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John F. Dodge, Jr. S.Ed.
University of Michigan Law School

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LABOR LAW—LEGALITY OF A TEMPORARY LOCKOUT AS A COUNTERMEASURE TO A STRIKE—After several months of unsuccessful negotiations on a new contract, a local union of truck drivers, affiliated with the A.F.L. Teamsters International Union, struck one of the members of a multi-employer bargaining association. The following day the remaining members of the association locked out their non-striking employees after advising the union that the action was the result of the union's strike against one member of the association, and that the employees who had been laid off would be recalled if the union withdrew its picket line and ended the strike. The union processed a complaint to the National Labor Relations Board, alleging that the members of the association who had locked out their employees had coerced and discriminated against their employees in violation of §§8(a)(1) and (3) of the amended National Labor Relations Act.¹ *Held*, with Member Murdock dissenting, an economic strike

¹Labor Management Relations Act, 1947, 61 Stat. L. 142 (1947) §8(a) and (c), 29 U.S.C. (1952) §§158(a) and (c).

against one member of a multi-employer association constitutes a threat of strike action against the remaining members which is per se the type of economic or operative problem at the plants of the non-struck employers which justifies their resort to a temporary lockout of employees. *Buffalo Linen Supply Co.*, 109 N.L.R.B. No. 69 (1954).

Since the enactment of the original Wagner Act the NLRB has consistently held that the NLRA leaves intact the employer's right to discontinue his operations for any reason whatsoever, provided only that the action is not motivated by a desire to interfere with his employees' union activity.² Furthermore, the Board for some time has taken the position that an employer may justify a discontinuance of operations when a strike, or threat of strike, causes the danger of spoilage of materials,³ a breach of contract with customers,⁴ or other operative difficulties.⁵ On the other hand, reprisals against employees for their strike activity have been uniformly held unlawful by the Board even when such activity subjects an employer to unusual economic hardships.⁶ Thus, until the principal case, the Board had steadfastly refused to allow an employer lockout prompted by bargaining, as opposed to strictly economic considerations. Consequently, the holding in the principal case appears on the face of things to be a capitulation by the Board to the views of the Seventh⁷ and Ninth⁸ Circuits that a lockout, when used as a defensive weapon, is the employer's correlative power to the union's power to strike, and is not a violation of the NLRA.⁹ The Board, however, seems reluctant to accept fully the correlative power theory, expressly limiting the decision in the principal case to instances of union strike action against one member of a multi-employer bargaining association. At first glance this decision seems fair. Allowing the use of lockouts in the multi-employer situation would tend to prevent the whipsawing of individual members of an

² *NLRB v. Cape County Milling Co.*, (8th Cir. 1944) 140 F. (2d) 543; *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 57 S.Ct. 615 (1937).

³ *Duluth Bottling Assn.*, 48 N.L.R.B. 1335 (1943).

⁴ *Betts Cadillac Olds, Inc.*, 96 N.L.R.B. 268 (1951).

⁵ *International Shoe Co.*, 93 N.L.R.B. 907 (1951), where union struck one out of three integrated departments in the same plant; *Link-Belt Co.*, 26 N.L.R.B. 227 (1940), to avoid a sitdown strike; *Beckerman Shoe Co.*, 19 N.L.R.B. 820 (1940), to avoid excessive wildcat strikes; *Brown-McLaren Mfg. Co.*, 34 N.L.R.B. 984 (1941), to avoid a burdensome union contract; *NLRB v. Lovvorn*, (5th Cir. 1949) 172 F. (2d) 293 (1949).

⁶ *NLRB v. National Broadcasting Co.*, (2d Cir. 1945) 150 F. (2d) 895; *NLRB v. Star Publishing Co.*, (9th Cir. 1938) 97 F. (2d) 465. That merely threatening a lockout is enough, see *NLRB v. Frank Bros.*, (1st Cir. 1943) 137 F. (2d) 989. If any proscribed motive could be found, other facts will not mitigate the violation, *NLRB v. Gluek Brewing Co.*, (8th Cir. 1944) 144 F. (2d) 847.

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

⁸ *Leonard v. NLRB*, (9th Cir. 1952) 197 F. (2d) 435.

⁹ In *Leonard v. NLRB*, note 8 supra, the court maintained that the prohibition and regulation of "strikes and lockouts" in the LMRA [tit. I, §8(d)(4); tit. II, §§203(c), 206, 208(a)] implies that some lockouts are lawful. The opponents of this view contend that these sections are concerned with the *existence* of lockouts, not their *status*.

employer association by a union,¹⁰ would act as a deterrent to strikes by large unions against individual members of an association,¹¹ and would be in keeping with the existence of the multi-employer unit.¹² In addition, the allowance of such lockouts would be consistent with congressional intent to limit the bargaining advantages which labor was thought to have had under the original Wagner Act. On the other hand these arguments ignore several practical considerations.¹³ The genesis of employer organization is in large part a defensive response by the small employer to the problem of dealing with large and powerful unions.¹⁴ Giving the employer association the weapon of the defensive lockout may deter unions in the future from entering into such bargaining relationships,¹⁵ and may be an impetus to the discontinuance of such relationship now existing,¹⁶ for a union, whose strike action against the employer bargaining individually would be protected against lockouts, will not be inclined to look favorably on multi-employer bargaining in which the same strike against the same employer, now bargaining as a member of an association, would not be protected against lockouts. Furthermore, since the burden of proof of employer anti-union motive is on the general counsel,¹⁷ and since such former evidence of anti-union motive as the timing of the lockout,¹⁸ past lay-off practices by the employer,¹⁹ or anti-union statements²⁰ are clearly irrelevant or inadmissible, the difficulties of proof of anti-union motivation for the lockout are so great as to furnish an employer association with an effective "union busting" weapon.²¹ Particularly is this true

¹⁰ 3 STAN. L. REV. 510 (1951). Query whether such whipsawing could not be offset by establishment of a fund for the purpose of aiding employer members of the association who are struck by the union.

¹¹ 65 HARV. L. REV. 353 (1951).

¹² 20 UNIV. CHI. L. REV. 299 (1953).

¹³ Most authors have assumed that the protection of multi-employer bargaining is an end in itself. See Petro, "The NLRB on Lockouts," 3 LAB. L.J. 659 (1952). But in many instances the "picking-off" of single members of employer associations serves an excellent purpose, since it may be the recalcitrant, anti-union employer member who has brought about the impasse in bargaining and who is chosen for the union attack.

¹⁴ FREIDIN, *THE TAFT-HARTLEY ACT AND MULTI-EMPLOYER BARGAINING* 4 (1948).

¹⁵ Since a history of multi-employer bargaining is almost always essential to the recognition of a multi-employer bargaining unit by the Board, there is no compulsion on a union to enter such a bargaining relationship in the original instance. NLRB, *ELEVENTH ANNUAL REPORT* 26 (1946).

¹⁶ Fairness requires that a union be allowed to discontinue multi-employer bargaining at will, since the employer may do so, and since the act makes the appropriate unit a representation rather than a bargaining question. However, the Board has refused to pass directly on the question of union withdrawal power. See *Continental Baking Co.*, 99 N.L.R.B. 777 (1952).

¹⁷ *Abe A. Bochner*, 85 N.L.R.B. 633 (1949).

¹⁸ *NLRB v. Somerset Classics, Inc.*, (2d Cir. 1952) 193 F. (2d) 613.

¹⁹ *American Radiator Co.*, 7 N.L.R.B. 1127 (1938).

²⁰ Section 8(c) makes employer anti-union statements non-admissible as evidence of unfair labor practices.

²¹ In practice the distinction between bargaining motivation and anti-union motivation is too tenuous to exist in many situations. In many instances, continued economic success at the bargaining table is a condition of the union's existence, and sometimes it is the employer association which is the stronger of the two.

if the language of the principal case to the effect that a strike against one member of the association per se justifies a lockout by the other members means that the union is precluded from introducing any evidence of anti-union motivation for the lockout.²² Finally, it is difficult to believe that a Congress which so extensively modified and spelled out the rights of both management and labor by the passage of the Labor Management Relations Act would not have specifically excluded defensive lockouts in the multi-employer situation from the broad coverage of §§8(a)(1) and (3) of title I if it had intended them to be so excluded.

John F. Dodge, Jr., S.Ed.

²² See the dissenting opinion of Member Murdock in the principal case.