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LOCKOUTS UNDER THE LMRA: NEW SHADOWS ON AN OLD TERRAIN*

BERNARD D. MELTZER†

I N DEALING with bargaining lockouts under the LMRA, I will, with respect, be critical of what the NLRB has said and done and of what it has left unsaid. This contentious approach to a weapon of contention would at any time be a doubtful basis for an after-dinner talk. It may seem particularly ungracious right now; for there is increasing concern about the overt use of pressure in collective bargaining and increasing discussion of proposals for reducing such pressures. I am somewhat uncomfortable about examining rules of war in the face of this widespread preoccupation with the more amiable subject of promoting peace. I am also troubled because the apple of discord into which I am to bite has been well chewed in the law reviews.¹

I am tempted to put all the blame on our Chairman for my troubles, but I am in the dock with him. He at least in mitigation can plead a benevolent purpose, that is, saving me from thinking. He tactfully hinted at that purpose when he invited me to present the substance of an article I wrote in 1956.² But our plan for after-dinner featherbedding ran into a familiar obstacle. That area of journalism called labor law has not stood still, and I will compress my earlier observations in order to deal with more recent developments. These developments have not shaken my opinion that the Board's basic approach to lockouts is erroneous; they have, moreover, reenforced my conviction that that approach breeds unreal and unworkable distinctions, which impose unmanageable burdens on the Board and the courts.

The Board has distinguished between three types of lockouts which arise in the bargaining context: the first I will call the bargaining lockout—that is, a shutdown initiated by an employer in order to break a bargaining impasse in circumstances where, apart from the lockout, the employer's conduct is blameless. The Board has in general condemned such lockouts.³ The Supreme Court has, however, not squarely ruled on this point, despite a generation of litiga-

* This paper was the basis of a talk delivered before the Labor Law Section of the Association of the Bar of the City of New York, on May 25, 1961.

† Professor of Law, University of Chicago Law School.

¹ See, e.g., Koretz, *The Lockout Revisited*, 7 SYRACUSE L. REV. 263 (1956); Koretz, *The Multi-Employer Lockout Vindicated*, 9 SYRACUSE L. REV. 40 (1957); Meltzer, *Single-Employer and Multi-Employer Lockouts under the Taft-Hartley Act*, 24 U. CHI. L. REV. 70 (1956).

² See Meltzer, *supra* note 1.

³ See note 8 *infra*.

tion and a good deal of criticism of the Board's position.⁴ The second type of lockout is the so-called defensive multi-employer lockout—that is, a lockout by the members of a multi-employer unit in response to a whipsaw or selective strike against one or more of them, after an impasse in negotiations for a master agreement. In 1954 the Board, abandoning its original position, upheld the legality of such lockouts and was sustained by the Supreme Court in the *Buffalo Linen* case.⁵ Some of the Court's language in that case might be read as permitting the defensive lockout only when the employers are relatively small, but that reading seems extremely doubtful—although I will not take the time to argue the point.⁶ Finally, there is the so-called economic lockout, which is designed to avoid extraordinary economic or operational losses threatened by an imminent strike. The Board has declared that a lockout is warranted by a real threat of such a strike.⁷

The generalities which I have just put before you have undoubtedly bored the sophisticates and have perhaps bewildered the innocents, if there are any in this formidable audience. I will fill out the outline as I go along. But my main purpose will not be a comprehensive treatment of the cases but rather an exploration of the rationale for the Board's doctrines, their internal consistency, and the administrative burdens and uncertainties which they have generated. On all three counts, I will find the Board's position subject to serious difficulties.

The principal source of these difficulties is the Board's general proscription

⁴ In addition to the references in note 1 *supra*, see Littler, *The Right to Lockout*, A.B.A. SECTION OF LABOR RELATIONS LAW 4 (1952); 73 HARV L. REV. 787, 789 (1960).

⁵ *Buffalo Linen Supply Co.*, 109 N.L.R.B. 447 (1954) (Murdock, dissenting), *rev'd sub nom.* *Truck Drivers Local Union v. NLRB*, 231 F.2d 110 (2d Cir. 1956), *rev'd sub nom.* *NLRB v. Truck Drivers Union*, 353 U.S. 87 (1957).

⁶ The Court, after declaring that the statute did not bar employer self-help when legitimate interests of employees and employers collide, particularized that point by referring to the conflict "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 advantages resulting from nonuniform contractual terms." *Id.* at 96. (Emphasis added.) The Court also was careful to limit its approval of the Board's new position to "the circumstances of this case." *Id.* at 97. It is those aspects of the Court's opinion which may invite the contention that the Court's sanction of the multi-employer defensive lockout extends only to "employers" who are small absolutely or in relation to the union with which they are bargaining. *Cf.* Sweetal & Aiges, *Lockouts*, 9 LAB. L.J. 43, 48 (1958). But this contention is not easy to square with the Court's conclusion that the legislative history of the Wagner Act negates any "intent to prohibit strikes or lockouts as such." *Id.* at 92. That history affords no basis for a rule distinguishing between lockouts by "small" and "large" employers. Such a rule, viewed as an effort to "equalize" bargaining power in particular cases, would, moreover, be a gross oversimplification of considerations bearing on bargaining power and would be inconsistent with the Court's subsequent emphasis in the *Insurance Agents* case. See text accompanying note 25 *infra*. Finally, any attempt to identify "relatively small employers" in the broad spectrum of labor-management relationships involved would confront the Board with impossible evidentiary and administrative burdens. See Sweetal & Aiges, *supra* at 48; Meltzer, *supra* note 1, at pp. 83-84, 86-87.

⁷ See generally Meltzer, *supra* note 1, at 73-77 and text accompanying note 44 *infra*.

of bargaining lockouts. The rationale for that prohibition goes like this: Collective bargaining and strikes are protected activity; a lockout, even though prompted solely by bargaining objectives, constitutes a reprisal for protected activity. It is thus inconsistent with section 7 of the act, with the statutory protection of strikes embodied in section 13, and with the statutory objective of reducing economic warfare. Accordingly, it constitutes a violation of sections 8(a)(1), 8(a)(3), and 8(a)(5).⁸

The Board has reenforced its argument from the statute by so analyzing an employer's alternatives as to suggest that, as a matter of policy, strikes and lockouts should not be reciprocal weapons. Even though lockouts are proscribed, the union's right to strike is, according to the Board, counterbalanced by the employer's right to replace economic strikers and his right, after an impasse, to put into effect terms previously offered to the union.⁹ And even where the right to replace cannot be exercised, the strike-bound employer is said to be in no worse position than the strikers.¹⁰ To add the lockout to his alternatives would place a heavy thumb on the employer's side of the scale and thereby derange the statutory scheme for equalizing bargaining power.

The Board's argument bristles with difficulties. Its major premise appears to be that any interference with protected activity or with the right to strike is unlawful. But that premise is manifestly incompatible with the employer's right to replace strikers and to take other action, such as stockpiling, designed to neutralize a strike.¹¹

Nor does the language or history of section 13 of the act support the Board's premise. That section in the Wagner Act did not purport affirmatively to guarantee the right to strike or to expand the scope of protected activities. That section was in essence a proviso designed to make clear that the Wagner Act, despite its stated objective of promoting industrial peace, was not to be used as a basis for proscribing strikes. On this point, the legislative history is clear.¹²

It was perhaps these difficulties in its arguments from the statute which

⁸ See, e.g., *Morand Bros. Beverage Co.*, 91 N.L.R.B. 409, 412-13 (1950), *remanded sub nom.* *Morand Bros. Beverage Co. v. NLRB*, 190 F.2d 8, 576 (7th Cir. 1951); *Morand Bros. Beverage Co.*, 99 N.L.R.B. 1448, 1460-65 (1952), *enforced*, 204 F.2d 529 (7th Cir. 1953), *cert. denied*, 346 U.S. 909 (1953). The Board's argument against the single-employer bargaining lockout was first developed in cases involving multi-employer defensive lockouts. That argument has, however, not been altered despite the Board's change with respect to the legality of defensive multi-employer lockouts. See, e.g., *Dalton Brick & Tile Corp.*, 126 N.L.R.B. 473, 482-86 (1960).

⁹ See *Davis Furniture*, 100 N.L.R.B. 1016, 1020-21 (1952); *rev'd sub nom.* *Leonard v. NLRB*, 205 F.2d 355 (9th Cir. 1953); *Dalton Brick & Tile Corp.*, 126 N.L.R.B. 473, 482-86 (1960).

¹⁰ *Davis Furniture*, 100 N.L.R.B. 1016, 1020-21 (1952).

¹¹ See *Waterman, J.*, dissenting in *Buffalo Linen*, 231 F.2d 110, 119 (2d Cir. 1956); *Meltzer*, *supra* note 1, at 78.

¹² *Ibid.*

moved the Board to seek reenforcement from an examination of the alternatives, the lockout aside, open to the strike-bound or strike-threatened employer. But there is a touch of unreality in the Board's emphasis on those alternatives. The right to replace is more often than not a purely paper right because of the lack of qualified replacements or because replacements would produce bitterness, if not bloodshed. On the other hand, where the right to replace can be and is exercised, its exercise generally poses a more serious threat to industrial peace than does a lockout; the prospect of replacements constitutes, moreover, a more effective restraint on concerted activities than does a lockout. Thus, in emphasizing the replacement of strikers as an alternative to a lockout, the Board has somewhat perversely ignored its stated objective of promoting industrial peace.

The Board's emphasis on the employer's right after an impasse to institute offers rejected by the union is no more persuasive. The employer has no assurance that such action will avert a strike timed in accordance with union strategy; indeed, unless an impasse is established by a strike, doubts remain about the propriety of unilateral action.¹³ Furthermore, the unilateral institution of benefits may suggest that increased benefits will flow from a strike or its prolongation. Such piece-meal concessions may thus undermine the employer's trading position unless he holds back something solely to give it later on. But such withholding may prejudice him with his employees and the public by making him appear more tight-fisted than he is. The employer's limited control over employment terms is thus plainly no substitute for the stable terms which he seeks through negotiations and, if necessary, the lockout.

Equally unpersuasive is the Board's abstract conclusion that the employer, even though denied the lockout, is no worse off than the employees after they strike. In saying this, I do not ignore the hardships for employees or the danger to precarious union organization that may be produced or aggravated by a strike. But there are no meaningful standards for comparing the impact of shutdowns of indeterminate length on abstract enterprises, employees and unions. Consequently, the Board's calculus of comparative detriment verges on empty sloganeering. Indeed, the Board's calculus is no more meaningful than the converse assertion that locked-out employees are in no worse position than an employer shut down by a strike.

If, as the Board has also urged,¹⁴ the prohibition of the bargaining lockout would reduce the incidence of economic warfare, that prohibition would gain some support from the statutory purpose of reducing industrial warfare. But limitations on the parties' bargaining pressures generally influence their respective sticking points and their willingness to compromise. Hence, the contribution of the lockout-prohibition to industrial peace is wholly conjectural.

¹³ See *NLRB v. Crompton Mills*, 337 U.S. 217, 224 (1949).

¹⁴ See, e.g., *Morand Bros. Beverage Co.*, 91 N.L.R.B. 409, 412-13 (1950), 99 N.L.R.B. 1448, 1460-65 (1952).

Exclusive preoccupation with economic peace ignores, moreover, the ambivalence of the Wagner Act about that objective. The basic statutory purpose was, after all, the protection of unionization and collective bargaining. That purpose was implemented against a background in which the bargaining lockout, like the strike, was considered one of the driving forces behind the bargaining process.¹⁵ Thus the statutory endorsement of collective bargaining could be fairly read as extending to its familiar concomitants, including the lockout. No express statutory provision barred such a reading; on the contrary, efforts to enact a qualified prohibition of lockouts had failed.¹⁶ (Then) Professor Magruder in an article sympathetic to the Wagner Act and published two years after its enactment stated the apparently prevailing position¹⁷ this way:

The Act cannot be said to be "one-sided" in not forbidding strikes, because neither on the other hand does it deprive the employer of his bargaining weapon, the power to withhold from the employees, an economic need, employment, unless they will accede to his offer as to wages, hours, and other working conditions. The Act relies upon a fact of experience that "where men are well organized, and the power of employers and employees is fairly well balanced, agreements are nearly always reached by negotiation."¹⁸

These considerations based on the Wagner Act are reenforced by the Taft-Hartley Act. Four sections of that act, dealing with bargaining impasses, link "strikes and lockouts."¹⁹ These provisions support the judicial dicta which have sanctioned the bargaining lockout on the ground that the parallel statutory provisions imply corresponding treatment for bargaining strikes and bargaining lockouts.²⁰ The Supreme Court in *Buffalo Linen*, although it reserved

¹⁵ See Koretz, *Legality of the Lockout*, 4 SYRACUSE L. REV. 251, 253 (1953).

¹⁶ See Meltzer, *supra* note 1, at 79.

¹⁷ For some time after the enactment of the Wagner Act, non-legal writings by knowledgeable students of industrial relations indicated that the bargaining lockout was legal. See Littler, *supra* note 4, at 13.

¹⁸ See Magruder, *A Half Century of Legal Influence upon the Development of Collective Bargaining*, 50 HARV. L. REV. 1071, 1110 (1937); the inner quotation is from 1 COMM. ON INDUSTRIAL RELATIONS, FINAL REPORT 66 (1916).

¹⁹ Sections 8(d)(4), 203(c), 206, 208.

²⁰ See the *Leonard* cases, 197 F.2d 435, 438-41 (9th Cir. 1952), 205 F.2d 355, 357 (9th Cir. 1953); and the *Morand* case, 190 F.2d 576, 582 (7th Cir. 1951); 204 F.2d 529, 531 (7th Cir. 1953); Meltzer, *supra* note 1, at 81-82. To suggest parallel treatment for strikes and lockouts as measures for breaking a bargaining deadlock is not to ignore the differences between such measures. One important difference is that the ostensible bargaining lockout may be activated by a desire to break the union and not merely the deadlock. But such a purpose may also shape a bargaining position which is calculated to, and which does, produce strike action at a time when such action would jeopardize a union's representative status. In either case, difficult issues of motivation are inescapable. But in both cases the history of the parties' relationship would aid the proper resolution of such questions. Furthermore, it seems likely that cases raising serious problems of whether an ostensible bargaining lockout was a union-busting device would be relatively rare. In any event, there is no basis for assuming that such lockouts would generally be tainted by such purposes, an assumption that might justify a rule of prohibition as a prophylactic. Cf. *Local 357, Teamsters Union v. NLRB*, 365 U.S. 667, 675 (1961).

judgment on the single employer bargaining lockout,²¹ used language which possibly intimates agreement with those dicta.²² It is worth noting that parallel treatment for strikes and lockouts would eliminate the requirement that a "bargaining impasse" precede a lawful bargaining lockout. That requirement involves troublesome evidentiary problems and might also provoke union stalling in negotiations designed to deprive the employer of control over the timing of a shutdown, which is the main advantage of the lockout weapon. Nevertheless, the impasse requirement has inconsistently been announced along with judicial dicta calling for parallel treatment of strikes and lockouts.²³

The Board's position also runs counter to the mood which lay behind, and was reflected in, the Taft-Hartley Act. The act arose from a general conviction that the relative power of employers should be increased. This conviction implies that in the bargaining context employers were to be given more power to cope with, or more bluntly, to resist union demands—short of action challenging the basic idea of free association or collective bargaining. True, as the Board has urged,²⁴ the statutory purposes were generally to be realized by new prohibitions of so-called union bad practices and not (except for the free-speech guarantee in section 8(c)) by lifting the pre-existing limitations on employers. But that generality would be helpful only if the Wagner Act had proscribed the bargaining lockout—a proposition which, as we have seen, is quite doubtful. Thus, the larger statutory purpose, which plainly should be considered in resolving the ambiguities arising from the Taft-Hartley coupling of strikes and lockouts, operates against the Board's position.

Recent Supreme Court opinions also give no comfort to the Board. During the last term, the Court, in *Insurance Agents*, in reversing the Board's condemnation of union harassing tactics during negotiations, emphasized that the exercise of economic power is part and parcel of the bargaining process.²⁵ The Court denied, moreover, that "the Board has been afforded flexibility in . . . choosing which economic devices of labor and management shall be branded as unlawful."²⁶ It denied also that the Board had been authorized "to

²¹ 353 U.S. at 93 n.19.

²² "Legislative history of the Wagner Act indicates that there was no intent to prohibit strikes or lockouts as such." *Id.* at 92. The "intimation" in the text presupposes that the Court was using "lockout" to mean a "bargaining lockout" rather than any shutdown.

²³ In both *Morand* opinions, the Seventh Circuit seemed to require an "impasse," *i.e.*, the exhaustion of "the possibilities of good faith collective bargaining with the union," as a prerequisite for a bargaining lockout. See 190 F.2d 576, 582 (1951); 204 F.2d 529, 531 (1953). This inconsistency could perhaps be rationalized on the somewhat fanciful ground that, absent an impasse, a lockout would necessarily be prompted by anti-union motivation. It is also arguable that a lockout, before an impasse, constitutes a failure to bargain in good faith, but that argument, coupled with section 8(b)(3), which requires unions so to bargain, would also imply that unions could not properly strike before an impasse. In this connection it should also be noted that the prerequisites for strikes and lockouts imposed by Section 8(d) of the LMRA do not include an impasse.

²⁴ See *Morand Bros. Beverage Co.*, 99 N.L.R.B. 1448, 1465 (1952).

²⁵ *NLRB v. Insurance Agents*, 361 U.S. 477, 489 (1960).

²⁶ *Id.* at 498.

act at large in equalizing disparities of bargaining power between employer and union."²⁷ It is the apparently unauthorized quest for such equalization that, as I have already suggested, underlies the Board's lockout prohibition.

It is true that *Insurance Agents* involved the union's duty to bargain whereas the lockout raises questions not only about the employer's reciprocal duty but also about his obligation to avoid interference with protected activities as well as discrimination on that account. But in the lockout context all of these duties are functionally interrelated, and it would be extremely artificial to give effect to the Court's emphasis solely in defining the employer's duty to bargain.²⁸

I have already suggested that the Court's statement in *Buffalo Linen* that lockouts as such are not prohibited²⁹ raises a question about the Board's approach. There is a sharper tension between that approach and the Board's basic rationale for legalizing the multi-employer defensive lockout. The Board's view, which was endorsed by the Supreme Court, was, in essence, that such lockouts should be sanctioned in order to prevent fragmentation of the bargaining unit by means of the threat of successive strikes against unstruck members of the unit, implicit in the strike against one.³⁰ The Court suggested, moreover, that the preservation of the multi-employer structure is important because of its ultimate impact on the terms of immediate and successive bargains.³¹ It may be that the defensive lockout is designed to operate on the bargain indirectly by preserving the alliance rather than directly through pressure on the union and the locked-out employees. But the critical point is that the defensive lockout necessarily exerts such pressure by increasing the number of employees out of work at a time chosen by the unstruck employers

²⁷ *Id.* at 490.

²⁸ Board decisions proscribing the bargaining lockout have cited the Board's condemnation of union-harassing during collective bargaining, prior to the Court's reversal of that condemnation in *Insurance Agents*. See, e.g., *Quaker State Oil Ref. Corp.*, 121 N.L.R.B. 334, 337 (1958), *enforced sub nom.* *Quaker State Oil Ref. Corp. v. NLRB*, 270 F.2d 40 (3d Cir. 1959), *cert. denied*, 361 U.S. 917 (1959); *Wilamette Ass'n of Plumbing & Heating*, 125 N.L.R.B. 924, 976 (1959). See also, *Dalton Brick & Tile Corp.*, 126 N.L.R.B. 473, 486 (1960), where the examiner admitted his uneasiness about holding that a lockout, after the exhaustion of good faith bargaining, constituted a violation of section 8(a)(5).

²⁹ See text accompanying note 22 *supra*.

³⁰ 109 N.L.R.B. 447, 448 (1954); 353 U.S. at 96. Since the basis for the defensive lockout is an express strike threat or one implicit in the strike against one member, the lockout privilege would not be activated by an impasse on an issue peculiar to the struck enterprise. Cf. *Continental Baking Co.*, 104 N.L.R.B. 143, 145 (1953).

In *Buffalo Linen*, the Board had also urged that the defensive lockout was justified by the *Betts Cadillac* rule sanctioning lockouts designed to avoid extraordinary operational or economic losses. 109 N.L.R.B. at 448-49. But that rationalization runs counter to the Board's attempt to distinguish between "economic" and bargaining considerations, and indeed, underscores the illusory character of that distinction. The Court appeared obliquely to reject the Board's expansion of the "economic defense," declaring that the Second Circuit had erred "in too narrowly confining the exercise of Board discretion to cases of economic hardship." 353 U.S. at 97.

³¹ See note 6 *supra*.

rather than the union. And as to any particular defensive lockout, it would be a heroic task to determine whether its primary significance goes to preserving the unit rather than to exerting pressure. Moreover, and more important, whatever the determination in a particular case might be, the fact remains that the defensive lockout has its primary significance as an attempt to improve the employers' bargain. If that proposition be conceded, as I believe it must, it undermines the basic distinction which the Board has sought to maintain in the lockout context—that is, the distinction between shutdowns designed to improve the bargain, on the one hand, and shutdowns designed to preserve the bargaining structure or the economic integrity of the enterprise, on the other.

Furthermore, the Board's distinction cannot be justified on the basis of the bargaining power considerations which it has emphasized in condemning the bargaining lockout. That emphasis implies that members of a multi-employer unit, barred from using the defensive lockout, would have less bargaining power than employers who bargain separately and who are barred from resorting to an anticipatory lockout. Plainly, such an abstract calculus of bargaining power is practically meaningless. "Inequality of bargaining power" was a sacred phrase when unions were struggling for acceptance, but "bargaining power" has never been a workable tool of analysis.³² Indeed, "power" is always a fuzzy term unless we talk about power "to do what." And its fuzziness is not reduced by adjectives such as "bargaining" or "countervailing." The invocation of these popular phrases, without more, is merely a naked claim for more power vis-à-vis an adversary or the rest of the community. The rhetoric, despite its appealing connotation of helping the underdog, tells us nothing about the underlying power situation.

I will not detain you with an exploration of various attempts to give more content to "bargaining power."³³ Whatever the content of that elusive phrase, there is no basis for any general assumption that employers bargaining on a multi-employer basis are weaker than employers bargaining individually. Indeed, considerations urged as the basis for the "bargaining weakness" of the members of the larger unit generally operate with similar force on employers bargaining individually. Such employers are often vulnerable to whip-sawing tactics similar to those applied to members of a multi-employer unit. The employer bargaining alone may find his hand forced by the bargain of his competitor, not to speak of national patterns. Furthermore, single-employer

³² For references to pertinent literature, see Meltzer, *supra* note 1, at 83 n.52.

³³ "Bargaining power" may be viewed as the parties' staying power in a particular dispute, which depends on their capacity to absorb losses and on the stakes involved. See generally CHAMBERLAIN, *COLLECTIVE BARGAINING*, ch. 10, esp. 236-38 (1951). "Bargaining power" may also be reflected over time by the terms associated with bargaining in one sector compared with terms in other sectors. The variables involved obviously complicate such comparisons. But even when such difficulties are overcome, past differentials attributed to "bargaining power" do not necessarily illuminate relative power with respect to particular negotiations. Indeed, bargaining power may be a "wasting asset" which cannot be successfully exerted so as to pyramid the resulting gains.

bargaining, which remains the numerically dominant type, involves many small and competitive employers who consider themselves weaker than the union. If such employers bargaining alone are denied the right to resort to a bargaining lockout, there is no plausible concept of bargaining power which justifies more favorable legal treatment for the defensive lockout.

That disparate treatment, moreover, poses a troublesome question: What kind of bargaining arrangements will be considered multi-employer in adjudicating allegedly defensive lockouts? One possible approach would be to permit defensive lockouts only where a multi-employer unit would, prior to the lockout, have met the Board's standards for certifying multi-employer units. Such an approach would have the virtue of requiring formal arrangements affording a fair warning to all concerned of the existence of a common interest that might be protected by unified action. But the extent of common interests among employers is obviously not a function of their capacity to satisfy the requirements for certifying a multi-employer unit. Thus the integration of certification and lockout criteria would subordinate the realities of collective bargaining to purely formal considerations. On the other hand, an attempt by the Board to develop a different set of criteria in the lockout-context would involve substantial difficulties. Such an attempt would be vulnerable to attack as inconsistent with the prohibition of single employer lockouts. It would, moreover, multiply uncertainties in an area where both unions and employers require a reasonable degree of predictability—unions because they wish to know whether they can limit the number of employees involved in a given shutdown; employers, because a wrong guess as to when individual bargaining may be treated as multi-employer bargaining, for lockout purposes, would involve substantial risks of back pay liability. The difficulties in the lockout context of either adhering to or modifying the Board's certification criteria are another reason against disparate treatment of the multi-employer defensive and the bargaining lockout.

Although those difficulties have not yet emerged in the cases, similar difficulties have resulted from the Board's refinement of the *Buffalo Linen* doctrine. Thus, in *Anchorage Business Men's Ass'n*³⁴ the Board's condemnation of a lockout by unstruck members of an association in response to a selective strike rested in part on the finding that the employers had been trying to exert bargaining pressure as well as to preserve the bargaining unit. The Board's approach involves, as I have suggested, a wholly unrealistic effort to separate two inseparable objectives. It seems plain that *Anchorage* will not affect the sophisticated employer's objectives, but only his candor in describing them.

In *Great Falls Employers' Council, Inc.*,³⁵ the Board developed an equally

³⁴ 124 N.L.R.B. 662, 668-69 (1959). The Board also relied on the fact that the lockout had been discriminatory in that only union employees were laid off. *Ibid.*

³⁵ 123 N.L.R.B. 974 (1959).

questionable limitation on *Buffalo Linen*. The unstruck employers, after a complete lockout, had offered their employees one day's work a week for the avowed purpose of disqualifying them from unemployment compensation, financed exclusively by employer payments based on experience ratings. The Board, with two members dissenting, concluded that the partial lockout had not been a defensive attempt to preserve the bargaining unit, but a retaliation against the union-directed effort to secure unemployment compensation. The Ninth Circuit reversed.³⁶ It noted, incidentally, that the employers' strategy had backfired and had actually increased the funds of the locked out employees since they would have been disqualified even though the lockout had been complete.³⁷ But the court's essential point was that the privilege to lockout implied a privilege to make the lockout effective, and it supported that point by referring to the Supreme Court's emphasis, in *Insurance Agents*, on the power component of the bargaining process.³⁸ The employers' tactics were not pretty, but I do not find them more unpleasant than the harassing tactics tolerated in *Insurance Agents*.³⁹

I want now to turn to so-called economic lockouts, which also occur in the context of a bargaining impasse but which have been sanctioned on the ground that they are directed at forestalling extraordinary economic losses rather than at the exertion of bargaining pressure. Whether this distinction is justifiable or manageable are questions which will be considered after a brief reference to some of the pertinent cases.

In *Duluth Bottling*,⁴⁰ decided before the Board's about-face in *Buffalo Linen*, the Board held that the fear of raw-material spoilage because of an impending strike warranted a lockout. The raw materials endangered at each of the small plants involved were not worth more than \$100.00 to \$300.00. Similarly, in *Betts Cadillac Olds*⁴¹ the Board sanctioned a lockout of automobile service departments as a means of avoiding the wrath of customers whose unfinished cars might have been caught in a sudden strike. In both of these cases, the

³⁶ *NLRB v. Great Falls Employers' Council, Inc.*, 277 F.2d 772 (9th Cir. 1960).

³⁷ *Id.* at 775.

³⁸ *Id.* at 777.

³⁹ Before leaving the multi-employer cases, a reference to *Retail Associates, Inc.*, 120 N.L.R.B. 388 (1958) is appropriate. There the Board declared that it would "refuse to permit the withdrawal of an employer or a union from a duly established multi-employer unit, except upon adequate written notice given prior to the date set by the contract for modification, or to the agreed-upon date to begin the multi-employer negotiations." *Id.* at 395. For a more detailed discussion of the *Retail Associates* litigation, see ABA LABOR RELATIONS SECTION, COMM. REP. ON DEVELOPMENTS OF THE LAW UNDER THE NLRA 17-18 (1959). For the issues underlying the Board's recognition of parallel rights of withdrawal, see Meltzer, *supra* note 1, at 94.

⁴⁰ *Duluth Bottling Ass'n*, 48 N.L.R.B. 1335 (1943).

⁴¹ *Betts Cadillac Olds, Inc.*, 96 N.L.R.B. 268 (1951). For a more detailed discussion of earlier cases involving "economic" lockouts, see Meltzer, *supra* note 1, at 73-77.

lockout had been enforced by unstruck members of an employers' association after a whipsaw strike and thus would have been legal under the doctrine subsequently announced in the *Buffalo Linen* case.

Betts Cadillac Olds had suggested that some forms of customer disaffection would constitute unusual economic losses warranting a preventive lockout. But since strikes generally involve the risks of such losses, the line between usual and unusual losses is an elusive one. The line was made even murkier by the *American Brake Shoe* litigation. There, the Board spelled out⁴² two basic requirements for the economic defense: The first was a real threat of a strike; a good faith fear of a strike was not enough. The second was fear of unusual economic losses beyond those normally incident to any strike. In addition, the Board required the employer, before resorting to a preventive lockout, to seek assurances, apparently from the union, designed to forestall extraordinary losses.⁴³

The difficulties in applying the foregoing requirements need no elaboration; these difficulties were reflected by the divisions in the *American Brake Shoe* litigation, between the trial examiner and the Board, which itself was divided, and by the reversal of the Board by the Seventh Circuit.⁴⁴ But I do want to say a word about the Board's determination that the losses feared by the company were not sufficiently unusual to warrant a lockout.⁴⁵ That determination was, incidentally, not necessary to the decision since the Board held that there had not been a real threat of a strike. The company, in accordance with a threat made at the beginning of negotiations covering only one of its plants, had progressively transferred new orders from that plant to other plants. Layoffs and ultimately a shut-down had resulted at the plant involved in negotiations. The transfers had been timed so as to permit completion of special order equipment required by railway customers for seasonal rehabilitation programs. The company sought to justify its action as necessary to avoid loss of business which past experience and customer warnings had indicated would result from strike-induced delays in delivery.

The company's fears, which were not questioned by the Board, seemed to be at least as serious as the fears of disappointed auto owners, which had

⁴² *American Brake Shoe Co.*, 116 N.L.R.B. 820, 827 (1956).

⁴³ *Id.* at 824, 830-31. In prior cases, the Board had not been clear or consistent in applying the assurances requirement. Compare *Duluth Bottling Ass'n*, 48 N.L.R.B. 1335 (1943) with *Betts Cadillac Olds, Inc.*, 96 N.L.R.B. 268 (1951). In *American Brake Shoe*, the Board did not make clear whether the employer was entitled to insist on written assurance; instead it emphasized that the employer's request for no-strike assurances had been broader than what was sufficient to forestall extraordinary loss, *viz.*, that work in progress would have been completed or allowed to be transferred to other plants. 116 N.L.R.B. at 830-31.

For the analytical and practical difficulties raised by the Board's position on assurances, see Littler, *supra* note 4, at 17; Meltzer, *supra* note 1, at 74 n.20; Quaker State Oil Ref. Corp., 121 N.L.R.B. 334, 335, 342 (1958) (dissenting opinion).

⁴⁴ *American Brake Shoe Co. v. NLRB*, 244 F.2d 489 (7th Cir. 1957).

⁴⁵ See 116 N.L.R.B. 820, 831-32 (1956).

served to legitimize the lockout in *Betts Cadillac*.⁴⁶ But the Board dismissed the company's fears as involving only the "ordinary economic hardship" of a strike.⁴⁷ It distinguished *Betts Cadillac* on the ground that there the lockout had accelerated the normal consequences of a strike, whereas in *American Brake Shoe* the employer had avoided such consequences by transferring orders to other plants.⁴⁸ There was no showing that the transfer had not imposed any costs on the employer, and it seems unlikely that such was the case. In any event, the important point is that the Board concluded that the lockout had been tainted in that it had insulated the company against the costs usually associated with a strike and that that conclusion rested on the alleged repugnance between a painless lockout and the statutory guarantee of the right to strike.⁴⁹

I have already suggested that the Board has misconceived the significance of that guarantee. In addition, that guarantee does not explain why the employer should surrender his "right" to avoid unusual losses where the exercise of that right would also avoid usual losses. Given *Betts Cadillac*, the issue in *American Brake Shoe* was how to resolve the clash between the employees' and the union's interest in maximizing strike pressure and the employer's interest in protecting his goodwill. Invocation of the "right to strike" tells us only that the employer's interest is to be subordinated without illuminating the ultimate determinants of the choice.

There are, moreover, weighty practical objections against the Board's insistence that an employer deadlocked in bargaining should not be free to avoid all pain and suffering by a lockout. That position presupposes some meaningful standard for determining how much suffering is enough. Suppose, for example, *American Brake Shoe* had shown that its transfer of work had entailed a 10% increase of labor costs because of overtime or other reasons. Would such costs have been sufficient to purify the lockout? The Board has not suggested a meaningful standard of suffering, and I can see no way of constructing one.

The Board's most recent application of the economic defense, in *Packard Bell Electronics Corp.*,⁵⁰ has deepened the uncertainties surrounding that defense. In that case, an impasse and the threat of an imminent strike had arisen solely from the employer's unusual demand for the elimination of an 18 year old union-security clause. The employer, after arranging for sub-contractors to service its customers' TV sets, had locked out its own service branches. Shortly before the lockout, the employer had engaged in unlawful coercion

⁴⁶ See text accompanying note 41 *supra*.

⁴⁷ See 116 N.L.R.B. at 831.

⁴⁸ *Id.* at 832.

⁴⁹ *Ibid.*

⁵⁰ 130 N.L.R.B. (No. 117), 47 L.R.R.M. 1455 (March 3, 1961).

and interrogation in the bargaining unit. Two weeks after the lockout, the employer had called his employees back, advising them that the lockout had been a counter-measure to the strike and a means of providing service. Less than half of the employees had returned, and the others had been replaced. The Board, disagreeing with the examiner, upheld the lockout on the basis of *Betts Cadillac*. If *Betts Cadillac* had not been complicated by subsequent cases, the Board's disposition of *Packard Bell* would be understandable. It would, however, not be free from difficulty, since the totality of the employer's conduct would have supported a finding that his primary purposes had been the undermining of the union rather than the exertion of bargaining pressure. In any event, the cases subsequent to *Betts Cadillac* presented additional difficulties which the Board chose to ignore. Thus Packard Bell had not met the requirement laid down in *American Brake Shoe*,⁵¹ that it seek assurances designed to permit the completion of work in process. Furthermore, Packard Bell had apparently sub-contracted all of its service work and not merely work on the unfinished sets on its premises, and one of the sub-contractors had been a wholly owned subsidiary. Thus it was fairly arguable that the company through the lockout and sub-contracting arrangements, had brought itself within the ban of *American Brake Shoe* by virtue of its success in avoiding suffering. Finally, the Board ignored that the employer, by describing the lockout as a countermeasure to the strike, had come close to the rhetoric condemned in *Anchorage*.⁵²

These evasions in *Packard Bell* may have been prompted in part by the fact that the Board in *American Brake Shoe* had chosen to avoid the perplexing issue resulting from the interplay between the economic defense and the waiting period for strikes and lockouts imposed by section 8(d) of the act.⁵³ The lockout in *American Brake Shoe* had occurred prior to the expiration of the waiting period. Consequently, even if the lockout had met the general requirements of the economic defense, another question would have remained: whether an otherwise economically justified lockout could properly be instituted before the expiration of the waiting period. This question involves genuine difficulties: a loose application of the economic defense to such lockouts would involve the risk of eroding the statutory moratorium. On the other hand, an absolute proscription of employer-initiated shutdowns during the moratorium period would involve the risk of inflicting extraordinary losses on

⁵¹ See text accompanying note 43 *supra*.

⁵² See text accompanying note 34 *supra*.

⁵³ Section 8(d) in effect requires parties to a collective bargaining agreement to serve notice of proposed termination or modification sixty days in advance thereof, and section 8(d)(4), the most relevant provision, requires a party desiring such termination or modification to continue "in full force and effect, *without resorting to strike or lockout*, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later." (Emphasis added.)

employers, including losses from physical damage to plant and raw materials, losses which, in the Board's view, have produced the best case for economically privileged lockouts. In order to permit the avoidance of such losses the Board may engraft a qualification on the lockout prohibition during the waiting period. Such a result could rest on a narrow interpretation of "lockout," as used in section 8(d) as well as on an analogy to the limitations on the literal language of that section sanctioned by the Supreme Court in *Mastro Plastics*.⁵⁴ There the Court upheld the Board's limitation of the statutory language whereby a union was permitted, during the waiting period, to strike against flagrant unfair labor practices which had threatened its existence. But a corresponding qualification, designed to safeguard an enterprise against extraordinary loss, would have to be rigorously limited in order to avoid the erosion of the waiting period requirement. Thus unusual losses might be limited to those associated with physical damage. The distinction between such damage and other economic losses is, of course, artificial because all forms of loss generally have a cash nexus. But that distinction may serve to avoid the threat to the legislatively imposed moratorium that might otherwise arise from the interplay of the waiting requirements and the economic stringency doctrine.

It was perhaps the desire to avoid that threat which moved the Board in *American Brake Shoe* to restrict *Betts Cadillac* while purporting to follow it. And it may be that until the special difficulties posed by lockouts during the moratorium period are squarely faced,⁵⁵ there will be in fact, if not in form, two different approaches to the economic defense, one for lockouts occurring during the waiting period and a less stringent approach for lockouts occurring after that period has run. Such an approach, although confusing, would provide some escape from the dubious prohibition of bargaining lockouts while limiting the risk to the policy behind the moratorium requirement.

I have suggested that as to shutdowns during the waiting period, the Board probably cannot avoid the difficulties inherent in its distinction between economic and bargaining lockouts. But where the waiting period has run, the need to draw that distinction arises from the Board's proscription of bargaining lockouts. The difficulties of drawing that distinction reenforce the considerations urged against that proscription. It may be useful to recapitulate the source of those difficulties: the consequences of strikes are so diverse and uncertain that there is no workable concept of "usual strike losses." Furthermore, the uncertainties, disruption, and threat to customer relations which generally attend a strike are a basis for plausible claims that extraordinary losses could have been avoided only by an employer's timing of an impending shutdown. Finally, as the *Anchorage Business Men's* case suggests,⁵⁶ the Board

⁵⁴ *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270 (1956).

⁵⁵ Those difficulties were also avoided by the reviewing court. See *American Brake Shoe Co. v. NLRB*, 244 F.2d 489, 494 (7th Cir. 1957).

⁵⁶ See text accompanying note 34 *supra*.

may further complicate life by seeking to unscramble the employer's dominant motivation or indeed to condemn his lockout if a desire to exert bargaining pressure appears to have entered into his decision.

These administrative difficulties aside, the Board's distinction between economic and bargaining lockouts is questionable because of the essential similarities between them. Both may inflict losses on employees as a consequence of their protected activity. Both may, therefore, in effect constitute bargaining weapons and may inhibit protected activities. Both may involve an attempt to protect the economic integrity of the enterprise without, however, any attempt to eliminate the union or to avoid the bargaining process. These similarities seem to me to overshadow the slender difference between them, that is, the economic lockout is designed to avoid strike losses independent of the settlement whereas the bargaining lockout is designed to improve the settlement.

In questioning the Board's prohibition of the bargaining lockout, I have not, of course, intended to say anything about the desirability of resorting to lockouts in particular situations or to encourage their use. Indeed, in concluding, it may be appropriate to notice that the term "lockout" is still something of a cuss word because of the abuse of the lockout in the pre-Wagner Act era. Its use may thus involve the risk of alienating important segments of the public and of prejudicing particular labor-management relationships. I have tried to suggest only why the Board should in general permit employers to run such risks under the existing statutory framework and under a labor policy which has evolved no general alternative to the use of economic pressure as a means of breaking a bargaining impasse.