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An Analysis of the NLRB's "Runaway Shop" Doctrine in the Context of Mid-Term Work Relocation Based on Union Labor Costs

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AN ANALYSIS OF THE NLRB'S "RUNAWAY SHOP" DOCTRINE IN THE CONTEXT OF MID-TERM WORK RELOCATIONS BASED ON UNION LABOR COSTS

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I. INTRODUCTION

A. History of the "Runaway Shop" Doctrine

This Article considers an employer’s potential legal obligations and liabilities with regard to a decision to relocate union work during the term of a collective bargaining agreement where the decision is based, in part or in whole, on labor costs. An employer should anticipate that such a decision may be the subject of a National Labor Relations Board ("Board" or "NLRB") investigation.1 Accordingly, the decision may be challenged as an unfair labor practice, specifically as a "runaway shop," under various provisions of the National Labor Relations Act ("Act" or "NLRA").2

The term "runaway shop" was developed by the NLRB to describe a situation where an employer, in an attempt to evade its obligations to deal with a union, would close a unionized facility and transfer the work performed at that facility to another location utilizing different (usually

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1. See 29 U.S.C. § 158 (a)(1) (1994) (providing that, "[i]t shall be an unfair labor practice for an employer . . . to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title").

non-union) employees. Historically, this practice developed in the context of union organizing activity. When a particular group of employees would organize a union, the employer, rather than dealing with the union, would relocate the work to a different location and close the organized operation.

In circumstances where an unlawful "runaway shop" has been found, the Board has required the employer to take a variety of actions to remedy its unlawful conduct. The Board's first preference has been to order the employer to reopen the unlawfully closed facility and resume the work previously performed at that location. Where reopening a facility is not practicable, or is otherwise inappropriate, the Board has utilized other remedies such as requiring the employer to offer the unionized employees jobs at the new location, providing back pay to the employees, recognizing the union as the bargaining representative at the new location, or other similar measures.

Since its inception, the "runaway shop" concept has been expanded to include circumstances where an employer, during the term of a collective bargaining agreement, decides to relocate work from a unionized facility to another location. The result of such relocations is the layoff of employees at the unionized facility. Over the past fifty years, Board decisions as to the lawfulness of such actions have varied as the political composition of the Board has changed and as American businesses have become more dynamic and increasingly vulnerable to changing economic climates.

Under current law an employer has the right to relocate work during the term of a collective bargaining agreement from a unionized facility to other company facilities based upon valid economic considerations, provided that the employer otherwise satisfies its duty to bargain with the union. The cost of operating under a union agreement may not

4. See id.
5. See id.
7. See id.
8. See id. ("When restoration of eliminated operations is not feasible, the Board may order back pay, reinstatement at either the old or the new location, and, reimbursement for necessary moving expenses.").
9. See Dunn, supra, note 3, Supp. § 5, at 56. (discussing NLRB v. Die Supply Corp., 393 F.2d 462 (1st Cir. 1968)).
10. See id. at 736-37.
11. See id.
be the sole basis for this economic decision.\textsuperscript{12} Rather, to be lawful, substantial and various legitimate economic factors must be the basis for the decision.\textsuperscript{13}

Depending on the type of business involved, similar considerations are applicable where an employer decides to scale back union work during the term of a labor contract and purchase products from an independent third party to satisfy its customer contracts.\textsuperscript{14} Although the Board considers this type of practice to be subcontracting, rather than a true "runaway shop," the employer must fulfill its bargaining obligation with the union and justify its actions with legitimate economic considerations.\textsuperscript{15} Any employer who encounters a situation where a "runaway shop" charge could be alleged during the term of a labor contract should undertake a careful analysis of facts, options and legal implications. This Article is intended to serve as a starting point for such an analysis.

B. Analyzing the Mid-Term "Runaway Shop" Charge

If, during the term of a labor contract, an employer decides to relocate bargaining unit work to other operations, several provisions of the NLRA may provide the basis for an allegation of an unfair labor practice. First, sections 8(d)\textsuperscript{16} and 8(a)(5)\textsuperscript{17} of the Act may be implicated.

\textsuperscript{12} See id.; see also Dunn, \textit{supra} note 3, at 737.

\textsuperscript{13} These economic factors may include shipping costs, product quality, customer desires, equipment costs, or other non-labor production costs. See Dunn, \textit{supra} note 3, at 737; see also Dubuque Packing Co., 303 N.L.R.B. 386, 390-92 (1991); Columbia City Freight Lines, Inc., 271 N.L.R.B. 12, 15-18 (1984).


\textsuperscript{15} See id. at 210-12.

\textsuperscript{16} 29 U.S.C. § 158(d) (1994). Section 8(d) of the NLRA sets forth, in detail, the responsibilities of an employer and union under the Act to bargain collectively before, during, and after the execution of a collective bargaining agreement. Generally, section 8(d) places an affirmative obligation on employers and unions alike to engage in continuous good faith collective bargaining, which includes bargaining to impasse on mandatory subjects. Mandatory subjects of bargaining under section 8(d) include wages, hours, and other terms and conditions of employment. An employer's decision to relocate work may be considered a mandatory subject of bargaining depending on the factors prompting the decision and the relevant language contained in the applicable collective bargaining agreement. If work relocation is a mandatory subject, an employer is required to engage in good faith bargaining to impasse regarding the decision and its effects on employees. See id.

\textsuperscript{17} 29 U.S.C. § 158(a)(5). Section 8(a)(5) of the NLRA provides that "[i]t shall be an unfair labor practice for an employer ... to refuse to bargain collectively with the representatives of his employees, ..." 29 U.S.C. § 158(a)(5), regarding mandatory subjects of bargaining, i.e., "rates of pay, wages, hours of employment, or other conditions of employment," 29 U.S.C. § 159. Thus, if an employer's decision to relocate work is considered a mandatory subject of bargaining, a failure
Generally, these sections obligate an employer to bargain in good faith with the union about the decision to relocate work and its effects. 18 Second, allegations of “anti-union” discrimination against employees may arise under section 8(a)(3). 19 In this regard, a union may claim that the employer’s decision to abandon the labor contract, coupled with the layoff of the operation’s employees and the subsequent relocation of work, amount to a “runaway shop.” 20 Third, the employer’s conduct may implicate section 8(a)(1) 21 of the Act. Such a charge may allege that, by failing to bargain in good faith and by engaging in discriminatory conduct, the employer has necessarily interfered with, restrained and/or coerced employees in their attempts to exercise rights under the Act. 22

Historically, the Board has been inconsistent in determining whether certain mid-term work relocation decisions violate the Act’s unfair labor practice provisions. 23 In fact, the Board appears to have left a number of issues unresolved where it has attempted to determine what kinds of reasons will legitimately and lawfully support an employer’s decision to transfer union work during the term of a collective bargaining agreement. 24 However, there has been one thread of consistency in the Board’s opinions in this area. An employer may not take adverse action against employees, including laying off or terminating employees due to a decision to relocate bargaining unit work, if such conduct is grounded in anti-union animus and has little or no legitimate basis in

on the part of the employer to engage in good faith bargaining will likely be considered an unfair labor practice. See Dubuque Packing Co., 303 N.L.R.B. at 391.


19. See 29 U.S.C. § 158(a)(3). Section 8(a)(3) of the NLRA provides that “[i]t shall be an unfair labor practice for an employer .. by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.” Id.

20. See Dunn, supra note 3, at 736-37, Supp. at 56-57.


22. See id. Section 8(a)(1) of the NLRA provides that “[i]t shall be an unfair labor practice for an employer .. to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157.” Id. Section 157, also known as “Section 7”, provides, in pertinent part, that [e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities.


fact. This is particularly true where an employer’s conduct takes the form of the purposeful relocation of union work in order to avoid unfavorable contract provisions, especially bargained-for wage rates and benefits.

It is well established that the cornerstone for a finding of discriminatory conduct under section 8(a)(3) is employer motivation. In mid-term work relocation situations, the actual conduct that a union could challenge as discriminatory would be: (1) any failure by the employer to bargain in good faith; (2) the work transfer itself; and (3) the layoffs that result from such a transfer. If such conduct is the result of anti-union animus, the Board will often find an illegal “runaway shop.” Thus, in most cases, the ultimate issue before the Board is an employer’s motivation for making the decision to relocate work.

C. Employer Motivation in the Context of Mid-Term Work Relocation

Where the Board evaluates the question of motive by an alleged “runaway” employer, the initial burden is placed on the Board’s General Counsel and the charging party to demonstrate an employer’s anti-union motivation. However, employers should be aware that iron-clad proof of unlawful motivation is not always necessary to successfully carry this initial burden. Evidence sufficient to raise a presumption of discrimination on the part of an employer is usually enough. Employers should further recognize that the Board will often conclude that discriminatory conduct has taken place even in the face of minimal circumstantial evidence (although technically the evidence must be “substantial”). Once

25. See id. at 737-41, Supp. 56-57.
26. See UAW v. NLRB, 765 F.2d 175, 183-84 (D.C. Cir. 1985) (stating that only in the absence of anti-union animus, may an employer consider mid-term contract modifications for economic reasons).
27. See International Paper Co. v. NLRB, 115 F.3d 1045, 1048 (D.C. Cir. 1997).
29. See Great Chinese Am. Sewing Co. v. NLRB, 578 F.2d 251, 255 (9th Cir. 1978).
30. See International Paper Co., 115 F.3d at 1048.
31. See Quality Control Elec., Inc., 323 N.L.R.B. 238 (1997) (holding that in order to make a prima facie case of unlawful discrimination evidence of a discriminatory motive must be established).
32. See id.
33. See Wright Line, 251 N.L.R.B. 1083, 1096 (1980).
34. In this regard, it is important for employers to note that at least one federal court of appeals has recognized that “[m]otive or intent almost always must be inferred from circumstantial evidence.” Geske & Sons, Inc. v. NLRB, 103 F.3d 1366, 1375 (7th Cir. 1997). Although the evidence of ill-motive must be substantial to withstand the scrutiny of an appeal, a determination
the General Counsel charging party produces evidence of possible discrimination, the burden shifts to the employer to rebut the union's *prima facie* assertions with substantial, legitimate, and nondiscriminatory justifications for its challenged conduct.\(^3\)

In some cases, however, a decision to relocate during the term of a collective bargaining agreement, accompanied by other serious and egregious conduct by an employer, most often a failure to bargain in good faith about the decision, can be found to be so clearly and patently discriminatory that an initial evidentiary showing of anti-union motivation is not required.\(^3\) In these types of cases, the employer's actions are labeled by the Board as "inherently destructive" of employee rights and are, in a sense, automatically discriminatory and therefore violative of section 8(a)(3).\(^3\) Yet, just as in cases where the union is required initially to prove a discriminatory motive, an employer may rebut a showing of "inherently destructive" conduct "with sufficient evidence of ... legitimate and substantial business justification[s]" for its actions.\(^3\) However, the employer's burden of producing sufficient evidence in such instances has been described as "'heavy ... if not impossible.'"\(^3\)

The legal analysis below sets forth the Board's prevailing position, albeit inconsistent at times, regarding the legality of decisions to transfer work during the term of a collective bargaining agreement, where the employer's decision is based in whole or in part on union labor costs. For the purpose of crystallizing several main points to draw from the legal precedents stated below, the following concepts should be recognized as critical factors for an employer's consideration when contemplating a decision to relocate work during the term of a labor contract:

1. Before taking any action that amounts to a work relocation during the term of a collective bargaining agreement, an employer may be required to bargain with the employees' representative in accordance with the terms of its labor agreement and in accordance with the applicable

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35. See *Wright Line*, 251 N.L.R.B. at 1096.
37. See *id*.
38. *Id*.
39. *Id* (quoting *International Bhd. of Boilermakers, Local 88* v. NLRB, 858 F.2d 756, 763 (D.C. Cir. 1988)).
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elements of good faith bargaining contained in various provisions of the Act and cases interpreting the Act; (2) prior to relocating, an employer should be prepared to justify its decision with legitimate and substantial economic reasons which demonstrate a business necessity for transferring bargaining unit work; and (3) as a general matter, a decision to relocate cannot be based solely on a desire to avoid union labor costs associated with a current contract, although labor costs may be legitimately proffered as one factor amongst many which have caused an employer to consider relocating union work.

This Article will show that where these three conditions are satisfied, an employer should be substantially protected from an immediate finding by the Board of an unfair labor practice. It is important to note that in all “runaway shop” cases, the Board has been notoriously fervent in its pursuit of what it believes to be the “true” motivations for an employer’s decision. A review of the Board’s decisions in this area suggests that any inquiry and ultimate decision by the Board will be highly fact-specific and fact-intensive, and will be analyzed using a standard that incorporates a totality of circumstances surrounding an employer’s conduct. Such a standard presents employers with a precarious “grey-area” of labor obligations and “lawful versus unlawful” conduct.

In these kinds of situations there is also the potential for substantial liability, particularly in terms of back pay and reinstatement, upon an adverse finding by the Board.

One ultimate certainty in all such cases will be the standard focus on employer motivation. Thus, because administrative law judges and the current Board will likely scrutinize each and every fact that plays a role in motivating a decision which appears adverse to unionization, an employer must remain cognizant of the nature of its words and actions as it approaches a final determination of whether to engage in a relocation of bargaining unit work. Using the advantage of foresight, an em-

40. See id. at 1048; see also Geske & Sons, 103 F.3d at 1375.
42. See UAW v. NLRB, 765 F.2d 175, 179-81 (D.C. Cir. 1985); see also International Paper Co., 115 F.3d at 1048-49.
43. See Los Angeles Marine Hardware Co., 235 N.L.R.B. at 738. But see International Paper Co., 115 F.3d at 1046 (refusing to enforce Board’s order and denying backpay).
44. See International Paper Co. 115 F.3d at 1048 (“An employer does not violate section 8(a)(3) every time it acts in a manner that may affect union activity. Rather, an employer’s action violates section 8(a)(3) only if it acts specifically with the intent or purpose of encouraging or discouraging union membership.”).
45. See Milwaukee Spring II, 268 N.L.R.B. at 604 (finding no conduct that indicated any
ployer can capitalize on and highlight its own deliberate, legitimate actions in preparation for the possibility of Board review in the future.\textsuperscript{46} Accordingly, prior to a mid-term work relocation situation, an employer should strategically position itself to avoid liability by ensuring that it does not engage in conduct that might be viewed as discriminatory or “inherently destructive” of employee rights, and by insulating its ultimate decision with legitimate, nondiscriminatory justifications based on sound business/economic factors.\textsuperscript{47}

II. THE LAW OF MID-TERM WORK RELOCATION UNDER THE NLRA

A. Background

Absent anti-union animus, and upon fulfilling relevant bargaining obligations, employers are generally free during the term of a collective bargaining agreement to make necessary economic decisions, including closing certain operations, laying off employees, and transferring work to new facilities.\textsuperscript{48} Mid-term work relocations, when premised on substantial and legitimate business justifications, and when implemented after appropriate bargaining has taken place, will not usually rise to the level of a “runaway shop” violation.\textsuperscript{49} However, if an employer’s decision to transfer work is motivated solely by a desire to avoid the financial impact of current union wage rates and/or benefits, as contained in its labor contract, the Board and courts have generally found a violation of the Act.\textsuperscript{50} In such instances, the Board has recognized a strong pre-
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sumption of anti-union animus, and has often found the employer’s conduct to be “inherently destructive” of employees’ rights under the Act.\(^5\)

Historically, in alleged “runaway shop” cases, the Board has vigorously analyzed factual situations to determine the importance to the employer of avoiding bargained-for wage rates and benefits.\(^2\) Essentially, the more apparent it is that an employer’s decision to transfer work was primarily motivated by a desire to avoid paying union wages and benefits, the more likely it is that the Board or a court will find the employer was actually motivated by anti-union animus.\(^3\) Where labor costs appear to dominate an employer’s decision to close a plant and transfer work, the totality of circumstances surrounding the employer’s

ful motivation is shown, the burden of persuasion shifts to the respondent to prove its affirmative defense that the alleged discriminatory conduct would have taken place even in the absence of the protected activity. See Wright Line, 251 N.L.R.B. at 1090-91. The Wright Line test applies regardless of whether the case involves pretextual reasons or dual motivation. See Frank Black Mechanical Servs., Inc., 271 N.L.R.B. 1302 (1984). In this regard, “a finding of pretext necessarily means that the reasons advanced by the employer either did not exist or were not in fact relied upon, thereby leaving intact the inference of wrongful motive established by the General Counsel.” Id. at 1302 n.2 (quoting Limestone Apparel Corp., 255 N.L.R.B. 722 (1981), enforced sub nom. 705 F.2d 799 (6th Cir. 1982)); see also Quality Control Elec., Inc., 323 N.L.R.B. 238, 238 n.7 (1997) (concluding that statements, without more, may constitute direct evidence of illegal motivation sufficient to satisfy animus and motive requirements).

51. Notwithstanding the more common application of the Wright Line paradigm of proof, in a narrow class of circumstances a violation of the Act can “be established [even] absent direct evidence of unlawful motivation.” International Paper Co., 115 F.3d at 1048. The Board has recognized that in certain instances, “[e]mployer conduct may so tend to discourage union activity that an unlawful purpose will be inferred.” Id. Under what has become known as the Board’s Great Dane Trailers analysis, “[t]his conduct is divided into two categories—‘inherently destructive’ and ‘comparatively slight’—depending on the potential effect of the employer’s conduct on union activity.” Id. See generally NLRB v. Great Dane Trailers, Inc., 388 U.S. 26, 34 (1967). The D.C. Circuit has described the Great Dane Trailers analysis as follows:

If it can reasonably be concluded that the employer’s discriminatory conduct was “inherently destructive” of important employee rights, no proof of an antunion motivation is needed and the Board can find an unfair labor practice even if the employer introduces evidence that the conduct was motivated by business considerations... If the adverse effect of the discriminatory conduct is “comparatively slight,” an antunion motivation must be proved to sustain the charge if the employer has come forward with evidence of legitimate and substantial business justifications for the conduct. An employer that engages in inherently destructive conduct may overcome the inference of unlawful intent with sufficient evidence of a legitimate and substantial business justification. We have, however, described the employer’s burden in justifying inherently destructive conduct as “heavy... if not impossible.”

International Paper Co., 115 F.3d at 1048 (alteration in original) (citations omitted).

52. See, e.g., Weather Tamer, Inc. v. NLRB, 676 F.2d 483, 491 (11th Cir. 1982).

conduct and financial status will be the ultimate focus of inquiry. In order to avoid a "runaway shop" violation, an employer should be prepared to support a mid-term work relocation decision with a variety of legitimate and substantial business justifications, which may include labor costs as a factor.

B. Basic "Runaway Shop" Law

The traditional "runaway shop" unfair labor practice charge focuses primarily on employer motivation. The analysis for such a charge has been succinctly described by the United States Court of Appeals for the Eleventh Circuit in the case of Weather Tamer, Inc. v. NLRB. The Weather Tamer court explained that "[a] runaway shop exists when an employer, in retaliation against union activities, transfers work from the closed facility to another plant or opens a new plant to replace the closed plant." The Eleventh Circuit further noted: "If no transfer of work has taken place or if there is a transfer of work, but the decision to transfer is made for business reasons unrelated to union activity at the closed plant, then there has been no unfair labor practice." In recognizing that the employer's motivation was central to the merits of the work relocation "runaway shop" charge, the court focused specifically on the fact that it was "clear from the record that [the employer] did not increase production capacity at [the new plant or any of] its other plants to compensate for the shutdown." The court went on to

55. Similar considerations are applicable where a unionized employer decides to purchase products from an independent third party to satisfy its customer contracts. Although the Board considers this type of practice to be subcontracting, rather than a true "runaway shop," an employer must otherwise fulfill its bargaining obligation with the union, and the employer must justify its action by legitimate economic considerations. See generally Bob's Big Boy Family Restaurants, 264 N.L.R.B. 1369, 1371-72 (1982) (holding that the decision to subcontract did not represent a substantial change of business or economic restructuring to remove an employer's obligation to bargain).
56. See Weather Tamer, Inc, 676 F.2d at 491.
57. 676 F.2d 483 (11th Cir. 1982).
58. Id. (finding that the employer did not violate section 8(a)(3) when it transferred work from one of its recently unionized plants to a non-unionized plant because the employer had demonstrated that the decision to close was based on valid economic reasons - "what occurred was a business consolidation resulting from a declining demand for Weather Tamer's goods").
59. Id. (citing Frito-Lay, Inc. v. NLRB, 585 F.2d 62, 67-68 (3d Cir. 1978)).
60. Id. In reviewing the factual record before it, the court further recognized: Uncontested evidence establishes that orders for Weather Tamer's garments began to drop during the spring, 1978, season. At the end of that season company records reflect a substantial decline in sales, and this decline continued through the fall, 1978,
explain that the only sensible conclusion to draw from this evidence was that the employer had "made a business decision to consolidate its holdings" based on a deteriorating economic climate. The Eleventh Circuit discussed the breadth of an employer's prerogative to make neutral economic business judgments and noted that "management decisions unmotivated by union animus need not be reasonable and may even be harsh." In addition to the basic labor relations and economic policies addressed in the Weather Tamer case, the Eleventh Circuit's decision also illustrates the fact-specific nature of a "runaway shop" legal analysis and that a "totality of the circumstances" standard will apply.

C. Mid-Term "Runaway Shop" Law: The Los Angeles Marine Case

In Los Angeles Marine Hardware Co., a seminal mid-term work relocation case, the NLRB explained that "runaway shop" cases "take into account a number of factors," and "each case of this type must therefore be decided on the basis of its own facts, including both the character of the employer's conduct and the probabilities resulting from the surrounding physical circumstances." In Los Angeles Marine, the

season. The layoffs at Tuskegee coincided with this declining demand. The record also discloses that although approximately 100 Tuskegee employees were discharged, employment at the [new] plant did not increase throughout 1978, and the total Weather Tamer payroll decreased by approximately 200 employees from mid-July, 1978, to mid-December, 1978.

Id. at 491 (footnote omitted).

61. Id.

62. Id. at 491 n.6 (citing Federal-Mogul Corp. v. NLRB, 566 F.2d 1245, 1259-60 (5th Cir. 1978)).

63. See Weather Tamer, Inc., 676 F.2d at 491. It is important to note the standards of review applied by a federal court of appeals in reviewing findings of the Board. A court will deem conclusive the factual determinations of the Board so long as they are supported by "substantial evidence." See Geske & Sons, Inc. v. NLRB, 103 F.3d 1366, 1375 (7th Cir. 1997) ("As long as the Board's determination is premised on substantial evidence, its conclusion is both valid and binding on this court."); see also Richardson v. Perales, 402 U.S. 389, 401 (1971) (explaining that substantial evidence is defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion"). The Board's legal conclusions, however, are reviewed de novo. See NLRB v. CWI of Md., Inc., 127 F.3d 319, 330 (4th Cir. 1997). In this regard, an administrative law judge's conclusions of law, if accepted by the Board, are also reviewed de novo. The Board's established policy for reviewing the findings of administrative law judge's is not to overrule "credibility resolutions unless the clear preponderance of all the relevant evidence convinces [the Board] that they are incorrect." Mid-Hudson Leather Goods Co., 291 N.L.R.B. 499, 499 n.1 (1988) (citing Standard Dry Wall Prods., 91 N.L.R.B. 544 (1950), enforced, 188 F.2d 362 (3d Cir. 1951)).

64. 235 N.L.R.B. 720 (1978), enforced, 602 F.2d 1302 (9th Cir. 1979).

65. Id. at 732 (citing Jack Lewis & Joe Levitan Co., 114 N.L.R.B. 765, 769 (1955)).
The Board considered alleged violations of sections 8(a)(1), 8(a)(3), 8(d), and 8(a)(5) of the Act, where, during the term of a collective bargaining agreement, an employer terminated its union employees at one location and moved the bargaining unit's work to another non-unionized plant. The employer admitted that its decision to relocate was motivated by the need to obtain economic relief from the terms of its collective bargaining agreement with the union. The Board initially determined that the employer had violated sections 8(a)(1), 8(d), and 8(a)(5) by unilaterally modifying its current labor contract without the union's consent, notwithstanding the fact that the employer had bargained in good faith to impasse on the issue of relocation. The Board explained:

Under Section 8(d) of the Act, no party to a collective-bargaining agreement can be compelled to discuss or agree to a midterm modification of a collective-bargaining agreement, and, accordingly, a proposed modification can be implemented only if the other party's consent is first obtained. The fact that the parties have bargained to impasse regarding the matter does not serve to change this result. This mandate is not excused either by subjective good faith or by the economic necessity of maintaining viability of an employer's operation and preserving the jobs of the employees in the bargaining unit. "Nowhere in the statutory terms is any authority granted to us to excuse the commission of the proscribed action because of a showing either that such action was compelled by economic need or that it may have served what may appear to us to be a desirable economic objective." Oak Cliff-Goldman Baking Co., 207 N.L.R.B. 1063, 1064 (1973). Consequently, notwithstanding the persuasiveness and validity of an employer's economic straits, an employer is not free, without union consent, to make midterm modifications in wage rates, nor to remove work from the bargaining unit, nor to replace all unit employees.

Having discussed and ruled on the 8(a)(1), 8(d), and 8(a)(5) bargaining issues, the Board then considered the 8(a)(3) discrimination issue. The Board found a violation of 8(a)(3) based on the employer's termination of twenty-three recreational sales employees as a direct result of its effort to abandon the terms of its collective-bargaining agreement with the union:

66. See id.
67. See id. at 733, 735.
68. See id. at 735.
70. See id. at 735.
[A]s their terminations resulted from Respondents' efforts to escape the economic obligations imposed by the Union's collective-bargaining agreement, these terminations violated Section 8(a)(3) and (1) of the Act. For, where, as part of a plan to escape the obligations of a collective-bargaining agreement, an employer terminates and refuses to reinstate employees, its actions are "inherently destructive of employee interests," thereby constituting violations of Section 8(a)(3) of the Act, absent adequate business justification. The sole justification advanced in the instant case is that the wages in the collective-bargaining agreement had proven to be too high. Yet, Respondent Los Angeles had entered into this agreement voluntarily, and as the United States Court of Appeals for the Eighth Circuit observed in *NLRB v. Nash-Finch Co.*, 211 F.2d 622, 626 (1954):

> The following language from *Printing & Co. v. Sampson*, L.R. 19 Eq. 462, 465, has several times been approved by the Supreme Court of the United States: "... if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred, and shall be enforced by courts of justice."\(^71\)

Under this rationale, the Board held that the terminated employees were indeed "discriminatees" under section 8(a)(3).\(^72\) The "inherently destructive" language supporting the Board's decision was summarized by the Ninth Circuit in its decision enforcing *Los Angeles Marine*.\(^73\) The Ninth Circuit noted:

> A § 8(a)(3) violation requires normally that the Board make an affirmative showing that the employer's discriminatory conduct was motivated by an antiunion purpose. When the employer's conduct is "inherently destructive," however, antiunion motivation is presumed to exist. . . .

Because the conduct here is "inherently destructive,"

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71. *Id. at 736* (citations omitted). *See generally* Brown Co., 243 N.L.R.B. 769, 771 (1979) (holding that an employer violates 8(a)(3) where it lays off employees in an effort to escape its economic obligations under a labor contract).


the employer has the burden of explaining away, justifying or characterizing "his actions as something different than they appear on their face," and if he fails, "an unfair labor practice charge is made out." And even if the employer does come forward with counter explanations for his conduct in this situation, the Board may nevertheless draw an inference of improper motive from the conduct itself and exercise its duty to strike the proper balance between the asserted business justifications and the invasion of employee rights in light of the Act and its policy.

The employers did not carry the burden of justifying their actions. On balance, the employers' desire to escape the financial burden they contracted for voluntarily is not an adequate business justification that would excuse the unlawful terminations.\(^\text{74}\)

In summarizing its opinion in *Los Angeles Marine*, the Board recognized the severe impact of its ruling despite the wealth of evidence that was favorable to the employer in terms of a lack of anti-union animus and a showing of good faith in the bargaining process:

\[T\]he result in this matter may seem quite harsh, since Respondents have displayed no hostility toward the Union nor toward the concept of representation of employees. The relocation was effected solely for economic reasons, the validity of which has not been challenged. Moreover, Respondents made every effort to bargain with the Union regarding the matter. Nevertheless, there had been agreement to the economic terms of a collective-bargaining agreement. This being true, Section 8(d) does not permit a party to, in effect, tear up the agreement simply because the bargain which it struck has turned out to be disadvantageous. No matter how inept or inattentive the Union may have been in negotiations for midterm changes, Section 8(d) mandates consent of all parties to any such changes. The time for curing economic problems posed by wage rates and benefits had passed when there had been agreement to the terms of a contract, and that time will not occur again until the period for renegotiation arrives. Furthermore, the fact that Respondents have not been hostile to the employees because of their representation does not alter the impact of Respondents' actions upon their employment—those employees were the victims of Respondents' unlawful effort to escape the economic impact of a binding agreement, and, as a result, their employment interests have been in-

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\(^{74}\) *Los Angeles Marine Hardware Co.* 602 F.2d at 1307 (citations omitted).
vaded to the same degree as would have occurred had Respondents been motivated by the utmost malice.\textsuperscript{75}

The Board had occasion to reconsider the issues raised in Los Angeles Marine in 1982 when the mid-term work relocation concept was once again presented in a pair of cases referred to as Milwaukee Spring I\textsuperscript{76} & II.\textsuperscript{77}

\textbf{D. The Milwaukee Spring I & II Cases}

Milwaukee Spring I & II offered a different group of Board members the opportunity to revisit the legality of mid-term work relocations based exclusively on the avoidance of union labor costs. The issue submitted for the Board’s review was:

[W]hether an employer, after engaging in decision bargaining and while offering to engage in further effects bargaining, may, without union consent, relocate bargaining unit work during the term of an existing collective-bargaining agreement from its unionized facility to its nonunionized facility, and lay off employees, solely because of comparatively higher labor costs in the collective-bargaining agreement at the unionized facility which the union declined to modify.\textsuperscript{78}

In presenting this issue to the Board, the parties in the Milwaukee Spring cases had stipulated to the fact that the employer’s decision to relocate its operations to a non-union facility was due solely to the “comparatively higher labor costs” under the collective-bargaining agreement.\textsuperscript{79} They had further stipulated that “[t]he relocation decision [was] economically motivated and . . . not the result of union animus,” and that “[t]he failure to provide an adequate return on investment prompted the decision to relocate . . . not an inability to pay the contractual wage rates.”\textsuperscript{80}

In clarifying, if not retreating a bit from, its broad Los Angeles Marine holding, the Milwaukee Spring II Board announced what appeared to be a new, more pro-employer rule, stating that “under

\textsuperscript{75} Los Angeles Marine Hardware Co., 235 N.L.R.B. at 736-37.
\textsuperscript{78} Milwaukee Spring I, 265 N.L.R.B. at 206.
\textsuperscript{79} \textit{Id.} at 207.
\textsuperscript{80} \textit{Id.}
Sec[ion] 8(d), an employer must obtain a union’s consent before implementing a change during the life of a contract only if the change is in a mandatory term or condition “contained in” the contract. The obvious practical effect of the Milwaukee Spring II decision was to overrule its predecessor, Milwaukee Spring I, which held that the employer had violated sections 8(a)(1), 8(d), 8(a)(5), and 8(a)(3) of the NLRA by engaging in a mid-term work relocation, without the union’s consent, notwithstanding the fact that there was no provision contained in the parties’ labor contract specifically prohibiting the relocation of work. The more far-reaching effect of Milwaukee Spring II was to overrule the landmark Los Angeles Marine analysis of sections 8(d) and 8(a)(5) bargaining violations in mid-term work relocation situations, upon which the defunct Milwaukee Spring I had relied.

Thus, under Milwaukee Spring II, where no specific contractual provision (such as a work preservation/jurisdiction clause) prevents work relocation, it would appear that an employer is only required to bargain in good faith to impasse about the relocation decision, and its effects on employees, before carrying out its plans. In other words, no specific union consent would appear to be needed. The Board in Milwaukee Spring II explained that the new standard in any work relocation or reassignment case would be as follows:

[U]nless transfers are specifically prohibited by the bargaining agreement, an employer is free to transfer work out of the bargaining unit if:

(1) the employer complies with Fibreboard Paper Products v. NLRB, 379 U.S. 203 ... (1964), by bargaining in good faith to impasse; and

(2) the employer is not motivated by antiunion animus, Textile Workers v. Darlington Mfg. Co., 380 U.S. 263 ... (1965).
Notably, despite its more pro-employer stance, the concept of anti-union animus remained an important part of the *Milwaukee Spring II* analysis. 87

Interestingly, a majority of the Board in *Milwaukee Spring II* refused to accept the dissent’s argument that, regardless of whether a contract provision directly prohibits work relocation, a work relocation decision *indirectly* affects contractual wage rates, thereby modifying a mandatory term contained in the contract. 88 In response to the dissent’s reasoning, the Board majority explained:

> [T]he dissent would imply a work-preservation clause from the mere fact that an employer and a union have agreed on a wage scale. This revolutionary concept, if adopted would affect virtually every American collective-bargaining agreement and would undoubtedly come as a surprise to parties that have labored at the bargaining table over work-preservation proposals. An agreed-upon wage scale, standing by itself, means only that the employer will pay the stated wages to the extent that the employer assigns work to the covered employees. 89

The Board summarized its position as follows:

> [W]e find in the instant case that neither wage and benefits provisions nor the recognition clause contained in the collective-bargaining agreement preserves bargaining unit work at the Milwaukee facility for the duration of the contract, and that Respondent did not modify these contract terms when it decided to relocate its assembly operations. Further, we find that no other term contained in the contract restricts Respondent’s decision-making regarding relocation. 90

In essence, the majority of the Board, in *Milwaukee Spring II*, brought what appeared to be a more pro-employer stance to the forefront of mid-term work relocation issues under the NLRA. 91 *Milwaukee Spring II* seemed to offer employers a more discernible road map for navigating the murky waters of potential bargaining obligations and allegations of discrimination in the context of relocating union work during the term of a labor contract. 92

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87. See id.
88. See id. at 604 n.13.
90. Id. at 602.
91. See id.
92. See id.
E. What Are an Employer's Potential Bargaining Obligations When Considering a Mid-Term Relocation of Work?

Under Milwaukee Spring II, the bargaining duties arising out of a mid-term work relocation, based on 8(d) and 8(a)(5), could take one of the following forms: (1) the relocation could squarely conflict with a term contained in the contract (a term such as a work preservation or work jurisdiction clause, but not a wage and benefits provision or a recognition clause), in which case the employer could not relocate work without the union’s consent; 93 (2) the contract could expressly or implicitly grant an employer the right to relocate work through, for example, a broad management’s rights clause, in which case an employer would have no duty to bargain prior to relocating work; 94 (3) the contract could be silent with respect to an employer’s right to relocate work, such as in Milwaukee Spring II, in which case, prior to implementation, an employer would be required to bargain in good faith to impasse regarding the decision and effects of carrying out a work relocation; 95 or (4) the contract could be silent on the relocation issue, but contain a zipper clause, in which case neither party could require the other to bargain about mandatory subjects not covered by the contract, nor could an emp-

93. See id.
94. See UAW v. NLRB, 765 F.2d 175, 183 n.30 (D.C. Cir. 1985), enforcing Milwaukee Spring II, 268 N.L.R.B. 601 (1984) (“Obviously, if [a] Company has the contractual right to make [a] relocation decision, it has no duty to bargain before making that decision.”). Where an employer might attempt to bargain for such a contractual right, one Board case is particularly instructive: Reece Corp., 294 N.L.R.B. 448 (1989). In Reece Corp., the Board considered an assortment of unfair labor practice charges based on allegations of an unlawful mid-term work relocation. See Reece Corp., 294 N.L.R.B. at 449. The Board explained that even though the parties’ contract contained a seemingly broad management rights clause referring

95. See Reece Corp., 294 N.L.R.B. at 451-52.
employer implement a unilateral change affecting a mandatory subject of bargaining even after bargaining to impasse.\textsuperscript{96}

\textbf{F. The Effect (or Non-effect) of Milwaukee Spring II on Los Angeles Marine’s Section 8(a)(3) Discrimination Holding}

As noted, the \textit{Milwaukee Spring II} decision overruled the holdings addressing sections 8(d) and 8(a)(5) (regarding the duty to bargain in good faith) of \textit{Los Angeles Marine} and of \textit{Milwaukee Spring I}, which had relied on \textit{Los Angeles Marine}.\textsuperscript{97} The \textit{Milwaukee Spring II} case further overruled the section 8(a)(3) discrimination violation found in \textit{Milwaukee Spring I}, since the layoff of employees was in fact the result of a lawful work relocation.\textsuperscript{98} In response to the union’s 8(a)(3) charge, and only for the purpose of the case before it, the \textit{Milwaukee Spring II} Board accepted the logic of \textit{Milwaukee Spring I} that a section 8(a)(3) discrimination violation necessarily “flowed from” a section 8(a)(5) bargaining violation if employees were laid off as a result of an illegal work relocation.\textsuperscript{99} Hence, having overruled \textit{Milwaukee Spring I}’s finding of an 8(a)(5) violation, the Board in \textit{Milwaukee Spring II} determined that there was “no factual or legal basis for finding that the consequent layoff of employees violated Section 8(a)(3).”\textsuperscript{100}

However, \textit{Milwaukee Spring II} clearly did not overrule the basis for the \textit{Los Angeles Marine} 8(a)(3) discrimination holding, although opin-
ions tend to differ on this conclusion. Unlike the Board's decision in Milwaukee Spring II to view the employer's 8(a)(3) violation as inextricably linked to the 8(a)(5) violation regarding bargaining, the Los Angeles Marine opinion recognized an independent policy-driven basis for finding an 8(a)(3) violation. Specifically, under Los Angeles Marine, regardless of the employer's fulfillment of bargaining obligations, a violation will always surface where an employer engages in a mid-term work relocation solely to avoid the terms of a labor contract.

Again, although the Board in Milwaukee Spring II plainly overruled the 8(a)(3) holding of Milwaukee Spring I, purportedly because no collateral 8(a)(5) bargaining violation was found, no where in its opinion did it claim to overrule the 8(a)(3) analysis of Los Angeles Marine. In this regard, cases following Milwaukee Spring II continue to cite Los Angeles Marine for the proposition that an 8(a)(3) violation will always be found where employees suffer adverse employment consequences based on an employer's attempt to disengage itself from the economic terms of a current collective bargaining agreement.

The vitality of Los Angeles Marine's 8(a)(3) holding has been supported since Milwaukee Spring II as the Board has continued to recog-

101. See Milwaukee Spring II, 268 N.L.R.B. at 604 ("Consistent with our decision today, we hereby overrule . . . the portion of Los Angeles Marine that held that the respondent's transfer of work from one location to another location violated Sections 8(a)(5) and 8(d)."); see also UAW, 765 F.2d at 179 n.16 (explaining that the Milwaukee Spring II case only "overruled the portion of Los Angeles Marine . . . that held that [an employer's] transfer of work from one location to another violated sections 8(a)(5) and 8(d) of the Act"); see also Mid-Hudson Leather Goods Co., 291 N.L.R.B. 449, 449 n.2 (1988) ("We also note that Los Angeles Marine . . ., relied on by the judge for other reasons, was overruled in Milwaukee Spring II, only insofar as it held that the employee's transfer of work from one location to another location violates Sec. 8(a)(5), if done during the term of a contract without union consent.").


103. See id.

104. The Board specifically limited the effect of its decision by overruling only "the portion of Los Angeles Marine that held that the respondent's transfer of work from one location to another location violated Sections 8(a)(5) and 8(d)." Milwaukee Spring II, 268 N.L.R.B. at 604.

105. See Hahn Motors, Inc., 283 N.L.R.B. 901, 907 (1987). In Hahn Motors, the ALJ (with an affirming Board) favorably cited Los Angeles Marine, 235 N.L.R.B. 720 (1978), and Milwaukee Spring II as a "line of precedent [that] views the removal of unit work as a mid-term modification of a collective-bargaining agreement and, hence, absent concurrence of the employee representative, such action violates Section 8(d) and constitutes a refusal to bargain violative of Section 8(a)(5)." Id. at 907. The ALJ continued: "Those cases stand for the further proposition that prejudice to employment terms sustained by unit employees in consequence of such a loss of work is inherently destructive of employee interests' and violative of Section 8(a)(3) and (1) of the Act." Id. (citing NLRB v. Great Dane Trailers, 388 U.S. 26 (1967)). "This is so even in the absence of specific proof of union animus or, indeed, in the face of credited evidence that the employer pleaded an inability to afford terms of the contract and unsuccessfully sought relief therefrom through renegotiation." Id.
nize that employers are entitled to make entrepreneurial operational decisions based on legitimate financial concerns, but has cautioned that "[a] desire to escape collective-bargaining obligations, though economically motivated, is not a legitimate justification" for such decisions. The Board has continued to reason that an employer violates section 8(a)(3) "of the Act when during the term of a collective-bargaining agreement an employer relocates work covered by the agreement without the union's consent in order to avoid the labor costs contained in the collective-bargaining agreement."

G. Although Los Angeles Marine Remains Valid Law, a "Totality of the Circumstances" Standard Should Control the Board's "Runaway Shop" Analysis

Although the prospects of defending a mid-term "runaway shop" case may appear daunting, particularly given the apparent pro-employee policies espoused under Los Angeles Marine and some of its progeny, an employer should be able to derive some solace from the fact that a

106. Swift Indep. Corp., 289 N.L.R.B. 423, 431 (1988) (citing Los Angeles Marine Hardware Co., 235 N.L.R.B. 720, 735-36 (1978), enforced 602 F.2d 1302 (9th Cir. 1979); see also Dahl Fish Co., 279 N.L.R.B. 1084 (1986) enforced. mem. 813 F.2d 1254 (D.C. Cir. 1987)) (construing a situation where a plant was closed and employees were subsequently laid off for the purpose of escaping collective-bargaining obligations). The Seventh Circuit denied enforcement of Swift Indep. Corp. in Esmark Inc. v. NLRB, 887 F.2d 739 (7th Cir. 1989), supp. by Esmark, 315 N.L.R.B. 763 (1994), supp. by Swift Indep. Packing Co., 315 N.L.R.B. 774 (1994). However, notwithstanding its denial of enforcement, the Seventh Circuit also cited Los Angeles Marine for the proposition that an employer's "conduct [is] inherently destructive where [the] employer close[s] [a] union shop and then reopen[s] under [a] separate corporate guise in order to avoid [a] collective bargaining agreement." Esmark, 887 F.2d at 749 n. 16. Moreover, at least one federal district court has also implicitly recognized the continuing validity of the Los Angeles Marine case. See Harley-Davidson Motor Co., Inc. v. Local 209, Allied Indus. Workers, 613 F. Supp. 291 (E.D. Wis. 1985). The Harley-Davidson court construed a challenge to an arbitration award and held that the arbitrator's reliance on Los Angeles Marine was appropriate given the facts of the underlying grievance. See id. at 294. The court specifically noted that "[i]n Los Angeles Marine, the Board found anti-union discrimination in a situation where a company closed one facility and moved its operation to another to escape the bargaining unit's high labor costs. The company and union were bound to a collective bargaining agreement at the time." Id. The court continued: "Since the present case involves the Company's subcontracting of bargaining unit work to escape high labor costs pursuant to an effective Agreement, the arbitrator's finding that Los Angeles Marine directly applied to the present case is justifiable." Id.

107. Desoto, Inc., 278 N.L.R.B. 788, 808 (1986) (internal footnote omitted) (holding that an employer's decision to close one of its plants and transfer work, which occurred just under a year before the most recent collective bargaining agreement was to expire, did not constitute an unfair labor practice) (citing Los Angeles Marine Hardware Co., 235 N.L.R.B. 720 (1978); Milwaukee Spring Div. of Ill. Coil Spring Co., 265 N.L.R.B. 206 (1982)).
The totality of the circumstances test will be employed by the Board. The case of Desoto, Inc. provides an example of the Board’s posture in reviewing “runaway shop” allegations. In Desoto, the Board adopted an administrative law judge’s opinion explaining that the extent to which labor costs play a role in an employer’s motivation for closing a union plant and transferring work “must be examined in light of the totality of evidence present in the case.” Upon review of the evidence proffered by the union, under its “Los Angeles Marine theory,” the administrative law judge concluded the following with respect to employer motivation:

When the Union’s statistical analysis is balanced against the factors present in the employer’s behalf, I am persuaded that the contractual costs are not so substantial and impressive as to warrant the conclusion the employer was in any way seeking to obtain economic relief from the terms of the Union contract.

In the total context herein, the savings to the employer derived from abrogation of its contract does not loom as an operative factor in the decision to close. There is absolutely no evidence, as existed in LA Marine and Milwaukee Spring, of an express claim of such intent. To the contrary, the instant record contains a multitude of express denials.

Desoto is an insightful example of the Board’s traditional fact-intensive review of “runaway shop” section 8(a)(3) charges, where labor costs appear to motivate the employer’s conduct. More importantly, the decision also tends to suggest that the Los Angeles Marine 8(a)(3) holding remains at least somewhat intact.

108. See Desoto, Inc., 278 N.L.R.B. at 808.
109. See id.
110. Id.
111. Id.
112. See id.
113. See Desoto, Inc., 278 N.L.R.B. at 808.
H. Where Does the Los Angeles Marine 8(a)(3)/Discrimination Holding Stand Today?

1. How the Board Sometimes Views Los Angeles Marine

The Board has, at times, cast some doubt on the vitality of the 8(a)(3) holding of the Los Angeles Marine case. An example of such wavering was illustrated in Dahl Fish Co. The administrative law judge, in Dahl Fish, relying on Los Angeles Marine, found an 8(a)(3) discrimination violation where an employer relocated work and laid off union employees in contemplation of avoiding high union wage rates associated with its labor contract. Upon reviewing the case, the Board noted its agreement with the administrative law judge’s 8(a)(3) analysis. Yet, while agreeing with the 8(a)(3) finding, the Board also declined to rely on the administrative law judge’s discussion of Los Angeles Marine, noting that the case had been overruled, in relevant part, by Milwaukee Spring II by the time the exceptions to the administrative law judge’s decision in Dahl Fish had reached the Board. If the 8(a)(3) analysis of Los Angeles Marine actually survived the Milwaukee Spring II decision, presumably the Board, in Dahl Fish, would not have needed to disavow reliance on Los Angeles Marine with regard to the 8(a)(3) charge. However, in the Board’s defense, the administrative law judge, in Dahl Fish, relied on several other cases aside from Los Angeles Marine to support the finding that an 8(a)(3) violation occurs where an employer attempts to avoid the contractual wage scale. Since these cases support the same basic proposition regarding 8(a)(3) violations as was advanced in Los Angeles Marine, the Board could just as easily have agreed with the administrative law judge’s holding based on these decisions, and, presumably, it did. However, it stands to reason that if

114. 279 N.L.R.B. 1084 (1986).
115. See id. at 1095 (holding that the employees in question had been “placed on call, based on [the employer’s] effort to escape, during the term of the contract, the wage scale imposed by the collective-bargaining agreement in violation of Section 8(a)(3) and (1) of the Act”).
116. See id. at 1084 n.3.
117. See id. (“Additionally, in finding a violation of Sec. 8(a)(3), we agree with the judge’s analysis except that, as noted above, we do not rely on the judge’s discussion of Los Angeles Marine Hardivar Co., . . . .”).
118. See id. at 1095 (citing Helrose Bindery, Inc., 204 N.L.R.B. 499, 504 (1973); Rushton & Mercier Woodworking Co., Inc., 203 N.L.R.B. 123, 124 (1973), enforced by unpublished opinion, 502 F.2d 1160 (1st Cir. 1974) (Table), and quoting Los Angeles Marine’s recitation of a relevant passage from NLRB v. Nash-Finch Co., 211 F.2d 622, 626 (8th Cir. 1954).
119. See, e.g., Helrose Bindery, Inc., 204 N.L.R.B. at 504 (stating “economic difficulties do
the holding of *Los Angeles Marine* has been overruled, the holdings espousing identical holdings are also no longer good law.

2. How Some Scholars View *Los Angeles Marine*

In attempting to understand the current impact of the *Los Angeles Marine* 8(a)(3) doctrine, some academic critics have doubted whether, under *Los Angeles Marine* or any other case, the Board or courts will prevent an employer from relocating bargaining unit work solely to avoid wage rates associated with a current labor contract. The argument has been made that, regardless of motivation, a relocation decision should be viewed as an employer’s prerogative, assuming applicable contractual language and bargaining obligations are honored. One professor has explained that:

\[\text{[F]or management to relocate operations and eliminate union jobs based on the prospect of reduced labor costs elsewhere does not violate the Act . . . See, e.g., FMC Corp., 290 N.L.R.B. at 487; Milwaukee Spring II, 268 N.L.R.B. at 604. The Board held for a time that it was a violation of § 8(a)(5) to relocate work covered by a collective bargaining agreement during the term of that agreement without the union’s consent, and that resulting layoffs violated § 8(a)(3). See Milwaukee Spring Div. of Ill. Coil Spring Co., 265 N.L.R.B. 206 (1982); Los Angeles Marine Hardware Co., 235 N.L.R.B. 720 (1978), enforced, 602 F.2d 1302 (9th Cir. 1979). The Board reasoned that such conduct, though not necessarily indicative of anti-union animus, was “inherently destructive” of employee rights. Milwaukee Spring I, 265 N.L.R.B. at 209. The Board reversed itself, however, in Milwaukee Spring II, holding that management does not violate § 8(a)(3) when it relocates operations during the term of a union contract, thereby eliminating union jobs, in order to avoid paying contractual wages and benefits.}\]

Another scholar has painted a similar picture of an employer’s discretion to engage in work relocations based on labor costs:

\[\text{The distinction between “economically motivated” and “antiunion” operational changes rests on the “questionable empirical assumption”}\]

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121. *See* id.

122. *Id.* at 942.

123. *Id.* at 942 & n.77 (alterations in original).
that "firms have an interest in 'unionbusting' that exists independently of their interest in maximizing profits." Jefferey D. Hedlund, Note, An Economic Case for Mandatory Bargaining over Partial Termination and Plant Relocation Decisions, 95 Yale L.J. 949, 952 n.22 (1986). Nevertheless, absent any specific evidence of intent to undermine the union or otherwise discourage employees' organizational rights under § 7 of the NLRA, 29 U.S.C. § 157 (1988), both the Board and the courts have preferred to regard management's interest in minimizing labor costs through partial terminations and relocations as primarily "economic" in nature. Even when a relocation moves work to a nonunionized plant, antiunion animus is not presumed. 124

Academic insights such as these beg consideration of the true impact and precedential value of the Milwaukee Spring II case. Although the Board may, in theory, appreciate the lawfulness of relocating work based on legitimate economic factors, cases abound where the Board and courts have found an employer's justification for his actions to be a pretext or veil for a discriminatory motive. 125 As a general matter, employers should not presume that the current Board has abandoned Los Angeles Marine, and thus shelved its distaste for employers who seek to avoid high labor costs during the term of a collective bargaining agreement.126

3. How the Board Most Often Views Los Angeles Marine

Notwithstanding academic critiques and presumed implications of the Milwaukee Spring II decision, the concept of relocating bargaining unit work during the term of a labor contract, for the sole reason of avoiding unfavorable contractual wage rates, continues to be viewed by the Board as an unfair labor practice under section 8(a)(3). 127 A fair

125. See NLRB v. Wilhow Corp., 666 F.2d 1294, 1301-02 (10th Cir. 1981) (citation omitted). But see Pace Indus., 320 N.L.R.B. 661 (1996) (stating that the administrative law judge could not find violation of Section 8(a)(3) simply because he did not believe the employer's witness).
127. The NLRB's Office of the General Counsel has addressed the issue of 8(a)(3) violations in work relocation situations as well:
[A 1984] Memorandum... issued by the Board's General Counsel instructs the Board's regional offices to allege that relocation decisions are illegal under § 8(a)(3) if the region concludes that the decision was motivated by anti-union considerations. It goes on to set out a test for determining whether anti-union feelings motivated the relocation or not. The General Counsel encourages the regions to focus on whether an em-
reading of *Milwaukee Spring II* might suggest that an employer, who adheres to applicable bargaining obligations, may be able to implement a mid-term work relocation and consequently lay off union employees for reasons solely attributable to labor costs.\(^{128}\) This is particularly true considering the Board, in *Milwaukee Spring II*, found that the employer had not violated 8(a)(3) despite the parties’ stipulation that the work relocation was for the sole purpose of escaping the high wage rates of the parties’ collective bargaining agreement.\(^{129}\)

Regardless of how *Milwaukee Spring II* is independently interpreted, the Board maintains that a relocation decision cannot be based only on the avoidance of the economic terms of a labor agreement.\(^{130}\) This is not to say, however, that an employer, who is concerned with labor costs, could not lawfully relocate union work to a non-unionized site if labor costs were only one economic factor amongst others.\(^{131}\) Yet, such an employer would be well-advised to recognize that the other economic factors would be closely and aggressively scrutinized to assess their legitimacy in the face of the relative burden of contractual labor costs.\(^{132}\)

Admittedly, the ultimate strength of the *Los Angeles Marine* 8(a)(3) holding following the *Milwaukee Spring II* decision can reasonably be questioned.\(^{133}\) Employers must be cognizant that the Board continues to vigorously enforce the labor relations concepts built into the *Los Angeles Marine* 8(a)(3) holding, if not the precise holding it-

\(^{128}\) See *Milwaukee Spring II*, 268 N.L.R.B. at 603 (stating that the Board has found violations when there is a refusal to bargain and that bargaining does not require agreement, just a discussion of possible alternatives to the current action).

\(^{129}\) See id. at 601, 604.

\(^{130}\) See Mitchell, supra note 127, at 1457-58. Of course, the Board’s political persuasions will also play a large role in any decision as well, particularly in terms of interpreting what might be considered ambiguous precedent such as the *Milwaukee Spring* line of cases. See id. at 1458.

\(^{131}\) See, e.g., FMC Corp., 290 N.L.R.B. 483, 487 (1988) (dismissing an 8(a)(3) allegation based on work relocation because lower labor costs was only one of the economic reasons the employer used to justify its decision).

\(^{132}\) See id. at 487 (listing the numerous factors in this case which prompted the administrative law judge to not find an 8(a)(3) violation).

\(^{133}\) See *Milwaukee Spring Div. II*, 268 N.L.R.B. at 604 (overruling *Los Angeles Marine*’s 8(a)(3) and 8(d) holdings that were based on reasoning similar to the 8(a)(3) holding).
The NLRB's "Runaway Shop" Doctrine

For example, in the 1990 NLRB case of *D & S Leasing, Inc.*, an administrative law judge, citing *Los Angeles Marine*, held that the termination and subsequent refusal to hire employees, where their work had been transferred, "pursuant to a plan to avoid the obligations... of a collective-bargaining agreement... conduct which was inherently destructive of important employee rights." The opinion further noted: "patently, such conduct discouraged membership in [the union]. Thus, it violated Section 8(a)(1) and (3) of the Act." The Board, in *D & S Leasing*, agreed with the administrative law judge's 8(a)(3) analysis and noted that the employer's actions were not only inherently destructive of employee rights guaranteed under section 7 of the Act, but also appeared to have been "motivated by antiunion animus under the analysis set out in Wright Line." Additionally, in the years following the *Milwaukee Spring II* decision, the Board has favorably cited *Los Angeles Marine* in its legal analyses of 8(a)(3) violations in *Swift Independent Corp.*, and *Desoto*. Without question, the Board has not abandoned the *Los Angeles Marine* case.

I. Summarizing an Employer's Labor Obligations in the Mid-Term Work Relocation Context

In essence, the Board's more recent cases continue to reflect the fact that an employer will violate 8(a)(3) where it relocates work and subsequently lays off employees for the singular purpose of evading the economic terms of a current collective bargaining agreement. An attempt to transfer work to avoid the labor costs of a bargained-for contract, freely entered into by the employer, will likely be viewed as con-

136. Id. at 676 (citing Borg-Warner Corp., 245 N.L.R.B. 513 (1979); Los Angeles Marine Hardware Co., 235 N.L.R.B. 720 (1978)).
137. Id.
138. Id. at 659 (citing 251 NLRB 1083 (1980), enforced. 662 F.2d 899 (1st Cir. 1981), cert. denied, 455 U.S. 989 (1982)).
140. 278 N.L.R.B. 788, 808 (1986) (citing Los Angeles Marine for the proposition that "[r]elocations are violative of Section 8(a)(5) and (3) and Section 8(d) of the Act when during the term of a collective-bargaining agreement an employer relocates work covered by the agreement without the union's consent in order to avoid the labor costs contained in the collective-bargaining agreement.") (internal footnotes omitted).
142. See, e.g., F.M.C., 290 N.L.R.B. at 487; Swift, 289 N.L.R.B. at 431; Desoto, 278 N.L.R.B. at 808.
duct inherently destructive of employees’ rights and/or a strong indication of anti-union animus. In either case, an 8(a)(3) charge will likely result. In this regard, an employer who voluntarily enters into a labor contract with prescribed wage rates will be held to that contract during its term, unless legitimate and substantial economic considerations (which might include labor costs) compel the employer to adjust its position. Yet even where a need for adjustment is warranted, an employer remains bound by the NLRA’s bargaining obligations under section 8(d), which might include obtaining the union’s consent, bargaining to impasse, or perhaps no bargaining at all prior to implementation, depending on the collective bargaining agreement’s language.

J. An Aside: The Dubuque Packing Case

In order to clear up the confusion surrounding the duty to bargain in work relocation situations, the Board in 1993 developed a new test for determining whether a decision to relocate unit work is a mandatory subject of bargaining. The Board explained the new burden shifting analysis in Dubuque Packing as follows:

143. See, e.g., F.M.C., 290 N.L.R.B. at 487; Swift, 289 N.L.R.B. at 431; Desoto, 278 N.L.R.B. at 808.

144. See, e.g., F.M.C., 290 N.L.R.B. at 487; Swift, 289 N.L.R.B. at 431; Desoto, 278 N.L.R.B. at 808.

145. See generally Los Angeles Marine Hardware Co., 235 N.L.R.B. 720 (1978). Although, in Los Angeles Marine, the Board found that the employer’s desire to evade the terms of its current collective bargaining agreement coupled with mid-term bargaining violations made out a “runaway shop” case, the Board also recognized that, absent other extenuating unlawful conduct, labor costs may nevertheless be proffered as a legitimate factor in a decision to transfer work:

It is, of course, true that an employer’s conduct based even in part upon union considerations constitutes a violation of the Act, particularly where that conduct is inherently destructive of employee interest. However, it cannot be concluded that “because a condition of employment imposed by a collective-bargaining agreement was the economic ‘straw’ which ‘tipped the scale’ in the decision to close, Respondents’ motive for closing was to defeat employees’ statutory bargaining rights and, therefore, was unlawful.”

Id. at 733 (citations omitted).

146. See id. (holding there was no violation of the Act because the company attempted to bargain with the union before it decided to transfer the work).

147. See Dubuque Packing Co., 303 N.L.R.B. 386 (1991), enforced in part, 1 F.3d 24 (D.C. Cir. 1993). It would appear that the issue of whether work relocation is a mandatory subject of bargaining would only apply where a labor contract was silent with respect to an employer’s right to transfer work, and where no “zipper clause” had been included in the agreement. In other words, as indicated by Milwaukee Spring II, if a contract specifically prohibited work relocations, an employer would be required to obtain the union’s consent prior to implementation, regardless of whether the relocation was considered a mandatory bargaining subject and regardless of whether bargaining to impasse had taken place. Additionally, if a contract specifically granted an employer...
Initially, the burden is on the General Counsel to establish that the employer's decision involved a relocation of unit work unaccompanied by a basic change in the nature of the employer's operation. If the General Counsel successfully carries his burden in this regard, he will have established prima facie that the employer's relocation decision is a mandatory subject of bargaining. At this juncture, the employer may produce evidence rebutting the prima facie case by establishing that the work performed at the new location varies significantly from the work performed at the former plant, establishing that the work performed at the former plant is to be discontinued entirely and not moved to the new location, or establishing that the employer's decision involves a change in the scope and direction of the enterprise. Alternatively, the employer may proffer a defense to show by a preponderance of the evidence: (1) that labor costs (direct and/or indirect) were not a factor in the decision or (2) that even if labor costs were a factor in the decision, the union could not have offered labor cost concessions that could have changed the employer's decision to relocate.\textsuperscript{148}

The Board noted that the above standard was a combined formulation of the "principles set out in the two most relevant Supreme Court decisions—\textit{First National Maintenance Corp. v. NLRB}, 452 U.S. 666 (1981), and \textit{Fibreboard Corp. v. NLRB}, 379 U.S. 203 (1964)—and criticisms of the three tests for certain management decisions (including relocations) which were embraced by different Board Members in \textit{Otis Elevator Co.}, 269 NLRB 891 (1984)."\textsuperscript{149}

Although the \textit{Dubuque Packing} standard appears to suggest that labor costs can be viewed as \textit{one} legitimate economic factor prompting a work relocation, it does not indicate that labor costs can be the \textit{only} factor.\textsuperscript{150} \textit{Dubuque Packing} merely emphasizes that if labor costs are considered by an employer, the decision to relocate work is more likely to be a mandatory subject of bargaining under section 8(d).\textsuperscript{151} Nevertheless, \textit{Dubuque Packing} clearly does not address the section 8(a)(3) implications of relocating work \textit{solely} to avoid labor costs associated with the economic terms of a collective bargaining agreement.\textsuperscript{152} Thus, put-

\textsuperscript{148} \textit{Dubuque Packing Co.}, 303 N.L.R.B. at 391.
\textsuperscript{149} \textit{Id.} at 388.
\textsuperscript{150} See id. at 391.
\textsuperscript{151} See id.
\textsuperscript{152} See id.
ting aside potential bargaining duties associated with Milwaukee Spring II and Dubuque Packing, the section 8(a)(3) holding of Los Angeles Marine and other similar cases still prevails where work relocation is implemented solely to avoid contractual labor rates. This holds true irrespective of the language contained in the parties’ contract, including the absence or presence of a zipper clause. 153

Dubuque Packing changed the landscape for the analysis of an employer’s potential section 8(d) bargaining obligations in some work relocation situations. 154 However, it presumably had no impact on the basic tenets of section 8(a)(3), as espoused in Los Angeles Marine in the mid-term work relocation context. 155 In sum, any conduct, including work relocation, designed solely to avoid the terms of a prevailing labor contract, will continue to violate section 8(a)(3) irrespective of sections 8(d) and 8(a)(5) bargaining issues. 156

K. Why Was There No 8(a)(3) Violation in Milwaukee Spring II?

Under current Board decisions and particularly the more recent Dubuque Packing case, it appears that labor costs can be offered by an employer as one legitimate motivation for relocating work. 157 However, it cannot be the only motivation, even though Milwaukee Spring II might lead one to believe otherwise. 158 It is true that the Milwaukee Spring II Board found no violation of sections 8(a)(3) or 8(a)(5) where the employer relocated bargaining unit work and consequently laid off employees solely because its labor costs were too high at its unionized plant. 159 However, it is worth reviewing the specific facts of Milwaukee Spring II, as they apply to the Board’s holding, to measure the decision’s actual impact on the law of section 8(a)(3).

The Board, in Milwaukee Spring II, ruled: “[U]nless transfers are

153. If a contract containing a “zipper clause” was otherwise silent with respect to work relocation, neither party could compel the other to bargain about any mandatory subjects, nor could an employer implement a unilateral change in the status quo concerning a mandatory subject. Thus, whether relocation was a mandatory subject of bargaining would be inconsequential in such a case. See Duke, supra note 124, at 950.

154. See Dubuque Packing Co., 303 N.L.R.B. at 390 (creating a “new standard” for work relocation cases).

155. See id. at 392 (resolving relocations in the context of 8(a)(5), rather than an 8(a)(3) violation).

156. See Los Angeles Marine Hardware Co. v. NLRB, 602 F.2d 1302, 1306-08 (9th Cir. 1979).


159. See id. at 603-05.
specifically prohibited by the bargaining agreement, an employer is free to transfer work out of the bargaining unit if: (1) the employer complies with [the duty to bargain] in good faith to impasse; and (2) the employer is not motivated by anti-union animus . . . ."\(^{100}\) Critical to the opinion’s analysis, however, is the fact that the parties stipulated that labor costs under the collective bargaining agreement was the only reason for the relocation, and furthermore that economics controlled the decision, not union animus.\(^{161}\) These two stipulations would indeed appear inconsistent. In terms of a section 8(a)(3) analysis under Los Angeles Marine, this stipulation, as agreed to by the union/charging party is quite confusing.\(^{6}\)

Under cases like Los Angeles Marine, conduct designed specifically to avoid labor costs associated with a collective bargaining agreement, is held to be discriminatory under section 8(a)(3), as it is inherently destructive of employee’s section 7 rights and often an indication of anti-union animus.\(^{163}\) Therefore, the parties in Milwaukee Spring II stipulated to a fact that demonstrated conduct clearly violative of section 8(a)(3), and then stipulated that the conduct was not motivated by anti-union animus.\(^{164}\) The only sense to be made of these facts is that the union/charging party stipulated to a legal conclusion (i.e., the absence of animus) that the facts probably could have refuted.\(^{165}\) The stipulated facts appear to support the opposite legal conclusion (the presence of animus).\(^{166}\) Had the union not stipulated to these facts, and had it pursued a section 8(a)(3) charge on the basis of Los Angeles Marine, rather than in direct connection with the alleged section 8(a)(5) bargaining violation, it might have prevailed on that issue.\(^{167}\)

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\(^{100}\) Id. at 604 (citations omitted).

\(^{161}\) See id. at 601; see also Milwaukee Spring I, 265 N.L.R.B. 206, 207 (1982).

\(^{162}\) See Milwaukee Spring I, 265 N.L.R.B. at 208-10. But see Milwaukee Spring II, 268 N.L.R.B. at 604 (overruling part of the Los Angeles Marine decision that dealt with section 8(a)(5) and section 8(d) violations).

\(^{163}\) See Los Angeles Marine Hardware Co. v. NLRB, 602 F.2d 1302, 1307-08 (9th Cir. 1979).

\(^{164}\) See Milwaukee Spring II, 268 N.L.R.B. at 601.

\(^{165}\) See 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, 28-29 (1989) (stating that the union and the employer stipulated to the facts and thus avoided a hearing before an administrative judge and went directly to the Board).

\(^{166}\) See Milwaukee Spring II, 268 N.L.R.B. at 601-02. A fair reading of these facts appear to establish a clear demonstration of anti-union animus.

\(^{167}\) See O'Connor, supra note 165, at 29 (stating that the Board in Milwaukee Spring II had relied on the stipulations by each party as a major factor in its reversal of Milwaukee Spring I on the grounds that the basis for the earlier decision could not be maintained after examining part of
Perhaps this is why the Board, in *Milwaukee Spring II*, was so short in its analysis of the section 8(a)(3) charge carried over from *Milwaukee Spring I*. The Board limited its consideration of the employer's section 8(a)(3) violation to its direct relationship to the 8(a)(5) allegation, as had been done in *Milwaukee Spring I* (the Board found that without a 8(a)(5) finding there could be no section 8(a)(3) violation).\(^6\) Arguably, had the Board construed the section 8(a)(3) charge independent of the section 8(a)(5) allegation, using either a *Wright Line* "mixed-motives" analysis, or a *NLRB v. Great Dane Trailers, Inc.*\(^9\) "inherently destructive/comparatively slight" analysis, perhaps the result would have been different.

In sum, the *Milwaukee Spring II* case continues to reflect current Board findings regarding bargaining obligations under section 8(d) in the mid-term work relocation context.\(^7\) Similarly, the *Los Angeles Marine* case continues to carry precedential value with respect to its section 8(a)(3) holding in mid-term relocation scenarios.\(^7\) That is, unless relocations are contractually prohibited, an employer may transfer bargaining unit work if it complies with the obligation to bargain in good faith to impasse, and it is not motivated by anti-union animus.\(^7\) As a general matter, a mid-term relocation based solely on labor costs will substantiate a finding of animus.\(^3\) In this regard, employers should recognize that even where no direct proof of an anti-union motivation is present, the relocation decision may, nevertheless, be viewed as conduct "inherently destructive" of employees' rights under the NLRA (where the decision is based solely on an employer's desire to avoid the terms of its current collective bargaining agreement with the union).\(^4\) If an employer's conduct rises to this level, anti-union animus will most likely be presumed and the employer will be faced with the heavy, if not impossible burden, of rebutting such a presumption.\(^5\)

Therefore, assuming all bargaining obligations are met, any relocation and resulting layoffs, based *in part* on labor costs, may be lawful.\(^6\)

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168. See *Milwaukee Spring II*, 268 N.L.R.B. at 604.
170. See id. at 604.
171. See *Los Angeles Marine Co.*, 602 F.2d at 1307.
172. See id. at 1305-08.
173. See id. at 1307.
175. See *Los Angeles Marine Hardware Co.*, 602 F.2d at 1307; *Dubuque Packing Co.*, 303 N.L.R.B. at 391.
176. See *Los Angeles Marine Hardware Co.*, 602 F.2d at 1307; *Dubuque Packing Co.*, 303 N.L.R.B. at 391.
However, a relocation and layoff premised only on an effort to escape the economic terms of a collective bargaining agreement will be a violation of section 8(a)(3), as viewed under Los Angeles Marine as conduct inherently destructive of employees’ rights and/or conduct motivated by anti-union animus.177

III. CONCLUSION AND RECOMMENDATION

Based on Los Angeles Marine and subsequent Board decisions, an employer should proceed cautiously where it seeks to close active union operations and relocate bargaining unit work during the term of a collective bargaining agreement. An employer must closely examine its intended motivations in any potential relocation situation, and must be certain that any decision is supported by a variety of legitimate economic factors. Labor costs could be advanced as one of those economic factors, yet an admission of this sort would undoubtedly invite heightened and especially aggressive scrutiny by the Board. In any event, if an unfair labor practice charge is filed against an employer, based on a mid-term work relocation decision, the Board will inevitably be compelled to at least review the totality of circumstances and all possible motivating factors surrounding the employer’s conduct.

Under current Board trends, as evidenced in cases such as Dubuque Packing, labor costs appear to be more readily recognized than in the past as a legitimate economic factor for transferring work to new locations. But Board decisions, drawing from the basic tenets of contract law, continue to impose a heavy burden of justification on an employer who intends to relocate work and essentially repudiate a union contract to which it has voluntarily agreed.

Clearly, labor costs arising out of unfavorable contract terms cannot be the sole basis for relocating work and abrogating the terms of a collective bargaining agreement. On the other hand, a demonstrated adverse economic climate for a company, as a whole, may provide such a basis. In this regard, unmanageable labor costs could conceivably and, from the Board’s perspective, legitimately, contribute to such a climate. Accordingly, for an employer to justify walking away from the economic terms of a union contract, by transferring bargaining unit work to another facility, it must show a totality of adverse economic factors at

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177. See Los Angeles Marine Hardware Co., 602 F.2d at 1307; Dubuque Packing Co., 303 N.L.R.B. at 391.
the operation in question. Otherwise, the employer could be placing itself in serious jeopardy of violating the NLRA, as the Board may presume that an employer is discriminating against union labor. Even where an employer seeks to transfer union work to another unionized facility, although the Board may be more apt to credit the employer’s proffered justifications for the move, it would likely apply its usual intense scrutiny in seeking out the true motivation(s) for the decision.

In sum, an employer should be prepared for some form of backlash from the union and the Board if it engages in a work relocation during the term of a collective bargaining agreement. At present, the “mid-term work relocation” concept would appear to be a sensitive issue for the Board, especially considering its recent opinion in the Dubuque Packing case. The Board continues to be vigorous in its review of alleged “runaway shops,” and it is important for an employer to appreciate the magnitude of the Board’s power to remedy violations of this kind. Such remedies, which are intended to make affected employees “whole,” can be devastating for employers in terms of back-pay liability. Thus, when contemplating a work relocation decision, an employer is best advised to proceed deliberately and to act with legitimate, nondiscriminatory, and justifiable economic motivations.