

THE “WALKAWAY SHOP”: LONG-TERM UNION
AVOIDANCE AND MANAGEMENT DECISIONS TO OPEN
NEW FACILITIES AS LAWFUL CONDUCT UNDER THE
NATIONAL LABOR RELATIONS ACT

I. INTRODUCTION

Picture this scenario:¹ Unionized employees of a major manufacturer go on strike. Eventually, the strike ends and everything returns to normal. A few years later, the employer expands its operations, and instead of assigning the new work to the existing unionized facility, the employer chooses to locate the work at a new facility that will not utilize the unionized employees. The reasons for the decision include a generous financial package provided by the state where the new facility will be located and the employer’s desire to avoid the impact of subsequent strikes on its operations. If this decision to open a new facility is part of the employer’s long-term union avoidance strategy, does such conduct constitute an unfair labor practice? If not, should it? And if it does not, in what circumstances should long-term union avoidance constitute an unfair labor practice?

The recent dispute involving the Boeing Company (Boeing) and the International Association of Machinists and Aerospace Workers District Lodge No. 751 (IAM) presents a ripe opportunity for considering these questions.² Fortunately, the Boeing case was settled, and no National Labor Relations Board (NLRB) decision was necessary.³ Unfortunately, whether Boeing’s conduct would have been deemed an unfair labor practice remains unknown. In one sense, the system for adjudicating charges of unfair labor practices worked as it should: The union filed a charge, the NLRB regional

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1. This scenario is based on the facts of the dispute between the Boeing Company and the International Association of Machinists and Aerospace Workers District Lodge No. 751. See discussion *infra* Part II.B.1.
 2. See Complaint and Notice of Hearing at 6–7, *Boeing Co. v. Int’l Ass’n of Machinists & Aerospace Workers Dist. Lodge 751*, Case 19-CA-32431 (N.L.R.B. Apr. 20, 2011).
 3. Fred Feinstein, *Boeing Settlement Showcases the Value of Collective Bargaining*, THE HILL (Dec. 16, 2011, 12:50 PM), <http://thehill.com/blogs/congress-blog/labor/199945-boeing-settlement-showcases-the-value-of-collective-bargaining> (“As happened in the Boeing negotiations, the most common outcome of a complaint issued by the General Counsel is a settlement. In fact, more than 90 percent of complaints issued by the General Counsel of the NLRB are settled.”).

director conducted an investigation, the NLRB General Counsel issued a complaint, an Administrative Law Judge began reviewing the case, and the parties settled before a decision was reached.⁴ On the other hand, the settlement is unfortunate because no decision was rendered, and therefore, it remains uncertain whether conduct such as Boeing's constitutes an unfair labor practice.⁵

The critical issue that arises out of the Boeing dispute is not whether there were any unfair labor practices in that case specifically; rather, it is whether long-term union avoidance as embodied in capital allocation decisions constitutes or should constitute an unfair labor practice. To begin the task of answering this question, Part II of this comment discusses the purposes of the National Labor Relations Act (NLRA or the Act) and briefly summarizes the facts of the Boeing dispute.⁶ This background provides a foundation for the subsequent discussion in Part III, which labels long-term union avoidance as manifested through capital allocation decisions as a "walkaway shop."⁷ Part IV sets forth a framework in which walkaway shops should be analyzed.⁸ In so doing, Part IV distinguishes long-term union avoidance from transfers of work⁹ and analogizes such avoidance to partial closings.¹⁰ Ultimately, this comment argues that a walkaway shop should constitute an unfair labor practice only when the circumstances indicate an employer's purpose to chill union activity at either the existing unionized plant or the newly created non-union facility.¹¹

II. THE NLRA AND THE BOEING DISPUTE

A. *The Purpose of the NLRA*

The specific focus of this comment is how management decisions regarding new work should be analyzed under section 8(a)(3) of the NLRA, which preserves employees' right to engage in protected activity by prohibiting employer discrimination based on such employee conduct.¹² As amended by the Labor Management

4. For an overview of NLRB procedures, see *Unfair Labor Practices Process Chart*, NAT'L LAB. REL. BOARD, <http://nlrb.gov/node/3947> (last visited Dec. 11, 2012).

5. See discussion *infra* Parts II.B.1–3, IV.

6. See discussion *infra* Part II.A–B.1.

7. See discussion *infra* Part III.

8. See discussion *infra* Part IV.

9. See discussion *infra* Part IV.A.

10. See discussion *infra* Part IV.B.

11. See discussion *infra* Parts III.A, IV.C.

12. National Labor Relations Act, 29 U.S.C. § 158(a) (2006) (making it "an unfair labor practice for an employer . . . by discrimination in regard to hire or tenure of

Relations Act, the NLRA seeks to protect employees’ right to engage in unionism while also delineating “the legitimate rights of both employees and employers in their relations affecting commerce.”¹³ Thus, at the heart of the Act is the notion that “[i]ndustrial strife . . . can be avoided or substantially minimized if employers, employees, and labor organizations each recognize under law one another’s legitimate rights in their relations with each other”¹⁴

These statements make clear that there are rights afforded and obligations imposed upon each of the three stakeholders in labor relations—employers, employees, and labor organizations.¹⁵ In the context of an employer’s decision to create new work at a new facility, whether certain employer conduct should constitute an unfair labor practice comes down to finding a balance between employee and employer rights.¹⁶ This comment suggests that an appropriate balance between employer and employee rights exists when employers are permitted to make capital allocation decisions and employees receive protection from employer conduct that is intended to stifle protected section 7 activity.¹⁷ Employers will have the ability to make core entrepreneurial decisions and employees’ rights will receive protection under the NLRA.¹⁸

As stated by acting NLRB General Counsel Lafe Solomon, “A worker’s right to strike is a fundamental right guaranteed by the National Labor Relations Act. . . . We also recognize the rights of employers to make business decisions based on their economic interests, but they must do so within the law.”¹⁹ Accordingly, the core issue in an analysis of a management decision to create new

employment or any term or condition of employment to encourage or discourage membership in any labor organization”); *see also* Peter F. Munger, Stephen X. Munger & Thomas J. Munger, *Plant Closures and Relocations Under the National Labor Relations Act*, 5 GA. ST. U. L. REV. 77, 78–79 (1988) (discussing section 8(a)(3)’s prohibition against discrimination).

13. Labor Management Relations Act of 1947, 29 U.S.C. § 141(b) (2006).

14. *Id.*

15. National Labor Relations Act, §§ 151–169.

16. *See* discussion *infra* Part IV.

17. Section 7 of the NLRA states in part, “Employees shall have the right to self-organization, to form, join, or assist labor organizations, [and] to bargain collectively through representatives of their own choosing.” National Labor Relations Act, § 157.

18. *See* discussion *infra* Part IV.C.4–5.

19. Press Release, Nat’l Labor Relations Bd., Nat’l Labor Relations Bd. Issues Complaint Against Boeing Co. for Unlawfully Transferring Work to a Non-Union Facility (Apr. 20, 2011), <https://www.nlr.gov/news/national-labor-relations-board-issues-complaint-against-boeing-company-unlawfully-transferring->.

work is whether such a decision infringes upon fundamental rights guaranteed to employees by the NLRA.²⁰

The Boeing dispute provides the impetus for considering whether the NLRA adequately addresses management decisions regarding the creation of new work or whether the Act should be amended or reinterpreted to better serve its underlying policies.

B. *The Boeing Dispute*

1. The Complaint

On April 20, 2011, the NLRB issued a complaint against Boeing for conduct in violation of sections 8(a)(1) and 8(a)(3) of the NLRA.²¹ The complaint alleged that Boeing interfered with, restrained, and coerced employees in the exercise of their section 7 rights in violation of section 8(a)(1), and that Boeing discriminated “in regard to the hire or tenure or terms or conditions of employment of its employees, thereby discouraging membership in a labor organization in violation of [sections] 8(a)(3) and (1) of the Act.”²² The complaint stated that Boeing “made coercive statements to its employees that it would remove or had removed work from the Unit because employees had struck and [Boeing] threatened or impliedly threatened that the Unit would lose additional work in the event of future strikes.”²³ Additionally, the complaint alleged that Boeing decided to transfer a production line from the existing Unit²⁴ at the company’s Puget Sound facility in Washington State to a new, non-union facility in South Carolina.²⁵

While this comment is not about the merits of the Boeing dispute specifically, the conduct noted in the complaint raises important issues concerning how the NLRA treats an employer’s long-term union avoidance.²⁶ The issue addressed here is whether long-term union avoidance as manifested through capital allocation decisions should constitute a violation of section 8(a)(3).²⁷

2. Distinguishing New Work from a “Runaway Shop”

20. See discussion *supra* Part II.

21. Complaint, *supra* note 2, at 7.

22. *Id.*

23. *Id.* at 4.

24. The unit referred to in the complaint is comprised of the employees of Boeing as set forth in the collective bargaining agreement between Boeing and IAM and includes “all production and maintenance employees in Washington State.” *Id.* at 3–5.

25. *Id.* at 5.

26. See *id.* at 7–8.

27. See discussion *infra* Parts III.A, IV.

While the General Counsel’s complaint alleged that Boeing unlawfully transferred work,²⁸ this is not the case. Boeing did not transfer work; it opened a new facility that engaged in new work.²⁹ Thus, the issue here is not whether there has been an unfair labor practice in the form of an unlawful transfer or plant relocation; this is not an example of a “runaway shop.”³⁰ A runaway shop occurs when an employer transfers or relocates work from a unionized facility in retaliation for employees’ union activity.³¹ The label “runaway shop” was created to identify situations where an employer would close a unionized facility and transfer the work to a new, non-union facility with the purpose of evading the employer’s obligations to interact with the union.³²

Based on the definition above, a decision to open a new facility that will engage in new work is not a runaway shop because no work has been lost at the existing facility. Hence, in the Boeing dispute, Boeing’s decision to open a new facility in South Carolina is not a runaway shop because there was no loss of work at the existing unionized plant in Washington.³³ In fact, the number of workers at Boeing’s Puget Sound facility increased.³⁴

28. Complaint, *supra* note 2, at 5–7.

29. See Steven M. Bernstein, *The NLRB’s Boeing Dreamliner Complaint: A Tangled Web of Legal and Political Controversy*, 24 AIR & SPACE LAW., no. 2, 2011, at 13–15; Philip A. Miscimarra, *Capital Investment, Relocations, and Major Business Changes Under the NLRA*, 27 A.B.A. J. LAB. & EMP. L. 79, 89 (2011); Richard A. Epstein, *Senseless in Seattle*, DEFINING IDEAS (Apr. 26, 2011), <http://www.hoover.org/publications/defining-ideas/article/76501>.

30. See E. Walter Bowman, Note, *Plant Relocation: Viewed After Denial of Enforcement of Board’s “Runaway Shop” Remedy in Garwin*, 20 VAND. L. REV. 1062, 1062 (1966) (“Plant relocation—the transfer of all or a portion of plant operations to another site—can present two distinct categories of labor relations problems: (1) unfair labor practice problems under the National Labor Relations Act (‘runaway shop’ problems); and (2) problems of interpreting and applying a collective bargaining agreement.”).

31. *Weather Tamer, Inc. v. NLRB*, 676 F.2d 483, 491 (11th Cir. 1982).

32. Jan W. Sturner, *An Analysis of the NLRB’s “Runaway Shop” Doctrine in the Context of Mid-Term Work Relocations Based on Union Labor Costs*, 17 HOFSTRA LAB. & EMP. L.J. 289, 289–90 (2000).

33. See Diana Furchtgott-Roth, *Federal Labor Board’s Assault on Boeing Will Cost Many Jobs*, S.F. EXAMINER, June 19, 2011, at 18, *available at* <http://www.sfexaminer.com/opinion/op-eds/2011/06/federal-labor-board-s-assault-boeing-will-cost-many-jobs>.

34. Epstein, *supra* note 29 (“[U]nlike the employer’s decision in *Darlington Mills*, Boeing’s decision to open a new facility in South Carolina did not take away the job of a single worker in Washington state or the Portland area. Indeed, Boeing has expanded its workforce in that region by 2,000 workers.”); *see also* Furchtgott-Roth, *supra* note 33, at 18.

3. Why a New Classification is Needed

Because the creation of new work does not fit squarely within existing tests used by the NLRB to determine whether an unfair labor practice has been committed,³⁵ it is necessary to develop a framework by which such management decisions can be analyzed. The question of how to treat an employer's capital allocation decisions is not new. For example, Professor Cynthia Estlund has commented that she has "been unable to locate any decisions holding that a withholding of capital investment from a union plant, or a decision not to place new or expanded operations at the plant, was discriminatory under [section] 8(a)(3)."³⁶ Thus, under the current interpretation of the NLRA, "[i]t appears to be necessary . . . to show that existing unit work was eliminated, subcontracted, or relocated."³⁷

In light of calls for a broader interpretation of the NLRA,³⁸ this comment addresses how decisions regarding new work should be treated under the Act.³⁹ In so doing, it suggests an approach that strives to preserve the legitimate rights of employers and employees⁴⁰ without infringing too far upon management's right to make core entrepreneurial decisions,⁴¹ or employees' right to engage in protected activity.⁴²

As will be discussed in Part IV, a management decision to create new work at a new facility, by itself, is not and should not be seen as conduct that violates section 8(a)(3) of the Act.⁴³ Indeed, as former NLRB Chairman Peter Schaumber has noted regarding the Boeing dispute, finding an unfair labor practice in such a decision could have a negative impact on the economy.⁴⁴ Schaumber contends that "[t]he filing [of this complaint] threatens job growth and a sustained economic recovery today," and asks, "What domestic or foreign employer will want to maintain a U.S. presence or create a new one if

35. See discussion *infra* Part IV.A–C.

36. Cynthia L. Estlund, *Economic Rationality and Union Avoidance: Misunderstanding the National Labor Relations Act*, 71 TEX. L. REV. 921, 943 n.80 (1993).

37. *Id.*

38. *See id.*

39. See discussion *infra* Part IV.

40. See *infra* text accompanying notes 148–50; *cf.* National Labor Relations Act, 29 U.S.C. §§ 151–169 (2006).

41. See *infra* notes 130–134 and accompanying text.

42. See *supra* note 17 and accompanying text.

43. See discussion *infra* Part IV.

44. Peter Schaumber, *NLRB's Chief Lawyer Should Stop Obstructing Congress*, WASHINGTON EXAMINER (Nov. 15, 2011), <http://washingtonexaminer.com/article/41438#.UKmWg-Oe9rd> ("[W]e know the filing of this complaint is chilling business investment in the United States, and for good reason.").

the federal government can dictate the employer’s core entrepreneurial decisions—where to locate, relocate, transfer or outsource?”⁴⁵

While decisions to relocate, transfer, and outsource can be evaluated under existing applications of the NLRA,⁴⁶ decisions concerning where to locate new work are in a class of their own.⁴⁷ An underlying reason for finding such decisions lawful under the NLRA is that a decision to open a new plant with new workers, which does not negatively impact existing employees, is economically efficient.⁴⁸ Moreover, the Supreme Court has held that certain decisions are rightfully within the purview of management,⁴⁹ and the Court’s decision in *First National Maintenance Corp. v. NLRB* implies that management has the right to make certain decisions affecting the direction of the business without interference from the union or employees.⁵⁰

At the very least, clarity is needed: management and labor, employers and employees, and politicians and the public need guidelines on what constitutes an unfair labor practice with respect to this type of management decision.⁵¹ The ambiguity surrounding the Boeing dispute and the hyper-politicization of the public debate on that matter beg for clarification that will be useful in America’s economic recovery.⁵²

45. *Id.* According to Schaumber, “[The complaint] seeks to eviscerate the distinction long protected by the law between a core managerial decision based on the economic consequences of unionization and a management decision based on an employer’s hostility toward its employees’ union activities.” *Id.*

46. *See* discussion *infra* Part III.

47. *See* Estlund, *supra* note 36, at 943 n.80.

48. *See* Jeffrey D. Hedlund, Note, *An Economic Case for Mandatory Bargaining over Partial Termination and Plant Collection Decisions*, 95 YALE L.J. 949, 953–54 (1986) (“By definition, economic efficiency is enhanced when parties make exchanges that leave one party better off without leaving the other worse off.”).

49. *Textile Workers Union of Am. v. Darlington Mfg. Co.*, 380 U.S. 263, 268–69 (1965) (holding that an employer can lawfully close its entire business but cannot undertake a discriminatory partial closing).

50. *See* *First Nat’l Maint. Corp. v. NLRB*, 452 U.S. 666, 676 (1981) (“Congress had no expectation that the elected union representative would become an equal partner in the running of the business enterprise in which the union’s members are employed.”).

51. *See* Schaumber, *supra* note 44 (arguing that Congress must act in the Boeing dispute and that businesses will not want to open plants in the United States if they run the risk of being unable to make certain business decisions).

52. *See* Andrew Strom, *Boeing and the NLRB—A 64-Year-Old Time Bomb Explodes*, 68 NAT’L LAW. GUILD 109, 110 (2011) (discussing how the Boeing complaint set off a “firestorm”); Schaumber, *supra* note 44 (discussing the harm to the U.S. economy caused by Congress’ failure to clarify issues surrounding new work).

III. THE “WALKAWAY SHOP”

A. Defining “Walkaway Shop”

Part II discussed the prototypical runaway shop—when an employer closes a union plant and transfers that work to a non-union facility.⁵³ To distinguish long-term union avoidance from the short-term union avoidance evidenced in a runaway shop, this comment labels an employer’s long-term union avoidance strategy a “walkaway shop.” While long-term union avoidance is not a new concept,⁵⁴ labeling the practice a walkaway shop is helpful for a variety of reasons. First, because of the existence of the term “runaway shop,” the label “walkaway shop” provides for a simple comparison of certain employer conduct, eliciting an image of an employer’s prolonged union avoidance strategy. Second, beyond the similarities with a runaway shop (that an employer is avoiding a union), the conduct walkaway shop describes is inherently different—there is no transfer of work and no immediate loss of work as a result of the employer’s decision.⁵⁵ Thus, the label acknowledges that an employer is avoiding unionism while cautioning against rigidly categorizing management decisions under pre-existing labels. A walkaway shop is a gradual undertaking that may or may not result in a loss of union jobs down the road. It is nothing more than a long-term union avoidance strategy as manifested through capital allocation decisions regarding the creation of new work.⁵⁶

B. Critiques of Long-Term Union Avoidance

A walkaway shop should be lawful as described above because capital allocation decisions are the type of decisions that have been classified as management’s to make.⁵⁷ This premise, however, is not uniformly agreed upon, and there are some who would find an unfair labor practice in the decision to allocate capital to a new location itself, regardless of whether the employer’s purpose is to chill

53. See discussion *supra* Part II.B.2.

54. See, e.g., Estlund, *supra* note 36, at 945–46.

55. See discussion *supra* Part II.B.2.

56. See discussion *supra* Part II.B.2.

57. See Terry Collingsworth, *Resurrecting the National Labor Relations Act—Plant Closings and Runaway Shops in a Global Economy*, 14 BERKELEY J. EMP. & LAB. L. 72, 73 (1993) (discussing how in *Darlington*, “[t]he Court stated that without a clearer indication of congressional intent, it would not alter the fundamental assumption of the American economic system that decisions about the use of capital belong exclusively to its owners”).

unionism.⁵⁸ For instance, Professor Estlund argues that there is a basis in the text of the NLRA “for pressing beyond the existing limits of the antidiscrimination mandate.”⁵⁹ Professor Estlund has commented that the NLRA “unequivocally condemns some rational employer conduct that would serve the firm’s economic self-interest.”⁶⁰ An example of such condemned conduct is section 8(a)(3)’s “prohibition on anti-union discrimination,” which makes it unlawful for an employer to discriminate in regard to the hire, tenure, or terms of employment of unionized workers.⁶¹ Estlund believes that the NLRA’s “sweeping language embodies a solid statutory mandate for going beyond current doctrine in curtailing employers’ rational, market-driven conduct when it is necessary to enforce employees’ right to choose and to act through unionization.”⁶² The question is whether the language of section 8(a)(3) should be read to limit management decisions regarding new work.

In her work, Estlund addresses “which employer decisions that eliminate jobs violate the NLRA.”⁶³ In the context of a new plant, the question becomes whether an employer violates the NLRA by opening a new, non-union facility in order to avoid the costs of unionization, when at the time the decision is made, there is no detrimental impact on the unionized facility.⁶⁴ Professor Estlund’s framework provides great assistance in answering the question posed in this comment. As Estlund notes, “Union avoidance in investment decisions is widespread.”⁶⁵ As an example, Boeing’s decision to open a new facility in South Carolina is clearly union avoidance in an investment decision,⁶⁶ regardless of whether the decision is lawful or unlawful. Not all union avoidance, however, is or should be unlawful.⁶⁷

58. See Estlund, *supra* note 36, at 946–64.

59. *Id.* at 927.

60. *Id.* at 922.

61. *Id.* at 922 & n.2. Estlund characterized “[t]he prohibition on anti-union discrimination” as “perhaps the least controversial and most fundamental of the NLRA’s constraints on employers.” *Id.* at 922.

62. *Id.* at 928.

63. *Id.* at 926.

64. See discussion *supra* Parts II.A, II.B.3.

65. Estlund, *supra* note 36, at 926.

66. See Complaint, *supra* note 2, at 1–8 (alleging that past strikes at Boeing’s Puget Sound operations were part of the rationale for Boeing’s decision to open a new plant in South Carolina).

67. See Estlund, *supra* note 36, at 926. As Estlund states:

At least some capital investment decisions that eliminate union jobs are subject to scrutiny under the Act’s antidiscrimination

Estlund suggests that at the very least there should be mandatory bargaining over capital allocation decisions,⁶⁸ given the historical rationale for the NLRA.⁶⁹ Indeed, she finds flaws in the current interpretation of the Act and suggests that “the requirement of motive in these cases, and particularly the crucial dichotomy between anti-union motives and economically rational motives, misconceives the nature of anti-union animus and thereby defines the range of prohibited employer conduct too narrowly.”⁷⁰ She is not alone.⁷¹ Others note that management’s capital allocation decisions affect job security at existing plants.⁷²

Where Estlund argues that the current interpretation of the NLRA provides a too-confined scope of prohibited activity,⁷³ this comment argues that such conduct should not, absent more explicit anti-union discrimination, be found to violate the NLRA. While this comment ultimately concludes that a walkaway shop should not in and of itself constitute an unfair labor practice, it also suggests that the current NLRA framework for analyzing management decisions should be modified to define when such decisions cross the line to the point of becoming an unfair labor practice.⁷⁴ In order to explain this distinction, it is necessary to understand how the existing analysis of

requirement and may be unlawful if they are found to have been motivated by “anti-union animus.” But anti-union animus is defined in contrast to legitimate “economic” motives, which include efforts to avoid costs associated with unionization—in particular, higher labor costs.

Id.

68. *See id.* at 979–80.

69. *See id.* at 926–28 (arguing that the history and purpose of the NLRA support a broader interpretation of what employer conduct is prohibited).

70. *Id.* at 926.

71. *See* Collingsworth, *supra* note 57, at 73 (discussing how the Supreme Court has “interpreted the National Labor Relations Act (NLRA) to protect the right of the owners of capital to make fundamental entrepreneurial decisions, affecting the nature and direction of the business, without interference from workers”); Christopher Hexter et al., *Twenty-Five Years of Developments in the Law Under the National Labor Relations Act*, 25 A.B.A. J. LAB. & EMP. L. 299, 304 (2010) (“[T]he very notion of a broad range of ‘core entrepreneurial functions’ exempt from bargaining is contrary to the Act’s policies.”).

72. Richard Litvin, *Fearful Asymmetry: Employee Free Choice and Employer Profitability in First National Maintenance*, 58 IND. L.J. 433, 442 (1984) (“Many significant management decisions in pursuit of profit or efficiency threaten the job security of some employees. In deciding to produce a new product, an employer may commit capital that it could have invested in maintaining or improving its existing products.”).

73. Estlund, *supra* note 36, at 926.

74. *See infra* Part V.

management decisions under the NLRA would apply to a decision to invest in a new facility.

IV. ANALYZING WALKAWAY SHOPS

In determining whether a management decision to open a new facility constitutes an unfair labor practice, this comment begins with the assumption that decisions regarding new work should be treated differently from decisions that result in the loss of union work.⁷⁵ There is something to be gleaned, however, from the existing test for partial closings that can help delineate when a walkaway shop should constitute an unfair labor practice. While section 8(a)(3) does not currently prohibit new investment decisions when there is no relocation, transfer, or removal of work,⁷⁶ the framework proposed below strives to create a system in which such decisions do not necessarily constitute an unfair labor practice, but could in certain situations.⁷⁷ In so doing, the proposed analysis of walkaway shops strikes a balance that protects the rights of both employers and employees.⁷⁸

As a starting point, it is helpful to consider the following statement from *Ark Las Vegas Restaurant Corp. v. NLRB*: “It is well settled that an employer violates the NLRA by taking adverse employment action in order to discourage union activity.”⁷⁹ Inherent in this statement is the notion that there is no unfair labor practice if there has been no adverse employment action.⁸⁰ Thus, while section 8(a)(3) places limits on what an employer can do in response to union activity,⁸¹ when the employer’s decision involves neither a discharge

75. Robert VerBruggen, *Pulling Labor Law Out of Thin Air*, NAT’L REV. ONLINE (Apr. 28, 2011, 4:00 AM), <http://www.nationalreview.com/articles/265835/pulling-labor-law-out-thin-air-robert-verbruggen> (“It would seem odd for decisions about brand-new capacity to be treated the same as decisions to destroy existing capacity or fire workers . . .”).

76. Miscimarra, *supra* note 29, at 88–89 (discussing how section 8(a)(3) does not prohibit new investment decisions that do not involve relocations, transfers, or removal of work).

77. See discussion *infra* Part IV.B–C.

78. See discussion *infra* Part IV.B–C.

79. *Ark Las Vegas Restaurant Corp. v. NLRB*, 334 F.3d 99, 104 (D.C. Cir. 2003).

80. See *id.*

81. Collingsworth, *supra* note 57, at 83 (discussing how section 8(a)(3) “limits the freedom an employer otherwise would have to discharge employees or otherwise retaliate in response to union organizing activity”).

nor adverse employment action, the limits sections 8(a)(3) and 8(a)(1) impose on employers should be different.⁸²

A capital allocation decision creating new work at a new plant has no negative impact if one agrees with the assumption taken here that not obtaining the new work is not an injury inflicted upon the existing unionized employees.⁸³ Indeed, decisions regarding new work fit within the description articulated by the United States Supreme Court in *Textile Workers Union of America v. Darlington Manufacturing Co.*: “Naturally, certain business decisions will, to some degree, interfere with concerted activities by employees. But it is only when the interference with [section] 7 rights outweighs the business justification for the employer’s action that [section] 8(a)(1) is violated.”⁸⁴ Moreover, “[w]hatever may be the limits of [section] 8(a)(1), some employer decisions are so peculiarly matters of management prerogative that they would never constitute violations of [section] 8(a)(1), whether or not they involved sound business judgment, unless they also violated [section] 8(a)(3).”⁸⁵

Given this backdrop, determining how to analyze walkaway shops is necessary in order to discern when long-term union avoidance constitutes an unfair labor practice.⁸⁶ To accomplish this task, the following sections compare and contrast walkaway shops with transfers of work and partial closings.

A. *Transfers of Work*

In one category of management decisions, transfers of work, the standard established in *NLRB v. Wright Line* is used to determine whether the employer violated section 8(a)(3).⁸⁷ The *Wright Line* standard is a logical starting point, because in the Boeing dispute, the employer’s conduct was dubbed a transfer of work.⁸⁸

Under *Wright Line*:

First, we shall require that the General Counsel make a prima facie showing sufficient to support the inference that

82. See Estlund, *supra* note 36, at 943 n.80 (discussing how a management decision to open a new plant that does not negatively impact existing employees is not conduct currently prohibited by the NLRA).

83. See VerBruggen, *supra* note 75. But see Strom, *supra* note 52, at 112–13 (arguing that the distinction between new work and a transfer of existing work should be “irrelevant”).

84. *Textile Workers Union of Am. v. Darlington Mfg. Co.*, 380 U.S. 263, 268–69 (1965).

85. *Id.*

86. See *infra* text accompanying notes 110–20.

87. *NLRB v. Wright Line*, 662 F.2d 899, 904 (1st Cir. 1981).

88. Complaint, *supra* note 2, at 5.

protected conduct was a “motivating factor” in the employer’s decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.⁸⁹

The *Wright Line* standard is inappropriate in the context of a walkaway shop because there is no loss of union jobs when the capital allocation decision is made.⁹⁰ Moreover, inherent in the concept of a walkaway shop is long-term union avoidance.⁹¹ Therefore, if *Wright Line* were to be applied, an employer would always lose—the General Counsel would always be able to make its first stage case, and the employer’s rebuttal would fail because the employer would not be able to show that the capital allocation decision would have been made in the absence of the protected conduct.

Thus, distinguishing the creation of new work from the transfer of work is appropriate for two reasons. First, a walkaway shop involves no immediate loss of work, which is in direct contrast to an unlawful runaway shop.⁹² Second, refraining from using the *Wright Line* standard acknowledges that employers should be able to make capital allocation decisions based on a long-term union avoidance strategy instead of having to demonstrate legitimate economic reasons to justify employer conduct under section 8(a)(3).⁹³

Creating new work at a new, non-union facility because of the costs associated with past strikes or the possibility of future strikes is distinct from a transfer of work.⁹⁴ Again, the *Wright Line* standard is inappropriate because it emphasizes union animus, which is less critical in the walkaway shop scenario.⁹⁵ One should not even reach the issue of animus if there has been no detrimental impact on

89. *Wright Line*, 251 N.L.R.B. 1083, 1089 (1980).

90. See discussion *supra* Part III.A.

91. See discussion *supra* Part III.A.

92. See Munger et al., *supra* note 12, at 80 & n.16.

93. See *id.* at 80.

94. See *Capehorn Indus.*, 336 N.L.R.B. 364, 366–67 (2001).

95. See *NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393, 398 (1983). There is a difference between a decision to open a new plant without discharging any existing employees and a decision to transfer work such as what occurred in *Transportation Management*. In that case, the Court stated, “Soon after the passage of the [NLRA], the Board held that it was an unfair labor practice for an employer to discharge a worker where antiunion animus actually contributed to the discharge decision.” *Id.*

employees.⁹⁶ The critical issue in determining whether a walkaway shop is unlawful under the NLRA should not be generic union animus; rather, it should be an employer's specific purpose to chill union activity. Emphasizing the employer's purpose is the better approach because it will enable the NLRB to focus on an employer's efforts to impede employees in the exercise of protected section 7 activity.⁹⁷

An employer's decision to open a new plant should reasonably be viewed by the unionized employees as the type of decision management is expected to make.⁹⁸ After all, it is no secret that employers generally oppose unionization.⁹⁹ Instead, management decisions to open new facilities should be analyzed under a variation of the test used for partial closings.¹⁰⁰

B. Partial Closings

At first glance, a walkaway shop is quite dissimilar from a partial closing because no closing occurs when there is a walkaway shop.¹⁰¹ There are in fact, however, similarities between the two types of decisions. With a walkaway shop, there is the potential for the management decision to chill unionization at the new plant and protected activity at the existing unionized facility. With a partial closing, there is the potential for chilling unionization at any facilities that have not been closed; however, because the unionized facility has been closed, there is no chilling of protected activity at that plant.¹⁰² As stated by Collingsworth, "[B]enefits do accrue to an employer who engages in a 'partial closing,' in that any remaining employees at the employer's other facilities are likely to be discouraged in the exercise of their section 7 rights."¹⁰³

Under the current application of the NLRA, a partial closing is illegal, "only if the employer's interest in some other business allowed him to obtain ongoing benefit from the closing."¹⁰⁴ Moreover, "[a] prima facie case of a section 8(a)(3) violation is

96. *Id.* at 401 ("[T]he Board's decisions . . . have consistently held that the unfair labor practice consists of a discharge or other adverse action that is based in whole or in part on antiunion animus—or . . . that the employee's protected conduct was a substantial or motivating factor in the adverse action.").

97. *See* Munger et al., *supra* note 12, at 80–81.

98. *See, e.g.,* Estlund, *supra* note 36, at 926.

99. *See id.* at 928–29.

100. *See* discussion *infra* Part IV.C.

101. *See* discussion *supra* Part III.A.

102. *See* Collingsworth, *supra* note 57, at 87–88.

103. *Id.* at 88.

104. *Id.* at 87–88.

established if the General Counsel for the [NLRB] makes a showing that employee conduct protected by the NLRA was the motivating factor behind the employer’s decision to close or relocate a plant.”¹⁰⁵

In contrast, with a walkaway shop, whether employee conduct motivated the decision should not be considered beyond being used in determining whether the employer’s motive is to chill unionism.

Indeed, what matters is the purpose of the employer’s decision, as is the case with partial closings.¹⁰⁶ With walkaway shops, however, the inquiry into purpose should also consider whether the employer was motivated by a purpose to chill unionism at the existing unionized plant. Such a consideration would represent a departure from *Darlington*, where the inquiry was into whether there was a purpose to chill union activity at any remaining plants.¹⁰⁷ This comment suggests that the analysis for determining whether a walkaway shop constitutes an unfair labor practice should include an expanded version of the *Darlington* test.¹⁰⁸ If the test turns on whether there is a motive to chill unionism, then there can be protection for both the employee’s interest in protected activity as well as the employer’s interest in making core entrepreneurial decisions.

Applied to a walkaway shop, the decision to open a new plant should be unlawful under the NLRA if the employer’s purpose was to chill unionized activity at either the existing unionized plant or the newly created facility. This expansion is necessary because the NLRA should afford protection to unionized workers whose protected conduct is the target of the employer’s decision.

105. Munger et al., *supra* note 12, at 80–81.

106. See Joel F. Herold, Note, *Wages, Workers, and Potential Windfalls: Rethinking Section 8(a)(3) Labor Disputes in a Capitalist Economy*, 66 GEO. WASH. L. REV. 657, 661 (1998) (“Motive is the key factor in determining whether an employer’s actions violated section 8(a)(3).”).

107. *Textile Workers Union of Am. v. Darlington Mfg. Co.*, 380 U.S. 263, 269 (1965).

108. *Id.*; see also John O’Connor, *Employers Be Forewarned: An Employer’s Guide to Plant Closing and Layoff Decisions After the Enactment of the Worker Adjustment and Retraining Notification Act*, 16 OHIO N.U. L. REV. 19, 24 (1989) (discussing how in *Darlington* the owner instituted a partial closing in order to “chill unionism in other parts of the business . . . because they were . . . motivated by a desire to stop unionization in the owner’s other plants and the owner reasonably could have foreseen that the closing would have that intended effect”). Thus, one can see that finding an unfair labor practice in a walkaway shop where the employer’s purpose to chill unionism at either the existing unionized plant or the new non-union plant is simply an extension of the logic in *Darlington*.

C. Expanding *Darlington's* Test for Partial Closings

The analysis of a walkaway shop should therefore proceed as follows. As in *Boeing*, there is a unionized plant.¹⁰⁹ The employer opens a new plant without any loss of jobs at the existing unionized facility. If the purpose of the decision is to chill union activity at either plant, then this conduct should constitute an unfair labor practice.¹¹⁰ If there is no purpose to chill protected activity, then there is no unfair labor practice.¹¹¹

This is not, however, the end of the analysis. The NLRA process will need to be used to determine whether there is an unfair labor practice if the employer subsequently decides to close the union facility.¹¹² At this point, the existing partial closing analysis should be applied.¹¹³ The test for whether partial closings violate section 8(a)(3) is set forth in *Darlington*.¹¹⁴ There, the Supreme Court stated, “[A] partial closing . . . is an unfair labor practice under [section] 8(a)(3) if motivated by a purpose to chill unionism in any of the remaining plants of the single employer and if the employer may reasonably have foreseen that such closing would likely have that effect.”¹¹⁵

Thus, the *Darlington* test should be applied twice. The NLRB will look into the employer’s purpose both when the capital allocation decision is made and again when, and if, there is a partial closing. Under *Darlington*, there has been a violation of section 8(a)(3) if the following three-part test is satisfied:

If the persons exercising control over a plant that is being closed for antiunion reasons (1) have an interest in another business, whether or not affiliated with or engaged in the same line of commercial activity as the closed plant, of sufficient substantiality to give promise of their reaping a benefit from the discouragement of unionization in that business; (2) act to close their plant with the purpose of producing such a result; and (3) occupy a relationship to the other business which makes it realistically foreseeable that

109. See discussion *supra* Part II.B.1.

110. See *Darlington*, 380 U.S. at 275.

111. Thomas J. Schwartz, *Plant Relocation or Partial Termination—the Duty to Decision-Bargain*, 39 *FORDHAM L. REV.* 81, 89 (1970).

112. See discussion *supra* Part II.A.

113. See discussion *supra* Part IV.B.

114. *Darlington*, 380 U.S. at 268–69.

115. *Id.* at 275.

its employees will fear that such business will also be closed down if they persist in organizational activities¹¹⁶

To determine whether there has been an unlawful chilling effect, the NLRB considers three factors:

(1) [A]ny contemporaneous union activity at the facility to be closed and at the employer’s other plants; (2) the geographic proximity of the employer’s remaining plants to the closed facility; (3) the likelihood that employees at the remaining plants will learn of the circumstances surrounding the closure through employee interchange or contact; and (4) any representations made by the employer’s agents to other employees.¹¹⁷

With a walkaway shop, the NLRB would consider these factors, but they would first be analyzed in the context of a plant that has not been closed, but has instead not been selected for new work. A partial closing violates the NLRA “only when it is carried out with the intent and for the purpose of avoiding one’s obligations under the Act.”¹¹⁸ Thus, a decision to open and operate a new facility away from an existing unionized facility would constitute an unfair labor practice only if the decision was made with the purpose to chill protected activity.¹¹⁹

116. *Id.* at 275–76.

117. Munger et al., *supra* note 12, at 82 (citing Bruce Duncan Co., 233 N.L.R.B. 1243 (1977); George Lithograph Co., 204 N.L.R.B. 431, 431–32 (1973); Motor Repair, Inc., 168 N.L.R.B. 1082, 1083 (1968)).

118. Bowman, *supra* note 30, at 1064.

119. Even if one agrees with critiques of the motive requirement in plant relocation cases, a distinction between a plant relocation and creation of new work should at least be considered because with new work there is not necessarily any loss of union jobs. *See* discussion *supra* Part II.B.2. Accordingly, one could agree with Estlund that motive should not be required in a relocation case while also agreeing that motive is a proper consideration when an employer makes a capital allocation decision that results in no loss of work at an existing unionized facility. *See* Estlund, *supra* note 36, at 934–35 (discussing how a relocation violates section 8(a)(3) only where the employer is “motivated by a purpose to avoid dealing with a union or to discourage union activity”).

1. Employer Statements

An employer's statements should be considered in the analysis undertaken to determine the employer's purpose.¹²⁰ If the employer makes illegal statements in relation to its capital allocation decision, these statements should point toward a purpose to chill unionism. Here, the *NLRB v. Gissel Packing Co.* standard should be applied.¹²¹ Thus, in the Boeing dispute, the NLRB would consider whether comments accompanying the decision to locate the new production line in South Carolina constituted coercive speech that would discourage unionized workers from engaging in protected section 7 activity in the future.

As stated in *Gissel*, "[A]n employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a 'threat of reprisal or force or promise of benefit.'"¹²² And if the employer makes a prediction, that prediction "must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control."¹²³ Accordingly, a management decision to open a new facility as part of a walkaway shop strategy would constitute an unfair labor practice if the decision is accompanied by any statement that could reasonably influence employees in their exercise of protected section 7 rights, is a threat, or is a prediction that does not meet the *Gissel* standard, because such statements would be strong evidence of a purpose to chill unionism.¹²⁴

2. Extensive Investigation into the Employer's Purpose Will Often Be Necessary

As part of the analysis, it is necessary to consider whether the employer's conduct "carrie[d] with it an inference of unlawful intention so compelling that it is justifiable to disbelieve the employer's protestations of innocent purpose."¹²⁵ Thus, in considering the employer's purpose, the investigation will inquire into the true motives of the employer by examining circumstantial

120. Cf. *NLRB v. Saunders Leasing Sys., Inc.* 497 F.2d 453, 456 (8th Cir. 1974) (holding that employer's statements concerning benefit withdrawal demonstrated unfair labor practice).

121. *NLRB v. Gissel Packing Co.*, 395 U.S. 575 618–20 (1969).

122. *Id.* at 618.

123. *Id.*

124. *Id.*

125. *Am. Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 309, 311–12 (1965).

evidence.¹²⁶ Accordingly, reaching the point of an investigation will often be necessary because the General Counsel will need information and facts in order to determine the employer’s purpose. Such a determination can be made only once there is investigation into the facts of a specific dispute.¹²⁷ If the investigation does not provide information sufficient to determine the employer’s purpose, then the General Counsel would be justified in issuing a complaint so that additional facts could be ascertained through subpoenas and hearings.¹²⁸

3. Mandatory Bargaining

Some reformers call for a mandatory duty to bargain over management decisions to allocate capital to new plants.¹²⁹ Requiring mandatory bargaining would constitute a departure from the position put forth in *Fibreboard Paper Products Corp. v. NLRB*, where Justice Stewart stated in his noteworthy concurrence,¹³⁰ “Nothing the Court holds . . . should be understood as imposing a duty to bargain collectively regarding . . . managerial decisions, which lie at the core of entrepreneurial control.”¹³¹ Justice Stewart continued, “Decisions concerning the commitment of investment capital and the basic scope of the enterprise are not in themselves primarily about conditions of employment”¹³² Under the NLRA, bargaining is mandatory

126. *See id.*

127. *See id.* at 312–13.

128. *See* National Labor Relations Act, 29 U.S.C. § 161 (2006).

129. *See* Estlund, *supra* note 36 and accompanying text.

130. *See, e.g.,* Miscimarra, *supra* note 29, at 85–86 n.28 (highlighting the prominence of Justice Stewart’s concurring opinion).

131. *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 223 (1964) (Stewart, J., concurring). Justice Stewart continued:

While employment security has thus properly been recognized in various circumstances as a condition of employment, it surely does not follow that every decision which may affect job security is a subject of compulsory collective bargaining. Many decisions made by management affect the job security of employees. Decisions concerning the volume and kind of advertising expenditures, product design, the manner of financing, and sales, all may bear upon the security of the workers’ jobs. Yet it is hardly conceivable that such decisions so involve ‘conditions of employment’ that they must be negotiated with the employees’ bargaining representative.

Id.

132. *Id.*

with respect to terms and conditions of employment.¹³³ However, “placement of new operations is a topic of ‘permissive’ bargaining, over which the employer has no obligation to bargain with a union in the first place.”¹³⁴ From the premise of this comment that there is no unfair labor practice in a management decision to undertake a walkaway shop,¹³⁵ it necessarily follows that such a decision not be subject to mandatory bargaining. Such a decision is both inherently management’s to make and not by itself violative of employees’ section 7 rights.

One scholar has recommended legislation “guaranteeing employees significant input with respect to business decisions that directly affect their employment situations.”¹³⁶ Certainly, a walkaway shop that is accompanied by the purpose to chill union activity has a direct effect on the unionized employees’ employment situation.¹³⁷ A walkaway shop that is not intended to have a chilling effect, on the other hand, does not so clearly have a direct effect.¹³⁸ On one hand, the decision could be direct if there are immediate changes at the existing facility.¹³⁹ On the other hand, the impact would be indirect if changes come far down the road.¹⁴⁰ Indeed, when an employer reacts to the exercise of section 7 activity in the immediate term, “returning strikers [experience] alienation, frustration, anxiety, anger, and even depression.”¹⁴¹ It is true that these feelings can be experienced by employees at an existing unionized plant that is not chosen for additional work.¹⁴² In Boeing, employees in the Puget Sound region might feel alienated, frustrated, anxious, angry, and depressed because management chose to invest in a new, non-union plant. But if, as in Boeing, the unionized plant experienced an increase in work,¹⁴³ these sentiments should not be present. The magnitude, or even the existence, of these feelings is likely far diminished when

133. *First Nat’l Maint. Corp. v. NLRB*, 452 U.S. 666, 689 (1981); *see also* Epstein, *supra* note 29.

134. Epstein, *supra* note 29.

135. *See id.*

136. Charles B. Craver, *The National Labor Relations Act at 75: In Need of a Heart Transplant*, 27 *HOFSTRA LAB. & EMP. L.J.* 311, 347 (2010).

137. *See* Estlund, *supra* note 36, at 933.

138. *See supra* note 119 and accompanying text.

139. *See* Estlund, *supra* note 36, at 933.

140. *See id.*

141. Lyriisa C. Barnett, *Maintaining Order in the Post-Strike Workplace: Employee Expression and the Scope of Section 7*, 15 *BERKELEY J. EMP. & LAB. L.* 87, 102 (1994).

142. *See* Litvin, *supra* note 72, at 443.

143. *See supra* notes 33–34 and accompanying text.

there has been no immediate detrimental impact on the unionized employees. Yes, employees at the unionized facility may experience these sentiments, but they should reasonably understand that this is not management impeding protected activity but making a legitimate business decision.

The problem, as Estlund correctly points out, is that:

In general, firms tend to invest more capital and locate more new production in non-union than in union plants; to relocate existing production, gradually or more rapidly, from union to non-union plants; and to favor largely unorganized regions over regions where labor is strong. It should therefore not be surprising that union operations are disproportionately selected for closure, sometimes based on higher labor costs, but often based on outmoded products and product technology. The result of these patterns is a steady flow of capital and jobs out of union operations.¹⁴⁴

But, is making all such management decisions an unfair labor practice the answer? Estlund would say yes, because “[u]nion avoidance in capital allocation decisions is the silent plague of the labor movement.”¹⁴⁵ Indeed, studies have shown that union avoidance reduces the likelihood of unionization at new plants.¹⁴⁶ There is a distinction between long-term labor avoidance that should be the type of decision within the purview of management¹⁴⁷ and

144. Estlund, *supra* note 36, at 931–32.

145. *Id.* at 933.

146. See Thomas A. Kochan, Robert B. McKersie & Jon Chalykoff, *The Effects of Corporate Strategy and Workplace Innovations on Union Representation*, 39 *INDUS. & LAB. REL. REV.* 487, 497–99 (1986) (discussing the impact of union avoidance on organization efforts).

147. *But see* Estlund, *supra* note 36, at 943. Estlund frames the impact of capital allocation decisions on existing plants when she writes:

[A] firm may choose to establish or expand a non-union plant while withholding capital investment and new business or new product lines from an existing plant. None of these decisions will appear to discriminate against the union workers, or even to affect them directly; none may even be actionable under the Act. Ultimately, however, the antiquated plant will be a prime candidate for shutdown; the shift of some or all of the work from the older, less advanced, higher cost (union) location to the newer, more modern, lower cost (non-union) location will be readily justified on economic grounds without reference to the union.

Id. Estlund notes the difficulty in proving this long “train of events” and how that difficulty makes section 8(a)(3) “ineffectual.” *Id.* at 943 n.81.

capital-allocation decisions that may have the motive to chill unionization at existing unionized facilities.¹⁴⁸

Thus, to Collingsworth, “a policy which emphasizes promoting unfettered flexibility for capital no longer furthers the goals of the NLRA.”¹⁴⁹ However, “many labor-management practices under the NLRA were meant to have room to grow and develop.”¹⁵⁰ Accordingly, it should come as no surprise that a management decision to operate a new facility should be viewed differently today than in the mid-twentieth century, or fifty years from now.¹⁵¹ Professor Estlund frames the situation well:

But what constitutes a discriminatory motive? At one extreme are employers who act out of pure spite, whose desire for retaliation is untainted by instrumental motives such as the desire to chill the union activity of its other employees. Under the *Darlington* decision, an employer who closes all or part of its business for purely retaliatory reasons does not thereby violate Section 8(a)(3); only “a purpose to chill unionism in any of the remaining plants of the single employer” will suffice to establish an unlawful discriminatory purpose. The sharply limited definition of unlawful motive has been harshly and justifiably criticized, though its impact is more limited than its critics might have feared. This very narrow conception of the requisite purpose does not apply to employer decisions to close only some of the employer’s operations at a given location, or to transfer work to another location or to a subcontractor; as to those decisions, proof of a desire to retaliate against employees choosing union representation or simply to avoid dealing with a union is sufficient to satisfy the motive requirement of Section 8(a)(3).¹⁵²

Thus, if the employer’s purpose in opening a new plant instead of adding the new work to the existing operation is made in part to chill unionization and protected activity at the existing plant, such conduct

148. *See id.* at 945 (“The Court in *First National Maintenance* reaffirmed that even major business decisions that are insulated from the duty to bargain . . . are open to scrutiny under section 8(a)(3) if they are alleged to be discriminatorily motivated . . .”).

149. Collingsworth, *supra* note 57, at 76.

150. Charles J. Morris, *A Blueprint for Reform of the National Labor Relations Act*, 8 ADMIN. L.J. AM. U. 517, 526 (1994).

151. *See* Hexter, *supra* note 71, at 305–06 (discussing how the world has changed since the NLRA was passed).

152. Estlund, *supra* note 36, at 937–38.

should be an unfair labor practice.¹⁵³ However, if there is no purpose to chill protected activity, however, then such management decisions should not be an unfair labor practice.

Estlund would go further, stating, “the greater threat to employee rights comes from those many large enterprises that patiently follow a systematic, long run ‘union avoidance’ strategy for determining patterns of investment.”¹⁵⁴ But applying an expanded version of the *Darlington* test would alleviate Estlund’s concerns by providing protection to workers where the employer is seeking to stifle protected activity.¹⁵⁵

Making walkaway shops per se unlawful or subject to mandatory bargaining under the NLRA, however, would go too far in infringing upon core management decisions.¹⁵⁶ Employers should be able to, with limits, choose where to invest their dollars. If a slow, methodical union-avoidance strategy is legal, then unions may have to make some concessions in order to obtain new work. Unions can also sell the concept of unionization at new plants.¹⁵⁷ But under the long-term approach, the parties themselves will have to develop strategies: the employer will have to make capital allocation decisions, and the unionized facilities will have to compete for the dollars.

4. Applying Estlund’s Proposal to the Boeing Dispute

To see how Professor Estlund’s proposal would play out, her framework can be applied to the Boeing dispute. Under Estlund’s framework, Boeing’s conduct would be measured against a hypothetical non-discriminatory employer.¹⁵⁸ Boeing would be expected to bargain with the IAM because the decision to open a new facility in South Carolina instead of the Puget Sound region is one that may affect job security.¹⁵⁹ Estlund posits that “[e]mployers who view unions as legitimate partners in the enterprise would be expected to bargain with unions over structural decisions that may

153. *See id.* at 937.

154. *Id.* at 945–46. Estlund continues, “The firm that bides its time and bites its tongue as it shrinks or eliminates its unionized operations has little or nothing to fear from the anti-discrimination mandate of the NLRA.” *Id.* at 946.

155. *See* discussion *supra* Part IV.C.1–2.

156. *See* discussion *supra* Parts II.B.2–3, IV.C.1–3.

157. *See, e.g., About SEIU, SERVICE EMP. INT’L UNION*, <http://www.seiu.org/our-union/> (last visited Dec. 11, 2012).

158. *See* Estlund, *supra* note 36, at 981.

159. *See id.* at 942.

affect job security . . . because it is in their interest to maintain the trust on which the cooperative enterprise is based.”¹⁶⁰ Estlund also suggests that employers would be incentivized to negotiate regarding capital allocation decisions because unions and employees “can affect many of the factors that typically go into the profitability or viability of operations.”¹⁶¹

Conversely, Epstein has noted, “[O]ne reason why Boeing got into trouble in this case was that it announced union difficulties, as opposed to cost savings, as the reason for its decision to open the South Carolina plant. Candor comes at a high cost in labor relations.”¹⁶² The different perspectives raised by Estlund and Epstein show why a partnership-type approach may not be practical.¹⁶³

Returning to the analysis under Estlund’s proposal, if Boeing made a structural decision that may affect union jobs, without undergoing good faith bargaining, there would be a presumption of anti-union discrimination.¹⁶⁴ Boeing could then rebut the presumption by demonstrating that negotiations would most likely have been counterproductive.¹⁶⁵ Estlund’s approach presumes that bargaining would be beneficial for both parties, unless the employer could prove otherwise.¹⁶⁶ Under this model, the burden to show that bargaining would not be worthwhile is on the employer,¹⁶⁷ even though this type of decision has long been held to be management’s to make.¹⁶⁸ The real issue, however, is not about bargaining; it is about making a fundamental choice: what should firmly be a management decision? And then, even decisions that may impact unions, such as the decision to locate new work to a new facility, should stay within management’s control.¹⁶⁹ Moreover, no unfair labor practice has been found in situations where the employer relocated its plant for economic reasons while also fulfilling its obligation to bargain.¹⁷⁰

160. *Id.* at 981.

161. *Id.*

162. Epstein, *supra* note 29.

163. Compare Epstein, *supra* note 29, with Estlund, *supra* note 36, at 960–61.

164. Estlund, *supra* note 36, at 983.

165. *Id.*

166. *Id.* at 983–84.

167. *Id.*

168. *Am. Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 311 (1965).

169. *Id.* (“But we have consistently construed [8(a)(3)] to leave unscathed a wide range of employer actions taken to serve legitimate business interests in some significant fashion, even though the act committed may tend to discourage union membership.”).

170. See, e.g., *In re Fiss Corp.*, 43 N.L.R.B. 125, 138, 154 (1942) (finding that the employer relocated for economic reasons without neglecting its duty to bargain), *aff’d*

As Estlund has noted, “Employers are fighting for flexibility and managerial prerogatives that they claim are crucial to their economic survival, while unions are fighting for their very existence in the face of aggressive managerial resistance and long-term attrition.”¹⁷¹ The purpose of the NLRA, however, is to reduce industrial strife and to give employees a voice.¹⁷² Additionally, the purpose of section 8(a)(3) is “to allow employees to freely exercise their right to join unions, be good, bad, or indifferent members, or abstain from joining any union without imperiling their livelihood.”¹⁷³

5. The Lawful Walkaway Shop

A premise of this comment is that long-term union avoidance should not be seen as impacting employees in the exercise of their right to join unions unless the management’s purpose is to chill unionism.¹⁷⁴ If an employer decides to create new work at a non-union facility and does not intend to chill unionism, or as in Boeing, increases the number of workers at the unionized facility, the unionized employees’ right to join a union is not being infringed upon.¹⁷⁵

Thus, a distinction should be made. On one hand is the lawful walkaway shop, a long-term union avoidance strategy demonstrated by capital allocation decisions.¹⁷⁶ With a walkaway shop, a company could act similarly to Boeing and create new work at a new facility without any detriment to the existing unionized workers. Management would be able to reference past strikes as part of the justification for the decision. In making this distinction, this comment has strived to find a balance that provides insulation to management to make decisions that demonstrate long-term union avoidance, while also protecting employees in situations in which the employer’s purpose is to chill unionism.¹⁷⁷ Thus, employers should

per curiam, 136 F.2d 990 (3d Cir. 1943); *Kipbea Baking Co.*, 131 N.L.R.B. 411, 414–17 (1961) (permitting an employer’s decision to relocate for economic reasons after providing advance notice to the union about its plans).

171. Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1543 (2002).

172. National Labor Relations Act, 29 U.S.C. § 151 (1994).

173. Julius Getman, *The Boeing Case: Creating Outrage Out of Very Little*, 27 A.B.A. J. LAB. & EMP. L. 99, 100 (2011) (quoting *Radio Officers’ Union v. NLRB*, 347 U.S. 17, 40 (1954)).

174. See discussion *supra* Part III.

175. Epstein, *supra* note 29.

176. See discussion *supra* Part III.

177. See discussion *supra* Part IV.C.1–4.

be able to follow long-term union avoidance strategies, not because there is not the potential for such strategies to impact unionization efforts, but because such decisions should be management's to make.¹⁷⁸ To be sure, Estlund would take issue with this distinction, having stated, "To allow the presence of the same 'economic motives' that underlie the discharge of union activists to insulate from liability 'union avoidance' in capital allocation decisions rests on a fundamental misunderstanding of the nature of anti-union conduct."¹⁷⁹ This is not a misunderstanding, but simply a different balancing of the rights of the stakeholders in management-labor relations.

Furthermore, if masking union avoidance in long-term capital allocation decisions is an unfair labor practice, then there very well could be an impact on initial capital allocation decisions.¹⁸⁰ For both existing companies with new products and legitimate needs for new plants and new companies with new products, there will be strong motivation to locate the facility in an area where unions lack strength so that the employer is not confined in its decision making down the road.¹⁸¹ Otherwise, an employer who opens a new facility that will be staffed by unionized workers soon after its opening will be hard pressed to open new facilities with non-union employees because such conduct will be seen as a step in long-term union avoidance.¹⁸² This is an unnecessary restraint.

Additionally, it is important to remember that unions and employers are not partners.¹⁸³ While they necessarily work together, they have competing objectives and constituencies.¹⁸⁴ One need only look to the outcome of the Boeing dispute to see that the current process worked in that case.¹⁸⁵ This is not to say that unions should

178. Estlund has argued that "the same motive that lies at the heart of the paradigmatic discriminatory discharge—a desire to avoid the real economic costs of unionization—also underlies the larger patterns of investment and disinvestment that have increasingly relegated private sector unions to aging plants in shrinking sectors of the economy." Estlund, *supra* note 36, at 952. While this is a valid point, there is a difference between what Estlund describes and long-term union avoidance, because with the latter, there is not necessarily any negative impact on existing employees.

179. *Id.* at 963.

180. *See supra* text accompanying notes 44–45.

181. *See supra* text accompanying note 146.

182. *See* discussion *supra* Part II.B.3.

183. *First Nat'l Maint. Corp. v. NLRB*, 452 U.S. 666, 676 (1981) ("Nonetheless, in establishing what issues must be submitted to the process of bargaining, Congress had no expectation that the elected union representative would become an equal partner in the running of the business enterprise in which the union's members are employed.").

184. *Id.*

185. *See supra* text accompanying notes 33–34.

give up on what they are seeking or that there should be a race to the bottom, but that certain decisions are inherently the employer’s to make, and even if this results in a hurdle for unions, that is part of the price of capitalism.¹⁸⁶ Moreover, the union can gain leverage by using the investigation to impose pressure on employers to settle.¹⁸⁷ The result is that the union will get some of what it wants, and there can be a win-win for both the employer and employees.¹⁸⁸

There is some support for this contention from Professor Estlund, who recognizes what motivates employers when she writes, “The best defense of current doctrine sanctioning ‘economically motivated’ decisions about the allocation and relocation of capital is that it is simply inescapable—that employers must be free in a market economy to move capital from less profitable to more profitable uses.”¹⁸⁹ An expanded NLRA that precludes an employer from allocating capital away from unions in a slow manner could impede this conduct. It is not mutually exclusive to have a system that promotes unionization and worker rights while also recognizing certain employer prerogatives.¹⁹⁰

Even if one agrees with Estlund’s proposals and sentiments, the idea of precluding an employer from opening a new facility in order to avoid a union would be a slippery slope. As the Boeing dispute illustrates, the flexibility afforded the General Counsel in issuing a complaint may accomplish what Estlund is seeking—that a broader array of employer conduct will trigger an investigation of employer conduct because of the direct and indirect effects on employee rights.¹⁹¹ But, taking Estlund’s argument to its logical extension would be a bridge too far in limiting employer conduct. To be fair, Estlund tempers her recommendations when stating,

While an aim of both New Deal economic policy and the modern economists I have relied upon was and is to discourage primary reliance on a low-wage, anti-union strategy by American firms, neither calls for prohibiting management from any consideration of labor costs or other economic consequences of unionization in its effort to

186. See discussion *supra* Part IV.C.1–4.

187. See *Am. Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 317 (1965) (discussing how the Board can intrude upon area that employers and employees “can use in seeking to gain acceptance of their bargaining demands”).

188. See Feinstein, *supra* note 3.

189. Estlund, *supra* note 36, at 946.

190. See discussion *supra* Part IV.C.

191. See discussion *supra* Part II.B.

compete. To do so would give union workers a kind of tenure protection against market forces that affect union and non-union firms alike. I do not contend that the Act was meant to do this.¹⁹²

On the other hand, scholars at the conservative Heritage Foundation have suggested that Congress affirm that new capital investment decisions do not violate the Act.¹⁹³ While clarity is certainly needed in this regard, amending the NLRA is probably not a feasible solution, at least given the current makeup of Congress.¹⁹⁴ Moreover, some flexibility should remain in the Act so that the NLRB can pursue investigations of alleged unfair labor practices. And as previously discussed, some new investment decisions do infringe upon protected employee activity.¹⁹⁵ Therefore, a categorical exemption is unwarranted. Indeed, it should be noted that by issuing the complaint, the General Counsel was not finding Boeing liable for any conduct; this was merely a step in the adjudicative process.¹⁹⁶ And given the valid concerns raised by Professor Estlund,¹⁹⁷ it would be an overstep to close the door entirely to finding an unfair labor practice in all new capital investment decisions. Following the suggestion made by the Heritage Foundation's scholars is unlikely because amending the NLRA has historically been a difficult task.¹⁹⁸

192. Estlund, *supra* note 36, at 979. Estlund continues, "The question is how to distinguish prohibited from permissible conduct in a way that takes proper account of the Act's prohibition of much economically rational resistance to and discrimination against union employees without imposing unwarranted restraints on management's ability to respond to market conditions." *Id.*

193. Hans A. von Spakovsky & James Sherk, *National Labor Relations Board Overreach Against Boeing Imperils Jobs and Investment*, HERITAGE FOUND. (May 11, 2011), <http://report.heritage.org/lm0066> ("Congress should amend the National Labor Relations Act to reaffirm the long-standing construction . . . that any new investment decisions—such as (but not limited to) expanding existing facilities, building new plants, or relocating—are not unfair labor practices and are outside the legal jurisdiction of an overzealous NLRB.").

194. *See* Estlund, *supra* note 171, at 1530 ("Most importantly, a longstanding political impasse at the national level has blocked any major congressional revision of the basic text since at least 1959. Moreover, the basic text itself, almost all of which dates from either 1935 or 1947, contains additional built-in obstacles to change.").

195. *See* discussion *supra* Part IV.C.

196. *See* Feinstein, *supra* note 3.

197. *See* Estlund, *supra* note 36, at 971–77.

198. Estlund, *supra* note 171, at 1530.

V. CONCLUSION

While the facts of the Boeing case strongly point to there being no unlawful transfer of work,¹⁹⁹ there certainly could be instances of long-term union avoidance that at the very least warrant investigation.²⁰⁰ In such a scenario, if an employer makes a decision to open a new plant instead of expanding work at an existing location with the then purpose of chilling union activity, there will be a finding of an unfair labor practice under a modified version of the test for partial closings.²⁰¹ However, if a walkaway shop has no purpose to chill unionism, there should be no finding of an unfair labor practice.²⁰²

An amendment to the NLRA such as that recommended by von Spakovsky and Sherk²⁰³ would preclude any remedy under the NLRA for any of the above mentioned scenarios, so their suggestion to eliminate certain unfair labor practices should be rejected because of the possibility of the illegal walkaway shop.²⁰⁴ A management decision to create new work at a new facility should not, by itself, constitute an unfair labor practice.²⁰⁵ However, if such a decision is accompanied by threats that reveal a purpose to chill protected activity, or if the decision is accompanied by a proximate negative impact on the existing employees, then the current test for partial relocations provides a helpful starting point for determining whether there has been an unfair labor practice.²⁰⁶ Certainly, a decision to open a new plant may chill union activity at an existing plant, but this is not a foregone conclusion.²⁰⁷

Although it will be difficult, if not impossible, to prove that an employer plans to close a union operation a decade down the road, that should not preclude an employer from being able to make core entrepreneurial decisions.²⁰⁸ Under the NLRA, management does and should have the right to choose how to run its business, and the NLRA’s authority should not be expanded to remove the ability to

199. See discussion *supra* Part II.B.

200. See discussion *supra* Parts III–IV.

201. See discussion *supra* Part IV.B–C.

202. See discussion *supra* Part IV.C.5.

203. See *supra* note 193 and accompanying text.

204. See discussion *supra* Part IV.C.4–5.

205. See discussion *supra* Parts III–IV.

206. See discussion *supra* Part IV.B.

207. See discussion *supra* Part IV.C.4–5.

208. See discussion *supra* Part IV.C.4–5.

make such decisions from employers.²⁰⁹ The union will have to work to organize the new facility and the cycle continues. But that is a better course than so severely curtailing decisions that are rightly management's to make.

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209. See discussion *supra* Part IV.

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