



January 1965

Beefing-Up the Lockout

James H. Wallenstein

Recommended Citation

James H. Wallenstein, Note, *Beefing-Up the Lockout*, 19 Sw L.J. 622 (1965)
<https://scholar.smu.edu/smulr/vol19/iss3/8>

This Case Note is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in SMU Law Review by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

and antitrust laws is apparently impossible because of the conflicting interests of both economic units.

Sam P. Burford, Jr.

Beefing-Up The Lockout

I. STATUTORY HISTORY¹

Employers were relatively free to lockout their employees during bargaining disputes² until 1935 when Congress enacted the National Labor Relations Act.³ Sections 7 and 8 of the act assured unions the right to organize and engage in lawful activities⁴ and the right to be protected from unfair labor practices on the part of employers.⁵ These sections, in recognizing a new body of union rights, were especially distasteful to employers because they made possible attacks on traditional power tactics used in collective bargaining.⁶

Congress, of course, did not attempt to eliminate all hindrances to union activities.⁷ The act did not name lockouts as being *per se* unfair practices; the term "lockout" was in fact employed in the Taft-

¹ Both the courts and the legal writers have saturated this area with excellent analyses. See *NLRB v. Truck Drivers Union, Local 449*, 353 U.S. 87, 92-97 (1957) (*Buffalo Linen*). See also the following articles: Denbo, *Is the Lockout the Corollary of the Strike?*, 14 *LAB. L.J.* 400 (1963); Johannesen, *Lockouts: Past, Present, and Future*, *DUKE L.J.* 257, 258, 260 (1964); Koretz, *Legality of the Lockout*, 4 *SYRACUSE L. REV.* 251, 253 (1953); Sweetall and Aiges, *Lockouts*, 9 *LAB. L.J.* 43 (1958).

² *Iron Molders Union v. Allis-Chalmers Co.*, 166 F. 45, 50 (7th Cir. 1908). Of course, the lockout was only one of a number of powerful weapons employers originally had at their disposal. The injunction and the "yellow-dog" contract, perhaps the two most fearsome weapons, were specifically extinguished in 1932 by the Norris-LaGuardia Act.

³ 49 Stat. 449 (1935), as amended, 29 U.S.C. 151-68 (1962). The original act is commonly called the Wagner Act; the 1947 amendment, the Taft-Hartley Act. Hereafter, the statute in its present form will be referred to as the act.

⁴ Section 7 "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. . . ." 29 U.S.C. § 157 (1964).

⁵ Section 8:

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

(1) to interfere with, restrain, or coerce employees in the exercise of 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. 29 U.S.C. § 158 (1964).

⁶ "The anger of employers with the act is easy to understand. Within a period of less than five years the anti-union employer found his legal position against unions almost completely reversed." REIDER, *LABOR IN A GROWING ECONOMY* 221 (1957).

⁷ See speech by Senator Walsh, Chairman of the Senate Committee on Education and Labor, in debate on the floor of the Senate on the bill that became the Wagner Act. 79 *Cong. Rec.* 7673 (1935).

Hartley Act in the same context as the word "strike."⁸ The boundaries of fair and unfair lockouts were reserved for determination by the National Labor Relations Board, subject to review by the courts.⁹

II. ECONOMIC JUSTIFICATION

The Board recognized early that if no antiunion intent could be shown, an employer had the right to take measures to protect its welfare.¹⁰ "Economic" lockouts, those necessary to the economic interests of the employer, were allowed in the face of or in anticipation of a strike.¹¹ Moreover, the Supreme Court soon allowed an employer to protect itself during an economic strike, not only through a lockout, but also through use of temporary or permanent replacements.¹² On the other hand, lockouts which clearly intended to combat unionism, "offensive" lockouts, were condemned as unfair labor practices.¹³ This was true even if there were some element of economic justification present.¹⁴ Finally, even where a strike could damage the economic welfare of the employer, the Board's position was that the employees could not be locked out unless a strike was actually threatened.¹⁵

One employer-employee problem of increasing importance could not be easily resolved. This situation was the "whipsaw" strike in which a union would strike only one member of a multi-employer bargaining association in order to break up the unit and gain bargaining advantages. Employers would counter by warning unions that a strike against one member would be treated as a strike against the association as a whole and that uniform action would be taken against the employees of every member. Before 1954, the Board de-

⁸ 61 Stat. 140 (1947), 29 U.S.C. 158 (d) (4) (1964); 61 Stat. 153 (1947), 29 U.S.C. 173 (c) (1964); 61 Stat. 155 (1947), 29 U.S.C. 176 (1964); 61 Stat. 155 (1947), 29 U.S.C. 178 (1964).

⁹ 29 U.S.C. 160 (1964).

¹⁰ "We recognize that an employer may lawfully discontinue or reduce operations for any reason whatsoever . . . provided only that the employer's action is not motivated by a purpose to interfere with and defeat its employees' union activities." Pepsi-Cola Bottling Co., 72 N.L.R.B. 601, 602 (1947). (Emphasis added.)

¹¹ Betts Cadillac Olds, Inc., 96 N.L.R.B. 268 (1951) (to safeguard customers when the union refused to indicate when a walkout might be called); International Shoe Co., 93 N.L.R.B. 907 (1950) (to avoid the disruption of a department closely integrated with other departments); Duluth Bottling Ass'n, 48 N.L.R.B. 1335 (1943) (to prevent spoilage). The anticipated economic loss, however, must be more than ordinary loss of business accompanying a strike. *Re American Brake Shoe*, 116 N.L.R.B. 820, 826-27 (1956).

¹² NLRB v. Mackay Radio & Telephone Co., 304 U.S. 333 (1938).

¹³ NLRB v. National Motor Bearing Co., 105 F.2d 652 (9th Cir. 1939) (to impede employees from organizing); Williams Coal Co., 11 N.L.R.B. 579 (1939) (to discourage participation in union activities).

¹⁴ New England Web, Inc., 135 N.L.R.B. 1019 (1962); Savoy Laundry, Inc., 137 N.L.R.B. 306 (1962); Ripley Mfg. Co., 138 N.L.R.B. 1452 (1962).

¹⁵ *Re American Brake Shoe Co.*, 116 N.L.R.B. 820, 826 (1956).

nied employers such a counter-attack.¹⁶ The courts, on the other hand, seemed more inclined toward allowing it,¹⁷ but the Supreme Court withheld statement until 1957 in the well-known *Buffalo Linen* case.

III. BUFFALO LINEN—MUSCLE FOR THE LOCKOUT OR FOR THE BOARD?

A linen-supply association operating in and around Buffalo, New York, had been bargaining successfully on a multi-employer basis with the Teamsters Union for approximately thirteen years. In 1953, during negotiations for a new contract, the union struck and picketed one member of the eight-member association. On the next day the other seven employers shut down, locking out their workers. A week later an agreement was reached, and all employees returned to work. The union sued for violation of rights guaranteed by section 7¹⁸ and for unfair labor acts under section 8(a)(1) and (3)¹⁹ of the act. The Board modified its former rule²⁰ and dismissed the complaint.²¹ The Court of Appeals for the Second Circuit in a surprising action,²² remanded the case to the Board for a ruling that the lockout was unlawful.²³ Reviewing this issue for the first time, the Supreme Court upheld the Board and reversed the Second Circuit.²⁴

The Court expressly refused to generalize on an employer's right to lockout employees,²⁵ but it did help to justify lockouts used to protect an employer's association from a "whipsaw" strike. Although not purely "economic," this type of lockout was not necessarily "offensive" or even "retaliatory." The term used by the Board had been "defensive."²⁶ This term met with Court approval. The Court

¹⁶ Davis Furniture Mfg. Co., 94 N.L.R.B. 279 (1951); Morand Bros. Beverage Co., 91 N.L.R.B. 409 (1950). See also WERNE, *THE NATIONAL LABOR RELATIONS ACT AND MANAGEMENT'S OBJECTIONS IN COLLECTIVE BARGAINING* 44-5 (1956).

¹⁷ NLRB v. Spalding Avery Lumber Co., 220 F.2d 673 (8th Cir. 1955); Leonard v. NLRB, 205 F.2d 355 (9th Cir. 1953); Morand Bros. Beverage Co. v. NLRB, 190 F.2d 576 (7th Cir. 1951). The seventh circuit in *Morand* advanced the proposition that the lockout should again be considered a complete corollary to the strike. See note 33, *infra*.

¹⁸ 29 U.S.C. § 157 (1964).

¹⁹ 29 U.S.C. § 158(a) (1964).

²⁰ See note 16 *supra*. A distinction has been drawn between the "pre-Eisenhower" and "post-Eisenhower" composition of the Board. Meltzer, *Single-Employer and Multi-Employer Lockouts Under the Taft-Hartley Act*, 24 U. CHI. L. REV. 70, 71, 77, 81 (1956); Sweetall and Aiges, *Lockouts*, 9 LAB. L.J. 43, 46-7 (1958).

²¹ Buffalo Linen Supply Co., 109 N.L.R.B. 457 (1954).

²² See note 17 *supra* and accompanying text.

²³ Truck Drivers Union, Local 449 v. NLRB, 231 F.2d 110 (2d Cir. 1956).

²⁴ NLRB v. Truck Drivers Union, Local 449, 353 U.S. 87 (1957).

²⁵ "Nor are we called upon to define the limits of the legitimate use of the lockout. . . . We thus find it unnecessary to pass upon the question whether, as a general proposition, the employer lockout is the corollary of the employee's statutory right to strike." *Id.* at 93.

²⁶ "[I]n the absence of any independent evidence of antiunion motivation, . . . the Respondent's action in shutting their plants until termination of the strike at Frontier was defensive and privileged in nature, rather than retaliatory and unlawful." *Buffalo Linen*, 109 N.L.R.B. at 448.

recognized, however, that lockouts themselves were not easily categorized.²⁷ The problem was rather one of an equitable balancing of interests by an expert authority. That authority was the Board. Mr. Justice Brennan, writing for the majority, described the Board's function as follows:

The ultimate problem is the balancing of the conflicting legitimate interests. The function of striking that balance to effectuate national labor policy is often a difficult and delicate responsibility, which the Congress committed primarily to the National Labor Relations Board, subject to limited judicial review.²⁸

A problem left to be solved after *Buffalo Linen* was whether the Supreme Court had been approving primarily the lockout or the authority of the Board.²⁹ The Ninth Circuit³⁰ elaborated on the former view in *NLRB v. Great Falls Employers' Council, Inc.*³¹ The court allowed the association employers, in a situation similar to that in *Buffalo Linen*, not only to lock out all employees but also to recall them periodically for just enough time to prevent their receiving unemployment relief. Could this second action be labelled "defensive?" The Fifth Circuit went one step further. In *NLRB v. Dalton Brick & Tile Corp.*³² the court allowed a lockout by a single independent employer primarily intended to put pressure on the union during bargaining. Although the court would not adopt in full an earlier statement of the Seventh Circuit that the lockout should be accepted as a corollary of the strike,³³ the court did agree that a lockout created no presumption of illegality.³⁴ Most important, no attempt could

²⁷ Distinctions often made at present are as follows:

- (1) "economic"—independent of intent to interfere with unions;
- (2) "offensive" ("retaliatory")—striking (back) at union,
 - (a) "illegal"—purpose to avoid legal bargaining process,
 - (b) "bargaining"—purpose to advance employer interests in bargaining process;
- (3) "defensive"—concerning whipsaw strikes.

See Sweetall and Aiges, *Lockouts*, 9 LAB. L.J. 43, 45 (1958). Unfortunately, these labels are more easily defined than applied. See Koretz, *Legality of the Lockout*, 4 SYRACUSE L. REV. 251, 266-73 (1953) and Meltzer, *Single-Employer and Multi-Employer Lockouts Under the Taft-Hartley Act*, 24 U. CHI. L. REV. 70, 73 (1956). Sweetall and Aiges, *supra* at 45-6, argue that the Board itself has never attempted to classify lockouts in a rigid manner.

²⁸ 353 U.S. at 96. (Emphasis added.)

²⁹ For an excellent initial analysis see Larson, *Current Labor Decisions of the United States Supreme Court*, 11 SW. L.J. 322, 328-30 (1957).

³⁰ *Davis Furniture Mfg. Co.*, 94 N.L.R.B. (1951), decided before *Buffalo Linen*.

³¹ 277 F.2d 772 (9th Cir. 1960).

³² 301 F.2d 886 (5th Cir. 1962).

³³ The Seventh Circuit in *Morand* had stated, ". . . the lockout should be recognized for what it actually is, i.e., the employer's means of exerting economic pressure on the union, a corollary of the union's right to strike." 190 F.2d 576, 582 (7th Cir. 1951). After citing *Morand* the Fifth Circuit concluded, "To speak in absolutes is just the beginning, since it is now clear that any such 'right' to strike, favored as it is, is conditioned. Rather it is our view that each case must be carefully measured by its own setting." Note 32, *supra* at 894.

³⁴ *Ibid.*

be made to explain the *Dalton* court's decision in terms of "economic" or even "defensive" justification. The decision was a concrete, though qualified, acceptance of the lockout as a bargaining weapon.

On the other hand, several circuits placed increased emphasis on the authority of the Board. In *Quaker State Oil Refining Co. v. NLRB*³⁵ the Third Circuit affirmed the Board's decision that an "offensive bargaining" lockout was illegal,³⁶ quoting Mr. Justice Brennan's statement of the Board's importance.³⁷ The Tenth Circuit used similar reasoning (citing *Quaker State*) in affirming a Board order against another "offensive bargaining" lockout.³⁸ The Board itself indicated its interpretation of *Buffalo Linen* by denying the legality of an association lockout after a strike of one member when the employers admitted both "defensive" and "bargaining" intent.³⁹

In labor disputes not involving lockouts, the courts had frequently upheld the Board's decision, even before *Buffalo Linen*, on the basis of its special ability to balance interests and judge intent.⁴⁰ *Buffalo Linen* seemed to give express Supreme Court recognition to the Board's expertise and authority. Justice Brennan's conclusion was cited not only in lockout cases, but also in cases involving other unfair labor practices on the part of management. The Board was upheld in charging unfair labor practices due to lack of significant employer justification for otherwise legal actions.⁴¹ Moreover, the Supreme Court allowed the Board to brand certain employer actions with the label of *inherent unlawful discrimination*, thus presuming lack of justification.⁴²

The Board's increased authority was brought into question, however, in *NLRB v. Insurance Agents' Union*.⁴³ In that case the Supreme Court refused to uphold a Board decision that the *union* had violated section 8 (b)⁴⁴ of the act by sponsoring on-the-job harrassing activities to put pressure on the employer. The Board had judged the activities unlawful. Ironically, it was Justice Brennan who wrote the majority

³⁵ 270 F.2d 40 (3d Cir. 1959), *cert. denied*, 361 U.S. 917 (1959).

³⁶ In *Quaker State* the facts were ideal for the complaint. The union had given assurance that it would not strike and had offered to extend the bargaining agreement. The employer had closed down his plant before the expiration of the contract.

³⁷ *Id.* at 44; see note 28 *supra* and accompanying text.

³⁸ *Utah Plumbing & Heating Contractors Ass'n v. NLRB*, 294 F.2d 165 (10th Cir. 1961).

³⁹ *Anchorage Businessman's Ass'n*, 124 N.L.R.B. 662 (1959).

⁴⁰ *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941). *But see NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956).

⁴¹ *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945).

⁴² *NLRB v. Burnup & Sims, Inc.*, 379 U.S. 21 (1964); *NLRB v. Erie Resistor Corp.*, 373 U.S. 221 (1963); *Radio Officers Union v. NLRB*, 347 U.S. 17 (1954).

⁴³ 361 U.S. 477 (1960).

⁴⁴ 49 Stat. 452 (1947), as amended, 29 U.S.C. 158 (b) (1964). See note 3 *supra*.

opinion vindicating the union activities. In language somewhat surprising considering *Buffalo Linen*, Justice Brennan explained the Court's position:

Thus the Board in the guise of determining good or bad faith in negotiations could regulate the choice of economic weapons a party might summon to its aid, and if the Board could regulate the choice of economic weapons that may be used as part of collective bargaining, it would be in a position to exercise considerable influence upon the substantive terms on which the parties contract.⁴⁵

After acknowledging his conclusion in *Buffalo Linen* he added the following:

But recognition of the appropriate sphere of the administrative power obviously cannot exclude all judicial review of the Board's actions. . . . We see no indication here that Congress has put it to the Board to define through its processes what economic sanctions might be permitted negotiating parties in an "ideal" or "balanced" state of collective bargaining.⁴⁶

This language seems to fly directly in the face of his earlier statement in *Buffalo Linen*. One possible explanation for this apparent conflict might be based on the structure of the act. The Board in *Buffalo Linen* had exerted its authority in a relatively "gray" area. Sections 7 and 8(a) guaranteed protection to unions, but neither denied nor affirmed the legal power of employers to act as they had done. The extent of employers' legal power was then undefined by statute, and the Board's expertise was necessary. In *Insurance Agents* the Board had accused the union of violating Section 8(b) which outlawed several union abuses but gave the employer no positive rights, no corresponding protected activity. Moreover, the union's actions themselves were perhaps protected by section 7 and 8(a) guarantees. The Board had no cause to invade this statutory territory. Following such an analysis, it might seem that lockouts would have been relatively unaffected by *Insurance Agents*.⁴⁷

A second possible explanation reverts back to the dual emphasis of *Buffalo Linen*. Perhaps the Court approved the lockout in question but, hesitant to back employers absolutely, skirted the issue by deferring to the expertise of the Board. Following this analysis, the Court could later take a firmer stand on lockouts by using the language of *Insurance Agents* against the Board.

⁴⁵ NLRB v. Insurance Agents' Union, 361 U.S. 477, 490 (1960).

⁴⁶ *Id.* at 499-500.

⁴⁷ *But see* NLRB v. Great Falls Employers' Council, Inc., 277 F.2d 772, 776 (9th Cir. 1960), quoting *Insurance Agents*. See also *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 490 (1951).

Unfortunately, Justice Brennan did not leave any clues as to the correct explanation. In *Insurance Agents* he acknowledged *Buffalo Linen* but dismissed it without distinguishing it significantly. Until 1965, then, the area was marked by two opposing comments on the Board's authority and little light as to the legality of the lockout.

IV. AMERICAN SHIP BUILDING—BROWN

Two recent cases have indicated which aspect of *Buffalo Linen*, *i.e.*, the legality of the lockout or the Board's authority, is gaining greater Supreme Court approval. The first case⁴⁸ involved a lockout by a single employer. The employer, the American Ship Building Company, had been bargaining with a group of eight unions since 1952 and, during each series of negotiations, the unions had called a strike. On June 6, 1961, the company and the unions began new negotiations which extended beyond the expiration of the existing contract. During negotiations, the company expressed constant fear of a strike, which would have been especially harmful if called as a ship entered the Chicago yard. The union negotiator denied any intent to call a strike; however, he admitted his lack of complete control over the workers. (A wildcat strike had, in fact, broken out in February, 1961.) On August 9, the parties separated without having reached an agreement and, on August 11, the company shut down its operations, locking out the employees until a contract could be completed. Negotiations resumed and a contract was agreed upon on October 27. The next day the company recalled all employees. The unions filed unfair labor practices with the Board.

Reviewing the facts, the trial examiner found the lockout to be "economic" and thus justified.⁴⁹ The Board, by a three-to-two majority, decided that the company's main objective was "offensive," that is, that the company had shut down to bring pressure on the unions to break up the impasse.⁵⁰ The Court of Appeals for the District of Columbia affirmed the Board's decision.⁵¹ The Supreme Court unanimously reversed.

Mr. Justice Stewart's majority opinion is of special importance in that it practically ignores the "economic justification" argument.⁵²

⁴⁸ *The American Ship Bldg. Co. v. NLRB*, 380 U.S. 300 (1965).

⁴⁹ "The case at bar falls somewhere within the principles found in a line of cases where an employer has been found to have taken certain 'defensive actions' during bargaining. . . . Respondent was economically justified and motivated in laying off its employees when it did. . . ." *The American Ship Bldg. Co.*, 142 N.L.R.B. 1382, 1383 (1963) (trial examiner's report).

⁵⁰ *The American Ship Bldg. Co.*, 142 N.L.R.B. 1362 (1963).

⁵¹ *NLRB v. The American Ship Bldg. Co.*, 331 F.2d 839 (D.C. Cir. 1964).

⁵² In this respect Justices White, Goldberg, and Warren, expressly concurring only as to result, must certainly be considered dissenters.

Instead, it strikes directly at the question of lockouts employed to break up a bargaining impasse.⁵³ The Board had always presumed any bargaining lockout to be unlawful *per se* under sections 7 and 8 (a) (1) and (3).⁵⁴ Justice Stewart admitted that a bargaining lockout can weaken the union's capacity to organize and effectuate a strike, and that it can also tend to discourage union membership. He emphasized, however, that such effects, to constitute unfair labor practices, must be accompanied by antiunion intent. Intent, of course, had always been a familiar standard in labor charges.⁵⁵ But the Board had granted itself the authority to presume inherently unlawful intent in several instances.⁵⁶ One of the most prominent of these instances had been the bargaining lockout.⁵⁷ The opinion in *American Ship Building* indicates Supreme Court assurance that a lockout created merely to improve the employer's position in collective bargaining—not to avoid the bargaining process—may be free from unlawful intent. The lockout is then much closer to being the corollary of the strike.⁵⁸

The companion case to *American Ship Building*, *NLRB v. Brown*,⁵⁹ likewise enhances the status of the lockout—and more distinctly at the expense of the Board.⁶⁰ Here the dispute was between the union and an employer association of five retail grocers in Carlsbad, New Mexico. The association included Safeway Food Stores and four small private outlets. For years the association had bargained successfully with the union. In 1960 new negotiations began and on March 2, the union warned the employers that a strike had been authorized. The association answered that a strike against one employer would be considered a strike against the association as a whole. On March 16 the union struck one of the private outlets and the other four employers immediately locked out their union employees, promising to recall them when the strike ended. All five stores continued to operate using temporary replacements.⁶¹ On April 22, an

⁵³ "What we are here concerned with is the use of temporary layoff of employees solely as a means to bring economic pressures to bear in support of the employer's bargaining position, after an impasse has been reached." 380 U.S. at 308.

⁵⁴ See notes 13-15 *supra* and accompanying text.

⁵⁵ *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945); *NLRB v. Mackay Radio & Telephone Co.*, 304 U.S. 333 (1938).

⁵⁶ See note 42 *supra*.

⁵⁷ *American Ship Bldg.*, 142 N.L.R.B. 1362, 1364 (1963); *Duluth Bottling Ass'n*, 48 N.L.R.B. 1335, 1346-47 (1943).

⁵⁸ See notes 17 and 33 *supra* and accompanying text.

⁵⁹ 380 U.S. 278 (1965).

⁶⁰ The latter part of *American Ship Bldg.* itself placed limits on the authority of the Board. But in *Brown* the Court was faced with a situation more nearly comparable to *Buffalo Linen*—only with the parties reversed. The Board had ruled against the employer association.

⁶¹ The replacements consisted primarily of transferred managerial personnel and relatives of the managers and supervisors. A few "sack boys" and "box boys" were also hired. All replacements were told that the regular employees would be reinstated when the strike ended.

agreement was reached and all strikers and locked-out employees were returned to their jobs.

Reviewing the union's complaint, the trial examiner and the Board followed *Buffalo Linen* in agreeing that the lockout itself was lawful. They then held that the continued operations with temporary replacements constituted unfair labor practices.⁶² The Court of Appeals for the Tenth Circuit denied enforcement.⁶³ After granting certiorari, the Supreme Court affirmed the Court of Appeals with Justice White as the lone dissenter.

Justice Brennan delivered the majority opinion and cleared up much of the confusion perhaps caused by his opinions in *Buffalo Linen* and *Insurance Agents*. He followed the *Buffalo Linen* decision only to the extent of justifying the lockout as being a good-faith defensive measure,⁶⁴ adding that since a complete shut down would be critical to retail dealers of perishables, the use of temporary replacements must necessarily be allowed.⁶⁵ The remainder of his opinion in denying the Board's authority to intervene bears a close resemblance to his opinion in *Insurance Agents*. The employers' actions, he argues, may have been injurious to the union position and perhaps even discriminatory in nature. Nevertheless, they were unaccompanied by antiunion intent. Section 8(a)(3) requires the latter element, and the Board can assume antiunion intent only in exceptional circumstances.⁶⁶ "When the resulting harm to employee rights is thus comparatively slight, and a substantial and legitimate business end is served, the employer's conduct is prima facie lawful."⁶⁷

American Ship Building and *Brown* should give employers new cause for confidence. It is important that the Court in both cases spoke in broad, clear terms and met several issues head-on. The "bar-gaining" lockout was given renewed respectability. The "defensive"

⁶² John Brown, 137 N.L.R.B. 73 (1962). This decision, like *American Ship Bldg.*, was by a three-to-two majority.

⁶³ NLRB v. John Brown, 319 F.2d 7 (10th Cir. 1963).

⁶⁴ Justice Brennan's choice of words should be noted. He quoted the following sentence (cited in note 28 *supra*): "The ultimate problem is the balancing of the conflicting legitimate interests." Then, instead of continuing with the next sentence of the former opinion (which broadly reserves the "balancing" for the Board), he stated, "We concluded that the Board correctly balanced those interests in upholding the lockout. . . ." 380 U.S. at 282. (Emphasis added.) He thus seemed to reject the thesis that in *Buffalo Linen* the Court recognized the Board's special authority. Later, in discussing the sentence of *Buffalo Linen* dealing with Board authority, he discussed only the phrase "limited judicial review." 380 U.S. at 290-92. Cf. note 28 *supra* and accompanying text.

⁶⁵ Mr. Justice Brennan did not justify these later acts as permissible "offensive" tactics. They are still "defensive." In effect, he agreed that the active strike against one employer was a tactical strike against the entire association.

⁶⁶ He was quick to point out that even in *NLRB v. Erie Resistor Corp.*, 373 U.S. 221 (1963), the Court upheld the Board only after extensive review.

⁶⁷ 380 U.S. at 289.

lockout was allowed as a form of counterattack. Employer justification and intent was viewed in a new, favorable light and given even greater importance, and the Board's special authority to regulate bargaining was challenged. The Court finally admitted not only that "collective bargaining is a brute contest of economic power,"⁶⁸ but also that previous Board policy had been denying employers needed muscle.

V. CAVEAT

Employers should not allow themselves to become too confident over the increased strength of their weapon. Economically, the lockout by itself is an undesirable action for an employer because his plant is inoperative. In effect, he has created the same result as a strike, with the possible advantage of timing.

Moreover, although the Court's language is quite broad, it is doubtful that the permissibility of lockouts will be expanded absolutely to the limits stated. (*A fortiori* expansion is not likely beyond the limits stated.) In both cases the facts were equitably favorable for the employers' position. In *American Ship Building* the trial examiner, two Board members, and three Supreme Court justices agreed that the lockout was economically justifiable. Then too, a bargaining impasse had been reached. The Supreme Court's opinion, in fact, was expressly limited to cases fitting this situation. The Supreme Court, if reviewing lockouts which are without any legitimate economic justification or which occur before an impasse,⁶⁹ would probably uphold the Board. It is doubtful, then, that the lockout will soon attain the status of a complete corollary to the strike.⁷⁰

The facts in *Brown* were even more appropriate for the Supreme Court's decision. The employers were, with one exception, small retailers dealing with perishable items. Moreover, all elements of the association's actions, *i.e.*, warning, type of replacements, promise to reinstate, and immediate reinstatement, indicate that they were good-faith "defensive" actions purely to preserve the integrity of the bargaining unit. In situations where lockouts and replacements are shown to be clearly "offensive" or "retaliatory," the union would probably succeed in its action.⁷¹

⁶⁸ *NLRB v. Insurance Agents' Union*, 361 U.S. 477, 489 (1960).

⁶⁹ See, *e.g.*, *Quaker State Oil Refining Co.*, 270 F.2d 40 (3d Cir. 1959).

⁷⁰ Again it should be emphasized that the strike is expressly granted statutory protection, *supra* notes 4 and 5. No such provisions exist in favor of the lockout.

⁷¹ In *Food Giant Super Markets*, 145 N.L.R.B. 1221 (1964), for example, the union called a strike against a single employer. Since only 25% of the employer's employees went on strike the employer was able to continue normal business operations. Nevertheless, all employers in the association locked-out and replaced their union employees. This was—and probably still would be—held to be illegal.