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THE BARGAINING LOCKOUT: AN IMPATIENT WARRIOR

*Robert P. Duvin**

A lockout is a temporary refusal by an employer to furnish work to his employees. Although the word itself carries no invidious connotation, most students of collective bargaining and labor law have for many years rejected its acceptability as a negotiating pressure tactic. In the last fifteen years there have been very few cases in which the lockout was employed solely for the purpose of achieving bargaining objectives. When used in this manner, the lockout is the counterpart of the strike and, quite clearly, a potentially powerful economic weapon. Therefore, one can only assume that the infrequent appearance of such a potent tactic — in an arena not yet free from the stench of yesterday's hostilities — results from a widely held belief that it is illegal.

Recently, however, the bargaining lockout has been cloaked with respectability. Scholars have started to proclaim its virtues, and some have suggested that its legal status is popularly misunderstood.¹ They stress that the National Labor Relations Board has been responsible for the amputation of management's strong right arm and now the arsenal is nearly bare. Needless to say, the Board has performed this operation with tools usurped from Congress and contradictory to the teachings of the Supreme Court — and the scale of economic power, delicately balanced in 1947 by the Taft-Hartley Act, has now, supposedly, again been weighted in favor of organized labor.

These scholarly efforts have not fallen on deaf ears, and their intellectual thrust, in its own fashion, has had significant impact on recent decisions by some

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¹ See 76 HARV. L. REV. 1494 (1963); Denbo, *Is the Lockout the Corollary of the Strike?*, 14 LAB. L.J. 400, 406-08 (1963); Meltzer, *Lockouts Under the LMRA: New Shadows on an Old Terrain*, 28 U. CHI. L. REV. 614 (1961); Meltzer, *Single-Employer and Multi-Employer Lockouts Under the Taft-Hartley Act*, 24 U. CHI. L. REV. 70 (1956); Petro, *The NLRB on Lockouts-II*, 3 LAB. L.J. 739 (1952). See also Fleming, *The Obligation to Bargain in Good Faith*, 47 VA. L. REV. 988, 1009-10 (1961); Wollett, *The Weapons of Conflict: Picketing and Boycotts*, in PUBLIC POLICY AND COLLECTIVE BARGAINING 121, 140-43 (1962).

federal courts of appeal. The lockout, embellished by judicial and scholarly approval, has recently been an occasional participant in the labor-management drama. It is not unreasonable to speculate that if the stigma of illegality is eradicated altogether, the lockout will, like the strike, become an integral part of the collective bargaining system.

The answers to the difficult legal problems raised by the aggressive use of the bargaining lockout can be expected during this term of the Supreme Court, as two lockout cases² are on the Court's docket, already scheduled for oral argument. Unfortunately, this critical condition has developed at a time when the industrial sea is already stormy as collective bargaining itself is currently at a crossroads, unable to surmount the great social problems of unemployment, automation, and inflation, oftentimes blindly groping for solutions where none is to be found, hemmed in by the ever-lurking specter of government intervention.³ Quite obviously, it is of great importance that the fundamental issues now before the Court be resolved in a manner which is absolutely consistent with basic federal labor policy — and its major component, collective bargaining.

The great social institution of collective bargaining, at this crucial stage in its development, deserves the time and attention of those persons who are interested in its progress and want to contribute in whatever way possible to its preservation as a primary force in our economy. The bargaining lockout, not long ago a stranger to collective bargaining, now stands at the threshold, impatiently waiting to assume its rightful role, alongside the strike, as head of the house of labor.

Accordingly, I shall analyze the important legal problems raised by the bargaining lockout, review the arguments proffered by its proponents and opponents, and offer a rational solution consistent with law and policy. First, however, it is essential to discuss briefly the relevant provisions and underlying policies of the National Labor Relations Act.

I. THE NLRA — ITS PRIMARY OBJECTIVE AND IMPLEMENTAL FRAMEWORK

The most fundamental policy of the National Labor Relations Act is reflected by the Congressional selection of collective bargaining as the corrective for many of the economic maladies of our society.⁴ Problems such as recurrent business recessions, depressed wage rates, depleted consumer purchasing power, and substantial obstructions of the free flow of commerce are

2 See *Brown Food Store, Inc.*, 137 N.L.R.B. 73 (1962), *enforcement denied*, 319 F.2d 7 (10th Cir. 1963); *cert. granted*, 32 U.S.L. Week 3243 (Jan. 7, 1964) [hereinafter referred to as the *Brown Food Store case*]; *American Ship Building Co.*, 142 N.L.R.B. 1362 (1963), *enforced sub nom. Local 374, Boiler Makers Union v. N.L.R.B.*, 331 F.2d 839 (D.C. Cir. 1964), *cert. granted*, 33 U.S.L. Week 3115 (Oct. 13, 1964) [hereinafter referred to as the *American Ship Building Co. case*].

3 The railroad industry recently experienced the ultimate breakdown in collective bargaining when Congress, in response to an imminent national rail strike, intervened. On August 28, 1963, a bill establishing compulsory arbitration machinery for disposition of the railroad work rules dispute was enacted and signed by President Kennedy just hours before the strike deadline. See 53 L.R.R.M. 25 (1963).

4 See generally Duvin, *The Duty to Bargain: Law in Search of Policy*, 64 Col. L. Rev. 248 (1964).

listed in the text of the statute.⁵ Moreover, it states that "protection by law of the right of employees to organize and bargain collectively safeguards commerce from . . . industrial strife and unrest, by *encouraging practices fundamental to the friendly adjustment of industrial disputes*. . . ."⁶ Thus, Congress has decided, as a matter of national labor policy, that labor disputes are to be settled, whenever possible, through the process of negotiation without recourse by either party to economic pressure. Further, Congress has instructed the National Labor Relations Board, as administering agency, to decide bargaining cases in accordance with legal principles and standards that have been developed for the specific purpose of "encouraging practices fundamental to the friendly adjustment of industrial disputes." Thus, it seems unquestionable that the primary objective of the National Labor Relations Act is the promotion of industrial stability and harmony through collective bargaining.

In order to implement this objective, various types of prohibitions, or unfair labor practices, were enacted. An obligation to bargain collectively was imposed upon employers⁷ and unions,⁸ "but such obligation does not compel either party to agree to a proposal or require the making of a concession. . . ."⁹ It is this right to refrain, in good faith, from reaching an agreement that instills freedom and its constant traveling companion, uncertainty, into the system and causes the parties periodically to exert economic pressures in order to break a stalemate and achieve bargaining objectives. The right of the union to not accede to an employer's bargaining demands was considered such a basic ingredient of the system that a special enabling provision was added to the statute. Section 13 guarantees that the right to strike, the right of employees collectively to withhold their labor, is to be free from diminution or interference except as specifically provided in the statute,¹⁰ and the Supreme Court only last year declared that "[t]his repeated solicitude for the right to strike is predicated upon the conclusion that a strike when legitimately employed is an economic weapon which in great measure implements and supports the principles of the collective bargaining system."¹¹ The Court, in an earlier opinion, emphasized that the use of economic pressure in a labor dispute is "part and parcel of the process of collective bargaining."¹²

On the other hand, the statute is less generous in its guarantees of basic economic weapons to employers. There is no provision that expressly prohibits or authorizes the lockout, although there are four unqualified uses of the word,¹³

5 See National Labor Relations Act § 1, 49 Stat. 449 (1935), as amended, 29 U.S.C. § 151 (1958).

6 *Ibid.* (Emphasis added).

7 N.L.R.A. § 8(a)(5), 49 Stat. 453 (1935), as amended, 29 U.S.C. § 158(a)(5) (1958).

8 Labor Management Relations Act (Taft-Hartley Act) § 8(b)(3), 61 Stat. 141 (1947), 29 U.S.C. § 158(b)(3) (1958).

9 L.M.R.A. (Taft-Hartley Act) § 8(d), 61 Stat. 142 (1947), 29 U.S.C. § 158(d) (1958).

10 61 Stat. 151 (1947), 29 U.S.C. § 163 (1958).

11 N.L.R.B. v. *Eric Resistor Corp.*, 373 U.S. 221, 233-34 (1963).

12 N.L.R.B. v. *Insurance Agents' Union*, 361 U.S. 477, 495 (1960).

13 61 Stat. 143 (1947), 29 U.S.C. § 158(d)(4) (1958) (no resort to "strike or lockout" during requisite 60-day notice period); 61 Stat. 154 (1947), 29 U.S.C. § 173(c) (1958) (the Director of the Federal Mediation and Conciliation Service is to aid parties in the peaceful settlement of labor disputes "without resort to strike, lockout, or other coercion"); 61 Stat. 155 (1947), 29 U.S.C. § 176 (1958) (the President is to appoint a board of inquiry when a "threatened or actual strike or lockout" creates a national emergency); 61

which, in the Supreme Court's opinion, "is statutory recognition that there are circumstances in which employers may lawfully resort to the lockout as an economic weapon."¹⁴ This conclusion is well supported by the legislative history of the act.¹⁵

It seems clear, however, that an employer's right to lock out his employees or exert other forms of economic pressure does not have the broad-based statutory authorization that Congress has conferred on the strike. Furthermore, the act contains two specific prohibitions on the employer's use of economic pressure. Under Section 8(a)(3) employers are not permitted to apply pressure to discriminate among employees "in regard to hire or tenure of employment or any term or condition of employment" for the purpose of accomplishing certain prohibited objectives,¹⁶ including, among others, discouraging union affiliation or participation in concerted activities such as economic strikes.¹⁷ Similarly, an employer violates Section 8(a)(1) if pressure is employed which would "interfere with, restrain, or coerce employees in the exercise" of their rights to organize, form, join, or assist unions, bargain collectively, or engage in other concerted activities for their mutual aid and protection.¹⁸

II. THE LOCKOUT—CURRENT AREAS OF AGREEMENT

Before the passage of the Wagner Act in 1935, the lockout was considered a legitimate exercise of employer rights.¹⁹ The Wagner Act, at least on its face, did not condemn the device and, for that matter, it was not prohibited in any of the several wartime measures regulating labor pressures which were enacted or considered by Congress.²⁰ Further, as noted above, the Taft-Hartley Act made several specific references to lockouts.²¹ Nevertheless, the Board, even with no explicit statutory support, has generally found it an improper exercise of economic coercion.²²

Stat. 155 (1947), 29 U.S.C. § 178 (1958) (a "strike or lockout" that creates a national emergency is subject to the injunctive powers of the federal judiciary).

14 N.L.R.B. v. Truck Drivers Local No. 449, 353 U.S. 87, 92-93 (1957).

15 See, e.g., H.R. Rep. No. 245, 80th Cong., 1st Sess. 21-22, 70, 82 (1947); S. Rep. No. 105, 80th Cong., 1st Sess. 24 (1947); H. R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 34-35 (1947). See also, e.g., 93 Cong. Rec. 1827-28, 1893-94 (1947); "So far as the bill is concerned, we have proceeded on the theory that there is a right to strike and that labor peace must be based on free collective bargaining. We have done *nothing* to outlaw strikes for basic wages, hours, and working conditions after proper opportunity for mediation." 93 Cong. Rec. 3835 (1947). (Emphasis added.) (Remarks of Senator Taft.)

16 See 49 Stat. 452 (1935), as amended, 29 U.S.C. § 158(a)(3) (1958).

17 See N.L.R.B. v. Erie Resistor Corp., 373 U.S. 221, 233 (1963); Radio Officers' Union v. N.L.R.B., 347 U.S. 17, 39-40 (1954); N.L.R.B. v. Wheeling Pipe Line, Inc., 299 F.2d 391 (8th Cir. 1956); Republic Steel Corp. v. N.L.R.B. 114 F.2d 820 (3d Cir. 1940).

18 See 49 Stat. 452 (1935), as amended, 29 U.S.C. § 158(a)(1) (1958).

19 See, e.g., Iron Molders' Union v. Allis-Chalmers Co., 166 Fed. 45 (7th Cir. 1908); Atchison, Topeka and Santa Fe Ry. v. Gee, 140 Fed. 153 (S.D. Iowa 1905); Denbo, 14 LAB. L. J. 400, 401-02 (1963).

20 E.g., War Labor Disputes Act, ch. 144, § 3, 57 Stat. 163 (1943); H. R. 4908, 79th Cong., 1st Sess., § 4(a)(2) (1945).

21 See *supra* note 13.

22 See, e.g., Square Building & Ruling Co., 146 N.L.R.B. No. 21 (1964); Nelson Mfg. Co., 138 N.L.R.B. 883, (1962); St. Cloud Foundry & Machine Co., Inc., 130 N.L.R.B. 911 (1961); Utah Plumbing & Heating Contractors Ass'n., 126 N.L.R.B. 973 (1960), *enforced*, 294 F.2d 165 (10th Cir. 1961); Dalton Brick & Tile Corp., 126 N.L.R.B. 473 (1960), *enforcement denied*, 301 F.2d 886 (5th Cir. 1962); Morand Bros. Beverage Co., 91 N.L.R.B. 409 (1950), *remanded*, 190 F.2d 576 (7th Cir. 1951), *on remand*, 99 N.L.R.B. 1448 (1952), *enforced*, 204 F.2d 529 (7th Cir.), *cert. denied*, 346 U.S. 909 (1953); 73 HARV. L. REV. 787, 789 (1960).

There is no serious doubt that a lockout employed for the obvious purpose of thwarting unionism or discriminating against union members is illegal.²³ For example, an employer who locks out his employees immediately after a union requests recognition rights has unquestionably violated Sections 8(a)(1) and (3).²⁴ Similarly, an employer who locks out only those employees who are union members cannot reasonably deny that he has, through the use of economic pressure, discriminated in a manner calculated to discourage union membership.²⁵ This type of lockout is not actually a bargaining device; infrequently it is employed prior to negotiations and often for the purpose of eliminating the need to negotiate by destroying the union's support.

There are, however, special circumstances which are thought to justify the use of the lockout as a means of exerting pressures, even though the Board currently considers the lockout "a drastic form of discrimination"²⁶ which is presumptively violative of the Act.²⁷ These circumstances are all dependent upon a bargaining relationship and are within the comprehension of the term "bargaining lockout."²⁸

It is generally agreed that when an employer is faced with an unusual economic or operational situation and, due to his unique situation, is peculiarly vulnerable to an unexpected strike, a bargaining lockout in order to eliminate or minimize the risk of extreme losses is legal.²⁹ The essence of this type of "special circumstance" is the unusual nature of the employer's business circumstances; the employer must be able to prove that a sudden unanticipated

23 See e.g., Clodomiro Isolino, dba Ravena Sportswear, 142 N.L.R.B. 1299 (1963); Nelson Mfg. Co., *supra* note 22; North Country Motors, Ltd., 133 N.L.R.B. 1479 (1961); Standard Industries, Aggregate Division, 133 N.L.R.B. 320 (1961); Liberty Coach Co., 128 N.L.R.B. 160 (1960); Ralph's Wonder, Inc., 127 N.L.R.B. 1280 (1960).

24 See Square Bldg. & Ruling Co., 146 N.L.R.B. No. 21 (1964).

25 See Anchorage Businessmen's Ass'n, 124 N.L.R.B. 662 (1959), *enforced*, 289 F.2d 619 (9th Cir. 1961).

26 Brown Food Store, Inc., 137 N.L.R.B. 73, 75 (1962).

27 Dalton Brick & Tile Corp., 126 N.L.R.B. 473, 483 (1960).

28 The Board described the "special circumstances" concept in the following manner:

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. This right may, under some circumstances, embrace the curtailment of operations before the precise moment the strike has occurred. . . . 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. . . . The application of broad principles involving the balancing of factors whose weight, both absolutely and relatively, will vary according to the circumstances in which they occur, must necessarily await specific cases. Betts Cadillac Olds, Inc., 96 N.L.R.B. 268, 286-87 (1951).

29 See, e.g., Betts Cadillac Olds, Inc., *supra* note 28 (auto repair shops permitted to lockout in order to avoid accepting new repair orders from customers requiring prompt service); International Shoe Co., 93 N.L.R.B. 907 (1951) (lockout permitted to avoid unusual losses caused by interdependence of the employer's production processes); Duluth Bottling Ass'n, 48 N.L.R.B. 1335 (1943) (lockout permitted in order to avoid material spoilage). Compare American Brake Shoe Co., 116 N.L.R.B. 820, 827 (1956) (Board stated that the unusual-situation lockout is permitted only when the anticipated economic losses are in excess of those normally incident to a strike) with Packard Bell Electronics Corp., 130 N.L.R.B. 1122 (1961) (Board placed little significance on the anticipated amount of monetary loss).

strike would in all likelihood result in undue hardship to the company or its customers.³⁰

Another special circumstance usually recognized as justifying a bargaining lockout is a union's serious threat of immediate strike action,³¹ but a modest degree of caution and the cases indicate that there must be reasonable and substantial grounds for believing that the strike is imminent.³² Moreover, a careful reading of these cases leads one to the conclusion that the Board will condone a lockout in response to an imminent strike only if the nature of the employer's operations is such that an untimely strike would result in unusual damage to the business.³³ In short, this type of bargaining lockout is valid only when there is no doubt of imminent strike action and, due to the nature of the employer's business, a variation of days or hours in the timing of the work stoppage could cause unusually severe economic hardship.

Another type of allowable shutdown is one which is responsive to general economic conditions, even though these conditions may be the result of protected concerted activities.³⁴ The Board's opinions on this type of work cessation are frequently misleading as they are sprinkled with the specialized terminology and analytical discourse of the lockout case. The reason for this is that if the economic considerations are found to be a mere subterfuge for discriminatory conduct, then the employer's refusal to furnish his employees with work constitutes an unlawful lockout.³⁵ On the other hand, if the claimed economic motivation is upheld, the employer has done no more than to lay off employees because of lack of work,³⁶ elimination of jobs,³⁷ dangerous working conditions,³⁸ or inability to continue operating on a sound basis.³⁹ In this latter group of cases, the lockout terminology seems inappropriate, but, in the Board's defense, it only becomes so after the work cessation is deemed legal.

The last special circumstance consistently held to justify a bargaining lockout is responsiveness to "whipsaw" strike action by a union against a multi-

30 See Tidewater Express Lines, Inc., 142 N.L.R.B. 1111 (1963).

31 See, e.g., Packard Bell Electronics Corp., 130 N.L.R.B. 1122 (1961); Betts Cadillac Olds, Inc., 96 N.L.R.B. 268 (1951).

32 See American Ship Bldg. Co., 142 N.L.R.B. 1362 (1963); Hercules Powder Co., 127 N.L.R.B. 333 (1960); cf. J. R. Simplot Co., 145 N.L.R.B. No. 16 (1963).

33 See Associated Gen. Contractors, Ga. Branch, 138 N.L.R.B. 1432 (1962); cf. J. R. Simplot Co., *supra* note 32; Tidewater Express Lines, Inc., 142 N.L.R.B. 1111 (1963).

34 See Pepsi Cola Bottling Co. of Beckley, Inc., 145 N.L.R.B. No. 82 (1964) (inability to make important equipment repairs because of strike and picketing of craft union employees caused dangerous and highly unsatisfactory operating conditions which justified the employer's lockout of production employees); The Associated Gen. Contractors of America, Inc., 105 N.L.R.B. 767 (1953) (strike by plumbers of construction projects made it impractical for the employer to continue operating and justified lockout of nonstriking employees).

35 See, e.g., American Ship Building Co., 142 N.L.R.B. 1362 (1963); Ripley Mfg. Co., 138 N.L.R.B. 1452 (1962); Savoy Laundry, Inc., 137 N.L.R.B. 306 (1962); New England Web, Inc., 135 N.L.R.B. 1019 (1962). Moreover, even though there is legitimate economic reason for a lockout, if anti-union animus is a contributing factor in the decision, the lockout is illegal. See Ethel J. Hinz, Ex'rx, 140 N.L.R.B. 232 (1962) (lockout accelerated because of union request for recognition); Nevada Tank & Casing Co., 131 N.L.R.B. 1352 (1961) (attempt to thwart union organization).

36 See H. H. Zimmerli, 133 N.L.R.B. 1217 (1961).

37 See Gen. Counsel Admin. Rul. No. SR-1972, 50 L.R.R.M. 1120 (1962) (automation).

38 See Pepsi Cola Bottling Co. of Beckley, Inc., 145 N.L.R.B. No. 82 (1964); cf. Building Contractors Ass'n of Rockford, Inc., 138 N.L.R.B. 1405 (1962). But cf. Texas Gas Corp., 136 N.L.R.B. 355 (1962).

39 See The Associated General Contractors of America, Inc., 105 N.L.R.B. 767 (1953).

employer bargaining unit.⁴⁰ The whipsaw tactic is the calculated striking—separately and successively—of each member of the unit in order to place the struck employer in the precarious position of losing his business to the operating competitors, and thus force him to accept the union's negotiating demands or risk financial disaster. "If the union could successfully strike one at a time, the other members of the employer unit would in ordinary circumstances continue operating to the severe economic damage of the struck member, and each in turn could be driven to the wall in the 'whipsaw.'"⁴¹ Therefore, in order to afford the multi-employer bargaining unit the power to preserve its integrity, or stated another way, its very existence, the nonstruck members of the unit are permitted to lock out their employees in response to a strike against one member.⁴²

The Supreme Court, in upholding this type of lockout, captured the essence and difficulty of the Board's task in administering the National Labor Relations Act:

Although the Act protects the right of the employees to strike in support of their demands, this protection is not so absolute as to deny self-help by employers when legitimate interests of employees and employers collide. Conflict may arise, for example, between the right to strike and the interest of small employers in preserving multi-employer bargaining as a means of bargaining on an equal basis with a large union and avoiding the competitive disadvantages resulting from nonuniform contractual terms. The ultimate problem is the balancing of the conflicting interests. The function of striking that balance to effectuate national labor policy is often a difficult and delicate responsibility. . . .⁴³

Therein lies the nub of this complicated problem. It seems indisputable that a bargaining lockout, whatever its form or timing may be, in some way discriminates against employees because they, or their fellow union members, have pursued a course of concerted activity authorized and protected by the Act. In reviewing an analogous problem, the Supreme Court recently conceded that an employer's absolute right permanently to replace employees striking for bargaining objectives "may be . . . obviously discriminatory and may tend to discourage union membership,"⁴⁴ but this concession did not cause the Court

40 A multi-employer bargaining unit is a group of employers who have united for the purpose of collective bargaining. Although the text of the statute does not contain an explicit recognition or approval of an employer grouping, the Supreme Court found that multi-employer bargaining activity antedated the statute. The Court then concluded that such a long-standing practice is a legitimate method of increasing bargaining power and simultaneously eliminating competitive economic disparity among its participants caused by sizeable wage rate variations within the geographic sphere of competition, local, regional, or national. *N.L.R.B. v. Truck Drivers Local No. 449*, 353 U.S. 87, 94-96 (1957) [hereinafter referred to as the *Buffalo Linen* case]. See generally Brundage, *The Lockout and Multi-Employer Bargaining*, 14 *LAB. L.J.* 976 (1963).

41 *Brown Food Store, Inc.*, 137 N.L.R.B. 73, 76 (1962), *enforcement denied*, 319 F.2d 7 (10th Cir. 1963), *cert. granted*, 375 U.S. 962 (1964).

42 See *Buffalo Linen*, 353 U.S. 87 (1957); *accord*, *Clune v. Publishers' Ass'n of New York City*, 214 F. Supp. 520 (S.D.N.Y. 1963); *Publishers' Ass'n of New York City*, 139 N.L.R.B. 1092 (1962), *affirmed sub nom.* *New York Mailers Union No. 6 v. NLRB*, 327 F.2d 292 (2d Cir. 1964). Compare *Industrial Conference Bd. & Kitsep County Retail Druggists' Ass'n*, 141 N.L.R.B. 625 (1963).

43 *Buffalo Linen*, 353 U.S. 87, 96 (1957).

44 *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 232 (1963).

to reconsider its earlier decision legitimizing the permanent replacement policy.⁴⁵

It was long ago determined that these questions cannot be resolved by literal applications of the statute.⁴⁶ Employer conduct many times appears to be violative of certain statutory provisions, "but as often happens, the employer may counter by claiming that his actions were taken in the pursuit of legitimate business ends and that his dominant purpose was not to discriminate or to invade union rights but to accomplish business objectives acceptable under the Act."⁴⁷ When these problems are presented to the Board for disposition, that tribunal has the difficult task "of weighing the interest of employees in concerted activity against the interest of the employer in operating his business in a particular manner and balancing in the light of the Act and its policy the intended consequences upon employee rights against the business ends to be served by the employer's conduct."⁴⁸

Once this decision-making process is grasped, it becomes apparent that the areas of agreement discussed above are all characterized by one common element: the employer conduct was approved only when the employer interest involved was one of sufficient importance to be worthy of protection by application of economic power which, as a natural consequence, dilutes a conflicting employee interest. This is consistent with the Supreme Court's mandate: cases dealing with the exercise of economic pressure by employers to the detriment of employee rights should be resolved by first ascertaining what interest the employer is trying to protect and then weighing it against the employee interest being diminished.⁴⁹ Ultimately, it will always be necessary for the Board to forge lines of restraint,⁵⁰ but the first confrontation can produce only one victor.

III. THE LOCKOUT—CURRENT AREAS OF DISAGREEMENT

Two forms of employer pressure are the subjects of considerable controversy, and both are embodied in law suits pending decision in the United States Supreme Court. The first case, *Brown Food Store v. NLRB*,⁵¹ deals with the right of nonstruck employers in a multi-employer bargaining association to lock out their employees in response to a whipsaw strike against one member

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

46 *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941):

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

See also *NLRB v. Erie Resistor Corp.*, 373 U.S. 221 (1963); *Teamsters Local 357 v. NLRB*, 365 U.S. 667, 679 (1961); *Buffalo Linen*, 353 U.S. 87 (1957); *Radio Officers Union v. NLRB*, 347 U.S. 17 (1954).

47 *NLRB v. Erie Resistor Corp.*, *supra* note 46, at 228.

48 *Id.* at 229.

49 *Ibid.*

50 For example, in the *Mackay* case, 304 U.S. 333 (1938), the Supreme Court held that a struck employer could protect his interest in business continuity by hiring new employees to replace the strikers, but in *Erie Resistor*, 373 U.S. 221 (1963), the Court qualified *Mackay* by prohibiting a struck employer from giving the replacements super-seniority even though the employer cannot otherwise obtain new employees.

51 137 N.L.R.B. 73 (1962), *enforcement denied*, 319 F.2d 7 (10th Cir. 1963), *cert. granted*, 375 U.S. 962 (1964).

and then continue operating through the use of temporary replacements. The second, *Local 374, Boiler Makers v. NLRB*,⁵² (hereinafter referred to as the *American Ship Building Co.* case) is limited to the single question of whether an employer can lock out his employees during negotiations solely for the purpose of applying economic pressure on them and thereby achieving his bargaining objectives. Although the issues in these cases are similar, at least on the surface, the differences are such that separate treatment seems appropriate.

A. *The Brown Food Store Case — The Employers' Dilemma*

A multi-employer bargaining association, composed of five food retailers, had recognized and bargained with a union for a number of years. Negotiations commenced for a new labor agreement in January, 1960, and by March 2, agreement had been reached on every item except retroactive wage benefits.⁵³ At that time the union was authorized by its members to call a strike if the association refused to make further concessions, and notice of the strike authorization was conveyed to the association's negotiating committee. The employers, through the committee, made it clear that a strike against one would be considered a strike against all, thus leaving the nonstruck members no choice but to lock out. On March 16, the disputed issue still unresolved, one member was struck, and the other four retaliated promptly by locking out. The employers then attempted to continue their business operations; the struck employer hired permanent replacements and the others utilized the services of supervisory personnel, relatives, and a small number of new employees hired on a temporary basis. Negotiations continued during this period, and on April 22, a final agreement was reached. The strike and lockouts were terminated and the locked-out employees reinstated.

The Board found the lockout legal under the *Buffalo Linen* ruling, but the subsequent operational activities of the nonstruck employers were held violative of Sections 8(a)(3) and (1).⁵⁴ The business continuation through the use of temporary replacements, according to the three-man majority, "upset the delicate balancing of interests struck in the *Buffalo Linen* case and hence was not privileged under that decision."⁵⁵ *NLRB v. Mackay Radio & Tel. Co.*,⁵⁶ the United States Supreme Court decision permitting a struck employer permanently to replace economic strikers with new employees, was considered inapposite to the nonstruck employers' predicament. A struck employer is permitted, under *Mackay*, to hire replacements because his own employees will not work at the prevailing terms; only by hiring such replacements can he remain operational. But an employer who locks out his employees — employees willing to continue work on the employer's terms — cannot then resort to replacements. According to the Board, this type of lockout is valid solely as a defensive measure

52 *American Ship Bldg. Co.*, 142 N.L.R.B. 1362 (1963), enforced sub nom. *Local 374, Boiler Makers Union v. NLRB*, 331 F.2d 839 (D.C. Cir. 1964), cert. granted, 33 U.S.L. Week 3115 (Oct. 13, 1964).

53 It is not uncommon for agreements reached after expiration of a previous contract to provide for retroactive application of increased economic benefits.

54 *Brown Food Store*, 137 N.L.R.B. 73 (1962).

55 *Id.* at 74.

56 304 U.S. 333 (1938).

and only when premised on economic necessity. The post-lockout resumption of business with replacements negates the premise and, therefore, converts the whole scheme into an offensive or retaliatory use of force.⁵⁷

The dissenters saw the problem in much simpler terms, and their logic seems both ingenious and irrefutable: *Buffalo Linen* stands for the proposition that nonstruck members of a multi-employer bargaining unit can convert a partial-unit, or whipsaw, strike into a whole-unit strike; *Mackay* stands for the proposition that a struck employer can permanently replace his striking employees; accordingly, the nonstruck employers did no more than temporarily replace employees who could have been permanently replaced.⁵⁸ Unfortunately, careful analysis discloses this apparently impregnable logical edifice to be little more than a tautological structure with a foundation of semantic clay. Obviously, once the out-of-work situation created by the lockout is characterized as a "strike," the legal implications of the characterization supply the answers to problems caused by the use of replacements.

The Tenth Circuit refused to enforce the Board's order.⁵⁹ The majority was of the opinion that the Board's decision would render the employers' right to lock out meaningless as it leaves the multi-employer unit members only three unacceptable alternatives: (1) the nonstruck employers can lock out their employees in response to the whipsaw strike, but, without the privilege to hire replacements, unity could be maintained only if the one struck employer voluntarily waives his right to continue operating with the use of replacements; (2) if the nonstruck employers locked out but only the struck employer hired replacements, then an economic advantage would pass to the struck employer and virtually ensure the success of the whipsaw tactic;⁶⁰ or (3) the nonstruck employers can refuse to lock out their employees and let the whipsaw tactic take its natural course. The Court believed that this disparity of interests among the members of a multi-employer bargaining unit would constitute a serious deterrent to the exercise of their fundamental right to preserve the unit's economic integrity. Though the nonstruck employers could continue operating merely by retaining their own regular employees, yet, to make it difficult, if not impossible, for them to do otherwise causes a forfeiture of the lockout right. "The preservation of the multi-employer bargaining unit, approved as it is by Congressional consideration and judicial decision, is necessary to assure economic justice. It would be largely destroyed by leaving in the hands of the striking agency the power, by law, to determine which employers among the group could remain operative and which could not."⁶¹ Therefore, the Court concluded, the Board's decision "clearly fails to balance the legitimate interests of the parties and constitutes a prohibited determination by the Board of the economic weapons available to employers faced with a whipsaw strike."⁶²

57 137 N.L.R.B. 73, 76.

58 *Id.* at 77-78.

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

60 It seems likely that the nonstruck employers would predicate their lockouts on the condition that the struck employer also remain inoperative.

61 NLRB v. Brown, 319 F.2d 7, 11 (10th Cir. 1963).

62 *Ibid.* The court in reaching its decision relied heavily upon NLRB v. Insurance Agents' Union, 361 U.S. 477 (1960).

The Court's holding in *Brown Food Store* closely paralleled an earlier decision.⁶³ The latter considered the right of employers to employ a legal *Buffalo Linen* lockout and then recall the locked-out employees for a minimum number of hours each week in order to disqualify them under state law for unemployment compensation.⁶⁴ As in *Brown Food Store*, there was no question as to the legality of the lockout; the sole issue for adjudication was whether employers, once having exercised the legal right to lock out their employees, can exert still more economic pressure for the admitted purpose of strengthening their bargaining posture. The Board believed this post-lockout pressure upset the balance struck in the *Buffalo Linen* case and, therefore, was illegal.⁶⁵ The Ninth Circuit disagreed with this conclusion and refused to enforce the agency's order.⁶⁶ The Court, in a rather curious opinion, summarily dismissed the 8(a)(3) discrimination problem by deciding that there can be no discrimination when all employees are treated equally.⁶⁷ Once "over" the discrimination hurdle, the Court then considered the 8(a)(1) interference-with-protected-employee-activities problem. It was recognized that the answer was neither simple nor obvious, but, fortunately, the Supreme Court's beacon light opinion in *NLRB v. Insurance Agents' Union*⁶⁸ enabled the Court quickly "to see the light" and thus eliminated the need for critical analysis and accommodation of conflicting legitimate interests. In the *Insurance Agents'* case, we are told, the Supreme Court held that either party to a labor dispute can employ every conceivable form of economic pressure unless specifically condemned by the act.⁶⁹ Thus, since the Board was then admonished for choosing the types of weapons which bargaining parties may use to gain acceptance of their demands, the same doctrinaire conclusion must apply in the instant case. The Ninth Circuit, finding that "the activities here involved have never been specifically outlawed by Congress,"⁷⁰ easily concluded that the Board again had exercised power which Congress had not given, and, therefore, its decision must fall.⁷¹

63 See *NLRB v. Great Falls Employers' Council*, 277 F.2d 772 (9th Cir. 1960), *denying enforcement* of 123 N.L.R.B. 974 (1959).

64 Under Montana law, an eligible applicant for unemployment compensation receives \$32.00 per week for a period of twenty-two weeks, but an otherwise eligible applicant is rendered ineligible for such compensation for any week in which he is employed in excess of one eight-hour day and earns wages in excess of \$15.00. See Ch. 140, Montana Sess. Laws (1957). If the locked-out employees refused to accept the offered employment, they would thereby convert their employment status to "strikers," which would also serve to disqualify them for unemployment compensation. See *ibid*.

65 123 N.L.R.B. 974 (1959).

66 See *NLRB v. Great Falls Employers' Council*, 277 F.2d 772 (9th Cir. 1960).

67 *Id.* at 775.

68 361 U.S. 477 (1960).

69 *NLRB v. Great Falls Employers' Council*, 277 F.2d 772, 776-77 (9th Cir. 1960).

70 *Id.* at 777.

71 The court quoted and relied upon Professor (now Solicitor General) Cox's famous declaration that "collective bargaining is a brute contest of economic power somewhat masked by polite manners and voluminous statistics." *Id.* at 776. It might be suggested, however, that the author of that statement intended it to be interpreted in context; the failure to present the statement in its whole is tantamount to a distortion of its true meaning:

Collective bargaining is curiously ambivalent even today. In one aspect collective bargaining is a brute contest of economic power somewhat masked by polite manners and voluminous statistics. As the relation matures, Lilliputian bonds control the opposing concentrations of economic power; they lack legal sanctions but are nonetheless effective to contain the use of power. Initially it may be only fear of the economic consequences of disagreement that turns the parties to facts, reason, a sense of responsibility,

Although the facts in the *Brown Food Store* case are slightly different, it is submitted that analytically the two cases are indistinguishable.⁷² Both raise the question of whether an employer-unit (single or multiple) that has legally locked out its employees can exert additional economic pressure on the employees and the union for the purpose of bringing the labor dispute to a conclusion on terms desired by the employer-unit.

B. *The American Ship Building Co. Case — The Employees' Dilemma*

The employer had recognized a group of eight unions as the joint representative of his employees, and the parties had entered into a number of collective bargaining agreements, the last scheduled to expire on August 1, 1961. Prior to this date, negotiations for a new agreement commenced, but by August 1, many items still remained unsettled. On August 11, the employer locked out most of the employees, and it was finally decided by the Board that no legitimate economic reason existed which would justify the lockout, and, therefore, it must be assumed that the motive was to impose pressure on the employees and the unions to achieve bargaining objectives. The agency, consistent with its previous decisions,⁷³ held that the employer violated Sections 8(a)(3) and (1).⁷⁴ The reviewing Court affirmed this conclusion,⁷⁵ and the United States Supreme Court granted certiorari and instructed that it be scheduled for oral argument immediately after *Brown Food Store*.⁷⁶ The Court limited its review to one question: whether, in a collective bargaining context, a lockout is the corollary of a strike.

This issue is of paramount importance to the future socio-economic development of our society. As noted above, the bargaining lockout is an extremely potent weapon, and if it can be employed with abandon every time a union refuses to accept an employer's terms, the long-standing distribution of power between capital and labor will undergo a substantial readjustment. Only an oracle could prophesy the exact effects this reallocation would work on our society, but it does not seem unreasonable to speculate that the impact would be sizeable.⁷⁷

a responsiveness to government and public opinion, and moral principle; but in time these forces generate their own compulsions, and negotiating a contract approaches the ideal of informed persuasion.

Cox, *The Duty To Bargain in Good Faith*, 71 HARV. L. REV. 1401, 1409 (1958). (Emphasis added). Perhaps the judicial phobia of overemphasizing the "brute contest of economic power" aspect of collective bargaining and the corresponding neglect of the "sense of responsibility" and "ideal of informed persuasion" aspects is a prime cause of the deterioration of the collective bargaining system. See Duvin, *The Duty To Bargain: Law in Search of Policy*, 64 COLUM. L. REV. 248, 284-85, 286-87, 291-92 (1964).

72 *Contra*, Denbo, *Is the Lockout the Corollary of the Strike?*, 14 LAB. L.J. 400, 408 (1963).

73 *E.g.*, Ripley Mfg. Co., 138 N.L.R.B. 1452 (1962); Savoy Laundry, Inc., 137 N.L.R.B. 306 (1962); Texas Gas Corp., 136 N.L.R.B. 355 (1962); New England Web, Inc., 135 N.L.R.B. 1019 (1962); Nevada Tank & Casing Co., 131 N.L.R.B. 1352 (1961); Hercules Powder Co., 127 N.L.R.B. 333 (1960).

74 142 N.L.R.B. 1362 (1963).

75 *Boiler Makers Union v. NLRB*, 331 F.2d 839 (D.C. Cir. 1964) (per curiam).

76 33 U.S.L. WEEK 3115, 3128 (Oct. 13, 1964).

77 "Future historians may find, as the author suspects, that one of the most significant developments of this century in the domestic affairs of our nation was the advent of collective bargaining as a major social and economic institution. Every community has in some measure been touched and changed by it, and this change is still going on." Duvin, *supra* note 71, at 248.

Six of the ten federal appellate courts have considered this particular problem, and they have divided equally. In agreement with the District of Columbia Circuit's decision in *American Ship Building* are the Third⁷⁸ and Tenth⁷⁹ Circuits. On the other hand, the Fifth,⁸⁰ Seventh,⁸¹ and Ninth⁸² Circuits have reached the opposite result, although two of the decisions are more than ten years old.

In *Quaker State Oil Refining Corp. v. NLRB*,⁸³ the Third Circuit concluded that the employer's initiation of an out-of-work situation to achieve a bargaining objective is illegal as such a tactic is contradictory to the employees' right to strike and thus forbidden by Section 13.⁸⁴ The Tenth Circuit, in *Utah Plumbing & Heating Contractors Ass'n v. NLRB*,⁸⁵ reached the same result, but the decision seems premised on a rather artificial concept of collective bargaining⁸⁶ and adds little to the judicial dialogue between the conflicting camps.

The opposition also has exhibited certain analytical disfigurations. The Ninth Circuit, in 1953, rightly held that the nonstruck members of a multi-employer bargaining unit could respond to a whipsaw strike by locking out their employees,⁸⁷ basing its decision on the equally sound assertion that the preservation of vital employer interests such as the bargaining power and economic strength derived from unity is permissible even though accomplished by a lockout.⁸⁸ After having completed this difficult exercise of legal analysis and having balanced and accommodated the parties' conflicting interests, the Court added the blanket conclusion that "it is apparent that the power of a union to initiate a strike which calls out all the employees in an entire or substantial part of an industry is no more than equalled by the power of the employers to lock out temporarily all or a substantial part of such employees."⁸⁹ In another pre-*Buffalo Linen* case,⁹⁰ the court approved the right to lock out in response

78 *Quaker State Oil Refining Corp. v. NLRB*, 270 F.2d 40 (3d Cir. 1959), *cert. denied*, 361 U.S. 917 (1959).

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

80 *NLRB v. Dalton Brick & Tile Corp.*, 301 F.2d 886 (5th Cir. 1962).

81 *Morand Bros. Beverage Co. v. NLRB*, 190 F.2d 576 (7th Cir. 1951), 204 F.2d 529 (7th Cir. 1953), *cert. denied*, 346 U.S. 909 (1953).

82 *Leonard v. NLRB*, 205 F.2d 355 (9th Cir. 1953).

83 270 F.2d 40 (3d Cir. 1959), *cert. denied*, 361 U.S. 917 (1959).

84 61 Stat. 151 (1947), 29 U.S.C. § 163 (1958): "Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike. . . ."

85 294 F.2d 165 (10th Cir. 1961).

86 The court indicated that since negotiations were proceeding "in conventional manner" and "had not been terminated," the employer association could not construe as a strike threat the strike authorization conferred on the union "in the event no better offer should be received." *Id.* at 168. If the employer association was not prepared to make a "better offer," does that mean that the legal rights of its members hinge on the vocal chords of the union negotiators? The imminence of strike action is not a matter of words but of conditions, and any attempt to tailor the imminence concept to a particular word formula is, to say the least, artificial.

87 *Leonard v. NLRB*, 205 F.2d 355 (9th Cir. 1953). It is important to note that this decision predates *Buffalo Linen*, *NLRB v. Truck Drivers Local 449*, 353 U.S. 87 (1957), the whipsaw/lockout decision.

88 *Leonard v. NLRB*, *supra* note 87, at 357.

89 *Ibid.*

90 *Morand Bros. Beverage Co. v. NLRB*, 190 F.2d 576 (7th Cir. 1951), 204 F.2d 529 (7th Cir. 1953), *cert. denied*, 346 U.S. 909 (1953).

to a whipsaw strike not merely because of the implied recognition in the Taft-Hartley Act that such a right exists,⁹¹ "but because the lockout should be recognized for what it actually is, *i.e.*, the employer's means of exerting economic pressure on the union, the corollary of the union's right to strike."⁹²

In *NLRB v. Dalton Brick & Tile Corp.*,⁹³ the Fifth Circuit recently disposed of the problem in the same manner as its two sister Circuits did over ten years ago. The Court's reasoning was simple: *Insurance Agents*⁹⁴ stands for the proposition that economic weapons, exerted in aid of bargaining objectives, are legal unless specifically condemned by a provision of the Act;⁹⁵ improper motive or intent cannot be inferred hypothetically but must have a reasonable basis in fact;⁹⁶ therefore, since there is no reason to believe the employer was doing anything more than "trying to make a better bargain — through the use of its economic arguments re-enforced by the pressure of work stoppage,"⁹⁷ there was no violation of the Act.⁹⁸ When the Board makes any attempt to "balance the relative powers of the competing forces its authority must be found in the statute."⁹⁹ Thus, the unmistakable implication is that the bargaining lockout is the equivalent of the union's right to strike, and so long as the employer is attempting only to reinforce his bargaining posture, there is nothing unlawful in locking out employees.¹⁰⁰

The review is now complete, the arguments on either side have been ventilated, and both labor and management anxiously await solutions to their dilemmas. An employer is uncertain whether, once having legally locked out his employees, he can exert additional pressure to make the lockout more effective; employees and unions are uncertain whether, once having entered negotiations, employers can temporarily terminate operations and thereby deprive them of the right to withhold their labor in the pursuit of bargaining objectives.

IV. CONCLUSION

A. The Primary Cause of the Dilemmas

When there is a wide breadth of thought such as that currently existing

⁹¹ The "implied recognition" was deduced from the use of the term "lock-out" in § 8(d)(4) of the Act.

⁹² *Morand Bros. Beverage Co. v. NLRB*, 190 F.2d 576, 582 (7th Cir. 1951).

⁹³ 301 F.2d 886 (5th Cir. 1962).

⁹⁴ *NLRB v. Insurance Agents' Int'l Union*, 361 U.S. 477 (1960).

⁹⁵ *NLRB v. Dalton Brick & Tile Corp.*, 301 F.2d 886, 894 (5th Cir. 1962).

⁹⁶ *Id.* at 898. The court rejected the widely held assumption that a lockout, by its very nature, interferes with, restrains, or coerces employees in the exercise of their protected rights (such as striking for better wages). Instead of such "theoretical" or "hypothetical" abstraction, the real question is "whether in the *actual setting* of the *particular parties* . . . the conduct under review could reasonably have been looked on, or considered as, or interpreted to be an interference with some protected right." *Ibid.*

⁹⁷ *Ibid.* The court also rejected the conclusion that the employer, in locking out his employees during contract negotiations with the union, "either *expected*, or *hoped for*, the destruction or *deterioration*" of the union's support. (Emphasis added). This conclusion was reached because in *Teamsters Local 357 v. NLRB*, 365 U.S. 667, 675 (1961), an 8(a)(3) hiring hall case, the United States Supreme Court stated that "[i]t is the 'true purpose' or 'real motive' in hiring or firing that constitutes the test." (Emphasis added). The 8(a)(3) discrimination test — not the 8(a)(1) interference-with-protected-rights test presented in *Dalton* — was the test referred to.

⁹⁸ *Ibid.*

⁹⁹ *Id.* at 899. Is it possible that the Board thought otherwise?

¹⁰⁰ It is undoubtedly true that this conclusion could not have been reached without the thrust of *NLRB v. Insurance Agents' Int'l Union*, 361 U.S. 477 (1960).

among tribunals that have viewed bargaining lockout problems, it is always difficult — and often presumptuous — to attempt to isolate one historical factor and identify it as the major cause of the schism. Nevertheless, certain occurrences cannot be overlooked and, therefore, some discussion of cause seems appropriate before a solution is offered.

It has long been accepted that the National Labor Relations Act is a panorama-type statute which cannot possibly be given a literal interpretation.¹⁰¹ Furthermore, it is obvious, from even a superficial reading, that there are numerous rights and interests, allocated and distributed to employers, unions and society, which must, when extended, conflict with other rights and interests. This conflict produces a tension which can be relieved only by a judicial decision-making process of balancing and accommodating. For example, an employer has a right to discharge an incompetent employee, and employees have a right to join unions without interference from their employer. If an incompetent employee happens also to be a union organizer, a foreseeable result of his discharge is quite clearly an interference with the group interest in union membership.¹⁰² This type of interpretative problem is by no means unique; the adjudicative process, at any level, often requires accommodation of conflicting legitimate interests, and wise men long ago taught us that the process must be guided by the primary objective of the legislation in question.¹⁰³

The United States Supreme Court recognized this problem in *Buffalo Linen*¹⁰⁴, and, in an opinion which squarely faced the difficulties of balance and accommodation, affirmed the Board's decision and, of far greater importance, its decision-making process. The Court pointed out that conflict may exist "between the right to strike and the interest of small employers in preserving multi-employer bargaining . . . as a means of bargaining on an equal basis with a large union and avoid[ing] the competitive disadvantages resulting from non-uniform contractual terms. *The ultimate problem is the balancing of conflicting legitimate interests.*"¹⁰⁵

The balance and accommodation of "conflicting legitimate interests" in labor relations has never been easy, but the Court and the Board have generally remained steadfast to the principle and its application. Although this annealing process has been conducted in an area where unusually strong feelings

101 See *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941); see also *NLRB v. Erie Resistor Corp.*, 373 U.S. 221 (1963); *Teamsters Local 357 v. NLRB*, 365 U.S. 667 (1961); *NLRB v. Truck Drivers Local 449*, 353 U.S. 87 (1957); *Radio Officers Union v. NLRB*, 347 U.S. 17 (1954).

102 See *Teamsters Local 357 v. NLRB*, *supra* note 101, at 679 (concurring).

103 "The Legislature has the power to decide what the policy of the law shall be, and if it has intimated its will, however indirectly, that will should be recognized and obeyed [even though it] not be set out in terms. . . ." *Johnson v. U.S.*, 163 Fed. 30, 32 (1st Cir. 1908) (Holmes, J.); "Compunctions about judicial legislation are right enough as long as we have any genuine doubt as to the breadth of the legislature's intent; and no doubt the most important single factor in ascertaining its intent is the words it employs. But the colloquial words of a statute have not the fixed and artificial content of scientific symbols; they have a penumbra, a dim fringe, a connotation, for they express an attitude of will, into which it is our duty to penetrate and which we must enforce grudgingly when we can ascertain it, regardless of imprecision in its expression." *Commissioner v. Ickelheimer*, 132 F.2d 660, 662 (2 Cir. 1943) (L. Hand, J., dissenting). See generally Cox, *Judge Learned Hand and the Interpretation of Statutes*, 60 HARV. L. REV. 370 (1947).

104 *NLRB v. Truck Drivers Local 449*, 353 U.S. 87 (1957).

105 *Id.* at 96. (Emphasis added).

and emotions still survive, sound legal tenets, designed to effectuate the basic statutory policies, have been forged to guide the parties.¹⁰⁶

The Supreme Court, however, in the *Insurance Agents'* case, seemed to suggest a partial repudiation of this long-standing adjudicative process and thereby struck the blow, perhaps unwittingly, which caused the resultant shift in basic attitudes toward the lockout. The parties in that case had been bargaining for three months in an attempt to reach a new labor agreement. Just prior to the contract expiration date the union announced that if a new contract were not agreed upon by that date, a series of planned on-the-job harassing tactics would be instituted. No agreement was reached and the union began its program of harassment¹⁰⁷ while negotiations continued. The Board held, notwithstanding the union's sincere desire to reach agreement, that its tactics constituted a refusal to bargain.¹⁰⁸

The Supreme Court rejected the Board's conception of collective bargaining as reasoned discussion between parties possessing relatively equal economic power.¹⁰⁹ Quite the contrary, the Court believed that the "presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel of the system. . . ."¹¹⁰

The opinion should have ended with that sentence as the matter in issue had been properly disposed of. However, Mr. Justice Brennan, writing for the Court, apparently believed more exposition necessary, and subsequent dicta concluded that the Board is not empowered to regulate economic weapons unless the act provides a "specific warrant for its condemnation of the *precise* tactics involved here."¹¹¹ Therefore, absent a specific statutory prohibition, the Board

106 One of the most significant accommodations effectuated by the NLRB revolved around an employer's right to continue his business operations and the employees' right to engage in concerted activities without incurring employer retribution. The issue was finally settled by the Supreme Court in *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333 (1938), which determined that a struck employer has the right to permanently replace the strikers. However, in a later case the Court imposed a boundary of restraint on the *Mackay* decision by holding that an employer cannot attract replacements by establishing an employment structure which favors the replacements over the unreplaced employees, even if the employer could not otherwise obtain replacements. See *NLRB v. Erie Resistor Corp.*, 373 U.S. 221 (1963). There are many other examples of accommodation and subsequent demarcation of restraining lines which could be listed. See, e.g., *NLRB v. Bradley Washfountain Co.*, 192 F.2d 144 (7th Cir. 1951); *Boeing Airplane Co.*, 110 NLRB 147 (1954) (both holding that an employer can deviate from the legally imposed collective bargaining requirements when confronted with a business emergency); see also Duvn, *supra* note 71, at 277-79, but the author's personal restraints, imposed by time and space, preclude further discussion. Nevertheless, it cannot be seriously disputed that interest balance and accommodation is an integral and fundamental function of any tribunal called upon to administer our national labor legislation.

107 The employees refused to solicit new business, refused to comply with standard office procedures, asked policy holders to sign "persuasion" petitions, and engaged in mass demonstrations.

108 *Insurance Agents' Int'l Union*, 119 NLRB 768 (1957). The tactics employed by the union were thought to be inconsistent with the basic purposes of the Act. Economic harassment, as the antithesis of reasoned discussion, was held to be a per se violation of the duty to bargain. The District of Columbia Court of Appeals denied enforcement per curiam. *Insurance Agents' Int'l Union v. NLRB*, 260 F.2d 736 (D.C. Cir. 1958). See also *Textile Workers Union v. NLRB*, 227 F.2d 409 (D.C. Cir. 1955), *cert. denied*, 352 U.S. 864 (1956); *Int'l Union, United Mine Workers v. NLRB*, 257 F.2d 211 (D.C. Cir. 1958).

109 See 361 U.S. 477 (1960).

110 *Id.* at 488-89.

111 *Id.* at 490. (Emphasis added.)

has no "flexibility in picking and choosing which economic devices of *labor and management* shall be branded as unlawful."¹¹² The clear implication of these conclusions is that economic weapons, employed in aid of bargaining objectives, are immune from regulation.¹¹³

Mr. Justice Frankfurter, in a separate opinion, took issue with the majority on the extent of the regulatory immunity conferred upon economic weaponry. Obviously, he concedes, the Act "contemplates some play of 'economic pressure,' [but] it does not follow that the purpose in engaging in tactics designed to exert it is to reach agreement *through the bargaining process*. . . ."¹¹⁴

The anguished cry of Justice Frankfurter embodies more than a technical dissent on statutory interpretation; it comprehends the fundamental policy of the National Labor Relations Act, and, in reliance on that doctrine, he suggests that the majority has overlooked the very essence of their Congressional mandate, namely, to promote collective bargaining as the method of peacefully resolving labor disputes and thus relieving society of the socio-economic cancer of frequent industrial strife. His words cannot be improved upon:

The *presupposition* of collective bargaining was the *progressive enlargement of the area of reason in the process* of bargaining through the give-and-take of discussion . . . in order to substitute, in the language of Mr. Justice Brandeis, "processes of justice for the more primitive method of trial by combat." . . . Therefore, in the unfolding of law in this field *it should not be the inexorable premise that the process of collective bargaining is by its nature a bellicose process*. The broadly phrased terms of the Taft-Hartley Act should be applied to carry out the broadly conceived policies of the Act. *At the core of the promotion of collective bargaining, which was the chief means by which the great social purposes of the National Labor Relations Act were sought to be furthered, is a purpose to discourage, more and more, industrial combatants from pressing their demands by all available means to the limits of the justification of self-interests*. This calls for appropriate judicial construction of existing legislation. *The statute lays its emphasis upon reason and a willingness to employ it as the dominant force in bargaining*. That emphasis is respected by declining to take as a postulate of the duty to bargain that the legally impermissible exertions of so-called economic pressure must be restricted to the crudities of brute force.¹¹⁵

It is submitted that the lockout problems today infesting the federal judiciary are illegitimate by-products of the Supreme Court's *Insurance Agents'* opinion. It is, of course, undeniable that the use of economic power underlies the collective bargaining process, but it is terribly dangerous to overemphasize this aspect of the process. The Act, through promotion of collective bargaining, is intended to *discourage* resort to economic exhaustion, and though the use of economic pressures is not prohibited, the same cannot be said for its misuse. This crucial distinction the *Insurance Agents'* majority failed to grasp, and its broad, sweeping reliance upon statutory specificity in the regulation of "what

112 *Id.* at 498. (Emphasis added.)

113 *Accord*, see Fleming, *The Obligation to Bargain in Good Faith*, 47 VA. L. REV. 988, 1006-10 (1961); Comment, 27 MO. L. REV. 121 (1962); 21 MD. L. REV. 234 (1961).

114 361 U.S. at 505. (Emphasis added.)

115 *Id.* at 507-08. (Emphasis added.)

economic sanctions might be permitted *negotiating parties*¹¹⁶ has spawned the ideological division on the lockout and consequent industrial tension caused by the confusion. The Court, in instructing the Board to maintain a "hands off" posture, has repudiated, by implication, the decision-making process of balancing and accommodating conflicting legitimate interests which is so vital to the National Labor Relations Act, its most basic underlying policy, and the future of collective bargaining.¹¹⁷ Accordingly, it seems probable that the Supreme Court's unfortunate discourse in the *Insurance Agents'* case has caused the erosion of the former position, solidified by practice and judicial decision, that a bargaining lockout is lawful only when the employer interest which it is designed to protect is greater, on balance, than the conflicting employee interests which are necessarily diminished or diluted by the lockout.¹¹⁸

B. A Suggested Resolution of the Lockout Dilemmas

In regard to the employers' dilemma, as typified by the *Brown Food Store* case,¹¹⁹ it appears that the Board was not cognizant of the applicable statutory guidelines, nor illumined by national labor policy as amplified by Justice Frankfurter, and, therefore, reached the wrong conclusion, although at no cost to the decision-making process of balance and accommodation. The Board's decision that employers in a multi-employer bargaining unit who have legally locked out their employees¹²⁰ are precluded from taking additional steps to firm-up the impact of the lockout seems unwarranted. The Board premised its holding on a "critical distinction" between the strike situation and the lockout situation: In a strike situation the employees are not willing to work on the employer's terms, but in a lockout situation the employees are willing to work on his terms.¹²¹ Therefore, a lockout followed by a business continuation, is not "defensive" but in fact "offensive" or "retaliatory" and not justified by the economic necessity which prompted the *Buffalo Linen* and *Mackay* decisions.¹²²

It is submitted that this premise is absurd and its authors totally blind to the realities of the whipsaw strategy. Admittedly, the *Mackay* decision¹²³ means that an employer can hire replacements in order to remain operational *only* if his employees refuse to work on his terms, that is, if they have struck. However, to view a whipsaw strike as pressure against only the one struck employer is incredibly naive. The whipsaw, when viewed realistically, is a strike against the entire membership of a multi-employer bargaining unit, aimed at compelling all of them ultimately to accept the contract terms demanded by the union. This is true even though *tactically* the strike action is against one member at a time; the nonstruck employers, by the very virtue of their temporary competitive advantage, stand in no better long-range position than the struck em-

116 *Id.* at 500. (Emphasis added).

117 *Cf. Duvin, The Duty to Bargain: Law in Search of Policy*, 64 COLUM. L. REV. 248, 258-65 (1964) (dealing with another claimed immunity from NLRB regulation).

118 See Section II, *supra*.

119 137 N.L.R.B. 73 (1962), *enforcement denied*, 319 F.2d 7 (10th Cir. 1963), *cert. granted*, 32 U.S.L. Week 3243 (Jan. 6, 1964).

120 In this instance, the lockout was justified under the *Buffalo Linen* doctrine.

121 *Brown Food Store*, 137 N.L.R.B. 73, 76 (1962).

122 *Ibid.*

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

ployer. The whipsaw, by definition, is a pressure maneuver of striking each member of a multi-employer unit *separately and successively*, and the first strike is merely the opening round of a planned series of economic battles with the final objective always being unit-wide success.¹²⁴

The Supreme Court, in the *Buffalo Linen* case,¹²⁵ supported the Board's conclusion that the nonstruck employers, in order to survive as a bargaining unit, must be able to counteract the whipsaw with extreme economic pressure, *i.e.*, the lockout. This decision was based on the widely held belief that the whipsaw, if left unattended to, will inevitably accomplish its objective.¹²⁶ However, once the probable, if not inevitable, consequences of the whipsaw strategy are admitted, it is then ludicrous to stigmatize the locking out employers by the use of an artificial rationale, namely, that their employees are willing to work on the prevailing terms, and thereby deprive them of the basic right, recognized and approved by the Supreme Court in *Mackay*, to continue operating. In actuality, the exact opposite is true; the employees' willingness to continue working at the then existing terms is part and parcel of the union's weapon.

Accordingly, it is submitted that the members of a multi-employer bargaining unit should possess the same rights regardless of whether the union employs a whipsaw, or partial-unit, strike or a unit-wide strike. To hold otherwise works an unwarranted hardship on the employers as they must sacrifice either the preservation of the integrity and continuity of the bargaining unit or the continuation of their businesses. The imposition of this obviously difficult choice, hinged on the union's strategical undertakings, is without justification; an employer's interest in continued operation is no less substantial if his employees are out of work by virtue of a lawful *Buffalo Linen* lockout or a strike. For that reason, the *Mackay* replacement rule ought to apply not only to strike situations but to any lawfully created out-of-work situation which is the product of the legitimate employment of economic pressure devices.¹²⁷

The view from the other side is no less persuasive. The employees' (and union's) interests in a *Buffalo Linen* lockout situation are not really different from, and certainly should be no greater than, those in a *Mackay* strike situation. It cannot reasonably be claimed that the lockout has deprived the employees of their right to strike,¹²⁸ as they *did* strike, and the scope or scale of the strike was a *strategic or tactical* decision and not one that should alter substantive rights of the *Mackay* dimension. Moreover, as in a strike situation, the blow to society has already been struck. Negotiation alone did not produce the intended result, and the consequent legally tolerated cessation of productive pro-

124 The Supreme Court recognized that the whipsaw strategy is an attempt to break the employers' ranks with the "calculated purpose" of "causing *successive and individual* employer capitulations." *NLRB v. Truck Drivers Local No. 449*, 353 U.S. 87, 91 (1957).

125 *Supra* note 124.

126 *Id.* at 96-97.

127 Of course, when the work cessation is analogous to a lay-off rather than a consciously employed lockout, see notes 34-39 and accompanying text, *supra*, no replacement right inures to the employer. Furthermore, it may be that the *Mackay* replacement right should be restricted to temporary replacements in lockout cases, but the actual lines of restraint must be forged after the first accommodation is effected — with experience as the primary guide.

128 See *supra* note 84.

cesses, whatever its origin, obstructs, by definition, the free flow of commerce.¹²⁹ Therefore, the overriding public policy at this point would seem to favor the rapid conclusion of the labor battle by submerging the disputed matters in a collective bargaining agreement, and any limitation of otherwise legitimate economic weapons and counter-weapons constitutes a barrier to this objective. Once work is stopped, legally, and the parties are at a bargaining impasse, economic pressure calculated to produce agreement is absolutely consistent with national labor policy, and, correspondingly, any rule which has the effect of extending the out-of-work situation is contradictory to it.

In regard to the bargaining lockout employed only for the purpose of achieving bargaining objectives, with no other employer interest at stake, the balancing problem becomes more delicate.¹³⁰ It is true that the act explicitly confers on an employer the right to reject a union's negotiating demands;¹³¹ it is equally true that the act expressly prohibits any abridgment or diminution of the right to strike.¹³² When an employer locks out his employees in aid of his bargaining posture, the validity of his conduct must stand or fall according to the significance of these two conflicting rights.¹³³

It is submitted that an employer's interest in achieving his bargaining objectives is not so vital as to justify protection by the use of economic pressure which effectively vitiates the basic right of employees to withhold their labor for their mutual benefit. Collective bargaining, almost by definition, contemplates that the party whose strength depends upon unity will, on occasion, exercise that strength.¹³⁴ The ability of the employer to deprive the union of this strength saps not only the strength of the one party, but also damages the whole system which is dependent upon the strength's very existence,¹³⁵ and that realization is the very essence of the statutory guarantee of freedom from regulation conferred upon the right to strike. The very nature of the institution we call collective bargaining presupposes the existence of strike power, and a dilution

129 See *supra* Section I.

130 See *American Ship Building Co.*, 142 N.L.R.B. 1362 (1963), *enforced sub nom. Local 374, Boiler Makers Union v. NLRB*, 331 F.2d 839 (D.C. Cir. 1964), *cert. granted*, 33 U.S.L. Week 3115 (Oct. 13, 1964).

131 See L.M.R.A. (Taft-Hartley Act) § 8(d), 61 Stat. 142 (1947), 29 U.S.C. § 158(d) (1958).

132 See *supra* note 84.

133 See *Sahm, Construction Industry Lockouts*, 14 LAB. L. J. 477, 479 (1963).

134 See *American Steel Foundries v. Tri-City Central Trades Council*, 257 U.S. 184, 209 (1921), in which the Court visualized *collective power* as the essence of the collective bargaining process:

Labor unions . . . were organized out of the necessities of the situation. A single employee was helpless in dealing with an employer. He was dependent ordinarily on his daily wage for the maintenance of himself and family. If the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and to resist arbitrary and unfair treatment. Union was essential to give laborers opportunity to deal on equality with their employer. *They united to exert influence upon him and to leave him in a body in order by this inconvenience to induce him to make better terms with them. They were withholding their labor of economic value to make him pay what they thought it was worth.* The right to combine for such a lawful purpose has in many years not been denied by any court. The strike became a lawful instrument in a lawful economic struggle or competition between employer and employees as to the share or division between them of the joint product of labor and capital. (Emphasis added.)

135 See *supra* Section I.

of that power, whatever its source, distorts the whole system.

There is another reason, perhaps equally fundamental, for depriving the employer of an absolute right to employ a bargaining lockout. The public's interest, as expressed in the basic policy of our national labor legislation, is diametrically opposed to work-stoppages except when negotiation alone has not produced agreement.¹³⁶ Whenever possible, rules consistent with this axiom should be formulated, that is, the legal guidelines should be designed to minimize industrial discord. To permit the unrestricted use of the bargaining lockout not only deprives employees and unions of their lifeblood, the strike, but it also does a disservice to the public interest by encouraging rather than discouraging "the more primitive method of trial by combat."¹³⁷ As Mr. Justice Frankfurter stated:

[T]he broadly phrased terms of the Taft-Hartley Act should be applied to carry out the broadly conceived policies of the Act. *At the core of the promotion of collective bargaining*, which was the chief means by which the great social purposes of the National Labor Relations Act were sought to be furthered, *is a purpose to discourage, more and more, industrial combatants from pressing their demands by all available means to the limits of the justification of self-interest.* The statute lays its emphasis upon *reason* and a willingness to employ it as the *dominant force* in bargaining.¹³⁸

Collective bargaining is as much the core of our national labor policy today as it was in 1935 when the Wagner Act was enacted, and in 1960 when Justice Frankfurter wrote that declaration of principle, and, as one of our great socioeconomic abrasives, it needs and deserves the protection afforded by sound regulation.¹³⁹

As the Supreme Court so correctly visualized in the *Buffalo Linen* case, the process of decision-making in matters such as those brought in issue by the bargaining lockout is basically one of balancing and accommodating conflicting legitimate interests, of making whole cloth out of what often seems to be irreconcilable elements.¹⁴⁰ The lockout, an impatient warrior, is on the threshold of the labor arena, and should the Court fail to reaffirm this principle in the two lockout cases awaiting decision, the result may well be a return to "the good old days" of labor, when the odor of violence and bloodshed, nourished by widespread frustration, was strong, and when those people of good will, on both sides of the bargaining table, closed ranks and worked tirelessly to end the reign of terror.¹⁴¹

136 The Supreme Court previously recognized that our "national labor policy" is the "promoting of *labor peace* through *strengthened* collective bargaining." *Buffalo Linen*, 353 U.S. 87, 95 (1957). (Emphasis added.) See generally, Duvin, *supra* note 117.

137 *NLRB v. Insurance Agents' Int'l Union*, 361 U.S. 477, 507 (1960) (separate opinion), quoting with approval, *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 448 (1920) (Brandeis, J., dissenting).

138 *Id.* at 507-08. (Emphasis added.)

139 See Duvin, *supra* note 117.

140 "[I]t has long been recognized that an employer can make reasonable business decisions, unmotivated by an intent to discourage union membership or protected concerted activities, although the foreseeable effect of these decisions may be to discourage what the act protects." *Teamsters Local 357 v. NLRB*, 365 U.S. 667, 679 (1961).

141 The ominous tone of the concluding statement is anchored in more than speculation. See *Bagdad Bowling Alleys*, 147 N.L.R.B. No. 97 (1964); *Food Giant Super Markets*, 145 N.L.R.B. No. 124 (1964); *Kroger Co.*, 145 N.L.R.B. No. 26 (1963).