Michigan Law Review

Volume 51 | Issue 3

1953

LABOR LAW-LEGALITY OF EMPLOYER'S USE OF LOCKOUT

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LABOR LAW—LEGALITY OF EMPLOYER'S USE OF LOCKOUT—One of the employer's traditional weapons against the economic power of unions is the lockout. Since the central economic element involved in strikebreaking is that the operation of the plant and equipment is as important to labor as labor is to the operation of the plant and equipment, the lockout is one of the simplest methods of strikebreaking or of resisting union demands.[1] This is so because in the endurance contest which ensues the economic resources of the employer are likely to be greater than those of the employee. Just as there are restrictions on union use of the strike, however, so are there restrictions on employer use of the lockout, which has been called the employer's counterpart of the strike.[2] The purpose of this comment is to explore the question of when the employer can use the lockout or related devices[3] without committing an unfair labor practice under the Labor Management Relations Act[4] and without committing an actionable wrong at law or equity.

I. *Accepted Definitions of Lockout*

While the term "lockout" has been loosely used to cover a variety of situations, a study of the cases shows that courts have employed the word chiefly to describe two different types of employer action. Some

[1] BROOKS, WHEN LABOR ORGANIZES 150-151 (1937).

[2] Morand Bros. Beverage Co. v. NLRB, (7th Cir. 1951) 190 F. (2d) 576.

[3] By "related devices" is meant such employer weapons as plant removal (the geographical relocation of a factory or business), shutdown (the discontinuance or suspension of the whole of the employer's operations), and layoff (the temporary discharge of employees). Since all of these have been treated substantially the same as lockouts, no effort will be made to treat them separately.

[4] 61 Stat. L. 136 (1947), 29 U.S.C. (Supp. III, 1950) §§141-197. The relevant part of this act is Title I, which is largely an amendment of the National Labor Relations Act, 49 Stat. L. 449 (1935), 29 U.S.C. (1946) §§151-166.

of the older decisions have denominated the permanent discharge by an employer of some or all of his employees because of some labor controversy a "lockout."[5] Other courts and the NLRB have simply called that sort of action a "discharge" and have used "lockout" to describe a temporary shutdown of a plant or section without any formal discharge of employees where the object is to discourage union activities or to weaken union power at the bargaining table.[6] Unions have frequently used the term in a third sense, accusing a recalcitrant employer during a strike of a "lockout" merely because he refuses to meet the union's demands.[7] It would seem that a union's use of the word in such a situation is purely for publicity purposes, i.e., to shift any unfavorable public reaction to the strike to the employer.

II. *The Lockout as an Unfair Labor Practice*

From the earliest years of the National Labor Relations Act[8] the National Labor Relations Board has received complaints charging that employers have locked out their employees in violation of section 8(a)(1) and section 8(a)(3) [formerly 8(1) and 8(3)] of the act.[9] Sections 7 and 8(a)(1) of the act provide the broadest statutory basis for condemning the lockout. Section 8(a) declares: "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," which include the right ". . . to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . ." Nowhere does the act spell out what constitutes "interference" by an employer or "concerted activities" by employees; interpretation of these terms is left to the Board and the courts.

In interpreting these provisions the NLRB has started with the basic proposition that as a matter of principle an employer, apart from the issue of unionism, is entitled to conduct his own business as he pleases. Consequently the Board has refused to substitute its own judgment for that of the employer in the conduct of his enterprise.[10] The

[5] Atchison T. & S.F. R. Co. v. Gee, (8th Cir. 1905) 139 F. 582; Restful Slipper Co. v. United Shoe & Leather Union, 116 N.J. Eq. 521, 174 A. 543 (1934).

[6] Barnes v. Hall, 285 Ky. 160, 146 S.W. (2d) 929 (1941); Iron Molders' Union v. Allis-Chalmers Co., (7th Cir. 1908) 166 F. 45; Jeffery-De Witt Insulator Co. v. NLRB, (4th Cir. 1937) 91 F. (2d) 134; Morand Bros. Beverage Co., 99 N.L.R.B. No. 55 (1952); Leonard d.b.a. Davis Furniture Co., 100 N.L.R.B. No. 158 (1952).

[7] See Dail-Overland Co. v. Willys-Overland, (D.C. Ohio 1919) 263 F. 171.

[8] 49 Stat. L. 449 (1935), 29 U.S.C. (1946) §§151-166.

[9] 29 U.S.C.A. (1947) §158(a)(1)(3).

[10] NLRB v. Union Pacific Stages, (9th Cir. 1938) 99 F. (2d) 153; NLRB v. Cape County Milling Co., (8th Cir. 1944) 140 F. (2d) 543.

Board has recognized that an employer is free to hire, lay off, or discharge his employees for any reason, provided he does not, under cover of that right, intimidate or coerce them with respect to their self-organization or their participation in concerted activities.[11] Therefore, a temporary shutdown is not necessarily unlawful; it becomes an unlawful lockout only upon a finding that it was motivated by a purpose forbidden by the act, the unlawful motive converting the shutdown into an unfair labor practice.[12]

A. *Use of Lockout to Interfere with Employee Efforts toward Self-Organization.* The Board and the courts have consistently labeled the employer's use of the lockout to hinder his employees' efforts at self-organization an unfair labor practice. Locking out employees because of their membership in a union[13] or their attendance at union meetings[14] has been held an unfair labor practice. Barring employees from the plant because of their refusal to join a union preferred by the employer has likewise been treated as an unfair labor practice.[15] An employer was held to have violated the act when he shut down his plant to avoid bargaining with the union,[16] and where he locked out his employees in reprisal for their participation in a protected strike.[17] Even eviction of workers by non-union employees has been held to constitute an unfair labor practice by the employer where he did nothing to prevent the eviction.[18] All of the above are clear examples of employer interference with employee rights in violation of section 8(a)(1). Since such conduct tends to discourage membership in labor organizations it also violates section 8(a)(3) of the LMRA.

Employers have attempted in various ways to justify their temporary shutdowns as necessary for business reasons even when their hostility toward unions makes it apparent that the shutdown was really a lockout

[11] NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 57 S.Ct. 615 (1937).

[12] NLRB v. Somerset Shoe Co., (1st Cir. 1940) 111 F. (2d) 681. The burden of proving the employer's unlawful motivation rests on the General Counsel of the NLRB. Abe A. Bochner, 85 N.L.R.B. 663 (1949).

[13] NLRB v. Cape County Milling Co., (8th Cir. 1944) 140 F. (2d) 543.

[14] National Container Corp., 57 N.L.R.B. 565 (1944); Bohn Aluminum & Brass Corp., 67 N.L.R.B. 847 (1846); Santa Cruz Fruit Packing Co., 1 N.L.R.B. 454 (1936).

[15] NLRB v. Cowell Portland Cement Co., (9th Cir. 1945) 148 F. (2d) 237.

[16] NLRB v. Crowe Coal Co., (8th Cir. 1939) 104 F. (2d) 633; Long Lake Lumber Co., 34 N.L.R.B. 700 (1941), enf'd. (9th Cir. 1943) 138 F. (2d) 363; NLRB v. National Motor Bearing Co., (9th Cir. 1939) 105 F. (2d) 652.

[17] Re Omaha Hat Corp., 4 N.L.R.B. 878 (1938); D. H. Holmes Co. Ltd., 81 N.L.R.B. 753 (1949).

[18] Brown Garment Mfg. Co., 62 N.L.R.B. 857 (1945). One case has indicated that a contrary result should be reached where the employer has in no way instigated such conduct. See NLRB v. Ashville Hosiery Co., (4th Cir. 1939) 108 F. (2d) 288 at 292.

or when they have committed other unfair labor practices. All of these claims have been based on the fact that the act permits the employer to conduct his business in any manner which he believes best promotes his economic interests. Thus employers have urged as reasons for shutdowns the following: (1) a shortage of necessary raw materials,[19] (2) a necessary change in production techniques or installation of new machinery,[20] (3) a decline in orders,[21] (4) fear of a sit-down strike[22] or, (5) an increase in production costs due to disturbed conditions in the plant.[23] In the majority of cases the Board has rejected the employer's claim, having been persuaded by other evidence of an unlawful motivation, which renders the shutdown an illegal lockout even though it would otherwise have been justifiable.

Particularly important in determining the employer's motive has been the timing of the lockout. Where the shutdown has occurred immediately after a union organizational meeting, after a receipt of a request for recognition, or before a Board election, the Board has had little difficulty in finding an unlawful motive.[24] A recent circuit court decision illustrates that the courts also look to these factors when reviewing a finding of unlawful motivation by the Board. The court rejected the employer's claim that market conditions caused him to shut down, and, relying on the coincidence of the shutdown with union organizational efforts, the rehiring of only 58 per cent of unionized employees as compared to 90 per cent of non-organized employees, and previous employer threats of a lockout, upheld the Board's finding of an unfair labor practice.[25]

B. *Right to Use Lockout to Meet Economic Pressure Exerted by a Union.* Implicit in the law of labor relations is the principle that an employer may, in the absence of an unlawful motive,[26] shut down his

[19] Am. Radiator Co., 7 N.L.R.B. 1127 (1938); Sifers Candy Co., 75 N.L.R.B. 296 (1947), modified (10th Cir. 1948) 171 F. (2d) 63; Alside Inc., 88 N.L.R.B. 460 (1950).

[20] Pepsi-Cola Bottling Co. of Montgomery, 72 N.L.R.B. 601 (1947); E. C. Brown Co., 81 N.L.R.B. 140 (1949).

[21] Smith Cabinet Manufacturing Co., 1 N.L.R.B. 950 (1936).

[22] Hopwood-Retinning Co., 4 N.L.R.B. 922 (1938); National Motor Bearing Co., 5 N.L.R.B. 409 (1938), enf'd as modified, (9th Cir. 1939) 105 F. (2d) 652.

[23] Somerset Shoe Co., 5 N.L.R.B. 486 (1938).

[24] Long Lake Lumber Co., 34 N.L.R.B. 700 (1941). See also Walter Holm & Co., 87 N.L.R.B. 1169 (1949). Another important factor in indicating an unlawful motive is the employer's failure to follow his practice in earlier layoffs. See cases cited in note 19 supra.

[25] NLRB v. Somerset Classics, Inc., (2d Cir. 1952) 193 F. (2d) 613.

[26] If the proscribed motive can be shown, the fact that the employer is forced to engage in a lockout in order to protect the safety of his property or the profitable operation of his business would not appear to condone his violation of the act. See NLRB v. Gluek Brewing Co., (8th Cir. 1944) 144 F. (2d) 847. Cf. Hobbs, Wall and Co., 30 N.L.R.B. 1027 (1941).

plant to prevent material spoilage or to terminate unprofitable business operations. This is true whether these conditions are produced by an adverse business situation[27] or aggressive union conduct.[28] A recent decision indicates that an employer may use a shutdown in the nature of a lockout to punish workers for having engaged in a strike in violation of a union-management contract.[29] However, the question of whether the employer can use the lockout purely as a collective bargaining weapon has not been conclusively determined. For example, may the employer, after futile efforts to come to terms with the union as a result of good faith bargaining, shut down his plant as a means of breaking the deadlock and coercing acceptance by the union of his offer? The Board in *Leonard, d.b.a. Davis Furniture Co.*[30] indicated a negative answer. The union in that case, after collective bargaining with a multi-employer association had reached an impasse, announced that it would strike a specified one of the stores belonging to the association but stated that it did not intend to call a strike against the other members. Eleven of the other member stores then notified their employees that they would be closed until further notice in view of the union's strike action. The Board found that this was a lockout rather than a permanent discharge, but that the former was equally violative of sections 8(a)(1) and 8(a)(3). A majority of the Board on remand of the *Davis* case stated that a lockout in the form of a temporary layoff was unlawful ". . . even if it were true that its purpose was to bring economic pressure on the union and its members solely in order to break the bargaining impasse."[31] A dictum in the similar but earlier case of *Morand Bros. Beverage Co.*,[32] which held (on remand) that the non-

[27] Worthington Creamery & Produce Co., 52 N.L.R.B. 121 (1943) (shutdown to avoid business losses); Walter Holm & Co., 87 N.L.R.B. 1169 (1949) (same); F.M. Stamper Co., 54 N.L.R.B. 297 (1944) (lack of necessary equipment); Georgia Twine & Cordage Co., 76 N.L.R.B. 84 (1948), modified, (5th Cir. 1949) 172 F. (2d) 293 (need to make repairs); Ballston-Stillwater Knitting Co. v. NLRB, (2d Cir. 1938) 98 F. (2d) 758 (loss of an important customer).

[28] International Shoe Co., 93 N.L.R.B. 907 (1951) (lockout of employees in face of intermittent work stoppages by the union); Clayton & Lambert Manufacturing Co., 34 N.L.R.B. 502 (1941) (shutdown because plant could not be operated profitably under existing union contract); NLRB v. Aluminum Products Co., (7th Cir. 1941) 120 F. (2d) 567 (lockout because of a disturbance of operations when an NLRB hearing was in progress); Beckerman Shoe Corp., 19 N.L.R.B. 820 (1940) (shutdown because of business reversals resulting from an excessive number of strikes).

[29] NLRB v. Dorsey Trailers, (5th Cir. 1950) 179 F. (2d) 589.

[30] 94 N.L.R.B. 279 (1951); remanded in Leonard v. NLRB, (9th Cir. 1952) 197 F. (2d) 435; reconsidered in 100 N.L.R.B. No. 158 (1952).

[31] 100 N.L.R.B. No. 158 (1952).

[32] 91 N.L.R.B. 409 (1950); remanded in Morand Bros. Beverage Co. v. NLRB, (7th Cir. 1951) 190 F. (2d) 576; reconsidered in 99 N.L.R.B. No. 55 (1952).

striking employees of the multi-employer unit in question had been discharged rather than merely locked out, presaged the *Davis* rule in no uncertain terms, stating that even a temporary layoff interfered with and coerced the employees involved and amounted to ". . . a reprisal against them for the strike by members of the same union against Old Rose [one member of the multi-employer bargaining association]. . . ."[33]

These two cases indicate that the Board will limit the employer's right temporarily to shut down to situations where material spoilage or unprofitable operations are present, and where no true lockout in the anti-union sense is involved. The conclusion that this is in fact the test the Board uses is buttressed by its decision in *Betts Cadillac Olds Inc.*,[34] decided shortly after *Davis Furniture Co.* The case again involved a strike against one member of a multi-employer bargaining unit after the breakdown of collective bargaining negotiations. However, in this case the union threatened to strike against the other members of the bargaining unit, although refusing to say when, and the Board held the lockout to be lawful. The *Davis* case was distinguished on the basis that, unlike the situation in the *Betts* case, there was no threat by the union of strike action against the other employers. The trial examiner, whose findings were approved by the Board, specifically based his decision on the employer's need for protective measures necessary to avoid economic loss or business disruptions attendant upon a strike, and held that this protective right may, under some circumstances, embrace the curtailment of operations before the precise moment when the strike occurs.

The Board's refusal to permit use of the lockout as an economic counter-weapon correlative to the strike has been attacked by two circuit courts of appeal and within the Board itself by Chairman Herzog. The Seventh Circuit, in remanding the Board's decision in *Morand Bros. Beverage Co.*, viewed a strike against one member of a multi-employer bargaining association as ". . . in the strategic sense, a strike against the entire membership of their Associations, aimed at compelling all of them ultimately to accept the contract terms demanded by the Union."[35] Hence the Board was directed to determine whether there was a (justifiable) lockout or a discriminatory discharge. The court declared that the Taft-Hartley amendments impliedly recognize

[33] 91 N.L.R.B. 409 at 411 (1950).

[34] 96 N.L.R.B. No. 46 (1951). See also NLRB, SIXTEENTH ANNUAL REPORT 176 ff. (1951).

[35] Morand Bros. Beverage Co. v. NLRB, (7th Cir. 1951) 190 F. (2d) 576 at 582.

the right to lockout as a corollary of the union's right to strike, noting the linkage of the terms "strike" and "lockout" throughout the act.[36] The Ninth Circuit, on review of the original decision in the *Davis* case, was at least doubtful that a lockout necessarily amounts to an illegal reprisal, and also felt that it is ". . . arguable that Congress has recognized strikes and lockouts as correlative powers, to be employed by the adversaries in collective bargaining when an impasse in negotiations is reached."[37] In a dissent in the Board's reconsideration of the *Davis* case, Chairman Herzog insisted that the lockout in question was being used as a legitimate weapon of resistance to union demands upon arrival at a bargaining stalemate and was not an attempt to destroy the union.[38]

It is submitted that the Board rule unduly hampers employers, particularly in the multi-employer bargaining unit where the union has already called a strike against one member, inasmuch as it compels each employer to stand by helplessly until the union turns its attention to him. In many cases, furthermore, the employer is not trying to destroy the union but only to bolster his position looking to the eventual resumption of collective bargaining. On the other hand, the lockout falls literally within the prescription of section 8(a)(1), as it is clearly an attempt to interfere with and coerce employes in the concerted exercise of protected rights. There is also considerable logic in the Board's contention that if Congress had wanted to provide the right to lockout as the employer's counterpart of the right to strike it would have done so expressly. The basic policy question is whether or not this additional strong weapon should be put in the hands of the employer. Those who think unions are too strong would doubtless favor permitting the lockout when bargaining has reached an impasse; those who feel that the employer still retains the upper hand when it comes to a show of force would probably uphold the Board's view of the matter.

C. *Threatened Use of Lockout as an Unfair Labor Practice.* The mere threat of a lockout in interference with the rights secured employees by section 7 is obviously coercive, and therefore an unfair labor practice.[39] This is apparently true even though the employer never actually executes the lockout.[40] While the LMRA has not changed the

[36] E.g., §8(d)(4): ". . . without resorting to strike or lockout . . ." etc.
[37] Leonard v. NLRB, (9th Cir. 1952) 197 F. (2d) 435 at 441.
[38] Leonard d.b.a. Davis Furniture Co., 100 N.L.R.B. No. 158 (1952).
[39] For a collection of the cases see 152 A.L.R. 149 at 160 (1944).
[40] NLRB v. Franks Bros. Co., (1st Cir. 1943) 137 F. (2d) 989, affd. 321 U.S. 702, 64 S.Ct. 817 (1944); Re Luckenbach S. S. Co., 12 N.L.R.B. 1333 (1939).

substantive law in this respect, it has imposed upon the Board a greater burden of proof. Under the NLRA, statements of an anti-union nature, even though not coercive in themselves, were held to be an unfair labor practice.[41] Section 8(c), the "free speech" provision of the 1947 amendment, provides that anti-union statements shall not even constitute evidence of an unfair labor practice unless they "contain" a threat of reprisal or promise of benefit.[42] It is not clear from the language of the act or from the Conference Report[43] whether a statement to be illegal must in its own terms threaten a lockout or some other unfair labor practice, or whether it may be viewed in context to determine whether or not it contains a threat. The Board has indicated[44] that it will continue to look to the "totality of conduct" in examining employer statements apparently in much the same way as it did under the pre-Taft-Hartley *Virginia Electric*[45] doctrine. The circuit courts seem willing to accept Learned Hand's oft-quoted dictum that words ". . . take their purport from the setting in which they are used. . . ,"[46] and so far have upheld the Board.[47]

Section 8(c) not only introduces the problem of determining when a threat has been made by the employer, but also makes determination of the employer's motive in executing the lockout more difficult. While anti-union statements alone should not perhaps constitute an unfair labor practice, it is submitted that they should be weighed as one factor in ascertaining the employer's motivation. Throughout the law verbal statements are admissible to show the subjective intent of the speaker, and there would appear to be no good reason to single out anti-union statements for special treatment.[48]

41 Clark Bros. Co., 70 N.L.R.B. 802 (1946) (speech delivered on company property to a "captive" audience held to be an unfair labor practice); Monumental Life Ins. Co., 69 N.L.R.B. 247 (1946). Cf. Merry Brothers Brick & Tile Co., 75 N.L.R.B. 136 (1947).

42 61 Stat. L. 142 (1947), 29 U.S.C. (Supp. III, 1950) §158(c).

43 Conference Rep., House Rep. 510, 80th Cong., at 45.

44 Happ Bros. Co., 90 N.L.R.B. 1513 (1950); NLRB, THIRTEENTH ANNUAL REPORT 49 (1948).

45 NLRB v. Virginia Electric and Power Co., 314 U.S. 469, 62 S.Ct. 344 (1941).

46 L. Hand, J., in NLRB v. Federbush Co., (2d Cir. 1941) 121 F. (2d) 954 at 957.

47 See NLRB v. Kropp Forge Co., (7th Cir. 1949) 178 F. (2d) 822; NLRB v. O'Keefe and Merritt Mfg. Co., (9th Cir. 1949) 178 F. (2d) 445; cf. Pittsburgh Steamship Co. v. NLRB, (6th Cir. 1950) 180 F. (2d) 731. See also Daykin, "The Employer's Right of Free Speech under the Taft-Hartley Act," 37 IOWA L. REV. 212 (1952).

48 The sponsors of the LMRA themselves agree that §8(c) needs amendment. The "Taft substitute" bill (passed in the Senate on June 30, 1949) would have amended §8(c) to include specifically implied threats of reprisal. This bill was defeated in the House of Representatives. See the Thomas-Lesinski Bill (the "administration bill") S. 249, 81st Cong., 1st sess. (1949) and H.R. 2032, 81st Cong., 1st sess. (1949), which called for a repeal of §8(c).

D. *Remedies Given by the Board.* Where the illegal lockout, or related device,[49] is in effect at the time the case is decided, the Board will issue a cease and desist order.[50] Under the express authority of section 10(c), the Board is also permitted to take ". . . such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act."[51] Thus the Board possesses the power to require an employer to make whole employees who have been aggrieved by unfair labor practices.

A more difficult problem is whether after finding an illegal shutdown the Board may properly order the resumption of business operations in order to be able effectively to reinstate the locked-out employees. Logically, the Board must have the power to compel a company to open its doors if it is to order reinstatement, and such an order has been upheld by a circuit court.[52] Where the shutdown was motivated both by economic necessity and anti-union bias, however, the Board has indicated that the guilty employer may be required only to put the locked-out employees on a preferential hiring list.[53]

III. *Lockouts Actionable at Law or Equity*

Most of the cases involving lockouts have been brought before the NLRB, which generally provides the speediest and most adequate avenue of relief. There are certain situations, however, in which a resort to the courts may provide more effective relief. For example, where a lockout is in breach of a collective bargaining agreement, it may be more advantageous for the union to obtain an immediate injunction in equity rather than to await action by the Board.[54] Similarly, it has been held that a court of equity can enjoin a threatened lockout where the use of such a device is prohibited by contract.[55] This doctrine has even been extended to the case where a bargaining agreement does not ex-

[49] See note 3 supra.

[50] Port Gibson Veneer & Box Co., 70 N.L.R.B. 319 (1946), modified (5th Cir. 1948) 167 F. (2d) 144; Smith Cabinet Manufacturing Co., 1 N.L.R.B. 950 (1936).

[51] 61 Stat. L. 147 (1947), 29 U.S.C. (Supp. III, 1950) §160(c).

[52] NLRB v. Cape County Milling Co., (8th Cir. 1944) 140 F. (2d) 543.

[53] Williams Motor Co. v. NLRB, (8th Cir. 1942) 128 F. (2d) 960. This case, however, does not detract from the principle that the Board has authority to order the resumption of operations. The Board issued the more lenient order and, therefore, since the order was attacked by the employer, the court, even if it had the desire to do so, had no power to impose harder conditions upon the employer. For other remedies which have been used by the Board in peculiar situations see 50 COL. L. REV. 1123 at 1129 (1950).

[54] For a general collection of the cases see 173 A.L.R. 674 (1948).

[55] Goldman v. Cohen, 222 App. Div. 631, 227 N.Y.S. 311 (1928); Dubinsky v. Blue Dale Dress Co., 162 Misc. 177, 292 N.Y.S. 898 (1936).

pressly prohibit a lockout, but the employer's purpose is to evade other obligations under it.[56]

Several arguments, based on traditional limitations of equity jurisdiction, have been advanced against use of the injunction against lockout. It has been urged, for example, that the granting of a mandatory injunction against the continuance of a lockout is contrary to the rule that equity will not grant specific performance of a contract for personal services.[57] This objection has been overcome by pointing to the fact that the contract here is not with the individual employees but with the union, and that the union itself does not perform personal services, but acts in the capacity of an employment agency.[58] Employers have also argued that there is an adequate remedy at law for damages. There is dictum to this effect,[59] but most courts have recognized that as a practical proposition it is difficult to determine what damages a union sustains when the employer violates a contract prohibiting a lockout, since the union does not receive compensation for furnishing employees to the employer. Therefore the union can ordinarily show no damage.[60] Finally, it has been argued that there is no mutuality of obligation or remedy present.[61] However, the courts, influenced by the public interest in avoiding irreparable losses due to lockouts and strikes, have been satisfied with the slightest semblance of mutuality. Thus it has been held that there is sufficient mutuality between an employer and a union to authorize the issuance of an injunction where the union has agreed to furnish employees or to refrain from striking, and the employer himself could obtain an injunction against any strike.[62] There is one situation in which the courts will refuse to give the union equitable relief: a union will not be able to secure an injunction against a lockout if it is guilty of a material breach of the contract by striking prior to the lockout.[63] Such a result is, of course, in accord with the general proposition that equity will not aid one who is himself in default.

[56] Mississippi Theatres Corp. v. Hattiesburg Local Union No. 615, 174 Miss. 439, 164 S. 887 (1936); Farulla v. Ralph A. Freundlich, Inc., 152 Misc. 761, 274 N.Y.S. 70 (1934).

[57] See 135 A.L.R. 279 at 285 (1941).

[58] Mississippi Theatres Corp. v. Hattiesburg Local Union No. 615, 174 Miss. 439, 164 S. 887 (1936).

[59] Atchison, T. & S.F. R. Co. v. Gee, (8th Cir. 1905) 139 F. 582.

[60] Weber v. Nasser, (Cal. App. 1930); 286 P. 1074; Mississippi Theatres Corp. v. Hattiesburg Local Union No. 615, 174 Miss. 439, 164 S. 887 (1936).

[61] See 28 AM. JUR. 274, Injunctions §79 (1940).

[62] Harper v. Local Union No. 520, I.B.E.W., (Tex. Civ. App. 1932) 48 S.W. (2d) 1033.

[63] Moran v. Lasette, 221 App. Div. 118, 223 N.Y.S. 283 (1927); McGrath v. Norman, 221 App. Div. 804, 223 N.Y.S. 288 (1927).

IV. *Arbitration of Lockouts*

Arbitration has been termed a supplement to no-strike, no-lockout clauses since by settling disagreement it prevents resort to these harsh remedies.[64] Even after the lockout has been executed, however, arbitration may provide the most effective remedy for resolving the differences which led to it and bringing about a resumption of operations. Arbitration has the advantage of simplicity and informality of procedure, and the parties are not restricted by the rules of evidence.[65] In the absence of an appropriate provision in the collective bargaining agreement, the union, of course, cannot get arbitration of the lockout without the consent of management. If it is available, however, arbitration may provide the speediest and most effective method of relief.[66]

V. *Conclusion*

The "lockout" should be distinguished from the "discharge," for although at the present time the NLRB regards the two species of severance of employment as equally violative of the act, the circuit bench has indicated that the future rule may permit use of the lockout in certain situations. Where the lockout is being used to exert economic pressure on a union after a bargaining impasse has been reached, the Board may be compelled to hold that no unfair labor practice has been committed, at least in the absence of any outward manifestations of anti-union motivation. It is dubious, however, that such a rule can be based on a finding of a congressional intent to treat the lockout and the strike as correlative powers.

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[64] Taylor, "Further Remarks on Grievance Arbitration," 4 ARB. J. 92 (1949).

[65] Certain minimum requirements of procedure and proof must be met if the award is to be legally binding. All interested parties should be given notice of the time and place of the hearing, and an opportunity to introduce evidence in support of their respective positions, to submit written briefs if they so desire, to cross-examine witnesses and to make oral arguments. See UPDEGRAFF AND MCCOY, ARBITRATION OF LABOR DISPUTES 89 (1946).

[66] Section 201 of the L.M.R.A. shows that Congress recognized and intended to facilitate the use of arbitration to settle labor disputes.

* This comment was written originally by Norman Spindelman and later revised and brought up to date by William Davenport.—Ed.