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LOCKOUTS: AN ANALYSIS OF BOARD AND COURT DECISIONS SINCE *BROWN* AND *AMERICAN SHIP**

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One approaches the writing of an article about lockouts with a good deal of caution. Some excellent scholars have applied themselves to an analysis of *American Ship Building Co. v. NLRB*[1] and *NLRB v. Brown*[2] and of the probable interpretations of these decisions by the National Labor Relations Board and the courts.[3] As a result of having been more dilatory than some of these other authors, however, I have the advantage of a somewhat greater number of decided cases. While the decisions do not always clarify where the Board is going, they at least tend to pinpoint the areas where further clarification is needed.

As Professor Summers pointed out soon after the decisions in these two landmark cases, the validity of lockouts depends ultimately on economic data and policy considerations that have not been explored.[4] These issues have still not been fully examined by the Board or the courts. Thus, there are difficulties in applying the formulas enunciated by the Supreme Court in *Brown* and *American Ship* that the Board and the courts have yet to acknowledge, let alone overcome.

The Board and the courts have, of course, decided the cases that have come before them and in the process a number of the problems

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1 380 U.S. 300 (1965). *See* notes 55-61 and accompanying text *infra.*

2 380 U.S. 278 (1965). *See* notes 30-39 and accompanying text *infra.*

3 Baird, *Lockout Law: The Supreme Court and the NLRB,* 38 GEO. WASH. L. REV. 396 (1970); Dugan, *Labor Law Decisions of the Supreme Court—1964 Term,* 1965 ABA SEC. LAB. REL. L. 101; Feldesman & Koretz, *Lockouts,* 46 BOSTON U.L. REV. 329 (1966); Freilicher, *The Supportive Lockout,* 19 SYRACUSE L. REV. 599 (1968); Janofsky, *New Concepts in Interference and Discrimination Under the NLRA: The Legacy of American Ship Building and Great Dane Trailers,* 70 COLUM. L. REV. 81 (1970); Lev, *Suggestions to Management: The Lockout,* 19 LAB. L.J. 80 (1968); Meltzer, *The Lockout Cases,* 1965 SUP. CT. REV. 87; Oberer, *Lockouts and the Law: The Impact of Amercan Ship Building and Brown Food,* 51 CORNELL L.Q. 193 (1966); Rosen, *The Evolution of the Lockout,* 4 SUFFOLK U.L. REV. 267 (1970); Ross, *Lockouts: A New Dimension in Collective Bargaining,* 7 B.C. IND. & COM. L. REV. 847 (1966); Shawe, *The Regenerated Status of the Employer's Lockout: A Comment on American Ship Building,* 41 N.Y.U.L. REV. 1124 (1966); Summers, *Labor Law in the Supreme Court: 1964 Term,* 75 YALE L.J. 59 (1965).

4 Summers, *supra* note 3, at 74.

foreseen by the commentators have been resolved. Most of the Board and circuit court decisions on lockouts, however, consist largely of a statement of facts, a repetition of the Supreme Court language in *Brown* and *American Ship*, and a statement of the result. In the average case, where the issues are not closely balanced, this may be sufficient. Unfortunately, however, the same format has been used in the close cases, so that it is difficult to determine how the facts and issues were evaluated.[5]

Nevertheless, many of the situations where a lockout is likely to be used, including most of the situations where it has been used, are covered by existing precedent. Accordingly, before berating the Board any further for what it has not done, it would be best to analyze what it has done. The cases so far decided by the Board may be grouped into four categories: (*1*) multi-employer or common interest lockouts; (*2*) bargaining lockouts; (*3*) lockouts in support of unfair practices; and (*4*) attempts to invoke the protection of the lockout rule for other economic sanctions by the employer.

I

MULTI-EMPLOYER AND COMMON INTEREST LOCKOUTS

Employers have often used lockouts to counter union whipsaw strikes.[6] The employers' right to use a lockout to counter a strike against one member of a multi-employer unit was established even before *Brown* and *American Ship* by the *Buffalo Linen Supply Co.* case.[7] After *Brown* and *American Ship* the privilege was broadened through development by the Board of a concept of "joint bargaining."

A. *Common Interest Lockouts Before Brown and American Ship*

Before *Brown* and *American Ship* lockouts were allowed only in exceptional circumstances.[8] For a time the Board refused to consider

[5] Many lockout cases, of course, do not involve the close questions of law which concern the commentators. *See* generally P. ROSS, THE LABOR LAW IN ACTION—AN ANALYSIS OF THE ADMINISTRATIVE PROCESS UNDER THE TAFT-HARTLEY ACT 1 (1966).

[6] In a whipsaw strike, a union strikes one or more, but not all members of a multi-employer unit or uses a similar tactic with a group of employers with whom it bargains individually over the same terms at the same time. Because the employers are usually in competition with each other the struck employer will lose business to the others if they continue to operate. The union is thus able to bring enormous pressure upon the struck employer to settle. To prevent the union from picking them off one at a time, the employers find it advantageous to declare a joint lockout when the union strikes one of them.

[7] 109 N.L.R.B. 447 (1954), *rev'd sub nom.* Truck Drivers Local 449 v. NLRB, 231 F.2d 110 (2d Cir. 1956), *rev'd*, 353 U.S. 87 (1957).

[8] American Ship Bldg. Co. v. NLRB, 380 U.S. 300, 306-07 (1965). *See* Baird, *supra* note 3, at 397-98.

lockouts in defense of a multi-employer unit as involving exceptional circumstances,[9] despite contrary circuit court authority.[10]

In *Buffalo Linen* the Board changed course and allowed an exception for lockouts in defense of a multi-employer unit.[11] The union in *Buffalo Linen* had put into effect a whipsawing plan by striking one member of a multi-employer unit that had been established for thirteen years. The other employers in the unit responded by locking out their employees but made no attempt to continue operations during the lockout.

The Board's decision was reversed in the Second Circuit, and the case was remanded.[12] The Supreme Court, however, reinstated the Board's decision and its new rule.[13]

The legislative history of the Wagner Act[14] and the language of the Taft-Hartley Act, according to the Court,[15] indicated that lockouts

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Some commentators have maintained that these exceptions were used to soften the general prohibition against lockouts in any case in which the Board, for its own reasons, did not want to apply the general rule. Meltzer, *Lockouts Under the LMRA: New Shadows on an Old Terrain*, 28 U. CHI. L. REV. 614, 623-28 (1961); Meltzer, *Single-Employer and Multi-Employer Lockouts Under the Taft-Hartley Act*, 24 U. CHI. L. REV. 70, 73-76, 97 (1956); Oberer, *supra* note 3, at 197-98.

9 Continental Baking Co., 104 N.L.R.B. 143 (1953); Spalding Avery Lumber Co., 103 N.L.R.B. 1516 (1953); Davis Furniture Co., 100 N.L.R.B. 1016 (1952); Morand Bros. Beverage Co., 99 N.L.R.B. 1448, 1460-66 (1952).

10 NLRB v. Continental Baking Co., 221 F.2d 427, 431-32 (8th Cir. 1955); NLRB v. Spalding Avery Lumber Co., 220 F.2d 673 (8th Cir. 1955); Leonard v. NLRB, 205 F.2d 355 (9th Cir. 1953); Morand Bros. Beverage Co. v. NLRB, 190 F.2d 576, 582 (7th Cir. 1951).

In *Morand* the Seventh Circuit disapproved of the Board's lockout rule, but upheld a finding of violation on the ground that the employees had been permanently discharged. In *Leonard*, the Ninth Circuit also disapproved of the Board's rule and refused enforcement. When *Spalding Avery* and *Continental Baking* came before the appellate tribunals, the Board had already changed its position and sought enforcement on other grounds. The courts, however, refused to accept the Board's new arguments and enforcement was again denied.

11 Buffalo Linen Supply Co., 109 N.L.R.B. 447 (1954).

12 Truck Drivers Local 449 v. NLRB, 231 F.2d 110 (2d Cir. 1956).

13 NLRB v. Truck Drivers Local 449, 353 U.S. 87 (1957).

14 The legislative history shows that the Wagner Act was "not for the purpose of taking rights away from either party."

> [T]here are some fundamental rights an employer has . . . . No one can compel an employer to keep his factory open. No one can compel an employer to pay any particular wage. No one can compel an employer to hire others in addition to those he sees fit to hire. . . .
>
> No one can keep an employer from closing down his factory and putting thousands of men and women on the street. So in dealing with this bill we have to recognize those fundamental things, and we have not gone into that domain.

79 CONG. REC. 7673 (1935) (remarks of Senator Walsh). The National Labor Relations Act (Wagner Act) was approved July 5, 1935. Twelve years later it was amended and supplemented by the Taft-Hartley Act. 29 U.S.C. §§ 141-87 (1970).

15 The term "lock-out" is used in four sections of the Labor Management Relations Act (Taft-Hartley Act) (29 U.S.C. §§ 141-87 (1970)): *id.* § 158(d)(4) (no resort to "strike or lock-out" during 60-day notice period); *id.* § 173(c) (Director of Mediation Service to seek

were not to be prohibited "as such."[16] Its decision, however, was limited to the narrow question of "whether a temporary lockout may lawfully be used as a defense to a union strike tactic which threatens the destruction of the employers' interest in bargaining on a group basis."[17] The Court stated that the right of employees to strike is not "so absolute as to deny self-help by employers when legitimate interests of employees and employers collide."[18] The ultimate problem of balancing the conflicting interests was to be left to the Board and to be subject to limited judicial review. Applying this standard, the Court found that the balance struck by the Board in this case was correct.[19]

The effect of *Buffalo Linen* as interpreted by the Board[20] was to graft a new exception for lockouts in defense of a multi-employer unit upon the general rule that lockouts were prohibited. This exception, however, was not extended so far as to allow employers in a multi-employer unit to use temporary replacements in response to a whipsaw strike.[21] Nor was it extended to situations where a formal multi-employer unit had not been established, even though the employers had a strong, common interest and were seeking in their negotiations with the union to establish a multi-employer unit.[22]

The Board's reluctance to extend the exception embodied in *Buffalo Linen* is illustrated by its decision in *Topeka Grocers Management Association*,[23] decided when *Brown* and *American Ship* were pending before the Supreme Court. In *Topeka* non-struck members of the multi-employer unit put their employees on a shortened work-week, matching the level of operations that the struck employer was

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to induce parties to settle dispute peacefully "without resort to strike, lock-out, or other coercion"); *id.* § 176 (appointment of board of inquiry by President when "threatened or actual strike or lock-out" creates a national emergency); and *id.* § 178 (power to enjoin "strike or lock-out" in case of national emergency).

16 353 U.S. at 92.

17 *Id.* at 93.

18 *Id.* at 96. The Court cited NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333 (1938) and some of the previous cases in which the Board and the courts had made an exception to the general rule and found no violation in the use of a lockout.

19 353 U.S. at 97.

20 Professor Meltzer noted at the time that the Board might have read some of the language in the decision as a direction to reconsider its whole approach to lockouts. Meltzer, *supra* note 8, 28 U. CHI. L. REV. 618-19.

21 Food Giant Supermarkets, 145 N.L.R.B. 1221 (1964), *dismissed*, 154 N.L.R.B. 32 (1965); Kroger Co., 145 N.L.R.B. 235 (1963); Brown Food Store, 137 N.L.R.B. 73 (1962), *enforcement denied sub nom.* NLRB v. Brown, 319 F.2d 7 (10th Cir. 1963), *aff'd*, 380 U.S. 278 (1965).

22 Great Atl. & Pac. Tea Co., 145 N.L.R.B. 361 (1963), *enforced*, 340 F.2d 690 (2d Cir. 1965).

23 150 N.L.R.B. 938 (1965).

able to achieve with the use of replacements. The trial examiner upheld this tactic as a legitimate defense of the unit, citing as authority a concession in the Board's brief to the Supreme Court in the *Brown* case.[24] The Board, however, chose to avoid this issue, basing its decision solely[25] on the rationale of *Betts Cadillac Olds, Inc.*[26] that the reduction was necessary to prevent the non-struck employers from being caught with large inventories in case they too were struck.

The Board's last multi-employer unit lockout case before the Supreme Court decisions in *Brown* and *American Ship* did, however, involve some extension of the *Buffalo Linen* doctrine. The *Natkin & Co.* decision[27] allowed non-struck members of a multi-employer bargaining unit to lock out not only members of a craft, but also any other craft members who refused to cross the picket line. In *Natkin* the iron workers struck one member of a multi-employer bargaining unit. The Board held that non-struck employers were privileged not only in locking out their own iron workers, but also in locking out all the other crafts who had refused to cross the picket line. Such defensive action had previously been allowed only when the original strike had been illegal.[28] After *Natkin*, refusal to cross even a legal picket line could privilege a defensive lockout against the refusing crafts by non-struck employers in the multi-employer unit.

B. *Lockouts in Multi-Employer Units after Brown and American Ship*

In *American Ship*, the Supreme Court declared that "use of the lockout does not carry with it any necessary implication that the em-

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24 *Id.* at 944.

25 *Id.* at 939 n.1.

26 96 N.L.R.B. 268 (1951). An early exception to the general rule that lockouts were prohibited allowed lockouts which were "economically justified," that is, designed to protect an employer from peculiar economic loss or operational difficulty not usually suffered by an employer subjected to a strike. *See* Oberer, *supra* note 3, at 196. In *Betts Cadillac* a strike would have caught customers' disassembled automobiles in non-struck employers' repair shops. The lockout was allowed as a defense against the loss of good will such a strike would have caused.

In *Topeka* the Board accepted the trial examiner's finding of an extraordinary potential economic hardship: the possibility that the employers would be "caught with large inventories of perishable meat products." 150 N.L.R.B. at 945.

27 150 N.L.R.B. 1542 (1965).

28 Publishers' Ass'n, 139 N.L.R.B. 1092 (1962), *aff'd sub nom.* New York Mailers' Union No. 6 v. NLRB, 327 F.2d 292 (2d Cir. 1964). *See* Hearst Corp., 161 N.L.R.B. 1405 (1966), *aff'd sub nom.* News Union v. NLRB, 393 F.2d 673 (D.C. Cir. 1968); News Union v. Hearst, 278 F. Supp. 423 (D.C. Md. 1968) (same case brought under section 301 of the Taft-Hartley Act, 29 U.S.C. § 185 (1970), in district court for violation of collective bargaining agreement provisions).

ployer acted to discourage union membership or otherwise discriminate against union members as such."[29] Read together, *Brown* and *American Ship* established that, absent evidentiary findings of hostile motive and unless the lockout in the particular circumstances of the case is "demonstrably so destructive of employee rights and . . . devoid of significant service to any legitimate business end,"[30] a lockout is a legitimate technique of an employer. Thus, the effect of the two decisions was to rescind the general prohibition against lockouts.

The specific holding of *Brown* was that employers in a multi-employer unit using a lockout to counter a whipsaw strike were permitted to use temporary replacements. The *Brown* case involved an association of food retailers who had bargained with the union successfully on a group basis for many years. In response to a whipsaw strike the non-struck members of the employer group declared a lockout. Both the non-struck employers and the struck employer continued operations with the use of temporary replacements. The Board had found that this lockout, together with the use of temporary replacements, violated sections 8(a)(1) and (3) of the National Labor Relations Act (NLRA).[31] The Tenth Circuit, however, refused to enforce the Board's order.[32] The Supreme Court affirmed the court of appeals, reversing the Board.[33]

The Court observed that the replacements were used only for the duration of the labor dispute; that the lockout would have been terminated at any time the union agreed to management's terms; and that the union was protected from loss of membership by a union shop clause.[34] The Court continued:

> Under all these circumstances, we cannot say that the employers' conduct had any great tendency to discourage union membership. Not only was the prospect of discouragement of membership comparatively remote, but the respondents' attempt to remain open for

29 American Ship Bldg. Co. v. NLRB, 380 U.S. 300, 312 (1965).

30 NLRB v. Brown, 380 U.S. 278, 286 (1965); *see also* American Ship Bldg. Co. v. NLRB, 380 U.S. 300, 311 (1965).

31 Brown Food Store, 137 N.L.R.B. 73 (1962).

32 NLRB v. Brown, 319 F.2d 7 (10th Cir. 1963).

33 NLRB v. Brown, 380 U.S. 278 (1965).

34 The whipsaw strike in *Brown* was called by the union after agreement had been reached on all terms of a new collective bargaining agreement, except regarding the amount and effective date of a wage increase. A union shop provision was one of the terms already agreed to when the strike and lockout occurred. That the stores would be union shops, and that the employees had been expressly advised that replacements were only for the duration of the labor dispute, meant that the employees had "nothing to gain, and much to lose" if they quit the union. This would hardly discourage union membership. *Id.* at 289.

> business with the help of temporary replacements was a measure reasonably adapted to the achievement of a legitimate end—preserving the integrity of the multi-employer bargaining unit.[35]

The Court then applied a rationale similar to that it had used in deciding *American Ship* the same day.[36]

> When the resulting harm to employee rights is thus comparatively slight, and a substantial and legitimate business end is served, the employers' conduct is prima facie lawful. Under these circumstances the finding of an unfair labor practice under § 8(a)(3) requires a showing of improper subjective intent.[37]

Finding no evidence of antiunion animus, but on the contrary that the union and the employer had an amicable relationship, the Court concluded that there was insufficient evidence to find a violation.[38]

Although the *Brown* decision went beyond *Buffalo Linen*, the scope of permissible common interest lockouts would still have been narrow had the case been limited to its facts. First, each employer locked out all of his employees; second, all locked out employees were members of the union; third, the lockout lasted only as long as the strike; fourth, only temporary replacements were allowed; and finally, the common interest was based upon an established multi-employer bargaining unit. Cases decided since *Brown* have extended its rationale and have called some of these factual limitations into question.

Immediately after the Supreme Court's decisions in *Brown* and *American Ship* the Board reconsidered two previous cases docketed for review by circuit courts, which were decided under the Board's rule[39] that an employer who had locked out to protect a multi-employer unit could not use temporary replacements.[40] One of these, *Food Giant Supermarkets*,[41] was found to be controlled in all respects by the decision in *Brown*, and the union's complaint was dismissed by supple-

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35 *Id.* at 289 (footnote omitted).

36 *See* text accompanying note 29 *supra.*

37 380 U.S. at 289.

38 *Id.* at 289-90.

39 *See* note 21 and accompanying text *supra.*

40 By temporarily replacing employees at a time when they were willing to work and not on strike, the employer was deemed to: (*1*) interfere with, restrain, and coerce the employees in the exercise of their right to bargain collectively and strike in furtherance of economic demands, violating Labor Management Relations Act (Taft-Hartley Act) § 8(a)(1) (29 U.S.C. § 158(a)(1) (1970)); and (*2*) discriminate unlawfully in regard to tenure of employment to discourage employees from supporting the union and engaging in concerted activities for mutual aid and protection, violating Labor Management Relations Act (Taft-Hartley Act) § 8(a)(3) (29 U.S.C. § 158(a)(3) (1970)). *See* Food Giant Supermarkets, 145 N.L.R.B. 1221, 1224 (1964) (trial examiner's decision adopted by the Board).

41 154 N.L.R.B. 32 (1965).

mental decision and order of the Board. The other, *Kroger Co.*,[42] is arguably distinguishable from *Brown* both because the employers continued their lockout several days past the end of the whipsaw strike and because they selectively locked out only those employees represented by the union which had struck. The Board, however, dismissed the case without opinion and without considering either of these issues.[43]

In *Acme Markets, Inc.*[44] an employer was allowed to take lockout action in defense of a multi-employer unit against nonunit and, indeed, nonunion employees. When Acme, a member of a multi-employer unit, was struck by the union, other employer members of the unit declared a lockout. Acme also had nonunit stores which were in direct competition with some of the stores closed by other employer members of the unit. These nonunit stores were closed to avoid gaining an unfair competitive advantage, thus undermining the integrity of the unit. Acme's conduct was found not to constitute a violation of the NLRA. Noting that the locked out nonunit employees were protected from

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42 145 N.L.R.B. 235 (1963), *remanded*, No. 14-CA-2382 (D.C. Cir. 1965), *complaint dismissed*, Oct. 19, 1965. The unreported court of appeals decision and final disposition by the Board were obtained through correspondence. Letter from Thomas W. Miller, Director of Information, NLRB, to the Author, Feb. 27, 1970.

43 The general counsel never argued in *Kroger* that the selective lockout constituted an unfair labor practice. He did, however, argue that the continuation of the lockout past the end of the whipsaw strike was a violation. 145 N.L.R.B. at 240. This contention, however, appears never to have been considered by the Board.

In the original decision, before the Supreme Court opinions in *Brown* and *American Ship*, the trial examiner found not only that the use of replacements during the lockout constituted an unfair labor practice but also that the lockout violated the Act from its inception because it was not defensive. *Id.* at 242. The trial examiner used the fact that the lockout had continued past the end of the strike to support this latter finding. *Id.* at 242-43.

The Board upheld the examiner's decision that the lockout with replacements violated the Act but did not affirm his finding that the lockout violated the Act from its inception. The Board in a footnote (*id.* at 236 n.2) explains that no such allegation originally had been made by the general counsel and that in any case since the charge had been filed more than six months after the inception of the lockout it was now barred by section 10(b) of the Act. 29 U.S.C. § 160(b) (1970). While the general counsel had alleged to the trial examiner that the continuation of the lockout past the end of the strike constituted a violation, and this contention was certainly not barred by 10(b), he apparently did not reargue this position before the Board.

After the Supreme Court decisions in *Brown* and *American Ship* the Board asked the District of Columbia Court of Appeals to remand the *Kroger* case for reconsideration. The court did so and the Board dismissed the case on the basis of those two Supreme Court opinions. Letter from Thomas W. Miller, *supra* note 42. There is no public record of any consideration given at that time to the issues raised by the continuation of the lockout past the end of the strike.

44 156 N.L.R.B. 1452 (1966).

financial loss during the lockout,[45] the Board emphasized its finding that Acme's purpose was to preserve the integrity of the multi-employer unit. Citing both *Brown* and *American Ship*, the Board concluded:

> In sum, as the lockout here was designed to serve the legitimate business end of protecting the integrity of the multiemployer unit, we do not view the Respondent's conduct here complained of as "demonstrably so destructive of employee rights" or "inherently so prejudicial to union interests and so devoid of significant economic justification that no specific evidence of intent to discourage union membership or other anti-union animus is required." And as the record here contains no such specific evidence of hostile motivation or discriminatory intent, we conclude that the Respondent has not violated Sections 8(a)(1) and (3) of the Act.[46]

There is no doubt that the combined effect of *Brown* and *American Ship* is to allow employees increased flexibility in defense of a multi-employer unit. A number of important questions as to just how much flexibility employers have, however, remains unresolved. For example, will employers be permitted to continue a lockout with replacements after the end of a whipsaw strike? Employers were permitted to do this in the *Kroger* case, but there is no record of the Board considering the issue.[47] A lockout with replacements past the end of a whipsaw strike could be construed as a bargaining lockout with replacements and, therefore, an unfair labor practice under the Board's *Inland Trucking* rule.[48] If, however, what has happened is that the struck employer has given in to the union's terms, then by denying the right of the other employers to continue a lockout with replacements, the Board would be providing unions with an effective tool for destroying the employers' united front. Thus, if the union correctly selected those employers who were most likely to capitulate quickly it could strike them one at a time with the other employers privileged to use a lockout with replacements only during the period of the strikes. A rule which attempted to distinguish between such a situation and one where the bargaining association was taking advantage of the union's strike to force its terms would be impossible to apply. Accordingly, the best rule would appear to be that as long as they do not deliberately attempt to undermine the union, employers in a multi-

45 The nonunit employees affected by the lockout were given "inventory or other such work in their own stores or work in other stores which remained open," and where insufficient work was available to afford the employees their usual income, the employer made up the difference. *Id.* at 1454-55.

46 *Id.* at 1458 (footnotes omitted).

47 *See* note 43 and accompanying text *supra.*

48 *See* notes 81-92 & 155 and accompanying text *infra.*

employer unit should be privileged to continue a lockout, with replacements, started in response to a whipsaw strike until full settlement is reached. Of course, if the union and the association had agreed on terms, a continued lockout or even a failure to subscribe to those terms by any employer member of the unit would be an unfair labor practice.[49]

Where the union represents only some of the employees, the action the non-struck employers may take depends upon whether or not the other employees cross the picket line. If as in *Kroger* the non-striking employees continue to work for the struck employer, other employer members should be able to lock out only the members of the striking union, replacing them temporarily but otherwise continuing with their regular employees. In this way the struck employer's situation is duplicated by the locking out employers for the duration of the strike and lockout.

Where employees other than those represented by the striking union refuse to cross the picket line, employers under *Natkin* may lock out all those employees. Although the case has not yet arisen, it would seem that employers should also be privileged to replace these employees temporarily as long as there is an absence of antiunion animus. Such use of replacements would serve the same economic purpose as in *Brown*, that is, continuing operations in the entire multi-employer unit in the face of a whipsaw strike. Employees in all departments are necessary to continue operations, and other union members would probably be less willing to work where a sister union has been locked out than they would be if the other union were merely on strike.

The *Acme* decision permits employers to shut down a nonunit enterprise when allowing it to stay open would undermine the employers' united front against the union's whipsaw tactic. This privilege should be available only where the unit enterprises are shut down and not where they are operating with temporary replacements.

Finally, the *Topeka* case[50] suggests the very interesting question of the validity of a partial lockout by a non-struck employer. The resulting partial shutdown would attempt to match the level of operations of a struck employer who is able to continue functioning only on a partial basis. The locking out employers should be free to limit their lockout to members of the union that had called the strike, and to continue operations using their regular employees and temporary replacements

49 Service Roofing Co., 173 N.L.R.B. 321 (1968); *see* NLRB v. Sheridan Creations, 357 F.2d 245 (2d Cir. 1966).

50 Topeka Grocers Mgt. Ass'n, 150 N.L.R.B. 938 (1965); text accompanying notes 23-26 *supra*.

for the locked out employees. Presumably they would also be free to shut down any operations where the locked out employees were needed and to lay off any additional employees who could not be used because of reduced operations. Referring to the Board's decision in *Brown*, the trial examiner in *Topeka* construed the partial shutdown not as a partial lockout for the purpose of arranging for temporary replacements, but simply as an attempt by the non-struck employers to put themselves "in the same boat" with the struck employer, thus protecting the whole unit.[51] *Topeka* approved this tactic where no replacements were hired. It would seem that after the *Brown* decision, the use of temporary replacements to continue operating on a partial basis should be allowed. The partial lockout by laying off some of the employees would seem to be unobjectionable provided that layoffs followed contractual seniority and employees were offered full reinstatement once the dispute was over. Indeed, a recent Board decision indicates that the employer would not necessarily have to follow contractual seniority.[52] The effects of such a tactic would be no more severe than those of the layoff with temporary replacements allowed in *Brown*.

An attempt to reduce operations by reducing the number of hours per employee might run into the objections raised in *United States Pipe & Foundry Co.*[53] If for any reason the employees found the reduced work schedule worse than no work at all, their only alternative would be to strike and face the possibility of permanent replacement. Thus, such a partial lockout might be more destructive of employee rights than the total lockout with temporary replacements allowed in *Brown*. If, however, employees were given the option of taking the reduced hours or a temporary layoff, there could be no such objection.[54]

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[51] *See* 150 N.L.R.B. at 943.

[52] Laclede Gas. Co., 187 N.L.R.B. No. 32, 75 L.R.R.M. 1483 (Dec. 14, 1970). But *see* text accompanying notes 222-29 *infra*.

[53] 180 N.L.R.B. No. 61, 73 L.R.R.M. 1260 (Dec. 16, 1969), *enforced sub nom.* Molders Local 155 v. NLRB, 76 L.R.R.M. 2133 (D.C. Cir., Jan. 5, 1971). *See* text accompanying notes 218-21 *infra*. The Board did decide one case involving a partial lockout through a reduction of hours. Great Falls Employers' Council, 123 N.L.R.B. 974 (1959). It does not seem, however, that the issues raised in *United States Pipe* were considered in that decision. The Board's finding of violation on other grounds was reversed by the Ninth Circuit (NLRB v. Great Falls Employers' Council, 277 F.2d 772 (9th Cir. 1960)). *See* Meltzer, *supra* note 8, 28 U. CHI. L. REV. 622-23.

[54] An employer may, of course, choose to maintain his normal level of operations in the face of increased demand resulting from a strike at a competitor. *See, e.g.*, Southern Beverage Co., 171 N.L.R.B. No. 128, 71 L.R.R.M. 1429 (June 4, 1968), *enforced*, 423 F.2d 720 (1970).

C. *Common Interest Lockouts not Involving a Multi-Employer Unit*

Recent decisions relying on *American Ship* as well as *Brown* have indicated a broader concept of valid common interest lockouts in situations not involving a formal multi-employer bargaining unit.

In *American Ship* a single employer laid off his employees during his slack season after reaching an impasse with the union in negotiations and fearing that a strike would be called as soon as ships were taken into the yard.[55] The employer had bargained with the union for a period of nine years and each previous agreement had been preceded by a strike. The trial examiner found that in view of the potentially disruptive effects of a strike while ships were in the yard, the employer's action was justified under the *Betts Cadillac* rationale.[56] The Board overruled the examiner's decision on the basis of what it regarded as adequate assurances by union officials that they would endeavor to avoid a strike and would complete any work in the yard if a strike did occur.[57] The Board's decision was affirmed by the District of Columbia Circuit.[58]

The Supreme Court reversed the Board and the court of appeals and enunciated an entirely new rule.[59] This rule allowed the "temporary layoff of employees solely as a means to bring economic pressure to bear in support of the employer's bargaining position, after an impasse has been reached."[60] The opinion expressly avoided the issue of whether an employer would be permitted to use replacements in order to continue to operate during such a bargaining lockout.[61] Under this new rule the Board's differences with the trial examiner became irrelevant. Employers were privileged to use the lockout not only defensively but also offensively in an attempt to secure legitimate bargaining demands.

A further question unanswered by *American Ship* is whether the offensive lockout can be utilized to preserve a common position among employers also bargaining individually in the face of union demands and whipsaw pressures. The first indication that the Board might sanction a common interest lockout where there was no valid multi-

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55 American Ship Bldg. Co. v. NLRB, 380 U.S. 300, 302-04 (1965).

56 American Ship Bldg. Co., 142 N.L.R.B. 1362, 1382-83 (1963).

57 *Id.* at 1364-65. Note the criticism leveled by Justice Goldberg at the Board's finding. 380 U.S. at 327 (concurring opinion).

58 Boilermakers Local 374 v. NLRB, 331 F.2d 839 (D.C. Cir. 1964).

59 American Ship Bldg. Co. v. NLRB, 380 U.S. 300 (1965).

60 *Id.* at 308.

61 *Id.* at n.8.

employer bargaining unit came in *Weyerhaeuser Co.*[62] That case involved an attempt by a group of employers who had previously bargained individually to establish a multi-employer bargaining unit. When the union struck two of the six employers involved, the others declared a lockout. The trial examiner found that they had successfully established a multi-employer unit and that their lockout was authorized under *Buffalo Linen.* The Board ruled that it was not necessary to determine whether a valid multi-employer unit was established since all six employers had reached impasse in joint bargaining with the union and were, therefore, privileged in declaring a lockout under *American Ship.* The District of Columbia Circuit remanded to the Board, noting that additional argument should be taken if the case were to be decided on grounds different from those originally argued.[63] The court also criticized the lack of clarity of the new proposition put forward by the Board.[64] On remand the Board specifically found that a multi-employer unit had been established. The Board also reaffirmed its initial position that a lockout is permissible, even in the absence of a multi-employer unit, where a group of employers jointly bargain to impasse and the union strikes some but not all members of the group.[65] The Board did not, however, fully indicate how such joint bargaining might differ from a formal multi-employer bargaining unit.[66] The District of Columbia Circuit upheld the Board on the basis of its finding that a multi-employer bargaining unit had been established without passing on the Board's other ground of decision.[67]

The *Detroit News* case[68] is the only case in which a lockout based

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62 155 N.L.R.B. 921 (1965), *remanded sub nom.* Woodworkers' Union v. NLRB, 365 F.2d 934 (D.C. Cir. 1966), *on remand,* 166 N.L.R.B. 299 (1967), *aff'd,* 398 F.2d 770 (D.C. Cir. 1968).

63 365 F.2d at 935, 939.

64 *Id.* at 937-38.

65 166 N.L.R.B. at 301.

66 The Board used the following language:

> In view of the court's request for further explication of our view of joint bargaining, particularly in the present context, we turn now to the essential components of the bargaining conducted in the instant case. All six members of the Association advanced a common bargaining position through a single desiguated representative, a fact recoguized by the Unions. The Unions in turn made common demands through the Association, which we here treat as their (the Employers') joint agent, upon all six Employers. Further, as noted above, each of the six Employers had committed itself from the outset of bargaining to be fully bound by any agreement reached on its behalf by the Association, and each of the Unions was so advised at the commencement of the respective negotiations.

Id. at 302 (footnote omitted).

67 398 F.2d at 773.

68 Evening News Ass'n, 145 N.L.R.B. 996 (1964), *enforcement denied sub nom.* Detroit Newspaper Publishers Ass'n v. NLRB, 346 F.2d 527 (6th Cir. 1965), *vacated and remanded,*

on a common interest among employers was expressly upheld in the absence of a multi-employer bargaining unit. *Detroit News* involved two employers, The Evening News Association, owner and publisher of the *Detroit News*, and Knight Newspapers, Inc., owner and publisher of the *Detroit Free Press*, who had traditionally bargained with a number of unions in multi-employer units but had bargained individually with the Teamsters Union. During bargaining in 1962, the Teamsters Union presented a number of similar demands to the two employers. In a secret agreement, the *News* agreed that if the *Free Press* were struck because of its refusal to concede to any of three demands which the employers regarded as crucial, the *News* would support the *Free Press* and would not publish. When the *Free Press* was struck by the Teamsters, the *News* locked out its employees and ceased operations until an agreement was reached with the union.

The Board's initial decision, which preceded *Brown* and *American Ship*, was that "an agreement to engage in supportive lockout action by employers who do not bargain jointly in a multi-employer unit contemplates conduct which exceeds the permissible defensive limits under *Buffalo Linen*."[69] The Sixth Circuit Court of Appeals vacated and denied enforcement of the Board's order, citing the language in *American Ship* that " 'where the intention proven is merely to bring about a settlement of a labor dispute on favorable terms, no violation of § 8 (a) (3) is shown.' "[70] Adopting the suggestion of the Board, the Supreme Court remanded the case for reconsideration in light of its opinion in *American Ship*.[71]

On remand the Board reversed itself in a somewhat confusing opinion. It noted that *American Ship* was " 'concerned with . . . the use of a temporary layoff of employees solely as a means to bring economic pressure to bear in support of the employer's bargaining position after an impasse has been reached.' "[72] The Board then went on to say that "the reasoning of the Court must obviously be taken into account in deciding a case such as the instant one, even though it does not present the exact situation present in *American Ship*."[73] In what significant

382 U.S. 374 (1966), *on remand*, 166 N.L.R.B. 219 (1967), *aff'd sub nom.* Newspaper Drivers' Local 372 v. NLRB, 404 F.2d 1159 (6th Cir. 1968), *cert. denied*, 395 U.S. 923 (1969).

69 145 N.L.R.B. at 1000 (footnote omitted).

70 346 F.2d at 531, *quoting* American Ship Bldg. Co. v. NLRB, 380 U.S. 300, 313 (1965).

71 Memorandum for NLRB at 7, Newspaper Drivers' Local 372 v. Detroit Newspaper Publishers Ass'n, 382 U.S. 374 (1966).

72 166 N.L.R.B. at 221, *quoting* 380 U.S. at 308.

73 166 N.L.R.B. at 221.

respects this case differed from *American Ship*, however, was not made clear. The Board noted that the lockout was designed to force the union to accept the employer's bargaining proposals, that the *News* was seeking to promote its own bargaining interests as well as to lend support to the *Free Press*, that both the union and the *News* regarded "their negotiations as being deadlocked on key issues, and that neither doubted that a work stoppage would be required to break the deadlock."[74] The Board stated that not all supportive lockouts or lockouts in support of a bargaining position were lawful, but that all cases had to be decided on their facts in accordance with the decisions of the Supreme Court.[75] This time the Sixth Circuit Court of Appeals affirmed the Board, holding that the lockout was authorized by *American Ship*, and stating that the words "impasse" and "deadlock" were synonymous.[76]

In *David Friedland Painting Co.*,[77] an employer's asserted common interest was found to be too attenuated to justify a lockout. Friedland was signatory to a collective bargaining agreement with Painters Local 1221. He had, however, hired nine painters who were members of Painters Local 144 because Local 1221 had no men available for work. At the time Friedland desired additional employees, Local 144 was engaged in negotiations with the painting contractors in its jurisdiction, who were represented by the Master Associated Painters of Perth Amboy and Vicinity. Friedland was not a member of the Perth Amboy association and took no part in the negotiations with Local 144. His sole connection with the negotiations was a provision of his contract with Local 1221 which required him to comply with the provisions of other Local contracts when working out of Local 1221's area, which he was not doing at the time. After an impasse had been reached in negotiations, Local 144 called a strike against the Perth Amboy association. Friedland then locked out his nine Local 144 employees for three days. Instead of shutting down his work, Friedland continued with his remaining employees, some of whom were members of Local 1221.[78]

The trial examiner rejected the employer's contention that his conduct came within *Buffalo Linen* and *Brown*. Friedland was not a member of the Perth Amboy unit, nor were the members acting as his agents. The New Jersey association of which he was a member and his

74 *Id.* at 221-22.

75 *Id.* at 222.

76 Newspaper Drivers' Local 372 v. NLRB, 404 F.2d 1159, 1160-61 (6th Cir. 1968), *cert. denied*, 395 U.S. 923 (1969).

77 158 N.L.R.B. 571 (1966), *enforced*, 377 F.2d 983 (3d Cir. 1967).

78 *Id.* at 573-76.

local area association were not only not engaged in the bargaining but, contrary to Friedland's contention, had not enunciated a uniform policy sanctioning the lockout in which Friedland had engaged.

The trial examiner also rejected Friedland's contentions under *American Ship*. Friedland was not engaged in bargaining with Local 144 and therefore he was not seeking to advance his own bargaining position. To allow such a tenuous interest as his to justify intrusion into negotiations by a lockout would lead to chaos in industrial relations. The Board adopted the trial examiner's opinion[79] and the Third Circuit Court of Appeals enforced the Board's order.[80]

Finally, the recently decided case of *Inland Trucking Co.*[81] bears upon the issue of common interest lockouts, although the case did not involve either a formal multi-employer unit or a whipsaw strike. Three employers who had bargained jointly with the union declared a lockout after their current contracts with the union expired and negotiations were at impasse. During the lockout, the employers continued their operations through the use of temporary replacements. The union charged that both the lockout and the use of replacements constituted a violation of the NLRA. The general counsel argued only that the use of replacements constituted a violation.[82]

The trial examiner found it unnecessary to pass upon the issue of whether and to what extent an employer might be justified in taking action to support another employer's bargaining position. He found that

> each of the Respondents had sufficient immediate interest in the bargaining to take appropriate and legitimate action in aid of the bargaining which was being conducted, in their own interest. The issue is whether the action taken, the employment and use of replacements to do the work of employees who had been locked out of their normal employment, constituted such appropriate and legitimate conduct, or contravened the rights of employees in violation of the Act.[83]

In an opinion later adopted by the Board, the examiner found that use of temporary replacements tended to undermine employee rights under the Act. He distinguished the use of temporary replacements allowed in *Brown* on two grounds. First, employer action in

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79 *Id.* at 572.

80 377 F.2d 983 (3d Cir. 1967).

81 179 N.L.R.B. No. 56, 72 L.R.R.M. 1486 (Oct. 27, 1969), *enforced*, 440 F.2d 562 (7th Cir. 1971).

82 72 L.R.R.M. at 1486-87.

83 *Id.* at 1488 (footnote omitted).

Brown was defensive in that it was in response to the union's strike. Second, the union could bring an end to the lockout in *Brown* by ending the strike.[84] In this case the union could end the lockout only by acceding to the employer's demands, a situation which the examiner found so destructive of collective bargaining as to take the case outside the ambit of *Brown* and *American Ship*.[85] As direct evidence of the tendency of this lockout to undermine the union, the examiner observed that a number of employees had quit. He further noted that such losses may be particularly damaging where "no long-established background of stable bargaining relationships [has] been established."[86]

The examiner held[87] that even with a "comparatively slight" invasion of employee rights "it becomes incumbent upon the employer to 'come forward with evidence of legitimate and substantial business justifications for the conduct.' "[88] In both *American Ship* and *Darling & Co.*[89] the employers had reason to fear a strike, whereas "[i]n the instant case . . . there is no substantial evidence of any affirmative or overt act on the part of the Union which impelled Respondents' conduct."[90] The union had not previously struck during the busy season, and the employers faced no unusual competitive circumstances at the time. The examiner concluded that the lack of a current contract did not constitute sufficient reason to justify the lockout and the use of temporary replacements.

The examiner disagreed with the respondents' contention that the Board had no "authority to pass upon the sufficiency of the business reasons advanced to justify their conduct."[91] He ruled that a lockout with replacements " 'carrie[s] its own indicia of [illegal] intent and . . . is barred by the Act unless saved from illegality by an overriding busi-

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84 *Id.* at 1489.

85 *Id.*

86 *Id.* (footnote omitted).

87 Reliance was placed on the Supreme Court's earlier decision in NLRB v. Great Dane Trailers, Inc., 388 U.S. 26 (1967).

88 72 L.R.R.M. at 1490.

89 171 N.L.R.B. No. 95, 68 L.R.R.M. 1133 (May 23, 1968), *aff'd sub nom.* Lane v. NLRB, 418 F.2d 1208 (D.C. Cir. 1969); *See* notes 134-48 and accompanying text *infra.*

90 72 L.R.R.M. at 1490. Indeed, the union had specifically notified the employers that it was not planning a strike. *Id.* at 1487.

91 *Id.* at 1491. The respondents were evidently relying upon the language in *American Ship* and *Brown* "that the Act does not constitute the Board as an 'arbiter of the sort of economic weapons the parties can use in seeking to gain acceptance of their bargaining demands.' " NLRB v. Brown, 380 U.S. 278, 283 (1965), *quoting* NLRB v. Insurance Agents' Union, 361 U.S. 477, 497 (1960). *See* American Ship Bldg. Co. v. NLRB, 380 U.S. 300, 316-18 (1965).

ness purpose justifying the invasion of union rights.' "[92] He found no such overriding business purpose in the instant case.

No clear concept has been developed by the Board distinguishing a joint bargaining lockout from a lockout in a multi-employer bargaining unit or a lockout in individual bargaining. In *Weyerhaeuser* the Board referred to a concept of joint bargaining, but since that case ultimately involved a valid multi-employer bargaining unit, the dimensions of the concept were not clarified. In the *Detroit News* decision, on the other hand, the Board did not mention joint bargaining, but rather analyzed the case in terms of a lockout of union members in support of the company's own bargaining position after negotiations were deadlocked. In fact, however, the lockout was partly in support of the bargaining position of another employer.

There are two types of cases where development of a joint bargaining concept would make a significant difference: (*1*) cases where an employer not presently engaged in bargaining with a union wishes to declare a lockout in support of another employer with whom he has a common economic interest in opposing the union's demands; and (*2*) cases where employers engaging in joint bargaining but not in a formal multi-employer unit wish not only to declare a lockout but also to use temporary replacements.[93]

The first situation was presented by *Friedland*, and the Board's decision in that case appears to be correct. Allowing an employer who is not even bargaining with the union to declare a lockout runs counter to the basic NLRA policy to encourage bargaining.[94] Moreover, a contrary decision might undermine recent cases that have broadened the employer's duty to consult with the union before taking action.[95] The proper remedy for an employer such as Friedland would be to assert his

92 72 L.R.R.M. at 1491, *quoting* NLRB v. Erie Resistor Corp., 373 U.S. 221, 231 (1963).

93 Until the recent decision in Darling & Co., 171 N.L.R.B. No. 95, 68 L.R.R.M. 1133 (May 23, 1968), *aff'd sub nom.* Lane v. NLRB, 418 F.2d 1208 (D.C. Cir. 1969), another important difference might have been the requirement of impasse in cases not involving a multi-employer unit. *Darling*, however, provided the final answer as to whether impasse was required for a bargaining lockout. *See* text accompanying notes 134-48 *infra*.

94 The policy of the NLRA has been stated by the Supreme Court as follows:

> The National Labor Relations Act is designed to promote industrial peace by encouraging the making of voluntary agreements governing relations between unions and employers. . . . The theory of the Act is that the making of voluntary labor agreements is encouraged by protecting the employees' rights to organize for collective bargaining and by imposing on labor and management the mutual obligation to bargain collectively.

NLRB v. American Nat'l Ins. Co., 343 U.S. 395, 401-02 (1952) (footnote omitted).

95 *See, e.g.*, Fibreboard Paper Prods. Corp., 130 N.L.R.B. 1558 (1961), *rev'd*, 138 N.L.R.B. 550 (1962); *enforced sub nom.* Machinists' Local 1304 v. NLRB, 322 F.2d 411 (D.C. Cir. 1963), *aff'd*, 379 U.S. 203 (1964).

right to bargain with the union concerning terms and conditions of employment.[96] Once bargaining has been established, a lockout may later be available under *Brown* or *American Ship*. Such an approach would be consistent with the general policy of the NLRA, which requires the parties to bargain but not necessarily to agree.

The second situation would arise where employers engaged in joint bargaining, but not members of a multi-employer unit, wished to engage in a lockout with the use of temporary replacements to counter a whipsaw strike. This is a decision the Board has not yet had to face.[97] The Board would not, however, need a special category of joint bargaining to cover it. The language of *Inland Trucking* is sufficiently flexible to allow the use of temporary replacements in any situation where the Board regards the employer interest involved as sufficiently important to justify some damage to employee rights. Thus temporary replacements might be allowed where the employer had reason to fear a strike or was faced with unusual competitive pressures. Both situations are more likely to occur where the union is attempting to use whipsaw tactics against a number of employers in an industry.

Although it may sometimes require definition at its boundaries,[98] the concept of multi-employer bargaining has a settled meaning. Parties know when they engage in bargaining through or with a formal multi-employer unit, and such bargaining is voluntary on both sides. If the privilege of using temporary replacements is extended beyond multi-employer units, the Board will have to determine exactly when employers should be allowed this privilege. Such definitional problems would require a form of sophisticated economic analysis not previously attempted under the NLRA.[99] Even economic analysis, however, will

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[96] Friedland's contract with Local 1221 required him to follow the agreements of other Locals when working in their area. *See* text accompanying note 78 *supra*. Insistence to the point of impasse in negotiations on a clause going beyond Local 1221's area of representation, however, would violate § 8(b)(3). Painters' Local 164, 126 N.L.R.B. 997 (1960), *enforced on other grounds*, 293 F.2d 133 (D.C.), *cert. denied*, 368 U.S. 824 (1961). Furthermore, for any union to insist that an employer sign an agreement without bargaining about its terms is a violation of § 8(b)(3). Plasterers' & Cement Masons' Local 2, 149 N.L.R.B. 1264 (1964).

[97] The Board in *Inland Trucking* found a violation in a joint lockout with replacements by a group of employers in a situation not involving either a multi-employer unit or a whipsaw strike. The finding of violation, however, was closely limited to the facts of that case. *See* text accompanying notes 81-92 *supra*.

[98] *E.g., compare* Evening News Ass'n, 119 N.L.R.B. 345 (1957) *and* Furniture Employers' Council, 96 N.L.R.B. 1002 (1951), *with* Bagel & Baily Bakeries' Council, 175 N.L.R.B. No. 148, 71 L.R.R.M. 1143 (May 8, 1969).

[99] *Cf.* Gross, *Economics, Politics, and the Law: The NLRB's Division of Economic Research, 1935-1940*, 55 CORNELL L. REV. 321 (1970).

not be useful without a much clearer formulation than we now have of policy goals in this area.[100]

A number of policy issues are apparent. On the one hand, if the Board attempts to establish a hard and fast rule that temporary replacements can be used only by a multi-employer unit, the result may be to encourage unions to withdraw from such units[101] and to attempt to achieve similar benefits from pattern bargaining. On the other hand, a lockout with the use of temporary replacements may have coercive effects upon employees, and the Board may not wish to sanction it where unions have not voluntarily entered into multi-employer bargaining.[102] In addition, there are issues as to the use of temporary replacements even in a multi-employer unit that still have not been settled by the Board. Defining a clear set of guidelines for this area will pose a difficult but unavoidable problem for the Board.

D. *Other Issues in Common Interest Lockouts*

Other issues relating to the common interest lockout include the use of a lockout to force multi-employer bargaining, the use of permanent replacements, and possible antitrust implications of this type of lockout.

The Board faced the issue of an employer attempting to force multi-employer bargaining by a lockout in the *Great Atlantic & Pacific Tea Co.* case,[103] decided shortly before *Brown* and *American Ship*. Adopting the conclusions of the trial examiner, the Board held that the use of a lockout to force a change from single to multi-employer bargaining was violative of the NLRA. In the context of the Board's position at the time that only defensive lockouts were privileged,[104] the decision that the lockout was an unfair labor practice was an easy one. Even after *American Ship* and *Brown*, however, the decision retains its vitality. Multi-employer bargaining is voluntary with both employers[105] and

100 *See* Jones, *Legal Regulation and Economic Analysis*, in LAW IN A CHANGING AMERICA 75, 95-96 (G. Hazard ed. 1968).

101 Great Atl. & Pac. Tea Co., 145 N.L.R.B. 361 (1963), *enforced in part*, 340 F.2d 690 (2d Cir. 1965).

102 *See* text accompanying notes 81-92 *supra*.

103 145 N.L.R.B. 361 (1963), *enforced in part*, 340 F.2d 690 (2d Cir. 1965).

104 Notes 68-75 and accompanying text *supra*.

105 Under recent Board rulings, unions are free either to withdraw totally from multi-employer bargaining (Hearst Consol. Publications, Inc., 156 N.L.R.B. 210 (1965), *aff'd sub nom.* Publishers' Ass'n v. NLRB, 364 F.2d 293 (2d Cir.), *cert. denied*, 385 U.S. 971 (1966); Evening News Ass'n, 154 N.L.R.B. 1494 (1965), *enforced sub nom.* Detroit Newspaper Publishers Ass'n v. NLRB 372 F.2d 569 (6th Cir. 1967)) or to select certain employers from an established multi-employer unit with whom they may demand individual bargaining (Pacific Coast Ass'n, 163 N.L.R.B. 892 (1967)).

unions[106] free to withdraw upon proper notice. Moreover, the Board has recently held that it is improper for a union to insist that an employer join a multi-employer unit.[107] To allow employers to use a lockout to pressure unions into multi-employer bargaining would destroy this symmetry of voluntary action.[108]

The Supreme Court in *Brown* explicitly refused to consider whether the use of permanent replacements in a lockout in defense of a multi-employer unit is a violation of the NLRA.[109] Such a tactic would appear to constitute a violation, however, because of its effect upon individual employees. The extra pressures brought to bear upon the union itself could be considered to be "no more than the result of the [union's] inability to make effective use of the whipsaw tactic."[110] Individual employees, however, would suffer the harsh consequences of replacement. In the ordinary strike situation an employee can avoid replacement by not supporting the strike.[111] Although he may be temporarily replaced under *Brown* regardless of his position on the strike, he would not be nearly so damaged as he would be by a permanent replacement.

There does not appear to be any overriding business purpose which would justify such an infringement of employee rights. In response to a whipsaw strike, employers are free under *Brown* to lock out employees and to maintain operations using supervisors, nonunit employees, and temporary replacements. Alternatively, an employer may stay open and seek to cushion revenue losses by some mutual aid strike plan.[112] These remedies are adequate to protect employers' interests.

Employees who engage in a common interest lockout may be subject to antitrust prosecution under the rationale of *UMW v. Pennington*.[113] While that decision specifically excepts multi-employer bargaining units from the strictures of the antitrust laws[114] it does rule that employers and unions may be subject to prosecution where they seek to impose wages and conditions on employers and employees outside the bargaining unit.[115]

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106 Great Atl. & Pac. Tea Co., 145 N.L.R.B. 361 (1963).
107 Southern Cal. Pipe Trades Dist. Council 16, 167 N.L.R.B. 1004 (1967).
108 *See* Evening News Ass'n, 154 N.L.R.B. 1494, 1498 (1965).
109 NLRB v. Brown, 380 U.S. 278, 292 n.6 (1965).
110 *Id.* at 286.
111 29 U.S.C. § 157 (1970).
112 *See, e.g.*, Six-Carrier Mutual Aid Pact, 29 C.A.B. 168 (1959).
113 381 U.S. 657 (1965).
114 *Id.* at 664-65.
115 *Id.* at 665-69.

Pennington, however, involved allegations of a conspiracy to eliminate product market competition[116] and is accordingly distinguishable from a common interest lockout where employers are normally concerned only with collective bargaining aims. While courts have been notoriously reticent about stating the rationale of labor antitrust decisions,[117] it would seem clear that the primary purpose of antitrust regulation of collective bargaining is to prevent the use of the labor exemption to shield deliberate interference with the product market.[118] Since this factor is not present in the common interest lockout, there would appear to be no excuse for bringing in the confusion of the labor antitrust decisions to augment the confusion of the lockout decisions.

II

USE OF THE LOCKOUT AS AN ECONOMIC SANCTION DURING BARGAINING

Before *American Ship*, the Board claimed to have a rule which prohibited bargaining lockouts, although commentators questioned whether the Board did not, in fact, permit those bargaining lockouts which it approved under its amorphous doctrine of "defensive" lockouts.[119] In *American Ship*, however, the Court stated unequivocally "that where the intention proven is merely to bring about a settlement of a labor dispute on favorable terms, no violation of § 8(a)(3) is shown."[120]

Limitations upon the employer's new freedom to engage in a bargaining lockout have not yet been established. The Supreme Court opinion specifically limited the scope of *American Ship* to the use of a temporary layoff of employees after an impasse had been reached in negotiations, and did not deal with the use of replacements.[121] Other limitations have been suggested by the commentators[122] and by dicta in Board or court opinions.[123]

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116 *Id.* at 665, 666.

117 Bernhardt, *The Allen Bradley Doctrine: An Accommodation of Conflicting Policies*, 110 U. PA. L. REV. 1094, 1097-1101 (1962); *see also* Winter, *Collective Bargaining and Competition: The Application of Antitrust Standards to Union Activities*, 73 YALE L.J. 14, 57-59 (1963).

118 Bernhardt, *supra note* 117, at 1107-09.

119 *See* Meltzer, *supra* note 3, at 101; Oberer, *supra* note 3, at 196-99; *see also* notes 8 & 26 and accompanying text *supra*.

120 American Ship Bldg. Co. v. NLRB, 380 U.S. 300, 313 (1965).

121 *Id.* at 308.

122 Oberer, *supra* note 3, at 228.

123 *See, e.g.*, Lane v. NLRB, 418 F.2d 1208 (D.C. Cir. 1969), *aff'g* Darling & Co., 171 N.L.R.B. No. 95, 68 L.R.R.M. 1133 (May 23, 1968).

A. *The Pre-Impasse Bargaining Lockout*

The original decision in *Body & Tank Corp.*,[124] which involved a pre-impasse bargaining lockout, preceded *Brown* and *American Ship* and was reached under the Board's rule that all bargaining lockouts were invalid. The trial examiner had specifically found that there was no impasse at the time of the employer's lockout.[125] His decision that the lockout was invalid was adopted in relevant part by the Board and affirmed by the Second Circuit.[126] After *American Ship* and on rehearing before the Second Circuit, the general counsel argued that the Board's decision should be reaffirmed in spite of *American Ship* because there was no impasse before lockout.[127] The Court in a short per curiam opinion set aside its previous enforcement of the Board's order without answering the general counsel's argument.[128] Although the brevity of the opinion makes the holding unclear, this case may be interpreted as a validation of a pre-impasse bargaining lockout.

Subsequently, the Board itself reversed a decision in which it had previously found a violation of the NLRA based on a bargaining lockout.[129] The trial examiner had found that "something of an impasse had been reached in bargaining [but that] negotiations were continuing."[130] The case was dismissed when neither the charging party nor the general counsel responded to a notice to show cause.

In *Detroit News*[131] the Board ruled that a bargaining lockout could be justified where negotiations had reached a stage called "deadlock."[132] The Board, however, did not indicate in what way deadlock differed from impasse, and the Sixth Circuit Court of Appeals in affirming the Board's decision found the two words to be synonymous.

In *United States Sugar Corp.*[133] the Board decided that it was not necessary to exhaust all possibilities of reaching agreement before declaring a lockout. The parties had reached impasse on several issues and negotiations were broken off. The employer made a suggestion for a

124 144 N.L.R.B. 1414 (1963), *aff'd*, 339 F.2d 76 (2d Cir. 1964).

125 *Id.* at 1423.

126 Body & Tank Corp. v. NLRB, 339 F.2d 76 (2d Cir. 1964).

127 Brief for Respondent at 17-35, Body & Tank Corp. v. NLRB, 344 F.2d 330 (2d Cir. 1965).

128 Body & Tank Corp. v. NLRB, 344 F.2d 330 (2d Cir. 1965).

129 J.R. Simplot Co., 145 N.L.R.B. 171 (1963), *remanded*, 52 CCH LAB. CAS. ¶ 16,579 (9th Cir. 1965), *dismissed*, CCH 1965 LAB. L. REP. (NLRB Dec.) ¶ 9775.

130 145 N.L.R.B. at 176.

131 Evening News Ass'n, 145 N.L.R.B. 996 (1964), *enforcement denied sub nom.* Detroit Newspaper Publishers Ass'n v. NLRB, 346 F.2d 527 (6th Cir. 1965), *vacated and remanded*, 382 U.S. 374 (1966), *on remand*, 166 N.L.R.B. 219 (1967), *aff'd sub nom.* Newspaper Drivers' Local 372 v. NLRB, 404 F.2d 1159 (6th Cir. 1968), *cert. denied*, 395 U.S. 923 (1969).

132 *See* notes 74-83 and accompanying text *supra*.

133 169 N.L.R.B. 11 (1968).

long term contract which ultimately broke the impasse. However, since the union had not responded favorably to this suggestion for several days, the Board found no violation in the lockout.

The Board expressly established in the *Darling & Co.*[134] case the principle that a pre-impasse bargaining lockout is not a per se violation of the NLRA. There the parties had been bargaining for twenty years and the union had a history of calling strikes during the busy season. During the most recent negotiation the union had called a four-month strike which caused the employer to lose most of the year's business. The parties had bargained for two months and had reached agreement on several points but remained in disagreement on others. Fearing a strike during his busy season not only because of past history but also because of remarks of the union negotiators, the employer declared a lockout to pressure the union to come to terms.

The general counsel conceded that the employer had bargained in good faith. The sole question, therefore, was whether the employer's use of a lockout violated the NLRA.[135] The examiner found no impasse and, despite militant statements by union negotiators, he found that the employer knew there was no danger of strike until the busy season, several months away. He concluded that the lockout violated sections 8 (a) (1) and (3) of the NLRA.

The Board reversed the trial examiner on the ground that absence of an impasse did not make a bargaining lockout a per se violation: the presence or absence of an impasse is rather just one element to be considered in determining the legality of a lockout. The Board found no evidence of unlawful motivation on the part of the employer. Finally, in view of the extensive negotiations that had taken place and the employer's legitimate concern over the possible timing of a strike, the Board concluded "that the lockout here was neither inherently prejudicial to union interests nor devoid of significant economic justification."[136]

The Board's decision was enforced by the District of Columbia Circuit.[137] The court agreed that it would be anomalous to adopt a per se approach after the Supreme Court had indicated the desirability of

134 171 N.L.R.B. No. 95, 68 L.R.R.M. 1133 (May 23, 1968), *aff'd sub nom.* Lane v. NLRB, 418 F.2d 1208 (D.C. Cir. 1969).

The Board's ruling that a bargaining lockout before impasse is not necessarily a violation of the Act was reaffirmed in Bagel Bakers Council, 174 N.L.R.B. No. 101, 70 L.R.R.M. 1301 (Feb. 19, 1969), *modified*, 75 L.R.R.M. 2718 (2d Cir. 1970), in which a violation was found on other grounds. *See* text accompanying note 198 *infra*.

135 68 L.R.R.M. at 1135.

136 *Id.*

137 Lane v. NLRB, 418 F.2d 1208 (D.C. Cir. 1969).

a more flexible approach in *Great Dane* and *Fleetwood*,[138] and held that the employer's " 'legitimate and substantial' business interests justif[ied] whatever comparatively slight impact the lockout in this case may have had on employee rights."[139]

In *Darling* the Board stated that bargaining lockout cases must be decided individually and, reiterating the formula of *American Ship*, that the test was whether the lockout " '[was] inherently so prejudicial to union interests and so devoid of significant economic justification that no specific evidence of intent . . . is required.' "[140] This formula, however, does not provide any firm answers and may even, as one commentator has suggested, serve only to confuse the issue.[141] Although the District of Columbia Circuit suggested that a new, more flexible approach had been devised by the Supreme Court in *Great Dane*,[142] the court did not offer any clear indication of the nature of standards under this new approach.

The Board's ruling that the lack of impasse does not itself make a bargaining lockout a violation seems unobjectionable. There appears to be no justification for requiring employers to bargain to impasse before declaring a lockout while allowing unions to strike at any time. Nevertheless, the *Darling* decision is a qualified one. The Board noted in finding no violation of the Act that "the Employer was legitimately concerned over timing of any possible work stoppage."[143] Thus one possible interpretation of *Darling* is that a pre-impasse bargaining lockout is justified only where an employer has reason to fear an ill-timed strike.[144]

Such a narrow interpretation seems unlikely, however, in view of the freedom which the Board has allowed employers in such cases as *Hess Oil & Chemical Corp.*[145] and *Guardian Glass Co.*,[146] and the Supreme Court's explicit statement "that where the intention proven is merely to bring about a settlement of a labor dispute on favorable

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138 *Id.* at 1211, *citing* NLRB v. Fleetwood Trailer Co., 389 U.S. 375 (1967), and NLRB v. Great Dane Trailers, Inc., 388 U.S. 26 (1967).

139 418 F.2d at 1212, *quoting* American Ship Bldg. Co. v. NLRB, 380 U.S. 300, 311 (1965).

140 68 L.R.R.M. at 1135.

141 Summers, *supra* note 3, at 71. *See* text accompanying notes 1-5 *supra*.

142 418 F.2d at 1211-12.

143 68 L.R.R.M. at 1135 (footnote omitted).

144 *See* Baird, *supra* note 3, at 420-21.

145 167 N.L.R.B. 115 (1967), *aff'd*, 415 F.2d 440 (5th Cir. 1969), *cert. denied*, 397 U.S. 916 (1970). *See* notes 157-68 and accompanying text *infra*.

146 172 N.L.R.B. No. 49, 68 L.R.R.M. 1323 (June 26, 1968). *See* notes 171-72 and accompanying text *infra*.

terms, no violation of § 8 (a) (3) is shown."[147] That such an interpretation is possible, however, indicates the meager guidance the *Darling* opinions give. Neither the Board nor the court stated any rules or standards other than the ambiguous weighing process enunciated by the Supreme Court in *American Ship*. The opinion, therefore, tells us very little more than that the lockout before impasse "in all the circumstances of this case" is not a violation.[148]

B. *The Use of Replacements or Diversion of Work During a Bargaining Lockout*

An employer may have work performed in several ways during a lockout. He may continue operation at the locked out facility using temporary replacements[149] or supervisors, or he may direct the work to another of his facilities which is not shut down. The employer may also use some combination of replacements, supervisors, and diversion.

The Supreme Court in its *American Ship* opinion specifically reserved for later decision the issue of the use of replacements in a bargaining lockout.[150] The possibility of continuing operations through diversion of work was not considered. It was the latter issue which arose in the *Ruberoid Co.* case.[151] *Ruberoid* involved negotiations for a first contract with the Gypsum Workers Union at the employer's Tampa plant. The employer had negotiated with the union at its Savannah plant for more than twelve years and at its Mobile plant for more than twenty years. Negotiations started with the submission of a written contract proposal by the union in January, and the parties were at impasse by March. At an April meeting the employer told the union that it would lock out its employees in support of its bargaining position unless the union either accepted the employer's most recent proposal or agreed that there would be no multi-plant work stoppage. When the union did not agree to either of the employer's demands, the employer laid off its Tampa employees. It continued to negotiate with the union and reached agreement in August. During the period of the lockout, the employer served some of the customers it normally served

147 American Ship Bldg. Co. v. NLRB, 380 U.S. 300, 313 (1965).

148 *See* NLRB, THIRTY-THIRD ANNUAL REPORT 24-25, 80-81 (1968).

149 It would be theoretically possible for an employer to continue operations during a bargaining lockout using permanent replacements. Such a course, however, would clearly be coercive and it has not been seriously argued that it would be permitted. For a discussion of the possible use of permanent replacements in defense of a multi-employer unit, see text accompanying notes 109-12 *supra*.

150 American Ship Bldg. Co. v. NLRB, 380 U.S. 300, 308 (1965); *see* Oberer, *supra* note 3, at 220-23.

151 167 N.L.R.B. 987 (1967).

from the Tampa plant from its other two facilities. There was no evidence, however, that the employer either increased production at these other two plants or used additional employees.

The trial examiner agreed arguendo with the contention of the general counsel that a lockout with the use of replacements would constitute an NLRA violation, but found that, although the employer had served some of his Tampa customers from his other plants, there was no showing that he had hired additional employees or altered his operations at these other plants. The examiner concluded that the employer was within his rights in maintaining normal operations at the other plants and in serving "any customer anywhere from such normal operations."[152] In addition, whatever might be the general rule as to first negotiations,[153] both parties in this case were aware of the employer's successful history of collective bargaining with the union at other plants. Accordingly, the lockout was not invalidated in that it occurred during first negotiations. The Board adopted the trial examiner's opinion.[154]

The *Inland Trucking* case held that the use of temporary replacements in a bargaining lockout violates the NLRA at least where the employer has no business justification other than his desire to secure a better bargain.[155] There have been no subsequent decisions exploring the circumstances, if any, in which the use of temporary replacements in a bargaining lockout would be justified.

The lines drawn in *Ruberoid* and *Inland Trucking* represent an attempt to allow the employer sufficient flexibility to protect his legitimate interests while denying the employer a weapon so devastating that the union's only alternative would be to give in to his demands. Thus, it was permissible in *Ruberoid* to divert work to another plant so long as the level of operations at the other plant was not changed; but *Inland Trucking* forbade the use of temporary replacements where the employer had no justification other than his desire to secure a better bargain. Under the circumstances of these cases the rules made sense.

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152 Id. at 993.

153 *See* notes 156-77 and accompanying text *infra*.

154 The temporary diversion of work allowed in *Ruberoid* should be distinguished from a permanent diversion of work for economic reasons. Before an employer could undertake such a permanent diversion it would have to bargain with the union as to its intended action. *See* Fibreboard Paper Prods. Corp., 130 N.L.R.B. 1558 (1961), *modified*, 138 N.L.R.B. 550 (1962), *aff'd*, 332 F.2d 411 (D.C. Cir. 1963), *aff'd*, 379 U.S. 203 (1964). Any diversion of work, temporary or permanent, for the purpose of undermining the union would constitute a violation. Bagel Bakers Council, 174 N.L.R.B. No. 101, 70 L.R.R.M. 1301 (Feb. 19, 1969), *modified*, 75 L.R.R.M. 2718 (2d Cir. 1970).

155 *See* notes 81-92 and accompanying text *supra*.

In other circumstances, however, the same rules could have entirely different effects on the balance of power between the parties.

Imagine a textile company producing cloth at a number of locations, some union and some nonunion, and selling it under a single brand name. The employer takes a tough position in negotiations, listening to union arguments and modifying certain proposals, but nevertheless offering the union a package that is no better than that given to employees at its nonunion plants. When the union refuses to accept parity with the nonunion plants, the employer declares a lockout. During the lockout, the employer continues to service all his customers from his other plants. This tactic would seem to be permissible under the *Ruberoid* rule and yet would probably be just as effective in forcing capitulation as would the use of temporary replacements.

On the other hand, imagine a group of small metal fabricators who desire some variations from the contract presented to them by the Steelworkers Union. The union has refused to bargain with them on a group basis and has refused the variations they desire. When the union strikes one of the fabricators, the others wish to declare a lockout and to use temporary replacements. In these circumstances the union surely would not have to capitulate.

Perhaps because of such possibilities the Board has carefully limited its decisions to the peculiar facts of the cases before it. What such an approach gains in flexibility, however, it loses in certainty and predictability. If the Board fails to provide more definite rules, the law will not be serving its purpose of providing a guide to the conduct of the parties.

C. *Lockouts in Negotiation of a First Contract*

It has been suggested that the Board might use a somewhat tougher standard to govern the use of a lockout in bargaining over a first contract.[156] Although language used in some of the Board's opinions gives some support to this position, the Board has not used a significantly tougher standard for judging the legality of lockouts in first contract negotiations.

Hess[157] was the first case involving a bargaining lockout in first negotiations decided by the Board after *American Ship*. The case had initially found a violation of the Board's rule that only defensive lockouts were permissible.[158] On reconsideration the Board found that the

156 Oberer, *supra* note 3, at 228-29.

157 Hess Oil & Chem. Corp., 167 N.L.R.B. 115 (1967), *aff'd*, 415 F.2d 440 (5th Cir. 1969), *cert. denied*, 397 U.S. 916 (1970).

158 Hess Oil & Chem. Corp., 148 N.L.R.B. 1080, 1097-1105 (1964).

lockout was not a violation, even though the employer had engaged in hard bargaining and had violated sections 8(a)(1) and (5) of the NLRA by insisting on a change in the contractual unit.[159]

The Hess Oil Corporation had purchased an oil refining plant from the Delhi-Taylor Oil Corporation which had a contract with the Oil, Chemical and Atomic Workers Union. Hess agreed to bargain with the union but not to accept the Delhi-Taylor contract.[160] Negotiations started on March 8. Hess insisted that if agreement was not reached by March 25, it would not continue production when it took over on April 1. On March 28, the parties had reached impasse on a number of issues including employer demands for a sixty-day probationary period during which employees could be discharged without a right to grieve, and for exclusion from the bargaining unit of laboratory and warehouse employees. On April 1, all employees were terminated and operations were shut down. On May 7, the employer started operations again, hiring back the old employees, except for one who had reached retirement age and eight who had physical defects. Terms and conditions of employment were determined unilaterally by the employer.[161] The parties continued to negotiate until May 28, evidently without reaching agreement.

The trial examiner found that both sides had negotiated in a good faith attempt to reach agreement, that the appropriate unit for bargaining included laboratory and warehouse employees, and that, by insistence to impasse upon exclusion of these employees from the unit, Hess had violated sections 8(a)(1) and (5) of the NLRA. The examiner further found that the purpose of the shutdown from April 1 to May 7 was to compel the union to accept the employer's bargaining proposals. Following the then rule prohibiting lockouts to compel acceptance of a bargaining position, he found violations of sections 8(a)(1), (3), and (5).[162] The Board adopted this opinion with minor changes.[163]

Subsequent to *American Ship*, however, the Board reconsidered its decision and reversed its finding that the lockout violated the Act. The Board reasoned that a lockout could not "be deemed unlawful simply because it was offensive, rather than defensive, in nature, or because it was designed, after impasse had been reached on legitimate bargaining proposals, to force acceptance of such proposals."[164] In this

159 167 N.L.R.B. at 117.
160 148 N.L.R.B. at 1082-85.
161 *Id.* at 1085-95.
162 *Id.* at 1097-1105.
163 *Id.* at 1080-81.
164 167 N.L.R.B. at 116.

case, moreover, there was no doubt that an impasse existed. The Board concluded, as the union had conceded, that "[w]ere these the only issues in this case, the *American Ship Building* decision would clearly require dismissal."[165]

There were, however, a number of factors that distinguished this case from *American Ship*. Not only was this a first negotiation, but the employer through a pattern of hard bargaining, including the lockout, had put the union in a position where its continued viability as a bargaining agent was in doubt.[166] The union was unable to stop the unilateral imposition of terms and conditions of employment and was unable to protect several of its members whose employment was terminated at the sole discretion of the employer. Although the employer might have taken unilateral action without the lockout after impasse had been reached, the use of the lockout certainly reduced the union's chance of organizing effective resistance to such unilateral changes. None of these matters is even mentioned in the Board's opinion.

The Board did, however, discuss the relevance of the employer's insistence that laboratory and warehouse employees be excluded from the unit, reaffirming its earlier decision that an employer's refusal to deal with the established, appropriate unit violated the NLRA. Since the parties had postponed consideration of this issue, however, it had not contributed to the impasse. The employer had not made the demand to disrupt negotiations and the union had not rejected the employer's proposals solely or even primarily because of the unit issue. The Board concluded:

> In view of these circumstances, we are convinced that Respondent would have locked out its employees even if the issue as to the unit status of laboratory and warehouse employees had been withdrawn from negotiations, and we find that Respondent's position on that issue did not materially motivate its decision to lock out its employees.
>
> In view of the foregoing and as the record indicates that Respondent was not motivated by union animus or in furtherance of an unlawful bargaining position, we find that Respondent's lockout did not violate Section 8(a)(3) or (1) of the Act.[167]

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165 *Id.*

166 In fact, the union did reach agreement with the employer in 1963 and there have been three extensions of that agreement. Letter from Clifford Potter, Director, Region 23, NLRB, to the Author, Jan. 14, 1971. If the NLRB doubted that the effects upon the union were not so devastating as they seemed, however, it was not indicated.

167 167 N.L.R.B. at 117.

The Fifth Circuit sustained the Board's decision, denying appeals by both the employer and the union.[168]

The next first negotiation lockout case decided by the Board was *Ruberoid Co.*[169] In that case the trial examiner cited Professor Oberer's discussion of the possible implications of a bargaining lockout in first negotiations[170] but found that since the employer had a successful history of bargaining in two other plants, the fact of first negotiations was insufficient to invalidate the lockout.

First negotiations were again involved in *Guardian Glass Co.*,[171] which involved negotiations by a successor employer who had taken over an operation that was losing money. At an employee meeting the company showed a movie about another plant that had been brought from bankruptcy to a state of thriving efficiency. Company representatives described in detail the unsound economic status of the recently acquired plant and indicated that drastic changes and union cooperation would be necessary. At a subsequent meeting the company proposed a three-year contract with no pay increases and a moratorium on pension payments. When the union rejected the company proposals, company negotiators threatened to close the plant, but later agreed to allow the union five days to reconsider the company proposals and offered the union a cost of living escalator clause. Union members voted to reject the company proposals and a shutdown was ordered. Negotiations with the International were then discontinued and the company attempted to negotiate with the Local.

The trial examiner found that the "take it or leave it" attitude of company negotiators and their threats to close the plant constituted bad faith bargaining. Since the lockout was in support of a bargaining position which was not in good faith, it too violated the NLRA. The trial examiner also held that company attempts to negotiate with the Local violated section 8(a)(1) of the Act.

The Board reversed the trial examiner and dismissed the complaint. It found that the employer had bargained in good faith, noting the employer's immediate recognition of the union and its attempts subsequent to the lockout to reach agreement. The Board also upheld the validity of the shutdown on the ground that the employer was motivated only by legitimate economic considerations. The Board

168 Hess Oil & Chem. Corp. v. NLRB, 415 F.2d 440 (5th Cir. 1969).
169 167 N.L.R.B. 987 (1967).
170 *Id.* at 992, *citing* Oberer, *supra* note 3, at 228-29.
171 172 N.L.R.B. No. 49, 68 L.R.R.M. 1323 (June 26, 1968).

rejected the examiner's finding of a section 8(a)(1) violation for encouraging bargaining through the Local rather than the International.[172]

Wantagh Auto Sales, Inc.[173] involved first negotiations with the United Auto Workers after they had intervened and been elected in a decertification proceeding involving the Teamsters Union. The employer entered into negotiations with the new union on July 21, presented his final offer on July 27 and, when the union did not accept it, declared a lockout on July 28. The employees were allowed to return on October 16 and agreement was reached on November 27. There was some evidence that the employer harbored resentment against one particular employee who had started the decertification proceeding and later served on the new negotiating committee.[174] The examiner, however, did not discuss the significance of this resentment or even of the new union; he merely found that no violation had occurred and the Board adopted his findings.

Except for *Ruberoid,* where the Board noted the employer's history of successful bargaining with the same union at other plants, the Board has ignored the factor of first negotiations. In two cases the Board found no violation in a first negotiation lockout despite an extremely tough bargaining stance and the commission of an unfair labor practice on the part of the employer.[175] In a third case the employer's evident preference for the union he had formerly been dealing with and his resentment against the individual who started decertification proceedings against that union did not preclude a finding of no violation.[176] In no case was the context of first negotiation a significant factor.[177]

Thus there are a number of cases which imply that no special, higher standard applies to first negotiation cases. The Board, however, has never articulated its reasons for not finding this factor relevant.

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172 68 L.R.R.M. at 1325.

173 177 N.L.R.B. No. 19, 72 L.R.R.M. 1541 (June 27, 1969).

174 *Id.* at 10-11 (trial examiner's decision).

175 Hess Oil & Chem. Corp., 167 N.L.R.B. 115 (1967), *aff'd,* 415 F.2d 440 (5th Cir. 1969), *cert. denied,* 397 U.S. 916 (1970) (text accompanying notes 157-68 *supra*); Guardian Glass, 172 N.L.R.B. No. 49, 68 L.R.R.M. 1323 (June 26, 1968) (text accompanying notes 171-72 *supra*).

176 Wantagh Auto Sales, Inc., 177 N.L.R.B. No. 19, 72 L.R.R.M. 1541 (June 27, 1969) (text accompanying notes 173-74 *supra*).

177 Terrace Lumber Co., 154 N.L.R.B. 1109 (1965), involved both an illegal lockout of employees who had just designated the union as their representative and a refusal by the employer to bargain. In response to the request for union recognition the employer announced that he had no work for the employees and refused to discuss the matter further. Although first negotiation was involved, it was only ancillary to the Board's finding of a clear violation of the NLRA.

Again, it would seem highly desirable that the Board delineate useful guidelines in this area to aid both unions and employers.

III

Lockouts in Conjunction with Unfair Labor Practices

Does action amounting to an unfair labor practice taken by an employer at the same time as the lockout make the lockout illegal? The Board's answer is that a lockout may be legal despite unfair labor practices if the purpose of the lockout is to support a legitimate bargaining position and not to support the unfair practices. On the other hand, if the purpose of the lockout is to support an illegal bargaining position or to undermine or weaken the union, the lockout will constitute a violation.

Golden State Bottling Co.[178] is an early case upholding the validity of an employer lockout despite a pattern of unfair labor practices. *Golden State* was decided by the Board before, and modified by the Ninth Circuit after, *American Ship*. The employer had locked out employees to force agreement on his terms and had also interfered in the union's internal affairs to promote that agreement. After reaching a deadlock in negotiations with union leaders, the employer threatened to refuse further work to his employees after the old contract expired. He encouraged dissident union members to elect new officers in order to reach agreement with him, which they did on the day of the lockout. After his refusal to reemploy the old union leaders unless they signed the new contract, they conceded to his terms. Four months later the employer discharged one of the former union leaders for union activity, giving a minor violation of plant rules as justification for his action.[179]

The trial examiner found that one of the purposes of the lockout was to coerce employees into selecting union leaders who would accept the employer's terms. Thus the examiner did not rely upon the rule that any offensive lockout was a violation, but specifically grounded his finding on the employer's purpose of undermining the union leadership.[180] This finding was confirmed in pertinent part by the Board.

The Ninth Circuit Court of Appeals reversed the Board's finding that the lockout constituted a violation, since there was no evidence of

178 147 N.L.R.B. 410 (1964), *modified*, 353 F.2d 667 (9th Cir. 1965).
179 *Id.* at 415-19.
180 *Id.* at 417.

wrongful motivation on the part of the employer, nor any showing that disruption of the functioning of the union was a necessary consequence of the lockout.[181] The court affirmed the Board's findings that the employer had violated sections 8(a)(1) and (3) by discharging a union leader[182] and section 8(a)(2) by assisting a dissident union group.[183]

Safeway Stores, Inc.,[184] involving a lockout in defense of a multi-employer bargaining unit, presented similar issues. The employer had threatened the employees with discharge if they picketed. The examiner concluded that because of the threats the lockout was illegal. The Board specifically overruled the examiner, ruling that although the threats violated section 8(a)(1) of the NLRA, they did not change the defensive character of the lockout. The Board, however, found that the lockout lost its defensive character, and thus violated the Act because of the use of temporary replacements. After *Brown* the Board reversed its finding of violation.

The *Hess* case[185] indicates that even an illegal bargaining position on the part of an employer will not necessarily invalidate a lockout. The employer in *Hess* had violated the Act by insisting on a change in unit. The Board, however, found that this insistence had not contributed to the impasse in negotiations, and that the lockout was not primarily in support of this illegal position. Accordingly, and since the Board otherwise found the employer's bargaining to be in good faith, the lockout did not constitute a violation.

Finally, in *United States Pipe & Foundry Co.*[186] the Board held that a bargaining lockout did not violate the Act, even though during the same bargaining the employer had attempted to use an illegal tactic

181 NLRB v. Golden State Bottling Co., 353 F.2d 667, 670 (9th Cir. 1965).

182 *Id.* at 669. It is obvious from the findings of the trial examiner and the Board that the intent to undermine the union leadership was an important determinant of the employer's conduct. In these circumstances, that the employer also sought to further his bargaining goals should not make the lockout valid. *See* text accompanying notes 206-10 *infra*.

183 *Id.* at 670. Although the Board did not appeal *Golden State* to the Supreme Court, it did find violations of sections 8(a)(1) and (3) of the NLRA in the use of a lockout in a subsequent, similar case. Tonkin Corp., 147 N.L.R.B. 401 (1964), *remanded*, 352 F.2d 509 (9th Cir. 1965), on *remand*, 158 N.L.R.B. 1223 (1966), *enforced*, 392 F.2d 141 (9th Cir.), *cert. denied*, 393 U.S. 838 (1968); *see* text accompanying notes 192-95 *infra*. The Ninth Circuit's enforcement of *Tonkin* undermines its holding in *Golden State*.

184 148 N.L.R.B. 660 (1964), *vacated in part*, CCH 1965 LAB. L. REP. (NLRB Dec.) ¶ 9694.

185 Hess Oil & Chem. Corp., 167 N.L.R.B. 115 (1967), *aff'd*, 415 F.2d 440 (5th Cir. 1969), *cert. denied*, 397 U.S. 916 (1970); *see* notes 157-68 and accompanying text *supra*.

186 180 N.L.R.B. No. 61, 73 L.R.R.M. 1260 (Dec. 16, 1969), *enforced sub nom.* Molders Local 155 v. NLRB, 76 L.R.R.M. 2133 (D.C. Cir., Jan. 5, 1971). *See* text accompanying notes 218-19 *infra*.

in support of his bargaining position. Before declaring a lockout the employer had attempted to pressure the union into acceding to his demands by lowering the employees' wages and benefits. The Board ruled the tactic illegal but found that it did not taint the subsequent lockout.

Where the lockout is directly and primarily in support of unfair labor practices, however, a violation will generally be found. Cases so holding may be divided into three categories: (*1*) where the lockout is in direct support of bad faith bargaining by the employer; (*2*) where an employer attempts to use a lockout either to control or dominate a union or to undermine employee support for it; and, (*3*) where the lockout is used to punish employees for union activity.

American Stores Packing Co.[187] illustrates the first category. *American Stores* involved impasse in negotiation caused by the employer's refusal to discuss the union's bargaining proposals. Union wage proposals were based on rates of packinghouses in the immediate vicinity, while the employer's proposals were based on wage rates in effect at the four largest packers.[188] The parties had been negotiating for several months. During discussions on February 22, the union stood ready to negotiate both proposals, but management representatives believed discussion of union proposals would be a waste of time. Union representatives threatened to strike if no agreement was reached by midnight, February 25. On February 23 the employer locked the employees out. The union struck and the parties continued negotiations. The employer refused to agree to any of the union's proposals. On March 22 the employees offered to return to work, but the employer refused to allow them to return until agreement had been reached. Within twelve days the union agreed to the employer's proposals and the employees returned to work.

The trial examiner found that the employer had engaged in bad faith bargaining and that the lockout violated sections 8(a)(1), (*3*), and (5) of the NLRA. The Board adopted the relevant portion of the examiner's decision. On remand after *American Ship*, the Board reaffirmed its earlier decision:

> [W]e find that the Respondent locked out its employees, and refused to reinstate them, not for "the sole purpose of bringing

187 142 N.L.R.B. 711 (1963), *remanded*, 351 F.2d 308 (10th Cir. 1965), *on remand*, 158 N.L.R.B. 620 (1966).

188 The employer wanted his contract to embody terms similar to those in the Denver, Colorado contracts of Armour, Wilson, Swift, and Cudahy. The union, on the other hand, wanted to negotiate contracts similar to those then in existence between the union and Denver area packinghouses owned by supermarkets. 142 N.L.R.B. at 716.

> pressure to bear in support of [its] legitimate bargaining position," but rather as a means of evading its duty to bargain by attempting through coercive pressure on the employees to compel union acquiescence in Respondent's unlawful restriction of the scope of bargaining.[189]

Port Norris Express Co.[190] also involved a lockout in support of a bad faith bargaining position. The employer's truck drivers had been represented by the Teamsters for a period of over twenty years. The agreements between the parties during this period were in the form of short memorandums covering wages, holidays, and vacations. During negotiations in February 1968, the union presented the employer with a more complete contract proposal and the employer refused to consider it. After the union members rejected the employer's more limited proposal, the employer began a lockout. Negotiations continued, with the employer still refusing to consider the union's proposal. In April, agreement was finally reached and the employees returned to work. The examiner ordered payment of lost wages, finding that the lockout violated section 8(a)(3) of the NLRA because it was in support of the employer's refusal to bargain. His decision was adopted by the Board.

The *Tonkin Corp.* case[191] coupled an illegal lockout with employer interference in the internal affairs of an independent union and a discriminatory discharge. The employer had been negotiating with the Independent for a number of years. When no agreement was reached during negotiations in 1963, he informed the employees that there would be no work after April 1 without a signed contract and that he did not want to deal with the Teamsters Union. By April 1 nine employees had submitted authorization cards to the Teamsters, and on that date the employer locked out the employees. After some objection the employees returned to work and the leaders signed the contract. On April 2 the Teamsters filed a representation petition seeking an election among the employees. Without authorization the employer forwarded a copy of the contract to the regional office of the NLRB in the name of the independent union to indicate interest in the proceeding. On April 8 the employer received a copy of unfair labor practice charges filed by the Independent, and on the following day he discharged a leader of the Independent who had solicited cards for the Teamsters.

The examiner found that the employer had violated sections 8

189 158 N.L.R.B. at 623.

190 174 N.L.R.B. No. 106, 70 L.R.R.M. 1339 (Feb. 14, 1969).

191 147 N.L.R.B. 401 (1964), *remanded*, 352 F.2d 509 (9th Cir. 1965), *on remand*, 158 N.L.R.B. 1223 (1966), *enforced*, 392 F.2d 141 (9th Cir.), *cert. denied*, 393 U.S. 838 (1968).

(a)(1), (2), and (3) of the NLRA. He ordered the employer to reinstate the discharged employee, to cease recognizing the Independent, and to reimburse employees for union dues paid to the Independent under a union security clause since April 1. The Board adopted his decision.[192] The Ninth Circuit Court of Appeals enforced the Board's order concerning the discharge but remanded the rest of the case for reconsideration in light of *American Ship*.[193]

On remand the Board reaffirmed its earlier decision that the employer had violated section 8(a)(2) by forcing a new contract to subvert the independent union and avoid the Teamsters. The Board also found that the lockout was an integral part of the employer's course of illegal conduct and, therefore, itself illegal.[194] The Board's decision was enforced by the Ninth Circuit Court of Appeals.[195]

The Board has consistently held that a lockout designed to undermine employee support for a union is prohibited by the NLRA.[196] Thus, for example, in *Weinstein Electric Corp.*[197] a violation was found in a lockout used both in support of an employer bad faith bargaining position and in an attempt to force employees into a rival union. In *Bagel Bakers Council*[198] the Board found a similar violation in a lockout used in support of a bad faith bargaining position and as an instrument to transfer work from union to nonunion employees.

The Board has also found that the use of a lockout to punish employees for strike activity violates the NLRA. Thus in *Serv-Air, Inc.*[199] the Board adopted the examiner's finding that an employer had violated the Act by using a lockout as punishment for returning strikers. The examiner had rejected the employer's claim that he could not use the returning strikers.[200] In *O'Daniel Oldsmobile, Inc.*[201] the Board found a violation when the employer selectively locked out only those employees who had previously been on strike.

The Board has thus drawn a distinction between those cases where an employer happens to commit unfair labor practices at the same time

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192 147 N.L.R.B. at 401-02.

193 NLRB v. Tonkin Corp., 352 F.2d 509 (9th Cir. 1965).

194 158 N.L.R.B. at 1223.

195 Tonkin Corp. v. NLRB, 392 F.2d 141 (9th Cir.), *cert. denied*, 393 U.S. 838 (1968).

196 *See, e.g.*, Terrace Lumber Co., 154 N.L.R.B. 1109 (1965); note 177 *supra*.

197 152 N.L.R.B. 25 (1965).

198 174 N.L.R.B. No. 101, 70 L.R.R.M. 1301 (Feb. 19, 1969), *modified*, 75 L.R.R.M. 2718 (2d Cir. 1970).

199 161 N.L.R.B. 382 (1966), *enforced in part*, 395 F.2d 557 (10th Cir.), *cert. denied*, 393 U.S. 840 (1968).

200 161 N.L.R.B. at 415.

201 179 N.L.R.B. No. 55, 72 L.R.R.M. 1526 (Oct. 28, 1969).

as he is legitimately using a lockout and those cases where the lockout is in support of unfair labor practices. In the latter category are cases where the employer had no legitimate interests to further by use of the lockout, where the Board concluded that the claimed legitimate interests were no more than a pretext, or where the employer's interests were mixed and the illegitimate ones were primary.

The easiest cases are those in which the employer has no legitimate interest to defend by his lockout. Such a situation occurs when the employer openly refuses to bargain with the union, either because he simply prefers not to engage in collective bargaining[202] or prefers another union.[203] No balancing process is necessary to find that such a lockout is illegal.

Only a shade more difficult are those cases where the allegedly legitimate reasons put forward by the employer are judged to be a pretext. Clearly, a false justification given by an employer cannot be allowed to legitimatize an attempt to undermine collective bargaining. In *Serv-Air* the employer's stated reason was found to be a pretext because his economic situation was not as he claimed.[204] Presumably, however, even a legitimate interest would not protect an employer if the evidence indicated that such interest had not been part of his motivation for the lockout.[205]

The problem of mixed motive cases has long been a cause of concern even for those otherwise satisfied with Board procedures.[206] In deciding these cases the Board has tended to give employers the benefit of the doubt. Where the facts indicate the presence of both a legal and an illegal purpose for a bargaining lockout the Board has found a violation only where the employer has openly stated his illegal goal and where his acts indicate that this was one of his primary purposes.

In *American Stores* and *Port Norris* the employers had mixed motives for their lockouts: to secure an agreement and illegally to restrict bargaining. In both cases the employers were willing to discuss their own proposals but openly refused to discuss legitimate proposals made by union representatives. Clearly, in these circumstances a lockout could become a convenient method for an employer to avoid his

202 *See, e.g.*, Terrace Lumber Co., 154 N.L.R.B. 1109 (1965); note 177 *supra*.

203 *See, e.g.*, Weinstein Elec. Co., 152 N.L.R.B. 25 (1965); text accompanying note 197 *supra*.

204 *See* text accompanying notes 199-200 *supra*.

205 A recent article which takes a strong position against the use of motive as a determinant nevertheless indicates that it is sometimes necessary to inquire into motive when equivocal conduct is involved. Christensen & Svanoe, *Motive and Intent in the Commission of Unfair Labor Practices: The Supreme Court and the Fictive Formality*, 77 YALE L.J. 1269, 1275 (1968).

206 Cox, *The Duty to Bargain in Good Faith*, 71 HARV. L. REV. 1401, 1432-33 (1958).

obligation to bargain. The Board decisions in these cases are unobjectionable.

Two cases in which the issue of mixed motives should have been given more consideration, however, are *Hess* and *Guardian Glass*. In both of these cases, although there was no direct evidence of an intent to undermine the union, it was clear on all the facts that although the employer was ready to sign an agreement on his terms, he would not have been unhappy if the union withered on the vine.[207] An employer is not gnilty of an unfair labor practice merely because he would rather not deal with a union, and it may be that in these particular cases the findings of no violation were justified. The Board's failure to give a more thorough analysis of the issue, however, indicates that the lockout may prove to be a convenient tool for those employers sophisticated enough to maintain the formalities of bargaining without its substance.

Although it is easy to be critical of the Board, it should be admitted that the problem is a difficult one to resolve. One approach would be to declare, as in *Inland Trucking*,[208] certain employer practices illegal regardless of motivation. However, such an approach may restrict certain employers in their conduct of labor relations while leaving others free to undermine the union.[209] On the other hand, if the Board were to retain motivation as a standard and to apply that standard more harshly to employers with mixed motives, the result might be an automatic finding of an unfair labor practice whenever the employer has any ambivalent feelings concerning unions on the record.[210] Thus, neither cure is responsive to the present problem.

Nevertheless, it is incumbent upon the Board at least to confront the issue of mixed motives. If the Board analyzes this issue more explicitly, both employers and unions will have a better notion of the Board's attitude, and open discussion may lead to more innovative solutions.

IV

Change in Terms and Conditions of Employment as an Economic Sanction During Bargaining

Crestline Co.,[211] which preceded *American Ship*, was the first case in which an employer argned that he was privileged to change terms

207 *See* text accompanying notes 157-68 & 171-72 *supra*.

208 *See* text accompanying notes 81-92 *supra*.

209 *See* text accompanying notes 155-56 *supra*.

210 Lev, *supra* note 3, at 103-05.

211 133 N.L.R.B. 256 (1961).

and conditions of employment as an economic sanction during bargaining. In *Crestline* the parties failed to agree on a contract and the employer unilaterally terminated its contribution to employee group insurance and payment of holiday wages. The employer relied on *NLRB v. Insurance Agents' Union*,[212] a recent case in which the Board had been reversed for excessively restricting the use of economic weapons during a labor dispute. The Board in *Crestline*, however, ruled that an employer must bargain with the union over proposed changes in conditions of employment, even if they are intended as economic sanctions during bargaining.[213] Although the Board clearly ignored the distinction made in the *Insurance Agents'* case between conditions meant to be permanent and those intended as an economic sanction,[214] the decision was not appealed.

After *American Ship* the Board decided *Laclede Gas Co.*[215] on the same basis as *Crestline*. In *Laclede* the employer, without following contractual seniority, had laid off a number of employees as a sanction during negotiations. The Board decided that the employer was required to bargain with the union over any departure from contractual procedures, even if the action were used as an economic sanction.[216] The Eighth Circuit Court of Appeals, however, finding no violation in the employer's failure to bargain, refused to enforce the Board's decision and remanded the case for decision on the legality of the lockout.[217]

While *Laclede* was pending before the Board, *United States Pipe & Foundry Co.*[218] was decided. There the employer had instituted certain changes in wages and working conditions after first announcing them to union leaders during bargaining and soliciting their comments. The examiner rejected the argument that the employer had met the requirements of bargaining with the union before instituting the changes. He ruled that sanctions to be used by the employer are not a fit subject for bargaining and that the Supreme Court in the *Insurance Agents'* case had distinguished temporary changes meant as economic sanctions from permanent changes in the terms and conditions of employment.[219]

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212 361 U.S. 477 (1960).

213 133 N.L.R.B. at 258, *citing* NLRB v. Crompton-Highland Mills, Inc., 337 U.S. 217 (1949).

214 361 U.S. at 496 n.28.

215 173 N.L.R.B. No. 35, 69 L.R.R.M. 1316 (Oct. 22, 1968), *remanded*, 421 F.2d 610 (8th Cir. 1970), *on remand*, 187 N.L.R.B. No. 32, 75 L.R.R.M. 1483 (Dec. 14, 1970).

216 69 L.R.R.M. at 1317.

217 Laclede Gas Co. v. NLRB, 421 F.2d 610 (8th Cir. 1970).

218 N.L.R.B. No. 61, 73 L.R.R.M. 1260 (Dec. 16, 1969), *enforced sub nom.* Molders Local 155 v. NLRB, 76 L.R.R.M. 2133 (D.C. Cir., Jan. 5, 1971). *See* note 53 *supra*.

219 73 L.R.R.M. at 1261.

Facing the issue which the Board had managed to avoid previously, the examiner found that such changes in terms and conditions of employment were a greater sanction than a lockout. If the employer locked out the employees, they would be entitled to reinstatement upon settlement of the labor dispute. On the other hand, if the employer was allowed to make changes in terms of employment as a sanction, this could virtually force a strike and the employees might then face permanent replacement. Such a sanction went beyond *American Ship* and constituted illegal interference with employees' rights under section 7 of the NLRA.[220] The Board adopted the examiner's opinion with one member dissenting.[221]

In its decision on remand in *Laclede*,[222] however, the Board did not consider the relevance of the *United States Pipe* precedent. The Board noted that the employer "was not motivated by any desire to undermine the Union,"[223] and, citing *American Ship* and *Brown*, concluded that "Respondent has sustained its burden of establishing legitimate objectives . . . particularly when one considers that the layoffs were intended to be, and were, temporary and incidental to what the Court of Appeals has held to be a lawful, tactical bargaining maneuver."[224] In his dissenting opinion, Board member Fanning stated that he felt it improper for the Board "to speculate as to the Respondent's business justification for ignoring seniority rights."[225]

It is submitted that the *United States Pipe* decision embodies the correct rationale for those cases in which the employer attempts to use changes in terms and conditions of employment as a sanction. If a change in terms and conditions is intended as a sanction there can be no meaningful bargaining. Moreover, to allow such sanctions would be a clear threat to the rights of employees under section 7 of the NLRA.

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220 *Id.* at 1262. Section 7 of the NLRA reads as follows:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment . . . .

29 U.S.C. § 157 (1970).

221 Board member Zagoria's dissent would have allowed the changes and found a resulting strike to be a "constructive" lockout. 73 L.R.R.M. at 1263 (dissenting opinion).

222 Laclede Gas Co., 187 N.L.R.B. No. 32, 75 L.R.R.M. 1483 (Dec. 14, 1970).

223 75 L.R.R.M. at 1484 (footnote omitted).

224 *Id.*

225 *Id.* at 1485 (dissenting opinion). This dissent is persuasive. The Board's opinion listed no business reasons that specifically explained the employer's failure to follow contractual seniority.

Faced with such sanctions, unions have three unpleasant alternatives: (*1*) they can agree to a contract on the employer's terms; (*2*) they can allow employees to continue work under terms less favorable than either their previous contract or the employer's latest offer; or (*3*) they can call a strike with the employees subject to permanent replacement. Clearly, forcing the union to make such a choice could tend to undermine collective bargaining. There is no compelling employer interest that requires the protection afforded by such sanctions.

The majority rule in *United States Pipe* is more sensible than the dissent, which would allow the sanctions but declare any resulting strike a "constructive" lockout.[226] That rule would have the anomalous effect of providing employers with a weapon that could be used only against weak unions. Thus, if the employer changed terms and conditions of employment as a sanction, a strong union would almost certainly strike. The only unions against whom the weapon would be effective would be those so weak that they dare not strike even though such action would be offered the protection of being declared a constructive lockout.

Of course, not all changes in terms and conditions of employment during bargaining are used as sanctions. As to any changes which are not intended to operate as sanctions, the rule that the employer must bargain with the union before changing the contractual terms of employment should apply.

According to these rules the *Laclede* case was incorrectly decided. If, on the one hand, the departures from contractual seniority were sanctions,[227] the principles of *United States Pipe* should apply. Although only some employees were laid off, the union faced the same grim choice of either asking its members to strike and face permanent replacement, submitting to the employer's unilateral changes, or agreeing to his contract proposals. A departure from contractual seniority may not be so great a sanction as, for example, a lowering of wages. But in the absence of any showing of special circumstances, the relative weakness of the sanction is no reason for departing from a valid general rule.

If on the other hand, the departure from seniority was not intended as a sanction, but was simply a change for the convenience of the employer in making the layoff, then there is no reason why the matter

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226 *See* note 221 *supra.*

227 In its first *Laclede* opinion, the Board noted:

> Fnrther, the Respondent contends that because the parties had reached an impasse in the negotiations, it had the right temporarily to lay off employees out of seniority, in order to carry on its business and in order to strengthen its hand at the negotiating table.

Laclede Gas Co., 173 N.L.R.B. No. 35, 69 L.R.R.M. 1316 (Oct. 22, 1968) (footnote omitted).

should not have been discussed with the union. The employer's obligation to discuss such matters would be limited by the magnitude of the change, and he would not be obligated to continue discussions if the union's concern was not the change but the lockout itself.[228] There is, however, no reason to allow an employer to ignore the normal mechanics of collective bargaining in his use of a lockout.[229]

CONCLUSION

Brown and *American Ship* gave employers new freedom to use the lockout as a bargaining weapon. Before those cases were decided, the use of a lockout was considered an illegal infringement of union and employee rights except in certain exceptional cases. Those two landmark cases declared the lockout valid unless it came within certain proscribed categories. These categories were defined by two standards: the presence of union animus and a formula which requires the Board to balance the employer's economic interest in pursuing the lockout with the resulting damage to the interests of the union and employees. Today, despite a number of Board and court decisions, there are significant problems in defining the nature of union animus, particularly where the employer acts from mixed motives. The balancing of interests test remains an enigma.

Some questions have been answered by Board rulings. The Board has specifically held that absence of impasse does not make a bargaining lockout an NLRA violation, that temporary replacements in a bargaining lockout constitute a violation in the absence of special circumstances, and that the use of changes in terms and conditions of employment as a sanction during bargaining also violates the Act.

Other questions were answered by the Board without specific consideration in the opinions. Thus, in a series of decisions, some of which did not even merit an opinion, the Board sanctioned lockouts in defense of multi-employer units. After creating a concept of joint bargaining, the Board appears to have abandoned it as a separate category without specifically so stating. Similarly, the Board considered the relevance of the factor of first negotiations in one decision, but then apparently considered it irrelevant in a number of other decisions, again without specifically so stating. Finally, without acknowledging that it was taking this position, the Board has chosen to give the employer the benefit of the doubt in cases of ambiguous motivation for a lockout.

228 *Cf.* Laclede Gas Co., 171 N.L.R.B. No. 180, 69 L.R.R.M. 1075 (June 14, 1968).

229 *See* note 95 *supra.*

In none of these cases, however, was the underlying basis of decision clarified. This deficiency makes it more difficult to predict how the Board will rule in future cases. Moreover, the Board's close qualifications of its decisions in such cases as *Darling* and *Inland Trucking* and its failure to discuss some of the underlying issues as, for example, in the first negotiation cases, leave even the decided cases susceptible to easy reversal. Much of the problem seems to be the inevitable result of deficiencies in the formulas advanced by the Supreme Court in the *Brown* and *American Ship* decisions. While these deficiencies are subject to no easy cure, open recognition and discussion of them by the Board would be a welcome first step towards that goal.