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LOCKOUTS: A NEW DIMENSION IN COLLECTIVE BARGAINING

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I. INTRODUCTION

Prior to the Supreme Court's decision in *American Ship Bldg. Co. v. NLRB*,[1] the validity of the "bargaining lockout"[2] under the National Labor Relations Act was a matter of disagreement among the circuit courts of appeal[3] and legal analysts.[4] Some viewed the bargaining lockout as the employer's legal counterpart to the union's strike weapon, while others considered the bargaining lockout illegal. In deciding *American Ship Bldg.*, the Supreme Court dealt with the very balance of power between labor and management in the collective bargaining process. Of the three decisions[5] in the field of labor law handed down by the Supreme Court on March 29, 1965, *American Ship Bldg.*, which received the least predecision publicity, may well be the most significant for the future of collective bargaining, for its rationale has the potential to affect virtually every collective bargaining relationship.[6]

In writing this article, it is my purpose to analyze the status of the bargaining lockout in the statutory scheme. The article will include an analysis of the existing law prior to *American Ship Bldg.* and an examination of the Supreme Court's decision: why the Court upheld the validity of the bargaining lockout, what the decision means for the

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[1] 380 U.S. 300 (1965).

[2] As used throughout this article, the term "bargaining lockout" is intended to mean the voluntary temporary cessation of operations by an employer during collective bargaining negotiations which precludes the employees from working, the purpose of which is to enhance the employer's position at the collective bargaining table.

[3] Compare NLRB v. Dalton Brick & Tile Corp., 301 F.2d 886 (5th Cir. 1962) and Morand Bros. Beverage Co. v. NLRB, 190 F.2d 576 (7th Cir. 1951), with Body & Tank Corp. v. NLRB, 339 F.2d 76 (2d Cir. 1964); see American Ship Bldg. Co. v. NLRB, 331 F.2d 839 (D. C. Cir. 1964); Utah Plumbing & Heating Contractors Ass'n v. NLRB, 294 F.2d 165 (10th Cir. 1961); Quaker State Oil Ref. Corp. v. NLRB, 270 F.2d 40 (3rd Cir. 1959).

[4] See generally Koretz, Legality of the Lockout, 4 Syracuse L. Rev. 251 (1953); Koretz, The Lockout Revisited, 7 Syracuse L. Rev. 263 (1956); Meltzer, Lockouts Under the LMRA: New Shadows on an Old Terrain, 28 U. Chi. L. Rev. 614 (1961); Meltzer, Single and Multi-Employer Lockouts Under the Taft-Hartley Act, 24 U. Chi. L. Rev. 70 (1956). These articles provide an extensive treatment of the status of the lockout in the statutory scheme prior to American Ship Bldg, supra note 1.

[5] American Ship Bldg. Co. v. NLRB, supra note 1; NLRB v. Brown, 380 U.S. 278 (1965); Textile Workers v. Darlington Mills, 380 U.S. 263 (1965).

[6] Approximately 100,000 collective bargaining agreements involving almost 40% of all employees represented by unions are negotiated annually.

future of collective bargaining and what questions were reserved for future resolution.

II. Status of Bargaining Lockout Prior to American Ship Building

A. *Under National Labor Relations Board Decisions*

Prior to *American Ship Bldg.*, the employer's purpose in shutting down was the factor determining the legality of a lockout. Lockouts fell into three classes.

The first category was the case in which the employer used the lockout as a means to destroy or to undermine the collective bargaining representative, to frustrate organizational efforts or to evade the duty to bargain.[7] The employer's motive in these circumstances rendered the lockout unlawful, since it fell within the specific proscriptions of Sections 8(a)(1), (3) and (5) of the National Labor Relations Act.[8]

The second type of case dealt with the implementation of a lockout for "defensive" purposes. The employer's purpose in shutting down here was "to safeguard against . . . loss where there is reasonable ground for believing that a strike was threatened or imminent."[9]

Betts Cadillac Olds, Inc.[10] was a case frequently cited for this proposition. Nineteen automobile dealers had bargained as a group for many years with a union which represented their service department employees. In the instance in question, the parties began negotiating and bargained in good faith to an impasse. During negotiations, authority to strike was sought and received by the union from its International. Anticipating a strike, the dealers issued instructions to their service departments not to accept work that could not be turned out the same day and to complete any large jobs then in the shops. The association was informed that the union had authority to strike if the parties had not concluded a new agreement by the expiration of the existing contract. The parties agreed that the dealers' final offer would be submitted to the union's membership for a vote and that the association would be informed of the results. The employees voted to turn down the last offer and to strike two of the dealers, beginning on the following day. The dealers were informed of the result of the vote on their final offer and were warned that the union would probably strike, but they

[7] NLRB v. Wallick, 198 F.2d 477 (3rd Cir. 1952); NLRB v. Somerset Classics, 193 F.2d 613 (2d Cir. 1952); Olin Indus. v. NLRB, 191 F.2d 613 (5th Cir. 1951); Joseph Weinstein Elec. Corp., 59 L.R.R.M. 1015 (1965); American Int'l Aluminum Co., 56 L.R.R.M. 2682 (1964); J.R. Simplot Co., 145 N.L.R.B. 171 (1963); Industrial Fabricating Inc., 119 N.L.R.B. 162 (1957).

[8] 49 Stat. 452 (1935), as amended, 29 U.S.C. §§ 158(a)(1), (3), (5) (1964).

[9] Quaker State Oil Ref. Corp., 121 N.L.R.B. 334, 337 (1958).

[10] 96 N.L.R.B. 268 (1951).

were not informed when, where or against which dealers. Rather than waiting to be struck, the dealers shut down, locking out their employees.

Upholding the legality of the lockout under the circumstances presented, the Board stated that

> an employer is not prohibited from taking reasonable measures, including closing down his plant, where such measures are, under the circumstances, necessary for the avoidance of economic loss or business disruption attendant upon a strike. . . . The nature of the measures taken, the objective, the timing, the reality of the strike threat, the nature and extent of the anticipated disruption, and the degree of resultant restriction on the effectiveness of the concerted activity, are all matters to be weighed in determining the reasonableness under the circumstances, and the ultimate legality, of the employer's action.[11]

Finding that the dealers in *Betts* were faced with the reasonable threat of a strike, and that occurrence of such a strike would cause the dealers operating difficulties, the Board concluded that the lockout was a legitimate protective measure.

The circumstances in which the *Betts* special "economic considerations" rule has been applied are diverse. There are, however, generally two factors present in all such cases: the reasonable threat of a strike[12] and the potential harm over and above the usual effects attendant upon any strike.[13] Thus, the Board has sanctioned the lockout in cases where the strike would have (1) caused the contractors to suffer contractual penalties for failure to complete their work on time, and would have caused inconvenience and endangered the public health and safety through extended use of detours and disruptions of public services;[14] (2) resulted in financial loss from spoilage of perishable goods;[15] (3) caused damage to customer relations due to the employer's inability to complete the servicing of its customers;[16] and (4) caused recurrent work stoppages in an integrated enterprise, preventing the employer from properly planning production schedules and thereby making continued operations uneconomical.[17]

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[11] Id. at 286.

[12] Cf. J.R. Simplot Co., supra note 7; Hercules Powder Co., 127 N.L.R.B. 333 (1960); American Brake Shoe Co., 116 N.L.R.B. 820 (1956) (Board found no threat of imminent strike existed).

[13] The severity of the consequences from the strike necessary to bring the lockout within the *Betts* rule has been reduced in recent years almost to the point where it is no longer a factor.

[14] Building Contractors Ass'n, 138 N.L.R.B. 1405 (1962).

[15] Duluth Bottling Ass'n, 48 N.L.R.B. 1335 (1943).

[16] Packard Bell Elec. Corp., 130 N.L.R.B. 1122 (1961).

[17] Marydale Prods. Co., 133 N.L.R.B. 1232 (1961); International Shoe Co., 93 N.L.R.B. 907 (1951).

A distinctly separate type of "defensive" lockout arose in cases where a multi-employer bargaining group was faced with a "whipsaw" strike.[18] In such cases, the lockout by non-struck members of the group was considered a legitimate protective measure. Since a whipsaw is a strike against less than all of the members of the group, it is regarded as an attack upon the integrity of the multi-employer unit. It raises the further possibility that other members of the group will be successively and individually struck. If the employer were unable to counter the whipsaw, the members of the group would be denied the advantages of multi-employer bargaining and the bargaining unit would be destroyed. The Board, adhering to the Supreme Court's decision in *Buffalo Linen*,[19] viewed a lockout by non-struck members as a legitimate defensive measure. Prior to *American Ship Bldg.*, the existence of a validly constituted and recognized multi-employer unit was, however, a prerequisite to a determination that the lockout by non-struck employers was lawful. Where the larger bargaining unit was not validly established and recognized, a lockout claimed to be in defense of a whipsaw strike was deemed to be an illegal offensive weapon.[20]

The third class of cases into which lockouts fell was the bargaining lockout—the use of the lockout to enhance the employer's bargaining position in collective bargaining negotiations. Unlike the second class of cases dealing with defensive lockouts, the employer's motive here was not to protect himself from the consequences of a strike, but rather to exert pressure upon the union to abandon its contract demands and to accept the employer's proposals. As such, it was regarded as an offensive weapon. Although the employer's motive was not such as to bring the lockout within the specific provisions of Section 8(a) of the National Labor Relations Act,[21] the Board consistently held that the bargaining lockout was unlawful.[22]

The Board reasoned that the employees were being locked out because they exercised their statutory right to bargain collectively. It follows that the reasonably foreseeable consequence of the employer's conduct was to infringe the employees' right under section 7 to bargain collectively[23] and to be free from employer discrimination based upon

[18] A "whipsaw strike" is a strike by a union against less than all of the members of a multi-employer bargaining unit with whom it has a collective bargaining relationship.

[19] NLRB v. Truck Drivers, 353 U.S. 87 (1957).

[20] Evening News Ass'n, 145 N.L.R.B. 996 (1964); Great Atl. & Pac. Tea Co., 145 N.L.R.B. 361 (1963).

[21] 49 Stat. 452 (1935), as amended, 29 U.S.C. § 158(a) (1964).

[22] See cases cited note 20 supra.

[23] Section 7 of the NLRA, 49 Stat. 452 (1935), as amended, 29 U.S.C. § 157 (1964), provides that: "Employees shall have the right to self-organization . . . *to bargain collectively* through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . ." (Emphasis added.)

the exercise of such right.[24] The fact that the lockout pre-empted the use of the strike weapon was the alternate basis upon which the Board rested its proscription of the bargaining lockout. Since it rendered the strike weapon impotent, the Board reasoned that the bargaining lockout contravened the language of section 13 of the act which specifically protects the right to strike from infringement.[25] As such, the bargaining lockout, in the Board's view, violated sections 8(a)(1) and (3) of the act. Moreover, the threat to shut down and the carrying out of that threat during negotiations were considered by the Board as inconsistent with the duty to bargain in good faith.[26] The Board considered such actions to be unwarranted and illegal pressures "creat[ing] an atmosphere in which the 'free opportunity for negotiation' contemplated by the Act did not exist."[27]

In so finding the bargaining lockout unlawful despite the absence of a specific illegal motive, the Board was performing a function which it believed Congress had committed to it—the function of balancing the conflicting legitimate interests of the employer and his employees. The basis for such an interpretation of the Board's role in this area was the Supreme Court's decision in *Buffalo Linen*.[28] In upholding the Board's finding that non-struck members of a multi-employer unit had the right to lock out in defense of a whipsaw strike, the Court in that case proceeded to explain the role of the Board in this complex area of economic conflict. Frequently, the Court concluded, the legitimate interests of the employer and his employees collide, and a decision as to which interest is paramount must be made: Congress had committed to the NLRB, subject to limited judicial review, the striking of this balance to effectuate the act's policy. In establishing the illegality of the bargaining lockout, the Board was thus exercising a function which it believed the Supreme Court had interpreted as within its scope of responsibility.

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[24] Employer conduct which discriminates against employees because they exercise their rights guaranteed by § 7 of the act violates §§ 8(a)(1) and (3) of the act, 49 Stat. 452 (1935), as amended, 29 U.S.C. §§ 158(a)(1), (3) (1964), which provide:

§ 158. (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 157 of this title;

(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. . . .

[25] Section 13 of the NLRA, 49 Stat. 457 (1935), as amended, 29 U.S.C. § 163 (1964), provides that, "Nothing in this subchapter, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right."

[26] American Brake Shoe Co., supra note 12.

[27] Id. at 833.

[28] NLRB v. Truck Drivers, supra note 19.

B. *Under Circuit Court Decisions*

A definite split of opinion concerning the legality of the bargaining lockout existed among the circuit courts of appeals prior to *American Ship Bldg.* Four circuits upheld the Board's theory on the matter.[29] On the other hand, two circuits rejected the Board's dichotomy between offensive and defensive lockouts, regarding both types as legitimate weapons of economic warfare.[30]

In *Quaker State Oil Ref. Corp. v. NLRB*,[31] the employer partially suspended operations at its oil refinery the day after its collective bargaining agreement with the Oil, Chemical and Atomic Workers had expired. The company advanced two reasons in justification of its work stoppage: First, the shutdown was dictated by plant and personal safety, in defense against a reasonable strike threat; second, the shutdown is a legitimate economic weapon, the employer's counterpart to the union's strike weapon. The Board found that the company had locked out in support of its bargaining position and not in anticipation of a strike, and concluded that such a bargaining lockout violated sections 8(a)(1), (3) and (5) of the act.[32]

The Third Circuit, in enforcing the Board's order, stated that the language of the Supreme Court in *Buffalo Linen* defined the limits of its reviewing power: that is, the primary responsibility for balancing legitimate conflicting interests resides with the Board, subject to limited judicial review. The court examined the Board's decision in light of those restrictions. The Board had concluded that the bargaining lockout accorded the employer an unfair advantage and thus distorted the bargaining process. The lockout lessened or even destroyed the effectiveness of the strike weapon, specifically protected by section 13 of the act. The Board had further noted that the employer possesses other means of economic warfare to combat a strike and to pressure for more favorable contract terms.[33] Granting the employer the right to lock out in addition to these other available courses of action would unduly tip the balance of power too far in the employer's favor.

On the basis of these considerations, the Third Circuit concluded that the Board had acted in accordance with congressional intent in

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[29] Body & Tank Corp. v. NLRB, supra note 3; American Ship Bldg. Co. v. NLRB, supra note 3; Utah Plumbing & Heating Contractors Ass'n v. NLRB, supra note 3; Quaker State Oil Ref. Corp. v. NLRB, supra note 3.

[30] NLRB v. Dalton Brick & Tile Corp., supra note 3; Morand Bros. Beverage Co. v. NLRB, supra note 3.

[31] Supra note 3.

[32] Quaker State Oil Ref. Corp., 121 N.L.R.B. 334 (1958).

[33] The employer may replace economic strikers, NLRB v. McKay Radio & Television Co., 304 U.S. 333 (1938), and may institute changes in terms and conditions of employment which he urged in good faith at the unsuccessful negotiations, NLRB v. Crompton-Highland Mills, Inc., 337 U.S. 217 (1949).

balancing the conflicting interests involved, and that its proscription of the bargaining lockout should stand.

The Tenth Circuit,[34] the District of Columbia Circuit,[35] and the Second Circuit,[36] espousing the *Quaker State* view that the Board possesses the primary responsibility for balancing the parties' legitimate conflicting interests, also sustained the Board's proscription of the bargaining lockout.

Only the Fifth Circuit, in *NLRB v. Dalton Brick & Tile Corp.*,[37] rejected the Board's ruling on the bargaining lockout. A marginal company, Dalton Brick, was in severe financial difficulty at the time that its collective bargaining agreement with the United Stone and Allied Products Workers expired. The parties had enjoyed a good relationship with no strikes or strike threats for many years. Due to its financial position, the company sought to renew the expiring contract, while the union pursued increased benefits. During negotiations, the company laid off its work force with the understanding that the employees could return to work when the employer's bargaining terms were agreed upon. The facts showed that the company bargained in good faith and that, in shutting down, it was not actuated by anti-union animus. The Board found that the primary purpose of the lockout was the enhancement of the employer's bargaining position and the ultimate acceptance of its proposals by the union.

While accepting the Board's finding, the Fifth Circuit could not disregard the company's financial plight and the necessity, in light thereof, that it obtain a strong bargaining position through a lockout. Considering the Board's rationale as establishing the proposition that a lockout is prima facie unlawful unless justified by special circumstances, the court stated that the act does not support such a presumption with respect to a bargaining lockout. Its illegality must be established, if at all, by an analysis of specific sections of the act and the application of the facts thereto. Not only does the act not outlaw lockouts, but the fact that there are limitations placed on its use in several sections of the statute demonstrates that, at least in certain other situations, the lockout is a legitimate economic weapon. A lockout is illegal only where it contravenes a specific section of the statute, *e.g.*, where it is used to subvert the collective bargaining process.

In the court's opinion, two Supreme Court decisions[38] determined that the Board must set forth a statutory basis for policies which it

[34] Utah Plumbing & Heating Contractor's Ass'n v. NLRB, supra note 3.

[35] American Ship Bldg. Co. v. NLRB, supra note 3.

[36] Body & Tank Corp. v. NLRB, supra note 3.

[37] Supra note 3.

[38] Local 357, Int'l Bhd. of Teamsters v. NLRB, 365 U.S. 667 (1961); NLRB v. Insurance Agents, 361 U.S. 477 (1960).

deems necessary in balancing legitimate conflicting interests between labor and management. This constitutes a recognition, declared the court,

> that the objective—the collective bargaining agreement—is by the very nature of things an annealing process hammered out under the most severe and competing forces and counteracting pressures. Unless Congress has proscribed a given pressure, or unless its exertion or manner of its exercise collides with some other specific policy of the Act, its use may not be transmuted to make what is in fact good faith at the bargaining table into something else.[39]

Thus, to establish a violation of section 8(a)(3), for example, it must appear that, in locking out its employees, the employer was motivated by a desire to discourage union membership and not merely by an intent to gain the favorable resolution of a bargaining conflict.

Only where the facts of a particular case establish that the lockout violated the specific provisions of sections 8(a)(1), (3) or (5) has the employer "tipped the scales" and acquired an unfair advantage. Absent such a finding, a lockout is not illegal merely because it accords the employer a bargaining advantage or removes an advantage from the union.

III. American Ship Building

The American Ship Building Company was engaged in the highly seasonal business of repairing ships used in Great Lakes shipping. The company's busy season was the winter months when navigation was impossible. While there was only a small amount of summer work, it had to be expedited so that the ships could return to service as rapidly as possible.

The company and a group of eight unions had a collective bargaining relationship dating back to 1952. In the ten-year period since 1952, five collective bargaining agreements had been consummated between the parties, and all five had been preceded by a strike. On May 1, 1961, the unions notified the company of their intent to seek modification of their contract due to expire on August 1, 1961.

Central economic issues divided the parties during the more than two months of negotiations which followed. The parties finally separated on August 9, 1961, after extensive negotiations, with no plans for future meetings. The union proposed a six-month extension of the existing contract or, in the alternative, an indefinite extension of the contract with any new agreement retroactive to August 1. Although the

[39] NLRB v. Dalton Brick & Tile Corp., supra note 3, at 895.

existing contract contained a no-strike clause, the company rejected all proposals for an extension of the contract. On the basis of the foregoing, the trial examiner concluded that the parties had reached a bargaining impasse. Throughout the negotiations, the company had expressed a fear that the union would either strike or delay negotiations until the peak season, when the company would be most vulnerable to work stoppage pressure. While assuring the company that it hoped to conclude an agreement without a strike, the union did admit that it lacked complete control over its membership with respect to a strike. Because of the threat of a wildcat strike and the consistent deliberate work stoppages in prior negotiations, management remained apprehensive that a strike would occur.

The company decided to lay off part of its work force because of the failure to conclude an agreement. The employees were notified that they were laid off until further notice because of an unresolved labor dispute. They were recalled to work immediately after the parties reached agreement on October 21, 1961.

Unfair labor practice charges were filed against the company alleging that the lockout unlawfully discriminated against the employees in violation of sections 8(a)(1) and (3) of the act.[40] The trial examiner found that the company was in reasonable apprehension of a strike[41] and concluded that the lockout was not unlawful since it was implemented as a defensive measure to avoid the "peculiarly harmful economic consequences of a work stoppage."[42] The fact that the company's additional motive in locking out its employees was *to break the bargaining impasse* was considered irrelevant.

In a three-to-two decision, the NLRB rejected the trial examiner's finding with respect to the existence of a reasonable apprehension of a strike.[43] The Board concluded that since the *sole* object of the lockout was to exert economic pressure to secure a favorable settlement of the dispute, the lockout was in violation of sections 8(a)(1) and (3) of the act.

The court of appeals viewed the situation as one of balancing the conflicting legitimate interests involved. Enforcing the Board's order, the court concluded that the balance struck by the Board should

[40] While a § 8(a)(5) charge alleging a refusal to bargain was also filed, the Board did not pass on it since the parties had long since reached agreement and no purpose would be served by the entrance of a bargaining order.

[41] Although the unions had given assurances that no strike would be called, past bargaining history was considered sufficient to warrant the apprehension that a strike would occur despite the assurances.

[42] The economic consequences would have been severe both to the employer and its customers if a strike had occurred either when a ship was in the yard during the shipping season or when the yard was full during the nonshipping season.

[43] American Ship Bldg. Co., 142 N.L.R.B. 1362 (1963).

stand.[44] The company petitioned the Supreme Court for certiorari. Because certain circuits had rejected the Board's theory on lockouts, the Board did not oppose the petition. The Court accepted certiorari on the issue "whether an employer commits an unfair labor practice under . . . sections [8(a)(1) and (3)] of the Act . . . when he temporarily lays off or 'locks out' his employees during a labor dispute to bring economic pressure in support of his bargaining position."[45]

Mr. Justice Stewart, as spokesman for the majority, narrowed the scope of the Court's decision concerning the legitimacy of the bargaining lockout to a situation where an *impasse has been reached in negotiations*.[46] He also made it clear that the decision should not be construed as encompassing situations where the lockout is used for the purpose of injuring a labor organization or evading the duty to bargain.[47]

Addressing itself to the issue of whether the bargaining lockout violated section 8(a)(1), the Court noted that the Board's position—that the lockout punishes the employees for presentation and adherence to their bargaining representatives' demands, and that it thus coerces them in the exercise of their right to bargain collectively—is untenable. Absent evidence that the lockout was implemented to serve ends inimical to collective bargaining or to discipline employees for seeking to secure their statutory rights, a conclusion that an employer's intention was to destroy or frustrate the process of collective bargaining is unwarranted. The employer's purpose to resist bargaining demands and to seek acceptance of terms more favorable to him is not inconsistent with or hostile to the rights of employees to bargain collectively. Nor does the lockout involve action which is inherently so destructive of collective bargaining that examination of the employer's motivation can be dispensed with.[48] While the pressure exerted by the lockout may cause employees to alter their bargaining positions, the right to bargain collectively does not include any "right" to insist on one's position free from economic disadvantage.[49]

The majority also rejected the Board's alternate basis for proscribing the bargaining lockout, that the weapon interferes with the right to strike, since it permits "the employer to pre-empt the possibility of a strike and thus leave the union with 'nothing to strike against.' "[50] While recognition of the lockout deprives the union of the sole control over the timing and length of work stoppages, said the Court, nothing

[44] American Ship Bldg. Co. v. NLRB, supra note 3.
[45] American Ship Bldg. Co. v. NLRB, supra note 1, at 301-02.
[46] Id. at 308.
[47] Ibid.
[48] See NLRB v. Erie Resistor Corp., 373 U.S. 221 (1963).
[49] 380 U.S. at 313.
[50] Id. at 310.

in the act confers upon the union exclusive control over such matters. The right to strike is nothing more than the right to cease work. While the union's bargaining power would be greatly enhanced if it alone possessed power to control the time and duration of work stoppages, there is no justification for such a restriction in the statute.

The Court then proceeded to consider the 8(a)(3) issue. To conclude that the bargaining lockout violates section 8(a)(3), it must be established that there was both discrimination and a resulting discouragement of union membership. Since there are numerous employer actions which serve legitimate business objectives and, at the same time, tend to discourage union membership, the employer's motivation will normally determine whether a violation of section 8(a)(3) has been established. Where the employer's purpose is to injure the collective bargaining representative, to evade the bargaining responsibility or to otherwise further designs inimical to the process of collective bargaining, unlawful motivation (anti-union animus) is established. There are certain situations where specific evidence of anti-union animus need not be shown. In these instances the action is inherently so prejudicial to union interest and so devoid of significant business justification that the employer's asserted lawful purpose cannot be credited.[51] The majority concluded that the lockout was not so destructive of union membership while serving no legitimate business end, rendering unnecessary a finding that the employer was motivated by anti-union considerations.

The sole purpose of American Ship Building's lockout was to pressure the union to alter its bargaining demands. The natural tendency of the lockout is not to discourage union membership, while serving no legitimate employer interest, and though the employees suffered economic disadvantage as a result of the union's adherence to demands unacceptable to the employer, the same is true of many actions an employer may take in a bargaining situation.[52]

In summary, the facts in *American Ship Bldg.* demonstrate that the company's sole purpose was to obtain a favorable resolution of the bargaining conflict in which it was involved, a legitimate objective. The statute does not accord employees the right to press their bargaining position free from economic pressure. Therefore, the sole intention to obtain a favorable settlement of a labor dispute does not constitute the required unlawful motivation indigenous to an 8(a)(3) finding.

The majority referred to certain provisions of the statute and its legislative history as support for its rationale. The lockout was spe-

[51] NLRB v. Erie Resistor Corp., supra note 48.

[52] NLRB v. Crompton-Highland Mills, Inc., supra note 33; NLRB v. McKay Radio & Television Co., supra note 33.

cifically prohibited by section 8(1) of the original version of the act.[53] Criticism in the Senate committee hearings was leveled against the provision as according unfair treatment to employers in that the lockout was specifically proscribed, while the strike was specifically protected. Deletion of the specific reference to "lockout" in section 8(1), noted the Court, raised the reasonable inference that the lockout was not to be regarded as per se unlawful.

Further, the fact that specific reference to lockouts appears in certain other sections of the statute dealing with the bargaining process indicates that such sections contemplate that lockouts will be used in some fashion in a bargaining context.[54] Specific determination concerning the legality of the lockout must rest upon analysis of sections 8(a)(1) and (3), since the scope of the lockout is not defined by other sections of the act.

In a concurring opinion, Mr. Justice White regarded the case as merely involving an employer who, in anticipation of a strike, lays off his employees for the purpose of safeguarding his property and protecting his relationship with his customers. Such a "defensive" lockout would be legitimate under existing Board and court precedent.[55] Since the majority did deal with the legitimacy of the bargaining lockout, however, Justice White proceeded to express his views on the majority decision. His remarks were not addressed to an analysis of the bargaining lockout as such, but rather to an explication of his view of the role of the Board in determining the legality of the conduct of a party to a collective bargaining relationship. He viewed the balancing of "conflicting legitimate interests" as the recognized function of the Board. The legality of the bargaining lockout, in the opinion of Justice White, called for application of such expertise by the Board, and he viewed the majority opinion as an usurpation of this function.

A second concurring opinion, in which the Chief Justice joined, was written by Mr. Justice Goldberg. In agreement with Mr. Justice White, Justice Goldberg concluded that the lockout in *American Ship Bldg.* was a legitimate defensive measure designed to avert peculiarly harmful consequences from a threatened strike. Justice Goldberg likewise proceeded beyond the merits of the case to comment upon the majority opinion. Regarding as variant the types of situations in which

[53] Legislative History of the National Labor Relations Act 3 (1935).

[54] Section 8(d)(4) of the act, 49 Stat. 452 (1935), as amended, 29 U.S.C. § 158(d)(4) (1964), requires that certain notice procedures be complied with before resort to a lockout or a strike; § 203(c) of the act, 61 Stat. 153 (1947), 29 U.S.C. § 173(c) (1964), directs the Federal Mediation and Conciliation Service to seek voluntary resolution of labor disputes without resort to strikes or lockouts; §§ 206 and 208 of the act, 61 Stat. 155 (1947), 29 U.S.C. §§ 176, 178 (1964), authorize the President to take certain emergency procedures to forestall threatened strikes and lockouts.

[55] Betts Cadillac Olds, Inc., supra note 10.

an employer might seek to lock out his employees, he called for a case-by-case analysis in dealing with the legality of the lockout as an economic weapon. This "evolutionary process" would take into account such factors as the length, character and history of the collective bargaining relationship, together with resolution of the existence of a bargaining impasse, in determining the legality of a lockout in a particular case. Justice Goldberg also agreed with Justice White that the majority had disregarded the role of the Board in the statutory scheme —the balancing of "conflicting legitimate interests."

In sustaining the Board's position on the bargaining lockout, it is evident that the four circuit courts viewed the Board as performing the balancing function ascribed to it by Congress and recognized by the Supreme Court in *Buffalo Linen*. The Board in *Buffalo Linen* had sanctioned the right of employers to lock out, although this diminished the effectiveness of the union's strike weapon. The Board, with the approval of the Supreme Court, had balanced the conflicting interests and determined that the employer's interest in protecting himself against the adverse consequences of a whipsaw strike outweighed the employees' countervailing interest in maintaining the effectiveness of the strike weapon. The Board struck the balance, and the Court stated that such was the Board's responsibility.

It is difficult to understand how the Board and four circuit courts could so misconceive, if indeed they did, the Court's apparently clear statement of the Board's role in this area of labor law. It is the opinion of the writer that, in concluding that the bargaining lockout was illegal, the Board was following the mandate of the Supreme Court in *Buffalo Linen*, but that the Courts which decided *Buffalo Linen* and *American Ship Bldg.* had markedly different views concerning the Board's role in this sensitive area of collective bargaining. The main thrust of the concurring opinions in *American Ship Bldg.* was that the Court was disregarding and indeed usurping the function of the Board to balance conflicting interests. The question now arises, in view of *American Ship Bldg.*, whether—and, if so, in what situations—the Court has left to the Board authority to balance conflicting legitimate interests.

Subsequent to *Buffalo Linen*, the Supreme Court decided *NLRB v. Insurance Agents*,[56] which foreshadowed the Court's changing philosophy in regard to the Board's role. The Board had determined that a union which otherwise bargains in good faith may nevertheless refuse to bargain collectively because, during negotiations, it seeks to exert economic pressure upon the employer to yield to its bargaining demands by sponsoring on-the-job conduct designed to interfere with the carrying out of the employer's business. The Supreme Court re-

[56] Supra note 38.

jected the Board's per se finding and in so doing examined the Board's role in the context of collective bargaining negotiations. When the Board declared a particular *economic* weapon *per se* unlawful, the Court said, it was establishing itself as the arbiter of permissible economic weapons. The Court did not believe that Congress intended the Board to seek to establish a balance of power between the parties to collective bargaining negotiations. Such a practice, in the Court's view, would permit the Board to exert considerable influence upon final terms reached by the parties, a result not intended by the framers of our national labor policy. The Court went on to reaffirm its statement in *Buffalo Linen* that it is the function of the Board to balance conflicting interests *where that is the ultimate problem.* The Court concluded, however, that in *Insurance Agents'* the Board's action amounted not to a resolution of interests which the act has left to it for a case-by-case adjudication, but to a movement into a new area of regulation which Congress never committed to it: the definition of "what economic sanctions might be permitted negotiating parties in an 'ideal' or 'balanced' state of collective bargaining."[57]

The question arises whether, in proscribing the bargaining lockout, the Board was attempting as in *Insurance Agents'* to achieve a balance of power between the parties. It is clear that such was not the Board's motive. Rather, the Board was attempting to balance the conflicting legitimate interests of the parties, the interest of the employer to exert economic pressure upon the employees to enhance his bargaining position and the interest of the employees to engage in their rights guaranteed by section 7 of the act.

IV. Questions Raised by American Ship Building

Frequently, a Supreme Court decision raises more questions than it answers. This is especially true in *American Ship Bldg.* where the Court rejected the Board's rationale on a significant segment of its law on lockouts and left in doubt a large body of case law developed by the Board in that area. While the decision sets forth broad statements of policy, the question arises, how broadly should the Court's language be applied? Is the case only as narrow as its facts or is it as broad as its rationale? As cases with different facts arise, the Board and the courts will necessarily have to interpret and apply the Court's broad statements of policy.

In addition to sanctioning the bargaining lockout after an impasse is reached, the decision leaves unaffected the law in those cases where the lockout is used for purposes specifically proscribed by section 8(a) of the act: *e.g.*, to evade the duty to bargain collectively,[58] to injure the

[57] Id. at 500.

[58] American Stores Packing Co., 158 N.L.R.B. No. 46 (1966).

collective bargaining representative or to punish employees for exercising their statutory rights. The use of the lockout for such purposes is unlawful, and therefore Board cases in this area remain unaffected by *American Ship Bldg.*

The most obvious question to arise is whether the existence of an impasse was crucial to the Court's holding. The two circuit courts which have had occasion to consider the issue since *American Ship Bldg.* have held that the bargaining lockout is a permissible economic weapon regardless of the fact that it occurred prior to an impasse. After the Second Circuit decided *Body & Tank Corp. v. NLRB*,[59] the Supreme Court decided *American Ship Bldg.* On the basis of *American Ship Bldg.*, the company petitioned for a rehearing. The court granted the petition, withdrew its earlier decision and set aside the Board's order, citing *American Ship Bldg.* as precedent.[60] The Board petitioned for a rehearing, requesting that the case be remanded for reconsideration in light of the principles enunciated by the Supreme Court. The petition was premised upon the absence of an impasse in the negotiations. Despite this fact, the Board's petition was denied.

The Sixth Circuit, in *Detroit Newspaper Publishers Ass'n v. NLRB*,[61] also considered the importance of an impasse to the Supreme Court's holding. Originally, the Board had found the employer's lockout unlawful,[62] but following *American Ship Bldg.*, the Board requested that the case be remanded for consideration in light of that decision. The Sixth Circuit also declined to remand the case to the Board. In the course of its decision, the court stated that while an impasse existed in *American Ship Bldg.*, that case did not merely add another exception to the Board's category of permissible lockouts. Rejecting the Board's finding that the lockout violated section 8(a)(1), the court noted that there was no allegation that the lockout was used in the service of designs inimical to collective bargaining, that the employer was hostile to the union or in any way attempted to interfere with the employees' right to bargain collectively, or that it was designed to discipline the employees for adhering to their union's demands. The court regarded the following facts as support for such conclusions: The parties had a long record of dealings; there was no disposition manifested by the employer to refuse to bargain; and no animus was exhibited toward the union or its members. The only issue between the parties concerned the terms of their collective bargaining agreement.

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59 339 F.2d 76 (2d Cir. 1964).
60 344 F.2d 330 (2d Cir. 1965).
61 346 F.2d 527 (6th Cir. 1965).
62 145 N.L.R.B. 996 (1964).

With respect to the 8(a)(3) finding of the Board, the court regarded the intention merely to bring about a favorable settlement of a labor dispute as insufficient to establish the required unlawful intent for an 8(a)(3) violation.

The Board's petition for certiorari was granted. The Supreme Court vacated the court's judgements and remanded the case to the court with instructions that the case be remanded to the Board for further consideration in light of *American Ship Bldg.*[63]

To conclude that a lockout before impasse is unlawful, it would have to be shown that such a lockout impaired the rights of employees more than a lockout after an impasse in bargaining. While on the facts of *American Ship Bldg.*, the absence of an impasse may not have altered the Supreme Court's holding, its importance as a factor should depend upon the circumstances of the particular case. Under certain conditions, for instance, the absence of an impasse may evidence an employer's unlawful motive in shutting down, especially where the employer and the union are negotiating their first contract and during the union's organizing campaign the employer exhibited anti-union animus.

As previously noted, prior to *American Ship Bldg.*, the existence of a validly established and recognized multi-employer bargaining unit was a prerequisite to a finding that non-struck members of such a group faced with a whipsaw strike may lawfully lock out. Absent such a unit, a lockout to combat a purported whipsaw strike was considered unlawful, since there was no larger bargaining unit to protect. The Board recently re-evaluated the status of a lockout by non-struck employers, where the multi-employer bargaining unit was defective, in light of *American Ship Bldg.*[64] The trial examiner had found the existence of a valid multi-employer bargaining unit and concluded that the lockout by non-struck members in defense of a whipsaw strike was lawful under *Buffalo Linen.* The Board found it unnecessary to pass on the trial examiner's factual conclusion that the association existed, functioned and was accepted by the unions as a multi-employer bargaining unit for two reasons: The association *did* serve as the designated bargaining representative of the employers, and all members of the group reached an impasse in bargaining with the unions over certain economic issues.

The Board concluded that whether designed to protect the integrity of the multi-employer bargaining unit or to enhance the employers' bargaining position, the lockout was a lawful weapon. Referring to the Supreme Court's language in *American Ship Bldg.* that inquiry into the employer's motivation for locking out following an impasse could not be dispensed with, the Board noted that there was no contention that

[63] Newspaper Drivers Union v. Detroit Newspaper Publishers Ass'n, 86 Sup. Ct. 543 (1966).

[64] Weyerhaeuser Co., 60 L.R.R.M. 1425 (Nov. 16, 1965).

the employer had "used the lockout in the service of designs inimical to the process of collective bargaining, [or] . . . evidence . . . [or] finding that the [employers were] hostile to [their] employees banding together for collective bargaining or that the lockout was designed to discipline them for doing so."[65] Even assuming that the multi-employer unit was invalid, where "two or more employers bargain jointly with a union, [and] an impasse in negotiations is reached over a mandatory subject of bargaining, and the union strikes only some of the employers engaged in such joint bargaining"[66] the lockout by non-struck employers is lawful since it lacks the discriminatory motive while serving a "significant employer interest."

As noted by the Board, the impasse must occur with respect to a mandatory subject of bargaining. Since it is a refusal to bargain to insist upon a non-mandatory subject of bargaining, should a lockout occur after a deadlock has been reached on a non-mandatory subject, the lockout in all probability would not be considered a legitimate economic weapon.[67]

While *American Ship Bldg.* involved a lockout by a single employer, there is little doubt that a lockout by a multi-employer group to enhance its legitimate bargaining position under the same circumstances would not have altered the result reached by the Supreme Court.

Whether the fact that a lockout occurs in a context of unfair labor practices is alone sufficient to render the lockout unlawful was recently presented to the Ninth Circuit in *NLRB v. Golden State Bottling Co.*[68] The existing contract between the union and the employer was scheduled to expire on March 31, 1963. The parties negotiated throughout the month of March but were unable to conclude an agreement by the expiration date of the existing contract. At the last union meeting, the employees rejected the employer's proposal and the group that voted against acceptance, led by the officers of the incumbent union, began to solicit membership for a rival union. Upon reporting for work on April 1, the employees were informed that they would not be permitted to work without a contract. The employer repeated its proposal and urged the employees to accept it. The group favoring acceptance of the offer, still loyal to the incumbent union, was told by the employer that it would have to have officers sign any new agreement. After conferring with the incumbent union's attorney and being told that they could elect new officers, the group loyal to the incumbent union agreed to accept the employer's proposal, elected new officers and signed the new

[65] Id. at 1426.
[66] Ibid.
[67] NLRB v. Crompton-Highland Mills, Inc., supra note 33.
[68] 353 F.2d 667 (9th Cir. 1965).

contract. The former officers of the union were the only two employees not permitted to return to work immediately after the new agreement was signed. The reason the employer would not permit them to return immediately was because the men had refused as the union's officers to sign the employer's contract proposal. Subsequently, one of these former officers was discharged because of his activities on behalf of the rival union.

The Board had concluded that the employer violated sections 8(a)(1) and (3) because of its discriminatory treatment of the union's former officers. In addition, the employer's conditioning continued employment upon the employees' acceptance of its proposals and forcing the employees to elect new officers to sign the contract, was considered by the Board to constitute interference with the internal administration of the union in violation of sections 8(a)(1) and (2) of the act.

The court sustained the Board's findings that the employer violated sections 8(a)(1), (2) and (3) of the act. In the court's view, however, this, in and of itself, was insufficient to transform an otherwise legitimate lockout into unlawful conduct. To sustain a finding that the lockout is bad, the court held, the Board must show more than a lockout and contemporaneous unfair labor practices. While the lockout in the instant case did have the effect of disrupting the internal administration of the union, such was not a necessary consequence of the lockout and did not necessarily destroy the union's capacity for effective and responsible representation. In the absence of evidence that the employer was wrongfully actuated in locking out or that the disruption within the union was a necessary consequence thereof, the court could not find that the lockout was unlawful.

Of vital significance was a statement by the court with respect to that part of the Board's 8(a)(2) finding which it sustained. Noting that it was inappropriate for the employer's general manager, with full knowledge of the split within the union, to tell one of the factions what to do, the court stated that the general manager sought the bargaining benefits of a lockout but was unwilling to assume its burdens. His conduct demonstrated an unwillingness to cease operation and a desire to go to any extent to keep the plant open despite the announced shutdown. The court then stated that "the legal course open to him was to hire temporary replacements for the locked out employees."[69] Of the several important questions raised by *American Ship Bldg.*, the most crucial one was merely touched upon in passing by the Ninth Circuit: Having locked out to enhance its bargaining position, may an employer hire either temporary or permanent replacements and thereby continue to operate?

[69] Id. at 670.

On the same day that it decided *American Ship Bldg.*, the Supreme Court handed down its opinion in *NLRB v. Brown.*[70] The Court ruled that the non-struck members of a multi-employer group faced with a whipsaw strike were permitted not only to lock out (*Buffalo Linen*) but also may continue to operate with temporary replacements. The Court regarded such conduct as a legitimate defensive measure designed to preserve the multi-employer group from the harmful effects of a whipsaw strike.[71] The question arises in light of *Brown* and *American Ship Bldg.* whether the Supreme Court would sanction the replacement of locked out employees following a *bargaining lockout.*

The Court in *Brown* emphasized the defensive nature of the employer's action in the face of a whipsaw strike—the protection of the integrity of the bargaining group. Under such circumstances, while the whipsaw strike may thus fail, "this does not mean that the employers' conduct is demonstrably so destructive of employee rights and so devoid of significant service to any legitimate business end that it cannot be tolerated consistently with the Act."[72] Unlawful motivation need not be shown in cases where, upon balancing the prejudicial effects of the employer's conduct upon the employees against the employer's asserted business purpose, it is clear that the conduct is directed at the employees and not to accomplish the asserted legitimate objective. "[C]onduct so inherently destructive of employee interests could not be saved from illegality by an asserted overriding business purpose pursued in good faith."[73] The Court in *Brown* did not consider the employers' conduct so destructive of employee rights, while failing to serve an important business objective, that specific evidence of an unlawful intent could be dispensed with in finding a violation.

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[70] 380 U.S. 278 (1965).

[71] In Acme Mkts., Inc., 61 L.R.R.M. 1281 (Feb. 28, 1966), the Board, relying on *American Ship Bldg.* and *Brown*, extended the doctrine enunciated in *Buffalo Linen* that non-struck members of a multi-employer unit may lock out their employees in defense of a whipsaw strike. Acme, a retail food chain, had both unionized and non-unionized stores. Acme's unionized stores were part of a multi-employer bargaining unit. When the union engaged in a whipsaw strike against the multi-employer unit by striking Acme, the other members of the group shut down their stores, locking out their employees. This left Acme's unorganized stores operating in areas where non-struck members of the unit had voluntarily closed down. Acme thereupon closed its non-unit stores in the area where they were in competition with other members of the bargaining unit. The Board ruled that the lockout of non-unit employees was a legitimate defensive measure designed to protect the integrity of the multi-employer unit. Drawing a comparison to *Brown*, the Board noted that if the employer had not locked out its non-unit employees, the non-struck members would have been deterred from closing their stores as part of the group's defensive lockout and the whipsaw strike would almost certainly have destroyed the multi-employer unit. Like the replacement by non-struck employers in *Brown*, the layoff of non-unit employees was designed to equalize the economic position of struck and non-struck employers in the face of a whipsaw strike and thus serves a legitimate business end.

[72] NLRB v. Brown, supra note 70, at 286.

[73] Id. at 287.

While, under the circumstances of *Brown*, the tendency to discourage union membership may have been comparatively slight, and while the company's conduct was reasonably adapted to accomplish a legitimate business objective, replacement following a permissible bargaining lockout would raise different considerations. No longer would the employer's objective be the protection of a legitimate right (bargaining on a multi-employer basis) from attack. A business purpose to gain a bargaining advantage (continuation of operations) would certainly not be accorded the deference paid to the defensive end sought to be accomplished in *Brown*. Whether on balance, however, the adverse effects upon employee rights caused by temporary replacement following a bargaining lockout will be deemed to outweigh the employer's business purpose will, in all likelihood, have to be answered by the Supreme Court, since that Court appears to want to strike the balance.

Since *Brown* only involved the use of temporary replacements, the question remains whether the Court in *Brown* would have reached a different conclusion had the employer *permanently* replaced his locked out employees. The answer to this question is also important in determining whether the employer may permanently replace following a bargaining lockout. While a permanent replacement may be motivated by the employer's subjective desire to further a legitimate business end, the devastating consequences wrought upon the rights of employees and union membership, and the lack of necessity to permanently (as opposed to temporarily) replace the locked out employees, should render such action per se unlawful. Such is the theory supporting the Supreme Court's holding in *Erie Resistor*,[74] that super-seniority offered to strike replacements and to strikers who would abandon the strike is unlawful despite the absence of subjective unlawful motivation. A less severe measure, temporary replacement, is available to the employer to accomplish the same lawful end—the continuation of operations.

V. The Validity of the Bargaining Lockout: Its Effects upon the Collective Bargaining Relationship

Attempting to foresee the consequences in the economic-nonlegal sense of the Supreme Court's holding in *American Ship Bldg.* raises several considerations.

The National Labor Relations Act is founded upon several countervailing policy considerations, two of which are relevant to this discussion. A primary purpose of federal labor law is the achievement of industrial stability and thus the continuous, unimpeded flow of goods

[74] NLRB v. Erie Resistor Corp., supra note 48.

and materials in commerce. Existing coextensively with this policy consideration is the necessity that labor and management retain the ability to take measures designed to accomplish legitimate objectives. The existence of economic weapons such as the strike and the lockout, which create work stoppages and thus impede the free flow of commerce, are justified in view of the legitimate objectives of such actions. Considering the effects of a bargaining lockout, the Supreme Court's decision will not further industrial stability. In the opinion of the Court, however, the necessity that the employer have the right to engage in a bargaining lockout outweighed countervailing policy considerations.

Besides the exercise of the bargaining lockout itself, there is a second reason why the Court's decision will not promote industrial stability. Prior to *American Ship Bldg.*, the union retained exclusive control over the timing of any work stoppage designed to exert economic pressure during collective bargaining negotiations. Under such circumstances, the union would normally negotiate until the parties reached an impasse and, if agreement were not in sight, attempt to time its strike to occur when the employer was most vulnerable. Negotiating to the point of impasse was desirable from the union's standpoint since, if it could gain a favorable resolution of the bargaining conflict without a work stoppage, it was in its best interests to do so. Assuming that the existence of an impasse is a requirement before an employer may legally lock out, the union will have reason to consider striking before an impasse is reached. Before an impasse, the union will retain exclusive control over the timing of the work stoppage and thus will still be able to strike at the time within that period when it regards the employer as most vulnerable. If it waits until an impasse has been reached, the union will run the risk that the employer will create the work stoppage at a time that it is least vulnerable to economic pressure. In view of these considerations, strikes may occur earlier than they would have occurred prior to *American Ship Bldg.*

The large number of collective bargaining agreements which are negotiated annually[75] would seem to indicate that the Supreme Court's decision is most significant. However, the bargaining lockout should be accorded significance commensurate with the actual role it will play in negotiations. The existence of the weapon, in and of itself, will have some meaning, but despite its theoretical significance, close analysis indicates that the bargaining lockout will be an infrequently used weapon. The importance of the bargaining weapon and the frequency of its use are integrally related to the relative strengths of the parties to the collective bargaining relationship. We must start with the prem-

[75] See note 6 supra.

ise that an employer will lock out only when he stands to gain from the work stoppage. Where a union is in a relatively stronger financial position than an employer, it is doubtful that the employer would lock out: Since the union is in a superior position to withstand the adverse effects of a work stoppage, the employer would have nothing to gain and everything to lose by locking out. Where, on the other hand, an employer is in a stronger position than the union, the employer can gain a favorable resolution at the bargaining table without resorting to a lockout and the lockout would serve no purpose. The employer is likely to lock out only where the parties are relatively equal in bargaining strength and the pressure exacted by the lockout will shift the balance of power to the employer. Under these circumstances, the employer may be willing to absorb the consequences of a cessation of operations to gain more favorable bargaining terms. Here and only here does the employer stand to gain from the lockout. Thus, while the Supreme Court's decision theoretically could affect virtually every collective bargaining relationship, it is doubtful that the bargaining lockout will, in reality, play an important role in collective bargaining. This assumes, of course, that an employer cannot gain the benefits of a lockout (economic pressure upon the employees) without assuming its burdens (cessation of operations). If an employer can legally replace his locked out employees, then the significance of the bargaining lockout would be considerably increased. In these circumstances, the relative strengths of the parties to sustain the consequences of a work stoppage would no longer be the determining factor in dictating whether or not an employer will lock out. While the Court's decision in *American Ship Bldg.* is important, the far more important case will be the one which deals with the legality of the replacement of locked out employees in a collective bargaining context.