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Unlocking The Lockout - American Ship Bldg. v. NLRB

Unlocking The Lockout

American Ship Bldg. v. NLRB[1]

On June 6, 1961, collective bargaining began between the American Ship Building Company and eight unions, but the employment contract expiration date, August 1, was reached with agreement still not in sight. The unions proposed that the existing contract be extended six months or in the alternative that it be extended indefinitely with terms of the new contract to be retroactive to August 1. Under either proposal, the unions would have had the prerogative of striking at whatever time appeared most damaging to the company, while still working under the security of the provisions of the old contract. The nature of the employer's business in this case made the unions' proposals particularly unacceptable. The American Ship Building Company is engaged in the repair of Great Lakes vessels and operates its yards at peak capacity during the winter months, when shipping

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

is curtailed by the freezing of the Lakes. Had the company continued to operate, it would have been under the constant threat of a strike which could have occurred at any time, and it was unwilling to assume such a disadvantageous bargaining position. Instead, it began laying off its employees on August 11, 1961.

The unions filed charges with the National Labor Relations Board alleging that this laying off or locking out of employees was an unfair labor practice under sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act.[2] The trial examiner, the finder of fact, determined that since each of the five previous agreements had been preceded by a strike, the company had reasonable cause to fear that a strike was imminent.[3] He sustained the company's actions, basing his decision on a line of cases which held that an employer may lock out his employees in anticipation of an imminent strike in order to avoid severe economic damage.[4] The National Labor Relations Board's interpretation of the facts, contrary to that of the trial examiner, was that the American Ship Building Company did not have reasonable cause to believe that a strike was imminent.[5] Consequently, the NLRB ruled that the company's action did not fit into one of the lawful categories of lockouts.[6]

The Supreme Court granted certiorari on the issue of whether an employer commits an unfair labor practice when he locks out his employees for the purpose of exerting economic pressure on the unions during contract negotiations.[7] The Court ruled that a lockout for the sole purpose of persuading the unions and the employees to accept the employer's bargaining position is a permissible economic weapon available to an employer after an impasse[8] has been reached

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2. 49 Stat. 452 (1935), as amended, 29 U.S.C. § 158(a) (1965), states:

> It shall be an unfair labor practice for an employer—
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> (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.

Similarly, 49 Stat. 452 (1935), as amended, 29 U.S.C. § 157 (1965), states:

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

3. 142 N.L.R.B. 1362, at 1376, 53 L.R.R.M. 1245 (1963).

4. *Id.* at 1382, referring, *inter alia,* to: Packard Bell Electronics Corp., 130 N.L.R.B. 1122, 47 L.R.R.M. 1455 (1961); Betts Cadillac-Olds, Inc., 96 N.L.R.B. 268, 28 L.R.R.M. 1509 (1951); Duluth Bottling Ass'n, 48 N.L.R.B. 1335, 12 L.R.R.M. 151 (1943).

5. *Id.* at 1363. The Board was upheld in a brief per curiam opinion by the District of Columbia Court of Appeals. Local 374, Boilermakers Union v. NLRB, 331 F.2d 839 (D.C. Cir. 1964).

6. *Id.* at 1364.

7. 379 U.S. 814 (1964).

8. An impasse has been said to occur when "there was no further reasonable prospect of reaching agreement . . ." NLRB v. Intracoastal Terminal, Inc., 286 F.2d 954, 958 (5th Cir. 1961).

in collective bargaining,[9] and that the lockout used by the American Ship Building Company was not an unfair labor practice.

In the past the use of lockouts by employers has been strictly regulated by the National Labor Relations Board. The Board generally maintained that a lockout was presumptively illegal.[10] Many Board rulings indicated that the burden of proof required of Board attorneys in a lockout case was merely to show that the lockout had occurred.[11] Upon this showing, absent a defense, the employer was guilty of an unfair labor practice under sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act and was liable for the back pay of his employees for the duration of the lockout. The financial risk an employer took in locking out his employees therefore was extreme.

An accurate statement of the Board's position is found in the *Quaker State Oil Refining Corporation* case:[12]

> [A]bsent special circumstances, an employer may not during bargaining negotiations either threaten to lock out or lock out his employees in aid of his bargaining position. Such conduct the Board has held presumptively infringes upon the collective-bargaining rights of employees in violation of Section 8(a)(1) and the lockout, with its consequent layoff, amounts to discrimination within the meaning of Section 8(a)(3). In addition, the Board has held that such conduct subjects the Union and the employees it represents to unwarranted and illegal pressure and creates an atmosphere in which the free opportunity for negotiations contemplated by Section 8(a)(5) does not exist.[13]

However, the Board had given some consideration to employer interests and had accepted two defenses to its general prohibition of lockouts. One of these exceptions was where a strike or intermittent

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9. 380 U.S. at 310–11, 318.

10. The following statement is typical of the Board's position:
To lay off (lock out) employees, or otherwise to reduce their earnings because they have [made demands through their union representative for better terms], operates as a restraint upon the free exercise of that right [Section 7 rights (29 U.S.C. § 157, *supra* note 2)], and hence constitutes at the very least, a prima facie violation of Section 8(a)(1); that violation is an unquestionable one where no basis appears for the lockout other than a coercive purpose to force, while negotiations are still in progress, abandonment of the Union's demands and acceptance instead of the contract term proposed by the employer.
Dalton Brick & Tile Co., 126 N.L.R.B. 473, 482–83, 45 L.R.R.M. 1337 (1960), *enforcement denied*, 301 F.2d 886 (5th Cir. 1962). See also Morand Brothers Beverage Co., 99 N.L.R.B. 1448, 30 L.R.R.M. 1178 (1952).

11. The Board placed lockouts in that category of employer conduct which so seriously interferes with lawful concerted activities of employees that it is unnecessary to make a finding of employer motivation. This policy has been approved by the Supreme Court in regards to other types of employer conduct. See, *e.g.*, NLRB v. Erie Resistor Corp., 373 U.S. 221 (1963) and Radio Officers' Union v. NLRB, 347 U.S. 17 (1954).

12. 121 N.L.R.B. 334, 42 L.R.R.M. 1343 (1958), *enforced*, 270 F.2d 40 (3d Cir.), *cert. denied*, 361 U.S. 917 (1959).

13. 121 N.L.R.B. at 337.

work stoppage[14] was imminent and would cause the employer economic loss due to spoilage of goods[15] or hardship to customers.[16]

The other defense was a lockout in retaliation against the use of a whipsaw strike.[17] A whipsaw strike is a strike against one member of a multiemployer bargaining association. Unions have made profitable use of the classic "divide and conquer" principle, for an employer is far more willing to agree to union demands when he is paralyzed by a walkout while his competitors are freely operating. Customers once lost are difficult to regain, and an employer can suffer fatal injury if he does not reach quick agreement with the union. After the first employer gives in, the union is free to act against the remaining employers one at a time. In order to maintain a collective front comparable to that of the employees', employer associations have made agreements which provide that if one member is struck, the others will close ranks behind their struck member by shutting down and locking out their employees. The power is then more in balance, and the union is forced to absorb the cost and pressure of a major, over-all strike. The Board has held that this defensive action by a multiemployer association is justifiable and that the association may act to preserve its existence. The Board announced its position in the case of *Buffalo Linen Supply Co.*,[18] the only previous lockout case which has gone to the Supreme Court. The *Buffalo Linen* decision, however, was confined to the multiemployer units — the whipsaw strike situation — and established the legality of the lockout only in that particular circumstance.[19]

The Supreme Court decided another multiemployer lockout case, *Labor Board v. Brown*,[20] the same day *American Ship Building* was decided. In that case one grocery store in a bargaining association was struck, and the other stores locked out their employees in accordance with prior agreements. The significant difference from the *Buffalo Linen* situation was that all the employers, by using super-

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14. International Shoe Co., 93 N.L.R.B. 907, 27 L.R.R.M. 1504 (1951).

15. Duluth Bottling Ass'n, 48 N.L.R.B. 1335, 12 L.R.R.M. 151 (1943).

16. Packard Bell Electronics Corp., 130 N.L.R.B. 1122, 47 L.R.R.M. 1455 (1961) (tie-up of customers' television sets); Betts Cadillac-Olds, Inc., 96 N.L.R.B. 268, 28 L.R.R.M. 1509 (1951) (tie-up of customers' automobiles).

17. Buffalo Linen Supply Co., 109 N.L.R.B. 447, 34 L.R.R.M. 1355 (1954), *enforcement denied, sub nom.* Truck Drivers Union v. NLRB, 231 F.2d 110 (2d Cir. 1956), *rev'd*, 353 U.S. 87 (1957); Publishers' Ass'n of New York City, 139 N.L.R.B. 1092, 51 L.R.R.M. 1434 (1962), *aff'd sub nom.* New York Mailers' Union No. 6 v. NLRB, 327 F.2d 292 (2d Cir. 1964).

18. 109 N.L.R.B. 447, 34 L.R.R.M. 1355 (1954).

19. *Buffalo Linen* can be said, however, to stand for the broader principle of accommodation of conflicting legitimate interests of employers and of employees, for the Court stated, 353 U.S. at 96:

> Although the Act protects the right of 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 multiemployer 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 conflicting legitimate interest.

See also NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333 (1938).

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

visors, relatives and temporary help, continued to operate their stores.[21] The Supreme Court, in holding that such action was lawful, further strengthened the employer's arsenal in time of economic warfare.[22]

The Board's general prohibition of bargaining lockouts has not stood unchallenged. The leading case in opposition to the Board's theory was that of *Dalton Brick and Tile Company v. NLRB,* decided by the Fifth Circuit Court of Appeals.[23] After an impasse had been reached in bargaining, the company, because of its marginal financial condition, locked out its employees. Factors leading the company to declare a lockout included the need to reduce the period of exposure to unpredictable but retroactive wage increases, probable embarrassment with its customers, and the need for resolution of the issue immediately, rather than in the midst of peak operations. The Board ruled that the purpose of the lockout was to enhance the company's bargaining position by exerting further pressure on the union to accept the company's terms.[24] The Fifth Circuit agreed that this was the company's primary purpose,[25] but the court disagreed that the matter could be analyzed on the basis of prima facie illegality, saying "to begin with, the Act does not outlaw the lockout."[26] Realizing the need for balancing the interests of employees against those of the employer, the court was constrained to abandon the per se approach:

> [I]t is our view that each case must be carefully measured by its own setting. But in that process our approach is certainly not one in which the employer starts with a presumptive burden of illegality which must somehow be overcome. Nor is the so-called employer justification limited to those factors which might be described as economic hardship.[27]

Some of the other circuits, however, upheld the view of the Board.[28] The Supreme Court in *American Ship Building* resolved the conflict among the circuits by agreeing with the *Dalton Brick and Tile* decision and rejecting the arguments advanced by the Board in

21. The Board's theory was that only the struck store could continue its operations. See NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333 (1938), where the Supreme Court held that a struck employer could continue to operate his business by employing permanent replacement for his striking workers.

22. In *Brown,* as in *American Ship Building,* the Supreme Court required the Board to point to independent evidence that the lockout was motivated by anti-union animus. *Brown,* 380 U.S. at 288; *American Ship Building,* 380 U.S. at 313. See also Textile Workers v. Darlington Mfg. Co., 380 U.S. 263, 276–77 (1965), decided the same day, where the Court also gave the Board instructions as to making a finding of employer anti-union motivation.

23. 126 N.L.R.B. 473, 45 L.R.R.M. 1337 (1960), *enforcement denied,* 301 F.2d 886 (5th Cir. 1962).

24. 126 N.L.R.B. 473.

25. 301 F.2d at 892.

26. *Ibid.*

27. *Id.* at 894.

28. For cases upholding the Board, see, *e.g.:* Body and Tank Corp. v. NLRB, 339 F.2d 76 (2d Cir. 1964); Boilermakers Union v. NLRB, 331 F.2d 839 (D.C. Cir. 1964); Utah Plumbing and Heating Contractors Ass'n v. NLRB, 294 F.2d 165 (10th Cir. 1961); Quaker State Oil Refining Corp. v. NLRB, 270 F.2d 40 (3d Cir.), *cert. denied,* 361 U.S. 917 (1959). *Compare,* NLRB v. Dalton Brick and Tile Corp., 301 F.2d 886 (5th Cir. 1962); Leonard v. NLRB, 205 F.2d 355 (9th Cir. 1953); Morand Bros. Beverage Co. v. NLRB, 204 F.2d 529 (7th Cir. 1953).

prohibiting virtually all lockouts as a matter of law.[29] The Court could find no indication in the Board's allegations or in the evidence that the company was trying to frustrate the process of collective bargaining or that it was trying to prevent its employees from organizing for the purpose of collective bargaining. Nor did the Court believe that the "lockout will necessarily destroy the unions' capacity for effective and responsible representation."[30] The Court found that the company's purpose was only to resist and to modify the unions' bargaining demands and that support of a bargaining position is not to be equated with hostility to the collective bargaining process.[31]

The Board, in pursuing its theory that the lockout was disruptive of collective bargaining rights, also argued that it destroyed another important and, in the Board's view, absolute right of the employees: the right to strike.[32] According to the Board, the company had interfered with this right by closing down the plant and leaving the employees with nothing to strike.[33] The effectiveness of the right to strike was thereby impaired, because the union no longer had sole control over the timing of the economic confrontation.[34] The Board's theory would thus leave the company with two alternatives — to accede to union demands or to resist in the hope that it could survive a probable strike. The Court termed the Board's argument "wholly specious" because the work stoppage, which would necessarily be the object of a strike, had already occurred. The court stated, "The right to strike . . . is the right to cease work — nothing more."[35] It noted that nowhere in the National Labor Relations Act can be found the proposition that the right to strike includes the unhampered right to control the timing and duration of work stoppages.[36]

The Board further contended, as it had in the past, that this sort of lockout was a per se violation of section 8(a)(3) of the act, prohibiting discrimination in regard to hire, tenure or other conditions of employment which discourages union membership, because it was employer conduct so destructive of employee organizational interests that no proof of an anti-union motivation was required. When pressed to explain how the discrimination and discouragement of union membership would occur, the Board reasoned that the employees would attribute their loss of pay to the union's persistent demands and would thereby be discouraged from supporting and maintaining membership in the union.[37] The Court made it clear that without positive proof of anti-

29. See note 13 *supra* and accompanying text.
30. 380 U.S. at 309.
31. *Id.* at 308–09.
32. See statutes cited in note 2 *supra*. See also 49 Stat. 457 (1935), as amended, 29 U.S.C. § 163 (1965): "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."
33. For a previous statement of this theory see Dalton Brick and Tile Co., 126 N.L.R.B. 473, at 482–83, 45 L.R.R.M. 1337 (1960).
34. Brief for Board, p. 15.
35. 380 U.S. at 310.
36. *Ibid.* "The pedestrian need not wait to be struck before leaping for the curb." Betts Cadillac-Olds, Inc., 96 N.L.R.B. 268, 286, 28 L.R.R.M. 1509 (1951).
37. See Dalton Brick & Tile Co., 126 N.L.R.B. 473, at 482–83, 45 L.R.R.M. 1337 (1960).

union animus, a bargaining lockout could not be a violation of the act.[38] In this case the only intent shown was that the company wanted to settle the dispute to its advantage.

It was also "the Board's judgment . . . that the interest of the employer in being free of the ordinary hazards of a strike is outweighed by the interest of employees in being free to use the strike weapon at a time of their choosing."[39] The Board claimed that it was within its province of competence and expertise to balance the competing interests of employers and employees,[40] and specifically to determine that the lockout was an overly powerful economic weapon which would upset this balance. According to the Board,[41] the employer was sufficiently armed, since he had such weapons as the right to permanently replace striking workers[42] and the right to institute changes on his own initiative after collective bargaining had failed to bring agreement.[43] If the union and the employer cannot agree on certain terms of the bargaining agreement and an impasse is reached, then the employer may put into operation his final proposals to the union. He may not, however, institute changes that exceed those final proposals. The Board further numbered among the employer's weapons the stockpiling of inventories and the transferral of orders to other plants.

The Court acknowledged the deference due the Board's special competence. However, it asserted that the Board was exceeding its authority in "balancing the competing interests of labor and management," for it was then attempting to pronounce national labor policy.[44] "The deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress."[45]

Justice White in his concurring opinion did not believe that the Board had acted beyond its scope of authority, nor did he believe that it was essential to show employer motivation to establish a violation of the act.[46] His ground for reversal was the Board's failure to articulate "a rational connection between the facts found and the decision made."[47]

Justice Goldberg, joined by Chief Justice Warren, also could not accept the majority's broad ruling. The former General Counsel of the United Steelworkers of America agreed that the lockout was

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38. 380 U.S. at 313. See *supra* note 22.
39. Brief for Board, p. 25.
40. See Justice White's concurring opinion in *American Ship Building*, 380 U.S. at 323–27. See also Koretz, *The Lockout Revisited*, 7 SYRACUSE L. REV. 263, 269 (1956).
41. Brief for Board, pp. 24–26.
42. NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333 (1938).
43. NLRB v. Tex-Tan, Inc., 318 F.2d 472 (5th Cir. 1963).
44. 380 U.S. at 315–17. See NLRB v. Insurance Agents' Int'l Union, 361 U.S. 477 (1960).
45. *Id.* at 318. But Congress has failed to make the necessary policy decisions in this area, and it has fallen upon the Court to do so. See 60 L.R.R.M. 24, at 27–29 (1965), reporting the recent speech given by Clyde W. Summers. See also Summers, *Labor Law in the Supreme Court: 1964 Term*, 75 YALE L.J. 59, 82–88 (1965).
46. *Id.* at 326–27. See NLRB v. Metropolitan Ins. Co., 380 U.S. 438 (1965), where the court remanded a bargaining unit determination of the Board because the Board had failed to articulate sufficiently the reasons for its decision.
47. *Id.* at 326.

lawful, but he would have found so on the same basis as the trial examiner — that there was reasonable cause to believe that a strike was imminent and that such a strike would cause considerable economic damage to the company and its customers.[48] Justice Goldberg stated that this area is too complex to be analyzed by a general formula. He maintained that a case by case treatment must be used because of the numerous factual diversities that are presented by different lockouts.[49]

The Sixth Circuit, the first court to decide a lockout case[50] in the light of *American Ship Building* and *Labor Board v. Brown,* declared a lockout legal where there was no joint contract between two Detroit newspapers and the striking union. The facts indicated a multi-employer bargaining interest, since the two papers had common interests in regard to the striking union; one was closely following the other's progress in contract negotiations; and the union had overtly indicated that similar demands in regard to the major issues would be made of both papers.[51] The court, in deciding that the lockout was lawful, referred to the broadened scope of legal lockouts as a result of *American Ship Building:* "While in American Ship Building there was an impasse in the negotiations between the employer and the union, we do not think the teaching of that case merely adds another exception to the Board's category of permissible lockouts."[52] The court seems to say that a pre-impasse lockout is legal, something that the Supreme Court expressly refused to rule upon. The court took this approach when it could have decided the case by extending the multiemployer doctrine to include this situation.

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48. *Id.* at 327.

49. *Id.* at 336–39.

50. Detroit Newspaper Publishers Ass'n v. NLRB, 346 F.2d 527 (6th Cir. 1965), *reversing* 145 N.L.R.B. 996, 55 L.R.R.M. 1091 (1964). The Court of Appeals of the District of Columbia in a short per curiam opinion did modify an earlier decision to conform with *Brown.* The Court of Appeals, faced with a fact situation quite similar to that in *Brown,* reserved its decision until *Brown* was decided. The court held that the members of the multiemployer bargaining unit could engage "in a lockout while continuing to operate their establishments." The employers had locked out in response to a whipsaw strike. Retail Clerks Union v. NLRB, 348 F.2d 64 (D.C. Cir. 1965). For other subsequent court cases see NLRB v. Tonkin Corp., 352 F.2d 509 (9th Cir. 1965) and NLRB v. Golden State Bottling Co., 353 F.2d 667 (9th Cir. 1965).

51. 346 F.2d at 529–30.

52. *Id.* at 530. A further question is whether the scope of the legal lockout includes a situation where two unions, which are parties to multiemployer bargaining agreements, in breach of those agreements refuse to cross the picket line of a striking union that represents employees of employer *A* only, and employer *B* then locks out his employees to put pressure on the two unions to go back to work at employer *A*'s place of business.

These were the facts presented in *The Hearst Corp.,* N.L.R.B. Case No. 5–CA–3116, *et seq.* (November 22, 1965), a case involving the two major Baltimore dailies, the News-American and the Sunpapers, presented before an N.L.R.B. trial examiner. The Daily Record, December 11, 1965, p. 2, col. 1. The Sun was originally struck by the Guild, a union which did not represent any employees of the News-American. The Printers and Teamsters, each of which had joint contracts with the two newspapers, refused to cross the Guild's picket line. The refusal to work by the Printers and the Teamsters, and not the Guild strike, caused The Sun to shut down. According to agreement, the News-American terminated its operation in support of The Sun. Both papers contended that the Printers and Teamsters were breaking their respective joint contracts, and the trial examiner agreed, supporting the lockout as permissible in this case. The *American Ship Building* decision was not discussed, however.

Brown and *American Ship Building* have made a significant adjustment in the balance of power in labor relations. In the area of collective bargaining, the employer has had few positive means for resisting union demands. In fact, he has had no method of initiating the offensive except in the narrow area of lockouts justified by economic necessity. The Board claimed that the scales were already balanced because the employer had the right to replace striking workers, to implement unilateral changes after an impasse had been reached in bargaining, to stockpile inventories, and to transfer orders to other plants. These are clearly defensive weapons. Now the employer has the potential of using a truly offensive weapon in bargaining. He can lock out his employees before they strike. He, too, can decide the timing of the work stoppage.

How far will he be able to further reinforce his lockout? It seems possible, reading the two decisions together, that a single employer could lock out his employees and continue to operate his business. If a multiemployer unit can continue to operate with temporary replacements, as the Court held in *Brown,* why should the right of continued operations be denied the single employer? The Supreme Court, however, refused to consider this point.[53] The *Brown* case could be distinguished by arguing that the multiemployer unit needs the additional leverage of continued operations, because its objective in locking out is to secure the continuation of the multiemployer bargaining unit,[54] not better bargaining terms for the particular employer who is struck. But better bargaining terms are the very purpose of multiemployer bargaining association and are the logical outcome of the continuation of the association.

In order for a lockout to have any practical value in many situations, it would have to be complemented with the replacement right. Where the current labor market will provide sufficient replacements for the employer to continue his operations in the event of a work stoppage, he would be wiser to forego his right to a lockout if he does not also have the right to replace. He could more economically exert pressure towards acceptance of his bargaining position through replacement of his employees in the event of a strike than he could by temporarily shutting down his operations.

The answer to the question of how the lockout will be further strengthened may be found in the Court's allocation of the burden of proof in these cases. The method of adjudicating the employer's duties and liabilities in lockout cases has been altered so that the employer is no longer guilty until he proves himself innocent. The

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53. See 380 U.S. 300, at 339 n.8.

54. A recent decision of the Board has added another obstacle to the preservation of the multiemployer bargaining unit. The Detroit newspapers once again were endeavoring to continue multiemployer bargaining. The Pressmen's Union refused to continue this method of bargaining. The Board found the employers guilty of a refusal to bargain because the employers, after an unsuccessful attempt to discuss continuation of the multiemployer unit with the union, would not bargain with the union on an individual basis. Evening News Association, 154 N.L.R.B. No. 121, 60 L.R.R.M. 1149 (1965); 154 N.L.R.B. No. 123, 60 L.R.R.M. 1154 (1965).

Board now must show proof of the employer's anti-union motivation to sustain a violation. In the first two lockout cases decided by the Board after *American Ship Building,* specific findings were made that the employer had an anti-union motivation, and the lockouts were therefore held to be illegal.[55]

Justice White took the Court's warning to the Board, that it require a showing of motivation, to be absolute. To him this meant that where there is no finding of motivation, there can be no violation. He stated, "If the Court means what it says today, an employer may not only lockout after an impasse . . . , but replace his locked-out employees with temporary help, *cf. Labor Board v. Brown, ante,* p. 278, or perhaps permanent replacements, and also lock out long before an impasse is reached."[56]

Perhaps Justice White believed that the Court had eliminated from its judicial repertoire that category of employer conduct which is so destructive of employee rights that an analysis of motivation is not required and is not relevant because the harm to employee rights is so great. But the Court expressly recognized in its opinion the continued existence of this category,[57] and thereby reserved a sound basis for deciding the issue posed by a lockout long before an impasse has been reached. As to the employer who utilizes a bargaining lockout and replaces his employees temporarily or permanently, the Court, according to what it believes to be the requirements of sound labor relations policy at the time, will place that conduct either in the category of activity requiring proof of motivation or in the category of conduct not permitted regardless of motivation. The Court must continue to balance the conflicting legitimate interests of employers and of employees in order to further the objectives of national labor policy and "to promote the full flow of commerce."[58]

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55. Hi-way Dispatch, Inc., 153 N.L.R.B. No. 22, 59 L.R.R.M. 1447 (1965) (lay-offs were not motivated by a desire to conserve cash in the face of a strike, but were designed to coerce employees into abandoning their grievance); Joseph Weinstein Electric Corp., 152 N.L.R.B. No. 3, 59 L.R.R.M. 1015 (1965) (repeated expressions of hostility toward union, attempts to persuade employees to affiliate with rival union, and proposals that employees enter agreement with him in disregard of the union). For three later cases where the Board did not find a violation, see Weyerhauser Co., 155 N.L.R.B. No. 82, 60 L.R.R.M. 1425 (1965), Topeka Grocers Management Ass'n, 155 N.L.R.B. No. 79, 60 L.R.R.M. 1428 (1965), and particularly, Acme Markets, Inc., 156 N.L.R.B. No. 127, 61 L.R.R.M. 1281 (1966).

56. Justice White's concurring opinion, 380 U.S. 318, at 324. See Getman, *Section 8(a)(3) of the N.L.R.A. and the Effort to Insulate Free Employee Choice,* 32 U. CHI. L. REV. 735, 749 (1965).

57. 380 U.S. at 311–12. See also note 11 *supra.*

58. 61 Stat. 136 (1947), 29 U.S.C. § 141 (1965). For other articles on the general subject see: Duvin, *The Bargaining Lockout: An Impatient Warrior,* 40 NOTRE DAME LAW. 137 (1965); Duvin, *The Duty to Bargain: Law in Search of Policy,* 64 COLUM. L. REV. 248 (1964); Forkosch, *Bargaining and Economic Pressure — The New Trilogy,* 16 LAB. L.J. 232 (1965); Koretz, *Legality of the Lockout,* 4 SYRACUSE L. REV. 251 (1951); Koretz, *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 Employer and Multiemployer Lockouts Under the Taft-Hartley Act,* 24 U. CHI. L. REV. 70 (1956); Oberer, *Lockouts and the Law: The Impact of American Ship Building and Brown Food,* 51 CORNELL L.Q. 193 (1966); Summers, *Labor Law in the Supreme Court: 1964 Term,* 75 YALE L.J. 59 (1965).