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SINGLE EMPLOYER AND MULTI-EMPLOYER LOCK-OUTS UNDER THE TAFT-HARTLEY ACT

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THE growth of multi-employer bargaining¹ has been accompanied by increased litigation regarding the legality of the so-called multi-employer "defensive" lockout, i.e., a lockout by the unstruck members of a multi-employer bargaining unit, who are subject to an express or implied strike threat, in response to a strike called against one or more members of their group after an impasse in negotiations for a master contract. Although such a lockout may raise anti-trust questions,² as well as questions under the Taft-Hartley Act, recent litigation has arisen exclusively under the Taft-Hartley Act. This litigation has made only one thing clear: The NLRB, according to the reviewing courts, is always wrong. Thus the initial position taken by a majority of the Board (pre-Eisenhower), that defensive lockouts are illegal under the Taft-Hartley Act, was rejected by the courts of appeals in three circuits.³ A new

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¹ For estimates of the number of employees involved consult *Collective Bargaining with Associations and Groups of Employers*, 64 Monthly Lab. Rev. 397, 398 (1947); *Collective Bargaining Structures: The Employer Bargaining Unit*, Bureau of Labor Statistics (1953). The former is discussed in Pierson, *Prospects for Industry-Wide Bargaining*, 3 Indust. & Lab. Rel. Rev. 341, 360 (1950).

² The author plans to discuss these questions in a forthcoming issue of this *Review*.

³ *Morand Bros. Beverage Co. v. NLRB*, 190 F. 2d 576 (C.A. 7th, 1951) [remanding first Board decision, 91 N.L.R.B. 409 (1950), for a determination of whether the employers intended a discharge, which would have been illegal, as opposed to a lockout of their employees, which the court considered legal], 204 F. 2d 529 (C.A. 7th, 1953) [affirming second Board decision, 99 N.L.R.B. 1448 (1952), on ground that there was substantial evidence of discharge], cert. denied 346 U.S. 909 (1953); *Leonard v. NLRB*, 197 F. 2d 435 (C.A. 9th, 1952) [remanding *Davis Furniture Co.*, 94 N.L.R.B. 279 (1951), for a determination of the Board's position as to the legality of a defensive lockout], 205 F. 2d 355 (C.A. 9th, 1953) [reversing Board's holding in *Davis Furniture Co.*, 100 N.L.R.B. 1016 (1952), that defensive lockout was illegal]; *NLRB v. Spalding Avery Lumber Co.*, 220 F. 2d 673 (C.A. 8th, 1955) [rev'g 103 N.L.R.B. 1516 (1953)]; *NLRB v. Continental Baking Co.*, 221 F. 2d 427 (C.A. 8th, 1955) [rev'g 104 N.L.R.B. 143 (1953)].

In *Spalding Avery*, the Board, after generally reasserting the illegality of defensive lockouts, urged also that the lockout there involved was not "defensive" because the association and its members had agreed to the union's request to engage in individual bargaining, and that as a result the employers had no collective interest to protect by a lockout. See 103 N.L.R.B. 1516, 1521-22 (1953). Chairman Herzog, although dissenting in the second Board decision in the *Leonard* case, *supra*, was apparently moved by this questionable argument and did not dissent. The Eighth Circuit, urging that the union had repudiated its request by striking prior to any individual negotiations, rejected the Board's contention as "put[ting] a premium on sharp practice." 220 F. 2d 673, 676 (C.A. 8th, 1955).

In *Continental Baking Co.*, 104 N.L.R.B. 143 (1953), the Board found, as a separate ground for illegalizing a multi-employer lockout, that there had been no reasonable likelihood that the union would have struck against each of the employers since the impasse had involved an

Board majority (post-Eisenhower), in the *Buffalo Linen*⁴ case, reversed the Board's initial position, but on review the Second Circuit, with one judge dissenting, again reversed the Board.⁵

The foregoing litigation reflects disagreement, not only as to the legality of the multi-employer defensive lockout, but also as to whether bargaining lockouts⁶ by an employer bargaining individually should be treated differently from multi-employer defensive lockouts. Initially, the Board drew no distinction between the two types of lockouts and proscribed both.⁷ In the *Buffalo Linen* case, however, the Board, although sanctioning the defensive lockout, expressly reserved the issue of the legality of the single-employer lockout.⁸ On review, the Second Circuit, in reversing the Board's decision, found the two issues indistinguishable. Indeed, as a basis for its reversal the court relied heavily on a concession by the Board's general counsel of "the basic principle that an employer [not part of a multi-employer group] who locks out its employees on mere threat of, or in anticipation of, a strike is guilty of an unfair labor practice."⁹ In the light of the Board's explicit reservation of this question, the general

optional and non-uniform week, pressed by the union because the only employer who had been struck spread forty hours work over six days. The Board, on the basis of these findings, distinguished the Leonard case on the ground that the lockout was not a measure of self-defense against a uniform demand but a sympathy lockout. 104 N.L.R.B. 143, 145 (1953). The Eighth Circuit, on review, did not challenge the premise that anticipation of a strike for a uniform demand was a condition of a legal multi-employer lockout but held that the Board's findings on this score, which were contrary to the trial examiner's, were not supported by substantial evidence. In *Buffalo Linen Supply Co.*, 109 N.L.R.B. 447 (1954), the Board declared that a strike against one member of a multi-employer unit carried with it an implied threat of strike against all. Although not emphasized by the Board, it may be significant in this connection that during the prior thirteen-year period the employers in *Buffalo Linen* had negotiated uniform contracts with the union. NLRB brief to the Second Circuit at 6.

⁴ *Buffalo Linen Supply Co.*, 109 N.L.R.B. 447 (1954) (Murdock dissenting).

⁵ *Truck Drivers Local Union v. NLRB*, 231 F. 2d 110 (C.A. 2d, 1956), cert. granted, No. 103, 25 Law Week 3103 (Oct. 9, 1956). Clark, J. and Frank, J. (who wrote the opinion) constituted the majority; Waterman, J. dissented, urging, inter alia, that the Board's specialized judgment on questions involving multi-employer bargaining should be respected. But the Board's experts and their judgments have been so transient and the limits of their expertise so ill-defined that reliance thereon appears often to be a rationalization rather than a justification. But cf. Koretz, *The Lockout Revisited*, 7 *Syracuse L. Rev.* 263, 268 (1956), which reached the author after this article had been prepared.

⁶ "Lockout" has frequently been defined as an employer's temporary cessation of operations for the purpose of securing employment terms more favorable to him. But "lockout" has not always been used with this meaning and has sometimes not been differentiated from the more general and neutral term "shutdown." For a discussion of the variant usages of "lockout," consult the references collected in Koretz, *Legality of the Lockout*, 5 *Syracuse L. Rev.* 251-52 (1953). In this article, "lockout" will be used not as a word of art but interchangeably with "shutdown."

⁷ See, e.g., *Morand Bros. Beverage Co.*, 91 N.L.R.B. 409 (1950), 99 N.L.R.B. 1448 (1952).

⁸ *Buffalo Linen Supply Co.*, 109 N.L.R.B. 447, 448 (1954).

⁹ *Truck Drivers Local Union v. NLRB*, 231 F. 2d 110, 113 (C.A. 2d, 1956). This concession was made in the NLRB's brief at 9.

counsel's concession scarcely seemed entitled to the force accorded it by the court.¹⁰

In view of the uncertainty as to whether these two types of lockouts are controlled by the same rule, it seems desirable to separate two questions: First, under the Taft-Hartley Act is an employer bargaining individually entitled to use a lockout to break a bargaining impasse in much the same way as a union may use a strike? If the answer to this question is, or may be, negative, the second question is: Despite the illegality of a single-employer lockout, is there a valid basis for sanctioning the multi-employer defensive lockout?

There is a group of cases which proscribes lockouts by individual employers but which can be put aside because they plainly do not control the legality of the bargaining lockout. These cases involve lockouts designed to frustrate organizational efforts, to destroy or to undermine the bargaining representative or to evade the duty to bargain.¹¹ In such situations the basic vice is not the lockout as such, but the fact that its purpose is plainly incompatible with the rights to organize or to bargain collectively, which are protected by the statute.¹² These illicit lockouts are plainly distinguishable from the bargaining lockout. The latter does not involve an attempt to evade collective bargaining or to bust the union any more than a strike is normally intended to bankrupt the employer. The bargaining lockout is an attempt, within the framework of collective bargaining, to checkmate the union's power to strike.¹³ Its function is

¹⁰ Since the question reserved by the Board was deemed crucial by the court, a remand to the Board for an exposition of its position on that question would have been preferable to reliance on the general counsel's concession. The general counsel, it should be noted, is not appointed by the Board but by the President, and any determination by the general counsel that an unfair labor practice occurred is subject to the Board's overriding authority.

¹¹ For a discussion of such cases consult 50 Col. L. Rev. 1123 (1950); Koretz, *op. cit. supra* note 6, at 253-54.

¹² "Statute" throughout refers to the Wagner Act, 49 Stat. 449 (1935) as amended by the Labor-Management Relations Act, 1947 (the "Taft-Hartley Act"), 61 Stat. 136 (1947), 62 Stat. 1286 (1948), 63 Stat. 880 (1949), 65 Stat. 601 (1951); 29 U.S.C. §§ 141-197 (1952). Except where amendments to the Wagner Act are relevant, the text will not distinguish between that Act and the Taft-Hartley Act.

¹³ This is the basic position adopted in the *Morand* case, 190 F. 2d 576, 582 (C.A. 7th, 1951), 204 F. 2d 529, 531 (C.A. 7th, 1953); and in the *Leonard* case, 197 F. 2d 435, 441 (C.A. 9th, 1952), 205 F. 2d 355 (C.A. 9th, 1953). In the second *Leonard* opinion, the court, although reaffirming its previous opinion, also sought to assimilate the bargaining lockout to lockouts prompted by economic or operational considerations. The latter are discussed at 73 *infra*.

The Seventh Circuit's language in both *Morand* opinions seemed to require an impasse, i.e., exhaustion of "the possibilities of good faith collective bargaining with the union through their association," as a prerequisite to a bargaining lockout. 190 F. 2d 576, 582 (C.A. 7th, 1951), 204 F. 2d 529, 531 (C.A. 7th, 1953). But since a strike appears to be permissible after compliance with the conditions imposed by Section 8(d) of the Taft-Hartley Act, which do not explicitly include an impasse, this requirement seems to be technically inconsistent with the court's basic rationale that the lockout is the corollary of the strike. This inconsistency could perhaps be avoided by accepting the assumption, which is, however, somewhat fanciful, that in the absence of an impasse resort to a lockout would necessarily be prompted by anti-

essentially the same as that of other apparently lawful arrangements designed to counter a possible strike, such as subcontracting, renting machinery to replace strikers, or indeed a publicity campaign to dramatize the evils of allegedly wage-induced inflation. The purpose of the lockout is, in short, to improve the employer's bargain rather than to avoid the bargaining process.

Somewhat closer to the bargaining lockout are lockouts arising out of protected activities but sanctioned by the Board because they are prompted by "economic" or operational reasons. Illustrative of such reasons are financial losses resulting from collectively bargained wage rates which could not be negotiated downward,¹⁴ uneconomic operations resulting from a strike in a single department of an integrated plant,¹⁵ fear of spoilage of raw materials¹⁶ or of customer dissatisfaction¹⁷ if a threatened strike materialized. In such cases, the lockout is sanctioned because it is deemed to be a response, not to the protected activities, but to their consequences. Similar consequences could be produced by material or manpower shortages unrelated to protected activities. Accordingly, these cases are technically distinguishable from the bargaining lockout which is necessarily a response to protected activities. Whether this distinction is one which should, or can effectively, be drawn is a question to which we will return after a closer look at the cases resting on this distinction.

In *Duluth Bottling*,¹⁸ the Board, although intimating that a bargaining or a defensive lockout would be illegal, held that the fear of raw-material spoilage justified a lockout by the unstruck members of an employers' association notwithstanding that the raw materials at risk at the various plants were not worth more than from \$100.00 to \$300.00,¹⁹ and that all of the members of the

union motivation. It is, moreover, arguable that a lockout, absent an impasse, involves a failure to bargain in good faith, but in view of Section 8(b)(3) of Taft-Hartley, requiring unions so to bargain, this argument would also be applicable to unions resorting to a bargaining strike prior to an impasse.

In any event, the question of when an impasse has been reached may prove troublesome. Thus in *Buffalo Linen*, *Murdock*, dissenting, pointed to the trial examiner's finding that there had been no impasse. 109 N.L.R.B. 447, 452 (1954). Although no explicit bargaining stalemate existed in that case, the strike against one member of the employer association after intermittent negotiations with the association over a two-month period seems entitled to the same effect as an explicit stalemate.

¹⁴ *Brown-McLaren Manufacturing Co.*, 34 N.L.R.B. 984 (1941); cf. *Lengel-Fencil Co.*, 8 N.L.R.B. 988 (1938) (lockout by an employer who "lost his temper" after a strike threat held not an unfair labor practice where the employer's course of conduct precluded a finding that the lockout was intended to discourage collective bargaining or other union activity).

¹⁵ See *International Shoe Company*, 93 N.L.R.B. 907 (1951) and cases cited by *Koretz*, op. cit. supra note 6, at 254; cf. *The Associated General Contractors of America, Inc.*, 105 N.L.R.B. 767 (1953).

¹⁶ *Duluth Bottling Ass'n*, 48 N.L.R.B. 1335 (1943).

¹⁷ *Betts Cadillac Olds, Inc.*, 96 N.L.R.B. 268 (1951).

¹⁸ 48 N.L.R.B. 1335 (1943).

¹⁹ Cf. *Buffalo Linen*, 231 F. 2d 110, 113 (C.A. 2d, 1956), where the court said that "the Board has held that *only in unusual cases of economic hardship*" does a threat of a strike justify a lockout. (*Italics added.*)

association had simultaneously decided to close down. Similarly, in *Betts Cadillac Olds*,²⁰ the Board sanctioned a lockout of automobile service and repair departments by the unstruck members of an employers' association on the ground that the lockout was designed to avoid customer dissatisfaction from unfinished work. The evidence, however, justified skepticism that this was the real reason for the lockout. The employers had discussed the advisability of a general shut-down and had advised their employees not only that the prospective strike threatened operational difficulties, but also that the strike against two association members was a strike against all. These two cases suggest that the pre-Eisenhower Board had, for practical purposes, softened its prohibition of bargaining lockouts by its alacrity in finding that lockouts occurring after a bargaining impasse were not motivated by bargaining objectives.

Furthermore, the Board's decision in *International Shoe*²¹ can be interpreted as a recognition that under certain circumstances a lockout by a single employer may properly be used to achieve bargaining purposes. Since *International Shoe* is difficult to reconcile with the position followed by the Board until its volte-face in *Buffalo Linen*, it merits full discussion. In *International Shoe* the union had conducted an organizing drive during negotiations for a new contract involving a demand for a maintenance-of-membership clause. This drive was implemented by intermittent stoppages in two departments, apparently in protest against the presence of non-union workers. The employer thereupon shut down the entire plant, rejected the union's proposal for an immediate reopening and resumption of negotiations and insisted, as a condition of reopening, on both a written no-strike pledge and an escape provision for all those who had joined

²⁰ 96 N.L.R.B. 268 (1951). The trial examiner, whose findings and conclusions were adopted by the Board, stated that although there was evidence justifying the inference that the shut-down was motivated by a desire to checkmate the union's piece-meal strike strategy, the General Counsel had not discharged his burden of showing that this motivation was operative.

The examiner gave careful attention to unsuccessful attempts, made by most of the employers prior to the lockout, to secure assurances from their employees that no strike would occur or that, in the event of a strike, unfinished work would be completed. The examiner, while finding no satisfactory explanation for the employers' failure to seek such assurances directly from the union, dismissed this irregularity because of the union's previous statement that further strikes might be called "at any minute," the strong likelihood of its knowledge of the employers' fears of unfinished work and its failure to dispel those fears. The examiner's approach suggests that justification of a lockout on "economic" or "operational" grounds may well depend on employer attempts to secure assurances—and preferably from the union—designed to avoid such difficulties. Nevertheless, it should be observed (a) that the examiner immunized both the employers who sought, but were denied, such assurances and the one and smallest employer whose employees, in effect, gave such assurances orally but declined to reduce them to writing; and (b) that in *Duluth Bottling Ass'n*, 48 N.L.R.B. 1335 (1943), there was no mention of any attempt by the employers to seek similar assurances.

A requirement that an employer seek assurances from the union designed to avoid special economic difficulties is consistent with the "economic" justification for lockouts. But if the right to strike means that the union is generally entitled to maximize the employer's losses by its timing of a bargaining shutdown, the question remains whether it is consistent to permit a lockout if union assurances designed to reduce the employer's losses are not forthcoming.

²¹ 93 N.L.R.B. 907 (1951).

the union after a date some nineteen days prior to the first stoppage. The union "accepted" the employer's offer, except for the escape clause.

The Board's holding that the lockout was justified initially by the integrated character of the plant and by the need for round-the-clock operations is a conventional illustration of the "economic" rationale. But serious difficulties are raised by the Board's further conclusions: (1) that the union's harassing tactics justified the continuation of the lockout pending execution of a no-strike clause and (2) that the employer's insistence on the escape-clause was not a reprisal against the union but was apparently prompted by the employer's justifiable belief that the clause was a necessary corrective of the union's coercive conduct, which had "approached" a Section 8(b) violation. To support the first conclusion, the Board invoked the broad language of the *Pepsi Cola* case:²²

[A]n employer may lawfully discontinue or reduce operations for any reason whatsoever . . . *provided only that the employer's action is not motivated by a purpose to interfere with and defeat its employees' union activities.*²³

The Board sought to buttress both conclusions by stating:

Here the parties were engaged in a contest over economic matters. Neither sought to undermine the other by unfair labor practices. The Union, which chose to use an economic weapon within its control, cannot rightly complain because the employer saw fit to follow suit. This case stands on its own facts; we are not here confronted with and need not pass upon the right of an employer in ordinary circumstances to lay off employees pending negotiation of a complete contract.²⁴

The union's initial resort to a stoppage plainly differentiates the *International* case from the bargaining lockout where the employer throws the first stone. The union's intermittent stoppages, together with the integrated nature of the operations are, moreover, an appealing basis for justifying a lockout designed to secure a no-strike pledge. But if the stoppages had occurred prior to the negotiations, the language of the Board quoted above,²⁵ as well as its general prohibition of bargaining lockouts, suggests that the Board would not have held the lockout privileged. Despite the fact that harassment during negotiations may appear to be especially distasteful,²⁶ an employer's stake in a no-strike

²² 72 N.L.R.B. 601 (1947).

²³ *Ibid.*, at 602.

²⁴ 93 N.L.R.B. 907, 911 (1951). Member Murdock, concurring in the result on the basis of the peculiar facts, complained that the broad *Pepsi Cola* dictum would sanction the employer's resort to a bargaining lockout. 93 N.L.R.B. 912 (1951). Members Houston and Styles, dissenting, pointed to the union's willingness to sign a no-strike clause, urged that the only bargaining issue was the escape clause and concluded that the continuation of the lockout was a coercive attempt to defeat the union's demand on that issue. 93 N.L.R.B. 912 (1951).

²⁵ Consult text at note 23 *supra*.

²⁶ Cf. *Textile Workers Union of America*, 108 N.L.R.B. 743 (1954), where the Board held that such tactics during negotiations constituted a refusal to bargain in good faith. This holding was reversed on appeal. *Textile Workers Union v. NLRB*, 227 F. 2d (App. D.C., 1955), cert. granted, 350 U.S. 1004 (1956), grant vacated, 38 L.R.R.M. 2757 (Oct. 15, 1956).

clause and his justification for resorting to a lockout to secure one is not necessarily greater when the harassment occurs during, rather than before, the negotiations. Accordingly, the Board's decision in *International Shoe*, which appears to be dependent upon the timing of the harassment, is questionable and, in any event, is not consistent with the proposition that a lockout may not be used to achieve bargaining ends.

With respect to the employer's use of the lockout to enforce his demand for a particular escape clause, the Board found that the union's activity was not an unfair labor practice and failed to find that it was unprotected. Accordingly, it is difficult to accept the conclusion that the employer's resort to the lockout to enforce this demand was justified by the need to neutralize the union's over-exuberant organizing activity. Therefore, this aspect of the case also appears to involve approval of the use of the lockout for bargaining purposes.²⁷

It is plain from these cases that the Board's distinction between "economic" and bargaining lockouts is difficult to administer. Furthermore, the similarities between the two types of lockout seem to be more important than their differences. Both types may involve losses to employees which arise out of protected activities and may, therefore, discourage or diminish the effectiveness of such activities. Both types may also involve an attempt to protect the economic integrity of the enterprise without any attempt to frustrate organizational activity or to avoid the bargaining process. The difference between these lockouts when they both arise in the context of bargaining, namely that the bargaining lockout is designed to reduce the union's pressure by depriving it of the initiative with respect to the timing of the shutdown while the economic lockout is designed to avoid the consequences of the union's exercise of its initiative, seems exceedingly slender.

The employer may make this distinction even more shadowy by choosing his rhetoric carefully. Even though his purpose is to exert bargaining pressure, he may contrive economic or operational reasons for his lockout. Such rationalizations are plausible because of the uncertainties and possible disruptions which attend any strike threat. Indeed, the Ninth Circuit, in its second opinion in the *Leonard* case,²⁸ criticized the Board for ignoring such uncertainties, assumed that they had prompted the lockout and assimilated the multi-employer *Leonard* lockout to lockouts which had been sanctioned by the Board on "economic" grounds.

The Board's distinction not only invites employers to contrive "economic" or "operational" justification for what are in fact bargaining lockouts but also

²⁷ The inconsistency between *International Shoe* and the Board's position in the *Morand* case (that a lockout may not be used for bargaining purposes) can, of course, be explained away because of the Board's emphasis in *International Shoe* on the "peculiar facts," and because none of the opinions secured a majority.

²⁸ *Leonard v. NLRB*, 205 F. 2d 355 (C.A. 9th, 1953). But cf. *Truck Drivers Local Union v. NLRB*, 231 F. 2d 110, 113 (C.A. 2d, 1956), relying on the general counsel's concession that "the ordinary economic hardship occasioned by a strike does not privilege an employer to counter a strike threat with an anticipatory lockout." NLRB brief at 9.

invites employers preferring an immediate shutdown to provoke a strike in order to avoid the liability which would be involved in such a lockout. Such provocation may poison the atmosphere more than a clear-cut lockout. While the familiar, but elusive, ideal behind mature bargaining is the subordination of power considerations to "responsible" persuasion, the candid resort to power may be less harmful than disingenuous tactics designed to provoke the other side to throw the first stone. In any event, the Board, once it proscribes the bargaining lockout, would presumably be required, in order to protect the integrity of its own processes, to inquire whether an employer had deliberately provoked a strike. Such an inquiry would invite disingenuous evasions before the event, cynicism after the event and substantial administrative difficulties.²⁹ Whether the Board is required by the statute to adopt a rule involving such difficulties is a question now to be examined.

The Board's argument (pre-Eisenhower) against the bargaining lockout by a single employer has, because of the absence of cases squarely raising that issue, been developed in cases involving multi-employer defensive lockouts. Its argument, which was accepted by the Second Circuit in *Buffalo Linen*, is as follows: Strike activity, actual or threatened, is protected activity; a lockout, even though prompted by bargaining objectives, constitutes a reprisal against protected activity inconsistent with both the statutory protection of the right to strike embodied in Section 13 of the Act and the statutory objective of reducing industrial warfare.³⁰ A bargaining lockout is, accordingly, a violation of Section 8(a)(1) and Section 8(a)(3) of the statute.

The Board has reinforced its argument from the statute by so analyzing the alternatives open to the employer after an impasse has been reached as to suggest that, as a matter of policy, strikes and lockouts should not be "commensurate weapons." In *Davis Furniture*,³¹ the Board declared:

Faced with an impasse in bargaining, the employer still retains control of the terms of employment so long as production continues. He is free to continue the existing terms

²⁹ Even the legalization of the bargaining lockout will not necessarily eliminate the question of the motivation of a lockout ostensibly designed to break a bargaining impasse. An employer may employ such a lockout for union-busting purposes. But such purposes may also generate a bargaining position which is calculated to, and which does, impel a union to strike at a time when strike action would jeopardize its representative status. In either case, difficult issues of motivation are inescapable. But it would probably be easier to determine whether or not the employer's lockout was motivated by a desire to destroy the union than to determine whether or not an ostensible bargaining lockout was in fact prompted by "economic" or bargaining considerations. The history of the parties' relationship would be considerably more useful in resolving the former question. In addition, it seems likely that cases seriously raising the problem of whether or not an ostensible bargaining lockout was a union-busting device would be rare whereas cases involving a bargaining lockout will almost always raise a serious question as to the existence of an "economic" justification for the lockout.

³⁰ 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).

³¹ 100 N.L.R.B. 1016 (1952), quoted with approval in *Buffalo Linen*, 231 F. 2d 110, 114 (C.A. 2d, 1956).

without any contract or, indeed, unilaterally to institute any previously proposed changes in those terms. These courses of action are obviously not available to the union. If the union resorts to an economic strike, the employer may lawfully meet the challenge by replacing the strikers. Thus, he may continue to operate on his own terms without any diminution of profits while the strikers suffer partial, if not complete, loss of wages. Even if the employer is unable to get replacements to permit continued operations in the face of the strike, he is generally in no worse position than the strikers. Both adversaries in the conflict would in such a case be under the same economic pressure to terminate the strike and restore the flow of wages and profits.³²

The Board's argument bristles with difficulties. What appears to be its basic premise, that any interference with protected activity or the right to strike regardless of the purpose behind such interference is a violation of the statute, is plainly unacceptable. Thus the employer's right to replace economic strikers has been recognized even though replacement interferes with and limits the right to strike.³³ The Board has gone even further and sanctioned discharge of supervisors (who were granted protection under the Wagner Act) for striking when their absence involved substantial risk of serious physical damage to the plant.³⁴ Familiar precedents thus preclude the mechanical conclusion that an anticipatory lockout is illegal because it interferes with the right to strike.

Nor does the language or the legislative history of Section 13 of the Wagner Act support this conclusion. Section 13³⁵ did not purport affirmatively to guarantee the right to strike or to expand the scope of activities protected by Sections 7 and 8 of that Act. That section was in essence a proviso designed to make clear that the Wagner Act, despite its provisions for elections and its stated objective of promoting industrial peace, was not to be used as a basis for proscribing strikes. Any doubt on this score should be eliminated by the pertinent legislative history, which shows that the section was designed to prevent a misconstruction of the statute by which strikes might have been made unlawful.³⁶

³² 100 N.L.R.B. 1016, 1020-21 (1952).

³³ Consult cases cited by Waterman, J. dissenting in *Buffalo Linen*, 231 F. 2d 110, 119 (C.A. 2d, 1956).

³⁴ See *Carnegie-Illinois Steel Corp.*, 84 N.L.R.B. 851 (1949) (Herzog and Houston dissenting), *aff'd sub nom. Albrecht v. NLRB*, 181 F. 2d 652 (C.A. 7th, 1950); cf. *NLRB v. Marshall Car Wheel and Foundry Co.*, 218 F. 2d 409 (C.A. 5th, 1955).

³⁵ The text of Section 13 is set forth below; amendments effected by the Taft-Hartley Act are italicized: "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, or to affect the limitations or qualifications on that right.*"

³⁶ Consult H.R. Rep. No. 972, 74th Cong. 1st Sess. 23 (1935). The desire to avoid such a misconstruction was the stated purpose of both Section 6 of Pub. Res. No. 44, 73rd Cong. 2d Sess., 48 Stat. 1183 (1934), from which Section 13 was derived, and earlier versions of Section 13. As to Pub. Res. No. 44, consult debates on H. J. Res. 375, 73rd Cong. 2nd Sess. (1934) (which became Pub. Res. No. 44), 78 Cong. Rec. 12,044 (1934). As to the earlier version of Section 13 consult Hearings before Committee on Education and Labor, 73rd Cong. 2d Sess. 53, 1014-15 (1934); 78 Cong. Rec. 12,029 (1934); S. 1958, 74th Cong. 1st Sess. 21 (1935). In the debates on H. J. Res. 375, *supra*, Senator Walsh stated that he had been advised by Labor Department counsel that Section 6 was unnecessary. 78 Cong. Rec. 12,044 (1934).

In this connection, it is also of some significance that the original bill introduced by Senator Wagner provided in Section 5(1) that it would be an unfair labor practice for an employer "to attempt, by interference, influence, restraint, favor, coercion, or *lockout*, or by any other means, to impair the right of employees guaranteed in section 4." (*Italics added.*)³⁷ Although the original bill had proscribed a "lockout" only when it was used to defeat protected activities, the hearings produced objections that this prohibition, while the right to strike was protected, was unfair.³⁸ Subsequent bills introduced by Senator Wagner omitted any express reference to lockouts. While this legislative history scarcely supports the right to resort to bargaining lockouts, it does foreclose the use of Section 13 as support for their proscription.

It is, perhaps, these difficulties in the Board's arguments from Sections 7, 8 and 13 which prompted its attempt to buttress its argument from the statute by an examination of the alternatives, the lockout aside, open to the employer threatened with strike action. But, there is a touch of unreality in the Board's emphasis on the employer's right, in the event of a deadlock, to replace strikers or, in the event of an impasse, unilaterally to institute terms previously offered to the union. The right to replace is more often than not a purely paper right either because of lack of qualified replacements or because its exercise would produce bitterness, if not bloodshed. Even where the employer exercises this right, the disruption of a trained work-force, as well as possible union attempts at consumer boycotts and the like, scarcely admit of the Board's easy assumption that operations can continue "without any diminution of profits."

The employer's exercise of his right to institute unilateral changes in employment conditions after an impasse also involves practical difficulties. He has no assurance that such action will avert a strike timed in accordance with union strategy. Furthermore, an employer's "concession" of all that he is prepared to offer without securing his demands or the withdrawal of additional union demands may interfere with the process of trading one demand off against others. Moreover, for the employer unilaterally to grant some concessions but to withhold others solely as a bargaining counter in relation to the disputed issues might put him in an unfavorable light with his employees and the general public. Finally, the unilateral institution of benefits, absent a strike, may suggest that more may be forthcoming after a strike. The employer's limited control over employment terms is thus plainly no substitute for the stable relationship which he seeks through negotiations and, if necessary, the lockout.

Equally unpersuasive is the Board's contention that the employer, even though precluded from initiating a shutdown, is in no worse position than the

³⁷ Sen. 2,926, 73rd Cong. 2d Sess. 5 (1934). Section 4 was substantially the same as Section 7 of the Wagner Act.

³⁸ Hearings, *op. cit.* supra note 36, at 372, 511 and 908. The objections to the lockout voiced in the hearings were directed at its use to defeat organizational efforts or to avoid the obligations of agreements resulting from bargaining and not at its use for bargaining purposes. Consult *ibid.*, at 38, 931.

strikers when they initiate the recourse to economic pressure. This is not to deny the hardship to employees resulting from any loss of employment or the danger to precarious union organization which a strike or a lockout may produce or aggravate. But there are no standards for comparing the impact of a shutdown of indeterminate length on enterprises, employees and unions, respectively. At best, such comparisons would be uncertain and impressionistic. At worst, they would be empty sloganeering. Furthermore, the Board's easy calculus of comparative detriment ignores completely the factor of the timing of the shutdown which may be of crucial importance in bargaining because of seasonal fluctuations in output, fluctuations in opportunities for stand-by employment and other factors. The Board's abstract statement concerning comparative detriment is, in short, no more meaningful than a similar assertion that laid-off employees are in no worse position than an employer who feels compelled by his bargaining position to engage in an anticipatory lockout.

If, as the Board has urged,³⁹ prohibition of the bargaining lockout would reduce the frequency of shut-downs, such a prohibition would gain some support from the statutory purpose of reducing industrial warfare. But any limitation on bargaining pressures open either to an employer or to the union presumably would, to the extent that it had any effect, influence their respective negotiating positions and their willingness to compromise. Accordingly, the impact of the lockout prohibition on the incidence of industrial warfare is wholly conjectural.

Critics of the Board's initial position may also argue persuasively that the more direct objectives of the Wagner Act, the protection of the employees' interest in organization and of the process of collective bargaining, do not support the proscription of bargaining lockouts. It was the protection of "concerted activity" and the imposition of the duty to bargain which were to redress the employees' "inequality of bargaining power." There was nothing in the statute which required that an employer who fully accepted the idea of unionization and collective bargaining should also be deprived of initiative in the use of economic pressure exerted solely for the objective of breaking a bargaining impasse.⁴⁰ Prior to the Wagner Act, the bargaining lockout was not only legal,⁴¹ but, like the strike, was widely assumed to be one of the driving forces behind collective bargaining.⁴² In view of the assumption that the lockout was a proper concomitant of collective bargaining, the statutory blessing of collective bargaining arguably embraced the bargaining lockout. In other words, the common law legality of lockouts continued unless tainted by a purpose proscribed by the Act.

³⁹ Consult discussion at 77 *supra*.

⁴⁰ Compare *International Shoe* (quoted in text at note 24 *supra*).

⁴¹ See *Iron Moulders' Union v. Allis Chalmers Co.*, 166 Fed. 45, 50 (C.C.A. 7th, 1908); consult Koretz, *op. cit. supra* note 6, at 253.

⁴² For references to the pertinent literature consult Koretz, *op. cit. supra* note 6, at 252, 268.

As suggested above,⁴³ the desire of an employer to forestall a shutdown at a time when it would be peculiarly damaging, or generally to improve his bargaining position, does not involve such a purpose. A distinction between the desire to avoid such damage and the desire to avoid spoilage of raw materials or uneconomic operations, although technically possible, is, as we have seen, extremely refined. It is, of course, possible to construe Sections 7 and 8(a) to bar the "interference" with "protected activities" which results from a lockout. But such a construction is a wooden one which ignores the need for balancing the legitimate interests of the employer against those of the union—a need which has been reflected in other interpretations of the statute.⁴⁴

The foregoing discussion has been limited to lockouts occurring after the expiration of the waiting period prescribed by Section 8(d)(4) of the Taft-Hartley Act and in compliance with the other requirements of that section. Where an employer shuts down during the waiting period, the Board will perforce have to determine whether the shutdown is referable to bargaining objectives or to the "economic" or operational difficulties occasioned by the prospect of a strike. While in such situations a distinction between "economic" and bargaining lockouts will be inevitable, the difficulties of drawing that distinction may suggest that the occasions in which it will be decisive should not be multiplied.

Thus far the discussion of the Board's argument (pre-Eisenhower) has not taken account of the new and important elements added to the problem by the Taft-Hartley Act. These elements consist of Sections 8(d)(4), 203(c), 206 and 208(a) of the statute,⁴⁵ together with the general concern about the growth of union power which apparently was the driving force behind this legislation. Although, as the course of litigation suggests, the problem remains a thorny one, these new considerations warrant, I believe, the judicial dicta which have sanctioned the bargaining lockout even in the absence of selective strikes against a member of a multi-employer unit. These new provisions can properly be read as impliedly recognizing that the bargaining lockout is the corollary of the strike.⁴⁶ This is not to question either the Board's contention that the prohibition of strikes and lockouts under similar circumstances does not necessarily mean that a lockout would be lawful whenever a strike would be, or its conten-

⁴³ Consult discussion at 72-73 *supra*.

⁴⁴ Consult discussion at 78 *supra*.

⁴⁵ All of these sections, in dealing with bargaining impasses, link "strikes and lockouts." Thus 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." (*Italics added.*)

⁴⁶ See the Leonard cases, 197 F. 2d 435, 438-41 (C.A. 9th, 1952), 205 F. 2d 355-57 (C.A. 9th, 1953).

tion that such prohibition would not necessarily serve to legalize lockouts otherwise prohibited by Section 8.⁴⁷ But these generalities appear to miss the mark. Contrary to the Board's assumption, it is, as we have seen, doubtful that the lockout was proscribed by the Wagner Act. Furthermore, Section 8(d)(4) is specifically directed at the situation of a bargaining impasse. To prohibit, as that section does, a strike or lockout in such a context unless a condition occurs would seem to sanction such activity where the condition is satisfied unless there were other clear language of prohibition, which is lacking. This commonplace construction is reinforced by the fact that, even after the Wagner Act, the prevalent assumption was that strikes and lockouts were equally permissible devices for breaking a bargaining impasse.⁴⁸

This construction is also reinforced by the mood which lay behind, and was reflected in, the Taft-Hartley Act. The Act arose from a general conviction that the power of employers, vis-à-vis unions, should be increased. In the context of bargaining this means that employers were to have greater power to cope with, or more bluntly, to resist union demands—short of action challenging the basic idea of free association or collective bargaining. It is true, as the Board has urged, that the statutory purpose was to be implemented by proscribing certain allegedly "bad practices" by labor organizations and not [except for the free-speech guarantee in Section 8(c)] by narrowing the pre-existing proscriptions on employer conduct.⁴⁹ But, as we have seen, it is far from clear that the bargaining lockout was proscribed by the Wagner Act. Accordingly, the larger statutory purpose of strengthening the employer's bargaining power is plainly relevant in interpreting the provisions of Sections 8(a), 8(d)(4) and the other provisions which coupled strikes and lockouts. Indeed, it is difficult to suggest a consideration which is more important.

If the bargaining lockout by a single employer is held legal under the Taft-Hartley Act, it will also be legal for the unstruck members of a multi-employer unit to engage in a defensive lockout. If, however, the bargaining lockout is prohibited to the single employer, the question remains whether the multi-

⁴⁷ See *Davis Furniture Co.*, 100 N.L.R.B. 1016, 1018 (1952). The Board stated that "Section 8(d)(4) does not expressly sanction lockouts. While it is arguable that by forbidding resort to lockouts under certain circumstances, it impliedly recognizes a right to lockout under other circumstances, such an implication is not sufficient to overcome the positive and sweeping language of Section 8(a)(3) and (1). Similarly, other provisions of the Act curtailing resort to lockouts [Sections 203(c), 206 and 208(a)] do not sufficiently demonstrate congressional intent to strike down the safeguards of employees' rights in Section 8(a)(3) and (1)."

⁴⁸ Consult Koretz, *op. cit. supra* note 6, at 252, 268. Despite the tendency of dissenters to overstate their case, it is of some significance that minority opponents of provisions in H.R. 3020, 80th Cong. 1st Sess. (1947), which also would have established waiting periods and other prerequisites to strikes or lockouts, complained that "the concept of bargaining under this statute merely imposes formalistic procedures before a strike or lock-out becomes legal. . . . It is, again an open invitation to industrial strife." H.R. Rep. No. 245, 80th Cong. 1st Sess. 82 (1947).

⁴⁹ See *Morand Bros. Beverage Co.*, 99 N.L.R.B. 1448, 1465 (1952).

employer defensive lockout should be treated differently. Mr. Guy Farmer, when he was Chairman of the Board, suggested in a newspaper article, that such employer lockouts should be sanctioned to "equalize bargaining power."⁵⁰ Nevertheless, he was part of the Board majority in *Buffalo Linen*, which, while sanctioning such lockouts, expressly reserved the question of the legality of a bargaining lockout by a single employer.⁵¹ Implicit in this position is the proposition that the members of a multi-employer unit, unless they are permitted to resort to the defensive lockout, would generally have less bargaining power than other employers who bargain separately. Such a proposition would be meaningful only if "bargaining power" were a concept which could serve as a common measure for different bargaining situations.

This, however, is plainly not the case and, accordingly, there appears to be no substance to the contention implicit in ex-Chairman Farmer's position. "Bargaining power" and "inequality of bargaining power," although sacred phrases when unions were building up their power, have never been refined or even workable tools of analysis.⁵² Economists have long criticized these phrases,⁵³ without, however, affecting their cavalier use by lawyers, judges and law professors. When "inequality of bargaining power" is invoked in favor of a group, the phrase is only a naked claim that that group should have an increase in power relative to another group or to the rest of the community, and this rhetoric, despite its connotation of helping the underdog, does not necessarily support the merits of the claim.

In the context of particular collective bargaining negotiations, the measure of bargaining power may be viewed as the relative ability of each side to inflict damage on the other in the event of a stalemate, or it may be viewed as the relative staying power of the contestants when they are subjected to economic and other pressures.⁵⁴ But staying power is also in part a function of the nature of the issues in dispute and of the consequences of capitulation or compromise at a particular time on the economic and power interests involved. "Bargaining power," as Professor Neil W. Chamberlain has said, "is dependent at least as much upon what each party is seeking . . . as it is upon each party's coercive ability."⁵⁵ It is, accordingly, impossible to apply any meaningful concept of bargaining power to abstract bargaining situations. Furthermore, each party's

⁵⁰ Consult 33 L.R.R.M. 100 (1954).

⁵¹ 109 N.L.R.B. 447, 448 (1954).

⁵² Consult Lindbloom, "Bargaining Power" in *Price and Wage Determination*, 62 Q.J. Econ. 396, 402-403 (1948); Mason, *The Monopolistic Power of Labor Unions*, 79 Monthly Lab. Rev. 161, 162 (1956); compare Stigler, *The Economist Plays with Blocs*, XLIV Am. Econ. Rev. (Papers and Proceedings) 7, 14 (1954).

⁵³ Consult Stigler, *op. cit. supra* note 52 and Hutt, *The Theory of Collective Bargaining* (1930).

⁵⁴ Compare Chamberlin, *The Monopoly Power of Labor*, in Wright, *The Impact of the Union 168-177* (1951); Chamberlain, *Collective Bargaining*, c. 10, esp. 237-38 (1951).

⁵⁵ Chamberlain, *op. cit. supra* note 54, at ¶236.

capacity to resist and to inflict damage is a function of so many variables, that "bargaining power" is not particularly useful even in a concrete case.⁵⁶

It is true that these difficulties with "bargaining power" could be conceded, without negating the contention that employers as a result of their association increase their bargaining power vis-à-vis the union. But even if this contention, which is prevalent, were accepted, it would not justify a distinction between single-employer and multi-employer lockouts. Such a distinction, if it is to be predicated on bargaining power considerations, depends, as indicated above, on the proposition that employers organized on a multi-employer basis are nevertheless weaker than other employers bargaining individually and therefore should be granted the right to resort to defensive lockouts. This proposition has not been verified and is scarcely verifiable without a more precise concept of bargaining power than now exists.

Furthermore, an examination of the factors conventionally urged as the basis for the "bargaining weakness" of the individual members of the larger unit does not support this proposition. Among such factors are the following: (1) The unstruck members of a larger unit are confronted with a prospect of successive strikes against individual members and the possibility of successive capitulations. (2) The initial bargain with a single member of a multi-employer group may have an almost coercive impact on subsequent negotiations with other members of that group. Indeed, selective strike strategy will presumably be fashioned with this purpose in mind. (3) Multi-employer bargaining, moreover, seems to "thrive . . . where employers are relatively small and highly competitive."⁵⁷ (4) Finally, it appears that employers associate in a multi-employer unit because of a conviction that individually they are "weaker" than the union and that an association will increase their bargaining power.

The foregoing factors generally operate, however, with similar force in the context of single-employer bargaining. Thus, the individual employer may find his hand forced by the bargain of his competitor, not to speak of "national patterns." General Motors, for example, bargains not only for itself but for Ford and Chrysler and to some extent, perhaps, for the whole economy. The same vicarious bargaining exists when smaller employers are bargaining individually with a strong centralized union. This fact, incidentally, is reflected by the existence of "most favored nation clauses" in collective bargaining agreements, designed to prevent discrimination among employers. Employers bargaining individually, moreover, are often vulnerable to the same whipsawing tactics which have been applied to the members of a large unit. In fact, individual employers may be in a worse position than the members of a multi-employer unit, since

⁵⁶ Compare Chamberlin, *op. cit. supra* note 54, at 177; consult also discussion at 85 *infra*.

⁵⁷ Pierson, *op. cit. supra* note 1, at 357. Kerr and Randall, *Collective Bargaining in the Pacific Coast Pulp and Paper Industry* 2-4 (1948). At the same time multi-employer arrangements of varying degrees of formality exist in apparently oligopolistic industries. Consult Chamberlain, *op. cit. supra* note 54, at 163, 176 (1951).

such employers lack whatever advantages may accrue from an agreement among associated employers for mutual aid and for an unbroken front whether the union presses its demands by simultaneous or successive strikes. Finally, single-employer bargaining, which remains the numerically dominant type, involves many employers who are small and competitive and who consider themselves "weaker" than the union. If such employers bargaining alone are denied the right to resort to a bargaining lockout, a concept of "bargaining power," whatever its content, scarcely justifies more favorable legal treatment for the defensive lockout.

The difficulty with the "bargaining power" approach is also illustrated by considering the assumption that the multi-employer unit enhances the power of its constituent members in the light of the Board's criteria for certifying multi-employer units. These criteria presuppose that both the employers and the union consent at least to the inception of multi-employer bargaining.⁵⁸ Participants in a power process, whether they be unions or sovereign states, do not readily consent to arrangements which reduce their relative power. And union consent to multi-employer bargaining raises the question of whether the assumption that multi-employer arrangements increase the employers' bargaining power is well founded.

It is possible, of course, that unions might consent to bargaining arrangements which would reduce their relative bargaining power vis-à-vis the employer because of the countervailing advantages said to accrue from bargaining on a broader basis. Such bargaining enlarges the organizing task of a rival union by requiring it to win a majority of a larger group of workers before it can displace an incumbent union. It may, moreover, be more convenient administratively because it replaces a series of single negotiations with a single set of master negotiations. Finally, multi-employer bargaining is said to promote the "common rule," which is a fundamental union aim.⁵⁹

Nevertheless, it is doubtful that the foregoing considerations would be sufficiently important to explain union consent if that consent involved an appreciable increase in employer "bargaining power." The union's protection against small-scale raiding is dependent on the employer's desire to continue in the

⁵⁸ The necessity for this consent arises from the Board's insistence on a history of bargaining on a multi-employer basis as a prerequisite for certification of a multi-employer unit. Consult *The NLRB and Multi-Employer Units in a Competitive Economy*, 43 Ill. L. Rev. 877 (1949); Jones, *The NLRB and the Multiemployer Unit*, 5 Lab. L. J. 34 (1954). In the absence of such a history and the concomitant union consent, employers who insist on multi-employer bargaining despite the union's unwillingness, would presumably be guilty of a refusal to bargain in good faith.

Section 8(b)(1)(B) of the Taft-Hartley Act, in prohibiting union restraint on an employer in the selection of his representative, does not appear to justify the employer's insistence that his representative also bargain simultaneously for other employers when all of the employers do not constitute the appropriate unit.

⁵⁹ For a fuller discussion of factors influencing the development of multi-employer units consult Chamberlain, *op. cit.* supra note 54, at c. 8.

larger unit since the employer's right to withdraw from the larger unit has been recognized.⁶⁰ Whether well-entrenched unions would agree to an immediate loss in relative bargaining power for such unstable and probably unneeded protection against potential rivals is conjectural. Similarly, although multi-employer bargaining may facilitate uniformity,⁶¹ more important for uniformity than the scope of the bargaining unit is the scope of the union's organization and the character of union policies. Finally, the administrative convenience of master negotiations may be significantly offset by the need to reconcile divergent local preferences of both employees and employers.

Skepticism about the bargaining-power consequences of the multi-employer unit is deepened by the fact that some economists, reversing the prevalent assumption discussed above, have viewed the multi-employer unit as strengthening the union's bargaining power.⁶² This contention poses the parallel dilemma of why employers should consent to the reduction of their relative bargaining power. Here again, other factors such as the desire of smaller employers to spread the cost of competent professional advisors, or the desire to protect an incumbent union against raiding, may be at work. But these factors, although they can be related to bargaining power considerations, seem remote from them.

The dilemma of why there is mutual consent to multi-employer bargaining may perhaps be explained by the fact that its impact on "bargaining power" may vary with the level of the union demands. The larger unit may strengthen the union's position by overcoming resistance to its demands prompted primarily by the fear that a competitor may make a better bargain.⁶³ On the other hand, the larger unit may strengthen the employers by preserving a united front against demands deemed excessive even though they are uniformly applied. The multi-employer unit may, moreover, be consented to because it facilitates cooperative monopoly, with both the enterprise and the union sharing in monopoly profits. Whatever the motivations for larger bargaining units, it seems plain that the conventional assumption that the multi-employer unit, acquiesced in by both parties, reduces the union's relative bargaining power, if not paradoxical, at least involves difficulties which require further exploration.

If the foregoing difficulties in a "bargaining power" approach are accepted, there are obvious difficulties with the Second Circuit's comment in *Buffalo Linen* that there was no proof that the employers who locked out the Team-

⁶⁰ See *Truck Drivers Local Union v. NLRB*, 231 F. 2d 110, 114 (C.A. 2d, 1956), and authorities cited therein.

⁶¹ "Uniformity" in the context of multi-employer bargaining is, however, a vague and often deceptive term. Consult Kennedy, *The Significance of Wage Uniformity* (1949), for a discussion of varying types of wage uniformity and the conflicts among them.

⁶² Consult Haberler, *Wage Policy, Employment, and Economic Stability*, in Wright, *op. cit. supra* note 54, at 41. Furthermore, while employers' spokesmen have sharply divided on the desirability of legislative limitations on multi-employer bargaining, union spokesmen have been unanimous, or substantially so, in opposition to such limitations or prohibitions.

⁶³ *Ibid.*

sters were "too economically weak" to stand up to a strike.⁶⁴ One can speculate on the kind of data which may be offered in the next case on matters such as ability to pay, seasonal fluctuation of output, possibility of replacing strikers, the impact of a picket line, the availability of alternative suppliers or products, the possibility of consumers' boycotts, "hot goods" boycotts, customers' boycotts, the size and duration of strike benefits, employees' savings, stand-by employment, the proximity of the vacation and hunting seasons, etc. But it is difficult to see what the Board or a court could do with such data. And, although the Second Circuit intimated that proof of employer weakness would make no difference in its result, its reservation of that question suggests the possibility of lockout legality depending on judgments of relative bargaining power in particular situations. The difficulties of administering such a rule are too plain to require comment.

Even though assumptions about bargaining power in connection with the single-employer lockout and the multi-employer lockout do not justify disparate treatment of such lockouts, two additional considerations may be urged to justify such treatment: (1) the Board's interpretations of Section 9 of the Wagner Act under which the Board certified multi-employer units, together with the legislative history surrounding the re-enactment of Section 9 and (2) the "unfairness" of permitting the union to make intermittent and opportunistic use of the multi-employer unit for bargaining purposes. In addition, under some circumstances, the defensive lockout could be legalized by accepting the drastic position of Reynolds (dissenting from the Board's original decision in *Morand*⁶⁵), that a selective strike designed to coerce the abandonment of a pre-existing multi-employer unit violates the Taft-Hartley Act, and that as a result the employers are privileged to discharge as well as to lockout employees approving or participating in the union conduct. It is these considerations to which we now turn.

Under the Wagner Act, the Board, by an elastic interpretation of Sections 9(b) and 2(2),⁶⁶ sanctioned the establishment of multi-employer units for representation purposes where, among other things, there was a history of multi-

⁶⁴ The court stated that "[t]he Ninth Circuit also reasoned that its decision was necessary because a strike against any one member of an association would find that member too weak economically to stand up [under a strike]. We seriously doubt whether mere proof of such weakness of an employer, when threatened with a strike, justifies him in utilizing a lockout. But we need not here consider that question. For there is no proof here, and no finding, that any of the employers who locked out was thus economically weak. On the contrary, according to the stipulated facts, the sole reason for the lockouts was the strike against a single member of the association and a desire to end that strike." 231 F. 2d 110, 114 (C.A. 2d, 1956). It should be noted that there was no proof concerning "bargaining weakness" before the Ninth Circuit in the Leonard case, 205 F. 2d 355 (C.A. 9th, 1953).

⁶⁵ See 91 N.L.R.B. 409, 412 (1950).

⁶⁶ Consult Freiden, *The Taft-Hartley Act and Multi-Employer Bargaining* 12-13, 19 (1948). Compare the doubts expressed by Senators Ball and Taft as to the statutory basis for multi-employer bargaining. 93 Cong. Rec. 4,568-69, 4,571, 4,572-73 (1947).

employer bargaining which was consented to by both the employers and the incumbent union. Prior to enactment of the Taft-Hartley Act, attempts were made in both the House and the Senate to limit the Board's discretion in the establishment of such units.⁶⁷ Although the debates reflected the prevailing controversy over the desirability of multi-employer bargaining,⁶⁸ these attempts failed. Opponents of such limitations urged that the growth of union power made it necessary for smaller employers to bargain on a group basis to achieve approximate "equality" with unions and that multi-employer bargaining was necessary to protect individual employers against divide-and-conquer tactics,⁶⁹ i.e., to prevent the union from singling out an individual employer, securing its demands from him and thereby setting standards for his competitors.

In the light of these reasons, the defeat of the limiting bills [together with the provisions of Section 8(d)(4) and the related provisions of the statute mentioned above] strongly suggests that the multi-employer defensive lockout should be held legal under the Taft-Hartley Act.⁷⁰ Otherwise, what appears to be one of the principal purposes behind the congressional rejection of the limiting legislation—protection of employers against selective strikes—would be frustrated. The Board, in *Buffalo Linen*, although it did not refer to this legislative history, made it clear that it was attempting to achieve this congressional purpose. It stated:

[T]he strike against the one employer necessarily carried with it an implicit threat of future strike action against any or all of the other members of the Association. For, the Union's action represents a similar technique of exerting economic pressure to atomize the employer solidarity which is the fundamental aim of the multiemployer

⁶⁷ Section 9(f)(1), H.R. 3020, 80th Cong. 1st Sess. (1947), which passed the House, would have prevented both certification of multi-employer units and certification of the same union as the representative of employees of competing employers, unless certain rigorous conditions were met. The amendment introduced by Senator Ball would have banned certification of a multi-employer unit unless the employees covered were in "the same metropolitan district or county." 93 Cong. Rec. 4,568 (1947). It was defeated by one vote. *Ibid.*, at 4,803.

⁶⁸ Consult *Buffalo Linen*, 231 F. 2d 110, 117 n. 13 (C.A. 2d, 1956), for reference to the relevant debate. Similar bills were introduced in later sessions without receiving such substantial support. E.g., H.R. 7967, 82d Cong. 2d Sess. (1952), introduced by Mr. Gwinn, and H.R. 7698, 82d Cong. 2d Sess. (1952), a substantially identical bill introduced by Mr. Fisher. These bills were later introduced with minor changes by Mr. Gwinn as H.R. 8449, 82d Cong. 2d Sess. (1952), which is the so-called Gwinn-Fisher Bill. That bill is debated by Iserman, *The Labor Monopoly Problem*, 38 A.B.A.J. 743 (1952), and by Kamin, *The Fiction of "Labor Monopoly"*, *ibid.*, at 748.

⁶⁹ Consult H.R. Rep. No. 245, 80th Cong. 1st Sess. 88 (1947); 93 Cong. Rec. 3,551, 3,633 (1947).

⁷⁰ This in general was the approach taken by the Ninth Circuit in the *Leonard* case, 197 F. 2d 435, 438 (C.A. 9th, 1952). The Court declared that "[t]he legislative history of the Act also shows that the twelve-year effect of the enhancement of union power had created huge unions covering vast areas, many industry wide, producing goods purchased by the public. Congress, in permitting small employers to strengthen their positions by joining multi-employer associations, undoubtedly had in mind the power of large unions to coerce these less financially able small employers."

bargaining relationship. The calculated purpose of maintaining a strike against one employer and threatening to strike others in the employer group at future times is to cause successive and individual employer capitulations. Therefore, and in the absence of any independent evidence of antiunion motivation, we find that the Respondent's action in shutting their plants until termination of the strike at Frontier was defensive and privileged in nature, rather than retaliatory and unlawful.⁷¹

The Second Circuit, however, in reversing the Board, gave little weight to the foregoing aspects of the legislative history. It declared:

Multi-employer bargaining has never received the express sanction of Congress. It would stretch the usual canons of interpretation unduly far to conclude that, in enacting the Taft-Hartley Act, Congress gave legislative approval to all the previous Board rulings concerning such bargaining.⁷²

And continued:

Even if we assume that it did, still the Board at that time had not gone to the extreme lengths to which it now seeks to go in order to maintain the "stability of the employer unit." We think Congress must have intended that such a radical innovation be left open for consideration by the joint committee it set up under §402 of the Act to study, among other things, "the methods and procedures for best carrying out the collective bargaining processes, with special attention to the effect of industry-wide or regional bargaining upon the national economy."⁷³

The first quoted statement is quite remote from the issue. No doubt the failure of Congress to give express sanction to multi-employer bargaining gives rise to a problem of construction. But, as the Second Circuit intimated in the footnotes to its opinion,⁷⁴ the legislative history indicates⁷⁵ that the 80th Con-

⁷¹ 109 N.L.R.B. 447, 448 (1954). A similar recognition of the community of interest among members of a multi-employer unit, as well as a willingness to treat a strike against one employer as the equivalent of a strike against all, is reflected in cases denying unemployment compensation to employees locked out by unstruck employers after a selective strike. See *McKinley v. California Employment Stabilization Commission*, 34 Cal. 2d 239, 209 P. 2d 602 (1949); *Olof Nelson Const. Co. v. Industrial Commission*, 243 P. 2d 951 (Utah, 1952). But cf. *Bucko v. J. F. Quest Foundry Co.*, 229 Minn. 131, 38 N.W. 2d 223 (1949). See also arbitration award in *Langendorf Baking Co.*, 15 L.A. 234 (1950), by Sheldon D. Elliott, declaring that a defensive lockout was not a violation of a no-lockout clause. Compare award in *Intermountain Operators League*, 26 L.A. 149 (1956), by Sanford H. Kadish, holding that employees locked out by unstruck employers after a selective strike were entitled to holiday pay under a contract provision granting such pay to employees "laid-off or terminated" within the period in which the lockout occurred.

⁷² 231 F. 2d 110, 117-18 (C.A. 2d, 1956).

⁷³ *Ibid.*, at 118.

⁷⁴ *Ibid.*

⁷⁵ Consult H.R. Rep. No. 510 (on H.R. 3,020), 80th Cong. 1st Sess. 32 (1947). "The treatment in the Senate amendment of the term 'employer' for the purpose of section 9 (b) is omitted from the conference agreement, since it merely restates the existing practice of the Board in the fixing of bargaining units containing employees of more than one employer, and it is not thought that the Board will or ought to change its practice in this respect." Consult also Sen. Rep. No. 105, 80th Cong. 1st Sess. 2 (1947) (on Sen. 1,126) and Sen. Min. Rep. No. 105, 80th Cong. 1st Sess. 6 (1947). Sen. 1,126 would have changed the definition of "employer" for representation purposes by adding the following: "Provided, That for the purposes of

gress "did not intend" to interfere with the Board's established practices regarding multi-employer bargaining. If, as the legislative history also indicates, the purpose behind the Congressional action was to protect the multi-employer unit against divide-and-conquer tactics, the fact that the Board had not previously sanctioned or squarely prohibited the multi-employer defensive lockout is of secondary significance. Such sanction by the Board, although an innovation, is not a "radical innovation" but one which seems faithful to the pertinent and recent legislative history.

The second consideration which may serve to distinguish the multi-employer lockout from the single-employer lockout depends on a judgment as to expectancies of the parties when they consent to bargaining on the basis of a larger unit. Since these expectancies are influenced by assumptions as to the legality of bargaining lockouts, this point involves an obvious danger of circular argument. Nevertheless, it is clear that one of the driving forces behind employer consent to multi-employer bargaining is the desire to match concerted action by employees with concerted action by employers. Indeed, it is striking how employers have explicitly borrowed the rhetoric and the tactics which have been used so effectively by unions: "Inequality of bargaining power," "an injury against one is an injury against all," "a strike against one is a strike against all," etc. In view of union consent to, and the basis for legislative toleration of, multi-employer bargaining, it would be strange to deny employers the right to engage in unified economic pressure at the time that such concerted action seems most necessary—when they are threatened by selective pressures whose purpose is to bring about group capitulation in slow motion. Such a denial might perhaps be justified if, as the Board has urged, the prohibition of the defensive lockout would substantially reduce industrial strife. Although such a prohibition obviously would prevent employers from expanding a selective strike into a broader shut-down, there is no *a priori* basis for the Board's conclusion. The pressures open to the parties in the event of a deadlock would, as

section 9 (b) hereof, the term 'employer' shall not include a group of employers except where such employers have voluntarily associated themselves together for the purposes of collective bargaining." Sen. 1,126, 80th Cong. 1st Sess. 4 (1947). Sen. Rep. No. 105, *supra*, stated that this amendment, while embodying the Board's relevant interpretations, was to make clear that "the Board cannot treat an employer association as an employer insofar as any individual employer has failed to delegate the association to act as his bargaining representative or has withdrawn authority from it to act in that capacity." It has been suggested that the rejection of this amendment indicates that the Congress chose not to confirm the Board's power to do what it had been doing under the old Act. Freiden, *The Taft-Hartley Act and Multi-Employer Bargaining* 18-19 (1948). But this conclusion is difficult to square with the House Conference Report. Moreover, the gloss on the Senate amendment contained in Sen. Rep. No. 105, *supra*, at 18 might have limited the Board's discretion in situations where there was no formal delegation of bargaining authority to the association and might also have been urged as a basis for the initial designation of a multi-employer unit despite the absence of union consent. These considerations may, accordingly, explain the rejection of the amendment. Cf. Freiden, *op. cit. supra*, at 19. Furthermore, it is significant that where the Congress intended to change the Board's established certification practices, it did so by express amendment of Section 9.

we have seen,⁷⁶ affect their respective demands and sticking points. The analogy to the theory of mutual deterrence in international relations is plain, and it may be that the prospect that any industrial warfare will erupt on a wide front will reduce, or at least not increase, the loss from shutdowns. In any event, an empirical study of multi-employer bargaining in the San Francisco Bay Area, which involved the use of the defensive lockout, shows that the frequency of strikes (presumably shut-downs) was reduced, and that the man-hour days per year lost as a result of strikes (presumably shut-downs) remained relatively constant.⁷⁷ It is, of course, difficult to generalize from this study.

It is true that "time lost on strikes is only one of the dimensions of the strike problem; the extent to which the time lost is concentrated at a particular time in a particular industry is the principal other dimension."⁷⁸ Multi-employer lockouts increase such concentration with the result that the same amount of time lost in a given interval may produce greater dislocations. Nevertheless, such concentration, when precipitated by simultaneous strikes, is accepted as a cost of the existing framework for industrial relations. It is not easy to see why the cost should become intolerable when it is precipitated by a joint lockout. In any event, the purpose behind the legislative toleration of multi-employer units reflects a judgment that the joint lockout should not be proscribed even though it may produce more concentrated shutdowns.

The proscription of the lockout would not only deprive employers of the benefit of concerted action when they need it most, but it would also permit the union in the course of a single set of negotiations, first to squeeze all of the advantages out of bargaining with a larger unit and then opportunistically to abandon it by the use of selective strikes. This attempt temporarily to fragment the larger unit appears to involve a denial of the premise behind the initial recognition of the multi-employer unit—the existence of a community of interest among the employers. On the other hand, a unified employer response in the form of a joint lockout is entirely consistent with that premise and is not inconsistent with any justifiable assumption by union or employers consenting to multi-employer bargaining.

In this connection it is important to note that the issue as to whether or not the selective strike may be met with a lockout is different from the question of whether or not, for certification purposes, the employer and the union are to have the same right of withdrawing from the larger unit. The selective strike against a single employer is generally an attempt by the union, not to withdraw from the multi-employer unit, but to exploit that unit opportunistically. It is doubtful that the employers, after such a strike, are relieved of the duty to bar-

⁷⁶ Consult discussion at 80 *supra*.

⁷⁷ Consult Kerr and Fisher, *Multiple-Employer Bargaining: The San Francisco Experience*, in Lester and Shister, *Insights into Labor Issues* 41 (1948).

⁷⁸ Lewis, *The Labor-Monopoly Problem: A Positive Program*, LIX J. Pol Econ. 277, 279 (1951).

gain on a multi-employer basis,⁷⁹ although the union's right to bargain individually with employers has been recognized.⁸⁰ In any event, the selective strike, as in the *Buffalo Linen* case itself, is usually followed by a settlement on a multi-employer basis and a continuation of bargaining on that basis.⁸¹ This factor strongly suggests that the selective strike usually is a temporary maneuver and should, therefore, not be equated with a withdrawal from or an abandonment of multi-employer bargaining.⁸²

Such an approach lies behind the Seventh Circuit's concurrence with the ruling of the Board majority in the *Morand* case,⁸³ that the union did not violate the Taft-Hartley Act when, after an impasse had arisen in association-wide bargaining, it requested bargaining with individual employers and followed its request with a selective strike. The court, however, rejected the majority's conclusion that the union, after such an impasse, was free to abandon a pre-existing association unit and to insist on bargaining with the employers individually.⁸⁴ The court apparently treated the union's request for individual bargaining as an invitation to the employers to exercise their right to withdraw from the asso-

⁷⁹ A protected strike does not generally relieve an employer of the duty to bargain. See *NLRB v. Reed & Prince Mfg. Co.*, 118 F. 2d 874 (C.A. 1st, 1941). The fact that a strike is directed at only part of a bargaining unit would not appear to change this result.

⁸⁰ See *Morand Bros. Beverage Co. v. NLRB*, 190 F. 2d 576, 581 (C.A. 7th, 1951).

⁸¹ This was also the case in *Morand*, 91 N.L.R.B. 409, 439 (1950), and in *Betts Cadillac*, 96 N.L.R.B. 268, 279-80 (1951).

⁸² In the *Buffalo Linen* Case, 231 F. 2d 110, 116-17 (C.A. 2d, 1956), the Second Circuit explicitly recognized that the legality of the defensive lockout raised a question different from the certification question. Nevertheless, it appeared to link the two questions and criticized the Board for not according the incumbent union the same right of withdrawal as an individual employer. *Ibid.* In this connection, it is significant that the Board, in a decision subsequent to *Buffalo Linen*, has held that, for certification purposes, it would not recognize an employer's withdrawal from a multi-employer unit after negotiations on that basis had produced an agreement which had been accepted by a representative of the employer involved but which had not been executed by a duly-authorized officer. *McAnary & Welter, Inc.*, 115 N.L.R.B. No. 165, 37 L.R.R.M. 1,483 (1956) (Chairman Ledon and Member Bean, dissenting). Although the Board did not articulate its rationale for this decision, the qualification it imposes on the employer's right to withdraw may reflect a distaste for opportunistic withdrawals.

⁸³ 190 F. 2d 576, 581-82 (C.A. 7th, 1951). Member Reynolds, vigorously dissenting from the Board's decision, had urged that (a) the union had violated Section 8(b)(1)(B), which proscribes union restraint or coercion of an employer in his selection of bargaining representatives and Section 8(b)(3), which proscribes refusal by a union with majority status to bargain with "an employer"; and (b) consequently, employees participating in or approving the union's conduct had lost the protection of the statute. Although Section 8(b)(1)(B) is susceptible of a construction which limits its protection to the employer's choice of his bargaining personnel, as distinguished from the bargaining unit, Reynolds pointed to legislative history and a judicial decision [*Madden v. M.W.A.*, 79 F. Supp. 616 (D.C., 1948)] which suggest that that section, together with Section 8(b)(3), was designed to protect bargaining through pre-existing multi-employer units against union pressure for individual bargaining. See *Morand Bros. Beverage Co.*, 91 N.L.R.B. 409, 425-26 (1950).

⁸⁴ The technical difficulties involved in the majority's rationale for this conclusion are discussed in *Multi-Employer Bargaining and the National Labor Relations Board*, 66 Harv. L. Rev. 886, 893-94 (1953).

ciation and concluded that such a request was not inconsistent with a willingness to bargain with the association.⁸⁵ It viewed the strike not as a device for enforcing the request for individual bargaining, but as pressure to secure better terms without prejudice to bargaining with the association. Since there was no explicit refusal by the union to bargain with the association and since such bargaining occurred after the strike, this interpretation of the strike was in accord with the realities.

There is a relationship between the court's legalization of the union's request for individual negotiations coupled with a selective strike and its legalization of the employers' defensive lockout. The legalization of the defensive lockout supplies an additional reason for sanctioning the union's conduct notwithstanding that such conduct may in some situations disrupt the larger unit.⁸⁶ Since such legalization affords the employers a weapon for protecting the integrity of the larger unit, there is less need or justification for seeking such protection by a drastic governmental requirement that a union strike all or none of the members of such a unit.

The foregoing discussion suggests that the union's selective pressure generally should not be assimilated to an attempt to withdraw from the multi-employer unit. If this suggestion is followed, the disposition of the legality of the defensive lockout generally will not involve the question of whether or not the union's right to withdraw from a multi-employer union should parallel the employers' right. Nevertheless, situations may arise where the union's selective pressures coincide with a genuine and unequivocal attempt by the union to abandon the multi-employer unit. Accordingly, a brief examination of the basic considerations pertinent to mutual rights of withdrawal is in order.

⁸⁵ To support this result, the Seventh Circuit relied in part on the Supreme Court's approval of Board decisions permitting employers, after bargaining in good faith to an impasse, unilaterally to institute benefits previously offered to, and rejected by, the union. This approval was based on the ground that no disparagement or collective bargaining was necessarily involved. See *NLRB v. Crompton Mills*, 337 U.S. 217, 224-25 (1949). The applicability of the *Crompton Mills* dictum to unilateral union action in the multi-employer context is, however, questionable. The employer's unilateral action sanctioned in that case does not diminish the union's legal right to bargain with, or to strike against, the employer. But a contract between the union and the individual employer, which is the ostensible aim and possible result of the union's unilateral action, would destroy the legal right of the employer or the association to bargain, or to lockout, for the modification of the contract during its term. Consult Sections 8(d) and 301 of the Taft-Hartley Act. Thus, the union's unilateral action carries with it a greater threat of disparagement of bargaining through the association, which the Seventh Circuit recognized as the appropriate unit, notwithstanding the impasse. Consequently, unilateral action by the union in the *Morand* context is not covered by the rationale underlying the *Crompton Mills* dictum.

⁸⁶ Requests for individual bargaining coupled with a selective strike could be used for the purpose of avoiding, as opposed to influencing, association bargaining. There are difficulties in determining the union's purpose in a particular case because the union's desire for better terms merges with its expressed desire to substitute individual bargaining for association bargaining. For example in *Morand*, 91 N.L.R.B. 409, 436 (1950), the employers, possibly for tactical reasons, appeared to treat the union's request for separate negotiations as an attempt to repudiate the multi-employer unit.

Such an examination is complicated by the Board's persistent failure to disclose its rationale for disparate treatment despite forceful criticism of such disparity within, and outside of, the Board.⁸⁷ Although the argument for equality of treatment has its customary appeal, it involves the risk of over-simplification. Before this argument can be appraised, a prior question must be faced: What are the reasons for sanctioning the multi-employer unit? If, as the pertinent legislative history suggests,⁸⁸ such units are sanctioned as an offset to union power, unlimited rights of union withdrawal from an established unit are as paradoxical as similar rights to an employer to abandon collective bargaining. If, however, as the Board's certification criteria indicate,⁸⁹ multi-employer units are recognized largely because particular units have achieved a stable labor-management relationship, coercion, and particularly one-sided coercion, appears to be extremely dubious because of its threat to such relationships. Further exploration of these issues is necessary before a definitive judgment as to the desirability of mutual withdrawal rights can be made.

We turn now to a troublesome question which may arise if multi-employer defensive lockouts are sanctioned while single-employer lockouts are proscribed: What kind of bargaining arrangements will be considered multi-employer for this purpose? An obvious possibility would be to permit defensive lockouts only in situations where a multi-employer unit would have met the Board's certification standards prior to the lockout.⁹⁰ This approach would have the virtue of requiring formal arrangements which would generally give fair warning to all concerned of the existence of a common interest which might be reflected in concerted economic pressure by the employers. It would, moreover, also be consistent with the Eisenhower Board's rationale for sanctioning the defensive lockout—namely, the need to protect the integrity of the larger unit against fragmentation by selective strikes.⁹¹ Finally, this approach would be consonant with the requirement apparently imposed by the Seventh Circuit in the *Morand* case, viz., that an impasse involving the appropriate bargaining unit is a prerequisite to a lawful defensive lockout.⁹²

It should be noted, however, that integration of certification and lockout

⁸⁷ See, e.g., dissent of Member Styles in *Continental Baking Company*, 99 N.L.R.B. 777, 785 (1952); *Multi-Employer Bargaining and the National Labor Relations Board*, op. cit. supra note 84; *Truck Drivers Local Union v. NLRB*, 231 F. 2d 110 (C.A. 2d, 1956).

⁸⁸ Consult discussion at 88 supra.

⁸⁹ For a discussion of the Board's criteria consult *Multi-Employer Bargaining and the National Labor Relations Board*, op. cit. supra note 84, at 889; Jones, op. cit. supra note 58.

⁹⁰ Consult authorities cited at note 89 supra.

⁹¹ Consult discussion at 88 supra.

⁹² Consult note 13 supra. If the right to lockout is conditioned on the existence of an impasse, in the absence of a formal multi-employer structure an impasse between one employer and a union would have to be imputed to another employer for the latter to be privileged to resort to a lockout.

criteria involves substantial difficulties. An important argument for the legality of the defensive lockout by members of a pre-existing multi-employer unit emphasizes that a strike against one employer threatens the common interests of the group. Such a common interest among a group of employers is, however, not dependent on the existence of a formal multi-employer unit. It arises primarily from the impact of particular negotiations (which may take the form of individual bargaining) on a group of employers and from market competition among the members of that group. Although the existence of bargaining structures which meet the Board's certification criteria identifies that common interest, it may plainly be as strong or stronger under other bargaining relationships. Thus, among such criteria is participation by the associated employers in joint bargaining negotiations for a substantial period⁹³ as well as the uniform adoption of resulting agreements by the putative members of the larger unit. Although the Board does not require organization of the employers into a formal association or the delegation to a bargaining committee of authority to bind the individual employers,⁹⁴ the requirement of participation in joint negotiations often operates to exclude from a multi-employer unit employers whose interests are, for practical purposes, indistinguishable from those of the employers included.⁹⁵ Furthermore, even where no formal association or joint bargaining of any kind is involved, there are situations where a single employer is, for practical purposes, bargaining for a group of employers. This is strikingly illustrated by the relationship in basic steel where bargaining leadership by a dominant firm has been generally accepted by the industry and the union.⁹⁶ Despite the formality of individual bargaining in such situations, the bargaining leader is as much the agent of its competitors as would be the bargaining committee of an employers' association whose members reserve freedom to reject the agreement negotiated by the association. While an association-wide unit would be appropriate despite such reservations, a unit comprising the firms in an industry which have in fact, if not in form, delegated bargaining functions to a dominant firm would presumably not be appropriate.

The absence of any correlation between bargaining forms and the common

⁹³ See *Associated Shoe Industries*, 81 N.L.R.B. 224, 228-29 (1949) (Houston and Murdock dissenting on the ground that execution of identical contracts without individual bargaining is much more persuasive evidence of a desire to be bound by group action than is participation in preliminary negotiations); consult also Jones, *op. cit. supra* note 58, at 36.

⁹⁴ Consult Jones, *op. cit. supra* note 58, at 36 and National Labor Relations Board, Seventeenth Annual Report 72 (1952).

⁹⁵ This is in substance the position of the dissenters in *Associated Shoe Industries*, 81 N.L.R.B. 224 (1949).

⁹⁶ In the 1956 steel negotiations, the "Big Three," rather than U.S. Steel alone, engaged in joint negotiations. Each company carefully stated that it reserved its freedom of action and that the joint negotiations were at the union's request. Consult 38 L.R.R. (B.N.A.) 91 (1956). This statement may have been motivated by considerations of possible antitrust liability.

interest of a group of employers in what is ostensibly an individual bargain produces an awkward dilemma. Denial by the Board of the right to a defensive lockout in the absence of certain formalities would subordinate the realities of collective bargaining to purely formal considerations. But the Board's recognition of such a right, notwithstanding the employers' failure to comply with the formal requirements for a multi-employer unit, would have no firm statutory basis and would also be vulnerable to attack as inconsistent with the prohibition of single-employer lockouts. The development of new criteria for lockout purposes would, moreover, multiply uncertainties in an area where both unions and employers require a reasonable degree of predictability—unions because they may wish to know whether the number of employees involved in a given shut-down could be limited; employers because a wrong guess as to when individual bargaining may be treated, for lockout purposes, as multi-employer bargaining subjects them to the risk of substantial back pay liability. In view of the foregoing difficulties, it seems highly unlikely that the Board would or should carve out new criteria designed to legalize allegedly defensive lockouts by employers who have never met the conditions for certification as a multi-employer unit.

The Board need not involve itself in such difficulties in order to allow such employers the right to lockout to protect their joint interests. It could do so by legalizing the single-employer lockout. Indeed, the difficulties of either adhering to or departing from the Board's certification criteria, for lockout purposes, is another reason against a rule which sanctions the multi-employer defensive lockout but not the single-employer lockout. If both were sanctioned, and if the employers' contracts expired at or about the same time, the expiration of the sixty-day period prescribed by Section 8(d)(4)⁹⁷ and the existence of an

⁹⁷ The requirements as to notice, bargaining and waiting period imposed by Section 8(d)(4), apply, according to the literal terms of that section, only to a party to a collective bargaining agreement "desiring [its] termination or modification." Consult note 45 *supra*. Hence it is arguable that an employer (or a union) desiring to continue a pre-existing contract is not subject to those requirements and may resort to a lockout (e.g., during the waiting period) unless such conduct is barred by other sections of the statute. For an employer successfully to make this argument in defense of a bargaining lockout within the waiting period might, however, involve a pyrrhic victory; for to the extent that the legalization of bargaining lockouts is based on the provisions of Section 8(d)(4) (consult discussion at 81-82 *supra*), it is arguable that the noncomplying employer should be denied privileges justified in part by reliance on that section. In any event, to interpret Section 8(d)(4), and particularly the waiting period provision, as inapplicable to a party desirous of continuing a pre-existing contract would threaten the purposes of that section, viz., assuring prior to any resort to industrial warfare, a cooling-off period during which negotiation and conciliation might operate to prevent such strife. Accordingly, the literal argument should be rejected as unduly "technical." It should be observed that the rejection of the argument freeing the party desiring to maintain the status quo from Section 8(d)(4) would not mean that an employer, as a condition of a lockout, would be required in every case to file the prescribed notices. Where the union (or the employer) has served the prescribed notices, such notices alone would appear to be adequate to achieve the statutory purpose, and this would seem to be true whether the employer (or the union) wished to maintain or to change the previous contract. Nevertheless, it would appear prudent for a party considering a strike or lockout after the waiting period to serve its own notices in order to comply literally with Section 8(d)(4) and to avoid defects in the other party's notice.

impasse,⁹⁸ would permit individual employers to shut down in accordance with their own concept of their individual and joint bargaining interests. This paper has suggested the reasons which make this result appropriate 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.

POSTSCRIPT

After this article went to press, the Board's divided opinion in *American Brake Shoe*⁹⁹ reached the writer. In this postscript it is possible only to suggest in a brief, cryptic and overgeneralized way why that complex opinion may be of interest to those whose patience has brought them this far.

American Brake Shoe confronted the Board for the first time with the question of the legality of threatened and actual curtailment of operations by an employer, beginning during negotiations for a new contract and prior to the expiration of the waiting period for "lockouts" prescribed by Section 8(d)(4) and extending beyond that period. The Board rejected the employer's defense based upon the *Betts Cadillac* doctrine,¹⁰⁰ found that the employer had violated Sections 8(a)(1) and 8(a)(3), and imposed back-pay liability from the inception of the lay-offs to the time of the employer's unconditional offer of reinstatement, which occurred after the expiration of the waiting period. While the Board's result is defensible, its opinion is open to question because it did not clearly identify or squarely face the complex of difficulties which result from the interplay of Section 8(d)(4) and the *Betts Cadillac* principle. These difficulties apparently led the Board to restrict *Betts Cadillac* while purporting to follow it. While this restriction appears to have been produced by the danger that an elastic "economic" rationale might erode the waiting period requirements of Section 8(d)(4), the tenor of the Board's opinion invites the contention that the restriction is to be generally applicable without regard to whether operations are curtailed during or after the waiting period. As a result, the distinction between "economic" and bargaining lockouts has become even more murky, and the wisdom and practicality of applying that distinction to lockouts occurring after the waiting period, which were questioned earlier in this article,¹⁰¹ have become even more questionable.

⁹⁸ Consult note 13 supra. A union, in order to avoid a defensive lockout, might attempt to confine its bargaining to one of a group of employers, thereby avoiding an "impasse" with the others. Employers desirous of instituting a defensive lockout might respond by attempts to accelerate bargaining, or, in the alternative, to establish the lack of good faith bargaining by the union. Since the Seventh Circuit's requirement of an impasse is designed to insure the exhaustion of the possibilities of good faith bargaining, the impasse requirement might be dispensed with if the union had not bargained in good faith.

⁹⁹ 116 N.L.R.B. No. 107, 38 L.R.R.M. 1330 (1956) (member Rodgers dissenting).

¹⁰⁰ Consult discussion at 74 supra.

¹⁰¹ Consult discussion at 76-77 supra.