Refusals to Cross Stranger Picket Lines and the Wealth Maximization Principle: An Economic Analysis of the Views of the NLRB and Judge Posner

Brenda Greenberg Bryn

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CASE COMMENT

Refusals to Cross Stranger Picket Lines and the Wealth Maximization Principle: An Economic Analysis of the Views of the NLRB and Judge Posner

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I. INTRODUCTION

This Comment analyzes the protection accorded an individual’s refusal to cross a “stranger” picket line, that is—a picket line at the site of an employer’s customer. Section 7 of the National Labor Relations Act assures employees “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.” An individual’s refusal to cross a stranger picket line would seem literally to “assist a labor organization” and to be “for the purpose of mutual aid and protection.” Recognizing this, the National Labor Relations Board (“Board”) has for over thirty years consistently extended section 7 protection to stranger picket line observance. Although the Board does allow employers to “permanently replace” employees who refuse to cross a stranger picket line when the employers make a sufficient showing of factors indicating an overriding business necessity, it does not currently permit actual discharge as a lawful employer response to this form of protected activity.

Both the Board’s longstanding rule on protection and its more recent replacement/discharge distinction have met with mixed suc-
cess in the courts. At least with regard to the threshold determination—whether in fact a "protected right" exists—a number of the reviewing circuit courts have answered in the negative, or at least expressed skepticism while avoiding the issue. The Supreme Court of the United States has never directly addressed the issue of protection.

In 1983, Judge Richard Posner, writing for the Seventh Circuit Court of Appeals in *NLRB v. Browning-Ferris Industries*, squarely upheld the Board's rule providing that a refusal to cross a stranger picket line was protected activity within section 7 of the Act. Those who viewed Judge Posner as "anti-labor" or at least "illiberal" were probably somewhat surprised by *Browning-Ferris*, while labor law "liberals" were possibly encouraged. Yet appearances can be deceiving, and Judge Posner's apparent deference to the Board's longstanding rule was just that. What commentators did not realize when *Browning-Ferris* was decided or since, is that the Board and Judge Posner differed considerably on the meaning of a "protected" right.

Judge Posner adopted the rhetoric and form of the Board's analytic approach, but not its substance. Using the Board's own termi-

8. Although the Supreme Court has recognized the Board's primacy in precisely delineating the boundaries of section 7 protected activity, see, e.g., NLRB v. City Disposal Sys., 465 U.S. 822, 830-31 (1984); Eastex, Inc. v. NLRB, 437 U.S. 556, 568 (1978), several of the circuit courts of appeals have demonstrated a certain reluctance to adopt the Board's rule in the stranger picket line area. See infra note 107 and accompanying text. Generally, the courts' review of Board decisions should be limited to determining whether the Board's practice has a "reasonable basis in law." *NLRB v. Action Automotive, Inc.*, 105 S. Ct. 984, 988 (1985).

9. See infra note 107.

10. In *NLRB v. Rockaway News Supply Co.*, the Supreme Court sidestepped the issue of protection, affirming on different grounds the Second Circuit's refusal to enforce the Board's order. 345 U.S. 71, 79-80 (1953). The Court based its denial of reinstatement to the discharged employee on the fact that in refusing to cross the picket line, the employee had violated the collective bargaining agreement's no-strike clause. *Id.* at 81. The Court clearly postponed its decision making on the issue of whether a protected right exists: "The parties here see the case as requiring decision of sweeping abstract principles as to respective rights of employer and employee regarding picket lines. But this decision does not, and should not be read to, declare any such principles." *Id.* at 75.

11. 700 F.2d 385 (7th Cir. 1983).

12. *Id.* at 387. This was a question of first impression in the circuit. *Id.* at 386. The Seventh Circuit had previously assumed the right of an employee to refuse to cross a picket line that a different union erected at the sight of a common employer. See *Gary Hobart Water Corp. v. NLRB*, 511 F.2d 284, 287 (7th Cir. 1975) (finding that employees had not waived this right in their agreement with the employer). But see *NLRB v. Illinois Bell Tel. Co.*, 189 F.2d 124, 127-28 (7th Cir. 1951) (holding that a refusal of eight employees of one union to cross a picket line that members of another union erected at a common employer was not protected). Judge Posner considered *Gary Hobart* to have inadvertently overruled *Illinois Bell* because it did not cite that case. 700 F.2d at 388.

13. See authorities cited supra note 23.
nology he found that, at least in the Browning-Ferris context, discharge was unnecessary because "replacement" sufficed. He reasoned: "If an employer can protect the reasonable needs of his business by permanently replacing a worker he has no right to go further and discharge him. That would unnecessarily burden the exercise of section 7 rights." Judge Posner apparently, therefore, opted for a resolution of the dispute which did not protect employer prerogatives to the fullest extent possible—a strikingly liberal result in light of the fact that several circuits rejected the replacement/discharge distinction and allowed employers a "right" of discharge.

What Judge Posner did not make clear was that what he allowed the employer, Browning-Ferris, to do was, in substance, to effect a discharge rather than a "permanent replacement." Despite his use of the Board's analytic structure, Judge Posner withdrew with one hand the employee protection he had accorded with the other. The irony of Judge Posner's decision in Browning-Ferris is that had he strictly followed the guidelines of his theoretical writings, he would have resolved the rights in question quite differently.

Judge Posner's decisions are generally of scholarly interest for two reasons. Both the controversy sparked by the "economic theories" he propounded as an academic and the challenge to unearth

14. 700 F.2d at 389. This view of the replacement/discharge distinction differs from that of the Board. See infra note 159 and accompanying text.

15. 700 F.2d at 389.

16. See infra note 205. Indeed, the Supreme Court in NLRB v. Rockaway News Supply Co. questioned the Board's distinction between replacement and discharge. 345 U.S. 71, 75 (1953). The Court stated that "[i]t is not based on any difference in effect upon the employee." Id. Regardless of the terminology, in both cases, the employee is out of work. Nevertheless, the difference between replacement and discharge is that while discharged workers lose all rights to regain their job, replaced workers remain "employees" and retain among other things, the not insubstantial right to regain their jobs when places become available. See R. Gorman, Basic Text on Labor Law 343-47 (1976). An employer who wishes to avoid recurring refusals to cross picket lines, would prefer to discharge recalcitrant employees, be. permenantly rid of them, and have no obligation to reemploy them.

17. See infra notes 160-73 and accompanying text.

the economic analysis which is said to pass as conventional wisdom in many of his decisions have kept eyes focused on this professor turned judge. Posner the theoretician has most often been criticized for the normative implications of his economic analysis. Similarly, Posner the jurist has been charged with applying his economic theories to promote conservative political goals. For this reason, Brown-

Economic Analysis of Allocative Efficiency, 8 Hofstra L. Rev. 811 (1980); Michelman, A Comment on Some Uses and Abuses of Economics in Law, 46 U. Chi. L. Rev. 307 (1979). This is not an exhaustive list of the material that has been written on Posner's academic work or on "law and economics" generally. It is intended only to give an indication of the vastness of the scholarly literature criticizing the application of "economic analysis" to law.


20. Some of these criticisms are directed at the "positive" or descriptive theory. See generally authorities cited supra note 18. Posner has emphasized that the distinction between "positive" and "normative" economic analysis is between "the use of economic analysis to explain what is or has been or to predict what will be . . . [and] the use of economic analysis to argue for what should be." Posner, Uses and Abuses, supra note 18, at 285 (emphasis added). He has stated further:

[It] is a distinction lawyers have difficulty getting straight because they are invertebrately normative, and it is a common source of confusion because many of the criticisms that are properly leveled at normative economic analysis are inapplicable to positive economic analysis. For example, that it may be hard to show that "efficient" is a synonym for "good" does not bear, at least directly, on the question whether the hypothesis that the common law is efficiency-promoting is supported by the evidence.

Id.

To Posner, the theoretical or "positive" usefulness of the wealth maximization criterion might even outweigh its normative value. In Some Uses and Abuses of Economics in Law, he stated, "I am personally less interested in normative economic analysis of law in any form than in positive economic analysis of law." Id. at 287; see also id. at 284-87.

21. Comment, supra note 19, at 1150. Posner has attempted to avert this type of attack by noting that economic analysis of law has been used to support traditionally "liberal" positions
ing-Ferris, cited by one commentator as “one of the ‘liberal’ stands that Posner has taken using economic analysis,” should have sparked some academic scrutiny and skepticism. Instead, the decision seems to have received only superficial attention for the probable reason that upon first glance, Judge Posner appears to have followed rather than rejected the Board’s traditional approach to stranger picket line observance. A scholarly debate might have arisen had he explicitly used economic efficiency analysis to justify stripping employees of their statutory protections and returning to a competitive market. But Judge Posner did not, and the academic commu-

on bail, right to counsel, discrimination against women, and the social costs of monopoly. R. POSNER, ECONOMIC ANALYSIS, supra note 18, at 24-25. The Comment author, however, has argued to the contrary that

[th]is response does not meet the present criticism. First, the fact that Posner’s application of economic analysis may support some liberal positions does not necessarily clear Posner of political bias in his application. Second, the criticism applies not to Posner’s conclusions, per se, but rather to the reasoning leading up to the conclusions.

... The criticism is that, instead of applying the theory as a conservative advocating a new methodology for general judicial use, Posner has applied the theory primarily to support his conservative ideology.

Comment, supra note 19, at 1150-51.

Professor Wilson, however, because of the comparative perspective of his study, has taken a somewhat different view:

Posner’s judicial opinions frequently have not been as “conservative” as those of Bork or Scalia. Posner’s commitment to the application of free market economics to legal problems reflects libertarian values, while Bork’s and Scalia’s traditionalism and deference are tools of positivism. Furthermore, as Posner’s critics have frequently observed, economic analysis of law generates uncertain results. People will disagree about costs, benefits, and externalities of any decision. Therefore, when Posner uses economic tools to analyze a case, he may reach a surprisingly “liberal” conclusion.

Wilson, supra note 19, at 1217-18.

22. Comment, supra note 19, at 1159 n.233.

23. See, e.g., Samuels & Mercuro, supra note 19, at 112-13 (using Browning-Ferris to illustrate Posner’s recognition of the importance of “rights qua rights” independent of relative costs and benefits); cf. infra notes 136-38 and accompanying text. See also Cox, supra note 1, at 154 n.149 (citing Browning-Ferris for the proposition that an employee’s motive for refusing to cross a stranger picket line is immaterial); cf. infra note 118 and accompanying text.

A somewhat more in-depth analysis of Browning-Ferris is found in Comment, supra note 19, at 1138-39, 1159 (describing Posner’s cost-benefit approach to judicial reasoning as demonstrated most clearly in Browning-Ferris, and noting the problem of defining what are the relevant costs and benefits which plagues Posner’s methodology).

nity has let the case pass without sufficient critical comment. Perhaps Judge Posner’s apparent deference in Browning-Ferris to the Board’s general analytic approach has served as a smokescreen, obscuring the case’s theoretical interest.

This Comment’s goal, however, is not to “unearth” in Browning-Ferris the economic theories Judge Posner propounded as an academic. Rather, it aims at demonstrating the deviations from this economic theory that the case represents. In evaluating Judge Posner’s result in Browning-Ferris and his decision-making process therein against the specific efficiency criterion which he has defined in his theoretical work, this Comment challenges the assumption that Judge Posner’s decision on any given topic should automatically be taken to represent the “economically efficient” response to the problem.

This Comment likewise assesses the greater body of Board law governing the rights of employees and employers in the stranger picket line context against Posner’s efficiency criterion. In this respect, it is meant to respond to Judge Posner’s challenge to develop

Professor Epstein on the preferability of employment at will. See R. POSNER, ECONOMIC ANALYSIS, supra note 18, at 306-07.

25. Although Judge Posner has never explicitly advocated choosing a resolution of a dispute because it would be wealth maximizing, commentators have argued that the wealth maximization construct implicitly and inconspicuously underlies many of his opinions, particularly where he does a cost-benefit analysis. Samuels & Mercuro, supra note 19, at 110; see also Comment, supra note 19, at 1126 n.46.

Posner, however, protests against this categorization:

Although there is bound to be some relationship [between the writing a lawyer may have done as a professor before he became a judge, and the opinions he writes as a judge], it would be quite wrong to imagine that a professor would become a judge in order to smuggle into the judicial reports the ideas he had developed as a professor, or that having become a judge, for whatever reason he had done so, he would then set about to see how much of his academic writing he could as it were enact into positive law. He will want to be thought a good judge, and he will not if he uses his position to peddle his academic ideas. He will not have the respect of his colleagues or of the bar, he will have trouble marshaling his court behind his positions, he will find that a judicial opinion is an inefficient vehicle for developing complex ideas, he will find that his opinions are discounted because of the ulterior motives behind them, and he will not have the time to write articles in opinion format. The whole atmosphere will be against him. The role of a judge is deciding cases, and then giving the reasons for the decision; it will be hard for the judge, whatever his background, to superimpose the very different role of the law professor. And it will be quite silly and futile anyway, unless he happens to be a Supreme Court justice, because less attention is paid to opinions of lesser judges than is paid to books and major articles.

Posner, WEALTH MAXIMIZATION AND JUDICIAL DECISION-MAKING, 4 INT’L REV. L. & ECON. 131, 131 (1984) [hereinafter Posner, Judicial Decision-Making]. This Comment’s examination of Posner’s opinion in Browning-Ferris gives credence to his contention that he does not necessarily use the analysis in his theoretical writings when deciding cases. Nevertheless, the Comment makes the normative claim that in this particular situation he should have used wealth maximization analysis because it would have led him to a better result.
economic analyses of specific provisions of the National Labor Relations Act. In concluding that the Board's rules function to enhance "wealth maximization," the Comment challenges a second assumption, namely that the "liberal" approach to an issue and the "economically efficient" approach will necessarily differ.

II. THEORETICAL OVERVIEW

A. Normative Economics: Wealth Maximization v. Utilitarianism

Posner the academic has an arsenal of economic theories which are applicable to different areas of the law. In general, he builds upon various aspects of microeconomic price theory. Reference to his economic theories, however, usually denotes a particular brand of efficiency analysis which Posner has called "wealth maximization." Because various scholars have attacked "economic theory" in general, and Posner's academic writings in particular—at least at one time—as being nothing more than applied utilitarian theory, Posner has gone to great lengths to distinguish wealth maximization from traditional utilitarianism.

According to Posner, utilitarianism aims at maximizing "happiness" and selects various courses of action based upon their effect in producing "[a] surplus of pleasure over pain"—aggregated across all of the inhabitants (in some versions of utilitarianism, all of the sentient beings) of society (which might be a single nation, or the whole world). It is in contrast to this vague "greatest happiness principle" and its concomitant definitional hurdles, that Judge Posner sit-
uates the more limited theory of wealth maximization whose goal is simply that of "enhancing wealth." Judge Posner has defined wealth as "the value in dollars or dollar equivalents . . . of everything in society . . . [and it] is measured by what people are willing to pay for something or, if they already own it, what they demand in money to give it up." While utilitarians are concerned with the satisfaction of every preference an individual (or indeed even an animal) might have, Judge Posner has emphasized that "the only kind of preference that counts in a system of wealth maximization is . . . one that is backed up by money."

Judge Posner's effort to establish that the definition of the "maximand" is what distinguishes the two theories has somewhat obscured the fact that there is also a difference in method between wealth maximization and utilitarianism. For instance, in the following passage, Judge Posner appears to collapse the method of wealth maximization into little more than utilitarian cost-benefit balancing, even if wealth maximization does use different measuring tools to determine the relevant costs and benefits:

' Wealth maximization' as a guide to governmental including judicial action means that the goal of such action is to bring about the allocation of resources that makes the economic pie as large as possible, irrespective of the relative size of the slices. It means in other words using cost-benefit analysis as the criterion of social choice, where the costs and benefits are measured by the prices the economic market places on them, or would place on them if the market could be made to work.

This characterization of wealth maximization as a guide to governmental or judicial action, taken by itself, is misleading. It implies that judicial or governmental interventionism goes hand-in-hand with a wealth maximization framework for decision-making. Indeed, the opposite is true. Utilitarian analysis instructs that wherever a different allocation of resources (through a different setting of entitlements) is possible, whereby the benefits would outweigh the costs, the existing allocation should be changed by actively manipulating legal entitlements to achieve the beneficial result. This approach is prop-

33. Id. at 119.
34. Id. Duncan Kennedy has argued that these two are not the same. See generally Kennedy, Cost-Benefit Analysis of Entitlement Problems: A Critique, 33 STAN. L. REV. 387, 401-21 (1981).
35. See Posner, Utilitarianism, supra note 28, at 112.
36. Id. at 119.
37. See id.
On the other hand, the Chicago School of Economists generally, and Posner in particular, draw upon the Coase Theorem and instead favor a system of private rather than governmental ordering. Basically, Professor Coase attacked the traditional utilitarian belief that a reasoned choice of upon whom to place various legal entitlements or rights could affect the substantive allocation of resources in society. Professor Coase maintained that in the absence of transaction costs, the initial assignment of legal rights was irrelevant. It could not affect the ultimate allocation of resources because the parties would privately bargain their way to the efficiency-producing equilibrium.

In the Chicago School's ideal world, the role of the state, including the judiciary, is limited. Where transaction costs are relatively low, the state and the courts have no efficiency-based reason to change existing entitlements because the market, through private bargaining, achieves a wealth maximizing result. Governmental or judicial cost-benefit balancing is only necessary if transaction costs are high, because this prohibits the buying and selling of rights between private parties. Only where transaction costs are high would the initial assignment of rights matter because it would be final. Only in such a case, therefore, would the courts be called upon to make a reasoned choice of entitlement distribution that would shape the most efficient definition of property rights.

Where transaction costs are high, judges may conduct a cost-benefit analysis to determine which party values the right more. Posner equates value with willingness to pay. Once it is determined

39. It is possible, of course, that Judge Posner's experience on the federal bench has caused him to rethink some of the bright-line distinctions that he drew as an academic. Although the general tenor of his article Wealth Maximization and Judicial Decision-Making is somewhat utilitarian, Posner's most recent edition of his book, Economic Analysis of Law, continues to rely heavily on Coase and the general approach of the Chicago School. See infra notes 40-44 and accompanying text. Most likely, whenever Posner switches to a more utilitarian tone it is a function of "high transaction cost" settings. See infra notes 45-46 and accompanying text.

40. See, e.g., R. POSNER, ECONOMIC ANALYSIS, supra note 18, at 7.
42. "It was of course the view of the judges that they were affecting the working of the economic system—and in a desirable direction [that is, for example, in holding a cattle owner liable for the crop damage the cattle caused]." Id. at 10.
43. See id. at 6-13.
44. See id. Even where transaction costs are low judges still need to be guided by efficiency concerns in initially setting entitlements. See id. at 19.
45. See R. POSNER, ECONOMIC ANALYSIS, supra note 18, at 45.
46. See id. at 45-46.
47. See, e.g., Posner, Utilitarianism, supra note 28, at 120.
who values the right more, the next step is to assign the right to the party who would purchase the right were it initially assigned to the other party.\textsuperscript{48} Wealth maximization is only achieved when goods (and rights are considered goods) are put in the hands of those who value them most.\textsuperscript{49} The important thing to remember in evaluating judicial intervention against the theory of wealth maximization is that in cases with low transaction costs, wealth maximization will occur by private bargaining, without the courts upsetting the preexisting entitlement structure.

B. Positive Economics: Labor Law v. Common Law

The foregoing discussion has focused on the normative use of the theory of wealth maximization—that is, its value in instructing decision makers on what “should be.”\textsuperscript{50} In his academic work, however, Posner has spent less time arguing for what should be than he has describing what “is”—the dynamic of wealth maximization at work in the common law. Posner has found the “engine” of wealth maximization\textsuperscript{51} at work in most of the important common law fields including contracts, torts, criminal law, and property.\textsuperscript{52} In essence, then, Posner sees common law rules as efficiency-promoting.

In contrast, Judge Posner has said that “the American labor laws are probably not wealth maximizing.”\textsuperscript{53} Nor according to his construct should they be. While judge-made common law, in his view, inevitably tends to promote efficiency, Posner has argued that legislation, because of government’s redistributive function and interest group pressure, tends toward an inefficient allocation of resources.\textsuperscript{54}

\begin{enumerate}
\item See R. Posner, Economic Analysis, supra note 18, at 45.
\item See Dworkin, Wealth, supra note 18, at 191.
\item See Posner, Uses and Abuses, supra note 18, at 285.
\item Id. at 291
\item Posner, Judicial Decision-Making, supra note 25, at 133 (emphasis added).
\item See Posner, Uses and Abuses, supra note 18, at 288–89; see generally R. Posner, Economic Analysis, supra note 18, at 495–506 (elaborating upon the reasons for this dichotomy); cf. Leff, supra note 18, at 474 (suggesting that “a culture’s ‘political’ system and its ‘economic’ system together form another system in which the ‘contradictions’ within each subpart may turn out more transcended than one would otherwise suspect.”). Professor Leff was a vocal critic of what he considered to be Posner’s narrowness of vision:
\begin{quote}
Let us assume that legislative regulation does, in fact, bring about less “efficient” results (in Posner’s technical meaning of the term) than the market as buttressed by common-law adjudication. . . . So what? Remember, the issue is not, for every consumer/citizen, what he gets out of “the market” or what he gets out of “politics,” but what he gets out of the society which is the product of both of these grand systems together. To say of a system that it is defective because, taken by itself, it fails to maximize or optimize something good is somewhat like arguing that steak is a defective food because it has virtually no carbohydrate. It
\end{quote}
That Judge Posner views labor law essentially as a species of legislation is evident from his focus on the regulatory scheme under the National Labor Relations Act. He has characterized this “scheme” as a device for facilitating the cartelization of the labor supply by unions. Because unions as labor cartels raise wages above their market-determined level and reduce the supply of labor, he assumes that the labor laws promote inefficiency. He notes that it is this inefficiency which has traditionally repelled the economic analysts of law from studying the field. Had Judge Posner looked beyond the legislative scheme, however, to the vast body of law interpreting the provisions of the National Labor Relations Act, he might have recognized the engine of wealth maximization silently at work in this presumably “inefficient” field.

Labor law, it seems, is no longer homogeneously nor even primarily “legislative” in character. Some of the key protections of the Act, such as the section 7 right to engage in concerted activities without employer interference, have been left largely to judicial or quasi-judicial imagination, ingenuity, and interest balancing. It is not would be defective (that is, conducive to early death) if that were all one ate. But in the context of general nutrition it might be seen as an important part of the process of sustaining life.

Thus it is at least plausible that the “weaknesses” in the political system, such as the frustration of allocational efficiency, are really complementary to, or even corrective of, “weaknesses” in the economic system, such as its tendency to distribute power in proportion to wealth, or even in proportion to wealth-producing talents.

Id. at 467-68.

56. Id. at 990, 999-1011.
59. See generally id. In Some Economics of Labor Law, Posner “narrowly defin[ed]” labor law as the regulatory scheme under the National Labor Relations Act. Id. at 988-89. He thus restricted his study of the field even though he recognized that this “regulatory scheme . . . is just a part of a much larger field.” Id. at 988.
60. It is quite probable that Judge Posner’s experience on the federal bench has caused him to reject the sharp lines he drew as an academic between statutory and common law. See, e.g., Posner, Judicial Decision-Making, supra note 25, at 134 (“True, much statutory law is really common law . . . .”). Posner has spent little time, however, analyzing the “common law” of labor law. Cf. J. Atleson, Values and Assumptions in American Labor Law (1983).
61. Even Judge Posner refers to section 7 as one of the key protections of the Act. He says: “The key protections are the sections of the Act that entitle employees to engage in concerted activities and that make it unlawful for the employer to interfere with those activities.” Posner, Labor Law, supra note 26, at 994.
62. See infra note 66 and accompanying text.
63. See generally J. Atleson, supra note 60.
surprising, therefore, that labor law scholars have noticed the reemergence of pre-NLRA common law notions to limit statutory rights particularly in the section 7 area. Further, because it is a common law of labor relations that has arisen under the statute, it should not be surprising either that this law limiting what seem to be absolute statutory rights might best be understood as the judges’ and, in some cases, the Board members’ attempts to turn what they consider to be a wealth minimizing system into a wealth maximizing one. This would appear to be so even though Posner’s contention that judges interpret statutes according to the “original deal struck” might seem at odds with such a result.

C. The “Original Deal Struck”: Interpretation of the Wagner Act

Underlying Posner’s “positive” writing is the assumption that “(1) when judges are the makers of the substantive law the rules of law will tend to be consistent with the dictates of efficiency, and (2) when judges are applying statutes they will do so in accordance with the terms of the original ‘deal.’” Posner explains this apparent inconsistency by using a theory of political checks and balances. He maintains that if judges did not enforce statutes according to the original tenor of the legislation, the legislature would reduce the judges’ independence. Because he believes that judges (self-interestedly) seek power and independence rather than the imposition of their personal economic interests through judicial decision, he concludes that

66. Because the Board—through its administrative law judges, whose decisions it generally adopts—sits as the trial level court in labor cases, one would think that Board members develop certain “judge-like” tendencies (including a tendency toward wealth maximization), despite their special responsibility in interpreting and enforcing the National Labor Relations Act. Yet such an assumption is not crucial to the argument proposed in this Comment. Recognition of the wealth maximizing features of the Board’s rules on refusals to cross stranger picket lines does not require acceptance of Posner’s theory of judicial behavior. The Board’s rules are merely being characterized. No claim is being made for why they might have acquired such a character.
67. See, e.g., infra notes 206-30 and accompanying text (discussing the wealth maximizing qualities of the Board’s “business necessity” factors in the stranger picket line context).
68. See infra note 75 and accompanying text.
69. R. POSNER, ECONOMIC ANALYSIS, supra note 18, at 505.
70. Id. at 506.
judges are not efficiency-minded in applying statutes.\textsuperscript{71}

Posner likewise explains that judicial incentives are significant in producing efficiency-promoting decisions in the common law area. He argues that there is a strong social consensus in favor of the efficiency criterion in the traditional common law areas.\textsuperscript{72} Because he sees this consensus, Posner has asserted that “if courts in these circumstances refused to enforce the efficiency criterion—for instance, failed to punish the murderer, or impose damages on the careless driver—the likely consequence would be legislative preemption of a major sphere of judicial autonomy—the fashioning of common law rules and doctrines.”\textsuperscript{73}

While Posner’s theory of common law decision-making is more convincing, definitional problems and subjectivism plague his theory of judicial decision-making within a statutory framework. There can certainly not be only one view of the “original deal” or the “original tenor of the legislation.” Because of the variety of the goals which have been attributed to the NLRA,\textsuperscript{74} this problem is most apparent in that context. If one assumes that the original “deal” struck in the Wagner Act was with American workers, to guarantee them protection to act in concert or in protest or to use their combined economic power to pressure employers,\textsuperscript{75} then some of the judicial limitations on section 7 activity appear to controvert Posner’s theory of judicial behavior. If, on the other hand, one assumes that the original “deal” struck was with employers, to assure them the economic benefits of industrial peace,\textsuperscript{76} perhaps there is a greater correlation between Posner’s theory and judicial practice in the labor arena. Posner takes a

\textsuperscript{71} Id. Although Posner never explicitly addresses this issue, the same would seem to be the case for Board members, whose tenure bears a direct relationship to political changes, and whose authority derives ultimately from Congress.

\textsuperscript{72} Id. He assumes popular approval from the standard’s persistence without giving way to distributive concerns. Id.

\textsuperscript{73} Id.

\textsuperscript{74} Karl Klare has identified at least six statutory goals of the National Labor Relations Act from which one might form different visions of the “original deal” struck: 1) industrial peace, 2) collective bargaining, 3) bargaining power, 4) free choice, 5) underconsumption, and 6) industrial democracy. See Klare, Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941, 62 MINN. L. REV. 265, 281-93 (1978).

\textsuperscript{75} Archibald Cox has argued, for instance, that “[t]he most important purpose of the Wagner Act was to create aggregations of economic power on the side of employees countervailing the existing power of corporations to establish labor standards.” Cox, The Duty to Bargain in Good Faith, 71 HARV. L. REV. 1401, 1407 (1958).

\textsuperscript{76} See, e.g., Emporium Capwell Co. v. Western Addition Community Org., 420 U.S. 50, 62 (1975) (“These are, for the most part, collective rights, rights to act in concert with fellow employees; they are protected not for their own sake but as an instrument of the national labor policy of minimizing industrial strife ‘by encouraging the practice and procedure of collective bargaining.’ ”)
middling ground by accepting the view that the NLRA was intended to strengthen unions. Perhaps this view of the original "deal" can explain why his approach to protection differed so radically from the Board's in Browning-Ferris.

III. "PROTECTING" REFUSALS TO CROSS STRANGER PICKET LINES: THE VIEWS OF THE BOARD AND JUDGE POSNER

A. The Board's View

The National Labor Relations Board considers a refusal of an employee to cross a picket line at the site of his employer's customer to be protected concerted activity within section 7 of the National Labor Relations Act. The Board admits no distinction between an employee's right to honor a picket line at a "stranger" employer's premises and his right to honor a picket line fellow employees have erected. The Board continues to adhere to its rule despite criti-

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77. See generally Posner, Labor Law, supra note 26. Strengthening unions strengthens employees through the power of numbers. On the other hand, it also bureaucratizes and hence, quiets them. See M. Fischl, supra note 65, at 19.


80. The Board has found a refusal to cross a stranger picket line unprotected in only two cases: Redwing Carriers, 130 N.L.R.B. 1208 (1961) and Auto Parts Co., 107 N.L.R.B. 242 (1953). Both cases were reversed in the Board's modification of Redwing Carriers. See Redwing Carriers, 137 N.L.R.B. 1545 (1962). Additional confusion concerning the continuity of the Board's rule may have resulted from its decision in L.G. Everist, 142 N.L.R.B. 193 (1963). In L.G. Everist, the Board found it unnecessary to decide the issue of protection against discharge because it found that the employer's refusal to reinstate employees who had not been permanently replaced violated section 8(a)(1). Id. at 195. Its prior decision in
cism from several courts\textsuperscript{81} and commentators.\textsuperscript{82}

In \textit{Cyril de Cordova \& Bros.},\textsuperscript{83} the Board first encountered a stranger picket line case. Although the refusing employee was a member of the union that had erected the picket line at the third-party employer,\textsuperscript{84} common union membership was not necessary to the Board's determination that the employee had engaged in protected concerted activity.\textsuperscript{85} In a succeeding case, \textit{Rockaway News Supply Co.},\textsuperscript{86} the Board explicitly stated that "[t]he fact that employees who participate in concerted activities are not members of the same union, or indeed of any union, or employees of the same employer, does not alter the concerted nature of such activity or deprive it of the protection accorded such activity by the Act."\textsuperscript{87} The Board has protected such activity because of its very nature\textsuperscript{88}—that is, because it falls "literally" within the section 7 categories of "assist[ance to] labor organizations . . . or concerted activities . . . for the purpose of . . . mutual aid or protection,"\textsuperscript{89} not because of a particular motive or intention the employee has had in engaging in such activity. The Board has explicitly declared that motive or intent are irrelevant to protection,\textsuperscript{90} and has upheld refusals based on fear alone, having nothing to do with either "principle"\textsuperscript{91} or intent to derive eco-

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\textit{Redwing} and its subsequent decisions generally, however, should resolve any ambiguity that the Board's approach might have caused in \textit{L.G. Everist}.
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\textsuperscript{81} See discussions of the First, Fourth, and Eighth Circuits infra note 107.

\textsuperscript{82} See, e.g., Carney \& Florsheim, \textit{The Treatment of Refusals to Cross Picket Lines: "By Paths and Indirect Crookt Ways."} 55 \textsc{Cornell L. Rev.} 940, 968-69 (1970) (justifying little or no protection for an employee refusing to cross a stranger picket line, as opposed to a picket line on his own employer's premises, on the basis of a less significant economic interest in the dispute and the partial strike analogy); Haggard, \textit{Picket Line Observance as a Protected Concerted Activity}, 53 \textsc{N.C.L. Rev.} 43, 108 (1974) (stranger picket line observance should be deemed totally unprotected because of the remoteness of the economic objective from the activity in question and because of its coercive nature).

\textsuperscript{83} 91 N.L.R.B. 1121 (1950).

\textsuperscript{84} \textit{Id.} at 1130.

\textsuperscript{85} \textit{Id.} at 336. See infra notes 86-87 and accompanying text.

\textsuperscript{86} 95 N.L.R.B. 336 (1951).

\textsuperscript{87} \textit{Id.} at 337-38.

\textsuperscript{88} In Cooper Thermometer Co., the Board stated, "[T]he focal point of inquiry in determining whether [the employee's] refusal to cross the picket line to perform production work was a protected activity must of course be the nature of the activity itself rather than the employee's motives for engaging in the activity . . . ." 154 N.L.R.B. 502, 504 (1965); see also Congoleum Indus., 197 N.L.R.B. 534, 547 (1972) (citing \textit{Cooper Thermometer} for the same proposition and applying it in the stranger picket line context).

\textsuperscript{89} 29 U.S.C. § 157 (1982). See also \textit{Redwing}, 137 N.L.R.B. at 1546-47 ("Such activity is literally for 'mutual aid or protection,' as well as to assist a labor organization within the meaning of section 7. . . . [T]herefore, we find the employees of Redwing engaged in protected concerted activity where they refused to cross the Virginia-Carolina picket line.").

\textsuperscript{90} See, e.g., Congoleum Indus., 197 N.L.R.B. at 547.

\textsuperscript{91} \textit{Id.}
nomic benefit.

The Board's view should not be confused with the approaches of the Seventh and Ninth Circuits which seem to require "proof" of either intended economic benefit or actual (even indirect) economic benefit for the refusing employees before protection is granted. Although the Board has frequently and plausibly used the "promise of reciprocity" to justify extending section 7 protection to employees engaging in sympathetic activity in support of fellow workers, the basis of its protection of stranger picket line observers has generally not been dependant upon the "promise of reciprocity" rationale. Quite likely, this difference derives from the fact that any argument for reciprocity is extremely tenuous where the picket line observers and the strikers are not employees of the same employer.

Although the Board has explained the satisfaction of the mutuality requirement in terms of indirect economic benefit or reciprocity upon two occasions, it should be noted that both of the factual situations which have elicited economic arguments from the Board can be regarded as atypical. Moreover, the economic benefit arguments

92. See infra text accompanying notes 112-26 & 136-38.
93. See NLRB v. Southern Cal. Edison Co., 646 F.2d 1352, 1363-64 (9th Cir. 1981); see also discussion infra note 104.
94. See M. Fischl, supra note 65, at 21-22.
95. See Business Servs. by Manpower, 272 N.L.R.B. 827, 827 (1984) (citing Browning-Ferris for the proposition that strengthening the union movement and collective bargaining process generally would promote honors' economic interests as workers); Cyril de Cordova & Bros., 91 N.L.R.B. 1121, 1135 (1950) ("Finn had a substantial and legitimate interest in the successful prosecution of the strike against the Exchange, not only because of his union membership, but also because of the possible reciprocal effect improved conditions in neighboring and associated businesses of like kind might have on his own future conditions of employment.").
96. The "typical" stranger picket line case usually involves a trucking firm whose truck driver refuses to cross a picket line at a customer's premises, either to pick up or make a delivery. It is unlikely that such a driver is a member of the same union as the picketing employees. See, e.g., Redwing Carriers, 137 N.L.R.B. 1545, 1545 (1962). Cordova is an atypical case because the honoring employee was a member of the same union that had erected the picket line at the New York Stock Exchange. In this factual situation, common economic interests in the success of the strike were more real than conjectural between the picketing and honoring employee. The Board, therefore, may have merely been describing the activity rather than seeking to justify protection of it. Even if the Board was using an economic benefit theory to justify a finding of mutuality and the ensuing "protection," the factual situation is distinguishable from the true stranger picket line context, and its rationale should be distinguishable as well.

Business Services is atypical for a different reason: the honoring employees were themselves temporary employees. It is rare in a stranger picket line case for the Board to show division over the issue of protection. It is therefore a cause for inquiry when Chairman Dotson, in his dissenting opinion, rejected Board precedent to the contrary and accepted the views of several courts of appeals in finding that

the refusal to cross a stranger picket line while protected is entitled to less weight
that the Board made in those two cases were not its own but those of the courts. The Board's approach (with these two exceptions) unqualifiedly presumes mutual aid from the mere activity of honoring a stranger picket line, and whenever this activity occurs, the Board treats the protection issue as well settled. In Browning-Ferris, the Board protected two refusals to cross stranger picket lines which it specifically found were motivated by sympathy with the striking workers. It stressed, in this regard, that such conduct is protected regardless of motivation.

when balanced against valid employer business considerations than refusal to cross a picket line at an employee's own place of employment.

Compared to picket lines directed against an employee's own employer, an employee's interest in refusing to cross a stranger picket line is highly attenuated. Such interest is based essentially on broad ideological grounds rather than immediate concerns related to the employee's own job. The employee cannot reasonably expect that concessions granted to the members of the picketing union by the picketing employer will have a reciprocal effect upon his or her own conditions of employment.

272 N.L.R.B. at 830.

Because the honoring employees’ “employer” in Business Services was a temporary employment agency, Chairman Dotson may have been correct as to the implausibility of reciprocal effect. Actual or even intended reciprocal benefit, however, has never been a requirement for the Board. The majority’s resort to economic arguments for mutuality may be understood as a defensive approach to counter the economic concerns of the dissent and to prevent any budding dissension within the Board on this issue. Quite possibly, the use of economic arguments by both the majority and the dissent can be explained by the unconventional employer-employee relationship.

97. The Board in Business Services relied on the economic arguments for mutuality that Judge Posner made in Browning-Ferris and the Ninth Circuit made in Southern California Edison. These courts in turn have relied upon the language in NLRB v. Union Carbide Corp., 440 F.2d 54 (4th Cir. 1971). The Union Carbide court stated that “[i]t cannot be denied that respect for the integrity of the picket line may well be the source of strength of the whole collective bargaining process in which every union member has a legitimate and protected economic interest.” Id. at 56. The Board in Business Services also relied on NLRB v. Peter Cailler Kohler Chocolates Co., 130 F.2d 503, 505-06 (2d Cir. 1942), wherein Judge Learned Hand stated that “the solidarity so established [by aiding another employee's grievance against his employer] is ‘mutual aid’ in the most literal sense.”

The Board in Cyril de Cordova likewise relied on Judge Hand's language in Peter Cailler. Cyril de Cordova, 91 N.L.R.B. at 1135. Judge Hand's rationale for a finding of mutual (economic) aid in Peter Cailler was that “the [employees] know that by their action each one of them assures himself, in case his turn ever comes, of the support of the one whom they are all helping . . . . [T]he immediate quarrel does not itself concern them, but by extending the number of those who will make the enemy of one the enemy of all, the power of each is vastly increased.” Peter Cailler, 130 F.2d at 505-06.


100. Id. (emphasis added).
B. An Analysis of Judge Posner's Approach to Protection

While Judge Posner cited the longstanding Board rule as support for his holding that observance of a stranger picket line is protected activity within section 7, deference to the agency does not seem to have been the principal basis of his holding. Rather, Judge Posner seemed to have reached his conclusion independently and for different reasons than the Board. That the Board happened to agree with his conclusion was more or less coincidental for Judge Posner.

Judge Posner noted that most circuit courts that had considered the issue had protected the right to refuse to cross a stranger picket line. This assessment of the circuit courts' record is somewhat misleading, however, because most circuit courts did not protect the right in any real sense. Clearly not very persuasive authority supported Judge Posner's decision to protect the right in question: only three circuits protected the right in form and in substance, one circuit in form if not in substance, one circuit only in dictum, and the rest

101. Browning-Ferris Indus., 700 F.2d 385, 387 (7th Cir. 1983). "For the last twenty years the Board has held that refusing to cross a picket line at the premises of an employer's customer is protected activity, and its view, so steadily maintained through several changes of Administration, is entitled to consideration." Id. (citations omitted).

102. See id. ("[W]e conclude that the natural reading [of section 7] is also the legally correct one. We are not alone in so concluding. For the last twenty years the Board has held that refusing to cross a picket line at the premises of an employer's customer is protected activity.")) 103. Id. at 387.

104. The D.C. Circuit, in its two decisions that actually reached the issue, deferred to the Board's determination that a refusal to cross a stranger picket line constitutes protected section 7 activity. See Teamsters Local Union 657 v. NLRB, 429 F.2d 204 (D.C. Cir. 1970); Teamsters Local Union No. 79 v. NLRB, 325 F.2d 1011 (D.C. Cir. 1963), cert. denied, 377 U.S. 905 (1964); cf. Truck Drivers Local No. 728 v. NLRB, 364 F.2d 682, 684 (D.C. Cir. 1966) (Overnite I) (considering it unnecessary to reach the section 8(a)(1) violation alleged or the issue of protection because the employee's dismissal was discriminatorily motivated and thus in violation of section 8(a)(3)). The Fifth Circuit agrees that section 7 protects the right to refuse to cross a stranger picket line. NLRB v. Alamo Express, 430 F.2d 1032, 1036 (5th Cir. 1970), cert. denied, 400 U.S. 1021 (1971).

The Ninth Circuit has also upheld the Board's determination that a protected right exists. NLRB v. Southern Cal. Edison, 646 F.2d 1352, 1364 (9th Cir. 1981). Unlike the D.C. and Fifth Circuits, however, the Ninth Circuit seemed compelled to prove the satisfaction of the "mutual aid or protection" requirement in terms of economic self-interest. The court argued in general terms for the stranger picket line observers' economic interest in strengthening the collective bargaining process and union movement. Id. at 1363. Additionally, it recognized an indirect form of back-patting or reciprocity which derived from their support: the picket line honorers "'[k]now that by their action each one of them assures himself . . . of the support of the one whom they are helping; and the solidarity so established is "mutual aid" in the most literal sense.' " Id. at 1364 (citing Peter Cailler Kohler Swiss Chocolate Co. v. NLRB, 130 F.2d 503, 505-06 (2d Cir. 1942)).

105. Until quite recently, the Second Circuit's view of protection had been the most removed from the Board's view. See NLRB v. Rockaway News Supply Co., 197 F.2d 111 (2d Cir. 1952), aff'd on other grounds, 345 U.S. 71 (1953). The Second Circuit in Rockaway explained that it accepted the proposition that section 7 guarantees the right to refuse to cross
of the circuits had never directly reached the issue. The First and

a picket line because such refusals were habitual, frequently aided labor organizations, and were “in a broad but very real sense directed to mutual aid or protection.” Id. at 113. After recognizing the existence of a protected right, however, the court rendered meaningless any protection granted, by limiting the free exercise of the protected right to “non-working time.” The court said, “An employee is of course free to exercise his right to refuse to cross a picket line when he is on his own time and his discharge for so doing would doubtless be a violation of section 8(a)(1). But he is not free to exercise the right during his working time in violation of his employer’s working rules by refusing to perform that part of his regular duties which requires him to cross the picket line.” Id. at 113-14. It is difficult to reconcile this position with any common sense understanding of substantive protection of the right in question. Because it is virtually impossible to encounter a picket line at another employer’s premises if one is not on working time, it is evident that the Second Circuit “protected” only those refusals to cross which could never occur.

Recently, the Second Circuit acknowledged that the Rockaway approach to protection had “died from desuetude.” Business Servs. by Manpower v. NLRB, 784 F.2d 442, 447 n.5 (2d Cir. 1986). It said, “[T]his court’s limitation of the right to honor stranger picket lines to nonworking hours seems never to have been followed.” Id. Thus the Second Circuit lifted the temporal constraints which had encumbered this protected right since Rockaway, and asserted that it “endorsed the Board’s position that recognition of stranger picketing is protected by § 7.” Id. at 452. In the specific context presented in Business Services, however, it found this protected right very “attenuated.” Id. at 453.

106. The Tenth Circuit has never encountered a case where an employee refused to cross a picket line on the premises of a customer of his employer. In NLRB v. Gould, however, an employee honored a picket line that his own union set up on his own employer’s premises, but it was directed at a stranger employer doing work on the premises. 638 F.2d 159 (10th Cir. 1980). The court held this to be protected activity. Although not necessary to its holding, the Gould court expressed its view that on the authority of Teamsters Local Union 657 and Alamo Express, it considered a refusal on a stranger employer’s premises to be protected as well. Gould, 638 F.2d at 163 (citing Teamsters Local Union 657 v. NLRB, 429 F.2d 204 (D.C. Cir. 1970); NLRB v. Alamo Express, Inc., 430 F.2d 1032 (5th Cir. 1970), cert. denied, 400 U.S. 1021 (1971)).

107. Not all of the federal courts have reached the issue of whether a refusal to cross a stranger picket line constitutes protected concerted activity within section 7 of the Act. The Sixth Circuit has not encountered the precise factual situation of an employee refusing to cross a picket line at his employer’s customer. It has only encountered the sympathy strike—an employee’s refusal to cross a picket line on the premises of a common employer. See Kellogg Co. v. NLRB, 457 F.2d 519 (6th Cir.), cert. denied, 409 U.S. 850 (1972); NLRB v. Difco Laboratories, 427 F.2d 170 (6th Cir.), cert. denied, 400 U.S. 833 (1970). The same was true for the Seventh Circuit until Browning-Ferris. See Gary Hobart Water Corp. v. NLRB, 511 F.2d 284 (7th Cir.), cert. denied, 423 U.S. 925 (1975) (assuming such activity was protected). But see NLRB v. Illinois Bell Tel. Co., 189 F.2d 124 (7th Cir.), cert. denied, 342 U.S. 885 (1951) (holding sympathy strikes unprotected under section 7).

The First, Fourth, and Eighth Circuits have all encountered cases involving refusals to cross stranger picket lines. See NLRB v. William S. Carroll, Inc., 578 F.2d 1 (1st Cir. 1978); G & P Trucking Co. v. NLRB, 92 L.R.R.M. (BNA) 3652 (4th Cir. 1976); Montana-Dakota Utilities Co. v. NLRB, 455 F.2d 1088 (8th Cir. 1972); NLRB v. L.G. Everist, Inc., 334 F.2d 312 (8th Cir. 1964). These courts, however, have not actually decided the issue of whether such activity is protected. They have skillfully avoided this issue, while nonetheless expressing skepticism as to the existence of a protected right.

The First Circuit in William S. Carroll felt it unnecessary to decide whether honoring a picket line is protected conduct. Even if it were, the court stated that the employer’s right to carry on business would outweigh the employee’s right to cross the picket line. 578 F.2d at 3. The court pointed out, nevertheless, that in a prior case it had expressed doubts that honoring
Eighth Circuits’ skepticism on the issue of protection derived from a recognition that stranger picket line observers have no self-interest in the underlying dispute. Moreover, Judge Posner’s own circuit had never explicitly overruled a decision in which it had found that there was no protected right to honor a picket line even on the premises of a common employer, because the honoring employees’ were unable to derive any benefit from support of fellow employees’ actions. Yet

A stranger picket line is protected. Id. (citing NLRB v. C.K. Smith & Co., 569 F.2d 162 (1st Cir. 1977), cert. denied, 436 U.S. 957 (1978)). In dictum in C.K. Smith, the First Circuit had considered stranger picket lines “arguably unprotected by § 7 inasmuch as the disciplined employees’ self-interest is not directly or indirectly implicated in the primary strike.” 569 F.2d at 165 n.1. Thus, the court used lack of economic interest in the dispute to militate against protection.

The Fourth Circuit in G & P Trucking Co. v. NLRB, also managed to avoid deciding the issue of protection in a stranger picket line case, while nonetheless conveying skepticism. 92 L.R.R.M. (BNA) 3652 (4th Cir. 1976). Although the court granted that refusing to cross a picket line at a common employer may be protected, the court stated that it had never approved or adopted a rule protecting honorers of stranger picket lines, and specifically rejected the Board’s contention that it should adopt an absolute rule recognizing section 7 protection. Id. at 3655. The Fourth Circuit has even been unwilling to adopt an absolute rule of protection in the common employer context. See NLRB v. Union Carbide Corp., 440 F.2d 54, 56 (4th Cir.), cert. denied, 404 U.S. 826 (1971) (distinguishing between refusals to cross motivated by principle which are protected, and those motivated by fear which are not).

The Board’s own sloppiness in framing the dispute, permitted the Eighth Circuit in Everist to dodge the issue of protection in the stranger picket line context and focus instead upon whether the refusal to reinstate the discharged employees was a section 8(a)(1) violation. NLRB v. L.G. Everist, Inc., 334 F.2d 312, 316 (8th Cir. 1964), denying enforcement to 142 N.L.R.B. 193, 195 (1963). The court in Everist held that deciding the protection issue was unnecessary because the employees were “permanently discharged.” 334 F.2d at 316. The court concluded that “permanent discharge” severed the employment relationship and any right a suspended employee might have had to reinstatement. Id. In so concluding, however, the court begged the question at issue—could employees be discharged or did they have some sort of protection?

Although the court in Everist explicitly left the protection issue unsettled, the inference to be drawn from the court’s characterization of the sympathetic activity in dispute casts doubt on the possibility of according it protected status. See id. at 318 (Matthis, J., dissenting). The court’s decision implies a certain unwillingness to protect employees who had demonstrated no self-interested reason for their activity: “[M]erely sympathetic activity . . . had no effect on their own union, their contract or their relationship with their employer. Such refusal was no more and no less than a refusal to work, a violation of their contract to continue hauling for which they could be and were validly discharged.” Id. at 317-18.

Although the Eighth Circuit has still not actually decided the protection question in a stranger picket line context, it may have rejected its harsh Everist inference against protection in favor of an inference for protection in Montana-Dakota Utilities Co. v. NLRB, 455 F.2d 1088 (8th Cir. 1972). In Montana-Dakota, the court assumed that employees have a protected section 7 right to honor a picket line that a union in which they have no direct interest erected. Id. at 1091. The court’s assumption, however, was only for the purpose of deciding whether the employees had waived such a right in the collective bargaining agreement. Id.

108. See supra note 107.

109. In Illinois Bell, the Seventh Circuit refused to classify such activity under the “mutual aid or protection” rubric. It stated that each picket line honorer acted individually out of principle, i.e., to support the demands of a different union, rather than for economic self-
in an opinion which must have shocked those who expected Judge Posner to defeat protection based upon stranger picket line observers’ lack of economic self-interest, Judge Posner rejected all of the “conservative” possibilities and like the Board, declared that stranger picket line observance was protected activity within section 7 of the National Labor Relations Act.

1. THE ORIGINAL “DEAL” STRUCK

Judge Posner began his analysis of the protection issue in Browning-Ferris by stating that “[a] natural reading of section 7 leads to the conclusion that refusing to cross a picket line at the premises of an employee’s customer is protected activity.” Having therefore recognized that the framers of the Act had given an entitlement to employees generally in section 7 (without reference to whether or not they were unionized), it would have been logical for Judge Posner to determine the original “deal” struck in section 7 to be a grant of rights to

interest. NLRB v. Illinois Bell Tel. Co., 189 F.2d 124, 127 (7th Cir.), cert. denied, 342 U.S. 885 (1951). Their activity was neither concerted nor intended for their own “aid or protection,” the court argued. Id. “They neither sought nor were entitled to seek on their own behalf any aid or protection from [their employer].” Id. at 128. The court added, “[The refusal] could have only been for the benefit and aid of those in a different bargaining unit, the representative of which could not have represented the involved employees and, consequently, could have obtained nothing from respondent for their benefit.” Id. at 129.

The Seventh Circuit’s next discussion of this issue, however, seemed to reject the Illinois Bell approach. In Gary Hobart, the court viewed sympathy striking as plighting one’s troth with fellow employees. Gary Hobart Water Corp. v. NLRB, 511 F.2d 284, 287 (7th Cir. 1975). Despite this seemingly contrary authority, however, Judge Posner could have used the “lack of self-interest” argument to defeat protection had he desired to, because the Seventh Circuit had not explicitly overruled Illinois Bell. See Browning-Ferris, 700 F.2d at 388.

Initially, Judge Posner recognized that the Browning-Ferris drivers’ refusals to cross the picket line erected at their employer’s customer, International Harvester, were not directly related to the drivers’ wages or working conditions, but instead, “a gesture of solidarity with the workers at the International Harvester plant.” 700 F.2d at 386. He realized that the link to the employees’ interest was “more attenuated” than in the common employer situation. Id. at 388. Judge Posner, like Professor Haggard, therefore, might have distinguished between vague working class solidarity and real economic self-interest and held the activity unprotected. See Haggard, supra note 82, at 98 (“[W]orking class solidarity is at best a political slogan, not a viable economic theory.”).

Judge Posner, however, rejected Professor Haggard’s notion. As he wrote: “Judge Hand’s statement [concerning “solidarity” as real mutual aid] is not just ‘ideological polemics . . . suggestive of a tract on class welfare,’ as charged in Haggard, Picket Line Observance as Protected Concerted Activity even in a case such as this where the workers in question are not members of a union.” 700 F.2d at 387 (citation omitted). Judge Posner apparently did not choose to limit Judge Hand’s economic benefit argument to a setting where the refusing workers were unionized, as he might have if he wished to argue that self-interested behavior did not exist and thus deny protection.

110. 700 F.2d at 387.
111. Id.
112. Id.
the individual employee and thus, protect the right on that basis.\textsuperscript{113} This straightforward analysis would have been consistent with his theory of judicial decision-making in a statutory framework.

Yet Judge Posner did not scrutinize the language of section 7 for the essence of the original "deal" struck in that provision and use this to guide his decision-making. Instead, he superimposed onto section 7 his own conception of an original "union-promoting deal"—a "deal" which apparently he determined pervaded the Act as a whole. For instance, it was only after considering "the pro-union ambience of the Wagner Act, and the Supreme Court’s frequent rejection . . . of a narrow reading of section 7,"\textsuperscript{114} that Judge Posner concluded that the natural reading of section 7 was also the legally correct one.\textsuperscript{115} However simple this conclusion may appear, the actual process of reconciling the language of section 7, the nonunionized employee context of \textit{Browning-Ferris}, and a conception of a "union-promoting" original deal, was quite a laborious task for Judge Posner.

2. THE ECONOMIC INTENT REQUIREMENT

There were two possibilities open to Judge Posner, assuming he wished to promote only the original "deal" (as he had asserted judges interpreting statutes generally do).\textsuperscript{116} According to his framework, he needed to protect only union-promoting or union-strengthening activity, not concerted activities of nonunionized individuals. His first option was therefore to hold that the refusals could not benefit a union at \textit{Browning-Ferris} (because none existed) and therefore to consider such refusals outside the scope of section 7.\textsuperscript{117} His second option was to recharacterize the facts so they would fit his conception of the original "deal" struck and hence, deserve protection. Judge

\textsuperscript{113} No interpretation of the original "deal" is unproblematic. The Supreme Court’s holding in \textit{Emporium Capwell}, makes this conception of the original "deal" struck in section 7 somewhat imprecise. \textit{Emporium Capwell Co. v. Western Addition Community Org.}, 420 U.S. 50 (1975). In \textit{Emporium Capwell}, the Court held that a minority group within a union had no section 7 right to engage in bargaining with the employer on their own because they would be bypassing their elected bargaining representative. \textit{Id.} at 70-71. Thus it seems that an employee gives up some of his section 7 rights once a union is installed.

\textsuperscript{114} 700 F.2d at 387.

\textsuperscript{115} \textit{Id.}

\textsuperscript{116} \textit{See supra} notes 69-70 and accompanying text.

\textsuperscript{117} Although refusing to cross a stranger picket line clearly "aids a labor organization" (the picketing union) and thus falls literally within the list of enumerated activities protected under section 7, one cannot expect Judge Posner to have accorded protection on this sole basis, despite his conception of the original "deal" struck. Even the Board has not taken such a literalist approach to section 7. Rather, both the Board and the courts have understood section 7 to protect aid to a labor organization when it is for "mutual aid or protection." \textit{See, e.g., NLRB v. Southern Cal. Edison}, 646 F.2d 1352, 1364 (9th Cir. 1981).
Posner chose to do the latter. He hypothesized that: "[The refusing drivers] may have hoped to become members [of a union]—hoped that a union victory at the International Harvester plant would encourage a successful organizing effort at their own plant."118 This language was telling. It belied Judge Posner's "personal" requirement for calling a concerted activity "protected"—that is, that it must not only function to actually benefit the individual in economic terms, but it also must be intended to have an economically beneficial effect. Although the courts had traditionally protected other forms of section 7 activity because of the presumed self-interest actually motivating employees to act in seemingly "selfless" manners,119 before Browning-Ferris such arguments had not been applied to support protection in the stranger picket line context.120

Judge Posner had to strain to find even a modicum of self-interest in the Browning-Ferris drivers' motivations for refusing to cross the picket line at International Harvester. While other courts had squarely determined self-interest to be lacking in such situations,121 and the Board had specifically found that the individuals in question "refused to cross the picket line out of sympathy for the striking workers,"122 Judge Posner chose instead to hypothesize:

The drivers may have felt that strengthening the union movement by honoring a union's picket line would promote their economic interests as workers . . . . [The refusing drivers] may have believed that the union movement improves the working conditions of non-union workers—that employers treat such workers better in order to ward off unionization. There is a third possibility. We do not know which workers were on strike at the International Harvester

118. 700 F.2d at 387 (emphasis added).
120. Judge Posner extended the economic benefit arguments even further than the Ninth Circuit had in NLRB v. Southern California Edison Co., 646 F.2d 1352 (9th Cir. 1981). In Southern California Edison, the court had presumed an economically beneficial effect for the refusing employees, although it did not imply that they honored the picket line specifically to obtain the benefit. See id. at 1363-64. Writing for the majority, Judge Skopil said, "Although reciprocity may be indirect, respect for another union's picket line leads to a stronger labor movement." Id. at 1364. The court stated generally in dictum that "sympathetic strikers 'know that by their action each of them assures himself . . . of the support of the one whom they are helping.' " Id. This "knowledge," however, must be distinguished from Judge Posner's implication of purposeful knowledge, closer to intent, which we find in both his general and more specific "hypotheses" for the Browning-Ferris drivers' refusals. See infra text accompanying note 123. Unlike Judge Posner, the Southern California Edison court never once inquired into the stranger picket line observers' actual motivations for acting.
121. See discussion of the First and Eighth Circuits supra notes 107-08 and accompanying text.
plant, but if they do the same type of work that BFI's drivers do an increase in their wages or benefits through a successful strike might put competitive pressure on BFI to offer better terms to its drivers.123

Because Judge Posner clearly could have held that the refusals lacked any economic benefit or concrete self-interest and thus left them unprotected,124 it is interesting that he went to such lengths to reject his previous characterization of the refusing activity as a "gesture of solidarity,"125 and instead (or in addition to this) portrayed it as being in these "workers practical, nonideological self-interests as workers."126 The theory of wealth maximization, however, did not

123. Browning-Ferris Indus., 700 F.2d 385, 387 (7th Cir. 1983) (emphasis added).
124. Certainly Judge Coffey had no qualms about taking this approach to the issue. See id. at 390 (Coffey, J., concurring). Although he concurred in the judgment, Judge Coffey took exception to Judge Posner's finding of concrete "mutual aid and protection": These three "possibilities" are, as the majority concedes, no more than mere "hypotheses." Our role as an appellate court is not to hypothesize as to what the BFI drivers hoped to achieve through refusing to cross the International Harvester picket line, but rather to decide the case on the basis of facts in the record. Based on the facts in the record, I am unable to ascertain how the BFI employees' refusal to cross the International Harvester picket line was for the "mutual aid" of both the striking International Harvester workers and the BFI drivers.

Id. at 390-91 (citations omitted). While Judge Posner's cost-benefit analysis is not without reproach in the sense that it favors the employer, see infra section IV(E), it is important to note that Judge Coffey's cost-benefit approach to protection is even more blatantly biased:

In considering whether the BFI employees' refusal to cross the International Harvester picket line was protected activity under the Act, this court should now begin to give adequate weight to the interest of employers, thereby fostering equality between employers and employees and promoting industrial harmony. Based on a careful weighing of the opposing interests of employers and employees in this fact situation, I believe that the BFI employees' refusal to cross the International Harvester picket line is not entitled to the protection of the Act because any benefit accruing to the BFI employees would be at best remote, and the interest of the employer [BFI] to operate its business without unnecessary interruption clearly outweighs the employees' remote interests.

700 F.2d at 390 (brackets in original).

Judge Coffey does not consider protection and replacement/discharge to be two separate determinations as do the Board and some courts. Instead, for Judge Coffey, protection is a case-by-case balancing determination: the interests are balanced against one another, and if the employee wins out, the conduct is protected. There is some common sense to Coffey's approach in that certain activities should not be denominated "protected activities" when employees will lose their jobs for engaging in them.

125. 700 F.2d at 386.
126. Id. at 387. Judge Posner asserted that the relationship between the challenged conduct and the workers' practical, nonideological self-interest as workers would be as close as it was in Eastex Inc. v. NLRB, where the Supreme Court held that the distribution on the employer's property of a newsletter criticizing the President's veto of an increase in the minimum wage was protected activity even though the employees were being paid more than the vetoed minimum wage.
3. WEALTH MAXIMIZATION V. UTILITARIANISM REVISITED

As both Posner and his critics have pointed out, the wealth maximization standard for decision-making rejects pure utilitarianism. Posner has written:

"[T]he economist, when speaking normatively, tends to define the good, the right, or the just as the maximization of "welfare" in a sense indistinguishable from the utilitarian's concept of utility or happiness. . . . But for my normative purposes I want to define the maximand more narrowly, as "value" in the economic sense of the term or more clearly I think, as "wealth.""

Posner's narrowing of the maximand, however, has not gone without comment. Professor Michelman, for instance, has criticized him for disregarding "all human valuations or motivations that are not responsive to considerations of price, or cost, in a sense approximately measurable by methods available to economic science."

If one adopts Professor Michelman's characterization of wealth maximization, it is understandable why Judge Posner was unwilling to acknowledge that feelings of solidarity alone could motivate an individual to honor a stranger picket line. An individual's motivation in acting to benefit other workers, or to increase his own sense of happiness from helping others, or merely because it is the "right" or "moral" thing to do would not seem capable of a conventional mar-
market valuation. Yet, contrary to what certain of his critics believe, Posner does not assume that only economic motivations have value. In fact, value for Posner has very little to do with motivation. It is determined solely by willingness to pay. 131 “Payment,” however, need not be understood in any conventional market sense.

Posner is the first to point out that a “market” exists as long as voluntary exchange is possible. He asserts most definitely that money need not be used in the transaction. 132 Thus, if rights and other entitlements can be voluntarily exchanged, a market can be said to exist for them. Even if a voluntary exchange is impossible because of high transaction costs, courts can nevertheless reconstruct hypothetical markets in which these rights would be traded. 133

While these rights may not have values which are objectively discoverable by economic science, they can be privately valued. In fact, the theory of wealth maximization reflects the Chicagoan’s preference for private valuation of rights rather than for valuation by political or judicial decision-makers. Posner has said: “In a market, people have to back up their value assertions with money, or some equivalent sacrifice of alternative opportunities. Willingness to pay imparts greater credibility to a claim of superior value than forensic energy does.” 134

The truck drivers in Browning-Ferris clearly possessed something they considered to be of value—a right to refuse to cross a picket line at their employer’s customer. Because anything of value can be traded, the employees might have traded their right of refusal for retention of their jobs. Their decision not to trade that right, therefore, involved a process of private valuation. By refusing to cross the picket line, they gave up the amount their employer would have paid them to induce them to cross and keep their jobs. They were “willing to pay” with their jobs, and thus, undisputably valued their individual rights of refusal quite highly.

Judge Posner ignored this “real” demonstrated value of the driv-

intentions of the actor. If he acts out of a desire to improve the welfare of others, his act has inherent moral value even if it does not benefit others. But of course it has no inherent moral value if he acts with the intention of benefiting only himself. Posner makes plain that his production-for-others claims have nothing to do with the other-regarding intentions of actors in the economic process. He supposes, on the contrary, that they will act to maximize benefit to themselves, benefiting others only through their inability to absorb every last bit of the consumer surplus, as they would like to do for themselves.

Dworkin, Wealth, supra note 18, at 211-12.
131. See, e.g., Posner, Utilitarianism, supra note 28, at 120.
132. See id.
133. Id.
134. R. POSNER, ECONOMIC ANALYSIS, supra note 18, at 494 (emphasis added).
ers’ right of refusal—a value which apparently derived from the strength of the employees’ feelings of solidarity, empathy, or at least commitment to principle. In according the right a “hypothetical” value dependent on “hypothetical” motivations or interests instead, Posner assured that the right would not weigh heavily as a benefit to the employee when he balanced employee benefits against employer costs in the second part of the opinion. Judge Posner’s recharacterization of solidarity into self-interest may best be understood, therefore, as a preliminary but subtle weighting of the costs and benefits which would figure into the more meaningful cost-benefit analysis to come.

4. THE BOTTOM LINE OF PROTECTION

It appears from the opinion that Judge Posner accorded stranger picket line observance protected status, only so that he could then conduct a cost-benefit analysis to determine who really merited the right in this case. He said, “[Treating] [s]uch conduct as protected allows a more flexible comparison of the benefit to the workers and the burden to the employer. To hold such conduct unprotected would allow the employer to suppress it even if its cost to him was trivial.” He ended his discussion of protection with the following disclaimer: “Holding that [such conduct] is protected does not make it sacrosanct but does require the employer to demonstrate good cause for suppression . . . .” Nowhere does Posner even imply that he is protecting “rights qua rights” irrespective of the relevant costs and benefits.

IV. THE EMPLOYER’S BUSINESS NECESSITY: THE VIEWS OF THE BOARD AND JUDGE POSNER

A. The Board’s Replacement/Discharge Controversy

In its first stranger picket line case, Cyril de Cordova Bros., the Board accorded the refusing employee what can be considered an unqualified right—protection without replacement or discharge. Although the trial examiner had raised the issue, the Board refused to consider any lawful actions the employer might have taken short of

135. See supra note 99 and accompanying text. For the significance of such motivations in employee protest activity, see generally M. Fischl, supra note 65.
136. NLRB v. Browning-Ferris Indus., 700 F.2d 385, 388 (7th Cir. 1983).
137. Id.
138. Cf. Samuels & Mercuro, supra note 19, at 112 (citing Browning-Ferris as support for the proposition that Judge Posner “seems to recognize that rights qua rights are important independent of relative costs and benefits”).
139. 91 N.L.R.B. 1121 (1950).
discharge to maintain operations with minimal interference. But the Board was not long able to resist employer arguments for such a right to maintain operations.

The next year, in *Rockaway News Supply Co.*, the Board implied for the first time that an employee's claim to protection for refusing to cross a stranger picket line was a qualified claim. It stated that although stranger picket line observance was protected activity, an employee could be forced to leave his job as an economic striker to make way for a replacement, because the employer had a "right to maintain its operations." The Board noted, however, that an employee engaging in this protected activity could not be discharged. The Board thus assumed a perfect analogy to the economic strike situation in *Mackay Radio & Telegraph Co.* where employers were given the right to replace employees during an economic strike, but not the right to discharge them, in order to continue business operations during the course of the strike. On certiorari, the Supreme Court, however, rejected this analysis, stating the following:

The distinction between discharge and replacement in this context seems to us as unrealistic and unfounded in law as the Court of Appeals found it. The application of the distinction is not sanctioned by Labor Board v. Mackay Co. It is not based on any difference in effect upon the employee. And there is no finding that he was not replaced either by a new employee or by transfer of duties to some nonobjecting employee, as would appear necessary if the respondent were to maintain the operation. Substantive rights and duties in the field of labor-management do not depend on verbal ritual reminiscent of medieval real property law.

With this bit of obfuscation, the Court upheld the employer's pre-

140. Id. at 1122.
141. See supra notes 142-43 and accompanying text.
142. 95 N.L.R.B. 336 (1951).
143. Id. at 337. The Board in *Rockaway assumed* that employers had such a right, although nothing in the Act itself would lead to this conclusion. As Professor Atleson has demonstrated so skillfully in *Values and Assumptions*, the employer's "right to maintain production" was a tenacious common law notion that the new statutory regime was unable to extinguish. See J. ATLESON, supra note 60, at 29-30 (discussing *Mackay Radio*).
144. 95 N.L.R.B. at 337.
146. See id. at 345 (finding that the employer had a right to protect and continue his business by filling positions that strikers left vacant). Note that the Court in *Mackay* also said that the replacements were entitled to permanency. Id. at 347. In *Rockaway*, the Board did not get this far. NLRB v. Rockaway News Supply Co., 345 U.S. 71 (1953).
147. Rockaway, 345 U.S. at 75 (emphasis added) (citations omitted).
148. The problem with *Rockaway*, is determining what the Court actually decided on the replacement/discharge issue so that the Board and courts would know by what standard they
rogative, sanctioning the discharge.\textsuperscript{149}

In \textit{Redwing Carriers},\textsuperscript{150} the Board interpreted the Supreme Court's language in \textit{Rockaway} to be only a repudiation of the verbalistic distinction between replacement and discharge.\textsuperscript{151} The Board stated that "substance, rather than form should be controlling . . . [and] we can see no reason for reaching different results solely on the basis of the precise words, i.e., replacement or discharge, used by the employer, or the chronological order in which the employer terminated and replaced the employees in question."\textsuperscript{152}

In \textit{Redwing}, therefore, the Board upheld the discharge of eight drivers after finding that the employer actually replaced the drivers and had to replace them to continue business with the picketed customer.\textsuperscript{153} Since \textit{Redwing}, the Board has upheld the discharge of employees in the stranger picket line context only two other times.\textsuperscript{154}

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\textsuperscript{149} \textit{Rockaway}, 345 U.S. at 81.
\textsuperscript{150} 137 N.L.R.B. 1545 (1962).
\textsuperscript{151} Haggard, \textit{supra} note 82, at 57.
\textsuperscript{152} 137 N.L.R.B. at 1547.
\textsuperscript{153} \textit{Id.} at 1548. These are the two findings necessary to satisfy what since \textit{Redwing} has become the Board's "business necessity" test. \textit{See infra} notes 196-201.
\textsuperscript{154} \textit{Overnite Transp. Co.}, 209 N.L.R.B. 691 (1974) (\textit{Overnite III}) (finding that employee was terminated and replaced in order to preserve efficient business operations of respondent's business); \textit{Thurston Motor Lines}, 166 N.L.R.B. 862 (1967) (upholding discharge of employee Jackson because discharge was necessary to complete a scheduled delivery). In both of these cases the employee had been "actually replaced," yet there were other
In neither of these cases were the discharged employees found to have the same rights to regain their jobs upon openings, which permanently replaced economic strikers were found to have in *Mackay*. More recently, however, the Board appears to have reinterpreted *Redwing* to be actually premised on the economic striker analogy. In so doing, it has rejected at least that part of the *Redwing* doctrine which permitted discharge as a valid employer response to business necessity. Today, the Board would only permit "permanent replacement." In *Torrington Construction Co.*, the Board explicitly

"aggravating" factors which weighed into the balance, and tipped the Board in favor of discharge. For a general discussion of these factors, see infra notes 206-09; 212-16; 218-20; 224-27 and accompanying text.

155. The trial examiner in *Overnite III* found that the employer had unlawfully discharged employee Tingen and owed him an offer of reinstatement and backpay. 209 N.L.R.B. at 695-96. Even if Tingen had been lawfully "replaced," the trial examiner expressed the view that he nevertheless had a right to reinstatement when a job was available. *Id.* The Board, however, refused to follow either of the trial examiner's suggestions. It determined that Tingen had been lawfully discharged and made no mention of reinstatement rights. See *id.* at 692. The Board in *Thurston* did not find Jackson to have a right to reinstatement, while it found that Cripps, another employee who had been unlawfully discharged, did. See 166 N.L.R.B. at 862, 867. Thus, although the refusers in these two cases had been permanently replaced, the Board no longer considered them to be "employees" as it did replaced economic strikers. See *supra* note 5.

156. See *Torrington Constr. Co.*, 235 N.L.R.B. 1540, 1541 (1978). Actually, this is not an altogether new interpretation. In the case that succeeded *Redwing*, L.G. Everist, Inc., 142 N.L.R.B. 193 (1963), the Board used the economic striker analogy to support its order for reinstatement of employees who had not yet been permanently replaced:

The employees involved herein are similar to economic strikers, who may also be replaced by an employer to permit continued operation of the business but who, if not permanently replaced, are entitled to reinstatement upon unconditional application. It follows, therefore, that where, as here, no permanent replacement has occurred at the time the claimants unconditionally apply for reinstatement so that their jobs are still available, the employer is obligated to return them to work.

*Id.* at 195.

In *Overnite Transportation Co.*, 212 N.L.R.B. 515 (1974) (*Overnite IV*) as well, the Board, relying on the administrative law judge's opinion, drew a distinction between replacement (which was permitted) and discharge (which was not). *Id.* at 516, 523. It was not until *Torrington Construction*, however, that the Board made clear that the replacement/discharge distinction had substance because replaced employees retain substantial rights that discharged employees do not. 235 N.L.R.B. 1540, 1541 (1978). Professor Axelrod has explained that the reemphasis of the replacement/discharge dichotomy in *Torrington Construction* might have had something to do with newer developments in the *Mackay* doctrine. Axelrod, *The Statutory Right to Respect a Picket Line*, 83 DICK. L. REV. 617, 647 (1979). These newer developments which gave "replaced economic strikers significant new rights, i.e., placement on a preferential hiring list with an enforceable right to reinstatement whenever vacancies arise," did not exist when the Supreme Court decided *Rockaway*. *Id.*

157. See, e.g., *Business Servs. by Manpower v. NLRB*, 784 F.2d 442, 450 (2d Cir. 1986) (recognizing the Board's doctrinal shift back to the strict replacement/discharge distinction that preceded the Supreme Court's decision in *Rockaway*), denying enforcement to 272 N.L.R.B. 827, 828 (1984) ("This removal was tantamount to discharge, and an employer may
announced this doctrinal shift:

Although earlier cases, including Redwing Carriers have sought to diminish the distinction between discharge and replacement, the Board long ago held that employees affected by a Redwing Carriers situation were akin to economic strikers and were entitled to reinstatement upon unconditional application if not permanently replaced. Economic strikers who have been replaced of course also retain the status of employees and are entitled to reinstatement upon the departure of their replacements. It is thus clear that there exists a substantial difference between replacement and discharge and we do not believe that sympathy strikers [meaning stranger picket line observers] possess any less rights in this regard than economic strikers. [They] may not be discharged.159

B. Browning-Ferris: A Distinction Between Replacement and Discharge?

In Browning-Ferris, Judge Posner explicitly endorsed a replacement/discharge dichotomy and a correlative difference in employee rights. In fact, he implied that his analogy to the economic strike situation was perfect:160

Discharge severs the employment relationship entirely; should the discharged worker apply for reemployment he would have to take his turn in the queue with other applicants. In contrast, a worker who has been permanently replaced jumps to the head of the queue; in addition, he is entitled to notice of job openings; most important, he retains his seniority.161

Judge Posner's mastery of the Board's verbalistic distinction was deceptive, however, for his application of it had quite different conse-

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159. Id. at 1541 (citation omitted). One author has argued that the economic striker analogy thus conceived is incomplete because by limiting the employer's remedy to replacement, "the employer of an employee who honors a stranger picket line has substantially fewer rights than an employer of an economic striker." Note, supra note 148, at 971. The author further explained that for instance:

In Edison, the Board held that an employer could not regard an employee's refusal to cross a stranger picket line as placing the employee in the same status as an economic striker who could be laid off until the completion of the strike. Instead, provided that the Redwing Carriers criteria were satisfied, the employer's remedy was limited to replacement.

Id.

160. NLRB v. Browning Ferris Indus., 700 F.2d 385, 388 (7th Cir. 1983).
161. Id. at 389.
quences than the Board's application. The Board's replacement/discharge dichotomy has resulted in a flat rule: Employees engaged in protected activity may be replaced (upon proof of sufficient business necessity), but may not be discharged. Judge Posner's approach, on the other hand, still seemed to leave the door open to discharge as a valid employer response—at least if permanent replacement would not satisfy what Judge Posner might consider reasonable business needs. This is the inference one draws from Judge Posner's contention that "[i]f an employer can protect the reasonable needs of his business by permanently replacing a worker he has no right to go further and discharge him." Judge Posner apparently preferred a case-by-case weighing of costs and benefits to the Board's flat rule prohibiting discharge because, at least hypothetically it seemed, he could have envisioned a situation where business necessity could justify discharge. He did not discuss the matter further, however, because he held that the drivers in *Browning-Ferris* had not been discharged, but only permanently replaced. For Judge Posner, the fact that the employer told the refusing employees that they were being "permanently replaced" was determinative.

The Board, on the other hand, has never considered the language that the employer used in terminating an employee's services determinative of whether or not the employee has actually been discharged. In *Browning-Ferris*, the Board found the refusing employees to have been actually discharged, not permanently replaced, regardless of the "permanent replacement" language the employer used. The Board found that the employer spoke in terms of "permanent replacement" in order to cloak its true intention which was to not employ any drivers who would honor a picket line. Moreover, the Board empha-

162. See *supra* notes 157-59 and accompanying text.
163. 700 F.2d at 389.
164. *Id.*
165. *Id.* "[T]here is no basis for taking the company's statement that it was permanently replacing rather than discharging them other than at face value." *Id.*
166. In *Overnite IV*, for instance, the Board noted that when Freeman spoke to Bullock by telephone on October 5, and informed him that we [sic] would not enter the Ferenback plant, he also asked if this refusal would cause Bullock to "fire" him. Bullock replied that Freeman would have to be "replaced altogether." Apparently Bullock's use of the word "replaced" persuaded the Administrative Law Judge that Freeman's termination did not constitute a "discharge."
212 N.L.R.B. at 515-16. The Board refused to follow the administrative law judge, however, noting that "in distinguishing between 'replacement' and 'discharge,' substance rather than precise wording is important. We are satisfied after reviewing all of the record evidence that Freeman was discharged." *Id.* at 516 (citation omitted).
167. The administrative law judge specifically made this finding, which the Board adopted. See *Browning-Ferris*, 259 N.L.R.B. at 60, 67.
sized that one of the practical accouterments of permanent replacement is the employee's right to notice of job openings, and Browning-Ferris gave no notice to the discharged drivers.\textsuperscript{168} Although Judge Posner himself had unqualifiedly recognized a permanently replaced employee's right to notice,\textsuperscript{169} he then proceeded to qualify this "right," making it contingent upon the workers' unconditional promise not only to return to work,\textsuperscript{170} but also to cross picket lines whenever they should arise at Browning-Ferris' customers.\textsuperscript{171} The latter is clearly an absolute denial of a protected right.\textsuperscript{172}

The Board was therefore correct that in substance, if not in form,

\textsuperscript{168} Id. at 67.
\textsuperscript{169} See supra note 161 and accompanying text.
\textsuperscript{170} The Board found that because the employees were unlawfully discharged, not permanently replaced, they had no duty to apply unconditionally for reinstatement. 259 N.L.R.B. at 60 (citing Abilities & Goodwill, Inc., 241 N.L.R.B. 27 (1979)).
\textsuperscript{171} This is the implication of Judge Posner's assertion that

[...]he duty to notify of a job opening arises only when the worker has made it clear that he will return to work "unconditionally"—that is, without insisting on the condition that led to his replacement—as soon as a suitable opening appears. See, e.g., Indiana Ready Mix Corp., 141 N.L.R.B. 651 (1963). Here that would mean agreeing to cross picket lines at premises of BFI's customers if necessary to enable BFI to fill those customers' orders.

700 F.2d at 389 (emphasis added). In explaining Andrus's and Ciukaj's termination to the other employees, their manager similarly stressed the need to "servic[e] our customers," and never once mentioned the need to complete the International Harvester assignment. Browning-Ferris, 259 N.L.R.B. at 67 (administrative law judge's findings). The administrative law judge's explanation of the significance of the reference to "customers" illuminates the meaning of Judge Posner's statement as well: "What this statement means to me, and, I am sure, to the other drivers is that Respondent did not want to employ any drivers who would honor a picket line because the mere act of honoring a picket line interfered with its business operations affecting all of its customers." Id.

\textsuperscript{172} The analogue of Judge Posner's rule in the economic strike context would be for an employer to offer reemployment to replaced striking employees only if they enter into a permanent no-strike agreement with the employer. This would clearly be a perversion of the "replacement" doctrine as it has arisen in the economic strike context. Strikers may be replaced only because an employer has a need to continue operations during a strike. The Court in Mackay stated, "Nor was it an unfair labor practice to replace the striking employees with others in an effort to carry on business... [The employer has not] lost the right to protect and continue his business by supplying places left vacant by strikers." Mackay, 304 U.S. at 345 (emphasis added). Replaced strikers, however, still retain their status as employees. See id. Permanent replacement has never been intended as a weapon the employer may use to weed out future strikers.

Judge Posner, it seems, misinterpreted the Board's Indiana Ready Mix decision in applying it to the stranger picket line context. See supra note 171. In Indiana Ready Mix Corp., a case involving economic strikers, the employer told the union that it needed a 60- or 90-day no-strike guarantee to restart its business. 141 N.L.R.B. 651, 652 (1963). The union counteroffered a 30-day no-strike period during which there would be negotiations. If no agreement were reached at the end of this period, the union reserved its right to strike again. Id. Under these circumstances, the Board construed the union's offer to return to work as only an "offer of a 30-day respite in the strike," not an unconditional application for reinstatement. Id. The Board in Indiana Ready Mix did not say that to satisfy the "unconditional application
the drivers in *Browning-Ferris* were discharged not "replaced." They lost their seniority and their jobs as well as any right to future reemployment because of a refusal to cross a picket line. There is no sense in which they were still "employees" of Browning-Ferris. Judge Posner's approach granted the refusing employees only hypothetical rights. In reality they were left with nothing.

**C. Transaction Costs in the Browning-Ferris Context?**

Essentially, Judge Posner used the replacement/discharge fiction to subtly shift what he previously had recognized as a section 7 entitlement away from the employee. Even had Posner upheld a true "permanent replacement" rather than a de facto discharge, however, the result would still have been the same: The employee would have lost his section 7 entitlement. The theory of wealth maximization suggests that judicial intervention is warranted only if there are high transaction costs preventing private ordering. Only if transaction costs are high might entitlement shifting after cost-benefit balancing be appropriate. If transaction costs are low, however, neither judicial entitlement balancing nor shifting is ever appropriate. An evaluation of Judge Posner's result in *Browning-Ferris* against the theory of wealth maximization, therefore, requires a determination as to whether there were any high transaction costs justifying judicial intervention after the initial recognition of a protected right.

Judge Posner has defined transaction costs as "the costs involved in ordering economic activity through voluntary exchange." Essentially, what this means is that transaction costs are factors which impede an efficient market allocation of resources, or prevent market transactions from occurring altogether. For instance, the ideal situation of "no transaction costs" has been described "broadly as involving both perfect knowledge [i.e., no impediments to making individual preferences known] and the absence of any impediments or costs of negotiating." Posner and the Chicago School of Economists have identified particular transaction costs which justify judicial intervention or cost balancing. None of them appear to have been present in the *Browning-Ferris* context.

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for reinstatement test," the union must enter a permanent no-strike agreement. This would be an absolute denial of a protected right to engage in section 7 activity.

173. See *Browning-Ferris*, 259 N.L.R.B. at 60, 67.
176. See infra notes 177-93 and accompanying text.
1. NO BILATERAL MONOPOLY

The situation which economists have termed bilateral monopoly exists where two parties become so specialized to each other that they can only exchange their goods or services with one another. Because the parties are essentially dependent on each other, they try to take advantage of one another's dependency by exerting "predatory pressure" to exact exorbitant prices for their goods or services. These exorbitant prices do not represent the respective true valuations of the goods, services, or rights in issue. Posner gives as a classic example of bilateral monopoly, the situation where a railroad or pipeline company begins to build its line. After a while, the company has expended significant time and resources on building the line and would find it extremely costly to abandon the effort. Homeowners living in the path of the line know that the company will eventually need their land. Once people know how high the costs are of abandoning the project, "people owning land in the path of the advancing line will be tempted to hold out for a very high price—a price in excess of the opportunity cost of the land."177 In such a situation where the two parties exert monopoly power on one another, and each holds out for his minimum or maximum price, wealth maximization cannot result through private exchange because the parties will never reach an agreement. "[T]he transaction costs incurred by the parties in an effort by each to engross as much of the profit as possible are a social waste."178 Where there is a bilateral monopoly, therefore, the economist would favor judicial intervention to set entitlements so as to bring about wealth maximization. One cannot depend on private bargaining between the parties to achieve this result when a bilateral monopoly exists.

No bilateral monopoly existed, however, in Browning-Ferris where the employer and the refusing drivers were not specialized to each other. Although the driver at Browning-Ferris could only bargain with his employer if he wished to sell his entitlement not to cross a particular picket line, Browning-Ferris was not locked into bargaining with that particular employee. The drivers at Browning-Ferris were unskilled workers. Where the work is not specialized in nature, the employer has the option of substituting other employees to do the refused work. While the refusing employee might demand an exorbitant price to give up his right not to cross, there will most likely exist substitute employees who will sell their right not to cross for nothing, or at least very cheaply. For a bilateral monopoly to exist, both the

177. R. POSNER, ECONOMIC ANALYSIS, supra note 18, at 49.
178. Id. at 55.
employer and the employee must be locked into dealing with one another—the employee’s only potential customer is the employer and the employer’s only potential customer is the employee. As Browning-Ferris could have bargained with other employees\(^\text{179}\) to cross the picket line at International Harvester, no bilateral monopoly existed. Assuming there were no other transaction costs, the courts should not have been called upon to “objectively” value the right.

2. **NO MULTIPLE PARTY OR FREERIDER PROBLEM**

Posner has recognized that “[t]he costs of transacting are highest where elements of bilateral monopoly coincide with a large number of parties to the transaction.”\(^\text{180}\) Not only is the holdout effect magnified where there are a number of parties to the transaction,\(^\text{181}\) but there is an added incentive for additional parties to “free ride.”\(^\text{182}\) For instance, if a factory is given a right to pollute and the surrounding homeowners must gather together to buy the right from the factory, Posner explains that each homeowner will think: “‘If I refuse to contribute my fair share of the purchase price, others, who care more deeply about pollution than I do will make up the difference. The factory will be induced to stop polluting. I will benefit along with the others, but at zero cost.’”\(^\text{183}\) The greater the number of homeowners there are, the greater the cost of overcoming this “footdragging” effect.\(^\text{184}\)

Posner argues that where no bilateral monopoly exists and there are only a few parties to the transaction, a value-maximizing exchange is possible.\(^\text{185}\) In such a case, the assignment of an absolute right to one party should nevertheless result in wealth maximization. It is only in the presence of high transaction costs (such as the multitude of potential “free riders”), that the assignment of an absolute right to one party may result in inefficiency. The high costs involved will prohibit a value-maximizing transaction.

There was no free rider problem in the *Browning-Ferris* context. Nothing prevented the employer from negotiating with each individ-

\(^{179}\) Browning-Ferris could have used supervisors to drive trucks, as it had in the past. See *Browning-Ferris*, 700 F.2d at 389.


\(^{181}\) Id.

\(^{182}\) Id.

\(^{183}\) Id.

\(^{184}\) Id.

\(^{185}\) Id. at 153. There may, however, be other transaction costs in a two-party setting, however, such as when a manufacturer of a consumer product and a consumer are negotiating over safety, and the probability of an accident’s occurrence is extremely low. See infra note 193 and accompanying text.
ual employee over his right to refuse, as the situation arose. Each
driver individually possessed the right to refuse to cross. He did not
have to negotiate with other drivers in order to sell that right to the
employer or for that sale to be effective. Thus, there were neither
"holdouts" nor "freeriders" preventing Browning-Ferris from
purchasing the employees' rights to cross.

3. NO INFORMATIONAL BARRIERS TO EXCHANGE

It is often too costly for one or both of the parties to a transaction
to learn the information that is necessary for each to value the entitle-
ment appropriately. For instance, Posner has suggested that "poten-
tial workplace hazards are often so subtle that the costs of
information about them to the workers would be prohibitive." In
such a case, even if a two-party negotiation were possible, a value-
maximizing transaction could not feasibly result.

Posner has recognized, however, that this same sort of informa-
tional barrier which might "defeat transactions over workplace
safety" does not exist where an employer and employee bargain over
whether a "good cause" provision should be included in the employ-
ment contract. One would not think them to be present either
where an employer and employee "transact" over the right to refuse
to cross a stranger picket line—at least where, as in Browning-Ferris,
realistic negotiation time exists. The employer will most likely be
able to obtain from his customer, information regarding the probable
length of time a picket line will persist. The employer knows the ease
with which another employee can be found to do the refused job. He
can therefore rationally value the cost to himself of the employee's not
crossing, while the employee can value the cost to himself of cross-
ing. There is no lack of information preventing both the employer
and the employee from valuing the entitlement for themselves and
then exchanging their views regarding value.

186. When the February 21 International Harvester order came in on February 19,
management interviewed each driver to see who would cross the picket line to complete the
scheduled work order. Browning-Ferris, 259 N.L.R.B. at 63.
187. Compare Posner's pollution hypothetical—if just one homeowner refused to sell his
entitlement, the result is that the business cannot pollute. See R. Posner, Economic
Analysis, supra note 18, at 55.
188. Id. at 235.
189. Id. at 307.
190. See supra note 186.
191. How the employee values this cost will most likely depend upon the strength of the
individual's commitment to principle or feelings of solidarity with the picketing employees.
See generally M. Fishel, supra note 65.
4. NO PROBLEM IDENTIFYING PUTATIVE PARTIES TO THE TRANSACTION

The economic analysts of law have cogently argued that in the field of tort law, judicial intervention in the form of liability rules is value-maximizing. Where accidents will occur, pre-accident negotiations between the ultimate plaintiff and defendant are impossible. Post-accident determinations of value by the courts are therefore necessary.\(^{192}\)

The case of a car accident resulting in extreme bodily injury is illustrative. The negligent driver cannot identify in advance the driver he will ultimately injure. Accordingly, he cannot solicit in advance this future plaintiff's true valuation of his right to be free from bodily injury. Nor can the injured driver identify in advance who will injure him so that he can bargain with him not to do so. The products liability case is similar. Even if the person who will ultimately be injured by a defective product can be identified in advance (for example, through customer or purchaser lists), "the very low possibility of an accident makes the gains from transacting over safety very low, so that the cost of transacting may exceed the benefits—which is all that matters [to prevent a transaction from occurring]. The allocation of resources to safety is therefore determined by the courts . . ."\(^{193}\)

In the stranger picket line context, there is no problem of identifying the person who must be induced not to exercise his right to honor a stranger picket line or the person who must induce him. When a stranger picket line arises and, as in Browning-Ferris, the employer has the opportunity to canvas his drivers in advance to determine who will or will not cross, the parties to the negotiation are easily identifiable. The pre-accident situation with its concomitant valuation problems is distinguishable.

5. NO JUSTIFICATION FOR JUDICIAL INTERVENTION OR ENTITLEMENT SHIFTING IN Browning-Ferris

The various types of transaction costs that economists have traditionally identified in legal contexts were thus absent at Browning-Ferris Industries. Browning-Ferris instead presented a classic low transaction cost setting. Posner has distinguished between low and high transaction costs settings by asserting that

\[\text{[i]n the former, the law should require the parties to transact in the}\]

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192. See, e.g., Calabresi & Melamed, supra note 175, at 1108-09.
193. R. POSNER, ECONOMIC ANALYSIS, supra note 18, at 153-54.
market; it can do this by making the present owner's property right [or entitlement] absolute (or nearly so), so that anyone who thinks the property is worth more has to negotiate with the owner. But in settings of high transaction costs people must be allowed to use the courts to shift resources to a more valuable use, because the market is by definition unable to perform this function in those settings.194

Under the optimum conditions presented in Browning-Ferris, therefore, the Coase Theorem would have worked. Each employee would have kept the entitlement if he valued it more. If the employer valued the entitlement more, he would have bought it. By refusing to cross even after employer threats, the employees showed how much they valued their rights. The employer showed no indication that he would have "bought" the employees' rights by trying to bribe the employees not to cross with other benefits.

Thus, the effect of Judge Posner's entitlement-shifting in Browning-Ferris was to take income away from the employees. Had he decided Browning-Ferris according to the dictates of wealth maximization theory, the employees should have been forced to cross the picket line only if they were paid. Perhaps Judge Posner ignored the implications of wealth maximization analysis in his decision-making because of what he might have deemed to be its "adverse" distributional consequences—the shifting of income into the class of employees away from the class of employers. A mainstay of the economic analysis of law is, however, that distributional consequences do not affect wealth maximization. Distributional consequences should not dictate the result in a case if the judge wishes only to promote wealth maximization.195

194. Id. at 49-50.
195. For instance, writing from the bench in response to Professors Samuels and Mercuro's article, Judge Posner said:

Notice that nothing is said in [wealth maximization] analysis about how liability will affect the distribution of wealth. . . . Yet even if one believes that distributive considerations must enter into any ultimately acceptable standard of social choice, the courts that administer the liability system might be justified in refusing to allow such considerations to influence the determination of liability. Courts can do very little to affect the distribution of wealth in society, so it may be sensible for them to concentrate on what they can do, which is to establish rules that maximize the size of the economic pie, and let the problem of slicing it up be handled by the legislature with its much greater taxing and spending powers.

The suppression of distributional considerations is one reason why wealth maximization is not the same thing as utilitarianism.

D. Wealth Maximization: The Board's Factor-by-Factor Balancing Test and Its Result in Browning-Ferris

In Redwing Carriers, the Board explained that before an employee may be discharged, the employer must prove that it "acted [1] **only** to preserve the efficient operation of his business, and . . . [2] so it could immediately or within a short period thereafter replace [the refusing employees] with others willing to perform the scheduled work." In Redwing, the Board did not elaborate on what it meant by the requirement that the employer act "only to preserve efficient operation of his business." It seemed more concerned with satisfaction of the second prong of the "test"—i.e., that the "terminated" employee was actually replaced. Yet as the Board soon noted in Overnite I:

[1] It is the Board's view that if the protected right of the employees is to have any meaning at all, then the employer who would justify a discharge on the basis of an overriding employer interest must present more than a mere showing that someone else may have to do the work. That fact is inherent in every situation where employees fail to perform a portion of their assigned tasks by respecting a picket line. To accept it alone as conclusive proof that their services were terminated solely to preserve efficient operation of the employer's business would be to render illusory any finding that the employees engaged in protected concerted activity. It would leave the refusal to cross a picket line without any protection at all. Clearly, what is required is the balancing of two opposing rights, and it is only when the employer's business need to replace the employees is such as clearly to outweigh the employees' right to engage in protected activity that an invasion of the statu-

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196. The Board has recently reinterpreted Redwing to prohibit discharge, but to permit permanent replacement under the same showing of business necessity. See supra notes 156-59 and accompanying text.
198. The only factor that the Redwing Board mentioned in this regard was the lack of union animus. See id. at 1548; cf. infra note 202.
199. See 137 N.L.R.B. at 1548. Professor Haggard has said, that actual replacement "is arguably the most important of the various factors." Haggard, supra note 82, at 71. In Redwing and the other two cases where the Board upheld a discharge, the discharged employee had actually been replaced. See supra note 154. On the other hand, the Board has not upheld a discharge in several cases where the employer did not actually hire replacements. See, e.g., Swain & Morris Constr. Co., 168 N.L.R.B. 1064, 1065 (1967) (finding unlawful a discharge of refusing employees where the employer "had no other crew it could use to complete the job and could not hire new employees to perform the work because of an acute shortage of unemployed linemen in the area"). However, actual replacement is only a necessary condition for a legal discharge. It is not a sufficient one. See Haggard, supra note 82, at 73; see, e.g., infra note 201 and accompanying text.
In a case-by-case fashion from Overnite I onward, the Board slowly defined what it meant for the employer to have acted only to preserve efficient business operations—that is, when the need to replace the employees clearly outweighed the employee's right to engage in protected activity. In general, various commentators have distilled from among the Board's decisions, certain factors which weigh into the business necessity determination. Those that appear to be the most significant for this determination are: (1) the availability of other employees to perform the refused work; (2) whether the refused work was part of the refusing employee's regular daily routine; (3) the availability of other work for the refusing employee; and (4) the urgency of the refused work.

These factors occur in various configurations in each given case. It is the mix of factors, and not the necessary presence or absence of particular factors, which leads the Board to a determination of whether the employer has demonstrated the requisite business necessity for discharge, or since Torrington Construction, for permanent replacement. Although the Board's balancing of factors is a factual determination within its particular area of expertise, and is thus deserving of considerable deference, the courts of appeals reviewing the Board's orders have not been uniformly deferential. Of the circuit courts that have decided stranger picket line cases, only three—the D.C., Fifth, and Ninth Circuits—appear to have ever adopted or approved of the Board's business necessity test. On the other hand,
at the time Judge Posner was writing, neither the First, Second, Fourth, nor Eighth circuits had ever adopted any semblance of the

1970) (review of Smith Transit); Truck Drivers & Helpers Local No. 728 v. NLRB, 364 F.2d 682 (D.C. Cir. 1966) (review of Overnite I); Teamsters, Chauffeurs, & Helpers Local No. 79 v. NLRB, 325 F.2d 1011 (D.C. Cir. 1963) (review of Redwing Carriers). The court, however, has said little on the matter of business necessity in enforcing these rulings. It has stated only that substantial evidence on the record supported the Board’s conclusion that the discharge of the refusing employee was not done to continue efficient business operations. 429 F.2d at 205; 364 F.2d at 684; 325 F.2d at 1012.

The Fifth and Ninth Circuits, on the other hand, have gone through the factor balancing process themselves, and upon this basis have either enforced or denied enforcement to the Board’s orders. See NLRB v. Southern Cal. Edison Co., 646 F.2d 1352, 1368-69 (9th Cir. 1981) (denying enforcement to the Board’s order); NLRB v. Swain & Morris Constr. Co., 431 F.2d 861, 863 (9th Cir. 1970) (enforcing the Board’s order); NLRB v. Alamo Express, Inc., 430 F.2d 1032, 1036 (5th Cir. 1970) (enforcing the Board’s order).

In Alamo Express, the Fifth Circuit found the discharges of the refusing employees to have been unlawful for three reasons. 430 F.2d at 1036. The employer did not actually replace the refusers with workers willing to cross a picket line, other available employees could easily have done the refused work, and there was demonstrated union animus. Id. In Swain, the Ninth Circuit agreed with the Board’s finding that the discharge could have served no legitimate business reason. 431 F.2d at 863. The court stated that the employer intended only to “make an example out of the employees involved.” Id. The court in Swain considered the following factors important in coming to this conclusion. First, the employer knew that the discharged crew could not have been immediately replaced with workers who would be willing to cross the picket line. Id. The inference is that the discharge was not “for the purpose of” replacing the refusing employees so that the refused work could be done, and thus it violated the Redwing doctrine. The Board also deemed important the delay with which the work was actually completed. Id. This evinced the lack of urgency of the work and that there was other work available that would not have forced the refusing employees to cross the picket line. Id. The Swain court understood the employee to have a duty to “mitigate his damages” in order to protect his rights: “Other assignments were available which would not have required the workers to cross picket lines and would not put the employer in the position of keeping men on the payroll for whom there was no work.” Id.

Despite this broad endorsement of the Board’s business necessity test in Swain, the Ninth Circuit, in a second stranger picket line case, overturned the Board’s finding of no business necessity in that context and allowed replacement of the refusing employees. See NLRB v. Southern Cal. Edison Co., 646 F.2d 1352 (9th Cir. 1981). In Edison, the court upheld the replacement of the refusing employee after finding that there was a certain degree of urgency to get the job done. It stated that “[t]here was evidence that the tape [the employee] was assigned to replace would shortly expire and that [the employer] had an important interest in the repair of the polyphase meter.” Id. at 1369. Yet the court qualified even this, its only finding on the issue of business necessity. It recognized that “the situation may not yet have become an emergency.” Id. The court apparently placed little weight on the availability of other employees, the availability of other work for the refusing employee, and the nonroutine nature of the task assigned—the factors that the Board had considered demonstrated a lack of business necessity. See Southern Cal. Edison Co., 243 N.L.R.B. 372, 373 (1979). In this respect, the most current approach of the Ninth Circuit is a rejection of the Board’s business necessity test. For the Ninth Circuit, business necessity has become little more than a presumption that business necessity will arise in the future. The court stated, “Although the situation may not yet have become an emergency, SCE was allowed to replace [the refusing employee] to maintain reasonable, normal business operations.” Edison, 646 F.2d at 1369. It is clear from this language, that the Edison court allowed replacement of refusing employees as a pre-emptive strike rather than as a response to proven business necessity.
Board's business necessity test.\textsuperscript{205}

Whether or not this deference or lack of deference is wealth maximizing is, of course, a derivative inquiry into the wealth maximizing properties of the Board's rules. The Board's rules, which more generously accord protection, might not be expected to promote wealth maximization as Posner and the economic analysts of law define it. Interestingly enough, however, on close examination they do turn out to promote wealth maximization. In fact, the Board's business necessity balancing test recreates the economist's transaction cost analysis! The same mix of factors which indicates that business necessity is not present also indicates that transaction costs are low. Thus, where the employer cannot prove business necessity, there will be no justifica-

\textsuperscript{205} Both the Second Circuit in N.L.R.B. v. Rockaway News Supply Co., 197 F.2d 111, 115 (2d Cir. 1952), and the Eighth Circuit in NLRB v. L.G. Everist, 334 F.2d 312, 316 (8th Cir. 1964), gave the employer an absolute right of discharge without having to prove business necessity. These courts' approaches are the most restrictive possible because they deny that the discharged employees have even the rights of economic strikers. See, e.g., Everist, 334 F.2d at 316 (citing NLRB v. Rockaway News, 345 U.S. 75 (1953)) ("The Board would equate such 'discharged' employees with economic strikers and hold that they had the right to return to work at any time up until they had been permanently replaced by respondent. We find no support for the Board's conclusion.").

The Second Circuit, however, appears to have recently rejected its harsh \textit{Rockaway} approach in favor of the kind of balancing approach that Judge Posner advocated. See Business Servs. by Manpower, Inc. v. NLRB, 784 F.2d 442, 452-54 (2d Cir. 1986). While recognizing the validity of the Board's balancing factors, the court in \textit{Business Services} concluded that the Board had balanced incorrectly because it did not take into account the different needs of an employer in a temporary employment agency. \textit{Id.} at 454. The Second Circuit, however, did not reject its \textit{Rockaway} approach altogether because it refused to adopt the Board's economic striker analogy—at least as applied to the somewhat unique factual situation presented in that case. \textit{See id.} at 454.

The respective approaches of the Fourth and First Circuits are somewhat different from those of the Second and Eighth, but they nevertheless agree that in certain cases the employer may discharge refusing employees without actual proof of the Board's business necessity factors. The Fourth Circuit, in G & P Trucking v. NLRB, for instance, allowed an employer a right of discharge because the refusals in that case were motivated by fear. 92 L.R.R.M. (BNA) 3653, 3656 (4th Cir. 1976). The Fourth Circuit does not protect refusals motivated by fear. See NLRB v. Union Carbide Corp., 440 F.2d 54, 56 (4th Cir. 1970).

The First Circuit in NLRB v. William S. Carroll, Inc., considered the refusing conduct unprotected for different reasons. 578 F.2d 1 (1st Cir. 1978). However, it neither gave the employer an absolute right of discharge, nor required the employer to prove his business necessity according to the Board's test. Instead, the court decided that the standard of proof was similar to that in the section 8(a)(3) area. See, e.g., NLRB v. Rich's of Plymouth, Inc., 578 F.2d 880, 886 (1st Cir. 1978) ("[The employer] having offered a legitimate business justification for its conduct, the burden shifted to the Board to establish . . . that the decision would not have been made 'but for' the employee's union activity.") The \textit{Carroll} court asserted that the employer needed only to demonstrate a legitimate business reason for the dismissal, and then the burden would shift to the Board to establish that the primary motivation was to penalize the employee for his sympathetic activity. \textit{William S. Carroll}, 578 F.2d at 4. Upon finding that the employee was fired for his irresponsible behavior, therefore, the court held the discharge to be valid. \textit{Id.} at 5.
tion for judicial entitlement shifting. Accordingly, in such situations, the Board gives the employee an absolute right: he may not be replaced. On the other hand, where the mix of factors indicates that business necessity is present, transaction costs will be high. Judicial cost balancing will therefore be justified. Proven business necessity in such situations leads the Board to shift the entitlement to the employer.

The first three of the Board's factors addressed below, when combined with one another, relate to the existence of a bilateral monopoly situation between employer and refusing employee. Unavailability of other employees, routineness of refused work, and unavailability of other work lock the employer and employee into dealing with one another. The last factor—urgency of refused work—although connected to the bilateral monopoly concern, also relates to the question of whether the necessary advance information is possible for a real face-to-face "pre-accident" negotiation.

1. UNAVAILABILITY OF OTHER EMPLOYEES

The Board has found the actual use of existing employees to undermine an employer's argument for business necessity. Even if an actual employee was not, but could have been, used to cover the job, the Board has determined there to be no business necessity. The fact that the employer asked another employee to do the job has been merely a "slight inconvenience" in the Board's view, incapable

206. See, e.g., Southern Cal. Edison, 243 N.L.R.B. 372, 373 (1979) (no business justification for replacement where business "had and used a replacement for [refusing employee] at no obvious inconvenience to it"). But see Thurston Motor Lines, 166 N.L.R.B. 862, 866 (1967) (finding that it was of no consequence that the employer was able to make the refusing employee's delivery by a makeshift arrangement because a common carrier need not be prepared to institute emergency procedures whenever interruptions such as picket line observance occur); Redwing Carriers, Inc., 137 N.L.R.B. 1545, 1548 (1962) (upholding discharge of refusing employees permanently assigned to a picketed customer even though the employer transferred other men from their normal jobs to make the scheduled deliveries in addition to hiring new men as replacements).

207. See, e.g., Overnite Transp. Co., 212 N.L.R.B. 515 (1974) (Overnite IV). In Overnite IV, the Board noted:

[The refusing employee] requested that the assignment be offered to another driver. Although there were 8 or 10 drivers available at the terminal, [the employer] declined to change the assignment or to ask the other drivers if they would take it. In fact, had [the employer] acceded to [the refusing employee's] request there is reason to believe that there would have been little difficulty in finding a driver to take [his] place.

Id. (footnote omitted).

208. See, e.g., Braswell Motor Freight Line, 189 N.L.R.B. 503, 506 (1971) ("At most [the employee's] refusal to pick up the trailer was a slight inconvenience to [the employer] as it could easily have asked one of its other drivers to take over the assignment, but chose not to.")
of tipping the balance against the protected employee right. The Board has even considered the use of supervisory personnel to do the refused work to be evidence supporting a finding of no business necessity.\textsuperscript{209}

Where anyone else can do the refused work, the employer has alternatives to dealing "only" with the refusing employee over the refused job. The refusing employee will not be able to exert holdout pressure on the employer. He will be forced to make known his true valuation of the right in a face-to-face negotiation. This is true especially when the refused work is not of a recurring nature,\textsuperscript{210} and there is other work available for the refuser to do.\textsuperscript{211}

2. REGULARITY OF REFUSED WORK

Where the Board has upheld a discharge upon a finding of business necessity, a significant factor has been that the refused work constituted a substantial part of a specific employee's permanent\textsuperscript{212} or regularly assigned\textsuperscript{213} work assignment. On the other hand, among the factors which have led the Board not to find business necessity has been the fact that none of the employees serviced regularly assigned customers or had regularly assigned routes, because in such cases, work assignments could easily be switched in the event of picket line

\begin{itemize}
  \item \textsuperscript{209} See, e.g., Smith Transit, Inc., 176 N.L.R.B. 1074, 1084 (1969) ("Wallace's trailer was in fact unloaded by Respondent's Irving supervisors and the Respondent was not dependent in this instance upon replacing him with other rank-and-file truckdrivers who might [have been] as unwilling to unload his trailer as Wallace was.").
  \item \textsuperscript{210} See infra notes 212-16 and accompanying text.
  \item \textsuperscript{211} See infra notes 218-20 and accompanying text.
  \item \textsuperscript{212} In Redwing Carriers, Inc., for instance, the refusing employees had been permanently assigned to the picketed customer. 137 N.L.R.B. 1545, 1546 (1962). The Board did not in that case, however, explicitly discuss the significance of this factor for its determination of business necessity. It was in a later case, \textit{Overnite I}, that the Board described its decision in \textit{Redwing} as upholding as lawful the termination of employees who had been \textit{permanently} assigned to certain projects of the employer's customer and who refused to cross a picket line established at the customer's premises. After observing that it was necessary for the employer to reassign other employees from their normal jobs and also hire new men to do the work, the Board found that the employer's action was taken entirely for the purpose of continuing business operations. Overnite Transp. Co., 154 N.L.R.B. 1271, 1274-75 (1965) (\textit{Overnite I}), enforced in part sub nom. Truck Drivers Local 728 v. NLRB, 364 F.2d 682 (D.C. Cir. 1966).
  \item \textsuperscript{213} See, e.g., Thurston Motor Lines, 166 N.L.R.B. 862, 866 (1967) (approving the trial examiner's finding that employer's interest in maintaining his efficient business operations outweighed employee Jackson's refusal to do a part of his regularly assigned work). Although the picketed business was not one of Thurston's major customers, it lay within Jackson's regularly assigned route. \textit{Id.} at 862-63, 866. The Board apparently believed that to reassign regular routes or to assign another employee to do the job at the picketed employer in addition to his own regular duties would be too great an inconvenience for the employer.
\end{itemize}
observance. Although on one occasion the Board has found the frequency of assignments of all employees to a major picketed customer to provide the requisite business necessity for discharge, in a case involving the same company soon thereafter, the Board did not consider this to be as significant for the business necessity determination as it did the irregular nature of the employee's work.

The relationship between the regularity of the refused work and transaction costs should be evident. Where the refusing employee is permanently assigned to the picketed customer, the employer would seem to be locked into dealing with the refusing employee over this job, particularly where there are no other available employees to exchange permanent assignments with the refuser. The regularity of the refused work would not seem to create a situation of bilateral monopoly by itself; it is the combination of this factor with the others which makes a value-maximizing exchange between employer and employee impossible.

3. UNAVAILABILITY OF OTHER WORK

The Board has also considered the amount of an employee's work assignment which he refuses to do relevant to a determination of whether a business justification exists for his discharge. Where the employee has actually performed all of his other jobs or assignments except that at the picketed customer, the Board has not found there to

214. See, e.g., Browning-Ferris Indus., 259 N.L.R.B. 60, 67 (1980) (no business necessity for replacing drivers who were not assigned to regular routes when the employer generally accommodated their wishes prior to making the schedule); Overnite I, 154 N.L.R.B. at 1275 (no business justification for discharging pickup-and-delivery men when they are not regularly assigned to routes but are instead continually assigned by dispatch in the course of a workday).

215. Overnite Transp. Co., 209 N.L.R.B. 691 (1974) (Overnite III). In Overnite III, the Board upheld a discharge of an employee who was not regularly assigned to the picketed customer, although the work was part of his "regular duties." Id. at 692. Every employee was frequently assigned runs to the customer and each run was quite time-consuming. Id. The Board distinguished this situation from that of a "one-shot operation." Id.; cf. Braswell Motor Freight Line, 189 N.L.R.B. 503, 506 (1971) (no overriding employer interest in efficiency where the refused work is "a single isolated, nonrepetitive event in the numerous pickups and deliveries [the employer's] three drivers perform daily.").

216. Overnite Transp. Co., 212 N.L.R.B. 515 (1974) (Overnite IV). In Overnite IV, the Board approved the trial examiner's finding that the picketed customer was a substantial customer and that the pickups and deliveries from the picketed plant were a substantial portion of the work daily assigned to the workers. Id. at 523. This finding, however, did not convince the Board that it should affirm the trial examiner's conclusion that the discharge was lawful. Id. at 515.

217. See Overnite III, 209 N.L.R.B. at 692 (finding the requisite business necessity for employee discharge where his refused duties were of a regular and recurring nature, there were no other employees available to perform the refused work, and no other work available for the refusing employee to do).
be business necessity for his discharge.\textsuperscript{218} The Board, however, has not required that the employee actually do his other tasks. Instead, it has recognized that although the employee may have been willing, the employer may not have allowed him to do his other assignments and may have forced him to go home.\textsuperscript{219} Where, however, the Board has found uncontradicted the employer's "assertion that it had no other city driving work available" to assign to an employee who had refused a recurring, time-consuming assignment at a picketed customer, it has upheld the discharge for reasons of business necessity.\textsuperscript{220}

The latter situation, when combined with the unavailability of other employees,\textsuperscript{221} appears to create a bilateral monopoly because neither party then has adequate alternatives to dealing with one another. Where there are both other employees available to do the refusing driver's work and other work for the refusing driver to do, the employer is not locked into dealing with the refusing employee in order to service the picketed customer. Where there is no other work for the refusing employee to do, however, the employer has no costless alternatives such as switching employee work assignments. Unless he can convince the employee to cross, the employer will be forced to keep on the payroll an individual for whom there is no work, and the picketed customer will not be serviced.\textsuperscript{222} Realizing the

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  \item \textsuperscript{218} See, e.g., \textit{Overnite I}, 154 N.L.R.B. at 1274-75 (distinguishing the facts from \textit{Redwing} because the refusing employee continued to make other assigned stops after his confrontation with the picket line and did not return to the terminal until the end of the day).
  \item \textsuperscript{219} See, e.g., \textit{Southern Cal. Edison Co.}, 243 N.L.R.B. 372, 373 (1979) (finding that when the employee refused to cross the picket line, the employer told him there was no work for him and that he should leave for the day).
  \item \textsuperscript{220} See \textit{Overnite III}, 209 N.L.R.B. at 692.
  \item \textsuperscript{221} See id.
  \item \textsuperscript{222} This situation bears a resemblance to the partial work stoppage or slowdown situation. When employees engage in a partial work stoppage or general slow down, the Board refuses to accord the concerted activity any protection. See \textit{Elk Lumber Co.}, 91 N.L.R.B. 333, 338 (1950). By its very nature, such activity creates the kind of "business necessity" that would justify a harsh employer response in the stranger picket line context. When a partial strike occurs, employees refuse to work at full capacity and hope that their action will coerce the employer into granting increased wages or other benefits. Assuming other employees who are not involved in the partial strike are working at their own full capacity, they cannot do the extra amount of work that the partial strikers leave undone. There are no "available" employees to do the refused work, and the refusers wish to do less than their regular amount. By declaring slowdowns unprotected, the Board does not force the employer to keep on the payroll individuals who are not producing at full capacity.

  Judge Posner, in \textit{Browning-Ferris}, in fact recognized the distinguishability of the partial strike situation from that presented in the case he had before him. He explained, BFI presses on us cases holding that employers may prohibit union solicitation during working hours, and may prohibit slowdowns, and other work interruptions. But these cases involve greater potential for disruption of the employer's business than does a refusal to cross a picket line at a single
employer's dependency on him alone to get the job done, the employee (just like the individual living in the path of a half-built railroad line\textsuperscript{223}) will be encouraged to hold out for an exorbitant price to give up his right to cross. It is unlikely in such a situation that the two parties will reach agreement over the proper valuation of the right in question.

4. URGENCY OF REFUSED WORK

On several occasions the Board has implied that one factor relevant to its finding of no business necessity was the lack of urgency of the refused work.\textsuperscript{224} The Board has relied on a variety of surrounding circumstances, such as the fact that a particular job was being performed for free,\textsuperscript{225} or the employer's permitting refusal to cross on several prior occasions,\textsuperscript{226} to demonstrate that the immediate completion of a particular job was not a sufficient imperative to justify discharge. In these cases, the Board has found that it was the employer's desire to interfere with protected activity, not the desire to preserve efficient operations, which motivated the discharges.\textsuperscript{227}

Although the Board has been explicit as to what it considers to be a nonurgent work assignment,\textsuperscript{228} it has never actually defined what an urgent work assignment would be.\textsuperscript{229} One can nevertheless project that an urgent situation would exist where the employer has no advance information about a picket line on a distant customer's prem-

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\begin{itemize}
  \item 700 F.2d at 388 (citations omitted). Judge Posner's finding that business necessity existed in \textit{Browning-Ferris} seems somewhat inconsistent with this recognition of the fundamental distinction between the stranger picket line and slowdown situations.\textsuperscript{223}
  \item See supra note 177 and accompanying text.\textsuperscript{224}
  \item See, e.g., \textit{Swain & Morris Constr. Co.}, 168 N.L.R.B. 1064, 1065 (1967) (finding that a job at a nonpaying picketed customer was low priority where it could have been completed in 6-7 hours, and the company completed it approximately two weeks after the crew refused to cross); \textit{Overnite Transp. Co.}, 164 N.L.R.B. 72, 73-74 (1967) (\textit{Overnite II}) (finding that the employee's discharge was not necessary to complete an urgent job because the employee had been instructed to leave the cargo on the dock and go about his other duties).\textsuperscript{225}
  \item \textit{Swain}, 168 N.L.R.B. at 1065.\textsuperscript{226}
  \item \textit{See \textit{Overnite II}}, 164 N.L.R.B. at 73.\textsuperscript{227}
  \item See, e.g., \textit{Swain}, 168 N.L.R.B. at 1065 ("The crew's refusal to cross the picket line [rather than a desire to perform the refused work] emerges as the motivating cause for their discharges."); \textit{Overnite II}, 164 N.L.R.B. at 74 ("[T]he objective of [the district manager] was not to get the Ideal freight delivered but to enforce company policy not to respect a picket line under any circumstances.").\textsuperscript{228}
  \item See \textit{supra} notes 224-26 and accompanying text.\textsuperscript{229}
  \item Even in the cases where the Board has permitted the employer to discharge the refusing employee, it has not explicitly found the situation to be urgent, presumably because other factors created the requisite business necessity. See \textit{Overnite III}, 209 N.L.R.B. 691 (1974); \textit{Thurston Motor Lines}, 166 N.L.R.B. 862 (1967).
\end{itemize}
ises. Once the employee arrives on the distant customer's premises and refuses to cross, a bilateral monopoly is created. The employer will generally not be able to effectively substitute another employee for the refuser who is already a great distance away. To recall the employee and send another would waste both time and resources. The employer is locked into dealing with the refuser if he wishes to complete the job. The employee, however, at this point in time, will have an incentive to hide his true valuation of his right to refuse to cross, and to demand an exorbitant price to relinquish his right. A value-maximizing exchange will be impossible.

One should recognize, however, that had the employer known of the picket line before the employee started out, there could have been effective "pre-accident" negotiations between the employer and the scheduled driver over the right to refuse to cross. But for these informational barriers preventing transactions prior to encountering the picket line, another employee might have been substituted and the situation would not have turned into a bilateral monopoly.

5. REDUCTION OF TRANSACTION COSTS

Posner has argued that the common law functions to promote efficiency for two reasons. Through its tort rules, the common law produces the efficient allocation of resources where transaction costs are prohibitive. Through its contract rules, on the other hand, the common law makes it unnecessary for parties even in low transaction cost settings to have to transact around the law's allocation because it tries to "guess" correctly in advance where the parties would want to allocate a "burden" if some remote contingency should arise. The Board's rules on replacement in light of proven business necessity fulfill these dual efficiency-promoting functions of the common law in the following way: By granting the entitlement to the employee in situations of both low transaction costs and low business necessity, the Board leaves the right in the hands of the party who values it the most under the circumstances. Where business necessity is not present, the employer probably would not buy the right even if he could. On the other hand, by shifting the entitlement to the employer in situations of both high transaction costs and high business necessity, the Board gives the right to the party who would probably buy it if high

230. But see Smith Transit, Inc., 176 N.L.R.B. 1074, 1084 (1969) (finding there to be no business necessity even though the refusing employee had transported his load almost 200 miles and then refused to deposit it, because the employer had a terminal at that distant point, and supervisors from that terminal were able to unload the truck).

transaction costs did not prevent him from making a value-maximizing exchange.

6. PROTECTION AS WEALTH MAXIMIZATION IN Browning-Ferris

The above analysis should illuminate the wealth maximizing nature of the Board's result in Browning-Ferris. Browning-Ferris Industries, Inc. was engaged in the business of hauling chemical waste. On February 19, International Harvester put in an order that would have required six drivers to do a job on February 21. The job would have required Browning-Ferris to work at full capacity for this one job because it employed a total of only six drivers. Four of the employees had refused to cross the picket line at International Harvester on a previous job, and management personnel eventually did the job. On February 19, when the February 21 work order came in, management asked which employees would not cross for the February 21 job. Only employees Andrus and Ciukaj stated that they would not cross. Management immediately told them that they would be replaced with employees who would cross. On February 20, International Harvester reduced its order to require only two men. At this time no replacements had yet been hired.\(^2\)

The Board found that at the time Browning-Ferris actually replaced Andrus and Ciukaj (February 21 or 22)\(^3\) there were other employees available to do the refused work, and other work available for the refusing employees to do.\(^4\) The employees had no regular routes, but were assigned to jobs daily by schedule.\(^5\) Management frequently accommodated the employees' wishes in preparing the schedule.\(^6\) The Board found ultimately that the replacements actually hired were neither needed nor used to complete the International Harvester job.\(^7\) Besides the two February orders, International Harvester only requested Browning-Ferris's services one more time during the course of its strike. This job was done on March 18 and only two drivers were required. On the basis of these findings, the Board

\(^{232}\) Browning-Ferris, 259 N.L.R.B. at 67.
\(^{233}\) Id. at n.8. The administrative law judge found "that Respondent hired Tim Doogan and David Doogan to replace Andrus and Ciukaj on February 21 and 22, and neither replacement drove for Respondent until February 25 and 26."
\(^{234}\) 259 N.L.R.B. at 63.
\(^{235}\) Id. The Board found that "[t]he work schedule for February 21 indicate[d] that there were five jobs or trucks scheduled: Breuckman and Pavlowski were assigned to International Harvester, while Ward, Chandler, and Supervisor Simpson were dispatched to other local customers."
\(^{236}\) Id.
\(^{237}\) Id.
\(^{238}\) Id. at 67.
concluded that Browning-Ferris had not acted only to preserve efficient business operations.\textsuperscript{239} In other words, there would not have been great cost to Browning-Ferris from allowing the employees to honor the picket line.

It is unlikely that Browning-Ferris desired to purchase the employees’ right where the cost of allowing picket line observance was so slight. Even had Browning-Ferris desired to purchase the right, there would have been no barriers to a value-maximizing purchase and sale because the absence of the Board’s business necessity factors indicates an absence of high transaction costs.\textsuperscript{240} As no transactions over the right in question occurred at Browning-Ferris, the theory of wealth maximization would deduce that the right was efficiently placed with the employee in that context.\textsuperscript{241} The Board’s decision not to allow a shifting of the entitlement thus correctly left the right with those who valued it most.

E. Judge Posner’s Cost-Benefit Balancing—A Critique

According to the Coase Theorem and wealth maximization theory generally, judicial cost-benefit balancing is an ineffective means of assuring that resources (including rights) end up with those who value them most—that is, if transaction costs are low. Until now, this Comment has in fact argued that transaction costs were low in Browning-Ferris and thus Judge Posner’s resort to utilitarian cost-benefit balancing was completely unwarranted. Even had there been high transaction costs warranting judicial setting of entitlements in Browning-Ferris, however, it is apparent that Judge Posner’s cost-benefit balancing was skewed. It achieved a flawed valuation of the right in question and thus led Judge Posner to set the entitlement incorrectly.

\begin{footnotes}
\item[239] Id.
\item[240] See supra notes 206-29 and accompanying text.
\item[241] Posner’s discussion of employment at will illustrates this point by analogy. Posner has explained that the absence of negotiated “good cause” provisions in employment contracts indicates that job security is really not efficient. See R. Posner, Economic Analysis, supra note 18, at 306. He stated,

If the requirement were optimal it would have been negotiated voluntarily; there do not seem to be the same sort of information problems that might defeat transactions over workplace safety. If such a requirement is not negotiated voluntarily, presumably this is because the cost to the employer of showing good cause for getting rid of an incompetent employee is greater than the benefit to the worker of being thus insured against discharge.

Id. at 307 (citation omitted).
\end{footnotes}
1. FUTURE RATHER THAN PRESENT COSTS TO THE EMPLOYER

Judge Posner was silent concerning the Board's findings on each of the factors weighing into the business necessity calculus. It is therefore not likely that he disagreed with any of the Board's factual findings. Rather, Judge Posner's disagreement with the Board was more broadly based: He rejected the Board's use of the time of replacement as the "time frame" to assess business needs.242

Judge Posner's approach to "business necessity" in Browning-Ferris was most similar to that of the Ninth Circuit in Southern California Edison.243 He adopted a presumptive244 or "preemptive" approach to business necessity. Once again, however, he added his own special "twist." While he had previously used hypotheticals to accord protection, Judge Posner now used hypotheticals to take away its substance.

Judge Posner justified the permanent replacement of the refusers in Browning-Ferris on the basis of a hypothetical future business necessity. He rejected the Board's business necessity determination, on the basis of nothing more than a "reasonable anticipation" that Browning-Ferris would be receiving a six-truck order in the future which would not be canceled.245 Posner rationalized as follows:

Had BFI, while the strike was still on, received an order from International Harvester requiring only five trucks to fill, it would not have been able to fill the order; it had only four drivers who were willing to cross the picket line. Moreover, it could not be sure that all four would be available for work every day—and if one was sick, and International Harvester required four trucks, as it had a few days before, BFI would not be able to fill the order.246

This reasoning was fatally flawed. The "sick employee" argument was actually a red herring because even if all six drivers had promised to cross the picket line and one had been sick on February 21, the employer would most likely have fulfilled its obligations by using supervisors or temporary employees instead of permanently replacing the sick driver. Further, Browning-Ferris did not do

242. See infra notes 243-46 and accompanying text.
243. 646 F.2d 1352 (9th Cir. 1981); see supra note 204.
244. Apparently, Judge Posner imported not only the replacement/discharge dichotomy from the economic strike context, but its presumption of business necessity for replacement as well. See Note, supra note 148, at 974 ("Under the Mackay Radio doctrine, the Board and the courts presume business necessity whenever an employer replaces an economic striker. Consequently, the employer need not prove that he acted solely to preserve the efficient operation of its business. No such presumption exists, however, under the Redwing Carriers doctrine.").
245. Browning-Ferris, 700 F.2d at 389.
246. Id.
enough business with International Harvester to justify so drastic a preemptive measure. It is quite likely that more employees missed work for illness-related reasons during the two-month period of the strike than for picket line observance.  

2. OVERESTIMATION OF PRESENT COSTS  

Not only did Judge Posner inflate the employer's business necessity by focusing on hypothetical future costs, but he also overestimated the real cost to the employer of using supervisors to do the refusing employees' work.247 Because Posner maintains that someone "values" a good in an alternative use if he is willing to pay more to have it, and supervisory personnel are generally paid higher wages than "hourly workers," a "positive" economic analysis would conclude that employers must "value" their supervisors' labor more. Yet this theory is based on a "hypothetical" that Judge Posner should have rejected based upon the administrative law judge's factual findings included with the Board's opinion.248 Supervisors at Browning-Ferris generally worked at the job sites with the drivers, not back at the home base like most managers.249 Moreover, at the time of Andrus's and Ciukaj's refusals to cross the International Harvester picket line, supervisors and drivers at Browning-Ferris were paid the same hourly wage.250 Because Posner's micro-economic focus generally allows him to disregard macroeconomic concerns such as skills specialization and to assume "jelly-like factor mobility,"251 he should

247. Judge Posner asserted, "BFI could of course have used management personnel to drive the trucks, as it had done once before when the other drivers balked at crossing the picket line, but a company is not required to use its managers to do work that its hourly employees refuse to do for reasons that though honorable are not the company's fault." Id.  

248. See Browning-Ferris, 259 N.L.R.B. at 64-65. The author of this Comment recognizes that the facts necessary to this analysis were buried in the administrative law judge's findings concerning one employee's supervisory status—an issue the Board resolved and not technically before Judge Posner on review. See infra notes 249-50 and accompanying text.  

249. 259 N.L.R.B. at 62 ("Respondent [hauls waste] at customer locations or plants which are located throughout many states. Usually each job requires several laborers and a supervisor.").  

250. Id. at 65-66.  

251. See Kelman, supra note 18, at 276 (criticizing the legal economists for "wish[ing] away the macroeconomy"). For the "legal economists," Professor Kelman explains,

- there is no problem of capacity underutilization . . . . Second, absolute jelly-like factor mobility . . . either is assumed, or the problems created by specialization of factor inputs and price rigidities are ignored. Third, investment decisions and paths are unproblematic; because little attention is paid to profit expectations or liquidity preference, entrepreneurs inevitably and instantaneously arrive at the cheapest potential production cost technique . . . . Fourth, there is little discussion of variations in labor productivity, of the political and cultural conditions in which workers are either more productive, in the sense that they
not have considered the substitution of "equally priced factors of production" for one another, to have imposed any substantial costs on Browning-Ferris. Resources would not have been relegated to lesser valued uses, even temporarily.252

The cost-benefit logic in Browning-Ferris is open to yet another criticism which stems from Judge Posner's persistent resort to hypotheticals.253 In Browning-Ferris, Judge Posner assumed that only "permanent replacements" could have provided the necessary "flexibility in coping with fluctuations in a valued customer's demands."254 He stated conclusively, without proof, that it is difficult to hire temporary replacements to be strikebreakers.255 Yet some commentators have attacked the factual premise of Mackay that an offer of permanency is necessary to induce replacements to come to work.256 Criticizing the presumptive approach of Mackay, which Posner adopted in Browning-Ferris, they have challenged employers to prove that they could not hire temporary replacements in order to justify claimed "costs" on the enterprise. Especially where, as in Browning-Ferris, the replaced job requires unskilled labor, temporary replacement may be a viable option.257 Indeed, using temporary replacements might have long-term hidden advantages for the employer.258

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produce more goods with the same psychic input, or exploitable, in the sense that they produce more as a result of increases in uncompensated input. Id.

252. Nor would Browning-Ferris have been forced to keep individuals on the payroll for whom there was no work. Cf. NLRB v. Swain & Morris Constr. Co., 431 F.2d 861, 863 (9th Cir. 1970) (deeming this factor significant in finding no business necessity).

253. Commentators have in fact frequently criticized Judge Posner's jurisprudence as founded on unsupported empirical assumptions that shield his legal conclusions from attack. See Cohen, supra note 19, at 1156-58.

254. 700 F.2d at 389.

255. Id. at 388.


257. See, e.g., Gillespie, The Mackay Doctrine and the Myth of Business Necessity, 50 Tex. L. Rev. 782, 791 (1972). Because "[a] highly skilled work force is the most difficult to replace with short-term workers," an unskilled work force is likely to be more easily replaceable with temporary replacements. Id. The unemployment rate will also likely affect the ease with which temporary workers can be hired.

258. Although the purpose of this Comment is to characterize Judge Posner's resolution of the instant case as inconsistent with the dictates of his own theory, it is worth mentioning that a different notion of wealth maximization, more broadly defined than Posner's, could demonstrate that the termination of the refusers' jobs and the hiring of replacements in Browning-Ferris was actually a wealth minimizing interference with protected activity. A more broadly defined notion of wealth maximization would reject Posner's "transactional" focus—that is, his focus on immediate, rather than long-term effects. A conclusion the trial examiner made in Braswell Motor, illustrates the wealth-defeating effect of Judge Posner's "transactional focus" and general disregard for the "macro" picture in the stranger picket line context: "Judging from the high rate of employee turnover Respondent has had in the times
3. NO CONSIDERATION OF THE BENEFIT TO THE EMPLOYEE

Finally, and most importantly, Judge Posner must be criticized in his "balancing" for considering only the costs to the employer—never the benefit to the employee. In the whole portion of the opinion dealing with the supposed flexible "weighing" of costs and benefits, Posner never once considered the value of the entitlement to Andrus and Ciukaj, the real employees in question. He was only concerned with the value of the right to hypothetical employees acting from hypothetical motives. If the employees' real interests, backed up by their willingness to pay with their jobs, had been weighed against what were only hypothetical employer interests, not backed up by willingness to purchase the right, it is clear that the employee should have ended up with the entitlement. In his foray into the hypothetical realm, Judge Posner apparently forgot that value is only determined by demonstrated willingness to pay. Browning-Ferris had not offered nor would have offered to pay these employees anything to give up their right. Judge Posner thus had no justification for shifting the entitlement in Browning-Ferris.

V. CONCLUSION

This Comment commenced with a bit of legal "mythology." At one end of the labor law spectrum, the labor law "liberals" advocated generous protection to all forms of employee protest or sympathetic here pertinent, it appears that the overall efficiency of Respondent's operations was more adversely affected by [the employee's] discharge as a relatively long term (1-year) employee than by his refusal to pick [up] the trailer in question." Braswell Motor Freight Lines, 189 N.L.R.B. 503, 506 (1971). In Browning-Ferris, Andrus and Ciukaj, the terminated employees, were the "most senior drivers." 259 N.L.R.B. at 67. Browning-Ferris, like Braswell, had quite a high rate of employee turnover. Id. at 62-63. For example, the company hired one driver June 12, and fired him June 20. It hired another June 12, and fired him October 8. The employees who replaced Andrus and Ciukaj did not even last two months. Browning-Ferris hired them in late February and terminated them in April. Id.

Dependability over the years does not always raise the amount of remuneration an employee receives, and therefore it carries little weight in Posner's price-determined theory of wealth maximization. Nevertheless, such a factor certainly weighs heavily into the employer's real cost of hiring permanent replacements. Because a replacement's general dependability and trustworthiness will only appear over time, the hiring of a new employee will often impose high costs on the employer.

The "permanent" replacements Browning-Ferris hired for Andrus and Ciukaj turned out to be a business blunder for the company because the replacements lasted for so short a time. Browning-Ferris could have engaged true "temporary" replacements for the International Harvester job and not paid Andrus and Ciukaj for the time they did not work, because the Browning-Ferris drivers did not drive every day and were only paid hourly. 259 N.L.R.B. at 63, 66. This approach would not have made any difference in the normal routine, and, in the long run Browning-Ferris would have maintained more efficient business operations and "maximized its wealth."
action. At the other, the "wealth-maximizers" or "efficiency-promoters," argued for scrapping statutory protections of workers in these circumstances, or at least for limiting their breadth. Yet paradoxically, an examination of the stranger picket line case law has revealed that the most "liberal" rules on protection have also turned out to be the most wealth maximizing.

The Board's unique combination of "protection" and "business necessity" has most frequently and most generously protected employees who honor stranger picket lines. Coincidental with this broad protection, the Board has finely-tuned its business necessity requirements to protect employees from discharge where transaction costs are low and the employer would not value the employee's right enough to purchase it. On the other hand, the Board permits an employer response where transaction costs are prohibitively high, and increased business necessity would warrant purchase of the right were it not for transaction costs. The Board's balancing of factors, by thus tracking the significant features of the theory of wealth maximization, generally helps to promote wealth maximizing results in case-by-case determinations. The Board's law on refusals to cross stranger picket lines can thus be said to contain the same engine of wealth maximization that Judge Posner has found in the traditional common law fields.

This Comment has revealed Judge Posner's approach to stranger picket line observance in *Browning-Ferris* to be less "liberal" than originally presumed, and not necessarily wealth maximizing. There were no high transaction costs in the *Browning-Ferris* context justifying Judge Posner's decision to shift the entitlement from the employee to the employer. Even if there had been transaction costs justifying judicial cost-benefit balancing, Judge Posner's balance was unfairly weighted.

There was an aberrant kind of logic to Judge Posner's analysis in *Browning-Ferris*. First, Judge Posner "protected" employee rights on the basis of economic self-interest—hypothetically defined. Employees' "real" interests in solidarity did not weigh into the cost-benefit analysis Judge Posner used to arrive at "protection." Second, because the benefit that Judge Posner determined the employees enjoyed from their activity was more hypothetical than real, the employer's business need to continue efficient operations easily defeated it. Although Judge Posner also defined the employer's interest hypothetically, all hypothetical interests were not equal in his "balancing act"—the employer's were clearly more weighted. Judge Posner left the "protected" employees with only hypothetical rights to job openings. In
reality, for all his grandiloquence about "protection," "replacement," and careful balancing of interests, Judge Posner gave these employees very little indeed.

Although it is natural to assume that Judge Posner reached the result he did in *Browning-Ferris* because it was wealth maximizing to do so, this Comment has demonstrated that Judge Posner is not beyond "abuse" or "misuse" of his own methodology. Had Judge Posner truly used the theory of wealth maximization to guide his decision-making in the case, and not tipped the balance, the refusing employees at Browning-Ferris would have gained substantive rather than hypothetical rights. For Judge Posner, the convergence of "liberalism" and "wealth maximization" remained only a hypothetical. But for the National Labor Relations Board it is, and hopefully for the Supreme Court one day it can be, a reality.

**BRENDA GREENBERG BRYN***

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259. In *Some Uses and Abuses of Economics in Law*, Posner focused on the two kinds of "abuses" of economics in law. He explained,

"Abuse," of course, is a word of at least two meanings, only one of which is "misuse." I confess to being more conscious of the abuse heaped upon the law-and-economics movement than of the occasional [judicial and academic] misuse of economics in law, but I shall give examples of both types of abuse . . . .


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