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# LOCKOUTS AND THE LAW: THE IMPACT OF AMERICAN SHIP BUILDING AND BROWN FOOD\*

Walter E. Oberer†

*Two recent Supreme Court decisions dealing with the bargaining lockout and the use of temporary replacements during a multiemployer, defensive lockout are analyzed and interpreted against the background of prior cases and doctrines and in terms of implications for the future. The impact of the Court's evolving "true motive" interpretation of sections 8(a)(1) and (3) upon the Board's "balancing power" is also examined. The author concludes with a discussion of four questions left unanswered by the decisions, involving the pre-impasse bargaining lockout, the hiring of temporary replacements after a bargaining lockout, the hiring of permanent replacements after a bargaining or defensive lockout, and the bargaining lockout in first-contract negotiations.*

Any forager in the law is beholden to those who have traveled before him. In the realm of lockouts the trailblazer is Professor Bernard Meltzer. He has articulated a *laissez-faire* thesis concerning the bargaining lockout with such scholarly force as to leave magnetic markings.<sup>1</sup> I am not alone among his readers. Nine men in Washington have also been reading Professor Meltzer—if not directly, then derivatively. A substantial majority of them have proved to be apt pupils. The evidence of this appeared last March in the *American Ship Building*<sup>2</sup> and *Brown Food*<sup>3</sup> decisions. The Supreme Court held, in accord with Professor Meltzer's cogent advocacy, although without express acknowledgment and for somewhat expanded reasons, first, that a single-employer bargaining lockout, after impasse, was not an unfair labor practice; and, second, that neither was it an unfair labor practice for the nonstruck members of a multiemployer bargaining unit, who had locked out their employees in response to a whipsaw strike, to employ temporary replacements where the struck employer had himself employed temporary replacements.

Before analyzing these two decisions, some historical perspective is in order.

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<sup>1</sup> Meltzer, "Single-Employer and Multi-Employer Lockouts Under the Taft-Hartley Act," 24 U. Chi. L. Rev. 70 (1956); Meltzer, "Lockouts Under the LMRA: New Shadows on an Old Terrain," 28 U. Chi. L. Rev. 614 (1961); Meltzer, "Lockouts: Licit and Illicit," N.Y.U. 16th Conf. on Lab. 19 (1963).

<sup>2</sup> *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300 (1965).

<sup>3</sup> *NLRB v. Brown (d/b/a Brown Food Store)*, 380 U.S. 278 (1965).

## BACKGROUND

At common law the lockout was a weapon implicit in the employer's arsenal, unless, of course, he had relinquished it by contract.<sup>4</sup> An employer who could discharge or lay off at will could, by definition, lock out at will. The various meanings attributed to the ambiguous term "lockout" all entail permanent or temporary severance of employment.<sup>5</sup> The temporary withholding of employment in order to serve some interest of the employer vis-à-vis his employees is the variety of lockout currently most kinetic and therefore most pertinent for the purposes of this paper.

The Wagner Act of 1935<sup>6</sup> contained no reference to the lockout. It did, however, in section 7,<sup>7</sup> establish the rights of employees to organize, bargain collectively, and engage in concerted activities. These rights it buttressed by creating the employer unfair labor practices of section 8.<sup>8</sup> The right to strike was additionally and explicitly protected in section 13.<sup>9</sup>

<sup>4</sup> E.g., *Atchison, T. & S.F. Ry. v. Gee*, 140 Fed. 153 (C.C.S.D. Iowa 1905); *Goldman v. Cohen*, 222 App. Div. 631, 227 N.Y. Supp. 311 (1st Dep't 1928); *Moran v. Lasette*, 221 App. Div. 118, 120, 223 N.Y. Supp. 283, 286 (1st Dep't 1927) ("Unless surrendered by agreement, the right to lockout was correlative with the plaintiff's right to strike"); *Dubinsky v. Blue Dale Dress Co.*, 162 Misc. 177, 292 N.Y. Supp. 898 (Sup. Ct. N.Y. County 1936); see Annot., 173 A.L.R. 674 (1948).

In *Iron Molders' Union v. Allis-Chalmers Co.*, 166 Fed. 45, 50 (7th Cir. 1908), the court said:

[E]mployers may lock out (or threaten to lock out) employees at will, with the idea that idleness will force them to accept lower wages or more onerous conditions; and employees at will may strike (or threaten to strike), with the idea that idleness of the capital involved will force employers to grant better terms. These rights . . . are mutual and are fairly balanced against each other.

<sup>5</sup> Various usages of the word "lockout" are discussed, and pertinent authorities gathered, in Trial Examiner Charles W. Schneider's Intermediate Report in *Betts Cadillac Olds, Inc.*, 96 N.L.R.B. 268, 282-83 (1951). See also *Denbo*, "Is the Lockout the Corollary of the Strike?" 14 Lab. L.J. 400-01 (1963); *Koretz*, "Legality of the Lockout," 4 *Syracuse L. Rev.* 251-52 (1953).

<sup>6</sup> National Labor Relations Act, 49 Stat. 449 (1935), as amended, Labor-Management Relations Act of 1947 (Taft-Hartley Act), 61 Stat. 136, Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 519, 29 U.S.C. §§ 141-87 (1964).

<sup>7</sup> Section 7, 49 Stat. 452 (1935), as amended, 61 Stat. 140 (1947), 29 U.S.C. § 157 (1964), presently reads:

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 as authorized in section 8(a)(3).

<sup>8</sup> The provisions of Section 8, 49 Stat. 452 (1935), as amended, 61 Stat. 140 (1947), 29 U.S.C. § 158 (1964), most pertinent for the purposes of this paper presently read:

(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 . . .

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . .

(5) to refuse to bargain collectively with the representatives of his employees . . .

<sup>9</sup> Section 13, 49 Stat. 457 (1935), as amended, 61 Stat. 151 (1947), 29 U.S.C. § 163 (1964), presently reads:

The Taft-Hartley Act of 1947<sup>10</sup> added four sections which deal with lockouts expressly but tangentially: section 8(d)(4)<sup>11</sup> prohibits strikes or lockouts, for the purpose of terminating or modifying a collective bargaining agreement, until the prescribed notice period has run; section 203(c)<sup>12</sup> instructs the Director of the Federal Mediation and Conciliation Service to seek the settlement of disputes before resort to "strike, lock-out, or other coercion"; sections 206<sup>13</sup> and 208(a)<sup>14</sup> authorize the President to deal with national emergencies caused by strikes or lockouts.

In reviewing the treatment of lockouts under these provisions, it is helpful to have in mind the major purposes to which the lockout has been put. They are: (1) to defeat an organizing effort; (2) to evade the duty to bargain, as by undermining an incumbent bargaining representative; (3) to avoid peculiar economic loss or operational difficulty resulting from a partial strike or threatened by an imminent strike; (4) to protect a multiemployer bargaining unit from fragmentation through the whipsaw strike; (5) to drive a better bargain in the process of negotiating a collective agreement.

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Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.

<sup>10</sup> Labor-Management Relations Act of 1947, 61 Stat. 136, 29 U.S.C. §§ 141-87 (1964).

<sup>11</sup> Section 8(d), 61 Stat. 140 (1947), 29 U.S.C. § 158(d), (1964), reads in pertinent part:

[W]here there is in effect a collective-bargaining contract . . . the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party . . . of the proposed termination or modification sixty days prior to the expiration date thereof [and] . . .

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later . . . .

<sup>12</sup> Section 203(c), 61 Stat. 153 (1947), 29 U.S.C. § 173 (1964), reads in pertinent part:

If the Director is not able to bring the parties to agreement by conciliation within a reasonable time, he shall seek to induce the parties voluntarily to seek other means of settling the dispute without resort to strike, lock-out, or other coercion . . . . The failure or refusal of either party to agree to any procedure suggested by the Director shall not be deemed a violation of any duty or obligation imposed by this Act.

<sup>13</sup> Section 206, 61 Stat. 155 (1947), 29 U.S.C. § 176 (1964), reads in pertinent part:

Whenever in the opinion of the President . . . a threatened or actual strike or lock-out affecting an entire industry or a substantial part thereof engaged in [interstate commerce] . . . will, if permitted to occur or to continue, imperil the national health or safety, he may appoint a board of inquiry to inquire into the issues involved in the dispute and to make a written report to him . . . .

<sup>14</sup> Section 208(a), 61 Stat. 155 (1947), 29 U.S.C. § 178(a) (1964), reads in pertinent part:

Upon receiving a report from a board of inquiry the President may direct the Attorney General to petition any district court of the United States having jurisdiction of the parties to enjoin such strike or lock-out or the continuing thereof, and if the court finds that such threatened or actual strike or lock-out—

(i) affects an entire industry or a substantial part thereof engaged in [interstate commerce] . . . and

(ii) if permitted to occur or to continue, will imperil the national health or safety, it shall have jurisdiction to enjoin any such strike or lock-out, or the continuing thereof . . . .

The National Labor Relations Board and the reviewing courts had early opportunity to pass upon the legality of lockouts in the first two categories—those employed for the patently antistatutory objectives of defeating an organizing effort or evading the duty to bargain. Such lockouts were held unlawful.<sup>15</sup> These rulings, premised securely on what are now sections 8(a)(1), (3), and (5),<sup>16</sup> have never been questioned.

More vexing have been the problems presented in the other three lockout categories, all of which have some bearing on the *American Ship Building* and *Brown Food* cases. Accordingly, the developments in these three areas will be briefly outlined for background purposes.

#### *Lockouts To Avoid Peculiar Economic Loss*

Lockouts which are designed to protect the employer from peculiar economic loss or operational difficulty, *i.e.*, hardship not usually suffered by an employer subjected to a strike, have many times been held lawful by the NLRB.<sup>17</sup> The Board succinctly stated its doctrine in *Quaker State Oil*,<sup>18</sup> where it said: "lockouts are permissible to safeguard against unusual operational problems or hazards or economic loss where there is reasonable ground for believing that a strike was threatened or imminent. The burden of going forward with the evidence to justify the lockout rests on the [employer]."<sup>19</sup>

We may better understand this "economic justification" doctrine by reviewing the Board's three most frequently cited and illustrative applications of it.

In *Duluth Bottling*<sup>20</sup> the purpose of the employers in locking out in the face of a notice of impending strike was found to be the prevention of the spoilage of materials threatened by a sudden shutdown. Accordingly, the lockout motive was pure. It was "to avoid the peculiar economic loss which would have been a fortuitous incident of a strike,"<sup>21</sup> rather than the unlawful purpose of interfering with concerted activities of the employees.

<sup>15</sup> E.g., *NLRB v. Somerset Classics, Inc.*, 193 F.2d 613 (2d Cir. 1952); *NLRB v. Cape County Milling Co.*, 140 F.2d 543 (8th Cir. 1944); *NLRB v. National Motor Bearing Co.*, 105 F.2d 652, 657-58 (9th Cir. 1939); *NLRB v. Hopwood Retinning Co.*, 98 F.2d 97 (2d Cir. 1938). See also Note, "Permissibility of Lock-Outs, Shut-Downs and Plant Removals," 50 Colum. L. Rev. 1123 (1950).

<sup>16</sup> For the texts of these sections, see note 8 *supra*.

<sup>17</sup> The Board's "economic justification" doctrine has been searchingly examined, and criticized for its narrowness in excluding the bargaining lockout, by Professor Meltzer in the three articles cited note 1 *supra*.

<sup>18</sup> *Quaker State Oil Ref. Corp.*, 121 N.L.R.B. 334 (1958), enforced, 270 F.2d 40 (3d Cir.), cert. denied, 361 U.S. 917 (1959).

<sup>19</sup> 121 N.L.R.B. at 337-38.

<sup>20</sup> *Duluth Bottling Ass'n*, 48 N.L.R.B. 1335 (1943).

<sup>21</sup> *Id.* at 1336.

Again, in *International Shoe*<sup>22</sup> the purpose of the lockout was found to be to protect against intermittent work stoppages which made further operations in an integrated plant "uneconomical."<sup>23</sup>

And in *Betts Cadillac*<sup>24</sup> the purpose of the lockout by the nonstruck employers in a multiemployer unit was found to be to avoid the customer inconvenience and damage to good will which would have resulted from a sudden broadening of the strike so as to catch disassembled cars in the nonstruck employers' repair shops. The law does not require, the Board held, "that the employer caught in strike activity must be a sitting duck, stripped of his power to save himself from attendant loss or operative disruption."<sup>25</sup> "The pedestrian need not wait to be struck before leaping for the curb."<sup>26</sup>

The logic of this "economic justification" doctrine is more compelling the less one scrutinizes the cases giving rise to it. The logic runs like this: (1) The law does not require an employer to continue to operate where to do so makes no business sense. (2) A partial strike or threatened strike may, in the particular circumstances, render further operations sufficiently uneconomical to justify a temporary shutdown. (3) A shutdown in such circumstances is not a punishment for the exercise of section 7 rights and therefore unlawful, but is "defensive" in nature and therefore privileged.

But a closer examination of the three "classic" examples of the economic justification doctrine, discussed above, will demonstrate how nebulous the line may be between good lockouts, which are "defensive," and bad lockouts, which are "retaliatory." In *Duluth Bottling* we may properly ask what the loss through spoilage of materials would have been had the soft-drink manufacturers not anticipated the threatened strike by locking out. The facts were that the syrup from which the soft drinks were made would spoil within one to five days after being poured from storage drums into processing vats. By using up the syrup already in the vats at the time the strike notice was received and *then* closing down, the producers saved the cost of the syrup in the vats. How much did this saving amount to? The intriguing answer is: *from \$100 to \$300 per employer*. True, the trial examiner inferred that even this modest loss held significance for the small producers there involved, but we may be

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<sup>22</sup> *International Shoe Co.*, 93 N.L.R.B. 907 (1951).

<sup>23</sup> *Id.* at 909.

<sup>24</sup> *Betts Cadillac Olds, Inc.*, 96 N.L.R.B. 268 (1951). A case much like *Betts Cadillac* is *Packard Bell Electronics Corp.*, 130 N.L.R.B. 1122 (1961), where a lockout for the purpose of ensuring that customers' television sets would not be tied up during a threatened strike was held lawful.

<sup>25</sup> *Betts Cadillac Olds, Inc.*, *supra* note 24, at 285.

<sup>26</sup> *Id.* at 286. The two last-quoted statements in the text are from the Trial Examiner's Intermediate Report, which was adopted by the Board. *Id.* at 269.

permitted a little tongue in cheek in response to this inference, relegated to the fine print of a footnote.<sup>27</sup> A more persuasive interpretation of the case, looking through the form to the substance, is that on the total facts it was evident that the employers were underdogs, caught in an unfortunate bargaining situation by a powerfully situated union, and that, in locking out, they were rather innocent of any anticollective-bargaining animus (although they quite apparently favored a switch by their employees from the Brewery Workers Union, and the intoxicating wage pattern which that union had become accustomed to in representing beer-making employees, to the Teamsters Union which was subject to intoxication at lower rates<sup>28</sup>).

Similarly, in *International Shoe* the employer not only locked out all its employees in response to recurrent strikes on the part of a few, but also refused to reopen until first obtaining a no-strike pledge and an "escape" clause in the maintenance of membership provision permitting the withdrawal from the union of those who had joined after a certain date. The union agreed to the no-strike provision immediately, but balked at the escape clause. The employer's insistence upon the latter prolonged the lockout by more than a month. Was it uneconomical operation which motivated the lockout over this last month, or was it bargaining leverage? The Board majority held it was the former. Two dissenting members said it was the latter and that such a bargaining lockout constituted coercion within the meaning of section 8(a)(1) and discrimination within the meaning of section 8(a)(3). Furthermore, the dissenters contended, since the insistence upon the escape clause, unlike the no-strike clause, prolonged the lockout for reasons *other than* the assurance of stable operations, it was "in derogation of the basic policy of the Act to minimize interruptions of commerce."<sup>29</sup>

Again, in *Betts Cadillac* the most prominent reason given by the non-struck car dealers who locked out their repair shop employees was not that a sudden extension of the strike to them would risk the entrapment of customers' cars in their shops, but rather that "a strike against some was a strike against all."<sup>30</sup> The latter, standing alone, was no defense at all for a lockout in this pre-*Buffalo Linen* era. And the General Counsel strongly contended that it should be no defense on the facts of *Betts Cadillac* since, he argued, the real motivation for the lockout was reprisal

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<sup>27</sup> Duluth Bottling Ass'n, 48 N.L.R.B. 1335, 1359 n.50 (1943).

<sup>28</sup> The Board in fact found that certain actions of the employers, other than the lockout itself which was held lawful, in behalf of the Teamsters and against the Brewery Workers, constituted violations of §§ 8(1), (3). *Id.* at 1336-39.

<sup>29</sup> *International Shoe Co.*, 93 N.L.R.B. 907, 914 (1951).

<sup>30</sup> *Betts Cadillac Olds, Inc.*, 96 N.L.R.B. 268, 277-78, 288 (1951).

for the exercise of the strike weapon against two of the car dealers. The Board avoided this contention by holding that the burden of proof in such circumstances was on the General Counsel, and that he had failed to carry it.

Against this background, the difficulties with the logic of the economic-justification doctrine may become more apparent. As Professor Meltzer has put it:

It is plain from these cases that the Board's distinction between "economic" and bargaining lockouts is difficult to administer. Furthermore, the similarities between the two types of lockout seem to be more important than their differences. Both types may involve losses to employees which arise out of protected activities and may, therefore, discourage or diminish the effectiveness of such activities. Both types may also involve an attempt to protect the economic integrity of the enterprise without any attempt to frustrate organizational activity or to avoid the bargaining process. The difference between these lockouts when they both arise in the context of bargaining, namely that the bargaining lockout is designed to reduce the union's pressure by depriving it of the initiative with respect to the timing of the shutdown while the economic lockout is designed to avoid the *consequences* of the union's exercise of its initiative, seems exceedingly slender.

The employer may make this distinction even more shadowy by choosing his rhetoric carefully.<sup>31</sup> [Emphasis added.]

### *Multiemployer and Bargaining Lockouts*

The difficulty in distinguishing the "economically justified" lockout from the "bargaining" lockout cast its shadow across the multiemployer landscape. This was true because of the long resistance of the Board to any effort to distinguish multiemployer from single-employer lockouts. Each variety was subjected to the same test of legality, namely the *presence* of economic or operational difficulty of an atypical sort and the *absence* of antiunion animus. Thus, for example, in the *Morand*<sup>32</sup> and *Davis Furniture*<sup>33</sup> cases the Board held lockouts by nonstruck members of a multiemployer bargaining unit to be unlawful "reprisals" rather than privileged "defensive" measures, where no justification existed other than the desire to avoid the consequences of "divide and conquer" tactics on the part of the union. The Board's rationale was that the strike—even the "divide and conquer" strike—was a protected activity, and that a lockout designed solely to diminish the effectiveness of such a strike

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<sup>31</sup> Meltzer, "Single-Employer and Multi-Employer Lockouts Under the Taft-Hartley Act," *supra* note 1, at 76.

<sup>32</sup> *Morand Bros. Beverage Co.*, 91 N.L.R.B. 409 (1950), remanded 190 F.2d 576 (7th Cir. 1951), on remand, 99 N.L.R.B. 1448 (1952), enforced, 204 F.2d 529 (7th Cir.), cert. denied, 346 U.S. 909 (1953).

<sup>33</sup> *Davis Furniture Co.*, 94 N.L.R.B. 279 (1951), remanded sub nom. *Leonard v. NLRB*, 197 F.2d 435 (9th Cir.), on remand sub nom. *Davis Furniture Co.*, 100 N.L.R.B. 1016 (1952), enforcement denied sub nom. *Leonard v. NLRB*, 205 F.2d 355 (9th Cir. 1953).



was part of what the strike was protected against. This bootstrap reasoning was sought to be reinforced through asserting that whereas the employees had need of the strike to correct an imbalance in bargaining power, the employer had no countering need for the lockout because (1) he had the right to hire replacements in response to an economic strike, and (2) he had control over the terms of employment, in contrast to the employees who could affect such terms only through concerted activities.<sup>34</sup> Moreover, to permit employers to lock out in response to a selective strike would, as the Board viewed it, defeat the purpose of Congress to allay industrial strife. As stated in *Morand*:

In this case, the effect of granting immunity to the discriminatory lockout by 34 employers [involving about 700 employees], in reprisal against the strike against a 35th employer [involving only about 60 employees], would be to multiply the obstruction to commerce. It would set a sweeping precedent for the conversion of any single employer's dispute into an association-wide or industry-wide dispute. An isolated skirmish would become a civil war.<sup>35</sup>

To say that the reviewing courts were unimpressed by the Board's position that the multiemployer temporary lockout in response to a whip-saw strike was unlawful would be the understatement of this paper. The courts of appeals reversed the Board in every case in which review as to this question was sought.<sup>36</sup> Representative of some of the thinking of these courts was the Seventh Circuit's statement in *Morand* that the non-struck employers:

[C]ould quite properly . . . view the strike . . . in the strategic sense [as] . . . against the entire membership of their Associations, aimed at compelling all of them ultimately to accept the contract terms demanded by the Union. It follows that they had a right to counter the strike's effectiveness by . . . locking out their salesmen . . . . We so hold, not merely on the basis of the implied recognition, in . . . Section 8(d)(4), of the existence of such a right, but because the lockout should be recognized for what it actually is, i.e., the employer's means of exerting economic pressure on the union, a corollary of the union's right to strike.<sup>37</sup>

The Board resisted these judicial instructions until 1954 when the *Buffalo Linen*<sup>38</sup> case was presented to a new constituency. Even then,

<sup>34</sup> See *Davis Furniture Co.*, 100 N.L.R.B. 1016, 1020-21 (1952).

<sup>35</sup> *Morand Bros. Beverage Co.*, 91 N.L.R.B. 409, 413 (1950). The Board was quoting from the brief of the General Counsel.

<sup>36</sup> *NLRB v. Continental Baking Co.*, 221 F.2d 427 (8th Cir. 1955); *NLRB v. Spalding Avery Lumber Co.*, 220 F.2d 673 (8th Cir. 1955); *Davis Furniture Co.*, supra note 33; *Morand Bros. Beverage Co.*, supra note 32.

The only Board victory, which came in the second *Morand* decision, see note 32 supra, was premised on a finding that the employers had in fact "discharged" their employees, rather than merely locking them out temporarily. The employees were, however, re-employed after the dispute was settled.

<sup>37</sup> *Morand Bros. Beverage Co. v. NLRB*, 190 F.2d 576, 582 (7th Cir. 1951).

<sup>38</sup> *Buffalo Linen Supply Co.*, 109 N.L.R.B. 447 (1954).

it did only a partial about-face. It found the union's whipsaw tactic to be for the purpose of atomizing "the employer solidarity which is the fundamental aim of the multiemployer bargaining relationship."<sup>39</sup> Therefore, the Board majority said, "in the absence of any independent evidence of antiunion motivation, we find that the Respondent's [*sic*] action in shutting their plants . . . was defensive and privileged in nature, rather than retaliatory and unlawful."<sup>40</sup> The majority hastened to add: "Contrary to the assertion of our dissenting colleague, our decision herein does not establish that the employer lockout is the corollary of the employees' statutory right to strike. Upon the facts of this case, we find it unnecessary to pass upon that issue."<sup>41</sup> The majority wound up by jamming the case into the "economic justification" pigeonhole:

We have done no more in this case than affirm . . . that a strike by employees against one employer-member of a multiemployer bargaining unit constitutes a threat of strike action against the other employers, which threat, *per se*, constitutes the type of economic or operative problem at the plants of the nonstruck employers which legally justifies their resort to a temporary lockout of employees.<sup>42</sup>

The Second Circuit,<sup>43</sup> with a nice irony, reversed the Board, thus maintaining the Board's record for error on multiemployer, whiplash appeals. Judge Frank first put a pin to the economic-justification balloon. The only grounds for this contention, he pointed out, were, first, that the nonstruck employers could not feel safe in taking orders from their customers because they might not be able to make deliveries, and, second, that such employers could not feel safe in placing orders with suppliers because they might lack employees to handle the goods when they arrived and because the goods, even if delivered, might simply lie dormant as depreciating inventory. This reasoning, Judge Frank said, would apply as well to a single employer threatened with a strike, for he, too, would be faced with the prospect of disappointing customers or getting stuck with large depreciating inventories. Yet, as Judge Frank noted, the Board inconsistently conceded that the single employer would *not* be justified in locking out for such reasons.

Turning to the more difficult question of the justification of the lockout as an effort to defend the multiemployer unit against whipsaw fragmentation, Judge Frank observed that "multi-employer bargaining has never received the express sanction of Congress,"<sup>44</sup> whereas Congress had

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<sup>39</sup> *Id.* at 448.

<sup>40</sup> *Ibid.*

<sup>41</sup> *Ibid.*

<sup>42</sup> *Id.* at 448-49.

<sup>43</sup> *Truck Drivers Union v. NLRB*, 231 F.2d 110 (2d Cir. 1956).

<sup>44</sup> *Id.* at 117.

expressly protected the right to strike. He summed up with the half-accurate prophecy that "the problems involved in legalizing the lockout in multi-employer situations are manifold, and their solution must be left to Congress."<sup>45</sup>

The Supreme Court, in its first real encounter with lockouts under the act, reversed the Second Circuit and affirmed the Board.<sup>46</sup> In a unanimous decision it established these propositions: (1) that the act did not make lockouts illegal per se; (2) that the legality of lockouts was not confined to "unusual economic hardship" cases;<sup>47</sup> (3) that Congress had tacitly approved multiemployer bargaining; (4) that the member employers had a substantial interest in preserving such bargaining; (5) that Congress had committed the balancing of "conflicting legitimate interests" of employees and employers "primarily" to the Board, "subject to limited judicial review;"<sup>48</sup> and (6) that "in the circumstances of this case" the Board had "correctly balanced the conflicting interests in deciding that a temporary lockout to preserve the multi-employer bargaining basis from the disintegration threatened by the . . . strike action was lawful."<sup>49</sup>

Two points about this decision deserve emphasis: First, the Court did not attempt to delineate the outer bounds of lawful lockouts, expressly leaving open the question of "whether as a general proposition, the employer lockout is the corollary of the . . . strike."<sup>50</sup> Second, the Court expressly acknowledged the congressional commitment of strike-lockout balancing primarily to the Board. As we shall see shortly, the deference thus paid by the Court to this balancing function of the Board was recaptured, with interest, in *American Ship Building* and *Brown Food*.

### *American Ship Building*: THE SINGLE-EMPLOYER

#### BARGAINING LOCKOUT

The essential facts in the *American Ship Building*<sup>51</sup> case were these: The employer operated ship-repair yards on the Great Lakes. The work was highly seasonal, being concentrated in the winter months when the lakes were frozen. Repairs in other seasons required great speed to avoid undue immobilization of ships. The employer had previously executed five collective bargaining agreements with the unions representing its

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<sup>45</sup> Id. at 118.

<sup>46</sup> NLRB v. Truck Drivers Union, 353 U.S. 87 (1957).

<sup>47</sup> Id. at 92, 97.

<sup>48</sup> Id. at 96.

<sup>49</sup> Id. at 97.

<sup>50</sup> Id. at 93 n.19.

<sup>51</sup> *American Ship Bldg. Co. v. NLRB* 380 U.S. 300 (1965).

employees, each agreement having been preceded by a strike. The last contract expired on August 1, 1961. The requisite statutory notice of intention to seek modification of the contract was given by the unions on May 1, pursuant to section 8(d)(4) of the act. Substantial economic differences developed during the negotiations. Proposals and counter proposals were made, to no avail. Shortly before expiration of the contract, the unions proposed a six-month extension of the current contract, or, in the alternative, an indefinite extension, negotiations to continue in the interim. The employer rejected these extensions, fearing they might result in a strike during the peak season or when ships were otherwise in a yard for repair. On August 8, the unions announced an overwhelming rejection by their membership of the employer's last offer. On August 11, the employees were advised of layoff "until further notice."<sup>52</sup> Violations of sections 8(a)(1) and (3) were charged.<sup>53</sup>

The trial examiner, applying criteria with which we are now familiar, found that the shutdown was "economically justified" even though partially motivated by a desire to break the bargaining impasse,<sup>54</sup> as, in fact, it did on October 27, when a new contract was executed. The situation was, in effect, *Betts Cadillac* on water.

The Board, by a three-to-two majority, rejected the conclusion of the trial examiner that the shutdown was economically justified.<sup>55</sup> The Board's reason was its refusal to accept the trial examiner's conclusion that the employer could reasonably anticipate a strike. The Board found that certain oral assurances by union representatives were sufficient to dispel any such apprehension.<sup>56</sup> In such a situation, the Board concluded,

<sup>52</sup> *Id.* at 304.

<sup>53</sup> For the language of §§ 8(a)(1) and (3), see note 8 *supra*. The employer operated four yards, but the complaint was limited to the Chicago yard. A violation of § 8(a)(5) was also stated in the complaint, but "the Board made no findings as to this claim, believing that there would have been no point in entering a bargaining order because the parties had long since executed an agreement." *American Ship Bldg. Co. v. NLRB*, *supra* note 51, at 306 n.5. Moreover, as the Court noted, the decision in *NLRB v. Insurance Agents' Int'l Union*, 361 U.S. 477 (1960), upsetting the Board's determination that a slowdown or partial strike during contract negotiations was a *per se* violation of § 8(b)(3), had direct relevance to the § 8(a)(5) charge. *American Ship Bldg. Co. v. NLRB*, *supra* note 51, at 306 n.5.

<sup>54</sup> *American Ship Bldg. Co.*, 142 N.L.R.B. 1362, 1381-83 (1963); *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 305 (1965).

<sup>55</sup> *American Ship Bldg. Co.*, 142 N.L.R.B. 1362 (1963).

<sup>56</sup> The Board restated its requirement of a "real strike threat" as one of the elements necessary to justify a lockout and applied this requirement to the facts of the *American Ship Building* case in the following language:

[W]here the union has given the employer assurances that no sudden strike would be called, or that, in the event a strike were called, adequate safeguards would be taken by the union to protect the employer's facilities and work commitments during the course of the shutdown, a lockout is illegal; for in such a situation the lockout is deemed an offensive weapon intended to force the abandonment of the union's contract demands and the acceptance of the employer's.

Here, it appears that the Unions made every effort to convey to the Respondent their intention not to strike; and they also gave assurances that if a strike were called,

"the lockout is deemed an offensive weapon intended to force the abandonment of the union's contract demands and the acceptance of the employer's."<sup>57</sup> The lockout was therefore coercive within the meaning of section 8(a)(1) and discriminatory within the meaning of section 8(a)(3).

The District of Columbia Circuit, in a per curiam decision,<sup>58</sup> affirmed the Board, concluding that it had simply performed the balancing function which the Supreme Court had expressly sanctioned in *Buffalo Linen*.

The Supreme Court reversed,<sup>59</sup> without a dissent but with two concurring opinions representing the views of three of the Justices. Justice Stewart, writing for the majority, framed the question for decision as follows:

What we are here concerned with is the use of a temporary layoff . . . solely as a means to bring economic pressure to bear in support of the employer's bargaining position, after an impasse has been reached. This is the only issue before us, and all that we decide.<sup>60</sup>

He then considered the alleged violation of sections 8(a)(1) and (3). As to section 8(a)(1), he reviewed the Board's position that the lockout interfered with the section 7 rights to bargain collectively and to strike. "In the Board's view," he said, "the use of the lockout 'punishes' employees for the presentation of and adherence to demands made by their bargaining representatives . . ."<sup>61</sup> This contention Justice Stewart scotched on the ground that there was no allegation, no evidence, no finding that the employer was hostile to collective bargaining or that the lockout was designed to discipline the employees for banding together to engage in it. The employer's sole intention was to secure modification of the unions' demands. "We cannot see," Justice Stewart said, "that this intention is in any way inconsistent with the employees' rights to bargain collectively."<sup>62</sup> "Nor," he added, "is the lockout one of those

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any work brought into Respondent's yard before the strike would be completed. The Unions further offered to extend the existing contract for 6 months, or indefinitely, until contract terms were reached; in either case, the no-strike clause was to remain in effect during the negotiations.

In these circumstances, Respondent, having refused to accept the Unions' assurances that there would be no strike and having also rejected the Unions' offer to continue the existing contract, cannot now claim that there was reasonable ground to fear that the Unions would strike at some indeterminate date. Indeed, we find that there was, in fact, no reasonable ground for such a fear.

American Ship Bldg. Co., supra note 55, at 1364. [Footnote omitted.]

<sup>57</sup> Ibid.

<sup>58</sup> Local 374, Int'l Bhd. of Boilermakers v. NLRB, 331 F.2d 839 (D.C. Cir. 1964).

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

<sup>60</sup> Id. at 308.

<sup>61</sup> Ibid.

<sup>62</sup> Id. at 309.

acts which is demonstrably so destructive of collective bargaining that the Board need not inquire into employer motivation, as might be the case, for example, if an employer permanently discharged his unionized staff and replaced them with employees known to be possessed of a violent antiunion animus."<sup>68</sup> (Citing *Erie Resistor*.<sup>64</sup>)

As for the claimed interference with the right to strike, "there is nothing in the statute," Justice Stewart said, "which would imply that the right to strike 'carries with it' the right exclusively to determine the timing and duration of all work stoppages. The right to strike . . . is the right to cease work—nothing more."<sup>65</sup>

Accordingly, there was no violation of section 8(a)(1).

As for section 8(a)(3), Justice Stewart said: "It has long been established that a finding of violation under this section will normally turn on the employer's motivation."<sup>66</sup> Thus, if an employer discharges a union leader who has broken shop rules, the question is whether the employer has acted in defense of shop discipline or to damage employee organization. In *both* cases the discharge is likely to discourage union membership, but the first is lawful discrimination and the second unlawful. Again, some employer actions may be "inherently so prejudicial to union interests and so devoid of significant economic justification that no specific evidence of . . . antiunion animus is required."<sup>67</sup> The employer's conduct might carry with it "an inference of unlawful intention so compelling" that the Board might "truncate its inquiry into employer motivation."<sup>68</sup> (Citing *Erie Resistor* and *Radio Officers*.<sup>69</sup>) But this lockout did not fall into such a category.

As for the Board's balancing function, so deferentially acknowledged in *Buffalo Linen*, Justice Stewart said: "Sections 8(a)(1) and (3) do not give the Board a general authority to assess the relative economic power of the adversaries in the bargaining process and to deny weapons to one party or the other because of its assessment of that party's bargaining power."<sup>70</sup> Such would amount to the Board's "entrance into the substantive aspects of the bargaining process to an extent Congress has not countenanced."<sup>71</sup> (Citing *Insurance Agents*.<sup>72</sup>) Justice Stewart concluded with the following:

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<sup>68</sup> *Ibid.*

<sup>64</sup> *NLRB v. Erie Resistor Corp.*, 373 U.S. 221 (1963).

<sup>65</sup> *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 310 (1965).

<sup>66</sup> *Id.* at 311.

<sup>67</sup> *Ibid.*

<sup>68</sup> *Id.* at 311-12.

<sup>69</sup> *Radio Officers' Union v. NLRB*, 347 U.S. 17 (1954).

<sup>70</sup> *American Ship Bldg. Co. v. NLRB*, *supra* note 65, at 317.

<sup>71</sup> *Id.* at 317-18.

<sup>72</sup> *NLRB v. Insurance Agents' Int'l Union*, 361 U.S. 477 (1960).

The deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress. Accordingly, we hold that an employer violates neither § 8(a)(1) nor § 8(a)(3) when, after a bargaining impasse has been reached, he temporarily shuts down his plant and lays off his employees for the sole purpose of bringing economic pressure to bear in support of his legitimate bargaining position.<sup>73</sup>

Justice Goldberg, surely the most sophisticated member of the Court in labor matters, took issue with the majority as to everything except the result in a concurring opinion joined by the Chief Justice. In Justice Goldberg's view, the trial examiner was dead right in his conclusion that the lockout was economically justified. The record made it "crystal clear," Justice Goldberg said, that the employer had locked out "in the face of a threatened strike under circumstances where, had the choice of timing been left solely to the unions, the employer and his customers would have been subject to economic injury over and beyond the loss of business normally incident to a strike . . . ."<sup>74</sup> (Citing, most pertinently, *Betts Cadillac*.<sup>75</sup>) The conclusion of the Board that the evidence did not support the trial examiner's finding that the employer had reasonable grounds to fear a strike was "irrational," without a "scintilla" of support in the record.<sup>76</sup> The undisputed facts made it obvious, he said, that the employer could reasonably fear that the unions' strategy was to "strike when the time was ripe"<sup>77</sup>—*i.e.*, when a ship or ships could be caught in a yard for repairs. Each prior contract negotiation had entailed a strike. The assurances to the contrary of union representatives were simply what one might expect, in the nature of "hopeful augury" rather than "binding agreement."<sup>78</sup>

Justice Goldberg's approach to the case made it unnecessary to deal with the "broad question" of the legality of the bargaining lockout.<sup>79</sup> "The Court," he said, "should be chary of sweeping generalizations in this complex area."<sup>80</sup> Both the Court and the Board had "reached out" in passing upon the legality of the bargaining lockout.<sup>81</sup> The problem of lockouts requires, he said, "an evolutionary process," not a "quick, definitive formula."<sup>82</sup>

Moreover, the Court's requirement of an affirmative showing of anti-

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<sup>73</sup> *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 318 (1965).

<sup>74</sup> *Id.* at 327.

<sup>75</sup> *Betts Cadillac Olds, Inc.*, 96 N.L.R.B. 268 (1951).

<sup>76</sup> *American Ship Bldg. Co. v. NLRB*, *supra* note 73, at 335.

<sup>77</sup> *Id.* at 331.

<sup>78</sup> *Id.* at 333.

<sup>79</sup> *Id.* at 336.

<sup>80</sup> *Id.* at 338.

<sup>81</sup> *Id.* at 341-42.

<sup>82</sup> *Id.* at 336. Justice Goldberg was quoting Justice Frankfurter in *Local 761, Int'l Union of Elec. Workers v. NLRB*, 366 U.S. 667, 674 (1961).

union animus in 8(a)(1) and (3) cases, except where the employer's conduct was "demonstrably so destructive of collective bargaining" or "so prejudicial to union interests and so devoid of significant economic justification" as to render such unnecessary,<sup>83</sup> did not square with precedent. The proper test, from precedent, he said, was "whether the business justification for the employer's action outweighs the interference with § 7 rights . . ."<sup>84</sup> (Citing, for example, *Republic Aviation*.<sup>85</sup>) This test involves "the balancing of the conflicting legitimate interests," and this often "difficult and delicate responsibility" had been committed by Congress "primarily to the . . . Board, subject to limited judicial review."<sup>86</sup> (Citing *Buffalo Linen*.)

Justice White wrote a separate concurring opinion, in which he, too, strongly excepted to everything the Court had done but the ultimate disposition of the case. In his view, the case entailed no "lockout" problem whatsoever; the issue was rather "whether an employer who in fact anticipates a strike may inform customers of this belief to protect his commercial relationship . . . and to safeguard their property, thereby discouraging business, and then lay off employees for whom there is no available work."<sup>87</sup> This, he said, was precisely what had happened in this case and what the trial examiner had found. He quoted the manager of one of the employer's yards to the effect that "the owner that brought a boat into dock would have rocks in his head if he would have taken the chance."<sup>88</sup> Justice White found nothing in the law to indicate that an employer might not "truthfully inform his customers of a labor dispute and his fear of a strike to protect his business and their property" and then lay off his employees for "lack of work."<sup>89</sup> Such a situation is no lockout, he said, defining the latter as "the refusal by an employer to furnish *available* work to his regular employees."<sup>90</sup> Accordingly, Justice White also criticized the Court for "reaching out" to decide the bargaining lockout question "not at all presented by this case."<sup>91</sup> However, he felt "constrained" by the Court's decision to state his views on the subject.<sup>92</sup> These were in accord with the views of Justice Goldberg, but more vehement. The Court's opinion he characterized as a "*tour de force*," entailing a misinterpretation of sections 8(a)(1) and (3), usurpation of

<sup>83</sup> *Id.* at 339. These two different formulations of the test, quoted by Justice Goldberg, appear in the opinion of the Court at pages 309 and 311.

<sup>84</sup> *Id.* at 339.

<sup>85</sup> *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945).

<sup>86</sup> *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 340-41 (1965).

<sup>87</sup> *Id.* at 319.

<sup>88</sup> *Id.* at 319-20.

<sup>89</sup> *Id.* at 321.

<sup>90</sup> *Ibid.* [Emphasis added.]

<sup>91</sup> *Id.* at 322.

<sup>92</sup> *Ibid.*



the Board's balancing function, and a "truncated definition of the right to strike . . . ." <sup>93</sup> Carried away by his outrage, he framed this picture of what the Court had done:

If the Court means what it says today, an employer may not only lock out after impasse consistent with §§ 8(a)(1) and (3), but replace his locked-out employees with temporary help [citing *Brown Food*], or perhaps permanent replacements, and also lock out long before an impasse is reached. Maintaining operations during a labor dispute is at least equally important an interest as achieving a bargaining victory . . . and a shut-down during or before negotiations advances an employer's bargaining position as much as a lockout after impasse . . . . I would also assume that . . . he may lock out for the sole purpose of resisting the union's assertion of grievances under a collective bargaining contract, absent a no-lockout clause. Given these legitimate business purposes, there is no antiunion motivation, and absent such motivation, a lockout cannot be deemed destructive of employee rights. . . .

The balance and accommodation of "conflicting legitimate interests" in labor relations does not admit of a simple solution and a myopic focus on the true intent or motive of the employer has not been the determinative standard of the Board or this Court.<sup>94</sup>

*Brown Food: Buffalo Linen "PLUS"*

The facts in *Brown Food*<sup>95</sup> were akin to those in *Buffalo Linen* with these additives: (1) the struck employer exercised his right to hire temporary replacements; (2) the nonstruck employers, who had locked out their own bargaining-unit employees for the duration of the strike, also hired temporary replacements. Agreement was reached on a new contract within a month or so thereafter. The strikers and locked-out employees were immediately restored to their jobs.

The Board,<sup>96</sup> two members dissenting, found the situation not controlled by *Buffalo Linen* for the reason that, since the struck employer was operating through replacements, no need existed for the non-struck employers to lock out in defense of the multiemployer unit. "If," the Board said, "in those circumstances they resort to a lockout and hire replacements [rather than utilizing their regular employees, who, of course, were willing to work on the employer's terms], it may be reasonably inferred that they do so not to protect the integrity of the employer unit, but for the purpose of inhibiting a lawful strike. In short, the lockout in these circumstances ceases to be 'defensive' and becomes 'retaliatory.'" <sup>97</sup>

The Tenth Circuit, in a two-to-one decision, reversed the Board.<sup>98</sup>

<sup>93</sup> *Id.* at 323-24.

<sup>94</sup> *Id.* at 324-25.

<sup>95</sup> *NLRB v. Brown*, 380 U.S. 278 (1965).

<sup>96</sup> *John Brown (d/b/a Brown Food Store)*, 137 N.L.R.B. 73 (1962).

<sup>97</sup> *Id.* at 76.

<sup>98</sup> *NLRB v. Brown*, 319 F.2d 7 (10th Cir. 1963).

There was no evidentiary finding of unlawful motivation, it said, and the Board could not reasonably infer that "the act of hiring replacements, per se," was retaliatory rather than defensive.<sup>99</sup>

The Supreme Court affirmed the reversal of the Board, with Justice Goldberg and the Chief Justice again concurring, and Justice White this time dissenting.<sup>100</sup> Justice Brennan, writing for the Court, began by agreeing with the Tenth Circuit that neither the lockout nor the continued operations by the nonstruck employers through the use of temporary replacements, whether "viewed separately or as a single act," constituted, per se, a violation of the statute.<sup>101</sup> He reiterated the propositions announced in *American Ship Building* with respect to sections 8 (a)(1) and (3), namely that "evidentiary findings of hostile motive" are necessary to support a determination of unlawfulness except where "the employers' conduct is demonstrably so destructive of employee rights and so devoid of significant service to any legitimate business end that it cannot be tolerated consistently with the Act."<sup>102</sup> This exception, he said, was "but an application of the common-law rule that a man is held to intend the foreseeable consequences of his conduct."<sup>103</sup> As an example of such a situation, he cited *Erie Resistor* where, he said, the "only reasonable inference that could be drawn by the Board from the award of superseiority" to employees who worked during a strike "—balancing the prejudicial effect upon the employees against any asserted business purpose—was that it was directed against the striking employees because of their union membership; conduct so inherently destructive of employee interests could not be saved from illegality by an asserted overriding business purpose pursued in good faith."<sup>104</sup> The conduct of the respondents did not come within this exception, since it had a "comparatively slight" tendency to discourage union membership.<sup>105</sup> It analogized, Justice Brennan suggested, to the admittedly lawful efforts of an employer to "blunt the effectiveness of an anticipated strike by stockpiling inventories, readjusting contract schedules, or transferring work from one plant to another, even if he thereby makes himself 'virtually strike-proof.'<sup>106</sup> Therefore, the conduct of the respondents did not imply hostile motivation. Rather, the "compelling inference" was "that this was all part and parcel of respondents' defensive measure to preserve the multiemployer group in the face of the whipsaw strike."<sup>107</sup>

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<sup>99</sup> Id. at 10.

<sup>100</sup> NLRB v. Brown, supra note 95.

<sup>101</sup> Id. at 283.

<sup>102</sup> Id. at 286.

<sup>103</sup> Id. at 287.

<sup>104</sup> Ibid.

<sup>105</sup> Ibid.

<sup>106</sup> Id. at 283.

<sup>107</sup> Id. at 284.

The most difficult obstacle in Justice Brennan's line of reasoning was the claimed justification for the Board's inference of hostile motivation based on the respondents' discriminatory refusal to use some of their regular employees, who were willing to work, instead of temporary non-union replacements. Justice Brennan circumvented this obstacle by concluding, in effect, that to require the use of regular employees would force the respondents to help finance the whipsaw tactic. This, he said, would "render 'largely illusory' . . . the right of lockout recognized by *Buffalo Linen*."<sup>108</sup>

As for the embarrassing language in *Buffalo Linen* regarding the Board's balancing function, this did not mean, Justice Brennan said, that the reviewing courts were relegated to the role of "rubber-stamp," particularly where, as here, the question involved was not one of fact but of an "erroneous legal foundation" upon which the Board's balancing of the conflicting interests had been based.<sup>109</sup> "Congress," he said, "has not given the Board untrammelled authority to catalogue which economic devices shall be deemed freighted with indicia of unlawful intent."<sup>110</sup>

Justice Goldberg, joined again by the Chief Justice, wrote a concurring opinion for the sole purpose of emphasizing that "this would be an entirely different case had the nonstruck employers . . . hired *permanent* replacements even if the struck employer had exercised his right to hire permanent replacements under the doctrine of"<sup>111</sup> *Mackay Radio*.<sup>112</sup> On such facts, he said, a Board determination of nonjustification "might well be controlling" "for *Buffalo Linen* makes clear that the test in such a situation is not whether parity is achieved between struck and nonstruck employers, but, rather, whether the employers' actions are necessary to counteract the whipsaw effects of the strike and to preserve the employer bargaining unit."<sup>113</sup> This test was satisfied, Justice Goldberg agreed, by the hiring of temporary substitutes.

Justice White, dissenting, found fundamental flaws in the Court's disposition of the case. First, it unduly restricted the Board in dealing with 8(a)(1) and (3) cases. Sufficient leeway must be afforded the Board, in applying a statute "expressive of such large policy" and necessarily so "broadly phrased," to find some employer conduct "sufficiently destructive of concerted activities and union membership" as to fall within sections 8(a)(1) and (3) "notwithstanding that the employer has a

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<sup>108</sup> *Id.* at 285.

<sup>109</sup> *Id.* at 291-92.

<sup>110</sup> *Id.* at 292.

<sup>111</sup> *Id.* at 293.

<sup>112</sup> *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333 (1938).

<sup>113</sup> *NLRB v. Brown*, 380 U.S. 278, 293-94 (1965).

business justification for his actions."<sup>114</sup> *Republic Aviation*,<sup>115</sup> *Buffalo Linen*,<sup>116</sup> *Erie Resistor*,<sup>117</sup> and *Burnup & Sims*<sup>118</sup> had so decided. Second, the Court's reasoning had a faulty premise, namely "that *Buffalo Linen* gave the nonstruck employer . . . a 'right' to lock out whenever a member of the unit is struck so that a parity of economic advantage or disadvantage between the struck and the nonstruck employers can be maintained."<sup>119</sup> "If this reasoning is sound," Justice White said, "the nonstruck employers cannot only lock out employees who belong to the union because of their union membership but also hire permanent . . . nonunion replacements whenever the struck employer hires such replacements . . ."<sup>120</sup>

Justice White rejected this reasoning on the following grounds: (1) *Buffalo Linen* established no unqualified "right" of employers in a multi-employer unit to lock out; it simply held that the Board was within its authority in the balance it there struck. (2) The threat to the integrity of the multiemployer unit on the present facts was not the same as in *Buffalo Linen* since it could not be assumed that the struck employer operating with replacements was at the "same disadvantage vis-à-vis the nonstruck employers as the employer in *Buffalo Linen* whose operations were totally shut down by the union. Indeed, there was no showing here that the struck employer was substantially disadvantaged at all . . ."<sup>121</sup> (3) Such disparity as existed in the present case was caused by the unilateral action of the struck employer in resuming operations, not by the union's whipsaw tactic. (4) The Court had so sanctified the multiemployer unit as to license the nonstruck employers to refuse to employ union men and to employ, instead, nonunion replacements, the "prototype of discrimination under § 8(a)(3)."<sup>122</sup> Even *struck* employers had never been accorded this right of discrimination. "The Court's justification for this invasion of employee rights by a member of a multiemployer unit is the employer's right to burden the union strike fund with all its members to bring economic pressure to bear on the union. Unfortunately," Justice White pointed out, "this reasoning has equal, if not greater, force in the single employer partial strike situation."<sup>123</sup> (5) The "fundamental premise" of the Court "on which its balance of rights is founded" was unacceptable—namely "that a lockout

<sup>114</sup> *Id.* at 294.

<sup>115</sup> *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945).

<sup>116</sup> *NLRB v. Truck Drivers Union*, 353 U.S. 87 (1957).

<sup>117</sup> *NLRB v. Erie Resistor Corp.*, 373 U.S. 221 (1963).

<sup>118</sup> *NLRB v. Burnup & Sims, Inc.*, 379 U.S. 21 (1964).

<sup>119</sup> *NLRB v. Brown*, *supra* note 113, at 295.

<sup>120</sup> *Ibid.*

<sup>121</sup> *Id.* at 296.

<sup>122</sup> *Id.* at 297.

<sup>123</sup> *Id.* at 298.

followed by the hiring of nonunion men to operate the plant has but a 'slight' tendency to discourage union membership, which," he added, "includes participation in union activities."<sup>124</sup>

#### IMPLICATIONS OF *American Ship Building* AND *Brown Food*

The major implications of the Supreme Court's decisions in *American Ship Building* and *Brown Food* are these: (1) Sections 8(a)(1) and (3) have been freshly defined so as to require specific evidence of the subjective existence of antiunion animus in the usual case, but it is not at all clear where the line is to be drawn between usual and unusual cases. (2) The Board's balancing function with respect to "conflicting legitimate interests" has been curtailed, but it is not at all clear what the new boundaries are. (3) The Court has itself struck a new balance in bargaining power between employers and unions through the validation of new weapons for the employer, but it is not at all clear how far this impetus will carry in subsequent cases.

In short, the decisions in *American Ship Building* and *Brown Food*—even more so, the opinions—raise more questions than they answer. My interpretation is as follows.

The primary impact of the decisions is upon the balancing power of the Board. Prior to these decisions, the Board was authorized to find violations of sections 8(a)(1) and (3) on the basis of a balancing of the legitimate employer interest served by a particular employer action against the prejudice to expressly protected employee rights resulting from such action. If, as a result of such balancing, the Board concluded that the policy of the labor statute was more defeated than served by the particular employer action, the Board was authorized to infer from such action, without more, the requisite employer intention to do that which was proscribed under sections 8(a)(1) or (3).<sup>125</sup> In such a situa-

<sup>124</sup> Ibid.

<sup>125</sup> Justice Brennan, writing for the Court in *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 228-30 (1963) said:

[T]he employer may counter by claiming that his actions were taken in the pursuit of legitimate business ends and that his dominant purpose was not to discriminate or to invade union rights but to accomplish business objectives acceptable under the Act. Nevertheless, his conduct does speak for itself—it is discriminatory and it does discourage union membership and whatever the claimed overriding justification may be, it carries with it unavoidable consequences which the employer not only foresaw but which he must have intended. As is not uncommon in human experience, such situations present a complex of motives and preferring one motive to another is in reality the far more delicate task . . . of weighing the interests of employees in concerted activity against the interest of the employer in operating his business in a particular manner and of balancing in the light of the Act and its policy the intended consequences upon employee rights against the business ends to be served by the employer's conduct. This essentially is the teaching of the Court's prior cases dealing with this problem . . . .

Justice Brennan further said:

Here, as in other cases, we must recognize the Board's special function of applying the

tion the Board was not required to demonstrate independent evidentiary support for its finding of unlawful motive. Moreover, the determination of the Board on the basis of such balancing was subject to "limited judicial review," as prescribed in *Buffalo Linen*.<sup>126</sup>

The concern evinced by the Supreme Court in *American Ship Building* and *Brown Food* is the product of the nebulous character of the balancing standard. In fact, it is hardly a standard at all, but rather delegates to the Board a broad policy-making power most difficult of supervision through judicial review, particularly the "limited" judicial review prescribed in *Buffalo Linen*. This kind of blank-check power for the Board is especially troublesome where it is employed in passing upon the legality of economic pressures not specifically prohibited by the statute which are brought to bear by either side in the process of negotiating a contract. In the exercise of such power the Board necessarily gets a thumb on the bargaining scales and, to that extent, interferes with free collective bargaining. In the *Insurance Agents*<sup>127</sup> case the Court struck down the Board's exercise of such power to render a slowdown or partial strike during contract negotiations a per se violation of section 8(b)(3).<sup>128</sup> The two present cases in a sense declare, "What's sauce for the goose is sauce for the gander."

What the Board has, in fact, been doing in seeking a rational exercise of its balancing power with respect to sections 8(a)(1) and (3) is to ask itself two questions:<sup>129</sup> First, how significant is the business interest which the particular employer conduct seeks to vindicate? Second, to what extent does this employer conduct prejudice expressly protected employee rights? What the Supreme Court has done in *American Ship Building* and *Brown Food* is to tighten the balancing standard by re-

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general provisions of the Act to the complexities of industrial life, *Republic Aviation Corp. v. Labor Board*, 324 U.S. 793, 798; *Phelps Dodge Corp. v. Labor Board*, [313 U.S. 177], at 194, and of "[appraising] carefully the interests of both sides of any labor-management controversy in the diverse circumstances of particular cases" from its special understanding of "the actualities of industrial relations." *Labor Board v. United Steelworkers*, [357 U.S. 357], at 362-363. "The ultimate problem is the balancing of the conflicting legitimate interests. The function of striking that balance to effectuate national labor policy is often a difficult and delicate responsibility, which the Congress committed primarily to the . . . Board, subject to limited judicial review." *Labor Board v. Truck Drivers Union*, 353 U.S. 87, 96.

Consequently, because the Board's judgment was that the claimed business purpose would not outweigh the necessary harm to employee rights—a judgment which we sustain—it could properly put aside evidence of respondent's motive and decline to find whether the conduct was or was not prompted by the claimed business purpose. *Id.* at 236-37.

To similar effect, see *Radio Officers' Union v. NLRB*, 347 U.S. 17, 44-52 (1954).

<sup>126</sup> *NLRB v. Truck Drivers Union*, 353 U.S. 87, 96 (1957).

<sup>127</sup> *NLRB v. Insurance Agents' Int'l Union*, 361 U.S. 477 (1960).

<sup>128</sup> Section 8(b)(3) makes it an unfair labor practice for a union to refuse to bargain collectively. 61 Stat. 140 (1947), 29 U.S.C. § 158(b)(3) (1964).

<sup>129</sup> See, e.g., note 125 supra.

formulating in more extreme, but nonetheless fuzzy, form the questions to be asked and answered by the Board. In other words, it is still open to the Board to hold a particular employer action violative of sections 8(a)(1) or (3) despite the absence of independent evidence justifying a finding of antiunion animus. But it can only do so where the employer action is so "inherently prejudicial" to (or "demonstrably destructive" of) employee rights and/or "so devoid of significant economic justification" as to "carry its own indicia of unlawful intent." The Court's statement and restatement of the new test in the two recent decisions make it unclear whether *both* inherently prejudicial impact upon employee rights *and* lack of significant serving of legitimate employer interests are required before a violation of sections 8(a)(1) or (3) may be found. My interpretation is that the requirements are disjunctive in the sense that it is open to the Board to find a violation *either* because the action of the employer which prejudices protected employee rights serves no significant legitimate interest of the employer *or* because, even where it does serve such an interest, it is so invasive of employee rights as to be inconsistent with the purposes of the labor statute. Either one of these situations would seem to provide rational support for an inference of unlawful motive. In the first, the action of the employer is explainable more rationally in terms of an antistatutory motivation than in terms of an effort to protect *insignificant* employer interests.<sup>130</sup> In the second, the situation is precisely what it was in *Erie Resistor*, fulsomely cited in both opinions of the Court as illustrative of a situation where independent inquiry need not be made by the Board as to employer motivation. Since the super seniority granted in *Erie Resistor* to replacements during an economic strike was sought to be justified by the employer on the ground that replacements could not otherwise be acquired, and since the Court there approved the Board's refusal to inquire into the validity of this employer contention,<sup>131</sup> it would seem to follow that "inherent prejudice" to employee rights, whatever this may mean,<sup>132</sup> is sufficient to render an otherwise legitimate action of the employer unlawful. As Justice Brennan

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<sup>130</sup> If support is needed for this seemingly self-evident proposition, it may be found in *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945), apparently still viable. Further support is found in this statement from Justice Brennan's opinion for the Court in *Brown Food*: "When the resulting harm to employee rights is . . . comparatively slight, and a substantial and legitimate business end is served, the employer's conduct is *prima facie* lawful." *NLRB v. Brown*, 380 U.S. 278, 289 (1965).

<sup>131</sup> See note 125 *supra*.

<sup>132</sup> Justice Stewart's view of what the Court means by such phrases is apparently quite extreme. He states, writing for the Court in *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 309 (1965):

Nor is the lockout one of those acts which is demonstrably so destructive of collective bargaining that the Board need not inquire into employer motivation, as might be the case, for example, if an employer permanently discharged his unionized staff and replaced them with employees known to be possessed of a violent antiunion animus.

put it in the *Brown Food* decision, *Erie Resistor* is "but an application of the common-law rule that a man is held to intend the foreseeable consequences of his conduct."<sup>133</sup> Justice Brennan's purpose in this attempted accommodation was to square the embarrassing *Erie Resistor* precedent (and many others)<sup>134</sup> with the Court's evolving "true motive" rationale in 8(a)(1) and (3) cases. Whatever reservations one may have about such a presumed intent, involving at worst a fiction and at best a preference of one motive over another in a mixed-motive situation,<sup>135</sup> the Court seems to have accepted it.

Against the backdrop of the foregoing, we may now speculate as to the disposition of four specific questions raised but unanswered in *American Ship Building* and *Brown Food*.

(1) *The Pre-Impasse Bargaining Lockout*

The first question is: May the employer lock out for bargaining purposes *before* an impasse is reached and in the absence of any real threat to strike? At first blush, this might not seem a lively problem since a shut-down for bargaining purposes before the need for such has crystallized would appear to hold little attraction for employers. But, as a practical matter, the question may be of importance. Suppose, for example, the employer locks out for bargaining leverage under circumstances which he interprets to constitute an impasse. Must he act at the risk of being found by the Board to have made an erroneous judgment that an impasse existed? Moreover, in some situations, delaying the lockout until an anticipated impasse has actually crystallized may, because of the crucial importance of tinning in the particular case, be claimed to deprive the employer of the value of the lockout.

The starting point for analysis of this pre-impasse lockout question is, of course, *American Ship Building*. The "only" issue there decided by the Supreme Court was that the bargaining lockout was lawful *after* a bargaining impasse had been reached. But Justice White, concurring in the result for other reasons, decried as one implication of the majority's reasoning that the employer could lock out during or even before negotiations since this would advance his bargaining position "as much as a

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<sup>133</sup> NLRB v. Brown, supra note 130, at 287. Justice Brennan went on to add: "conduct so inherently destructive of employee interests could not be saved from illegality by an asserted overriding business purpose pursued in good faith." Ibid.

<sup>134</sup> Justice White, concurring in *American Ship Building*, cites pertinent cases in conflict with the "true motive" rationale. *American Ship Bldg. Co. v. NLRB*, supra note 132, at 324. The cases cited are: *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945); *Radio Officers' Union v. NLRB*, 347 U.S. 17 (1954); *NLRB v. Truck Drivers Union*, 353 U.S. 87 (1957); *NLRB v. Erie Resistor Corp.*, 373 U.S. 221 (1963); *NLRB v. Burnup & Sims, Inc.*, 379 U.S. 21 (1964).

<sup>135</sup> See note 125 supra.



lockout after impasse.<sup>136</sup> Given this legitimate business purpose, Justice White said, there would be no basis for an inference of antiunion motivation, and the lockout, absent independent evidence of such motivation, would be lawful. Justice White's projection of the logic of the majority is forceful. While the Supreme Court has never held the bargaining lockout to be the corollary of the strike,<sup>137</sup> there is support for this proposition in lower-court decisions<sup>138</sup> and among legal scholars.<sup>139</sup> And, of course, if the strike and lockout are to be treated as corollaries in the bargaining context, the lockout, like the strike, is lawful before or after impasse. Moreover, section 8(d)(4)<sup>140</sup> equates strikes and lockouts where the purpose is termination or modification of an existing contract; a notice and waiting period are required for each, but no express requirement of an impasse is laid down. However, the design of section 8(d)(4) is quite clearly to deal with bargaining impasses. In addition, the lockout, unlike the strike, is *not* expressly protected in the act.

What, then, is the Board to do when it has this question of the pre-impasse bargaining lockout presented to it? What it will *want* to do is fairly predictable, namely to read *American Ship Building* narrowly. The Board has always viewed the bargaining lockout as a Pandora's Box. Underlying the interpretative concern over the impact upon expressly protected employee rights has been a companion concern for the avoidance of "unnecessary" industrial strife. Equating the bargaining lockout with the strike would create the risk of more industrial warfare, the Board has reasoned, thus periling the most fundamental goal of the national labor policy.<sup>141</sup> Professor Meltzer and other critics of the Board's position

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<sup>136</sup> *American Ship Bldg. Co. v. NLRB*, supra note 132, at 325. Justice Goldberg, who also concurred in *American Ship Building*, took a more conservative view of the Court's position on this question: "the Court itself seems to recognize that there is a difference between locking out before a bargaining impasse has been reached and locking out after collective bargaining has been exhausted, for it limits its holding to lockouts in the latter type of situation without deciding the question of the legality of locking out before bargaining is exhausted." *Id.* at 337.

<sup>137</sup> The question was expressly left open in *Buffalo Linen*. See *NLRB v. Truck Drivers Union*, 353 U.S. 87, 93 n.19 (1957).

<sup>138</sup> See, e.g., *Morand Bros. Beverage Co. v. NLRB*, 190 F.2d 576, 582 (7th Cir. 1951), quoted in text to note 37 supra. But, while vigorously asserting that the lockout was the corollary of the strike, the Seventh Circuit seemed to require at the same time an exhaustion of "the possibilities of good faith collective bargaining" (i.e., an "impasse") as a condition precedent to the exercise of the bargaining lockout. *Ibid.* This position was reiterated in the second *Morand* decision. *Morand Bros. Beverage Co. v. NLRB*, 204 F.2d 529, 531 (7th Cir. 1953).

<sup>139</sup> See, e.g., Brundage, "The Lockout and Multi-Employer Bargaining," 14 *Lab. L.J.* 976, 979 (1963); Denbo, "Is the Lockout the Corollary of the Strike?" 14 *Lab. L.J.* 400 (1963); Johannesen, "Lockouts: Past, Present, and Future," 1964 *Duke L.J.* 257, 260; Meltzer, "Single-Employer and Multi-Employer Lockouts Under the Taft-Hartley Act," 24 *U. Chi. L. Rev.* 70, 81 (1956); Meltzer, "Lockouts Under the LMRA: New Shadows on an Old Terrain," 28 *U. Chi. L. Rev.* 614, 618 (1961).

<sup>140</sup> See note 11 supra.

<sup>141</sup> See text accompanying note 35 supra.

have challenged this premise on the ground that there is no way of knowing whether an enhancement of industrial strife would result; instead, they have argued, validating the bargaining lockout might well, through the counter pressure thus created, cause an actual reduction in time lost in labor disputes by providing additional "motive power" for compromise.<sup>142</sup> Moreover, the compromises thus resulting might tend to be less inflationary and thus more in the national interest. I do not expect the Board to be receptive to this line of conjecture, particularly in view of its predictable and proper concern over the potential for camouflaged subversion of collective bargaining under the guise of "bargaining" lockouts.

But how is the Board to rationalize the result it will likely desire to achieve? Obviously, it will be astute to discover any evidence independent of the pre-impasse lockout from which to find, by inference if necessary, the existence of an antistatutory motive. Failing this, it will have to confront the old balancing problem in its new dress. The prejudice to employee rights is obviously greater in degree, if only slightly, where the bargaining lockout occurs before impasse than where it occurs after impasse. For one thing, the employees cannot avoid such a lockout as surely through concessions in bargaining which postpone an impasse.<sup>143</sup> Similarly, the employer interest served by the pre-impasse lockout is lesser in degree, since, in view of the clear availability of the lockout after impasse when the real bargaining need has crystallized, a pre-impasse lockout may be deemed somewhat gratuitous and to that extent freighted with the implication of impurity of purpose.<sup>144</sup>

Moreover, the only mention of lockouts in the labor statute occurs in sections 8(d)(4),<sup>145</sup> 203(c),<sup>146</sup> 206,<sup>147</sup> and 208(a),<sup>148</sup> all of which are designed to deal with bargaining impasses.<sup>149</sup> Such implied licensing of

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<sup>142</sup> See, e.g., Meltzer, "Single-Employer and Multi-Employer Lockouts Under the Taft-Hartley Act," supra note 139, at 80, 90-91; Meltzer, "Lockouts Under the LMRA: New Shadows on an Old Terrain," supra note 139, at 617-18.

<sup>143</sup> Professor Meltzer would invert this concern: "That requirement [of an impasse before resort to the bargaining lockout] involves troublesome evidentiary problems and might also provoke union stalling in negotiations designed to deprive the employer of control over the timing of a shutdown, which is the main advantage of the lockout weapon." Meltzer, "Lockouts Under the LMRA: New Shadows on an Old Terrain," supra note 139, at 619.

<sup>144</sup> Professor Meltzer, commenting upon the "inconsistency" of the Seventh Circuit in *Morand*, see note 138 supra, in speaking of the lockout as the corollary of the strike while at the same time seeming to require an impasse before resort to the bargaining lockout, pertinently observes: "This inconsistency could perhaps be avoided by accepting the assumption, which is, however, somewhat fanciful, that in the absence of an impasse resort to a lockout would necessarily be prompted by anti-union motivation." Meltzer, "Single-Employer and Multi-Employer Lockouts Under the Taft-Hartley Act," supra note 139, at 72 n.13.

<sup>145</sup> See note 11 supra.

<sup>146</sup> See note 12 supra.

<sup>147</sup> See note 13 supra.

<sup>148</sup> See note 14 supra.

<sup>149</sup> Professor Meltzer emphasizes this point in arguing the legality of the bargaining lockout. Meltzer, "Lockouts Under the LMRA: New Shadows on an Old Terrain," supra

the bargaining lockout as may be derived from these provisions<sup>150</sup> may therefore be argued to be limited to a situation where a bargaining impasse exists. The fact that the lockout is equated with the strike in these provisions and that the pre-impasse strike is lawful does not necessarily answer this argument, since the strike, unlike the lockout, is to no extent dependent upon the existence of these provisions, and the inferences to be drawn from them, for its legality. Sections 13<sup>151</sup> and 7<sup>152</sup> afford the strike, before and after impasse, express and independent protection.

Despite all of this, I do not believe that the pre-impasse lockout can be safely treated by the Board as "carrying its own indicia of unlawful intent" within the meaning of the *Erie Resistor* exception to the requirement of independent evidence of hostile motivation. My conclusion might be different if *none* of the following factors were present: (1) a good-faith belief by the employer that an impasse existed at the time of lockout; (2) pre-impasse strike activity or the threat thereof; (3) a substantial lessening of bargaining leverage to be gained from the lockout because of a delay in resort to it until impasse; (4) some other, more exotic justifying circumstance. In the absence of all of these factors, the most rational inference might be an antistatutory state of mind. How else explain the *timing* of the lockout? But the very statement of the problem in this involved manner demonstrates the manifold factual contexts in which it may arise and the dependence of a proper solution upon the particular circumstances.

Whatever the Board does with the pre-impasse question, the courts of appeals are likely to split.<sup>153</sup> Whether or not this is an accurate guess, one court of appeals vote has, indeed, already been registered. In *Detroit Newspaper Publishers Ass'n v. NLRB*,<sup>154</sup> decided on June 3, 1965, the

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note 139, at 618; Meltzer, "Single-Employer and Multi-Employer Lockouts Under the Taft-Hartley Act," supra note 139, at 81 n.45, 82. "Section 8(d)(4) is specifically directed at the situation of a bargaining impasse." *Id.* at 82.

<sup>150</sup> The Court relied upon these provisions in *American Ship Building*: "The correlative use of the terms 'strike' and 'lockout' in these sections contemplates that lockouts will be used in the bargaining process in some fashion. This is not to say that these provisions serve to define the permissible scope of a lockout by an employer." *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 315 (1965). The provisions were similarly relied upon in *Buffalo Linen*: "The unqualified use of the term 'lock-out' in several sections of the Taft-Hartley Act is statutory recognition that there are circumstances in which employers may lawfully resort to the lockout as an economic weapon." *NLRB v. Truck Drivers Union*, 353 U.S. 87, 92-93 (1957).

<sup>151</sup> See note 9 supra.

<sup>152</sup> See note 7 supra.

<sup>153</sup> The issue had produced diversity of views among the circuits before *American Ship Building* was decided. Compare *NLRB v. Dalton Brick & Tile Corp.*, 301 F.2d 886 (5th Cir. 1962) (lockout held lawful despite no impasse), with *Utah Plumbing & Heating Contractors Ass'n v. NLRB*, 294 F.2d 165 (10th Cir. 1961) (held unlawful); *Quaker State Oil Ref. Corp. v. NLRB*, 270 F.2d 40 (3d Cir. 1959), cert. denied, 361 U.S. 917 (1959) (held unlawful). See also *Morand Bros. Beverage Co. v. NLRB*, 190 F.2d 576, 582 (7th Cir. 1951), 204 F.2d 529, 531 (7th Cir. 1953) discussed at note 138 supra.

<sup>154</sup> 346 F.2d 527 (6th Cir. 1965).

Sixth Circuit had before it the following facts. The Association, comprised of the two newspapers published in Detroit, the News and the Free Press, had been formed years before for the purpose of negotiating and administering labor contracts and handling the labor relations of members. The Association did not, however, bargain on a multiemployer basis with the Teamsters Union, here involved; contracts with the Teamsters had traditionally been negotiated on an individual-unit basis. The Teamsters struck the Free Press over contract renewal demands, and the News, with which the union was simultaneously bargaining, locked out its employees shortly thereafter in accordance with a prior agreement to this effect with the Free Press. At the time of the lockout, the negotiations between the union and the News had apparently not reached a formal impasse, although it was clear that the crucial issues which prompted the Free Press strike existed also with respect to the negotiations with the News and that the two newspapers had agreed, prior to the strike against the Free Press, that neither would yield on these matters. The Board had found the News guilty, on these facts, of violating sections 8(a)(1) and (3) by reason of its lockout.<sup>155</sup> The Sixth Circuit, with dubious wisdom, denied the Board's motion for remand of the case for further consideration in the light of the intervening *American Ship Building* decision, thus depriving the primary tribunal of the first opportunity to pass upon the pre-impasse question.<sup>156</sup> The court then proceeded, rather summarily, to refuse enforcement of the Board's order against the News, because of the absence of any evidence or finding that the employer was motivated by hostility to the union or to collective bargaining. The court pertinently stated: "While in *American Ship Building* there was an impasse in the negotiations between the employer and the union, we do not think the teaching of that case merely adds another exception to the Board's category of permissible lockouts."<sup>157</sup> Quoting *American Ship Building*, the court further concluded "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."<sup>158</sup>

While the Sixth Circuit's simplistic treatment of the pre-impasse question may, indeed, carry the day with the Board, it is worth noting that the case is distinguishable on its facts from others which may be expected to confront the Board. First, there may have been an impasse in the negotiations between the union and the Free Press. In any event, the

<sup>155</sup> Evening News Ass'n, 145 N.L.R.B. 996 (1964).

<sup>156</sup> The Board's motion for remand was granted under somewhat similar circumstances in *Topeka Grocers Management Ass'n v. NLRB*, 52 CCH Lab. Cas. ¶ 16,535, 59 L.R.R.M. 2736 (10th Cir. June 16, 1965).

<sup>157</sup> *Detroit Newspaper Publishers Ass'n v. NLRB*, 346 F.2d 527, 530 (6th Cir. 1965).

<sup>158</sup> *Id.* at 531.

strike against the Free Press was, for lockout purposes, the equivalent of an impasse. Second, the News was, in a way, party to this impasse or its equivalent, the strike, by reason of its agreement with the Free Press to stand fast on certain crucial issues during the simultaneous bargaining sessions with the union. Third, the situation was much akin to that in *Buffalo Linen*, in substance if not in technical form, and might have been disposed of under that doctrine, a contention strenuously urged by the News before the Board.<sup>159</sup>

Where all of this leaves us is a nice question—one I confidently expect the Supreme Court to delay answering, if, indeed, it ever has need to answer it at all, until sufficient experience accumulates to permit a sounder basis for judgment than is presently available.

(2) *The Hiring of Temporary Replacements After a Bargaining Lockout*

A second question left unanswered in *American Ship Building* and *Brown Food* may be framed in this fashion: May a single employer who locks out after impasse, solely for bargaining leverage, hire temporary replacements? In his concurring opinion in *American Ship Building*, Justice White said that the answer of the majority, by implication, was yes. This sufficiently nettled Justice Stewart, writing for the Court, that he added the following footnote to his opinion:

Contrary to the views expressed in a concurring opinion filed in this case, we intimate no view whatever as to the consequences which would follow had the employer replaced his employees with permanent replacements or even temporary help.<sup>160</sup>

Justice White's inference that the majority would sanction the hiring of temporary replacements was partially based upon the majority's decision in *Brown Food*. This decision does not, however, resolve the question because, as Justice White himself pointed out in his dissent, the decision of the Court was premised, in part at least, on a parity of treatment of the nonstruck and struck employers, the struck employer having hired temporary replacements. The question of parity is, of course, irrelevant in the single-employer situation.

The hiring of temporary replacements by the single employer therefore presents to the Board the old balancing problem as now reformulated, assuming no independent evidence of unlawful intent. The two questions for the Board are: (1) Does the hiring of temporary replacements serve a

<sup>159</sup> The News argued, first, that it was, in fact, engaged in joint or multiemployer bargaining with the Teamsters, Evening News Ass'n, 145 N.L.R.B. 996, 1018-20 (1964); second, that, in any event, the Buffalo Linen doctrine should be extended to cover a "lockout by employers over common issues." *Id.* at 1021.

<sup>160</sup> *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 308 n.8 (1965).

“significant economic purpose” of the employer? (2) If it does, is the action nonetheless “so destructive of employee rights” as not to be tolerated under the labor statute? The first question would seem, at first impression, to require an answer favoring the employer. His purpose is ostensibly to continue operations. This purpose might even be claimed to be more consistent with the fundamental goal of the national labor policy than the bargaining lockout itself, since whereas the lockout interrupts the flow of commerce, the hiring of replacements mitigates the interruption. Moreover, since the replacements are temporary, the second question may also be answered in a manner favoring the employer, namely that the prejudice to the rights of the locked-out employees is too slight to trigger the *Erie Resistor* formula permitting “truncated inquiry into employer motivation.”

I am not content, however, to leave the matter at this, since such would entail equating the locking-out employer with a struck employer. There are at least two differences between the hiring of replacements by a struck employer and a locking-out employer: First, the struck employer is acting defensively, whereas the employer who locks out—the “impatient warrior”<sup>161</sup>—bears the onus of casting the first stone. The defensive character of the struck employer’s hiring of replacements was the very basis for recognition of his replacement right.<sup>162</sup> And, indeed, in *Brown Food* the Court found the “compelling inference” from the hiring of temporary replacements to be “that this was all part and parcel of respondents’ defensive measure to preserve the multiemployer group in the face of the whipsaw strike.”<sup>163</sup> Second, the struck employer who is seeking to continue operations during a strike by hiring nonunion replacements is not permitted, while he is so hiring, to refuse work to strikers who abandon the union cause. Such a course of action would constitute a reprisal for the exercise of the section 7 right to engage in concerted activities, an interference with the section 7 right to refrain from engaging in such activities, and, in Justice White’s phrase, “the prototype of discrimination under Section 8(a)(3).”<sup>164</sup> In the case of the lockout, all of the regular employees desire to continue work. To deny them work which is then offered to nonunion replacements, solely because of their collective bargain-

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<sup>161</sup> This provocative sobriquet is borrowed from Duvin, “The Bargaining Lockout: An Impatient Warrior,” 40 *Notre Dame Law.* 137 (1965).

<sup>162</sup> *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333, 345 (1938): “Nor was it an unfair labor practice to replace the striking employees with others in an effort to carry on the business . . . [I]t does not follow [from § 13’s express protection of the right to strike] that an employer, guilty of no act denounced by the statute, has lost the right to protect and continue his business by supplying places left vacant by strikers.”

<sup>163</sup> *NLRB v. Brown*, 380 U.S. 278, 284 (1965).

<sup>164</sup> *Id.* at 297, citing *Mackay Radio*, supra note 162.

ing efforts, would seem clearly discriminatory and in the nature of reprisal for section 7 activities.

On the other hand, if the strategy of the lockout is not to be diluted, the employer must be permitted to hire replacements, if at all, from outside the ranks of his regular employees. This was precisely what happened in *Brown Food*, of course, in the multiemployer, whipsaw context, and the action was held to be lawful. The Court's reasoning on this troublesome facet of *Brown Food* was that any other decision would have the effect of forcing nonstruck employers into "aiding and abetting the success of the whipsaw strike."<sup>165</sup> The union had precipitated the shut-down; if the nonstruck employers had been required to utilize *any* regular bargaining-unit employees in their efforts to continue operations, to that extent they would have been required to subsidize the union's whipsaw tactic. Arguably, what the Supreme Court there intimated was only what employers have been contending all along with respect to the whipsaw: "a strike against one is a strike against all."<sup>166</sup>

This reasoning is obviously not available in the single-employer situation. It may therefore be argued that *Brown Food* is irrelevant, and that the single employer who chooses to lock out for bargaining purposes should resign himself to paying the price of a temporary cessation of business. Since he is himself responsible for his dilemma with respect to continued operations, he might fairly be required to take the bitter with the sweet. Put otherwise, his total conduct—the bargaining lockout *plus* the hiring of temporary nonunion replacements—might be said to "carry its own indicia of unlawful intent." Any other conclusion would entail subordinating expressly protected employee rights in favor of nonexpressly protected employer interests to a degree not involved in the validation of the bargaining lockout itself. Indeed, the usurpation of congressional power resulting from a sanctioning of the hiring of temporary nonunion replacements would seem more obvious than the usurpation for which the Board was condemned in giving *per se* treatment to the bargaining lockout.

A negative answer to the temporary replacements question would afford

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<sup>165</sup> *Id.* at 285.

<sup>166</sup> The two dissenting Board members in *Brown Food* interpreted *Buffalo Linen* in precisely this fashion. They said: "Thus, members of an association could require that all employers be struck, if any; partial-unit strikes were subject to being made full-unit strikes by the employer's [sic] lockout action. Granting this, it would seem to follow that temporary replacement of the employees in strike status was well within the employers' rights under *Mackay*." John Brown, 137 N.L.R.B. 73, 78 (1962).

The Tenth Circuit was not willing to go that far, in reversing the Board. The court stated: "However, we do not understand *Buffalo Linen* to hold, and we do not hold, that a permissible lockout after the initiation of a whipsaw strike places the locked out employees in the absolute status of the actual strikers." *NLRB v. Brown*, 319 F.2d 7, 11 (10th Cir. 1963).

a partial lid for the Pandora's Box of the bargaining lockout. It therefore will hold appeal for the Board. Perhaps what the Board ought to do in such captious waters is to keep the partial lid on until mandated by the courts to the contrary. The mandate from the courts of appeals is likely to be diverse, whatever the Board decides. By the time the question reaches the Supreme Court, we should all be better informed for passing judgment.

Another question, closely related to the temporary replacements problem, merits discussion before leaving this matter. Suppose the employer, in seeking to bring bargaining pressure to bear on the union while at the same time continuing to operate on a limited scale, engages in a *partial* lockout. Does the right recognized in *American Ship Building* to lock out *all* employees in the bargaining unit carry with it the right to lock out less than all, assuming that those who are locked out are selected on a nondiscriminatory basis? The answer, at first impression, would seem to be yes, on the theory that the part is encompassed in the whole. But there are problems here, too. The employees who are not locked out may refuse to work, since their colleagues have been deprived of work. To continue working under such circumstances might be deemed an implementation of the employer's strategy and therefore an act of disloyalty to the union and fellow members, the more so since continuing to work would probably require crossing a picket line established by the locked-out employees. If the nonlocked-out employees do refuse to work, is this a strike on their part? If it is a strike, the employer's right to replace them under *Mackay Radio* would seem to be triggered. If the nonlocked-out employees do not refuse to work altogether, but rather do their work in slipshod fashion, is this an unprotected "slowdown" for which they are subject to discharge?<sup>167</sup> Considering the divisive potential of the partial lockout, might not the use of it provide the basis for an inference of a purpose on the part of the employer to create such division among his employees? In short, does the bargaining lockout present a situation where the whole does *not* encompass the part?

Whatever may be said, as a *general* proposition, of the right of the employer who locks out for bargaining purposes to continue operations, whether through use of a skeleton bargaining-unit staff or through use of temporary outsiders, special circumstances might strengthen his case. Where, for example, he would suffer peculiar economic loss if certain services within the ambit of the bargaining unit were not performed during the lockout—*i.e.*, a loss not typically suffered by one who locks

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<sup>167</sup> Cf., e.g., *Elk Lumber Co.*, 91 N.L.R.B. 333 (1950).



out—his right to obtain the performance of such services (*e.g.*, tending a furnace) would seem too strong to deny. Recognition of such right would constitute a kind of reverse application of the old “economic justification” doctrine, here justifying the *granting* of work rather than the *withholding* of it.

### (3) *The Hiring of Permanent Replacements*

A third question left unanswered in *American Ship Building* and *Brown Food* concerns the right of an employer, whether in a single or multi-employer unit, to hire permanent replacements for locked-out employees. I think this question must surely be answered in the negative in the case of the bargaining lockout, and probably also in the case of the multi-employer, defensive lockout.

As to the bargaining lockout, a prime concern left over by *American Ship Building* is that such a lockout may be covertly used to defeat collective bargaining, indeed to break unions. An employer confronted by a weak union may, while keeping his rhetoric and actions otherwise pure, precipitate an impasse, lock out his employees for “bargaining” reasons at a propitious moment, and then destroy the union’s majority status by hiring a sufficient number of permanent replacements. Ironically, this would be most apt to happen in parts of the country where the national policy in favor of collective bargaining has been least honored.<sup>168</sup> If the hiring of permanent replacements after a lockout cannot be treated by the Board as unlawful without independent evidence of hostile motivation, a heavy premium will be placed upon dissimulation. Nor would it seem to make great sense to measure the lawfulness of the employer’s action by his *de facto* success or lack thereof in breaking or seriously weakening the union.<sup>169</sup>

There is nothing in *American Ship Building* or *Brown Food* which

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<sup>168</sup> Demands have been made for congressional investigations of antiunion employers in the South. Such a request was recently presented by the Industrial Union Department of the AFL-CIO to the House Labor Committee in connection with hearings on the NLRB and the law it administers. See 60 Lab. Rel. Rep. 47 (1965) (News and Background Information). Similarly, the Textile Workers Union of America has called for congressional investigation of “a ‘continuing conspiracy’ by Southern textile manufacturers to prevent unionization of their employees,” a “conspiracy” said to be “masterminded” by lawyers specializing in “union-busting” and “aided and abetted in some cases by the local press, the police and merchants eager to do the bidding of the big textile mill which is usually the town’s major employer.” N.Y. Times, Aug. 31, 1965, p. 24, cols. 2-3 (late city ed.).

<sup>169</sup> There is language in both the *American Ship Building* and *Brown Food* opinions indicating a reliance by the Court on the conclusion that in neither of those cases did the employer action, in fact, either destroy or impair the capacity of the unions for effective representation. Thus, in *American Ship Building* the Court observed: “The unions here involved have vigorously represented the employees since 1952, and there is nothing to show that their ability to do so has been impaired by the lockout.” *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 309 (1965). For a similar indication in *Brown Food*, see *NLRB v. Brown*, 380 U.S. 278, 288-90 (1965).

even arguably *controls* this question. In both of those cases the employer made clear that the locked-out employees would be taken back when the bargaining impasse was resolved. Indeed, in *Brown Food* the Court relied heavily upon the temporary character of the nonunion replacements in reaching the conclusion that the discrimination involved had but "slight" tendency to discourage union membership.<sup>170</sup> Even more to the point, the Court expressly limited the scope of its *Brown Food* decision by adding the following footnote:

We do not here decide whether the case would be the same had the struck employer exercised its prerogative to hire permanent replacements for the strikers under our rule in [*Mackay Radio*], and the nonstruck employers had then hired permanent replacements for their locked-out employees.<sup>171</sup>

Justice Goldberg, concurring, emphasized that the case would *not* be the same. Justice White, dissenting, feared that it would be.

Everything considered, it is predictable that the Board will treat the permanent replacement situation as falling within the *Erie Resistor* exception to the requirement of independent evidence of hostile motivation, in the bargaining lockout and, probably also, multiemployer, defensive lockout situations. While the hiring of permanent replacements may arguably serve a justifiable employer purpose, its potential for destruction of section 7 rights is sufficiently great to be said to carry "its own indicia of unlawful intent," as with the granting of superseniority—the more so since the employer's need for replacements is the product of his voluntary act in locking out.<sup>172</sup> The situation is much akin to the frequently frowned-upon *discharge* of workers for the exercise of section 7 rights.<sup>173</sup>

The Board's problem in rationalizing this result may be somewhat

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<sup>170</sup> *Ibid.*

<sup>171</sup> *Id.* at 292 n.6.

<sup>172</sup> But see Justice Stewart's strong statement suggesting the contrary, in *American Ship Bldg. Co. v. NLRB*, *supra* note 169, at 309, quoted at note 132 *supra*.

<sup>173</sup> See, most pertinently, *Morand Bros. Beverage Co.*, 91 N.L.R.B. 409 (1950), remanded, 190 F.2d 576 (7th Cir. 1951), on remand, 99 N.L.R.B. 1448 (1952), enforced, 204 F.2d 529 (7th Cir.), cert. denied, 346 U.S. 909 (1953). The issue upon which this case was ultimately resolved was whether the nonstruck members of a multiemployer unit had discharged their employees in response to a whipsaw strike or merely laid them off temporarily for bargaining leverage. The Board's determination that the employers had discharged their employees and thereby violated §§ 8(a)(1) and (3) was affirmed by the Seventh Circuit, despite the fact that the "discharged" employees had been taken back ("rehired") after settlement of the dispute over renewal of the contract, and despite the court's view that a temporary severance or lockout for bargaining purposes would have been lawful.

The Seventh Circuit said: "it is clearly settled that an employer's discharge of his employees because of their union affiliations or activities, strike activity included, is an unfair labor practice, violative of Section 8(a)(3) of the Act." *Morand Bros. Beverage Co. v. NLRB*, 190 F.2d 576, 583 (7th Cir. 1951), citing *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937); *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 183 (1941); *International Union of Auto. Workers v. O'Brien*, 339 U.S. 454, 456-57 (1950).

greater in the multiemployer situation where the struck employer has hired permanent replacements, since it will here be confronted by the "parity of treatment" argument, and also its counterpart, that "a strike against one is a strike against all." The "parity bubble" may burst under this respiratory pressure, for the only legitimate function of parity is to preserve the multiemployer bargaining unit. The hiring of permanent replacements by both struck and nonstruck employers can hardly be said to give rise to a "compelling inference" that the action is in "defense" of the multiemployer unit, as the Court found to be the case in *Brown Food*,<sup>174</sup> since such action would threaten the union's majority status and, with it, the very basis for group bargaining. Moreover, if defense of the multiemployer unit is the key, as it seems to be, the hiring of permanent replacements would seem to be justifiable only on the basis of a showing that temporary replacements were not available. If temporary replacements were found to be available, this should afford a basis, without more, for an inference of antiunion animus. The "strike against one is a strike against all" argument, which underlies the parity concern, may be more difficult to counter—particularly in view of the Board's recent decision<sup>175</sup> that the union, like the employer, may withdraw from the multiemployer unit upon timely notice to such effect. With this option available, the union, it may be contended, should be held to take the bitter with the sweet when it decides to continue bargaining on a multiemployer basis and then utilizes the whipsaw strike. However, if the hiring of permanent replacements succeeded in destroying or seriously undercutting the union's majority status, this very success would tend to vitiate *Brown Food* as a precedent for the employer since the Court relied heavily there on the fact that "the resulting harm to employee rights" was "comparatively slight."<sup>176</sup> In any event, the harm to the statutory rights of the employees *actually replaced* could hardly be said to be "slight."

The main difference, analytically, between the bargaining lockout and

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<sup>174</sup> NLRB v. Brown, supra note 169, at 284.

<sup>175</sup> Evening News Ass'n, 1965 CCH NLRB ¶¶ 9712-13 (Sept. 23, 1965) (companion cases). The Board held that employer-members of a multiemployer bargaining unit violated § 8(a)(5) in refusing to bargain on an individual basis with a union which had given written and unequivocal notice of its withdrawal from the multiemployer unit "before the date set by the contract for modification, or before the agreed-upon date to begin the multiemployer negotiations," precisely the same terms upon which withdrawal by an employer is permitted. Id. ¶ 9712, at 16,464. In response to the contention that such decision would deprive the employers of their defensive lockout protection against the whipsaw strike, the Board stated: "we have no occasion to decide at this time whether a union's withdrawal from multiemployer bargaining followed by its striking fewer than all of the former employer members of the larger unit would effectively deny to the employers who are not struck the right to engage in a lockout. That question, among others concerning lockouts, remains to be decided in light of the recent relevant Supreme Court decisions." Id. ¶ 9712, at 16,465.

<sup>176</sup> NLRB v. Brown, 380 U.S. 278, 289 (1965).

the multiemployer, defensive lockout lies in the fact that in the latter the union casts the first stone and, to that extent, is responsible for what follows. In this respect, the situation in the multiemployer, defensive lockout is akin to that in the single-employer partial strike. The question presented may then be framed in this fashion: Should the employer be held to be entitled to force the usual consequences and risks borne by strikers upon nonstrikers because the latter belong to the same union or bargaining unit and, to that extent, may be presumed to be in privity with the purposes of the strikers? In his *Brown Food* dissent, Justice White answered this with an emphatic no:

The Court finds it unnecessary to explain how they [the nonstrikers] are removed from the explicit protections of the Act, except to say they belong to the union or the unit the union represents and to assume conclusively they share its whipsawing purpose. Membership has never quite meant this before. The Court's justification for this invasion of employee rights by a member of a multiemployer unit is the employer's right to burden the union strike fund with all its members to bring economic pressure to bear on the union. Unfortunately, this reasoning has equal, if not greater, force in the single employer partial strike situation.<sup>177</sup>

Moreover, as Justice White pointed out in his *American Ship Building* concurrence, "the Court fully ignores the most explicit statutory right of employees 'to refrain from any or all [concerted] activities.'<sup>178</sup>

Since Justice White was the only member of the Court to address himself specifically to the troublesome implications of the validation of the use of temporary nonunion replacements in the multiemployer, defensive lockout situation, and since he shed his light in dissent, we are left in a heavy murk. The ultimate answer to the right of permanent replacement in the whipsaw context may turn on the acceptance or non-acceptance of the "strike against one is a strike against all" rationale and on the extent of the onus the Court is willing to attach to the union *and to those it represents* for having cast the first stone. While two dissenting Board members in *Brown Food* were apparently willing to carry the "strike against one is a strike against all" rationale to its logical extreme

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<sup>177</sup> Id. at 298. With respect to the single-employer partial-strike situation, Justice White stated:

The struck employer need not continue operations, but if he does, he may not give a preference to employees not affiliated with the striking union, any more than he may do so after the strike, for § 7 explicitly and unequivocally protects the right of employees to engage and not to engage in a concerted activity and § 8(a)(3) clearly prohibits discrimination which discourages union membership. [Citation of decisions of courts of appeals.] . . . If dismissing and replacing nonstriking union members at a struck plant discourages union membership and interferes with concerted activities, I fail to understand how this same conduct at a nonstruck plant, even if in the name of multiemployer parity and unity, has a different effect on employee rights. Id. at 297.

<sup>178</sup> *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 326 (1965).

under *Mackay Radio*, the Tenth Circuit expressed misgivings.<sup>179</sup> The misgivings seem in order.

#### (4) *The Bargaining Lockout in First-Contract Negotiations*

The final question I want to raise with respect to the decisions of last March is this: Is the bargaining lockout available to an employer who has bargained to an impasse in his *first* contract negotiations with a newly-certified collective bargaining representative? In both *American Ship Building* and *Brown Food* there was a history of successful bargaining over a period of several years. In each case the Supreme Court emphasized this background in reversing the Board. In neither case, however, did the Court expressly limit its holding so as to apply only to such a situation. But the "record" in a first-contract case does not as strongly attest the employer's purity of motive. And the prejudicial impact upon section 7 rights would seem to be much greater where the employees have not yet gained the sense of security in the exercise of their rights which comes with a satisfactory bargaining history. Moreover, the incentive for disingenuous use of the lockout, as a screen for nipping collective bargaining in the bud, would be greatest here, particularly in areas where industrialization and unionism have lagged.<sup>180</sup> It was the mischievous potential of situations such as this which prompted Justice Goldberg in *American Ship Building* to inveigh against the "quick, definitive formula"<sup>181</sup> approach of the majority to the bargaining lockout, and which prompted Justice White similarly to condemn the Court's "simple solution" and its "myopic focus" on the employer's "true motive."<sup>182</sup> As Justice Goldberg spelled the problem out:

The question of which types of lockout are compatible with the labor statute is a complex one . . . .

The types of situation in which an employer might seek to lock out his employees differ considerably . . . . This case presents the situation of an employer with a long history of union recognition and collective bargaining, confronted with a history of past strikes, who locks out only after considerable good-faith negotiation involving agreement and compromise on numerous issues, after a bargaining impasse has been reached, more than a week after the prior contract has expired, and when faced with the threat of a strike at a time when he and the property of his customers can suffer unusual harm.<sup>183</sup>

In other words, what the bargaining-lockout problems require for solution, in the judgment of both Justices Goldberg and White, is the very

<sup>179</sup> See note 166 supra.

<sup>180</sup> See note 168 supra.

<sup>181</sup> *American Ship Bldg. Co. v. NLRB*, supra note 178 at 336.

<sup>182</sup> *Id.* at 325.

<sup>183</sup> *Id.* at 336-37.

balancing by the Board of the legitimate economic interests of the employer and the statutorily protected rights of the employees which was endorsed in *Buffalo Linen*. Vital factors in any such balancing would be the presence or absence of a bargaining history and the quality of that history where it exists. The Board may be expected to continue to balance competing interests in subtle lockout cases, albeit on a new basis which precludes generic per se treatment being given to the bargaining lockout. The new basis will entail, as I have already indicated, a more express and detailed inquiry into the nature and extent of the otherwise legitimate interest which prompts the action of the employer and into the extent of the invasion of such into employee rights. This approach will preclude, in my judgment, the Board's treating a bargaining lockout or threat thereof in a first-contract negotiation as a per se violation of the act, but it will not preclude the Board's treating such a lockout less favorably than where a successful history of past negotiations exists. Less independent evidence of antiunion animus should be required by the reviewing courts here than would have sufficed in the more favorable contexts of *American Ship Building* and *Brown Food*.

#### CONCLUSION

It is untenable to assume that the Board may no longer balance conflicting legitimate interests of employers, employees, and, I might add, the public. In a sense, this is merely a definition of the peculiarly necessary function of an administrative agency applying a broadly-phrased statute to complex, fluid problems. It is clear, however, that the Board's balancing in the future must be framed in new semantics, more tightly formulated than was previously the case, with attendant implications as to the nature and depth of the inquiry.

The Court's opinions in *American Ship Building* and *Brown Food* must be read in the light of the circumstances there involved. So read, the sweeping generalizations about sections 8(a)(1) and (3) and the Board's balancing power may be reduced to the following: (1) The Board made a mistake of law in interpreting the statute so as to render all bargaining lockouts unlawful. (2) The Board made a correlative mistake in performing its balancing function by giving the bargaining lockout a per se weight in the scales, instead of evaluating the particular employer conduct in the total factual and statutory context and then carefully spelling out its findings and reasoning. In a sense, the Board's error was in failing to perform its proper balancing function at all, by treating the bargaining lockout as unlawful *whatever the circumstances*.

(3) In making these correlative mistakes, the Board arrogated to itself congressional power, rather than acting like an administrative agency. More specifically, the Board sought to impose its own ideas as to a proper balance of *bargaining power* between the parties, forgetting the lesson of the *Insurance Agents* case with respect to per se treatment of the "slowdown" or "on-the-job strike." (4) The requirement that the Board justify its section 8(a)(1) and (3) orders either on the basis of independent evidence of hostile motivation or on the basis of conduct "so destructive of employee rights" and/or "so devoid of significant economic purpose" as to "carry its own indicia of unlawful intent" is intended to discourage the Board's "easy out" reliance on per se rules, particularly where the economic pressures so essential to free collective bargaining are in issue. (5) There is room for a properly-circumscribed exercise of balancing power by the Board, including the drawing of rational inferences, within the ambit of the foregoing.

The actual decisions of last March, on the facts presented, make sense. The broad, murky language and rationale will, however, haunt the Board, courts, and Bar for some time to come.