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The Unanswered Questions of *American Ship*

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NOTES

The Unanswered Questions of *American Ship*

The National Labor Relations Act[1] does not specifically prohibit an employer from temporarily locking out his employees during collective bargaining negotiations.[2] For many years, nevertheless, only lockouts used solely to avoid substantial economic loss as a result of union action—so-called "defensive" lockouts—were allowed.[3] However, the emphasis which Congress placed on equality of bargaining pressure[4] in enacting the Taft-Hartley amendments to the NLRA[5] has caused a change in this judicial attitude. Although a few courts have gone so far as to suggest that the lockout should be as freely available as the strike,[6] the United States Supreme Court has been more cautious in defining the legal limits of the lockout. In fact, prior to its decision in *American Ship Building v. NLRB*,[7] the Court had held only that a non-struck member of a multi-employer bargaining unit could lock his employees out after the union had struck one of the other members of the bargaining group.[8]

In *American Ship* the union properly notified the employer that it intended to seek modification of the existing collective bargaining agreement. After several bargaining sessions, the employer made a final proposal, which the union refused to submit to its membership. The parties separated with no date set for further meeting. The employer notified the employees that because of the unsettled labor

1. 49 Stat. 449 (1935), as amended, 29 U.S.C. § 151 (1964).

2. A lockout has been defined at common law as the "cessation [by the employer] of the furnishing of work to employees in an effort to get for the employer more desirable terms." Iron Molders' Union v. Allis-Chalmers Co., 166 Fed. 45, 52 (7th Cir. 1908) (concurring opinion).

The first draft of the NLRA (Wagner Act) included a provision making the lockout illegal. S. 2926, 73d Cong., 2d Sess. § 5(2) (1935). However, this provision did not appear in the act as enacted.

3. See, *e.g.*, NLRB v. Long Lake Lumber Co., 138 F.2d 363 (9th Cir. 1943) (lockout to combat unionization not allowed); Atlas Underwear Co. v. NLRB, 116 F.2d 1020 (6th Cir. 1941) (lockout to avoid shutdown of plant by "mob takeover" allowed); NLRB v. National Motor Bearing Co., 105 F.2d 652 (9th Cir. 1939) (lockout motivated by inefficient operations not allowed); Duluth Bottling Ass'n, 48 N.L.R.B. 1335 (1943) (lockout to avert spoilage allowed); Isaac Schieber, 26 N.L.R.B. 937 (1940) (lockout to evade contract obligation not allowed); Link-Belt Co., 26 N.L.R.B. 227 (1940) (lockout to prevent seizure of a plant by sit-down strikes allowed); Lengell-Pencil Co., 8 N.L.R.B. 988 (1938) (lockout to break bargaining impasse not allowed).

4. See 93 CONG. REC. 4436, 4580 (1947) (remarks of Senator Taft); 93 CONG. REC. 4135 (1947) (remarks of Senator Ellender).

5. 61 Stat. 136 (1947), 29 U.S.C. § 141 (1964).

6. See, *e.g.*, NLRB v. Dalton Brick & Tile Corp., 301 F.2d 886 (5th Cir. 1962); Morand Bros. Beverage Co. v. NLRB, 190 F.2d 576 (7th Cir. 1951).

7. 380 U.S. 300 (1965).

8. NLRB v. Truck Drivers Union, 353 U.S. 87 (1957) (*Buffalo Linen*). In this decision the Court resolved a conflict among the circuits. *Compare* Morand Bros. Beverage Co. v. NLRB, 190 F.2d 576 (7th Cir. 1951), *and* Leonard v. NLRB, 197 F.2d 435 (9th Cir. 1952), *with* Truck Drivers Union v. NLRB, 231 F.2d 110 (2d Cir. 1956).

dispute they were laid off until further notice. Negotiations resumed, and two months later an agreement was reached. The union subsequently filed a complaint with the National Labor Relations Board charging that the employer had violated sections 8(a)(1) and (3) of the National Labor Relations Act.[9] The NLRB found that the employer had committed the alleged unfair labor practices, since the lockout was utilized solely to bring bargaining pressure on the union.[10] The Court of Appeals for the District of Columbia Circuit affirmed the Board's decision.[11] The Supreme Court reversed, holding that an employer does not violate the NLRA when he temporarily shuts down his plant and locks out his employees if (1) a bargaining impasse has been reached and (2) the employer's sole purpose is to bring economic pressure to bear on the union.[12]

Since the bargaining lockout in *American Ship* might have been upheld as a "defensive lockout,"[13] the Supreme Court's recognition of the right of a single employer to lock out under specified conditions without proving economic justification represents a significant labor-law development.[14] However, of equal or perhaps greater significance are the questions which the Court specifically left unanswered in its decision; their resolution will determine whether the lockout is likely to become an important bargaining weapon for employers.

The first of these questions relates to the legality of other bargaining lockouts which do not comply with the limitations specified in *American Ship*. In this regard, the Court itself indicated that this determination must be made by further analysis of sections 8(a)(1) and (3).[15] Section 8(a)(3) prohibits an employer from encouraging or discouraging union membership by discriminating against employees in regard to tenure or terms of employment.[16] Although a violation of this section generally requires a finding of anti-union

9. 49 Stat. 449 (1935), as amended, 29 U.S.C. § 158 (1964), states in pertinent part: It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7; . . .

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . .

NLRA § 7, 49 Stat. 449 (1935), as amended, 29 U.S.C. § 157 (1964), states in part: "Employees shall have the right to self organization, . . . to bargain collectively, . . . and to engage in other concerted activities for the purpose of . . . mutual aid or protection. . . ."

10. American Ship Building Co., 142 N.L.R.B. 1362 (1963).

11. Local 374, International Bhd. of Boilermakers v. NLRB, 331 F.2d 839 (D.C. Cir. 1964).

12. 380 U.S. at 318.

13. See *id.* at 327 (Goldberg, J., concurring).

14. The Court had specifically declined to consider this issue in NLRB v. Truck Drivers Union, 353 U.S. 87, 93 (1957).

15. 380 U.S. at 315.

16. 61 Stat. 140 (1947), as amended, 73 Stat. 525 (1959), 29 U.S.C. § 158(a)(3) (1964).

motivation on the part of the employer,[17] some employer activities are deemed to be so "inherently prejudicial and devoid of economic justification" that no anti-union animus need be shown.[18] The Court ruled that the bargaining lockout in *American Ship* was not inherently prejudicial,[19] and further stated that a lockout does not violate section 8(a)(3) if it is used for "the *sole* purpose of bringing economic pressure to bear in support of [the employer's] . . . bargaining position."[20] However, since any evidence of hostile intent wholly impeaches otherwise legal activity under section 8(a)(3),[21] it appears that this "sole purpose" language pinpoints one definite limitation on the use of a bargaining lockout. Thus, an employer who locks out for anti-union reasons commits an unfair labor practice.

Section 8(a)(1) prohibits employers' interference with or coercion of the right of employees to bargain collectively.[22] Although the Court's holding in *American Ship* applied only to a bargaining lockout employed after an impasse,[23] it appears that a pre-impasse lockout may be equally immune to attack under section 8(a)(1). Undoubtedly, such a lockout would place substantial bargaining pressure on the union. However, this pressure will affect only the ultimate terms of the bargaining agreement and not the employees' right to bargain.

17. See 380 U.S. at 311; Radio Officers Union v. NLRB, 347 U.S. 17, 43 (1954); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 46 (1938).

18. See NLRB v. Erie Resistor Corp., 373 U.S. 221, 229 (1963); Radio Officers Union v. NLRB, *supra* note 17, at 44-45.

19. 380 U.S. at 312.

20. *Id.* at 318. (Emphasis added.)

21. See NLRB v. Erie Resistor Corp., 373 U.S. 221, 227 (1963); Associated Press v. NLRB, 301 U.S. 103, 132 (1937).

22. 61 Stat. 140 (1947), 29 U.S.C. § 158(a)(1) (1964). This section prohibits interference with or coercion of employees' rights guaranteed in § 7 of the NLRA, which include the right to bargain collectively. For the relevant text of §§ 7 and 8(a)(1), see note 9 *supra*.

23. 380 U.S. at 318. In addition to holding that the employer had not interfered with the employees' right to bargain collectively, the Court ruled that a lockout within the imposed limitations does not interfere with the right to strike. This right is a protected "concerted activity" under § 7 of the NLRA; thus, an employer who interferes with that right violates § 8(a)(1). Division 1287, Amalgamated Ass'n of Street Workers v. Missouri, 374 U.S. 74, *rehearing denied*, 375 U.S. 870 (1963). However, in order to protect the employer's interests the Supreme Court has upheld certain practices which admittedly interfere with the employees' right to strike. The Court stated in NLRB v. Truck Drivers Union, 353 U.S. 87, 96 (1957), that the right to strike "is not so absolute as to deny self-help by employers when legitimate interests of employees and employers collide." The function of the NLRB is to balance these competing interests. See, *e.g.*, NLRB v. Erie Resistor Corp., 373 U.S. 221 (1963); Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945). In *American Ship*, the Supreme Court established as a matter of law that the employer's right to use the lockout as a bargaining weapon outweighs the infringement on the employees' right to strike. Such a holding removes from the NLRB the function of balancing interests in this situation. This result would not be altered even if the lockout were allowed before an impasse. The Court stated that a mere interference with the timing of the strike would not constitute an interference with the right to strike. Since unions may strike before an impasse is reached, the interference with the timing of the strike is the same whether the lockout occurs before or after an impasse.

As long as there is no deterioration of the union's capacity for effective and responsible representation,[24] the right to bargain collectively is impaired to no greater extent by a lockout employed before an impasse than by one used after an impasse.

Nevertheless, a pre-impasse lockout may constitute a violation of the employer's duty to bargain in good faith in compliance with section 8(a)(5).[25] An employer's use of an economic weapon after an impasse cannot violate section 8(a)(5), since an impasse is by definition a stalemate after the parties have bargained in good faith.[26] It does not necessarily follow, however, that the same weapon is legal when employed before an impasse. Although the Supreme Court did not consider section 8(a)(5) in *American Ship*,[27] it had previously held in *NLRB v. Katz*[28] that the unilateral imposition of terms—a permissible weapon when used after an impasse[29]—violated the employer's duty to bargain in good faith when invoked before an impasse had been reached,[30] even though bargaining continued and there was no showing of subjective bad faith.[31] It would seem possible to make a similar distinction between pre-impasse and post-impasse bargaining lockouts, since the employer in effect unilaterally changes the terms of employment by denying his employees the right to work. However, denial of the right to work is far different from the types of changed employment conditions unilaterally imposed in *Katz* before an impasse had been reached. The conditions in *Katz* related to sick leave, wage increases, and merit increases, and had all been the subject of bargaining immediately preceding the unilateral change. The Court found that these changes indicated a lack of good faith during bargaining tantamount to a refusal to negotiate,[32] but stated that unilateral action is not illegal if it merely places pressure on the other party in support of genuine negotiations without foreclosing discussion on any issue.[33] Thus, bargaining lockouts should fall within this exception to the *Katz* rule if the pressure itself is not unduly coercive.

A second factor which might support the legality of a pre-impasse

24. See 380 U.S. at 309.

25. 61 Stat. 140 (1947), 29 U.S.C. § 158(a)(5) (1964).

26. NLRB v. United Clay Mines Corp., 219 F.2d 120 (6th Cir. 1955).

27. "Although the complaint in *American Ship* stated a violation of § 8(a)(5), . . . the NLRB made no findings as to this claim, believing that there would have been no point in entering a bargaining order because the parties had long since executed an agreement." 380 U.S. at 306 n.5.

28. 369 U.S. 736 (1962).

29. See, *e.g.*, NLRB v. Tex-Tan, Inc., 318 F.2d 472, 479 (5th Cir. 1963); NLRB v. Katz, *supra* note 28 (dictum).

30. NLRB v. Katz, 369 U.S. 736, 747 (1962).

31. *Ibid.*

32. *Id.* at 746; *cf.* NLRB v. Crompton-Highland Mills, 337 U.S. 217 (1949).

33. NLRB v. Katz, 369 U.S. 736, 747 (1962); *accord*, NLRB v. Insurance Agents Int'l Union, 361 U.S. 477 (1960).

bargaining lockout is the close similarity between the economic pressure exerted by a lockout and that exerted by a strike. Since the union's duty to bargain in good faith,[34] which is analogous to the duty placed on the employer under section 8(a)(5), does not prevent the calling of a strike before an impasse has been reached,[35] it does not appear that section 8(a)(5) should limit the use of the lockout in this respect. Indeed, since the Taft-Hartley amendments to the NLRA were apparently intended to equalize the bargaining position of the employers and the unions,[36] a pre-impasse bargaining lockout should be legal if the employer does continue to bargain in good faith.

The recent decision by the Supreme Court in *Teamsters Local No. 372 v. Detroit Newspaper Publishers' Ass'n*[37] would seem to indicate that no definite statement by the Court on the legality of a pre-impasse bargaining lockout will be forthcoming until the NLRB, and subsequently the circuit courts, have indicated their respective views. In that case, one of the two major newspapers in Detroit locked out its employees after the other had been struck. The two had not formed a multi-employer bargaining unit, but had merely made an agreement between themselves that one paper would hold out on certain contract terms if the other would lock out its employees after a strike against the first. Thus, the lockout must be treated as a single-employer bargaining lockout before an impasse. The NLRB ruled, prior to the Supreme Court's decision in *American Ship*, that the lockout constituted an unfair labor practice.[38] While the case was on review before the Court of Appeals for the Sixth Circuit, the Board asked the court to remand it for reconsideration in light of the *American Ship* decision. Instead, the court overruled the Board's order, stating that *American Ship* indicated that the Supreme Court would allow a pre-impasse lockout.[39] The Supreme Court, however, vacated the decision of the circuit court and remanded the case to the NLRB for further consideration.[40] Thus, it appears that the Court, recognizing that the circuit courts will disagree on the legality of such a lockout,[41] wishes the Board to make

34. NLRA § 8(b)(3), 61 Stat. 136 (1947), 29 U.S.C. § 158(b)(3) (1964).

35. See NLRB v. Insurance Agents Int'l Union, 361 U.S. 477 (1960); Mine Workers v. NLRB, 257 F.2d 211 (D.C. Cir. 1958).

36. See note 4 *supra* and accompanying text.

37. 34 U.S.L. WEEK 3244 (U.S. Jan. 18, 1966).

38. Evening News Ass'n, 145 N.L.R.B. 996 (1964).

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

40. Teamsters Local No. 372 v. Detroit Newspaper Publishers' Ass'n, 34 U.S.L. WEEK 3244 (U.S. Jan. 18, 1966).

41. Several other cases involving questions relevant to *American Ship* have already reached the courts. When the facts have been within the limits of *American Ship*, the courts have simply overruled the Board. See NLRB v. Golden State Bottling Co., 52 CCH Lab. Cas. ¶ 16780 (9th Cir. Dec. 2, 1965); Body & Tank Corp. v. NLRB, 344 F.2d 330 (2d Cir. 1965). If the issue is unsettled, however, most courts have remanded the

an initial determination without any compulsion that might stem from the opinion of the Court of Appeals for the Sixth Circuit.

A second important question raised, but left unanswered,[42] in *American Ship* relates to the legality of hiring replacements after a permissible bargaining lockout. Since an employer usually must, for financial reasons, maintain operations during a labor dispute, it is unlikely that he will utilize any bargaining lockout unless he can hire replacements for those employees whom he has locked out. Rather, he will wait for a strike and then hire replacements, as he generally had to do prior to *American Ship*. Only when a sudden strike would cause him severe economic loss through spoilage, freezing of in-process inventories, or loss of good will through the inability to perform a contract—situations in which a lockout was legal even before *American Ship*[43]—would he be likely to employ a lockout by itself. Thus, unless the hiring of replacements is a permissible ancillary tactic, the uses of the bargaining lockout will be essentially theoretical.

At first glance, the doctrine enunciated in *NLRB v. Mackay Radio & Tel. Co.*,[44] which allows an employer to hire permanent or temporary replacements for striking employees, would appear to settle the issue. At least some bargaining lockouts are, like the strike, legal economic weapons; therefore hiring replacements for the locked-out employees might also seem to be legal. It would appear, however, that the hiring of permanent replacements for locked-out employees would constitute a violation of section 8(a)(3). Since striking employees desiring reinstatement must be accommodated when permanent replacements are being hired,[45] locked-out employees would appear to enjoy the same right. By initiating the work stoppage, therefore, an employer can force employees to choose between supporting the union position and losing their jobs. Although the same choice must be made after a strike, the employees themselves have taken the initial action; they have accepted the risk of being permanently replaced. Thus, hiring *permanent* replacements after *any* bargaining

cases to the NLRB for consideration in light of *American Ship*. See NLRB v. American Stores Packing Co., 51 CCH Lab. Cas. ¶ 19578 (10th Cir. 1965); NLRB v. Tonkin Corp., 352 F.2d 509 (9th Cir. 1965).

Prior to *American Ship* the circuit courts disagreed on the legality of a pre-impasse bargaining lockout. *Compare* NLRB v. Dalton Brick & Tile Corp., 301 F.2d 886 (5th Cir. 1962), *and* Morand Bros. Beverage Co. v. NLRB, 190 F.2d 576 (7th Cir. 1951), *with* Quaker State Oil Ref. Co. v. NLRB, 270 F.2d 40 (3d Cir. 1959), *and* Utah Plumbing & Heating Contractors Ass'n v. NLRB, 294 F.2d 165 (10th Cir. 1961).

42. 300 U.S. at 308 n.8.

43. See, *e.g.*, NLRB v. Great Atl. & Pac. Tea Co., 340 F.2d 690 (2d Cir. 1965); Pepsi Cola Bottling Co., 145 N.L.R.B. 785 (1964); Duluth Bottling Ass'n, 48 N.L.R.B. 1335 (1943).

44. 304 U.S. 333 (1938).

45. See NLRB v. Shenandoah-Dives Mining Co., 145 F.2d 542, 547 (10th Cir. 1944); Firth Carpet Co. v. NLRB, 129 F.2d 633 (2d Cir. 1942).

lockout is inherently detrimental to employee rights, and, indeed, probably amounts to a *de facto* discharge for union affiliation. Regardless of which theory is followed, the result is a violation by the employer of section 8(a)(3).[46]

Although an employer who locks out his employees apparently cannot hire permanent replacements, it should not be concluded that he cannot hire *temporary* replacements. In *NLRB v. Brown*,[47] a companion case to *American Ship*, the Supreme Court held that non-struck members of a multi-employer bargaining unit could hire temporary replacements after locking out their employees. While it does not follow directly from this decision that a single employer can hire temporary replacements after a bargaining lockout,[48] there are strong indications in both *Brown* and *American Ship* that the Court will sustain the hiring of temporary replacements, at least when the lockout is employed after an impasse.

As with the hiring of permanent replacements, section 8(a)(3) appears to be the only barrier to the hiring of temporary replacements after an impasse. Unless there is anti-union motivation,[49] a violation of this section would occur only if hiring temporary replacements is "inherently detrimental to employees' rights."[50] In *Brown* the Court said: "In the circumstances of this case, we do not see how the continued operations of the [company] . . . and their use of temporary replacements imply hostile motivation any more than the lockout itself: nor do we see how they are inherently more destructive of employee rights."[51] Although the "circumstances" referred to in *Brown* are not the same as those in *American Ship*, the Court found in each case that the lockouts were utilized for legitimate purposes. In addition, the effect on the locked-out employees was the same. Hence, if hiring temporary replacements was not inherently detrimental in *Brown*, it should not be inherently detrimental in a situation like that presented in *American Ship*. Furthermore, it should be noted that the *Brown* and *American Ship* cases seem to indicate

46. See NLRB v. Erie Resistor Corp., 373 U.S. 221 (1963); Radio Officers Union v. NLRB, 347 U.S. 17 (1954); Valley Transit Co., 142 N.L.R.B. 658 (1963).

47. 380 U.S. 278 (1965).

48. In part the rationale of the *Brown* decision was preservation of the parity in the multi-employer bargaining unit. Previously, the Court had held that non-struck members of the bargaining group could utilize the lockout to insulate themselves from the effect of whip-saw strikes. NLRB v. Truck Drivers Union, 353 U.S. 87 (1956). Since the employer who had been struck could hire replacements, NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333 (1938), the employers who had locked out their employees were allowed to hire temporary replacements to avoid being faced with the choice of reinstating their employees or remaining at a competitive disadvantage vis-à-vis the employer actually struck. In addition, if employers had been forced to reinstate the locked-out employees, they would have become vulnerable to whipsaw strikes. Thus, in order to maintain the effectiveness of the bargaining unit, the Court felt that parity between the members must be preserved.

49. See cases cited note 17 *supra*.

50. See cases cited note 18 *supra*.

51. 380 U.S. 278, 284 (1965).

a definite predisposition on the part of the Court toward increased use of the lockout as an economic weapon. As previously indicated, however, an employer will have little incentive to employ a lockout as a bargaining weapon unless he has the concomitant power to hire replacements. Thus, if the Court continues to make the issue turn on the employer's motive, it will sanction the hiring of temporary replacements for employees locked out after an impasse.

The ability to hire temporary replacements after a pre-impasse lockout, on the other hand, may be limited by the NLRA. In the first place, if temporary replacements are hired, the terms and conditions of employment must be identical to those in effect before the lockout; any change in the terms would, under the *Katz* reasoning, violate section 8(a)(5).[52] Although a simple refusal to rehire the locked-out employees is not a violation of section 8(a)(5),[53] it may violate section 8(a)(3). Since an employer hiring temporary replacements after a strike must consider strikers who apply for reinstatement,[54] an employer hiring replacements after a lockout would seemingly be bound by the same requirement. If he ignores the locked-out employees, he discriminates against them in violation of section 8(a)(3). After a post-impasse lockout, the employer has no need to discriminate, since the *Katz* reasoning allows him to hire any worker on his own terms.[55] After a pre-impasse lockout, however, the employer is not likely to rehire his former employees on the same terms, for this would amount to a *pro tanto* withdrawal of the lockout. Thus, the employer's ability to hire replacements after a pre-impasse lockout and still maintain any bargaining pressure is effectively precluded by section 8(a)(3).

Furthermore, hiring temporary replacements after a pre-impasse lockout may violate section 8(a)(1) on the ground that it interferes with the employees' rights to strike and to bargain collectively. Although the pre-impasse lockout, like any bargaining lockout, interferes with the right to strike by depriving the union of the ability to time the work stoppage, it does not constitute sufficient infringement of that right to constitute an unfair labor practice;[56] the economic pressure placed on the parties is the same as that created by a strike. In addition, a pre-impasse lockout by itself does not violate the right to bargain collectively.[57] When replacements are hired, however, the relative economic forces change drastically, since the employer is no longer under any pressure to settle. Whether this practice violates section 8(a)(1) must be determined by balancing the employer's in-

52. See notes 28-33 *supra* and accompanying text.
53. *Ibid.*
54. See NLRB v. Shenandoah-Dives Mining Co., 145 F.2d 542, 547 (10th Cir. 1944); Firth Carpet Co. v. NLRB, 129 F.2d 633 (2d Cir. 1942).
55. See notes 28-30 *supra* and accompanying text.
56. See note 23 *supra.*
57. See notes 22-24 *supra* and accompanying text.

terest with the degree of infringement upon the employees' rights.[58] If replacements are hired after a strike, for example, the employer's interest in maintaining his operations justifies the infringement of the employees' rights.[59] On the other hand, the employer's interest in attracting these replacements is not so compelling that he may offer them super-seniority.[60] Applying this balancing test to the pre-impasse lockout situation, it appears that the employer's interest in hiring replacements after a pre-impasse lockout would generally not be sufficient to overcome the interference with the employees' rights. The employer would not be significantly prejudiced by waiting until an impasse before locking out and hiring replacements. The only situation in which an employer's interest might justify the hiring of these replacements would occur when the employer faces a potential loss if he waits to lock out.[61] This type of a lockout, however, would be the defensive lockout permissible before *American Ship*, and not a bargaining lockout. Hence, it appears that the hiring of replacements after any pre-impasse bargaining lockout is illegal.

Although it might seem that the decision in *American Ship* will increase the number of lockouts actually utilized by employers, an examination of some of the unanswered questions in the decision suggests that this conclusion may be erroneous. In the first place, employers are not likely to lock out after an impasse unless they can hire replacements.[62] Second, even if the hiring of replacements is permissible, employers may never have the opportunity to lock out; unless the employer can also lock out before an impasse, the union can defeat the employer by calling a strike first. Third, although the pre-impasse lockout itself may not be an unfair labor practice, there is considerable doubt as to the legality of hiring temporary replacements at that time. Consequently, an employer generally would not utilize the pre-impasse lockout. Fourth, since the legality of employer action in any one of these situations appears to depend on whether an impasse has been reached, the employer may be reluctant to lock out and run the risk of unfair labor practice charges because no impasse was in fact reached. Thus, there may be few lockouts as a result of *American Ship* or its logical extension. In any case, it is quite clear that the critical issue in future decisions, absent any showing of anti-union motivation, will be whether an impasse was reached before the employer locked out or hired replacements.

58. NLRB v. Truck Drivers Union, 353 U.S. 87, 96 (1956); Republic Aviation Corp. v. NLRB, 324 U.S. 793, 798 (1945); Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 194 (1941).

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

60. NLRB v. Erie Resistor Corp., 373 U.S. 221 (1963).

61. *Cf.* NLRB v. Brown, 380 U.S. 278 (1965).

62. If an employer cannot hire replacements, a lockout exerts the same economic pressures on both parties as a strike. Therefore, a weak employer will not use the lockout, but wait and hope the union does not strike. A strong employer may not need to resort to the lockout. See 60 L.R.R.M. 161 (Nov. 8, 1965).