant}'s timeliness requirement appears to be critical. \textit{See, e.g.}, Wilson Trophy Co. v. NLRB, 989 F.2d 1502, 1511 (8th Cir. 1993) (holding that an employer’s repudiation of its unfair labor practice "several weeks" after it occurred was "not timely"); MPG Transport, Ltd., 315 N.L.R.B. 489, 489 n.1 (1994) (holding that an employer’s repudiation of its unfair labor practice "approximately 1 month" after it occurred was untimely), enforced, 91 F.3d 144 (6th Cir. 1996). \textit{See generally} American Postal Workers Union, 299 N.L.R.B. 858, 859 (1990) (Oviatt, dissenting in part) (The Board has stated "[t]o be effective . . . such repudiation must be timely") (internal quotation marks omitted).

\textsuperscript{87.} Foster Elec., 308 N.L.R.B. 1253, 1260 (1992) (discussing \textit{Passavant}).

\textsuperscript{88.} The Board has indicated that "[t]he criteria of \textit{Passavant} are stated in the conjunctive; all must be satisfied before an employer may escape liability for its unfair labor practices.” Raysel-IDE, Inc., 284 N.L.R.B. 879, 886 (1987); see also Webo Indus., 160 L.R.R.M. (BNA) 1217, 1219 (1998) (embracing a view of the repudiation doctrine that requires “adherence to all the standards set forth in \textit{Passavant}”), enforced, 217 F.3d 1306 (10th Cir. 2000).

\textsuperscript{89.} \textit{See General Indus. Employees Union, Local 42 v. NLRB}, 951 F.2d 1308, 1312 (D.C. Cir. 1991) (alluding to the hypothetical employer that, by satisfying \textit{Passavant}, “has cured its unfair labor practices so entirely that no further Board proceedings are appropriate” (internal quotation marks omitted); Action Mining, Inc., 318 N.L.R.B. 652, 654 (1995) (“Under Board law and policy, . . . the [employer’s] predisavowed unfair labor practices are considered . . . adequately remedied . . .”).

\textsuperscript{90.} \textit{See Foster Elec.}, 308 N.L.R.B. at 1259; Mohawk Liqueur Co., 300 N.L.R.B. 1075, 1086 (1990), enforced \textit{sub nom.} General Indus. Employees Union, Local 42 v. NLRB, 951 F.2d 1308 (D.C. Cir. 1991); Webo Indus., 160 L.R.R.M. (BNA) at 1220 (Hurtgen, dissenting in part); \textit{cf.} Dallas Times Herald, 315 N.L.R.B. 700, 710 (1998) (describing the \textit{Passavant} standards as "strict").

\textsuperscript{91.} \textit{See, e.g.}, Grief Bros. Corp., No. 34-CA-8726, 2000 NLRB LEXIS 128, at ** 78-79 (Feb. 29, 2000) (declining to find that the employer had “effectively repudiated [its] unlawful conduct” under \textit{Passavant}, even though it had “satisfied virtually all of the requirements for an effective repudiation”).
be converted to an economic strike,\(^9\) employers will rarely be able to establish such a conversion.\(^3\) Indeed, partly because the Board has occasionally applied *Passavant* in this context,\(^*\) cases finding that an unfair labor practice strike was converted to an economic strike are rare.\(^4\)

However, the analysis in *Passavant* has been criticized,\(^6\) and the Board has not always required employers to satisfy the requirements set forth in that case in order to convert an unfair labor practice strike to an economic strike.\(^7\) One Board administrative law judge\(^8\) recently remarked

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In some cases, little analysis has been needed to establish that an employer's attempt to rectify its misconduct failed to satisfy *Passavant*. See, e.g., *Mohawk Liqueur*, 300 N.L.R.B. at 1086; Value City Dep't Stores, Nos. 8-CA-21914 et al., 1991 NLRB LEXIS 1147, at *243 (Sept. 13, 1991).

92. See, e.g., *Target Rock Corp.*, 324 N.L.R.B. 373, 387 (1997), enforced, 172 F.3d 921 (D.C. Cir. 1998); *Chicago Beef Co.*, 298 N.L.R.B. 1039, 1055 (1990), enforced, 944 F.2d 905 (6th Cir. 1991); cf. Stewart, *supra*, note 93, at 1349 (suggesting that an unfair labor practice strike "might be reconverted if the employer remedies all his unfair labor practices").

93. See William R. Corbett, *A Proposal for Procedural Limitations on Hiring Permanent Striker Replacements: "A Far, Far Better Thing" Than The Workplace Fairness Act*, 72 N.C. L. REV. 813, 868 (1994) ("Although it is possible for an employer to take actions that result in the Board's finding that a strike was converted from [an unfair labor practice] strike into an economic strike, . . . the Board and courts have not often found such conversions.").

94. See, e.g., *Target Rock Corp.*, 324 N.L.R.B. at 387; *Chicago Beef Co.*, 298 N.L.R.B. at 1055-1056; *Gloversville Embossing Corp.*, 297 N.L.R.B. 182, 182-83 (1989). In the view of some observers, the dearth of cases finding that a strike had reconverted also may be attributable to the fact that "the Board uses . . . the conversion doctrine to protect the reinstatement rights of employees who have been permanently replaced." Corbett, *supra* note 93, at 869.

95. Work stoppages that "originate as economic strikes" are "[o]ften . . . 'converted' by the subsequent conduct of the employer into an unfair labor practice strike." *Facet Enters.* v. NLRB, 907 F.2d 963, 976 (10th Cir. 1990). There are, by contrast "fewer examples" of unfair labor practice strikes that have been converted to economic strikes. General Indus. Employees Union, Local 42 v. NLRB, 951 F.2d 1308, 1311-12 (D.C. Cir. 1991); see also Rabbitt, *supra* note 30, at 1143 n.6 ("The authority to reconvert an unfair-labor-practice strike into an economic one is probably inherent in the [Board's] power to classify activities as unfair labor practices. The [Board] has seldom exercised this conversion authority, however . . . .") (citation omitted).

96. See, e.g., *Webec Indus.*, 160 L.R.R.M. (BNA) 1217, 1219 (1998) (discussing one Board member's contention that *Passavant* should be overruled), enforced, 217 F.3d 1306 (10th Cir. 2000); *Local 1-2, Utility Workers Union of Am.*, 312 N.L.R.B. 1143, 1144 n.5 (1993) (referring to another Board member's argument that effectively would have required the Board to "disavow the test set out in [Passavant] . . . for effective repudiation of [unlawful] conduct"); see also *Columbia Alaska Reg'l Hosp.*, 160 L.R.R.M. (BNA) 1252, 1254 n.6 (1999) ("Member Hurtgen does not necessarily agree with all of the requirements for repudiation, as set forth in *Passavant Memorial Hospital*."); *Warren Manor Nursing Home*, 162 L.R.R.M. (BNA) 1308, 1309 n.3 (1999) (citing *Columbia Alaska Reg'l Hosp.*, 160 L.R.R.M. (BNA) at 1254 n.6).

97. *See* *Dallas Times Herald*, 315 N.L.R.B. 700, 710 (1994) ("[T]here are cases . . . which give credit to [an employer] who ameliorates its unfair labor practices even though the effort does not meet the strict requirements of *Passavant*"); *F.L. Thorpe & Co.*, 315 N.L.R.B. 147, 151 n.11 (1994) ("We do not suggest . . . that an unfair labor practice strike can never be converted back to an economic strike if an employer's attempted repudiation of the causative unfair labor practice fails to meet requirements for cure under the Board's standards in *Passavant Mem'l Area Hosp.*, 237 N.L.R.B. 138 (1978)."); *enforced in part and rev'd in part*, 71 F.3d 282 (8th Cir. 1995).

98. Unfair labor practice hearings under the NLRA are held before administrative law judges, whose decisions are then subject to Board review. *See* 29 C.F.R. §§ 102.15-16, 102.34, 102.45(a) &
that the Board’s traditional approach instead has been to find that a strike is economic in nature whenever the employer’s unfair labor practices have ceased to be the motivating factor for the strike. That undoubtedly can occur when Passavant has not been satisfied, such as where other circumstances surrounding the strike have caused the unfair labor practices to “fade in significance.” Indeed, there are several reported Board decisions finding that a strike was reconverted even though Passavant was not satisfied.

Unions and employees nevertheless often argue that, in accordance with Passavant, the pertinent unfair labor practice must be fully cured for an unfair labor practice strike to be converted to an economic strike. The most recent Board decisions in this area lend credence to this view, and some earlier Board cases also appear to support the argument. One commentator likewise believes that reconversion should be permitted “only when the employer has clearly eliminated any unfair labor practice and when there are sufficient safeguards for the rights of aggrieved

102.48(b) (1999).

100. See General Indus. Employees Union, Local 42 v. NLRB, 951 F.2d 1308, 1312 (D.C. Cir. 1991).
101. See Sunol Valley Golf Club, 310 N.L.R.B. 357, 371 (1993) (indicating that reconversion can occur when the unlawful conduct that prolonged the strike has “faded in significance and the employees continued the strike solely to enforce their economic demands”), enforced sub nom. Ivaldi v. NLRB, 48 F.3d 444 (9th Cir. 1995); Polar Kraft Mfg. Co., Nos. 26-CA-14036 et al., 1992 NLRB LEXIS 714, at *38 (June 18, 1992) (quoting Mohawk Liqueur Co., 300 N.L.R.B. 1075, 1086 (1990)).
102. See General Indus. Employees Union, 951 F.2d at 1313 (citing cases).
103. See generally id. at 1312 (discussing “the legal standard the Board uses under Passavant to determine whether a party has ‘cured’ its unfair labor practice . . . entirely”).
104. See, e.g., id. (discussing union’s contention that “the Board erred ‘as a matter of law’ in deciding that [a] strike [was] converted from an unfair labor practice strike to an economic strike,” because the employer’s unlawful practices “had not been fully ‘cured’”) (citing Passavant); cf. Trumbull Mem’l Hosp., 288 N.L.R.B. 1429, 1429 (1988) (rejecting employer’s contention that a strike was converted from an unfair labor practice strike to an economic strike because there was “no evidence . . . that the [employer] cured its unlawful conduct”).
105. See Outdoor Venture Corp., 160 L.R.R.M. (BNA) 1178, 1182 (1999) (“In order to find that [an unfair labor practice] strike had reconverted to an economic strike at the time of the [striker’s] offer to return, the unfair labor practices allegedly prolonging the strike . . . must have been fully remedied.”); CF & I Steel, L.P., Nos. 27-CA-15562, 2000 NLRB LEXIS 316, at **249-50 (May 17, 2000) (holding that an unfair labor practice strike had not been converted to an economic strike because the employer’s attempt to repudiate its unlawful conduct did not satisfy “the Board’s Passavant standards”).
106. See, e.g., Gloversville Embossing Corp., 297 N.L.R.B. 182, 182-83 (1989) (applying Passavant to reject employer’s contention that an unfair labor practice strike was converted to an economic strike, because the employer’s communication attempting to rectify the unfair labor practice “failed to disavow the unlawful [conduct] and failed to provide employees any assurances against future interference with the exercise of their Section 7 rights”); Domsey Trading Corp., 310 N.L.R.B. 777, 791-92 (1993) (citing Gloversville in rejecting the contention that an unfair labor practice strike had reverted to an economic strike, because the employer “never disavowed the unlawful [conduct], and never provided the employees with any assurances against future interference with their Section 7 rights”), enforced, 16 F.3d 517 (2d. Cir. 1994).
employees." However, the most persuasive Board reconversion decisions have taken a more flexible approach to the issue.

III. THE BOARD’S STRIKE RECONVERSION CASES

Perhaps the most notable Board reconversion decision is Chicago Beef Co. In one of its most recent discussions of the reconversion issue, the Board specifically indicated that it was applying the “test” it had enunciated in Chicago Beef. However, the Board also addressed the reconversion issue in a number of significant cases decided prior to Chicago Beef, including Nelson B. Allen, Pleasant View Rest Home, Studio 44, Inc, and Trident Seafoods Corp. Several of those cases merit discussion here.

A. The Initial Board Cases Addressing Reconversion

1. Nelson B. Allen

The first Board decision finding that a strike had reconverted, Nelson B. Allen.

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107. Rabbitt, supra note 30, at 1144 n.8; see also id. at 1151 (“The NLRB should [find] reconversion only if the employer clearly has corrected the unfair labor practice.”).
108. See infra notes 229-45 and 328-40 and accompanying text.
110. In addition to the cases discussed in the text, see Sundstrand Castings Co., 209 N.L.R.B. 414 (1974), where the administrative law judge concluded that the parties’ settlement of underlying unfair labor practices “eliminated these matters from strike consideration and converted the strike into an economic strike.” Id. at 425-26; see also D’Armigene, Inc., 148 N.L.R.B. 2 (1964) (discussed infra notes 117 and 179), enforced as modified, 353 F.2d 406 (2d Cir. 1965).
111. Trident Seafoods and Studio 44, in particular, have been cited as pertinent authority in other Board reconversion cases. See, e.g., Burns Int’l Sec. Servs., 324 N.L.R.B. 485, 493 (1997), enforcement denied, 146 F.3d 873 (D.C. Cir. 1998); Sunol Valley Golf Club, 310 N.L.R.B. 357, 371 (1993), enforced sub nom. Ivaldi v. NLRB, 48 F.3d 444 (9th Cir. 1995); see also Rabbitt, supra note 30, at 1149-50 (discussing other pre-Chicago Beef Board decisions that did “not address[] reconversion explicitly,” but nevertheless “imply support for the principle”).
112. The Board first discussed the potential reconversion of an unfair labor practice strike in D’Armigene, Inc., 148 N.L.R.B. 2, 16 (1964), enforced as modified, 353 F.2d 406 (2d Cir. 1965), but ultimately found that reconversion had not occurred in that case. For a discussion of D’Armigene, see Rabbitt, supra note 30, at 1149-50, 1152.
B. Allen,118 was decided nearly fifteen years before the Board articulated its requirements for curing unfair labor practices in Passavant Memorial Area Hospital.119 In Nelson B. Allen, an employer in the trucking business committed an unfair labor practice by discharging all of its drivers when some of them sought to exercise their statutory right to bargain collectively.120 The drivers then began picketing in protest,121 and this picketing was ultimately found to be an unfair labor practice strike.122

The trial examiner,123 whose decision was subsequently adopted by the Board,124 concluded that the employer’s conduct struck at “the heart of the rights guaranteed employees by Section 7 of the Act,”125 and had a potentially devastating effect on the drivers.126 He therefore recommended that the drivers be made whole through the employer’s payment of the earnings they had lost from the dates of their respective discharges to the dates they were offered reinstatement.127 The Board subsequently adopted that recommendation.128

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118. 149 N.L.R.B. 229 (1964).
120. See Nelson B. Allen, 149 N.L.R.B. at 230, 237. Specifically, a majority of the drivers had signed union authorization cards. Id. at 231-32. That fact permitted the employer to recognize the union as the employees’ representative. See id. See also NLRB v. Keystone Pretzel Bakery, 696 F.2d 257, 261 (3d Cir. 1982) (noting “the well settled rule that an employer may rely upon such cards to recognize a union and enter into a collective bargaining relationship”). However, it did not require the employer to do so:
   It is well settled that an employer does not violate ... the Act solely by refusing to accept evidence of majority status proffered by a union by some means other than a Board election. Thus, in the absence of unfair labor practices, an employer has the right to require a Board election, even if the union has demonstrated majority status by other evidence such as authorization cards.

News & Film Serv., No. 27-CA-7579, 1982 NLRB GCM LEXIS 96, at *3 (Jan. 29, 1982) (footnote omitted).
122. Id. at 229, 244-45.
123. The Board’s trial examiners are now referred to as “administrative law judges,” a designation that became effective on August 19, 1972. See 29 U.S.C. § 102.6 (1999); Leviton Mfg. Co. v. NLRB, 486 F.2d 686, 689 n.8 (1st Cir. 1973); Avco Corp., 199 N.L.R.B. 505, 505 n.1 (1972).
125. Nelson B. Allen, 149 N.L.R.B. at 245 (discussing 29 U.S.C. § 157 (1994)). Section 7 of the NLRA guarantees employees “the right . . . to bargain collectively through representatives of their own choosing.” 29 U.S.C. § 157 (1994). Section 8(a)(1) of the Act makes it an unfair labor practice for an employer to “interfere with, restrain, or coerce employees” in the exercise of their Section 7 rights. Id. § 158(a)(1). Thus, even a “threat to discharge employees because of their support of a union clearly runs afoul of . . . the Act.” Trimex Knitting Mills, Inc., Nos. 22-CA-17503 et al., 1991 NLRB LEXIS 932, at *16 (July 31, 1991) (emphasis added).
126. Nelson B. Allen, 149 N.L.R.B. at 244. The trial examiner noted that the employer “put the quietus on the whole bargaining process with the most drastic action possible, the termination of everyone in the [bargaining] unit.” Id. at 236.
127. Id. at 245, 247.
128. Id. at 229. See generally International Bhd. of Elec. Workers, Local 369 v. Olin Corp., 471
However, the trial examiner also noted that the employer's violation of the Act did not mean that "rehabilitation must remain forever an impossibility." In particular, he concluded that because the employer had undertaken in good faith to remedy its unlawful conduct by offering unconditional reinstatement to the terminated drivers, the strike thereafter continued in support of economic objectives, and the drivers who remained on strike after being offered reinstatement were converted from unfair labor practice strikers to economic strikers.

2. Pleasant View Rest Home

In Pleasant View Rest Home, several striking nurses' aides who had been told they were being fired were subsequently informed that they were not actually being discharged. The trial examiner, whose decision was later adopted by the Board, held that advising the aides that they were being terminated had initially converted the strike to an unfair labor practice strike. He nevertheless found that the employer had taken reasonable steps to rescind the terminations and that this rescission caused the aides to revert to the status of economic strikers.

However, the employer failed to reinstate some of the non-economic strikers when vacancies arose, although they had made unconditional requests for reinstatement. Laidlaw Corp. requires reinstatement under

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F.2d 468, 470 (6th Cir. 1972) (noting that "the purpose of back pay awards is to make a wrongfully discharged employee whole and to restore the economic status quo").

129. Nelson B. Allen, 149 N.L.R.B. at 244.

130. See id. at 240, 243-45. See generally Burnup & Sims, Inc., 157 N.L.R.B. 366, 371 (1966) ("The return to employment of a union adherent is not only the final achievement of the Act's protection in respect to such employee but it is the most realistic and articulate demonstration of the Act's paramount protection to other employees.").

131. The employer had also expressed its willingness to make reinstated drivers whole. Nelson B. Allen, 149 N.L.R.B. at 240. See generally Rabbitt, supra note 30, at 1151 ("If an employer were [sic] willing to recognize and terminate his unfair labor practices, he could offer the discharged employee unconditional reinstatement and backpay, the substance of relief under an NLRB order.").

132. Nelson B. Allen, 149 N.L.R.B. at 245; see also id. at 244 ("Those remaining out . . . did so to press for a union contract.").

133. 194 N.L.R.B. 426 (1971).

134. Id. at 427.

135. Id. at 428.

136. See id. at 426.

137. Id. at 430.

138. Id.

139. Id. at 430 n.8.

140. See id. at 431. See generally Bio-Sci. Labs., 209 N.L.R.B. 796, 803 (1974) ("[T]he economic striker . . . retains his status as an employee, and after application for reinstatement, is ordinarily entitled to his former or to a substantially equivalent job for which he is qualified when it becomes available.").

141. 171 N.L.R.B. 1366 (1968), enforced, 414 F.2d 99 (7th Cir. 1969).
those circumstances. Thus the employer committed a new unfair labor practice that converted the strike back to an unfair labor practice strike. Although *Pleasant View Rest Home* was decided seven years before *Passavant Memorial Area Hospital*, this ruling effectively anticipated "the Passavant proviso that no unfair labor practices [be] committed subsequent to the [employer's] disavowal" of its unlawful conduct. As the Board explained in a more recent case, "the Passavant doctrine is limited to situations in which an employer demonstrates its good faith by refraining from violating the Act in any other particulars."


In another significant pre-*Chicago Beef* case, *Studio 44, Inc.*, the parties' collective bargaining agreement contained a provision, commonly known as a no-strike clause, which stated: "There shall be no strikes or lockouts during the term of this agreement." Under the Supreme Court's decision in *Mastro Plastics Corp.* v. *NLRB*, such provisions do not prevent employees from striking in protest of an employer's serious unfair

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142. *Laidlaw* held that:

[E]conomic strikers who unconditionally apply for reinstatement at a time when their positions are filled by permanent replacements: (1) remain employees; and (2) are entitled to full reinstatement upon the departure of replacements unless they have in the meantime acquired regular and substantially equivalent employment, or the employer can sustain his burden of proof that the failure to offer full reinstatement was for legitimate and substantial business reasons.

143. *Pleasant View Rest Home*, 194 N.L.R.B. at 431. The Board has made it clear that an employer's "refusal to reinstate strikers . . . tend[s] to prolong the strike and thereby convert[s] it into an unfair labor practice strike." Weather Tec Corp., 238 N.L.R.B. 1535, 1535 (1978); see also Tufts Bros. Inc., 235 N.L.R.B. 808, 823 (1978) (finding that an employer's "refusal to reinstate [its striking] employees following their unconditional offer [sic] of reinstatement . . . [was] prolonging the strike").


145. Action Mining, Inc., 318 N.L.R.B. 652, 654 (1995); cf. *Facet Enters. v. NLRB*, 907 F.2d 963, 978 (10th Cir. 1990) (holding that an employer's issuance of a "curing notice" did not reconvert a strike because its subsequent additional unfair labor practices "obviated any possible benefit that the notice might have had").

146. *International Automated Machs.*, 285 N.L.R.B. 1122, 1134 (1987). *But see* *Concord Metal*, Inc., 298 N.L.R.B. 1096, 1101 (1990) (finding that an unfair labor practice "was at least partially tempered" by the employer's disavowal, even though the employer "failed to issue the repudiation in a context free of other illegal conduct").


149. *Studio 44, 284 N.L.R.B. at 609.*

labor practices, which are defined as those that are "destructive of the foundation on which collective bargaining must rest."

On the other hand, no-strike clauses generally do prohibit economic strikes, sympathy strikes, and "nonserious" unfair labor practice strikes. Employees electing to participate in those types of strikes in violation of a no-strike clause are subject to discharge. The employer in Studio 44 relied on these principles to argue that the discharge of its striking workers was not unlawful because the strike at issue was either unprotected from its inception, or lost its protected status when the employer offered reinstatement and made other assurances to the strikers.

151. See Arlan's Dep't Store, 133 N.L.R.B. 802, 807 (1961) (interpreting Mastro Plastics); see also Caterpillar Tractor Co. v. NLRB, 658 F.2d 1242, 1247 (7th Cir. 1981) (indicating that the Board's interpretation of Mastro Plastics "has received approval from the courts"). But see United Steelworkers of Am. v. NLRB, 530 F.2d 266, 278 (3d Cir. 1976) ("We have grave doubts that the Board's... Mastro Plastic's/Arland's formula furthers the cause of industrial peace.").

152. Arlan's Dep't Store, 133 N.L.R.B. at 808 (quoting Mastro Plastics, 350 U.S. at 281). Former Board Member (and later Chairman) John Fanning consistently maintained that "no unfair labor practice strike is subject to a general no-strike agreement." Dow Chem. Co. v. NLRB, 636 F.2d 1352, 1360 (3d Cir. 1980) (emphasis added); see also Charles E. Wilson, The Replacement of Lawful Economic Strikers in the Public Sector in Ohio, 46 OHIO ST. L.J. 639, 648 n.75 (1985) ("Member Fanning... [took] the position that all unfair labor practices are serious.").


155. See Park Inn Home for Adults, 293 N.L.R.B. 1082, 1087 (1989) ("The Board has construed Mastro Plastics as not affording protected status to all unfair labor practice strikes in violation of no-strike clauses, but only to strikes in response to 'serious' unfair labor practices by employers.").

156. See Newport News Shipbuilding & Dry Dock Co. v. NLRB, 631 F.2d 263, 268 (4th Cir. 1980) ("It is a settled rule of law that an employer may discharge employees who breach a no-strike clause... "); Jo-Mac Moving Corp., No. 31-CA-18665, 1993 NLRB LEXIS 1057, at *14 (Sept. 30, 1993) ("As a general rule, employees may be discharged for engaging in a strike in violation of a contractual no-strike clause"). For an academic discussion of this issue, see Thomas P. Gies, Employer Remedies for Work Stoppages That Violate No-Strike Provisions, 8 EMPLOYEE REL. L.J. 178 (1982).

157. The complaint alleged "both an unlawful discharge and an unlawful refusal to reinstate." Studio 44, 284 N.L.R.B. at 600 n.17. However, the administrative law judge (with the Board's apparent concurrence) concluded that "no useful purpose would be served by finding the latter conduct independently violative.") Id. (internal quotation marks omitted).

158. The employer argued that "even if it committed the unfair labor practices... alleged, the violations were not serious," and that the strike therefore was "subject to sanction pursuant to the contract's no-strike provision." Id. at 599.
shortly after the strike began.\textsuperscript{159}

The administrative law judge rejected both contentions.\textsuperscript{160} He concluded that the strike was originally protected despite the existence of the no-strike clause because it was prompted by "egregious" unfair labor practices.\textsuperscript{161} He also found that the employer's reinstatement offer was not sufficient to convert the strike into one that was unprotected because the offer was unaccompanied by any assurance that the unfair labor practices would not recur.\textsuperscript{162}

The Board agreed that the strike was initially protected,\textsuperscript{163} but disagreed with the administrative law judge's conclusion that the employer had failed to convert it to one that was unprotected.\textsuperscript{164} The Board acknowledged that the employer's effort to cure its unfair labor practices had not obviated the need for a Board remedy.\textsuperscript{165} However, it concluded that the unfair labor practices had been remedied to a sufficient degree that they were "no longer destructive of the parties' collective-bargaining foundation."\textsuperscript{166} The strike had therefore lost its protected status, and its continuation breached the no-strike provision in the collective bargaining agreement.\textsuperscript{167}

\textit{Studio 44} did not specifically involve the conversion of an unfair labor practice strike to an economic strike, but the conversion of a "serious" unfair labor practice strike (\textit{i.e.}, one protected from the application of a no-strike clause)\textsuperscript{168} to an unprotected, or nonserious, unfair labor practice

\textsuperscript{159} \textit{Id.} at 600.

\textsuperscript{160} \textit{See id.} at 609-10.

\textsuperscript{161} \textit{See id.} at 600, 610. Among other things, the employer had ignored contractual seniority provisions in laying off employees who had exercised their grievance rights under the contract. \textit{Id.} at 608-10. \textit{See generally} American Beef Packers, 193 N.L.R.B. 1117, 1119 (1971) (indicating that reprisal for filing a grievance "impedes and discourages the Union and the employees from exercising their right to invoke the grievance procedure and thus defeats the very purpose of the Act to promote the orderly settlement of labor disputes").

\textsuperscript{162} \textit{See Studio 44}, 284 N.L.R.B. at 600, 610.

\textsuperscript{163} The Board rejected the employer's contention that its unfair labor practices "were not serious." \textit{Id.} at 599. It concluded that the conduct at issue was "destructive of the foundation on which collective bargaining must rest," and thus was "serious enough to make the... walkout protected activity, despite the no strike provision." \textit{Id.; see also Servair, Inc., 265 N.L.R.B. 181, 183 (1982) ("Where an employer has engaged in serious unfair labor practices that undermine employee free choice, and has thereby destroyed the foundations of stable collective bargaining, an ordinary no-strike clause does not... justify[] the discharge of employees who strike in response to serious unfair labor practices.")}, enforced, 726 F.2d 1435 (9th Cir. 1984).

\textsuperscript{164} \textit{See Studio 44}, 284 N.L.R.B. at 600.

\textsuperscript{165} \textit{Id.} at 601 n.23.

\textsuperscript{166} \textit{Id.} at 601-02; \textit{cf.} Concord Metal, Inc., 298 N.L.R.B. 1096, 1101 (1990) (indicating that the "salient point" is whether the employer's unfair labor practices "had any real impact on the collective-bargaining process").

\textsuperscript{167} \textit{Studio 44}, 284 N.L.R.B. at 602.

\textsuperscript{168} \textit{See, e.g.,} Syn-Tech Windows Sys., 294 N.L.R.B. 791, 792 n.4 (1989) (discussing whether a work stoppage "was protected because it was provoked by a serious unfair labor practice"); Goodie
The case nevertheless has been cited for the proposition that "an unfair labor practice strike can be converted to an economic strike," and it is clearly relevant to that issue. 171

4. Trident Seafoods Corp.

The remaining significant pre-Chicago Beef reconversion decision, *Trident Seafoods Corp.*, 172 the employer notified employees engaged in an economic strike that they had been discharged, and were ineligible for rehire. 173 The administrative law judge, whose analysis was ultimately adopted by the Board, 174 held that this notice violated section 8(a)(1) of the Act, 175 and converted the economic strike to an unfair labor practice strike. 176

However, a subsequent letter to the employees conceded that the original notice was erroneous, and assured them that the employer would honor their statutory rights. 177 The administrative law judge concluded that this letter had the effect of reverting the status of the striking workers to that of economic strikers. 178 The Board (which, like the administrative law judge, did not discuss the potential application of *Passavant*) 179

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169. See Studio 44, 284 N.L.R.B. at 603-04 (Johansen, dissenting in part) (indicating that the majority held that a protected unfair labor practice strike was "converted ... to an economic strike or otherwise caused .... to lose its insulation from the contractual no-strike clause") (emphasis added).

170. See, e.g., Burns Int'l Sec. Servs., 324 N.L.R.B. 485, 493 (1997) (describing Studio 44 as a case in which "the Board found that an unfair labor practice strike was converted to an economic strike"), enforcement denied, 146 F.3d 873 (D.C. Cir. 1998).

171. See id. at 569.

172. 244 N.L.R.B. 566 (1979), enforced, 642 F.2d 1148 (9th Cir. 1981).

173. Id. at 569.

174. See id. at 566.


176. Trident Seafoods, 244 N.L.R.B. at 569.

177. Specifically, the letter stated that the original notice "mistakenly described your cessation of work as a discharge (when in fact you were participating in a strike) and mistakenly negated your eligibility for rehire." Id. The letter acknowledged that the initial notice "may have been misleading" and "should not have been used," and assured the employees that the employer would accord them "all rights as a striker under the National Labor Relations Act." Id.

178. Id. at 570 (citing Typoservice Corp., 203 N.L.R.B. 1180 (1973)).

179. In an earlier decision that predated *Passavant* (and also was not discussed in *Trident*), the Board held that a strike "was not converted from its original character of an unfair labor practice strike, in the absence of [the employer's] complete cessation and full remedying of [its] unfair labor practices." D'Armigene, Inc., 148 N.L.R.B. 2, 16 (1964), *enforced as modified*, 353 F.2d 406 (2d Cir. 1965); see also Rabbitt, supra note 30, at 1150 (predicting that an employer's failure to "completely purge" its
subsequently agreed with this conclusion.  

B. The Status of Strike Reconversion Law Immediately Prior to the Board’s Decision in Chicago Beef Co.

A review of the foregoing cases establishes that, at the time Chicago Beef Co. arose, the Board had held that an employer can reconvert an unfair labor practice strike to an economic strike by repudiating its unfair labor practices. It had also intimated that such a reconversion could occur even though the repudiation did not constitute an adequate remedy or complete “cure” for the unfair labor practices themselves. Without specifically considering the potential applicability of Passavant Memorial Area Hospital in this context, the Board had also suggested that a finding of reconversion might be inappropriate if the employer’s repudiation of its unfair labor practices was accompanied by other unlawful conduct that effectively would convert the strike back to an unfair labor practice strike.

Thus, prior to the Board’s decision in Chicago Beef, an employer arguably was required to satisfy at least one, but apparently not all, of Passavant’s repudiation requirements in order to reconvert an unfair labor practice strike to an economic strike. Unfortunately, the Board had given no indication as to which of the Passavant requirements, other than the requirement that the employer’s repudiation of its unfair labor practice be “free from other proscribed conduct,” might be essential to a finding of reconversion.

unfair labor practices would result in a “failure to reconvert the strikers to economic status”).

180. See Trident Seafoods, 244 N.L.R.B. at 566.
182. See, e.g., Trident Seafoods Corp., 244 N.L.R.B. 566, 570 (1979), enforced, 642 F.2d 1148 (9th Cir. 1981); Nelson B. Allen, 149 N.L.R.B. 229, 244-45 (1964).
188. See generally Rabbitt, supra note 30, at 1152 (describing the reconversion issue as an “uncertain area of labor law”). This certainly is not the only issue upon which the Board could be criticized for a “failure to provide guidance to employers.” Lasalle Ambulance Inc., 160 L.R.R.M. (BNA) 1151, 1154 n.6 (1998).
C. Applying Passavant to Strike Reconversions: Chicago Beef Co.

In Chicago Beef Co., a strike that began as an economic strike was converted to an unfair labor practice strike when the employer advised the striking employees that they would be required to resign from the union as a condition of reinstatement. The Board held that the employer’s conduct constituted an unfair labor practice, and concluded that the unfair labor practice had prolonged the strike.

Citing Trident Seafoods Corp., the employer argued that its unfair labor practice was cured, and the strike reconverted to an economic one, by its posting of a notice indicating that employees were not required to resign their union membership in order to work for the employer. However, the administrative law judge indicated that Passavant Memorial Area Hospital, rather than Trident, was the controlling authority governing the conversion of unfair labor practice strikes to economic strikes. Thus,
in order to convert the strike, the employer must repudiate its unfair labor practices in a manner that is "timely, unambiguous, specific in nature to the coercive conduct, and free from other prescribed illegal conduct." In addition, there must be adequate publication of the repudiation to the employees and there must be no prescribed [sic] conduct on the employer's part after publication. Finally, such repudiation or disavowal must give assurances to employees that in the future the employer will not interfere with the existence of their Section 7 rights.

Because the employer in Chicago Beef did not admit to any wrongdoing, or assure the employees that it would not interfere with their Section 7 rights in the future, it had failed to effectively repudiate its unfair labor practice under Passavant. Accordingly, the administrative law judge found that the strike had not reverted back to an economic strike.

The Board subsequently affirmed this ruling, although on slightly different grounds. Without specifically citing Passavant, the Board agreed that the unfair labor practice had neither been cured nor removed as a factor motivating the strike because the employer had not unequivocally repudiated and rescinded its unlawful actions. In fact, the Board concluded that the employer's attempted repudiation actually constituted objective evidence that its unlawful conduct had prolonged the strike, by confirming that the conduct had caused "consternation among the striking employees."

The Board based its conclusion on the following reasoning:

198. Id. at 1055-56 (emphasis omitted).
199. Id. at 1056 (emphasis added).
200. Indeed, the Board noted that the notice the employer had posted was "clearly a denial that [it] engaged in any wrongful conduct." Id. (emphasis added).
201. Id. The Board found this to be the most important deficiency in the employer's notice. Id. However, an employer's failure to provide such an assurance is not always fatal to the contention that a strike was economic in nature. See, e.g., Concord Metal, Inc., 298 N.L.R.B. 1096, 1101 (1990) (holding that a strike was economic even though the employer "failed to give . . . an assurance that no interference with . . . Section 7 rights would occur in the future").
203. See id. at 1040 (characterizing the administrative law judge's decision).
204. See id. at 1039.
205. See id. at 1040.
207. Chicago Beef, 298 N.L.R.B. at 1040; see also LeRoy, supra note 32, at 219 n.295 (quoting Chicago Beef).
208. Chicago Beef, 298 N.L.R.B. at 1040. See generally F.L. Thorpe & Co., 315 N.L.R.B. 147, 150 (1994) (indicating that the Board has "inferred" that the employer's conduct prolonged a strike "where there is objective evidence that the unfair labor practices caused consternation among the striking employees") (internal quotation marks and citations omitted), enforced in part and rev'd in part.
Despite the statement in the... notice to employees that "there is no requirement (and there never has been) that any employee resign from the Union to work at Chicago Beef," that notice did not mention the previously imposed condition on strikers of resigning their union membership to obtain reinstatement. Given the lack of a specific reference to the [employer's] past action, those strikers on whom the condition had been imposed, or those who knew of its imposition, might reasonably have been left in doubt about the notice's application to them.\(^{209}\)

*Chicago Beef* is a significant decision.\(^{210}\) Although the case's only discussion of *Passavant* appears in the administrative law judge's decision,\(^{211}\) rather than in the Board's own opinion,\(^{212}\) *Chicago Beef* is generally deemed to be the seminal Board ruling applying *Passavant*'s stringent standards for repudiating an unfair labor practice in the strike reconversion setting,\(^{213}\) and it effectively set the stage for the Board to apply *Passavant* in other reconversion cases.\(^{214}\) As discussed below, however, some subsequent Board decisions have taken a more flexible and pragmatic approach to the reconversion issue, holding that unfair labor practice strikes can occasionally be reconverted to economic strikes even though *Passavant* has not been satisfied.\(^{215}\)

D. The Board's Initial Post-Chicago Beef Reconversion Decisions

1. Gaywood Manufacturing Co.

The Board first relied on *Chicago Beef* to hold that an unfair labor practice strike was not reconverted to an economic strike by the employer's attempt to repudiate its conduct in *Gaywood Manufacturing Co.*\(^{216}\) The strike at issue in *Gaywood* had become an unfair labor practice strike when the employer's vice president informed some of the striking employees that they would be required to withdraw from the union in order to be

\(^{71}\) F.3d 282 (8th Cir. 1995).

\(^{209}\) *Chicago Beef*, 298 N.L.R.B. at 1040 (emphasis added and bracketing omitted).

\(^{210}\) *Chicago Beef*, 298 N.L.R.B. at 1055.

\(^{211}\) *See Chicago Beef*, 298 N.L.R.B. at 1055.

\(^{212}\) *See supra* note 206 and accompanying text.

\(^{213}\) However, the Board had first suggested that *Passavant* would apply in the strike reconversion context in *Gloversville Embossing Corp.*, 297 N.L.R.B. 182, 182-83 (1989), a case decided approximately eight months before *Chicago Beef* that did not actually involve reconversion.


\(^{215}\) *See General Indus. Employees Union, Local 42 v. NLRB*, 951 F.2d 1308, 1313 (D.C. Cir. 1991) ("The Board has... decided on several occasions that an unlawful practice not fully cured under *Passavant*... was not, or had ceased to be, a reason underlying a strike.") (citing cases).

reinstated. Citing Chicago Beef, the Board stated that the “conditioning of reinstatement on resignation from the Union is . . . an unfair labor practice that, by its nature, has a reasonable tendency to prolong the strike.”

In a subsequent bargaining session, the company’s vice president assured the union president that resignation from the union was not a condition to reinstatement of the strikers. The vice president thereafter advised the company’s supervisors of that fact as well. However, the Board again relied upon Chicago Beef in holding that “such statements to supervisors do not cure the [employer’s] unfair labor practices or otherwise remove them as a factor in prolonging the strike.” Alluding to one of the Passavant repudiation requirements, the Board added that the strike would not have reverted to an economic strike in any event because the employer “continued to violate the Act by refusing to reinstate unfair labor practice strikers who made unconditional offers to return to work.”

While the Board in Gaywood did not specifically cite Passavant, the analysis in Gaywood implicitly confirmed the significance of the Passavant repudiation standards in strike reconversion cases. In particular, the analysis in Gaywood, like the Board’s earlier decision in Pleasant View Rest Home, suggests that compliance with at least one of the Passavant standards—the requirement that there be “no proscribed conduct on the employer’s part” after giving employees notice of its attempted repudiation—may be essential to a finding that a strike has been reconverted.

217. See id. at 699-700.
218. Id. at 700.
219. Id. at 700 n.15.
220. Id.
221. Id.
222. See Passavant Mem’l Area Hosp., 237 N.L.R.B. 138, 138 (1978) (indicating that “there must be adequate publication of the [employer’s] repudiation to the employees involved and there must be no proscribed conduct on the employer’s part after the publication”).
227. See Gaywood, 299 N.L.R.B. at 700 n.15; cf. Meadow Valley Contractors, Inc., 331 N.L.R.B. No. 96, 2000 NLRB LEXIS 451, at *30 (July 19, 2000) (indicating that “whether there have been any further violations of the Act since the repudiation” is the “critical issue” under Passavant); Action Mining, Inc., 318 N.L.R.B. 652, 654 (1993) (stating that the “primary, critical issue” under Passavant “is whether the [employer] committed any unfair labor practices after . . . its disavowal”).
2. Mohawk Liqueur Co.

The Board’s analysis of the reconversion issue in other post-Chicago Beef cases has been mixed.\(^{228}\) In Mohawk Liqueur Co.,\(^{229}\) for example, the administrative law judge, whose reasoning was subsequently adopted by the Board,\(^{230}\) held that a strike that began as an unfair labor practice strike because it was motivated by the employer’s failure to honor contractually required cost of living ("COLA") adjustments\(^{231}\) was effectively converted to an economic strike when the employer eventually made the COLA payments.\(^{232}\) The judge reached this result even though the employer had not satisfied the standards for curing an unfair labor practice set forth in Passavant Memorial Area Hospital.\(^{233}\)

Because the Passavant standards had not been satisfied,\(^{234}\) the judge in Mohawk Liqueur held that the employer had not completely cured its unfair labor practice,\(^{235}\) and recommended an appropriate remedy\(^{236}\) that was subsequently adopted, in relevant part, by the Board.\(^{237}\) The judge nevertheless concluded that after the employees received their COLA payments, the employer’s earlier failure to make the payments played no part in their decision to continue the strike.\(^{238}\) The Board ultimately agreed

\(^{228}\) As is common in other contexts in which the Board has taken inconsistent positions, some of the Board’s more recent reconversion decisions reflect no apparent awareness of earlier pertinent authority. See, e.g., N.L.R.B. v. Vemco, Inc., 989 F.2d 1468, 1474 n.7 (6th Cir. 1993) (finding it "difficult to ascertain if the panel of the Board . . . was aware of the Board’s policy in [an] area"); see also Matthew W. Finkin, The Truncation of Laidlaw Rights by Collective Agreement, 3 IND. REL. L.J. 591, 598 n.32 (1979).


\(^{230}\) See id. at 1075 n.1.

\(^{231}\) See id. at 1079, 1082-83, 1085-86. See generally Meilman Food Indus., 234 N.L.R.B. 698, 698 (1978) (holding that an employer’s refusal to honor a COLA provision in a collective bargaining agreement constitutes "a unilateral change in the existing wage structure in violation of Section 8(a)(1) and (5) of the Act").

\(^{232}\) Mohawk Liqueur, 300 N.L.R.B. at 1086.

\(^{233}\) See id. (employer’s efforts “failed to satisfy most of Passavant’s stringent standards”) (citing Passavant Mem’l Area Hosp., 237 N.L.R.B. 138 (1978)).

\(^{234}\) Among other things, the employer’s attempt to remedy its unlawful conduct was found to be “untimely,” the employer failed to disavow that conduct (and indeed maintained that its actions had been proper), and it “gave no assurance that [it] would not engage in the same or other unlawful practices again.” Mohawk Liqueur, 300 N.L.R.B. at 1086.

\(^{235}\) Id.

\(^{236}\) Id. at 1086, 1093-94. The Board has indicated that the appropriate remedy in such a case is an order requiring the employer to make all COLA payments together with interest. See Struther Wells Corp., 262 N.L.R.B. 1080, 1081 (1982), enforced in part, enforcement denied in part, 721 F.2d 465 (3d Cir. 1983).

\(^{237}\) See Mohawk Liqueur, 300 N.L.R.B. at 1075-76.

\(^{238}\) Id. at 1086.
with this analysis as well.\textsuperscript{239}

\textit{Mohawk Liqueur} thus confirms the proposition that where an employer has failed to satisfy \textit{Passavant}'s repudiation requirements, the union or employees are entitled to "complete relief" from the employer's unremedied (or partially remedied) unfair labor practices.\textsuperscript{240} In \textit{Mohawk}, that relief included, among other things, an award of interest on the belated COLA payments.\textsuperscript{241}

As the administrative law judge noted, however, an employer's failure to fully remedy its unlawful conduct does not compel the conclusion that its conduct "continued to prove an obstacle in negotiations or prolonged the strike."\textsuperscript{242} Because there was no evidence of a causal connection between the employer's "failure to completely cure its unlawful conduct" and the continuation of the strike in \textit{Mohawk},\textsuperscript{243} the administrative law judge (and ultimately the Board)\textsuperscript{244} held that the strike reconverted to an economic strike when the employer made the COLA payments.\textsuperscript{245}

3. Target Rock Corp.

In contrast to the analysis in \textit{Mohawk Liqueur}, the administrative law judge in \textit{Target Rock Corp.},\textsuperscript{246} whose analysis of this issue was subsequently affirmed by the Board,\textsuperscript{247} rejected the employer's argument that an unfair labor practice strike had been converted to an economic strike, finding that the employer's attempted repudiation of its unfair labor practices did not satisfy \textit{Passavant}.\textsuperscript{248} The judge acknowledged the Board's recent indication, in a footnote in \textit{F.L. Thorpe & Co.},\textsuperscript{249} that there may be circumstances in which a reconversion could occur when \textit{Passavant} has not been satisfied.\textsuperscript{250} Despite the purported limitations on the applicability of \textit{Passavant} imposed by this footnote, the administrative law judge

\begin{itemize}
  \item \textsuperscript{239} See id. at 1075 n.1.
  \item \textsuperscript{240} Id. at 1086.
  \item \textsuperscript{241} See id. at 1086, 1093.
  \item \textsuperscript{242} Id. at 1086 (internal quotation marks and citation omitted).
  \item \textsuperscript{243} Id.
  \item \textsuperscript{244} See id. at 1075 n.1.
  \item \textsuperscript{245} Id. at 1086.
  \item \textsuperscript{246} 324 N.L.R.B. 373 (1997), enforced, 172 F.3d 921 (D.C. Cir. 1998).
  \item \textsuperscript{247} See id. at 373.
  \item \textsuperscript{248} See id. at 387.
  \item \textsuperscript{249} 315 N.L.R.B. 147 (1994), enforced in part and rev'd in part, 71 F.3d 282 (8th Cir. 1995).
  \item \textsuperscript{250} See Target Rock, 324 N.L.R.B. at 387 (discussing \textit{F.L. Thorpe}, 315 N.L.R.B. at 151 n.11). In \textit{F.L. Thorpe}, however, the Board ultimately held that the employer's "flawed repudiation effort" was not sufficient to reconvert the strike at issue in that case because that effort not only failed to cure the unfair labor practice, but also did not "otherwise remove it as a factor in prolonging the strike." \textit{F.L. Thorpe}, 315 N.L.R.B. at 151 & n.11 (emphasis, internal quotation marks and citation omitted).
\end{itemize}
effectively concluded that the analysis in Chicago Beef Co.\textsuperscript{251} had confirmed Passavant's requirement that the employer must unequivocally repudiate and rescind its unlawful conduct.\textsuperscript{252} Because the employer in Target Rock had not done so,\textsuperscript{253} the strike at issue in that case had not been reconverted.\textsuperscript{254}

4. Burns International Security Services

The Board also addressed the strike reconversion issue in Burns International Security Services.\textsuperscript{255} Citing Trident Seafoods Corp.\textsuperscript{256} and Studio 44, Inc.,\textsuperscript{257} the administrative law judge in Burns, whose analysis was subsequently adopted by the Board,\textsuperscript{258} indicated that an employer seeking to reconvert a strike must have "substantially" remedied the unfair labor practice that was a cause of the strike.\textsuperscript{259} Because the employer in Burns apparently made no effort to remedy its unfair labor practice,\textsuperscript{260} the judge held that the strike was not converted to an economic strike.\textsuperscript{261}

However, both the administrative law judge and the Board overlooked the possibility that the strike in Burns may have been economic from its inception.\textsuperscript{262} This possibility was confirmed when a federal appellate court\textsuperscript{263} subsequently held that there was no basis for the Board's finding

\begin{footnotesize}
\footnotesize{\begin{enumerate}
\item[251.] 298 N.L.R.B. 1039 (1990), enforced, 944 F.2d 905 (6th Cir. 1991).
\item[252.] See Target Rock, 324 N.L.R.B. at 387; see also LeRoy, supra note 32, at 219 n.295 (noting that the Board in Chicago Beef "stated... that in order to reconvert an unfair labor practice strike, an employer must unequivocally repudiate and rescind its unlawful actions") (internal punctuation omitted).
\item[253.] The administrative law judge noted that "among other things, [the employer] failed to publish a repudiation of its conduct to all members of the [bargaining] unit." Target Rock, 324 N.L.R.B. at 388. See generally Raysel-IDE, Inc., 284 N.L.R.B. 879, 886 (1987) (indicating that "adequate publication" of the attempted repudiation [is a] requirement of Passavant").
\item[254.] See Target Rock, 324 N.L.R.B. at 387.
\item[256.] 244 N.L.R.B. 566 (1979), enforced, 642 F.2d 1148 (9th Cir. 1981).
\item[257.] 284 N.L.R.B. 597 (1987).
\item[258.] See Burns, 324 N.L.R.B. at 485.
\item[259.] Id. at 493; cf. General Indus. Employees Union, Local 42 v. NLRB, 951 F.2d 1308, 1313 (D.C. Cir. 1991) (citing Studio 44 for the proposition that an unfair labor practice strike may be converted to an economic strike "when the employer 'substantially' correct[s] its unlawful practice").
\item[260.] See Burns, 324 N.L.R.B. at 493 (observing that "the employer here never remedied the unfair labor practice").
\item[261.] See id.
\item[262.] In other words, Burns actually may not have been a strike reconversion case at all. See Burns, 324 N.L.R.B. at 492 (discussing the parties' differing contentions concerning the nature of the strike when it "began"); cf. F.L. Thorpe & Co. v. NLRB, 71 F.3d 282, 291-92 (8th Cir. 1995) (finding it unnecessary to reach the reconversion question because the strike at issue had never been an unfair labor practice strike).
\item[263.] The Board's decisions are subject to limited federal judicial review. 29 U.S.C. § 160(f) (1994).
\end{enumerate}}
\end{footnotesize}
that the strike was an unfair labor practice strike.\textsuperscript{264}

That the strike in \textit{Burns} was economic in nature had been strongly suggested by the fact that the strikers made a conditional offer to return to work if their economic demands were met, "without any insistence on remedying the unfair labor practices."\textsuperscript{265} The administrative law judge rejected the employer's argument that this offer had converted the strike to an economic one,\textsuperscript{266} reasoning as follows:

Since the [employer]... never remedied the unfair labor practice, the employees were not put to the test of whether they would continue their strike solely for economic reasons. All that is shown by the employees' conditional offer to return to work is that they were prepared to abandon their strike if their economic demands were met. Such a position merely recognizes that the employees lost the strike and not that they were abandoning any interest in the unfair labor practice issues. Obviously, the employees could still pursue the alleged unfair labor practices by filing charges with the Board.\textsuperscript{267}

This reasoning is consistent with the analysis in other Board reconversion cases.\textsuperscript{268} In \textit{Local 19 Hotel Employees Union},\textsuperscript{269} for example, another administrative law judge, whose findings were subsequently affirmed by the Board,\textsuperscript{270} reached a similar conclusion, stating:

I reject Respondent's contention that [a union representative's]... mailgram had the effect of converting the strike to solely an economic one merely because she offered to cease picketing in return for an agreement. In the mailgram, she also made clear that [the union] was not abandoning its assertion that the terminations [that were the basis for the unfair labor practice allegations] were unlawfully motivated, but rather was simply willing to leave [the] question of termination with [the Board].

\textsuperscript{264} Burns Int'l Sec. Servs. v. NLRB, 146 F.3d 873, 878 (D.C. Cir. 1998).

\textsuperscript{265} Burns, 324 N.L.R.B. at 493. \textit{See generally} Stewart II, supra note 29, at 1312 (observing that "the final settlement of the strike may... be used to prove [whether] the [unfair labor practice] protracted the dispute").

\textsuperscript{266} Because the employees' offer to return was conditional, it did not end the strike, as effectively would have occurred in the case of an unconditional offer. \textit{See} McAllister Bros., 312 N.L.R.B. 1121, 1131 (1993) ("It is... well settled that a conditional offer, whether the strike is an unfair labor practice strike or an economic strike, does not trigger reinstatement rights of any kind."); LeRoy, \textit{supra} note 32, at 176 (noting that an employer "is under no duty to reinstate strikers until they have offered to end their walkout unconditionally"); \textit{cf.} Atlanta Daily World, 192 N.L.R.B. 159, 159 (1971) (holding that conditional requests for reinstatement are "not valid").

\textsuperscript{267} Burns, 324 N.L.R.B. at 493.

\textsuperscript{268} \textit{See, e.g.,} Nelson B. Allen, 149 N.L.R.B. 229, 238 n.15 (1964) (asserting that until the employer remedies its unfair labor practices, the strikers' "willingness to return without a contract cannot be tested"). \textit{See generally} Sunol Valley Golf Club, 310 N.L.R.B. 357, 371 (1993) (indicating that in order for the Board to find reconversion, the employees must have "continued to strike solely to enforce their economic demands"), \textit{enforced sub nom.} Ivaldi v. NLRB, 48 F.3d 444 (9th Cir. 1995).

\textsuperscript{269} 240 N.L.R.B. 240 (1979), enforcement denied, 628 F.2d 1357 (9th Cir. 1980).

\textsuperscript{270} \textit{See id.} at 240.
Accordingly, her offer expresses no more than willingness to resolve part of the dispute directly between the parties, while permitting the remainder to be resolved by the normal processes established by the Act. In no sense did she thereby abandon [the union's] contention that Respondent had unlawfully terminated the employees . . . , nor can it be said that her suggestion of an alternative means for resolution of the dispute rose to the level of an abandonment of the object of the picketing. She was simply suggesting a less disruptive and more peaceful means by which the total dispute could be handled.\footnote{271}

The analysis in these reconversion cases is not entirely persuasive,\footnote{272} and in any event is not dispositive of whether the strike in \textit{Burns} was economic from its inception.\footnote{273} An unfair labor practice is generally deemed to be the cause of a strike only if it “delay[ed] a settlement that otherwise would have been reached on the economic issues.”\footnote{274} Thus, a strike that ends when an unfair labor practice is remedied is deemed to have been caused by the unfair labor practice.\footnote{275} By the same token, a strike that ends when the employees’ economic demands are met, even though the employer’s unfair labor practices remain unremedied, would appear \textit{not} to have been motivated by the unfair labor practices.\footnote{276}

\footnote{271. \textit{Id.} at 248 n.12 (internal quotation marks omitted).}

\footnote{272. The relevant issue in a strike reconversion case is not whether the striking employees had abandoned their “assertion that the [employer’s] actions were unlawfully motivated,” as suggested in \textit{Local 19 Hotel Employees Union}, 240 N.L.R.B. at 248 n.12, or “any interest” in the employer’s unfair labor practices, as suggested in \textit{Burns}, 324 N.L.R.B. at 493, but whether they have abandoned their right “to strike in protest of the unfair labor practices.” \textit{Coronet Casuals, Inc.}, 207 N.L.R.B. 304, 320 (1973) (emphasis added).

\footnote{273. The employer in \textit{Burns} appears to have overlooked the argument that the employees’ offer to return demonstrated that the strike was economic from its inception, having instead argued only that “the strike was converted to an economic strike . . . when the employees made [the] offer to return.” \textit{Burns}, 324 N.L.R.B. at 493 (emphasis added).

\footnote{274. \textit{Facet Enters. v. NLRB}, 907 F.2d 963, 976 (10th Cir. 1990); see also \textit{Schmidt-Tiago Constr. Co., Nos. 27-CA-7424 et al.}, 1987 NLRB LEXIS 213, at *135 (Sept. 30, 1987) (“An economic strike . . . may be prolonged by an employer’s subsequent unfair labor practices . . . if the unfair labor practices obstruct . . . settlement.”).

\footnote{275. \textit{In Gem Urethane Corp.}, 284 N.L.R.B. 1349 (1987), for example, the Board held that a strike had resulted “at least in part, from the [employer’s] unfair labor practices.” \textit{Id.} at 1352. The Board relied in part upon the fact that the union had informed the employer that the strike would end “just as soon as the unfair labor practices [were] effectively remedied,” although it indicated that the union’s statement was not alone “determinative” of the issue. \textit{Id.} at 1351-52; see also \textit{Woods Schs.}, 270 N.L.R.B. 171, 179 (1984) (finding that a union’s “offer to call off the . . . strike” if the employer’s unfair labor practices were settled was “a clear demonstration that . . . the unfair labor practice charges [were] the complete reason, even more than a contributing cause, for the strike”); cf. \textit{Polar Kraft Mfg. Co., Nos. 26-A-14036 et al.}, 1992 NLRB LEXIS 714, at **38-39 (June 18, 1992) (finding that a strike was economic because there was “no change in the employees’ strike activity” when the employer ended its unfair labor practice).

\footnote{276. \textit{Cf. SKRL Die Casting}, 245 N.L.R.B. 1041, 1051 & n.8 (1979) (finding that a strike that “continued even after the parties reached an agreement on economic terms” was caused, at least in part, by the employer’s unfair labor practices) (emphasis added). \textit{But cf. Head Div., AMF, Inc.}, 228 N.L.R.B. 1406, 1418 (1977) (finding that a strike was an unfair labor practice strike despite a union official’s
In *Burns*, the strikers' conditional offer to return to work "if their economic demands were met" demonstrates that the employer's unfair labor practices were not an impediment to the settlement of the strike. Thus, those unfair labor practices were not a "cause" of the strike. Because the employees' offer to return was made before the unfair labor practices were remedied, the strike appears to have been economic from its inception, and the administrative law judge was technically correct in holding that it had not been "converted" to an economic strike. However, if the offer had been made after the employer substantially remedied its unfair labor practices, the Board might well have concluded that reconversion had occurred because a strike is generally deemed to have been reconverted when the unfair labor practices have been remedied to the extent they no longer "continued to prove 'an obstacle in negotiations.'"

admission that "there would have been no strike regardless of the status of the unfair labor practice issues" if the employer had accepted the union's bargaining proposal), enforced, 593 F.2d 972 (10th Cir. 1979).


278. See generally *Soule Glass & Glazing Co.*, 652 F.2d 1055, 1079-80 (1st Cir. 1981) ("It must be found not only that the employer committed an unfair labor practice . . ., but that as a result . . . settlement of the strike was thereby delayed . . .").

279. The Board has indicated that a conditional offer to return is, by definition, one that is "conditioned on removing the cause of the strike." *Atlanta Daily World*, 192 N.L.R.B. 159, 159 (1971) (emphasis added). In *Burns*, that "cause" was the employer's refusal to meet the strikers' "economic demands." *Burns*, 324 N.L.R.B. at 493.


281. See, e.g., *SCA Servs. of Ga.*, 275 N.L.R.B. 830, 837 (1985) (finding a strike to be economic in nature in part because "the Union's strike settlement proposal dealt with economic issues, not the resolution of the alleged unfair labor practices").

282. In an earlier decision the Board had held that where the unfair labor practices at issue are continuing, have never ceased, and remain unremedied, the legal principles relating to any argument which might conceivably be made that . . . the strike was reconverted to an economic strike are inapplicable." *Soule Glass & Glazing Co.*, 246 N.L.R.B. 792, 805 (1979), enforced in part, enforcement denied in relevant part, 652 F.2d 1055 (1st Cir. 1980).

283. See *Burns*, 324 N.L.R.B. at 493 (contrasting the situation in *Burns* with cases in which an unfair labor practice strike was converted to an economic strike when the employer substantially remedied the unfair labor practices that had been one of the causes of the strike, thereby removing that cause and converting the strike to a purely economic action").

284. See *Outdoor Venture Corp.*, 160 L.R.R.M. (BNA) 1178, 1183 (1999) (stating that an unfair labor practice strike "would . . . convert[] to an economic strike at the time of the offer to return" if "by then the . . . unfair labor practices have been fully remedied") (discussing *Carlsen Porsche Audi, Inc.*, 266 N.L.R.B. 141 (1983)); cf. *Sundstrand Castings Co.*, 209 N.L.R.B. 414, 425-26 (1974) (holding that a settlement that "eliminated [unfair labor practices] from strike consideration" prior to the employees' offer to return "converted the strike into an economic strike").

E. Attempting to Reconcile the Competing Views: Outdoor Venture Corp.

In *Outdoor Venture Corp.*,\(^{286}\) the Board attempted to reconcile the conflict between cases such as *Chicago Beef Co.*\(^{287}\) and *Target Rock Corp.*\(^{288}\) which suggest that the unfair labor practice must have been fully cured in order for an unfair labor practice strike to be converted to an economic one;\(^{289}\) and those like *Mohawk Liqueur Co.*\(^{290}\) which have found that reconversion occurred even though the employer failed to satisfy all of Passavant's standards for finding such a cure.\(^{291}\)

In *Outdoor Venture*, the employer agreed to settle an unfair labor practice charge filed by the union representing its striking employees.\(^{292}\) The charge had alleged that the employer committed unfair labor practices by threatening plant closure if the employees remained on strike,\(^{293}\) and by engaging in direct dealing with employees on the picket line.\(^{294}\) The settlement agreement required the employer to post a remedial notice for at least 60 days.\(^{295}\)

The union declined to join in the agreement,\(^{296}\) and continued to strike for several additional weeks.\(^{297}\) However, for reasons that are not explained

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\(^{287}\) 298 N.L.R.B. 1039 (1990), enforced, 944 F.2d 905 (6th Cir. 1991).


\(^{289}\) See *Outdoor Venture*, 160 L.R.R.M. (BNA) at 1182 & n.13 (discussing *Chicago Beef*). A Board administrative law judge followed this approach as recently as mid-May, 2000, finding on that occasion that an unfair labor practice strike had not been converted to an economic strike because the employer's attempted repudiation did not "remediate its numerous existing unfair labor practices as measured by the Board's Passavant standards." CF & I Steel, L.P., Nos. 27-CA-15562 et al., 2000 NLRB LEXIS 316, at **249-50 (May 17, 2000).


\(^{291}\) See *Outdoor Venture*, 160 L.R.R.M. (BNA) at 1182 n.16 (discussing *Mohawk Liqueur*).

\(^{292}\) *Id.* at 1179.

\(^{293}\) *Id.* See generally *Ford Bros.*, Inc., 294 N.L.R.B. 107, 141 (1989):

It is a violation of Section 8(a)(1) for an employer to threaten to fire his employees if they engage in concerted protected activities, such as a strike, and it is of no significance whether that result is threatened directly, or indirectly, as by eliminating jobs through closure of the employer's plant or facility.

*Id.*

\(^{294}\) *Outdoor Venture*, 160 L.R.R.M. (BNA) at 1179. See generally *Ford Bros.*, 294 N.L.R.B. at 142 ("That bypassing a union and dealing directly with bargaining unit employees is a violation of Section 8(a)(5) and (1) of the Act by an employer is well established.").

\(^{295}\) *Outdoor Venture*, 160 L.R.R.M. (BNA) at 1179-80 n.4.

\(^{296}\) Each of the Board's Regional Directors is authorized to settle charges with the charged party even when the charging party "will not join in [the] settlement." 29 C.F.R. § 101.7 (1999). However, "the charging party has the right to contest any proposed settlement agreement between the Regional Director and the charged party both by objecting to it before the Board and by petitioning for review if the Board enters an order over his objection based upon the agreement." Concrete Materials of Ga., Inc. v. NLRB, 440 F.2d 61, 68 (5th Cir. 1971). The union in *Outdoor Venture* did not exercise that right. *Outdoor Venture*, 160 L.R.R.M. (BNA) at 1180.

\(^{297}\) *Outdoor Venture*, 160 L.R.R.M. (BNA) at 1179-80.
in the Board’s opinion, the union subsequently made an unconditional offer to return to work on behalf of the striking employees.\textsuperscript{298} Contending that the strikers were economic strikers rather than unfair labor practice strikers,\textsuperscript{299} the employer refused to reinstate them on the ground that they had been permanently replaced and there were no existing vacancies for them to fill.\textsuperscript{300}

The union then filed a new unfair labor practice charge, alleging that the unfair labor practices that were the subject of the original charge had prolonged what began as an economic strike, and thus converted it to an unfair labor practice strike.\textsuperscript{301} The union further contended that because the strike had been converted, the strikers were entitled to immediate reinstatement when it made the unconditional offer to return on their behalf.\textsuperscript{302}

The principal issue before the Board was whether the settlement of the original unfair labor practice charge precluded litigation of whether the strike had been converted.\textsuperscript{303} Relying primarily on the language of the settlement agreement,\textsuperscript{304} the Board held that litigation of the conversion issue was not precluded.\textsuperscript{305}

However, the employer also argued that even if the conduct that formed the basis for the initial charge had prolonged the work stoppage, the strike was converted back to an economic strike by the settlement of that charge\textsuperscript{306} and by the employer’s attendant posting of the notice required by

\begin{itemize}
  \item \textsuperscript{298} Id. at 1180.
  \item \textsuperscript{299} Id. at 1180 n.5.
  \item \textsuperscript{300} Id. at 1180.
  \item \textsuperscript{301} Id. The Board noted that “the issue of whether an employer initially violated the Act is often litigated separately from the issues of whether the violation caused or prolonged a strike.” Id. at 1181 n.8. In fact, an attempt to litigate the nature of the strike in the underlying unfair labor practice proceeding arguably would have been premature because the strike was “still current and the issue of refusal to reinstate may never have arisen.” Colonial Press, Inc., 207 N.L.R.B. 673, 677 (1973).
  \item \textsuperscript{302} Outdoor Venture, 160 L.R.R.M. (BNA) at 1180.
  \item \textsuperscript{303} See id. at 1179.
  \item \textsuperscript{304} Id. at 1180. The agreement stated:
  \begin{quote}
  This Agreement settles only the allegations in the above-captioned case(s), and does not constitute a settlement of any other case(s) or matters. It does not preclude persons from filing charges, the General Counsel from prosecuting complaints, or the Board and the courts from finding violations with respect to matters which preceded the date of the approval of this Agreement regardless of whether such matters are known to the General Counsel or are readily discoverable. The General Counsel reserves the right to use the evidence obtained in the investigation and prosecution of the above-captioned case(s) for any relevant purpose in the litigation of this or any other case(s), and a judge, the Board and the courts may make findings of fact and/or conclusions of law with respect to said evidence.
  \end{quote}
  \begin{itemize}
    \item \textsuperscript{305} Id. at 1181-82; see also Council’s Center for Problems of Living, 289 N.L.R.B. 1122, 1142 (1988) (concluding that a similarly-worded settlement agreement established that “when the [employer] executed the settlement agreement it understood that the General Counsel reserved the right to establish the nature of the strike”), enforcement denied, 897 F.2d 1238 (2d Cir. 1990).
    \item \textsuperscript{306} Outdoor Venture, 160 L.R.R.M. (BNA) at 1180. The Board’s rules permit the settlement of
the settlement. The Board also rejected this contention because, at the
time the strikers offered to return, the remedial notice had not been posted
for the full period required by the settlement agreement.

Citing Chicago Beef Co., the Board stated: “In order to find that the
strike had reconverted to an economic strike at the time of the offer to
return, the unfair labor practices allegedly prolonging the strike (i.e., the
settled allegations) must have been fully remedied.” Because the 60-day
posting period had not expired when the employees requested
reinstatement, the conduct alleged to have prolonged the strike had not
been fully remedied. The Board concluded that it was therefore
precluded by Chicago Beef from finding that the strike had converted back
to an economic strike.

In reaching this result, the Board distinguished Mohawk Liqueur Co. on the
ground that the employer in Mohawk had completed some of its
remedial actions, whereas the employer in Outdoor Venture failed to
complete “the only affirmative action that the settlement agreement

an unfair labor practice charge with the approval of an appropriate Board representative. 29 C.F.R. §
102.9 (1999); see also Robinson Freight Lines, 117 N.L.R.B. 1483, 1485 (1957) (“The Board alone is
vested with lawful discretion to determine whether a proceeding, when once instituted, may be
abandoned.”).

307. Outdoor Venture, 160 L.R.R.M. (BNA) at 1180. The Board typically requires the posting of a
notice as a condition to approving the settlement of an unfair labor practice charge. See, e.g., Caterpillar
Tractor Co., 242 N.L.R.B. 523, 524 (1979) (“As a condition to approving the settlement, it was required
that [an] agreed-upon notice be posted for [a] requisite term . . . .”), enforced, 638 F.2d 140 (9th Cir.

311. “The Board as a standard policy requires that its remedial notices be posted for a period of 60
days as a necessary means of dispelling and dissipating the unwholesome effects of [an employer’s]
unfair labor practices.” Agri-International Inc., 271 N.L.R.B. 925, 938 (1984); see also Chet Monez
Ford, 241 N.L.R.B. 349, 351 & n.12 (1979) (“[T]he Board long ago determined that the posting of a
remedial notice for a 60-day period . . . . is necessary as a means of dispelling and dissipating the
unwholesome effects of . . . unfair labor practices.”) (citing Metropolitan Life Ins. Co., 91 N.L.R.B. 473,
477 (1950)).
at 938 (holding that an employer’s remedial notice was “sufficient to avoid a finding of a violation of the
Act” even though “the full 60-day posting period was not complied with”).
141, 152 (1983) (discussing a scenario in which “the presettlement agreement unfair labor practices, if
any, would have been fully remedied,” and the strike converted to an economic one, because the
settlement agreement’s posting requirements were “completed”). See generally Chet Monez Ford, 241
N.L.R.B. at 351 (“[T]he 60-day posting requirement is not to be taken lightly or whittled down as the
purpose of the notice is to provide sufficient time to dispel the harmful effects of [the employer’s] . . .
conduct.”).
314. 300 N.L.R.B. 1075 (1990), aff’d sub nom. General Indus. Employees Union, Local 42 v.
NLRB, 951 F.2d 1308 (D.C. Cir. 1991).
315. See Outdoor Venture, 160 L.R.R.M. (BNA) at 1182 n.16.
required [it] to take." While distinguishing Mohawk, the Board also asserted that the result in that case was not inconsistent with the analysis in Chicago Beef, because the finding that the strike in Mohawk was reconverted had been based on a "complete trial record." The Board contrasted that situation with the procedural posture in Outdoor Venture, concluding that it "certainly [could not] hold on a motion for summary judgment that a notice posted for less than the full remedial period necessarily changed the character of the strike."

The Board's analysis of this procedural issue is not entirely clear. The implication may be that because, under Chicago Beef, the cause of a strike depends upon the strikers' subjective motives, the question of whether the strike has been reconverted cannot be resolved on a motion for summary judgment when Passavant has not been satisfied. Where the Passavant requirements have been met, on the other hand, the reconversion issue may be amenable to resolution by summary judgment, because the unfair labor practice has been fully remedied and thus, as a matter of law, can no longer be a factor prolonging the strike.

In any event, despite indications elsewhere in its opinion that the unfair labor practice must be "fully remedied" in order to convert an unfair labor practice strike to an economic strike, the Board's failure to repudiate Mohawk suggests that remedial efforts that do not satisfy Passavant may be sufficient to convert a strike, if they "otherwise" remove the unfair labor practice as a factor prolonging the strike.

316. Id. at 1182.
317. Id.
318. Id. at 1182-83 n.16.
320. See Chicago Beef, 298 N.L.R.B. at 1040; see also General Indus. Employees Union, Local 42 v. NLRB, 951 F.2d 1308, 1313 (D.C. Cir. 1991) (citing Chicago Beef for the proposition that whether an unfair labor practice is the cause of a strike "depend[s] on the employees' motivation").
321. Cf General Indus. Employees Union, 951 F.2d at 1313 (noting that "the Board has never held, as a matter of law, that the contemporaneous existence of an incompletely cured unfair labor practice and a strike requires a determination that the two are causally connected") (emphasis altered). See generally D & M Co., 181 N.L.R.B. 173, 174 (1970) (acknowledging that "summary judgment is not to be used where a state of mind, motive, or intent are involved").
322. See F.L. Thorpe & Co., 315 N.L.R.B. 147, 151 n.11 (1994) (indicating that the issue under Passavant is whether "a particular unfair labor practice that had originally played a causative role in the strike at issue . . . was . . . completely remedied") (emphasis added), enforced in part and rev'd in part, 71 F.3d 282 (8th Cir. 1995).
323. Cf. Action Mining, Inc., 318 N.L.R.B. 652, 654 (1995) (finding that, "consistent with the Passavant requirements . . ., the [employer's] notice was sufficient, on its face, to repudiate [its] unfair labor practices"); Medical Ctr. of Ocean County, 315 N.L.R.B. 1150, 1159 (1994) (addressing "the legal question of whether [an employer's] retraction was sufficient as a matter of law [under] Passavant").
325. Id. at 1182 n.16 (quoting Chicago Beef, 298 N.L.R.B. at 1140).
Venture reflects the analysis in an earlier Board decision, Gibson Greetings,\textsuperscript{326} that was not discussed in Outdoor Venture, but that articulated the Board's clearest basis for assessing whether an unfair labor practice strike has reconverted to an economic strike.\textsuperscript{327}

\textbf{F. A Viable Strike Reconversion Test: Gibson Greetings}

Although its analysis in other strike reconversion cases has been inconsistent,\textsuperscript{328} the Board articulated a workable standard for determining whether an unfair labor practice strike has been converted to an economic strike in Gibson Greetings.\textsuperscript{329} Gibson Greetings is most often cited for its analysis of the employer's burden of proving that replacements for economic strikers were offered permanent employment.\textsuperscript{330} However, one Board administrative law judge recently asserted that the case also established "the appropriate standard for [an unfair labor practice] strike to revert to an economic strike."\textsuperscript{331} In that regard, the Board held as follows:

For an unfair labor practice strike to revert to an economic strike, the employer's efforts at repudiation must either cure the unfair labor practice or otherwise succeed in removing the unfair labor practice as a factor in prolonging the strike. While an actual "cure" is not always required, some action to repudiate the unfair labor practice must be taken, after which the Board will examine whether the force of the unfair labor practice as a factor in prolonging the strike remains.\textsuperscript{332}

By requiring "some action" to repudiate the unfair labor practice,\textsuperscript{333} the Board created an incentive for employers to attempt to cure their unfair labor practices.\textsuperscript{334} Indeed, because of the presumption that an employer relying upon Gibson Greetings must have acted in good faith,\textsuperscript{335} strikes will

\textsuperscript{327} See infra notes 328-40 and accompanying text.
\textsuperscript{330} See, e.g., Target Rock Corp., 324 N.L.R.B. 373, 379-83 (1997), enforced, 172 F.3d 921 (D.C. Cir. 1998); Corbett, supra note 93, at 854 n.215.
\textsuperscript{332} Gibson Greetings, 310 N.L.R.B. at 1289 (emphasis added and footnotes omitted).
\textsuperscript{333} Id.
\textsuperscript{334} One commentator has noted that the very purpose of the strike conversion doctrine is "to remedy unfair labor practices that prolong a strike." Stewart II, supra note 29, at 1323.
\textsuperscript{335} See International Automated Machs., 285 N.L.R.B. 1122, 1134 (1987) (indicating that the voluntary repudiation doctrine "is limited to situations in which an employer demonstrates its good faith"); cf. Dallas Times Herald, 315 N.L.R.B. 700, 710 (1994) (discussing an earlier Board decision, Almet, Inc., 305 N.L.R.B. 626 (1991), crediting an employer's "good faith, but incomplete, attempt to
rarely be found to have been reconverted under the test announced in that case unless the employer has at least substantially complied with *Passavant*. 336

At the same time, the *Gibson Greetings* standard reflects recognition of the fact that an unfair labor practice occasionally may cease to be the cause of a strike even though the employer has *not* satisfied all of *Passavant’s* requirements for an effective repudiation. 337 In narrowing employer liability to behavior that actually prolongs an underlying strike, 338 *Gibson Greetings*’ approach to reconversion is one that both denies aggrieved employees “full remedy” 339 and avoids another so onerous as to discourage compliance with the Act. 340

IV.

SUMMARY AND CONCLUSION

As one administrative law judge has observed, “despite the strict language of *Passavant*, there appears to be some flexibility in its application, obviously depending on the circumstances.” 341 The Board itself has expressed a similar view, 342 and cases involving the conversion of
strikes are among those in which a flexible application of *Passavant* is most appropriate.\footnote{343}

Indeed, a strict application of *Passavant* in strike reconversion cases undoubtedly would discourage some employers from attempting to cure their unfair labor practices.\footnote{344} This result would undermine the statutory policies of encouraging voluntary compliance with the NLRA\footnote{345} and promoting the peaceful resolution of labor disputes.\footnote{346} To this end, one administrative law judge has specifically indicated, with the Board’s approval,\footnote{347} that *Passavant’s* requirements should not be applied in a “highly technical or mechanical manner”\footnote{348} that might discourage voluntary

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\footnote{343} See, e.g., Concord Metal, Inc., 298 N.L.R.B. 1096, 1101, 1104 (1990) (finding that a strike was economic in nature even though the employer “met [only] three of the five criteria for curing an unfair labor practice as set forth in the *Passavant* case”). *Passavant* is also applied flexibly in cases involving the rescission of unlawful solicitation policies. See Atlantic Forest Prods., 282 N.L.R.B. 855, 872 (1987) (noting that “the Board has found such violations ‘effectively cured’ even where [the *Passavant* conditions have not been met” (quoting Phillips Indus. Components, 216 N.L.R.B. 885, 885 (1975)); Autozone, Inc. v. NLRB, 152 L.R.R.M. (BNA) 2384, 1996 U.S. App. LEXIS 14414, at *18 (Apr. 24, 1996) (‘In Atlantic Forest Products the Board found that even if the *Passavant* test was not satisfied, an action . . . could be cured.’).  

\footnote{344} See Webco Indus., 160 L.R.R.M. (BNA) 1217, 1221 (1998) (Hurtgen, dissenting in part) (“*Passavant* discourages prompt relief. If an employer . . . stubs its toe on one of the conditions, its prompt relief will be of no avail. The result is that prompt remedial action is frequently avoided because it will not serve the purpose of ending the dispute and the attendant litigation.”), enforced, 217 F.3d 1306 (10th Cir. 2000); see also Webco Indus. v. NLRB, 217 F.3d 1306, 1313 n.4 (10th Cir. 2000) (acknowledging the concern that “reliance on *Passavant* . . . may discourage prompt relief by an employer”); cf. Rabbitt, supra note 30, at 1148 (indicating that the Board’s failure to recognize reconversion would have encouraged employers to “delay compliance [with the Act] for as long as possible”).  

\footnote{345} See Agri-International Inc., 271 N.L.R.B. 925, 937 (1984) (indicating that employers should be encouraged to voluntarily repudiate their unfair labor practices “as a matter of . . . policy”); Broyhill Co., 260 N.L.R.B. at 1367 (“Such voluntary action by employers should be encouraged by this Board.”); Stewart, supra note †, at 1349 (noting that there is “much to be said” for the “voluntary remedy of unfair labor practices”); cf. Transport Inc., 225 N.L.R.B. 854, 862 (1976) (“The Board does not seek to prolong unfair labor practices but to prevent them.”).  

\footnote{346} See NLRB v. Howard Immel, Inc., 102 F.3d 948, 952 n.2 (7th Cir. 1996) (indicating that “voluntary compliance” is one component of “the NLRA’s policy of promoting amicable settlements”); Rabbitt, supra note 30, at 1144 (indicating that an employer’s termination of its unfair labor practices in order to reconvert a strike “further[s] the national labor policy of rapid and peaceful resolution of labor disputes”; id. at 1152 (observing that “reconversion . . . encourage[s] the national policy of peaceful resolution of labor disputes”). *But see* Passavant Mem’l Area Hosp., 237 N.L.R.B. 138, 139 n.4 (1978) (finding no merit in the suggestion that “the Board’s general policy in favor of settlement” compelled it to find that an employer’s voluntary remedial efforts were an “effective repudiation”).  


\footnote{348} Id. at 1213 (quoting Broyhill, 260 N.L.R.B. at 1366); cf. Dallas Times Herald, 315 N.L.R.B. 700, 710 (1994) (“[T]here are cases in [the *Passavant* line which give credit to] an employer who ameliorates its unfair labor practices even though the effort does not meet the strict requirements of *Passavant*.”).
remedial efforts.349

In addition, while an unfair labor practice that is not fully cured within the meaning of Passavant may be the continuing cause of a strike,350 there is no necessary correlation between what Passavant requires for an effective repudiation of unfair labor practices351 and the question of whether such practices have ceased to be the motivation for a strike.352 There may be many reasons why an unfair labor practice that has not been fully cured would cease to be the cause of a strike,353 including the fact that economic issues have replaced the unfair labor practice as the motivation for the strike,354 or the unfair labor practice has for other reasons become so minor355 or insignificant356 that it is simply not worth striking to achieve the complete relief on which the Board might insist.357 As one Board member

349. Bell Halter, 276 N.L.R.B. at 1213; see also NLRB v. Intertherm, Inc., 596 F.2d 267, 277 (8th Cir. 1979) (stating that "self-initiated remedies ... should be encouraged whenever possible").

350. See, e.g., Murd Indus., 129 L.R.R.M. (BNA) 1167, 1987 NLRB LEXIS 55, at *34 (Dec. 16, 1987) (finding that a strike was prolonged by unfair labor practices that were "not fully remedied"). See generally General Indus. Employees Union, Local 42 v. NLRB, 951 F.2d 1308, 1313 (D.C. Cir. 1991) ("[I]f an unfair labor practice is not fully cured, it may be... a continuing cause of a strike.").

351. See Bell Halter, 276 N.L.R.B. at 1213 ("In Passavant Memorial Area Hospital, the Board outlined the circumstances under which an employer may be said to have successfully repudiated earlier unlawful conduct to relieve himself of liability for such conduct."); see also Natico, Inc., 302 N.L.R.B. 668, 684 (1991) (referring to the employer's ability to "relieve itself of Board-imposed remedies by repudiating the violative conduct"); Almet, Inc., 305 N.L.R.B. 626, 629 n.14 (1991) (discussing the "finding of no violation of the Act under the test in Passavant").

352. See General Indus. Employees Union, 951 F.2d at 1312 ("[T]here is no necessary connection between the legal standard the Board uses under Passavant to determine whether a party has 'cured' its unfair labor practices so entirely that no further Board proceedings are appropriate, and a decision made by employees that their employer's action (which constituted an unfair labor practice) has been sufficiently modified or revoked as no longer to constitute a reason to strike."); Agri-International Inc., 271 N.L.R.B. 925, 938 (1984) (indicating that Passavant addresses whether an employer's "efforts to repudiate its own conduct" were "sufficient to avoid a finding of a violation of the Act," not whether they were sufficient "to dispel the harmful effects of [the misconduct]").

353. The Board has acknowledged that "[t]here are many factors that weigh on the [strike] causation question." Northern Wire Corp., 291 N.L.R.B. 727, 740 (1988), enforced, 887 F.2d 1313 (7th Cir. 1989); cf. Soule Glass & Glazing Co. v. NLRB, 652 F.2d 1055, 1079-80 (1st Cir. 1981) (describing causation as the "most problematic[] element" in determining the character of a strike).

354. In Mohawk Liqueur Co., 300 N.L.R.B. 1075 (1990), aff'd sub nom. General Indus. Employees Union, Local 42 v. NLRB, 951 F.2d 1308 (D.C. Cir. 1991), for example, the Board found that "the continuation of the strike... was caused by the striking employees' concern over other issues," even though the unfair labor practice that had "originally played a causative role in the strike... was not completely remedied under Passavant standards." F.L. Thorpe & Co., 315 N.L.R.B. 147, 151 n.11 (1994) (discussing Mohawk, 300 N.L.R.B. at 1075 n.1, 1086)), enforced in part and rev'd in part, 71 F.3d 282 (8th Cir. 1995).

355. See Concord Metal, Inc., 298 N.L.R.B. 1096, 1101 (1990) (holding that a strike was economic in nature where the unfair labor practice alleged to be a contributing cause was "minor in the overview").

356. See Northern Wire Corp., 887 F.2d 1313, 1321 (7th Cir. 1989) (acknowledging that an unfair labor practice may be "too insignificant... to be deemed a contributing cause" of a strike).

357. General Indus. Employees Union, 951 F.2d at 1312; cf. Burns Int'l Sec. Servs., 324 N.L.R.B. 485, 493 (1993) (discussing employees "prepared to abandon their strike" who  "could still pursue the
has explained:

When an employer commits a minor unfair labor practice, a strike in response is largely unnecessary because the integrity of the union and the collective-bargaining relationship remains intact. A statutory remedy is always available [through Board proceedings] and redress is also available through the grievance-arbitration provisions of the contract.358

By requiring that an unfair labor practice be cured to a sufficient extent that it ceases to be a cause of the strike,359 the reconversion standard applied in Gibson Greetings360 reflects the Board’s treatment of other strike causation questions,361 while also furthering the policy goals underlying the Passavant repudiation doctrine itself.362 For these reasons, it is the appropriate standard for use in addressing strike reconversion questions.363
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