

COMMENT

THE BARGAINING LOCKOUT—REINCARNATION
OF AN EQUALIZER

Recently, the Supreme Court held that an employer may lock out his employees after a bargaining impasse has been reached for the sole purpose of obtaining favorable contract terms.¹ Thus an old bargaining weapon has been revitalized, sharpened and added to management's arsenal. Prior to this decision two kinds of lockout had been generally recognized as lawful. One was the economic lockout prompted by the threat of an imminent strike which would cause extraordinary losses to an employer's operations and product.² The other was the lockout of employees of a multi-employer bargaining association to protect the unity of the association against "whipsawing,"³ *i.e.*, selective strikes against individual members of the association.⁴

Until the decision in *American Ship Bldg. Co. v. NLRB*,⁵ lockouts for the sole purpose of improving a bargaining position had been held presumptively to violate sections 8(a)(1)⁶ and 8(a)(3)⁷ of the National Labor Relations Act by interfering both with the union's right to bargain collectively and with its right to strike.⁸ But the Supreme Court in *American Ship* rejected both branches of this line of reasoning. Concluding that a bargaining lockout does not presumptively violate any section 8(a)(1) protection of the union's right to strike, the Court said that the union has the right to cease work, but not the right to determine the time of the work stoppage. Thus the union's argument that it had nothing left to strike against was deemed futile.⁹ The Court also held that the bargaining lockout is not so destructive of collective bargaining or of the union's ability to represent its members effectively as to constitute a prima

¹ *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300 (1965).

² *Packard Bell Electronics Corp.*, 130 N.L.R.B. 1122 (1961); *Betts Cadillac Olds, Inc.*, 96 N.L.R.B. 268 (1951); *Duluth Bottling Ass'n*, 48 N.L.R.B. 1335 (1943).

³ See *NLRB v. Truck Drivers Union*, 353 U.S. 87 (1957).

⁴ See *NLRB v. Brown*, 319 F.2d 7, 9 n.3 (10th Cir. 1963).

⁵ 380 U.S. 300 (1965).

⁶ "It shall be an unfair labor practice for an employer—(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7." 49 Stat. 452 (1935), as amended, 29 U.S.C. § 158(a)(1) (1964).

⁷ "It shall be an unfair labor practice for an employer—(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. . . ." 49 Stat. 452 (1935), as amended, 29 U.S.C. § 158(a)(3) (1964).

⁸ See *Quaker State Oil Ref. Corp. v. NLRB*, 270 F.2d 40 (3d Cir.), *cert. denied*, 361 U.S. 917 (1959).

⁹ *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 310 (1965).

facie violation of section 8(a) (1). In addition, the Court determined that a bargaining lockout does not necessarily violate section 8(a) (3). A violation of this section, the Court observed,¹⁰ normally turns on finding both that the employer, motivated by an anti-union animus, discriminated against members of the union and that the discrimination resulted in discouragement of union membership. The Court said that to find a bargaining lockout in violation of section 8(a) (3), the employer must be motivated by an unlawful purpose.¹¹

In *American Ship* the Court also rejected any Board authority to ban bargaining lockouts by balancing bargaining weapons and determining what weapons management and labor would be allowed to use.¹² This result seems reasonable since even if the Board possessed such balancing power, the bargaining lockout does not weight the scales so heavily in favor of management that it should prima facie constitute an unfair labor practice. Arguments to the contrary are usually based on the theory that management has other available alternatives,¹³ which are declared to be its right to replace strikers¹⁴ and its right to institute limited unilateral changes after a bargaining impasse has been reached¹⁵ in such areas as employment conditions, wages and hours.¹⁶

But neither of these alternatives is in fact effective. As Professor Meltzer has pointed out, the right to replace tends to be more academic than real. Replacement often produces bitterness, if not bloodshed, and the use of ill-trained substitutes at the time of union picketing and boycotting severely limits the effectiveness of the replacement power.¹⁷ Similarly, the right to make limited unilateral changes after an impasse is largely worthless unless in taking that action the employer holds back something with which to bargain. If he unilaterally institutes all of the program he is currently offering to the union, he may have nothing left to trade in exchange for union concessions, and the union will expect more in return for agreeing to contract terms. But holding back any part of the program prejudices him with both his employees and the public, making

¹⁰ Employer activity can be so inherently prejudicial to the union's protected rights as to present overwhelming evidence of an unlawful motive. See NLRB v. Erie Resistor Corp., 373 U.S. 221, 228 (1963).

¹¹ 380 U.S. at 313 (dictum). The Board no longer presses the contention that a bargaining lockout violates section 8(a) (5). If the employer continues to bargain with the union during the lockout, no violation of this section should be found. See 49 Stat. 453 (1935), as amended, 29 U.S.C. § 158(a) (5) (1964).

¹² 380 U.S. at 315.

¹³ See Davis Furniture Co., 100 N.L.R.B. 1016, 1020-21 (1952), *rev'd sub nom.* Leonard v. NLRB, 205 F.2d 355 (9th Cir. 1953); Morand Bros. Beverage Co., 99 N.L.R.B. 1448, 1465 (1952).

¹⁴ NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333 (1938).

¹⁵ An impasse is required before an employer can institute unilateral changes, because changes prior to impasse are thought to undermine the union's status as a bargaining representative. See NLRB v. Katz, 369 U.S. 736, 741-42 (1962).

¹⁶ See NLRB v. Tex-Tan, Inc., 318 F.2d 472, 479-82 (5th Cir. 1963).

¹⁷ See Meltzer, *Single-employer and Multi-employer Lockouts Under the Taft-Hartley Act*, 24 U. CHI. L. REV. 70, 79 (1956). Replacement power as a complement to a lawful bargaining lockout, however, may be effective. See note 19 *infra*.

him appear less willing to compromise than he really is.¹⁸ In the hostile atmosphere of a labor dispute, an employer who refuses to institute conditions which even he is willing to concede in return for a contract will probably lose more by creating additional antagonisms than he will gain by undermining the union's program. Since in reality management has few effective devices to counteract the protected power of labor, it seems fair that the bargaining lockout should not presumptively constitute an unfair labor practice.

In any case the Court has established the lawfulness of the bargaining lockout, and it is the impact of that decision that is now important. Much of that impact will turn, not on the questions the Court resolved, but on the answers to the questions the Court left unresolved: whether an impasse will be required before a lockout will be held lawful and whether an employer will be able to replace, either permanently or temporarily, his locked out employees.¹⁹

In *American Ship* the Court was dealing with a situation in which an impasse had occurred,²⁰ and consequently framed its rule in terms of an impasse. But it is unlikely that the Court meant that an impasse was requisite to a lawful lockout. An impasse requirement could be imposed to affect either the subject matter of bargaining or the time after which a lockout could lawfully be employed. Since the Court could not have been concerned with protecting bargaining over nonmandatory subjects,²¹ any impasse requirement would have to be designed to prevent a lockout prior in *time* to a stalemate. Insofar as the Court was trying to protect the bargaining process as a whole, an impasse requirement would be mere surplusage, in light of section 8(a)(5)'s demand for good faith bargaining.²² If an employer laid off his employees immediately upon receipt of the union's demands, for example, a strong inference of bad faith would arise,²³ and it would be unnecessary to reach the question whether an impasse

¹⁸ Meltzer, *supra* note 17, at 79.

¹⁹ Compare *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 308 n.8 (1965), with *id.* at 324 (White, J., concurring). Replacement as a complement to a lawful lockout does not suffer from all the infirmities discussed at text accompanying note 17 *supra*, relating to the use of that power during a strike. Management, being able to time the work stoppage, can make better plans to obtain qualified replacements such as workers seasonally unemployed in other industries.

²⁰ *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 303 (1965).

²¹ If an impasse requirement were imposed, it would only be to protect bargaining over mandatory items—"wages, hours, and other terms and conditions of employment." 49 Stat. 452 (1935), as amended, 29 U.S.C. § 158(d) (1964). Other items have no statutory protection in that management or labor can refuse to bargain about them. *Local 164, Brotherhood of Painters v. NLRB*, 293 F.2d 133 (D.C. Cir. 1961). A lockout over these nonmandatory ones, however, would be strong evidence of bad faith bargaining, and an employer refusal to continue to bargain during the lockout would be considered a refusal to bargain as to mandatory items, and thus a violation of section 8(a)(5). Cf. *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342, 349 (1958).

²² 49 Stat. 452 (1935), as amended, 29 U.S.C. § 158(a)(5) (1964); *NLRB v. Insurance Agents' Union*, 361 U.S. 477 (1960).

²³ *Arlington-Fairfax Broadcasting Co.*, 95 N.L.R.B. 846 (1951), *aff'd per curiam*, 204 F.2d 128 (4th Cir. 1953); see *Great Southern Trucking Co. v. NLRB*, 127 F.2d 180, 185 (4th Cir.), *cert. denied*, 317 U.S. 652 (1942).

had occurred. In fact, the finding that an impasse has been reached may be the same as a finding that the employer has bargained in good faith. It may therefore be a practical impossibility to litigate the one as distinguished from the other.

Whatever other purposes an impasse requirement might serve, neither the reasoning of the Court in *American Ship* nor the rationale behind use of the requirement in other situations supports its imposition as to bargaining lockouts.

The Court's reasoning in support of the legitimacy of the bargaining lockout after an impasse²⁴ is equally applicable to lockouts prior to impasse. In fact, the Court of Appeals for the Sixth Circuit has held that an employer does not prima facie violate the act by employing a bargaining lockout prior to an impasse.²⁵ The court of appeals said: "While in *American Ship Building* there was an impasse in the negotiations between the employer and the union, we do not think the teaching of that case merely adds another exception to the Board's category of permissible lockouts."²⁶

The Supreme Court has required that an impasse²⁷ in bargaining be reached before management may lawfully make limited unilateral changes in wages, hours, or employment conditions.²⁸ The impasse requirement as a prerequisite to these changes is, however, understandable. If management were permitted to institute favorable changes prior to a stalemate, it could successfully undermine the union's status as a bargaining representative.²⁹ No such effect would follow from holding lawful bargaining lockouts prior to an impasse. In order to avoid violating section 8(a)(5),³⁰ an employer would have to continue to bargain to an impasse during the lockout. The real advantage that would inure to management would be its ability to determine the time of the work stoppage—an advantage clearly lawful under *American Ship*.³¹

The institution of permanent or temporary replacements presents two related yet distinct factual situations. The hiring of temporary replacements as a complement to a bargaining lockout should not be held a prima facie violation of the act. It does not increase interference with the union's right to represent its members, its right to bargain for contract terms, or its right to strike over that which results from the lawful bargaining lockout itself. Moreover, the temporary replacement of locked out em-

²⁴ See text accompanying notes 9-11 *supra*.

²⁵ *Detroit Newspaper Publishers Ass'n v. NLRB*, 346 F.2d 527 (6th Cir. 1965).

²⁶ *Id.* at 530. This conclusion is compelled by the reasoning in *American Ship*. This is particularly true as to a union's right to collective bargaining. Allowing the employer to lock out prior to an impasse would not reduce his obligation to continue to bargain in good faith with the employees' certified representative.

²⁷ See p. 368 *supra*.

²⁸ See *NLRB v. Katz*, 369 U.S. 736, 741-42 (1962).

²⁹ *Ibid.*

³⁰ 49 Stat. 453 (1935), as amended, 29 U.S.C. § 158(a)(5) (1964).

³¹ See 380 U.S. at 310.

ployees is not such clear evidence of anti-union motivation as to constitute a per se violation of section 8(a)(3).³² Although hiring of replacements makes the bargaining lockout a more effective weapon and may severely damage labor's bargaining position, subsequent actions to make a lawful lockout effective do not prima facie constitute an unfair labor practice.³³ Management has two major legitimate interests during a labor dispute: gaining favorable contract terms and maintaining efficient operations. To outlaw the hiring of temporary replacements would require taking the seemingly untenable position that those bargaining lockouts which impose great burdens on management are lawful, while those which inflict only minimal loss, although otherwise lawful, are unlawful. Since the hiring of temporary replacements as a complement to a legitimate bargaining lockout no more violates the act than does the bargaining lockout itself, and since management should be allowed to protect its legitimate interest in maintaining operations,³⁴ the institution of temporary replacements should not prima facie constitute an unfair labor practice.

Permanent replacement presents a different problem;³⁵ if the practice were permitted, employers would be able not only to time any work stoppage for maximum advantage, but also to deprive involuntarily idle employees of their jobs. It is true that in an analogous situation—the strike—an employer can permanently replace striking employees on the theory that management has the right to maintain operations.³⁶ This theory, combined with management's right to try to make a lawful lockout effective³⁷ and the established lawfulness of the bargaining lockout,³⁸ leads to the conclusion that the hiring of permanent replacements should not prima facie violate the act. Per se rules should apply only to cases where an activity "carries with it an inference of unlawful intention so compelling that it is justifiable to disbelieve the employer's protestations of innocent purpose."³⁹ The hiring of permanent replacements is not such a case. Some employers will be unable to obtain qualified replacements to continue operation without making the positions permanent.⁴⁰ Although

³² *Id.* at 308, 311.

³³ *NLRB v. Great Falls Employers' Council, Inc.*, 277 F.2d 772 (9th Cir. 1960) (members of multi-employer bargaining association allowed their locked out employees to return to work once a week to disqualify them from collecting unemployment compensation).

³⁴ See *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333, 345 (1938).

³⁵ Compare *NLRB v. Brown*, 380 U.S. 278, 292 (1965) (Goldberg, J., concurring), with *id.* at 294 (White, J., dissenting).

³⁶ *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333 (1938).

³⁷ *NLRB v. Great Falls Employer's Council, Inc.*, 277 F.2d 772 (9th Cir. 1960).

³⁸ See *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300 (1965).

³⁹ *Id.* at 311-12.

⁴⁰ Furthermore, an employer who locks out highly skilled employees must go to great expense to train replacements. If he must discharge the replacements upon the locked out employees' return, the training expense will go to waste. In such circumstances, the hiring of permanent replacements should not be a prima facie violation of the act.

the hiring of permanent replacements should be strong evidence of a section 8(a)(3) violation, it should not be conclusive. The Board and the courts should look to the employer's motivation in hiring the replacements before finding an unfair labor practice. They should look to the surrounding circumstances: the availability of temporary help, the cost of training, and similar considerations. There should be no more difficulty applying this motivation test than there has been in finding many 8(a)(3) violations.