

# LOCKOUTS: PAST, PRESENT, AND FUTURE

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ONE OF the hardy perennials in labor literature is flowering again—the contention that employers should be permitted to use the lockout to enhance their position in collective bargaining. Recently it was pointed out that there is “no identifiable principle of federal labor policy that justifies holding that [t]his conduct is unlawful.”<sup>1</sup> Just as the union is free to strike, so the employer should be free to lock out. According to this argument, the employees have a right to have the employer bargain with their union representative in good faith, but they do not have the right to have him eschew the use of the economic weapons at his command so that they can make a better bargain.<sup>2</sup>

In a similar vein, it is contended that since union members are free to work without a contract until the time when a strike will work the greatest hardship on their employer, the prohibition of the bargaining lockout leaves the union with exclusive control of any plant shutdown, a factor which may prove decisive in the bargaining process. Therefore, so the argument goes, in the absence of a clear statutory mandate, it does not seem consistent with the policy of our present labor legislation to give one of the parties such a significant bargaining advantage.<sup>3</sup>

In addition, where an impasse in collective bargaining (when the parties realize that neither would surrender or persuade the other to abandon its position) is reached through inability to agree on terms, the employer is relieved of his duty to bargain further. However, since the NLRB has held that a strike subsequent to such a breakdown in negotiations breaks an impasse because it effects a

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<sup>1</sup> Wollett, *The Weapons of Conflict: Picketing and Boycotts*, in PUBLIC POLICY AND COLLECTIVE BARGAINING 121, 141 (Shister, Aaron, & Summers ed. 1962).

<sup>2</sup> *Ibid.*

<sup>3</sup> 73 HARV. L. REV. 787 (1960).

sufficient change in circumstances surrounding the bargaining, why should not a lockout be viewed in the same light?<sup>4</sup>

Actually, there is nothing in the National Labor Relations Act, as amended, which either forbids or protects the right to lock out, as there is the right to strike.<sup>5</sup> In fact, prior to statutory labor law, the common law right to lock out was never questioned by the courts, for it was considered to be a property right; and an employer might therefore keep out of his business or property any employee or group of employees for any or no reason.<sup>6</sup>

Under the present labor law, however, there are protected employee rights to organize and bargain collectively, to be free of discrimination for doing so, and to strike.<sup>7</sup> The employer is told to bargain in good faith and not to infringe these rights. Both the courts and the NLRB have applied a test which attempts to balance the right of employees to engage in concerted activities against the right of employers to protect their businesses. Therefore, the legality of a particular lockout depends upon each case and is determined by the application of considerations articulated in *Betts Cadillac Olds, Inc.*:<sup>8</sup> (1) the objective of the lockout, (2) the timing, (3) the reality of the strike threat, (4) the nature and extent of the anticipated disruption, and (5) the degree of the resultant restriction upon the effectiveness of the concerted activity. Therefore, a lockout initiated to undermine or negate employee rights constitutes an unfair labor practice, but a lockout is not considered unlawful when a plant is closed purely as a defensive action against a strike or threatened strike,<sup>9</sup> to avoid serious economic loss,<sup>10</sup> or to counter-

<sup>4</sup> Comment, 15 ARK. L. REV. 176 (1961).

<sup>5</sup> National Labor Relations Act (Wagner Act) § 13, 49 Stat. 457 (1935), as amended, 29 U.S.C. § 163 (1958).

<sup>6</sup> See *City Trust, Safe Deposit & Sur. Co. v. Waldhauer*, 47 Misc. 7, 95 N.Y. Supp. 222 (1905); *Cote v. Murphy*, 159 Pa. 420, 28 Atl. 190 (1894); DAUGHERTY, *LABOR PROBLEMS IN AMERICAN INDUSTRY* 920 (5th ed. 1941).

<sup>7</sup> Some of these protected rights are spelled out in § 8 of the Wagner Act as amended, which provides in pertinent part:

“(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 . . .” 49 Stat. 452 (1935), as amended, 29 U.S.C. § 158(a) (1958). See also the statutory provision cited in note 5 *supra*.

<sup>8</sup> 96 N.L.R.B. 268 (1951).

<sup>9</sup> *Duluth Bottling Ass'n*, 48 N.L.R.B. 1335 (1943).

<sup>10</sup> *Betts Cadillac Olds, Inc.*, 96 N.L.R.B. 268 (1951).

act whipsaw tactics by a union against nonstruck members of a multi-employer association.<sup>11</sup> When, however, an employer closes his plant to force a concession from the representatives of his employees during collective bargaining negotiations, this is considered an unfair labor practice, a lockout in violation of protected rights.<sup>12</sup> The lockout in such cases is deemed to have lessened or possibly to have destroyed the effectiveness of a future strike, and section 13 of the Wagner Act, as amended by the Taft-Hartley Act, specifically forbids interfering with, impeding, or diminishing in any way the right to strike. In each case the NLRB determines whether the lockout is permissible.

The Supreme Court has pointed out, however, that the NLRB should not be the arbiter of the economic weapons which the parties can use in seeking to gain acceptance of their bargaining demands. In the *Insurance Agents'* case,<sup>13</sup> the Court declared that the national labor policy consists of two factors which are of equal importance: (1) the necessity for good faith bargaining between the parties, and (2) the availability of economic pressure devices to each to try to force concessions from the other. The Court further declared that it was not the duty of the NLRB to act at large in equalizing disparities of bargaining power between employer and union or to determine their economic weapons. Such an assertion of power by the Board would permit it to sit in judgment upon every economic weapon the parties to a labor contract negotiation might employ.<sup>14</sup>

In a very strong dissent, Mr. Justice Frankfurter said that the majority opinion of the Court had not taken into account the Board's right to examine the whole record of conduct of a party charged with a refusal to bargain. He also chided the Court for its "inexorable" premise that collective bargaining is by its nature a bellicose process:

The broadly phrased terms of the Taft-Hartley Act should be applied to carry out the broadly conceived policies of the Act. At the core of promotion of collective bargaining, . . . is a purpose to discourage, more and more, industrial combatants from pressing their demands by all available means to the limits of the justification of self-interest. This

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<sup>11</sup> *Buffalo Linen Supply Co.*, 109 N.L.R.B. 447 (1954), *set aside sub nom.* *Truck Drivers Union v. NLRB*, 231 F.2d 110 (2d Cir. 1956), *rev'd*, 353 U.S. 87 (1957).

<sup>12</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>13</sup> *NLRB v. Insurance Agents' Union*, 361 U.S. 477 (1960).

<sup>14</sup> *Ibid.*

calls for appropriate judicial construction of existing legislation. The statute lays its emphasis upon reason and a willingness to employ it as the dominant force in bargaining.<sup>15</sup>

The decision seemed to indicate that the disputing parties were free to press for economic advantage by whatever means not clearly forbidden and that the Board should adopt a hands-off attitude, absent additional supporting evidence that an unfair labor practice had been committed.

## I

### IS THE LOCKOUT THE COROLLARY OF THE STRIKE?

Mr. Justice Frankfurter's dissent accords closely with established NLRB policy concerning the use of permissible weapons in collective bargaining. Regarding the lockout, the Board's reasoning concerns this vital question: is the lockout the corollary of the strike?

Those who propose the use of the lockout as a bargaining tactic contend that it is such a corollary, and they find support in the fact that the Taft-Hartley Act couples "strikes and lockouts" in sections 8 (d) (4), 203 (c), and 208 (a), thereby giving them an equality. It is also contended that since the Supreme Court has never said whether the lockout is the correlative of the strike but has held that the lockout was not forbidden by federal labor statutes,<sup>16</sup> this implies that a lockout is lawful unless there is some interference with employee rights other than an interference with the right to strike incident to every shutdown.<sup>17</sup>

Legislative history of the Wagner Act indicates that there was no intent to prohibit strikes or lockouts as such. In a speech before the Senate Committee on Education and Labor, Senator Walsh said:

[T]here are some fundamental rights an employer has, just as there are rights an employee has. No one can compel an employer to keep his factory open. No one can compel an employer to pay any particular wages. No one can compel an employer to hire others in addition to those he sees fit to hire. So with an employee; no one can compel him to work, no one can compel him to go on strike, no one can compel him to leave his work. No one can keep an employer from closing down his factory and putting thousands of men and women on the street.<sup>18</sup>

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<sup>15</sup> *Id.* at 507-08.

<sup>16</sup> NLRB v. Truck Drivers Union, 353 U.S. 87, 92-93 (1957).

<sup>17</sup> 73 HARV. L. REV. 787 (1960).

<sup>18</sup> 79 CONG. REC. 7673 (1935). For a case in which the NLRB found a statutory limitation on the employer's right to close his plant, see *Darlington Mfg. Co.*, 139

In reviewing the *Morand Bros. Beverage Co.* case,<sup>19</sup> the Second Circuit said that 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. Consequently, once the employers had exhausted the possibilities of good faith bargaining with the union through their association, any or all of them were free to exercise their rights to lock out their salesmen without waiting for a strike, just as the union was free to call a strike against any or all of them. In the *Davis Furniture Co.* case,<sup>20</sup> the Ninth Circuit said that the right of employers temporarily to lock out all their employees is no more than *equal* to the right of the union of all the employees to call out the employees of one after another of the employers in a whipsawing manner.

The author of a recent article<sup>21</sup> states that the lockout must be the corollary of the strike since it is not illegal per se, it has a long history of lawful use, and its legality is not impeached because of its interference with strikes or other concerted activities. However, if the employer does more than simply locking out, *i.e.*, replaces locked out employees, he discriminates against them. The lockout is then unlawful, and it is no longer the corollary of the strike because the employer's action has gone beyond that. "The employers may exercise *less* than their full right to lock out, as they do when they only partially lock out, but they may not do *more* than lock out, as they do when they hire replacements for the locked out employees."<sup>22</sup> While the NLRB does not agree that the lockout is the corollary of the strike,<sup>23</sup> in a recent case, *Brown Food Store*,<sup>24</sup> the Board found a multi-employer lockout unlawful on this very basis. The struck employer hired permanent replacements; then the nonstruck employer hired temporary replacements so that they could continue

N.L.R.B. 241 (1962), 1963 DUKE L.J. 786, *enforcement denied*, 325 F.2d 682 (4th Cir. 1963), *cert. granted*, 32 U.S.L. WEEK 3365 (U.S. April 21, 1964).

<sup>19</sup> 91 N.L.R.B. 409 (1950), *enforced in part, remanded in part*, 190 F.2d 576 (7th Cir. 1951), *supplemented and reaffirmed*, 99 N.L.R.B. 1448 (1952), *enforced*, 204 F.2d 529 (7th Cir.), *cert. denied*, 346 U.S. 909 (1953).

<sup>20</sup> *Davis Furniture Co.*, 100 N.L.R.B. 1016 (1952), *set aside sub nom. Leonard v. NLRB*, 205 F.2d 355 (9th Cir. 1953).

<sup>21</sup> Denbo, *Is the Lockout the Corollary of the Strike?*, 14 LAB. L.J. 400 (1963).

<sup>22</sup> *Id.* at 408.

<sup>23</sup> *Morand Bros. Beverage Co.*, 91 N.L.R.B. 409 (1950), *enforced in part, remanded in part*, 190 F.2d 576 (7th Cir. 1951), *supplemented and reaffirmed*, 99 N.L.R.B. 1448 (1952), *enforced*, 204 F.2d 529 (7th Cir.), *cert. denied*, 346 U.S. 909 (1953).

<sup>24</sup> 137 N.L.R.B. 73 (1962), *enforcement denied*, 319 F.2d 7 (10th Cir. 1963), *cert. granted*, 375 U.S. 962 (1964).

to operate during the lockout.<sup>25</sup> According to the Board, this action "upset the balance of conflicting interests" established in *Buffalo Linen*.<sup>26</sup> The Court of Appeals for the Tenth Circuit, however, reversed the Board because it did not agree that the mere hiring of replacements made the lockout retaliatory rather than defensive.<sup>27</sup>

The contention that employers may exercise *less* than the full right to lock out was based on the *Great Falls* case,<sup>28</sup> where locked out employees of the nonstruck employers were called back to work for eighteen hours of work per week so that they could not draw unemployment compensation. Supposedly this is just the other side of the coin from the *Insurance Agents'* case where a slowdown—less than a total strike—was found to be a harassing technique in collective bargaining but not an indication in itself of bad faith bargaining under section 8 (b) (3).<sup>29</sup> In other words, what is sauce for the goose is sauce for the gander.

The NLRB stated in the *Morand* case<sup>30</sup> that even though the argument that the lockout is the corollary of the strike has an aura of fairness, in reality it is subject to many inherent defects. To permit the employer to lock out his employees at any time, for any reason which is contrary to his interests, would give him a license to engage in conduct which the Board and the courts have uniformly found to violate the right of employees to organize and bargain collectively. Even if the lockout action is taken after a bona fide impasse in collective bargaining, it is still untenable under sections 8 (a) (1) and (3). As far as section 8 (b) (4) is concerned, it simply proscribes strikes and lockouts during the sixty day period prior to modification or termination of an agreement, but it does not sanction lockouts at other times or under other conditions.

It is also urged that Congress intended to restore equality of bargaining power under section 13 of the National Labor Relations Act, but Congress did not so state. Yet it expressly reserved the

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<sup>25</sup> *Brown Food Store*, *supra* note 24, at 74.

<sup>26</sup> *Buffalo Linen Supply Co.*, 109 N.L.R.B. 447 (1954), *set aside sub nom.* *Truck Drivers Union v. NLRB*, 231 F.2d 110 (2d Cir. 1956), *rev'd*, 353 U.S. 87 (1957).

<sup>27</sup> *NLRB v. Brown*, 319 F.2d 7 (10th Cir. 1963), *cert. granted*, 375 U.S. 962 (1964), 1964 DUKE L.J. 169.

<sup>28</sup> *Great Falls Employers' Council, Inc.*, 123 N.L.R.B. 974 (1959), *enforcement denied*, 277 F.2d 772 (9th Cir. 1960).

<sup>29</sup> 361 U.S. 477 (1960).

<sup>30</sup> *Morand Bros. Beverage Co.*, 91 N.L.R.B. 409 (1950), *enforced in part, remanded in part*, 190 F.2d 576 (7th Cir. 1951), *supplemented and reaffirmed*, 99 N.L.R.B. 1448 (1952), *enforced*, 204 F.2d 529 (7th Cir.), *cert. denied*, 346 U.S. 909 (1953).

right to strike. Section 13 of the act as amended states that "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 of that right."<sup>31</sup>

It would be extremely naive to assume that because the employer does not have lockout power as leverage in negotiations, he has no power to cope with the union. While the unions have the protected right to strike, that right is not absolute; instead it must be balanced against the right of the employer to protect his business against unusual economic loss. As the Supreme Court has stated, "accommodation between the two must be obtained with as little destruction of one as is consistent with the maintenance of the other."<sup>32</sup> An employer is not required to be a sitting duck when caught in strike activity by the union. He has a rather varied arsenal with which to protect himself by reasonable measures from harmful economic or operative consequences of a strike.<sup>33</sup> The employer can replace economic strikers,<sup>34</sup> he can put into effect unilaterally any proposals made to the union during negotiations,<sup>35</sup> or he can continue conditions as they previously existed. The employees, on the other hand, have no comparable power over the employment situation.

It is therefore the Board's position that the strike is merely a compensating, and possibly inadequate, substitute by which the disparity of economic strength is sought to be reduced. Thus viewed, the lockout would be an aggressive, not a corrective, device. Certainly it would not effectuate the policies of the act. There is an obvious and perhaps critical distinction between employer action designed to assure continuance of productive operations and that of shutting it down. The former is consonant with the statutory purpose of achieving uninterrupted production; the latter recognizably is at odds with it. Recognition of the useful right of an employer to take action consistent with a basic objective of the act is not necessarily authority for his taking voluntary and uneconomically motivated action inconsistent with the objective.<sup>36</sup> Despite the

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<sup>31</sup> National Labor Relations Act (Wagner Act) § 13, 49 Stat. 457 (1935), as amended, 29 U.S.C. § 163 (1958).

<sup>32</sup> *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956).

<sup>33</sup> *Betts Cadillac Olds, Inc.*, 96 N.L.R.B. 268 (1951).

<sup>34</sup> *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333 (1938).

<sup>35</sup> *NLRB v. Crompton-Highland Mills, Inc.*, 337 U.S. 217 (1949).

<sup>36</sup> *Betts Cadillac Olds, Inc.*, 96 N.L.R.B. 268 (1951).

coupling of "strikes and lockouts" under the act, it is by no means clear that the common law lockout would be protected. The term "lockout" may mean many things, and it would not make the device legal in all circumstances not prohibited under the act.

The legislative history of the Taft-Hartley Act clearly indicates that while Congress did not intend to prohibit either the strike or the lockout, there is also nothing to indicate that it viewed the two as corollaries. Senator Ball of Minnesota, in a debate with Senator Morse of Oregon (concerning a proposal to change the definition of "employee" under the act) stated

the Senator speaks of the employers [*sic*] right to lock out as the parallel right to the employees [*sic*] right to strike. It seems to me that this is faulty reasoning, because no employer, in that sense, ever locks out an employee. There are very few cases. The only effective weapon the employer has is to defeat a strike if he thinks it is completely impossible to reach a settlement.<sup>37</sup>

Senator Morse replied that he had meant to point out that in most cases there are both strikes and lockouts.

It has been my experience in this field that many strikes are an inseparable combination of lock-out on the part of the employer and strike on the part of labor, in the sense that the employer says, "This is it. Take it or else." . . . Frequently it will be found that it [the strike] was provoked by the employer and that he greatly welcomed direct action on the part of the union, because it permitted him to keep concealed what was also in fact a lock-out as well as a strike.<sup>38</sup>

Therefore, rather than considering the lockout as corollary of the strike, Senator Morse was simply pointing out that they frequently occur as a simultaneous strike-lockout and that labor is not necessarily the causal factor.

In all of the arguments supporting the use of the collective bargaining lockout, the term "corollary" has been used to indicate equality, *i.e.*, the lockout equalizes the employer's means of exerting economic pressure on the union with the union's power to strike. Obviously if the employer can use other weapons which the union cannot command, the argument is unfounded. As a consequence, there is no equality and, therefore, no corollary relationship.

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<sup>37</sup> 93 CONG. REC. 1828 (1947).

<sup>38</sup> *Ibid.*



## II

## LACK OF CONSISTENCY IN THE NLRB'S DEFINITION OF A LOCKOUT

One of the difficulties in trying to follow Board policy concerning the lockout is inherent in the way the Board defines, or fails to define, the term. Although it has consistently held that to permit an employer to lock out his employees in the absence of any special mitigating circumstances subjects the union and the employees to unwarranted and illegal pressure which creates an atmosphere not conducive to the free opportunity for negotiation contemplated by section 8 (a) (5),<sup>39</sup> the Board has shown a notable lack of consistency concerning its definition of a lockout. This fact was acknowledged by the Board itself in the *Betts Cadillac Olds* decision:

The Board does not appear to have defined the term, and Board decisions do not reflect any consistent definition. Thus, concepts as widely separated as a closedown to avoid property loss . . . ; a cessation of operations because sporadic strikes interfered with efficient operation . . . ; a shutdown in a fit of employer temper during an argument with a union representative and without purpose to interfere with union or concerted activity . . . ; and mass discharges in reprisal for union activity . . . have [all] been described as "lockouts." On the other hand, shutdowns because of economic considerations have been found not to constitute "lockouts." . . . Nor do the decisions reflect any invidious connotation in use of the term.<sup>40</sup>

Although the term "lockout" has been used in federal legislation since the early 1930's, it has never been statutorily defined; and it is not evident whether it means the same as under the common law or whether it was used to describe all voluntary shutdowns, other than strike action, consequent to a labor dispute or was confined to shutdowns for economic or operative reasons.<sup>41</sup>

Arbitration awards involving lockouts have tended to follow the tests laid down by the NLRB decisions, but the term "lockout" is defined generally as an "employer's refusal to permit employees to work, even when there is work to be done, in order to coerce them into performing or refraining from some course of action."<sup>42</sup> The three characteristics indispensable to a lockout were spelled out in the *General Cable Corp.* arbitration:<sup>43</sup> (1) the place of employment

<sup>39</sup> Great Falls Employers' Council, Inc., 123 N.L.R.B. 974 (1959).

<sup>40</sup> 96 N.L.R.B. 268, 283 (1951).

<sup>41</sup> *Betts Cadillac Olds, Inc.*, *supra* note 40.

<sup>42</sup> P-H LAB. ARB. SERV. ¶ 65371 (1960).

<sup>43</sup> 5 AM. LAB. ARB. AWARDS ¶ 69048.3 (1952).

must be closed in part or in whole by the employer; (2) closure must be an offensive measure rather than a defensive one; (3) closure must be for the purpose of gaining concessions from the employees.

This definition indicates that the lockout is a temporary action with no employer intent to make it permanent or to replace employees. If the Board used the term consistently in this manner and used "shutdown" or "closure" to indicate permanent discontinuance of business operations or removal to another site, it would simplify use and understanding of Board decisions in this area.

Be that as it may, there seems no doubt that the Board is right in its contention that the use of the lockout as leverage in negotiations would tend to destroy the protected rights of employees under the act and so contribute to instability in industrial relations.<sup>44</sup>

However, while the Board's finding that such lockouts violate sections 8(a)(1), (3), and (5) was sustained by the Third Circuit in *Quaker State Corp.*<sup>45</sup> and the Tenth Circuit found them violative of sections 8(a)(1) and (3) in *Utah Plumbing Ass'n*,<sup>46</sup> the Fifth Circuit set aside such findings in *Dalton Brick & Tile Corp.*<sup>47</sup> According to the Fifth Circuit, absent evidence that the employer was motivated by a purpose to discourage union membership or intended to interfere with its employees' rights, the lockout did not violate the act. It held that a "lockout may not be made a violation simply on the ground that this gives advantage to the employer, or takes advantage away from the employees, or tips the scales one way or the other."<sup>48</sup>

If permitted to stand, this decision could virtually nullify the effectiveness of the right to strike. It also seems to undermine the policy of balancing conflicting interests. If an individual employer is to be permitted the use of the lockout to enhance his bargaining position, then logic suggests that Congress should specifically reserve this right for him, just as it reserved the right to strike for the employees.

In light of its reasoning in respect to *single* employer lockouts,

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<sup>44</sup> *Morand Bros. Beverage Co.*, 91 N.L.R.B. 409 (1950), *enforced in part, remanded in part*, 190 F.2d 576 (7th Cir. 1951), *supplemented and reaffirmed*, 99 N.L.R.B. 1448 (1952), *enforced*, 204 F.2d 529 (7th Cir.), *cert. denied*, 346 U.S. 909 (1953).

<sup>45</sup> *Quaker State Oil Ref. Corp. v. NLRB*, 270 F.2d 40 (3d Cir.), *cert. denied*, 361 U.S. 917 (1959).

<sup>46</sup> *Utah Plumbing & Heating Contractors Ass'n v. NLRB*, 294 F.2d 165 (10th Cir. 1961).

<sup>47</sup> *NLRB v. Dalton Brick & Tile Corp.*, 301 F.2d 886 (5th Cir. 1962).

<sup>48</sup> *Id.* at 899.

the Board's reasoning concerning the use of *multi-employer* lockouts may be more confusing than enlightening.

### III

#### THE MULTI-EMPLOYER LOCKOUT

In *Buffalo Linen Supply Co.*,<sup>49</sup> the NLRB held that a strike against one employer-member of a multi-employer bargaining group constituted a threat of strike against all other members and gave them the right to employ a temporary lockout in order to safeguard the integrity of the bargaining unit. In other words, if the union's purpose in calling such strike is to cause successive and individual capitulation to its demands, *i.e.*, by whipsawing, the Board considers such a lockout defensive rather than aggressive.<sup>50</sup>

Prior to the *Buffalo Linen* decision, however, the Board held that members of an employer association were no different from other employers and could only use the lockout as a defense against a threatened strike to avoid serious economic loss. The *Buffalo Linen* decision was thus a definite change in Board policy, consistent with, and possibly stemming from, the decisions by the Seventh, Eighth, and Ninth Circuits.<sup>51</sup> The Second Circuit, however, did not agree with the other circuit court decisions and the Board's view in *Buffalo Linen*. It held that although a strike against one member of an employer association constituted a strike threat against other members, such action did not justify an association-wide lockout.<sup>52</sup> Subsequently, the Supreme Court overruled the Second Circuit and upheld the lockout in this case as a means of maintaining the integrity of the multi-employer bargaining unit:

Although the Act protects the right of the employees to strike in support of their demands, this protection is not so absolute as to deny self-help by employers when legitimate interests of employees and employers collide. Conflict may arise, for example, between the right to strike and the interest of small employers in preserving multi-employer

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<sup>49</sup> 109 N.L.R.B. 447 (1954), *set aside sub nom.* *Truck Drivers Union v. NLRB*, 231 F.2d 110 (2d Cir. 1956), *rev'd*, 353 U.S. 87 (1957).

<sup>50</sup> *Betts Cadillac Olds, Inc.*, 96 N.L.R.B. 268 (1951). *Cf.* *Duluth Bottling Ass'n*, 48 N.L.R.B. 1335 (1943). Similarly, an employer can shut down his plant and move it for economic reasons.

<sup>51</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); *Leonard v. NLRB*, 205 F.2d 355 (9th Cir. 1953); *Morand Bros. Beverage Co. v. NLRB*, 204 F.2d 529 (7th Cir.), *cert. denied*, 346 U.S. 909 (1953).

<sup>52</sup> *Truck Drivers Union v. NLRB*, 231 F.2d 110 (2d Cir. 1956), *rev'd*, 353 U.S. 87 (1957).

bargaining as a means of bargaining on an equal basis with a large union and avoiding the competitive disadvantages resulting from nonuniform contractual terms. The ultimate problem is the balancing of the conflicting legitimate interests. . . .

The Court of Appeals . . . erred, however, in too narrowly confining the exercise of Board discretion to the cases of economic hardship. We hold that in the circumstances of this case the Board correctly balanced the conflicting interests in deciding that a temporary lockout to preserve the multi-employer bargaining basis from the disintegration threatened by the Union's strike action was lawful.<sup>53</sup>

The Supreme Court decision raises some interesting questions. The proponents of the collective bargaining lockout ask: if the other members of an employer association who have not been struck are privileged to use the lockout, why cannot a single employer utilize the same weapon as a defensive measure? Also, if a lockout against whipsawing can be considered an aggressive act when committed by employers individually, how can it be considered any less aggressive simply because it is carried out in concert?

As an illustration, assume an impasse in negotiations between the United Automobile Workers and General Motors Corporation. According to the NLRB and the Supreme Court, GM cannot lock out its employees until after the UAW calls a strike. To do so prior to the strike call is an aggressive act which precludes the opportunity for bona fide collective bargaining. If, however, GM, Ford, Chrysler, and American Motors combine into an association for the purpose of negotiation, then a strike against one becomes a strike against all; and the three nonstruck firms may lock out immediately, since the lockout is then considered a defense of the integrity of the multi-employer bargaining unit. Moreover, they can go further. Under the *Great Falls* decision, the employers who have locked out their nonstriking employees may call them back for whatever number of hours of work will preclude their drawing unemployment compensation (under state laws which permit such compensation during a labor dispute). Only GM can hire permanent replacements for its striking employees; the other employers may not, since they locked out their employees, and there is some doubt that they can even hire temporary replacements.<sup>54</sup> As a matter

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<sup>53</sup> NLRB v. Truck Drivers Union, 353 U.S. 87, 96-97 (1957).

<sup>54</sup> Brown Food Store, 137 N.L.R.B. 73 (1962), *enforcement denied*, 319 F.2d 7 (10th Cir. 1963), *cert. granted*, 375 U.S. 962 (1964).

of fact, if GM hires replacements, the other members of the association no longer have any reason to continue the lockout. If they do continue it, however, they not only lose business to GM which is open and operating, but they also court an unfair labor practice because their employees are and were at the time of the lockout willing to work on their respective employer's terms.<sup>55</sup>

This hypothetical case poses this very interesting question: if a strike against one is a strike or threat of strike against all members of an employer association sufficient to warrant a multi-employer lockout, why can only the struck employer hire replacements? Why should the employees of the other members be considered "locked out" rather than "on strike"? Was it not the threat of strike and the resultant threat of impairment to the multi-employer bargaining unit which initially caused the lockout and made it permissible? While it may be argued that the legitimacy of the lockout depends not upon the strike or threat of strike but upon the *effect* of the strike on the bargaining unit, such an argument is more semantic than real. Absent the strike, there would have been no reason for a lockout, for the employers' interest in group bargaining would have suffered no actual or threatened impairment. The strike is the causal factor; to attempt to separate the fact of the strike from its effects serves little purpose. Therefore, if the Board and the courts consider that the strike warrants a defensive lockout, there seems little justification for denying the other employer members the same right to hire permanent replacements which exists in any economic strike.

Although the Tenth Circuit in *NLRB v. Brown*<sup>56</sup> carefully stipulated that the locked out employees were not placed in the status of actual strikers, there is room for argument on this point. It is just as realistic to consider these employees "on strike" as "locked out." In the dissent to the NLRB majority opinion in the *Brown* case,<sup>57</sup> members Fanning and Rodgers maintained that the regular employees of the nonstruck employers are not necessarily "willing to work at the employers' terms," as the majority said. The sentiment of these employees is no different from that of the striking employees. The difference lies in the fact that they are willing only

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<sup>55</sup> 19 P-H LAB. REP. NO. 46 (June 7, 1962).

<sup>56</sup> 319 F.2d 7 (10th Cir. 1963), cert. granted, 375 U.S. 962 (1964).

<sup>57</sup> *Brown Food Store*, 137 N.L.R.B. 73, 77 (1962) (dissenting opinion).

to receive wages, while the actual striking employees in the rest of the association-wide unit are exerting whipsaw pressure on one employer in order to gain benefits which will ultimately accrue to all employees in the association-wide unit, including those who are locked out. Viewed in this light, it may be contended that permanent replacement of these employees is as justifiable as in any economic strike. If the struck employer can permanently replace economic strikers on the ground that this diminution of the protected right to strike is necessary to accommodate the employer's legitimate conflicting interest in maintaining economic activity,<sup>58</sup> it would seem to follow that temporary replacement of their employees is well within the rights of the nonstruck employers. Temporary replacement is less, not more, than the right of permanent replacement granted in *Mackay*. Therefore, if the nonstruck employers should be forbidden to hire even temporary replacements, the Board's decision in the *Brown* case renders largely illusory the lockout right granted to members of a multi-employer bargaining unit by limiting their choice to either ignoring the whipsaw or closing down completely. If they choose to ignore the whipsaw, in effect they subsidize the strike by permitting their own employees to continue to work; if they choose to close down, they lose business to the struck employer who is able to make permanent replacements.

According to NLRB members Fanning and Rodgers:

The inequity of the majority's holding becomes evident when contrasted with its holding as to Food Jet, the first employer struck. Food Jet attempted to obtain replacements and is found not to have violated the Act; the other four employers did the same thing, but are found to have acted unlawfully. We can see no justification for thus treating the members of the Association differently; in our view, it is not consistent with the Supreme Court's concept of preserving the integrity of the association-wide unit, and unfairly handicaps those employers subject to the threatened whipsaw tactics. They must either wait to be picked off one at the time by the "whipsawing" union, or close down completely and cease operating, contrary to their right under *Mackay*.<sup>59</sup>

Since the Supreme Court has ruled that the multi-employer lockout is privileged in such cases, it is difficult to see how the performance of such a nondiscriminatory act as temporary replacement could make the lockout unlawful.<sup>60</sup> As mentioned earlier, the

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<sup>58</sup> NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333 (1938).

<sup>59</sup> Brown Food Store, 137 N.L.R.B. 73, 78 (1962) (dissenting opinion).

<sup>60</sup> *Id.* at 77-79.

Tenth Circuit agreed that it could not and reversed the Board.<sup>61</sup>

If the multi-employer lockout is a bona fide defense of the bargaining unit, as the *Buffalo Linen* and *Great Falls* cases maintain, there is every reason to believe that the decisions of the Board and the courts are promoting and encouraging the growth of multi-employer bargaining. Where this effectuates the policies of the act in stabilizing industrial relations, it is not open to question; but this is not always the case. There has been no real distinction drawn between the need for the collective display of strength in negotiation by small employers when dealing with a powerful union in contrast to the presumed lack of such need when powerful employers negotiate. The companies in the automotive industry have never bargained as an association. Obviously they feel capable of individually negotiating on an equal basis with the UAW. Yet, repeatedly the UAW subjects these companies to whipsawing tactics. If they combined and bargained as a group, the whole industry could lock out its thousands of employees when one of them was struck. Would this have a stabilizing effect on industrial relations, to the end that there is no obstruction to the free flow of commerce? Far from it. And there would certainly be some doubt that this action would tend to balance the conflicting legitimate interests of the employers and employees. Yet under the *Buffalo Linen* decision, these powerful employers would be within their rights to exercise such a "defensive" lockout.

It is not disputed that the total strike, though protected, is not an absolute right. It is limited in certain important respects by the Taft-Hartley Act. Congress has been rather specific when it has come to outlaw particular economic weapons on the part of unions.<sup>62</sup> However, nowhere among these restrictions is whipsawing outlawed as a collective bargaining device. By the same token, nowhere is it specifically protected. It occupies the same twilight zone of legal uncertainty as do the lockout and the slowdown. However, how can it be seriously maintained that organization among employers in effect transforms whipsawing into a tactic "so indefensible" that the collective employers may lock out to combat it when only one of them has been struck, but unorganized employers suffering the

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<sup>61</sup> NLRB v. Brown, 319 F.2d 7 (10th Cir. 1963), cert. granted, 375 U.S. 962 (1964).

<sup>62</sup> National Labor Relations Act § 8(b)(4), added by 61 Stat. 141-42 (1947), as amended, 29 U.S.C. § 158(b)(4) (Supp. IV, 1963).

same tactics must wait to be struck individually before being permitted to defend themselves by locking out? The threat of a strike is no less real or damaging to a single employer, such as those in the automotive industry, than it is to employers in an association.

Since the objective of whipsawing is to bring pressure against individual employers in an effort to gain concessions, it does not involve the selection of the employers' bargaining agent or their combination into a unit for bargaining, and in itself, it is not an indication of bad faith bargaining. Timing is an integral part of the effectiveness of any strike, and timing is what makes the whipsaw strike effective. The multi-employer lockout negates this effectiveness. If the right to strike means anything, its use as a whipsawing device does not make it less protected. Moreover, the threat of a strike is a time-honored negotiating device and does not necessarily mean that the strike will in fact take place. The multi-employer lockout not only undermines the effectiveness of the strike, but it also gives a hollow ring to its use as a bargaining threat.

Despite Supreme Court sanction, there is still doubt that the multi-employer lockout is justifiable under the act, that a strike against one member of an association justifies an association-wide lockout. This is particularly so when it appears to be within the power of an employer to virtually nullify sections 7 and 13 of the act by the simple expedient of joining a multi-employer association.<sup>63</sup> The fact that employers combine into associations means that they have greater strength to combat the union's demands. However, this does not grant them license to use their combined strength in a way which is forbidden to them separately and individually. Nor is it evident how such an association-wide lockout effectuates the stabilization of industrial relations. If anything, it accentuates and extends the area of discord.<sup>64</sup> Furthermore, it places the single employer who may not wish to join an association or who does not have the opportunity to do so in an unfavorable position. If whipsawing is really indefensible as an economic weapon when used against an employer association, is it not equally indefensible when used against a single employer? The purpose is certainly the same

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<sup>63</sup> This possibility is pointed out in the dissenting opinion in *Buffalo Linen Supply Co.*, 109 N.L.R.B. 447, 452 (1954), *set aside sub nom. Truck Drivers Union v. NLRB*, 231 F.2d 110 (2d Cir. 1956), *rev'd*, 353 U.S. 87 (1957).

<sup>64</sup> See DAVEY, *CONTEMPORARY COLLECTIVE BARGAINING* 93-97 (1959).



—playing one employer off against another to force capitulation to union demands.

Finally, it is not clear how the decision in *Buffalo Linen* permitting the use of the multi-employer lockout is any less a judgment by the NLRB of types of economic weapons permissible in collective bargaining than was the decision in the *Insurance Agents'* case, where the Board was expressly told it did not have this power. If the NLRB can determine only the *purposes* and *not* the *types* of economic weapons at the disposal of the disputing parties, does the Board have the right to tell the parties *in what manner* the weapons may or may not be utilized? If, as the Supreme Court avers, Congress alone has the right to determine legitimate economic weapons, surely Congress rather than the Board or the courts should restrict the use of whipsawing tactics. It would therefore seem more in keeping with the policies of the act for Congress to make whipsawing an unfair labor practice where the purpose of this action is the destruction of the multi-employer bargaining unit, thereby obviating the necessity for using the multi-employer lockout. This would serve to balance the legitimate conflicting economic interests of employers and employees, and it would aid in stabilizing industrial relations by keeping the nonstruck plants open and operating.

#### IV

##### POSSIBLE EFFECTS OF THE USE OF THE MULTI-EMPLOYER LOCKOUT

In spite of pro and con arguments, however, the inescapable fact is that the multi-employer lockout is currently permissible. Therefore, it may be useful to examine some of the possible effects it could have upon negotiations, union tactics, and the broader area of industrial relations.

##### A. The Employer-Employee Relationship

For one thing, it will be very difficult for a nonstruck employer of an employer association to convince his employees that he has their interests in mind during negotiations if he has locked them out. Once he severs his communication lines in the plant, the only picture the employees will get of negotiations is the one the union presents to them. Once an agreement is reached, it will automatically be one the union "won" for the employees from a grudging management. In addition to losing production and perhaps part of

his market during the lockout, the employer may find that he has also lost the "ear" of his employees.

### B. Changes in Union Tactics

A more important and far-reaching effect of the multi-employer lockout, however, may be a change in union tactics. If the right to strike is dissipated by lockout, the union may decide to resort to a greater use of the slowdown,<sup>65</sup> *an unprotected but not forbidden activity*<sup>66</sup> (except in secondary boycott cases), which is much harder to detect and handle than the total strike. The slowdown is a form of on-the-job activity in which workers, while appearing to be engaged in their usual routines, deliberately limit their output in order to exert pressure on management to make some desired change. It is difficult to pinpoint, since workers perform at their usual pace while a supervisor is present but slack off when he moves away. A whole department may slow down without management discovering the instigators or being able to prove that a slowdown is going on.

The unions have argued repeatedly that the slowdown is a protected form of concerted activity, basing their argument upon section 13 of the Wagner Act as amended when read in conjunction with section 501 (2) of the Taft-Hartley Act.<sup>67</sup> In the *Briggs-Stratton* case, however, the Supreme Court pointed out that section 13 plus the definition provides only that "nothing in this Act . . . shall be construed so as to interfere with or impede" the right to engage in these activities.<sup>68</sup> What other federal statutes or state laws might do

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<sup>65</sup> Hammett, Seidman & London, *The Slowdown as a Union Tactic*, 65 J. POL. ECON. 126 (1957). The slowdown is fairly common in portions of American industry where the nature of the work and the type of wage payment make the limitation of production a means by which a group of workers can exert pressure on management. Though the union usually disclaims responsibility for slowdowns, workers are somewhat less likely in the absence of a union organization to possess the cohesiveness and experienced leadership necessary for the successful use of the slowdown technique. Even in plants in which the slowdown has been used quite often, union leaders have some doubt about its legitimacy, and rank and file members have even more. Management generally condemns its use, arguing that it violates the contract and that a grievance should be filed instead.

<sup>66</sup> *NLRB v. Insurance Agents' Union*, 361 U.S. 477 (1960).

<sup>67</sup> Section 501 (2) states: "The term 'strike' includes any strike or other concerted stoppage of work by employees (including a stoppage by reason of the expiration of a collective-bargaining agreement) and any concerted slow-down or other concerted interruption of operations by employees." 61 Stat. 161 (1947), 29 U.S.C. § 142 (2) (1958). For § 13 of the Wagner Act, as amended, see the text at note 31 *supra*.

<sup>68</sup> *International Union, UAW v. Wisconsin Employment Relations Bd.*, 336 U.S. 245, 263 (1949).

is not attempted to be regulated by this section.<sup>69</sup> In addition, the Court said that the definition of the strike in section 501 (2) was to be considered *only* in connection with section 8 (b) (4) and not with section 13. In other words, it describes proscribed activities, *i.e.*, concerted activities the objectives of which have been declared illegal and unfair labor practices, rather than defining protected concerted activities. Therefore, the purpose of the Taft-Hartley Act was not to grant dispensation for the strike, but it was to outlaw strikes undertaken for illegal purposes.<sup>70</sup> Viewed in this light, it cannot be assumed that all work stoppages are federally protected concerted activities. The NLRB is empowered to forbid a strike only when its *purpose* is one which the Taft-Hartley Act makes illegal; it has no power to rule on the *method* of the strike.

In the *Insurance Agents'* case,<sup>71</sup> the concerted activity took the form of a union-sponsored slowdown and sit-in by insurance salesmen designed to harass the employer during negotiations. The NLRB, relying solely upon section 8 (b) (3), found such tactics to be an indication of bad faith bargaining. The Supreme Court, however, took the position that the Board was sitting in judgment upon economic weapons or the method rather than the motives and purpose, and it overturned the Board's ruling on the ground that the Board could not support its finding by relying upon section 8 (b) (3) alone. In so doing, the Court said that the Board "has sought to introduce some standard of properly 'balanced' bargaining power, or some new distinction of justifiable and unjustifiable, proper and 'abusive' economic weapons into the collective bargaining duty imposed by the Act."<sup>72</sup> Had the Board brought additional evidence before the Court, particularly conduct of the union at the bargaining table indicative of bad faith bargaining, its unfair labor practice charge might very well have been sustained. Mr. Justice Frankfurter, in his dissent, agreed with the majority that the Board could not sustain its finding on the basis of section 8 (b) (3) alone, but he thought the Court should have remanded the case to the Board for the presentation of additional evidence. He also took issue with the majority for fashioning rules governing collective bargaining on the assumption that the power and position of labor unions and their

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<sup>69</sup> *Id.* at 263-64.

<sup>70</sup> *Id.* at 261-63.

<sup>71</sup> NLRB v. *Insurance Agents' Union*, 361 U.S. 477 (1960).

<sup>72</sup> *Id.* at 497.

solidarity is now what it was twenty-five years ago. "Accretion of power may carry with it increasing responsibility for the manner of its exercise."<sup>73</sup> Instead of emphasizing the bellicose nature of the collective bargaining process and the right of industrial combatants to force acceptance of their demands by various economic weapons, Mr. Justice Frankfurter thought the Court should encourage reason and the willingness to use it as the dominant force in bargaining.

To assume from this case that the slowdown is a legally protected form of concerted activity is unwarranted by the facts. The Court did not rule on whether the slowdown and sit-in are legal; it simply said that they were neither forbidden by federal statute nor legalized and approved thereby and that they were *not* per se unfair labor practices. However, the Court did call attention to the *Briggs-Stratton* case, mentioned above, in which it had stated:

If we were... to make the [right to] strike an absolute right and the definition to extend the right to all other variations of the strike, the effect would be to legalize beyond the power of any state or federal authorities to control not only the intermittent stoppages such as we have here but also the slowdown and perhaps the sit-down strike as well.<sup>74</sup>

The NLRB's attitude toward the slowdown (as evidenced by its finding in the *Insurance Agents'* case) is of fairly recent origin. Prior to 1950 the NLRB had not considered partial strikes to be unprotected concerted activity. In a 1938 decision in *Harnischfeger Corp.*,<sup>75</sup> the Board determined that a union-sponsored refusal to work overtime did not constitute an action "so indefensible" as to warrant discharge. Although the refusal to work beyond eight hours on any shift caused the company considerable difficulty, it did not occasion the much more serious difficulty resulting from a total strike. Since employees could not be discharged for calling a strike, the Board did not see how such action could be sustained in the case of the *partial* strike.

The test laid down in the *Harnischfeger* case by the Board left a considerable degree of latitude in the interpretation of what constituted "indefensible" action sufficient to overcome the presumed intent of Congress to sanction concerted activities. Obviously, if the

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<sup>73</sup> *Id.* at 501.

<sup>74</sup> *International Union, UAW v. Wisconsin Employment Relations Bd.*, 336 U.S. 245, 264 (1949).

<sup>75</sup> 9 N.L.R.B. 676 (1938).

objective sought or the method used were illegal, then the activity would be denied protection.

The circuit courts, however, had consistently held that partial strikes were not protected activities because employees have no right to defy any reasonable order of an employer *unless they stop work completely*.<sup>76</sup> Apparently the courts wanted to limit the restrictions which the act placed on management's right to discipline defiant employees.<sup>77</sup>

When the *Elk Lumber* case<sup>78</sup> came before the Board in 1950, the issue was whether or not an employer could discharge employees for instituting a slowdown to protest a change in computation of pay from a piece rate system to an hourly rate. Citing the "indefensible" test laid down in the *Harnischfeger* case, the Board then reversed its reasoning concerning indefensible activity. Whereas before it had found the partial strike to be protected activity, it now found the *object* legal but the *means* a refusal to accept the terms of employment of the employer without engaging in a work stoppage and a continuation at work on the employees' own terms. The Board thus took the same line of reasoning as the circuit courts. However, it did not follow the thinking of the Supreme Court in *Briggs-Stratton*, for in the *Elk Lumber* case, the Board found the purpose of the action legal but the method, the slowdown, "indefensible" and no longer a lesser form of protected activity. This general proscription of the slowdown was definitely a ruling by the Board on the types of economic weapons which may or may not be used by the parties to collective bargaining. From 1950 until the *Insurance Agents'* ruling in 1960, the Board routinely considered the use of the slowdown during negotiations as evidence of bad faith bargaining. After the *Insurance Agents'* decision, the Board reversed itself and in subsequent cases held that such tactics were not *in themselves* a violation of section 8 (b) (3).<sup>79</sup>

An interesting parallel could be drawn between this situation involving the slowdown and the recent case concerning the agency

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<sup>76</sup> See, e.g., *NLRB v. Montgomery Ward & Co.*, 157 F.2d 486 (8th Cir. 1946); *NLRB v. Condenser Corp. of America*, 128 F.2d 67 (3d Cir. 1942); *C. G. Conn, Ltd. v. NLRB*, 108 F.2d 390 (7th Cir. 1939).

<sup>77</sup> 60 *YALE L.J.* 529 (1951).

<sup>78</sup> *Elk Lumber Co.*, 91 N.L.R.B. 333 (1950).

<sup>79</sup> *Lumber & Sawmill Workers*, 130 N.L.R.B. 235 (1961); *Local 220, Int'l Union of Elec. Workers*, 127 N.L.R.B. 1514 (1960); Fleming, *The Obligation to Bargain in Good Faith*, in *PUBLIC POLICY AND COLLECTIVE BARGAINING* 60, 77 (Shister, Aaron, & Summers ed. 1962).

shop as a form of union security. The slowdown occupies a position in relation to the total strike somewhat analogous to that of the agency shop in relation to the union shop. The agency shop is not specifically permitted by the Taft-Hartley Act, but the Supreme Court has recently held that it is a lesser form of union security and therefore legal under the Taft-Hartley Act.<sup>80</sup> However, the Court has not viewed the slowdown as a lesser form of a protected activity, the total strike, and therefore also protected.<sup>81</sup> Had it done so, the slowdown could have been treated, as has been suggested,<sup>82</sup> in the same manner as a complete work stoppage. If the employer wished to guard against such action, he could negotiate for it as he would for protection against the total strike; and in the event that a slowdown did occur, he could seek to replace the employees unless they agreed to work on his terms or he could institute a lockout against them.

Of course, treating the slowdown in the same manner as a total strike is essentially what the Board did prior to the *Elk Lumber* case. However, with the slowdown now moved from the protected category, there is no legal barrier to prevent an employer from using his common law right to lock out his defiant employees or to replace them. In the first instance he would simply be converting the unprotected partial strike into a total strike, and in the second he would be replacing his employees just as if they were engaged in an economic strike.<sup>83</sup> So long as there was no purpose of an illegal nature (such as a secondary boycott) involved in the slowdown and no other evidence indicating bad faith bargaining, the employees could use the slowdown during negotiations.<sup>84</sup> The employer, however, would not have to suffer it without retaliation.

The *Insurance Agents'* decision raises a number of questions.

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<sup>80</sup> NLRB v. General Motors Corp., 373 U.S. 734 (1963). However, the Supreme Court has subsequently held that states with so-called "right to work" laws may prohibit the enforcement of an agency shop clause in a collective bargaining agreement and that the state courts, rather than solely the NLRB, are tribunals with jurisdiction to enforce the state prohibition. Retail Clerks Ass'n v. Schermerhorn, 375 U.S. 96 (1963).

<sup>81</sup> Cf. NLRB v. Insurance Agents' Union, 361 U.S. 477, 492-94 (1960).

<sup>82</sup> Buffalo Linen Supply Co., 109 N.L.R.B. 447 (1954), *set aside sub nom.* Truck Drivers Union v. NLRB, 231 F.2d 110 (2d Cir. 1956), *rev'd*, 353 U.S. 87 (1957).

<sup>83</sup> "[I]t is not illegal for an employer to discharge employees, who, instead of striking in the conventional manner to support their grievances, persist in remaining on their jobs, while refusing in defiance of reasonable instructions of their employer to perform part of their allotted work tasks, and thereby in effect unilaterally attempt to prescribe their own terms of work." Cyril de Cordova & Bro., 91 N.L.R.B. 1121, 1136 (1951).

<sup>84</sup> NLRB v. Insurance Agents' Union, 361 U.S. 477 (1960).

A basic question concerns whether the slowdown is defensible as an economic weapon under any circumstances. Those who believe that it is not will certainly not find comfort in the Court's decision. It is difficult to understand how a slowdown may be sanctioned when the sit-down strike was declared illegal, for the slowdown bears a much closer resemblance to that tactic than it does to the complete withdrawal of services. Like the sit-down strike, the slowdown involves holding another's property while producing at an unsatisfactory rate rather than not at all. In effect, it is like having one's cake and eating it too. The workers will not vacate their jobs, they will not produce at a normal rate, but they continue to draw their pay. In other words, until such time as the employer can pinpoint the slowdown, place responsibility for it, and replace the workers, if possible, he is in the position of subsidizing his own strike. The slowdown does not ordinarily take place like a regular strike.<sup>85</sup> A whole department does not just slow down all at once. Workers may work at a normal rate while a supervisor is near but slow down when he moves away. It is a hit-and-run method, a subversive form of a strike. There is nothing in the slowdown which makes it defensible, particularly since the concerted refusal to work under unsatisfactory conditions is protected by law and available for use as a protest.

Where there is a contract providing for a grievance procedure, certainly its use should be encouraged for settling problems arising under the contract rather than the use of the slowdown. If there is no contract and therefore no grievance procedure, as is the case when a contract has expired (and has not been extended) before a new one is agreed upon or where an initial contract has not yet been signed, employees may still resort to the total strike. There is nothing in the slowdown conducive to constructive negotiations or the stabilization of industrial relations.

If the Supreme Court intended to "promulgate a per se rule that a partial strike could not be evidence of a failure to bargain in good faith"<sup>86</sup> in the *Insurance Agents'* case, it has effectively granted immunity to the slowdown as an employer harassing tactic, a job

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<sup>85</sup> The slowdown may take many forms other than a slowdown in production. For example, it may occur in materials failing to reach the production lines promptly or letting a machinery breakdown occur instead of informing the foreman of the need for repair work.

<sup>86</sup> See note 79 *supra*.

reserved to Congress which Congress itself did not do. Congress did not protect or prohibit the slowdown. It left to the NLRB the decision whether the conduct of a party to the negotiation constituted an unfair labor practice. Although the NLRB decisions are, and should be, subject to limited judicial review to the end that the Board does not exceed its statutory authority, the Supreme Court should not hamper the Board in its discretionary powers by unduly doctrinaire or arbitrary decisions, where the Court in effect simply substitutes its own judgment for that of the Board. As the Court itself said in *Phelps Dodge*:

There is an area plainly covered by the language of the Act and an area no less plainly without it. But in the nature of things Congress could not catalogue all the devices and stratagems for circumventing the policies of the act. Nor could it define the whole gamut of remedies to effectuate these policies in an infinite variety of specific situations. Congress met these difficulties by leaving the adaptation of means to ends to the empiric process of administration.<sup>87</sup>

Therefore, it may be argued that if the slowdown is to be sanctioned under any circumstances in the employee-employer relationship, Congress or the NLRB, rather than the Supreme Court, should do it.

## V

### CONCLUSION

If the multi-employer lockout, which dissipates the union's right to strike, promotes and encourages unions to retaliate with the slowdown, a tactic which infringes upon management's right to direct its labor force and utilize its plant and equipment efficiently, then the search for industrial peace through constructive labor relations will undoubtedly be retarded. If the single employer lockout as a pressure tactic in negotiations should be permitted as well, then Pandora's box of evils for industrial relations would be a *fait accompli*.

Although it has been contended that employers in the past have used the common law lockout infrequently during bargaining because either they have been strong enough without it, they wished to avoid the economic loss entailed, or they feared that it would constitute an unfair labor practice, there is no assurance that employers in the future would neglect its use if it had legal sanction. The very fact that in the past few years there have been an increasing

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<sup>87</sup> *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941).



number of plant closures to avoid bargaining with the union indicates that employers may be willing to suffer some economic loss on a permanent basis in order to avoid assuming their responsibilities under the act.<sup>88</sup> There is the distinct possibility that employers in areas traditionally hostile to unions would use the collective bargaining lockout to destroy the union. Since the burden of proof rests with the Board, an employer could risk the finding of an unfair labor practice (a refusal to bargain in good faith) if the lockout had already accomplished its purpose. Employers willing to close a plant permanently in the face of the union would not be likely to overlook the possibilities inherent in the collective bargaining lockout. Such a lockout plus mutual employer protection plans would insure defeat of the union and collective bargaining. Certainly this cannot be construed as effectuating the purposes of the National Labor Relations Act.

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<sup>88</sup> See, e.g., *Darlington Mfg. Co.*, 139 N.L.R.B. 241 (1962), *enforcement denied*, 325 F.2d 682 (4th Cir. 1963), *cert. granted*, 32 U.S.L. WEEK 3365 (U.S. April 21, 1964).