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A Primer/Refresher On Lockouts Under The NLRA: The Legal Landscape Since *American Ship Building*

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A PRIMER/REFRESHER ON LOCKOUTS UNDER THE NLRA: THE LEGAL LANDSCAPE SINCE *AMERICAN SHIP BUILDING*

William Bevan III*

I. INTRODUCTION

As the title would clearly imply, this paper is devoted to the subject of what was once a relatively settled area of labor law since the mid-1960's: an employer use of the lockout as an economic weapon. [1] However, recent National Labor Relations Board ("Board" or "NLRB") decisions have not always met with favorable court review. This paper will briefly trace the development of the law up to *American Ship Building,*[2] the Supreme Court's landmark decision in 1965 and subsequent changes that have come later as employers have resorted, reluctantly or otherwise,[3] to use lockouts more often and with different variations, and sometimes different results between the Board and the courts. Hopefully, the reader will be able to understand where the law has been, and where it might be going, before you advise a client on whether to pursue the use of this high profile, often risky economic weapon.

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1 The subject matter of this paper is limited to a discussion of lockouts under federal labor law, primarily the National Labor Relations Act, 29 U.S.C. § 150, *et. seq.* ("Act" or "NLRA").

2 *American Ship Building Co. v. NLRB,* 380 U.S. 300 (1965). Much of the academic scholarship actually predates the Court's decision. *See, e.g.,* Johannsen, *Lockouts: Past, Present, and Future,* 1964 Duke L.J. 257 (1964); Meltzer, *Lockouts Under LMRA: New Shadows on an Old Terrain,* 28 Chicago L.Rev. 614 (1961); Meltzer, *Single Employer and Multi-Employer Lockouts, under the Taft-Hartley Act,* 24 Chicago L. Rev. 70 (1956); Koretz, *The Lockout Revisited,* 7 Syracuse L.Rev. 263 (1956); Koretz, *Legality of the Lockout,* 4 Syracuse L.Rev. 251 (1953).

3 In the author's view, the term "lockout" is, for some reason, a more emotionally charged term in our labor relations lexicon. When a union calls a strike, there is, generally speaking, no negative connotation associated with such activity. The same cannot be said when an employer resorts to the use of a lockout.

II. DEVELOPMENT OF THE LAW PRIOR TO *AMERICAN SHIPBUILDING*

A. Early Definition of Lockout and The Law Prior to NLRA

While the Act uses the term "lockout" in several places, in no section of the statute is that term actually defined.[4] The earliest judicial recognition of the term "lockout" by a federal court appears to be the Seventh Circuit's decision in *Iron Molders' Union No. 125 v. Allis Chalmers Co.,* 166 Fed. 45, 52 (7th Cir. 1908), where a lockout was defined as ". . . a cessation of the furnishing of work to employees in an effort to get for the employer more desirable terms." After the passage of the NLRA, federal labor law generally recognized a number of different usages for the term lockout before perhaps arriving at the same concept used in *Iron Molders*: a lockout, for labor law purposes, exists when an employer denies his employees the opportunity to work under any circumstances until they agree to his bargaining proposals. *American Ship Bldg. Co. v. NLRB, supra* at 308 (1965).[5]

B. The Board Struggles to Delineate Lawful from Unlawful Lockouts

To say that the Board was less than clear about what conduct constituted a lockout by an employer during the early days of the Act, and more importantly, when a lockout violated the NLRA, is to state the obvious. Indeed, in the years after both the passage of the NLRA and the LMRA, the Board's position on what conduct constituted a lockout can be described as a patchwork quilt of conflicting holdings. This is perhaps best described in the Trial Examiner's decision adopted by the Board in *Betts Cadillac Olds, Inc.*, 96 NLRB 268, 282-283 (1951):

> 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." [citations omitted] Other authorities have defined it similarly:

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4 There is little in the NLRB's four-volume legislative history of the Act on the subject of lockouts. To be sure, the legality of lockouts to thwart organizational efforts was of major concern; however, there was also a concern that unions were being given unfettered right to strike under the Act, but the use of lockouts by employers would be specifically condemned. Hearing, S. 2926, 73rd Cong, reprinted in 1 NLRB, Legislative History of the National Labor Relations Act, 1935, 68,405-406 (1949). In the end, the right to strike was enshrined in both Sections 7 and 13 of the Act, and the Act neither defined lockouts nor attempted to prohibit their use *per se*. When the Act was substantially amended in 1947 by the Labor Management Relations Act amendments, there was even less discussion of lockouts, although the House Bill (H.R. 3020) would have prevented the use of either strikes or lockouts until certain conditions were satisfied, including a secret ballot vote taken on an employer's last offer of settlement. H.R. 3020, 80th Cong., 1st Sess., reprinted in 1 NLRB Legislative History of the Labor Management Relations Act, 1947, at 158,163-166 (1948). Obviously this portion of the House bill did not become a part of the law. This provision was replaced by the present Section 8(d), 29 U.S.C. § 158(d), *et seq.*, which placed certain limitations on the use of both strikes and lockouts, but otherwise did not define the term "lockout," and that has remained true until the present time.

5 Does this mean that lockouts for other purposes are unlawful? Must there always be a labor dispute with union represented employees involved? The answer to the latter question is apparently not. Thus, in *Brady v. Nat'l Football League,* 644 F.3d 661 (8th Cir. 2011), the court upheld the right of NFL teams to lockout players in support of a labor dispute, even though the union had been decertified and no longer represented the players for labor law purposes. The Court noted that there was no uniform definition of lockout. *Id.* at 674.

Millis and Montgomery, *Organized Labor* Vol. III, p. 554; Gregory and Katz *Labor Law*, pp. 147-8; Webster's New International Dictionary, 2d Ed., p. 1450.

Though the term has been often used in Federal legislation since the early 1930's, it has never been statutorily defined. See, for example, the first Senate draft of the Wagner Act, subsequently amended, S. 2926, 73rd Congress, 2d Session, original Senate print, which prohibited lockouts, and testimony in the Senate hearings thereon, reprinted in *Legislative History of the Wagner Act*, U.S. Government Printing Office, 1949, at pp. 212, 406, 545, 570, 946; cf. Comments of Senator Walsh, 79th Cong. Rec. 7673; *Legislative History*, p. 2392; and see references to "lockouts" in Executive Order 9017, establishing the National War Labor Board in World War II, January 12, 1942; the War Labor Disputes (Smith-Connelly) Act of June 25, 1943; and Section 8(d), 203, 206, and 208 of the Taft-Hartley Act. Whether the term "lockout" as employed in those contexts embraced the common law definition of the term, or instead was used generically to describe all voluntary closedowns, other than strike action, consequent upon a labor dispute, or was confined to shutdowns for economic or operative reasons, is not immediately evident in all instances, and is probably not necessary, for reasons to be adverted to, or decide here. The significant point is that the term is not statutorily defined, though statutorily used, an omission possibly suggestive of correction.

Usage of the term has consequently not been uniform. See for example, 50 Col. L. R. 1123, Note 1 [1951]:

> . . . "lock-out" means *terminating* the employment of a group of employees. [Emphasis supplied.] Frequently the. . . term is defined as the termination of employment of a group of employees in order to coerce them or restrain their activities. *See* Bankstone Creek Collieries v. Gordon, 399 Ill. 291, 299. . . . As used in this Note, however, "lock-out" is not confined to describing conduct designed to coerce.

The Board does not appear to have defined the term, and the Board decisions do not reflect *any consistent* definition.[6] Thus, concepts as widely separated as a closedown to avoid property loss (*Duluth Bottling Association*, 48 NLRB 1335); a cessation of operations because sporadic strikes interfered with efficient operation (*International Shoe Company*, 93 NLRB 907); a shutdown in a fit of employer temper during an argument with a union representative and without purpose to interfere with union or concerted activity (*Lengel-Fencil Co.*, 8 NLRB 988); and mass discharges in reprisal for union activity (*Hopwood Retinning Co.*, 4 NLRB 922; *Scott Paper Box Co.*, 81 NLRB 534) have been described as "lockouts." On the other hand, shutdowns because of economic considerations have been found not to constitute "lockouts": *Link-Belt Co.*, 26 NLRB 227, 261-4; *Hobbs-Wall Co.*, 30 NLRB 1027; *Worthington Creamery*, 52 NLRB 121). Nor do the

[6] Emphasis mine.

decisions reflect any invidious connotation in use of the term. Thus, in the *Duluth Bottling, International Shoe* and *Lengil-Fencil* cases the "lockouts" involved were found to be legal, whereas in the *Hopwood* and *Scott* cases they were found to be illegal.

What ultimately emerged from this conflicting approach was the Board's eventual acceptance of several decisions by the Courts of Appeals as to what might constitute a lockout for labor law purposes. That particular definition was first articulated by the Seventh Circuit in *Morand Bros. Beverage Co. v. NLRB*, 190 F.2d 576, 582-584 (7th Cir. 1951), where the Court determined that the term "lockout" would denote an employer's temporary layoff of employees, as distinguished from a discharge, severance, or termination of the employment relationship. The Board picked up on the Court's notion of what would constitute a lockout, but without defining the term, in its subsequent decisions in *Morand Bros.*[7] and *Davis Furniture*.[8]

Even though the Board might have reached a general consensus of what the term lockout would mean for purposes of administering the statute, there was clearly no agreement by the Board as to under what circumstances lockouts would be lawful or unlawful. What emerged over the course of approximately 30 years of experience was the Board's belief that offensive lockouts – those that arose during collective bargaining and were used to affect the outcome of bargaining – were unlawful[9] and defensive lockouts were lawful.[10] With respect to the latter, *Betts Cadillac* represents sort of the high water mark for defensive lockouts.

In *Betts Cadillac*, the Board found that unusual circumstances justified the employer's lockout. There, the Board upheld the use of a lockout where, because of the Union's refusal to give a reasonable advance notice of any strike, the employers who were bargaining in a multiemployer group had no certainty that new repair work could be booked, finished, and the customers cars returned to them; thus, these operating difficulties supported the use of the lockout. 96 NLRB at 287-291. The Trial Examiner whose decision was adopted by the Board was later described by the Board in a subsequent case[11] as the "unusual circumstances" test:

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7 *Morand Brothers Beverage Co.,* 99 NLRB 1448 (1952).

8 *Davis Furniture Co.,* 100 NLRB 1016 (1952).

9 *See, e.g., Quaker State Oil Refining Corporation,* 121 NLRB 334, 335-336 (1958) *enfd Quaker State Oil Refining Corp. v. NLRB*, 270 F.2d 48 (1959); *Dalton Brick & Tile Corporation*, 126 NLRB 473, 483 (1960); enforcement denied, *NLRB v. Dalton Brick & Tile Corporation,* 301 F.2d 886 (1962). The preceding cases involve single employer lockouts. In *Utah Plumbing & Heating Contractors Ass'n,* 126 NLRB 973, 978 (1960), the Board found unlawful a threatened lockout and the actual lockout by a group of contractors bargaining as a multiemployer unit. The Tenth Circuit enforced the Board's decision. *Utah Plumbing & Heating Contractors Ass'n v. NLRB,* 294 F.2d 165 (10th Cir. 1961).

10 *See Betts Cadillac Olds, Inc., supra* at 282-283.

11 In *American Brake Shoe Company,* 116 NLRB 820, 867 (1956), vacated 244 F.2d 287 (7th Cir. 1957), the Board labeled *Betts Cadillac* as representing the "unusual circumstances doctrine." In *American Brake Shoe Company,* the Board rejected the Trial Examiner's use of the "fear of the possibility of a strike" and instead relied on the "reality of a threat of a strike under the circumstances." *Id.* The Board found that there was no real threat of a strike justifying a lockout. The Seventh Circuit disagreed with the Board, on the facts, and found, like the Trial Examiner, that there were sufficient objective factors from which a reasonable person could assume that a real strike threat existed. 244 F.3d at 453. The court also found that

> An employer is not prohibited from taking reasonable measures, including closing down his plant, where such measures are, *under the circumstances,* necessary for the avoidance of economic loss or business disruption attendant upon a strike. This right may, *under the circumstances,* embrace the curtailment of operations before the precise moment the strike has occurred. The pedestrian need not to wait to be struck before leaping for the curb. The nature of the measures taken, the objective, the timing, the reality of the strike threat, the nature and extent of the anticipated disruption, and the degree of resultant restruction in the effectiveness of the concerted activity, are all matters to be weighed in determining the reasonableness *under the circumstances,* and the ultimate legality of the employer's action. Manifestly, where there is no real strike threat, or when the Union has given reasonable assurances against a strike, or assurance of notice sufficient to avoid disruption, there is no objective need for protective measures.

96 NLRB 286-287.

The problem with this approach was that the constellation of facts in many labor disputes does not necessarily reveal a single motive for a party's actions. Thus, whether the employer locked out as a defensive move to protect his legitimate business interest or merely as a ruse to apply pressure to the union by controlling the timing of the union's use of the strike weapon is not a question easily answered in many cases.

C. <u>The Supreme Court Brings Consistency to the Subject of Lockouts</u>

These issues ultimately had to be resolved by the Supreme Court, and, as with many cases, the Court approached the issue on an incremental basis. Three Supreme Court cases, each discussed below, laid down certain parameters for the employer's use of a lockout as a justifiable response to union activity or union power, without necessarily reaching all possible scenarios.

1. <u>The Multiemployer Cases</u>

In *NLRB v. The Truck Driver's Union* 353 U.S. 87 (1957), the Court resolved a conflict between the Board and various Courts of Appeals[12] concerning the legitimacy of whether non-struck members of the multiemployer bargaining unit could lawfully lock out their employees as a defensive maneuver to a union whipsaw strike against one of their members. The Board had viewed such conduct as a lawful *defensive* measure designed to protect the integrity of multiemployer bargaining. *Buffalo Linen Supply Co.,* 109 NLRB 447, 448-449 (1954).[13] It was also viewed as an "economic or operative problem" for the remaining nonstruck employers. *Id.*[14] The Court of Appeals had disagreed on the grounds that, *inter alia,* nowhere in the Act or in the

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there were "sufficient economic and operational problems" to warrant the "defensive" lockout ordered by the employer. *Id.* at 494.

12 353 U.S. at 89, n.5 and cases cited therein.

13 Prior to *Buffalo Linen,* the Board had found that a lockout by members of a multiemployer group in response to a whipsaw strike against a member of the group violated the act. *Davis Furniture Co., supra* (1952). *Morand Brothers Beverages,* 91 NLRB 409 (1950). In *Buffalo Linen,* the Board relied on the Ninth Circuit's opinion in *Leonard v. NLRB*, 205 F.2d 355, 357-358 (9th Cir. 1953).

14 Such language resembles the *Betts Cadillac* line of cases.

legislative history had Congress specifically sanctioned multiemployer bargaining. *Truck Drivers Local Union No. 4832 v. NLRB*, 231 F.2d 110, 117-118 (2d Cir. 1956). Accordingly, the actions of the remaining members of the association – based on the anticipation of a strike against them – were offensive in purpose, and not defensive, and not justified by the whipsaw strike by the union against a single member. *Id.* at 115-118.[15] Fortunately, for the sake of multiemployer bargaining, the Supreme Court upheld the Board's view that a lockout by the remaining members of the association was a legitimate defensive measure to protect against a union's attempt to whipsaw one or more members of the association.

The Court's unanimous opinion made short shrift of the Court of Appeals' various rationales for declining to grant enforcement of that Board's order. The Court's words are instructive.

> We cannot subscribe to this interpretation. Multi-employer bargaining long antedated the Wagner Act, both in industries like the garment industry, characterized by numerous employers of small work forces, and in industries like longshoring and building construction, where workers change employers from day to day or week to week. This basis of bargaining has had its greatest expansion since enactment of the Wagner Act because employers have sought through group bargaining to match increased union strength. Approximately four million employees are now governed by collective bargaining agreements signed by unions with thousands of employer associations. At the time of the debates on the Taft-Hartley amendments, proposals were made to limit or outlaw multi-employer bargaining. These proposals failed of enactment. They were met with a storm of protest that their adoption would tend to weaken and not strengthen the process of collective bargaining and would conflict with the national labor policy of promoting industrial peace through effective collective bargaining.
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> Although the Act protects the right of the employees to strike in support of their demands, this protection is not so absolute as to deny self-help by employers when legitimate interests of employees and employers collide. Conflict may arise, for example, between the right to strike and the interest of small employers in preserving multi-employer bargaining as a means of bargaining on an equal basis with a large union and avoiding the competitive disadvantages resulting from nonuniform contractual terms. The ultimate problem is the balancing of the conflicting legitimate interests. The function of striking that balance to effectuate national labor policy is often a difficult and delicate responsibility, which the

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15 The Court of Appeals also stated the prevailing view in some quarters that there was ". . . nothing in the Act which equates lawful strikes and lockouts. On the contrary, only the right to strike is expressly reserved by Congress in Section 13 of the Act. The absence of any similar expressed reservation of the right to lockout strongly argues against any intent to establish that right. 231 F.2d at 114. The Supreme Court expressly rejected this view of the law, relying on the language of Section 8(d) of the Act. 353 U.S. at 92-93. The Court said it was unnecessary to resolve the issue "whether, as a general proposition, the employer lockout is the corollary of the employees' statutory right to strike." *Id.* at n.19.

> Congress committed primarily to the National Labor Relations Board, subject to limited judicial review.
>
> The Court of Appeals recognized that the National Labor Relations Board has legitimately balanced conflicting interests by permitting lockouts where economic hardship was shown. The court erred, however, in too narrowly confining the exercise of Board discretion to the cases of economic hardship. *We hold that in the circumstances of this case the Board correctly balanced the conflicting interests in deciding that a temporary lockout to preserve the multi-employer bargaining basis from the disintegration threatened by the Union's strike action was lawful.*

353 U.S. at 94-97 (footnotes omitted; emphasis added).

The question left open in *Buffalo Linen* was whether the remaining members of the association could apply additional pressure to the union by hiring temporary replacements to keep their operations going.[16] The Supreme Court, in *NLRB v. Brown Food Store,* 380 U.S. 278 (1965), answered that question in the affirmative. While the Board had upheld the right of the non-struck members of the multiemployer group to lock out their employees to combat a whipsaw strike against one of its members, the Board specifically held in *Brown Food Store* that the remaining companies violated Sections 8(a) (1) and (3) of the Act by hiring temporary replacements. *Brown Food Store*, 137 NLRB 73, 76 (1962). The Tenth Circuit Court of Appeals disagreed and refused to enforce the Board's order. *NLRB v. Brown,* 319 F.2d 7, 11 (10th Cir. 1963).

The Supreme Court found that the non-struck members of the association could have been legitimately concerned for the integrity of the multiemployer unit being threatened unless they also managed to stay open during the lockout. 380 U.S. at 284. The Court found that using temporary employees during the lockout was wholly consistent with a legitimate business purpose. 380 U.S. at 285. To respond to the argument by the union and the Board that the use of temporary replacements over regular employees showed an unlawful motivation,[17] the Court held that finding otherwise would render the right of the remaining members to lockout, in support, against a whip saw strike would be largely illusory. *Id.* While the Court reiterated the fact that it should be hesitant to overturn the decisions of an expert administrative agency, it was not required to blindly accept the conclusions of the Board if, in the Court's judgment, they rested on an "erroneous legal foundation." 380 U.S. at 292. The Court held:

> The Board's finding of a § 8(a)(1) violation emphasized the impact of respondents' conduct upon the effectiveness of the whipsaw strike. It is no doubt true that the collective strength of the stores to resist that strike is maintained, and even increased, when all stores stay open with temporary replacements. The

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[16] It was assumed that the struck employer could hire permanent or temporary replacements in order to combat the strike against its operations. 353 U.S. at 96, and n.27.

[17] "In the circumstances of this case, we do not see how the continued operations of [the employers] and the 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." *Id.*

> pressures on the employees are necessarily greater when none of the union employees is working and the stores remain open. But these pressures are no more than the result of the Local's inability to make effective use of the whipsaw tactic. Moreover, these effects are no different from those that result from the legitimate use of any economic weapon by an employer. Continued operations with the use of temporary replacements may result in the failure of the whipsaw strike, but this does not mean that the employers' conduct is demonstrably so destructive of employee rights and so devoid of significant service to any legitimate business end that it cannot be tolerated consistently with the Act. Certainly then, in the absence of evidentiary findings of hostile motive, there is no support for the conclusion that [the employers] violated § 8(a)(1).[18]

380 U.S. at 286. [19] The Court was careful to point out that it was not deciding "whether the case would be same had the struck employer exercised its right to hire permanent replacements" and the "nonstruck employers had then hired permanent replacements for their locked out employees." *Id.* at 292.[20]

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18 The Court disposed of the Section 8(a)(3) allegation by finding that the use of temporary replacements was not inherently destructive of employee rights under the Act and there was no specific evidence of intent to discriminate based on union membership. 380 U.S. at 284, 286-288.

19 Ever the iconoclast, Justice White dissented in typical fashion for him. He would have upheld what he described as the Board's delicate balancing of the different interests set forth in the Act. One telling passage in his dissent perhaps says it best as to why he disagreed with the Court's majority: "This sanctification of the multiemployer unit ignores the fundamental rule that an employer may not displace union members with non-union members solely on account of union membership, the prototype of discrimination under § 8(a)(3)[citation omitted], and may not maintain operations and refuse to retain or hire non-striking union members, notwithstanding that most of the union members and most of the workers at that very plant are on strike. The struck employer need not continue operations, but if he does, he may not give preference to employees not affiliated with the striking union, anymore then he may do so after the strike, for § 7 explicitly and unequivocally protects the right of employees to engage [in] [or] not to engage in a concerted activity and § 8(a)(3) clearly prohibits discrimination which discourages union membership [citation omitted][.]. . . If dismissing and replacing non-striking union members at a struck plant discourages union membership and interferes with concerted activities, I fail to understand how this same conduct at a non-struck plant, even if in the name of multiemployer parity and unity, has a different effect on employees' rights. The employees are not on strike, and desire to work, for whatever reasons and nothing in the right to lockout can alter these facts. The Court finds it unnecessary to explain how they are removed from the explicit protection of the Act, except to say that they belong to the union or the unit the union represents and to assume conclusively they share its whip sawing purpose. Membership has never quite meant this before. The Court's justification for this invasion of employee rights by a member of a multiemployer unit is the employer's right to burden the union strike fund with all its members to bring economic pressure to bear on the union. Unfortunately, this reasoning has equal if not greater, force in the single employer partial strike situation." 380 U.S. at 297-298.

20 Justice Goldberg specifically stated in his concurring opinion that the case "would be entirely different" if "the nonstruck employer had locked out their employees and hired *permanent* replacements, even if the struck employer had exercised his right to hire permanent replacements . . ." Goldberg, J. concurring, 353 U.S. at 293 (citation omitted). The Board had held below that the struck employer was, of course, free to hire replacements "on any basis it found expedient. 137 NLRB at 80.

2. **Single Employer Lockout**

As indicated above, the Supreme Court previously dealt with the use of the lockout in the context of multiemployer bargaining. The question specifically reserved by the Court in *Buffalo Linen*, 353 U.S. 87 at 93, was whether an employer committed an unfair labor practice under Sections 8(a)(1) and (3) of the Act when it temporarily laid off or locked out its employees during a labor dispute in order to bring economic pressure on the union in support of the employer's bargaining position. The Board had steadfastly answered the question in the affirmative, but the Courts of Appeals had been split on the issue. Accordingly, the Supreme Court granted certiorari in order to resolve the issue,[21] and, in *American Ship Building Co. v. NLRB*, 380 U.S. 300 (1965), reversed the Board's decision. .

The relevant facts were that American Ship Building Company operated four shipyards along the Great Lakes located at Chicago, Buffalo, Toledo, and Lorain, Ohio, respectively. According to the Court, the company was primarily engaged in repairing ships, a business which both the Board and the Court found to be highly seasonal and concentrated primarily in the winter months when the Great Lakes were frozen and shipping was impossible. 380 U.S. at 802.

Since 1952, the company had engaged in collective bargaining with a group of eight different unions. By the time the dispute reached the Court, the company and the union had been parties to five collective bargaining agreements, each of which had been preceded by a strike. *Id.* The dispute that gave rise to the case before the Court commenced in May 1961 when the unions notified the company of their desire to reopen for negotiation the existing labor agreement, which was due to expire on August 1 of that year. *Id.* The parties negotiated over the summer and, on July 31, the eve of the contract's expiration date, the company made a proposal. That proposal resulted in a counterproposal by the union, as well as an offer for either a six-month extension of the existing contract or an indefinite extension of the no-strike clause of the contract pending the negotiations, with the new terms to be retroactive to the August 1 expiration date. 300 U.S. at 303. The company rejected the union's proposed extension, and its proposal was submitted to the various unions' membership. Approximately a week later, the unions overwhelmingly rejected the company's proposal. The company then made another proposal which the unions refused to submit to their respective memberships, without making any counteroffer. As a result, negotiations broke off with no further agreement on a date to resume them. *Id.*

The company remained extremely apprehensive concerning the possibility of a work stoppage, despite assurances to the contrary through the unions' negotiator. 300 U.S. at 304. Accordingly, the company commenced the layoff of employees on August 11, indicating that such employees would remain laid off until the labor dispute was resolved. *Id.* Eventually, on October 27, 1961, the parties reached agreement on a new two-year agreement, and the employer began recalling employees the following day. *Id.*[22]

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21 *American Ship Building Co. v. NLRB*, 379 U.S. 814 (1964).

22 During the lockout, the Chicago shipyard was completely shut down, and all but two employees were laid off at the Toledo yard. While a large force was retained at the Lorain yard to complete a major piece of work employees at the Buffalo yard were laid off as various tasks were completed. 300 U.S. at 304.

After the unions filed charges against the company for the lockout, the NLRB's General Counsel issued a Complaint, and the case proceeded to trial before a Board Trial Examiner. The Trial Examiner found that the company's primary purpose in locking out the employees was to avoid the economic consequences that it feared would be imposed, both on it and its customer, if a strike was called by the unions either when a ship was in the yard during the shipping season or at a later time when the yard was fully occupied. *The American Ship Building Company*, 142 NLRB 1362, 1381-1382 (1963).

By a three-to-two majority, the Board rejected the Trial Examiner's reasoning that the lockout had been economically justified out of fear of a strike. 142 NLRB at 1363. The Board found that there was no basis to fear a strike based on the unions' assurances to the contrary. *Id.* The Board did not disturb the Trial Examiner's findings that the parties were at impasse, that the lockout had not occurred until *after* a bargaining impasse had been reached, and that there had been no unlawful motivation based on hostility to the unions or to a desire by the company to avoid its bargaining obligations. 142 NLRB at 1379-1380. Nevertheless, the Board found that the company had violated Sections 8(a)(1) and 8(a)(3) of the Act. 142 NLRB at 1364-1365. It is important to note that both the Board and the Trial Examiner had, based on the Board's past analysis of the lockout issue, maintained that, if the company had shut down the shipyard solely for the purpose of bringing economic pressure to break an impasse in bargaining or to secure better contract terms, it would have committed an unfair labor practice. 142 NLRB at 1364.[23] The Court of Appeals enforced the Board's order *per curiam*. *Local 374, Int'l Bro. of Boilermakers, etc. v. NLRB,* 331 F.2d 339 (1964).

The Supreme Court reversed the Board and, in doing so, forever altered the standard applied to determine the legality of a lockout. No longer would the issue turn on whether the employer's motives were defensive or offensive. Rather, the Court said the sole issue before it was whether "the use of a temporary layoff of employees solely as a means to bring economic pressure to bear in support of [an] employer's bargaining position, after an impasse has been reached . . ." is lawful. 300 U.S. at 308. The Court, in resolving that issue, held:

> The lockout may well dissuade employees from adhering to the position which they initially adopted in the bargaining, but the right to bargain collectively does not entail any "right" to insist on one's position free from economic disadvantage.

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23 The dissenting Board members agreed with the Trial Examiner's assessment of the facts and his discounting of the unions' assurance that there would be no strike, noting that every contract prior thereto had resulted from a strike. 142 NLRB at 1367-1368. The dissenters further noted: "We do not go so far as to say that an employer may in all situations suspend operations during the course of collective bargaining simply because an agreement has not been reached and a possible strike may be in the offing. But we think it is at least clear that an employer ought not be compelled to invite injury to its own business and to that of its customers, by soliciting or accepting *new* orders for work to be done during a period when it has a genuine basis to fear strike delays leading to serious damage to its customers' interests, resultant customer ill will, and an attendant loss of future business. Yet—under our view of the facts—that is the practical effect of the majority's holding in this case. The conclusion we reach here is not altered by the fact that the Respondent's decision to suspend operations may also have been motivated, although only subordinately as the Trial Examiner found, by a desire to impose pressure on the Unions to force an earlier and more favorable agreement. We need not now pass on the question of whether the use of such a pressure device, standing alone, may properly be viewed as trenching upon employees' statutory rights." *Id.* at 1369. (Footnote omitted.)

> Proper analysis of the problem demands that the simple intention to support the employer's bargaining position as to compensation and the like be distinguished from a hostility to the process of collective bargaining which would suffice to render a lockout unlawful.
>
> The Board has taken the complementary view that the lockout interferes with the right to strike protected under§§ 7 and 13 of the Act in that it allows the employer to preempt the possibility of a strike and thus leave the Union with "nothing to strike against." Insofar as this means that once employees are locked out, they are deprived of their right to call a strike against the employer because he has already shut down the argument is wholly specious, for the work stoppage which would have been the object of the strike has in fact occurred. It is true that recognition of the lockout deprives the Union of exclusive control of the timing and duration of work stoppages calculated to influence the results of collective bargaining negotiations, but there is nothing in the statute which would imply that the right to strike "carries with it" the right exclusively to determine the timing and duration of all work stoppages. The right to strike as commonly understood is the right to cease work – nothing more. No doubt a union's bargaining power would be enhanced if it possessed not only the simple right to strike but also the power exclusively to determine when work stoppages would occur but the Act's provision are not indefinitely elastic, content-free forms to be shaped in whatever manner the Board might think best conforms to the proper balance of bargaining power.
>
> Thus we cannot see that the employer's use of the lockout solely in support of a legitimate bargaining position is in any way inconsistent with the right to bargain collectively or with the right to strike.

380 U.S. at 309-310 (citations and footnotes omitted).

The Supreme Court's decision in *American Ship* Building was, in my opinion, one of historic proportion. It arguably assured employers that they could employ their most important economic weapon, regardless of whether their motives were offensive or defensive in purpose, or had elements of both. Indeed, one might argue that the words "offensive" and "defensive" should simply be "permanently replaced." What follows is a discussion of various issues that have arisen after *American Ship Building* and the Board's or federal courts' current thinking about such matters.

III. THE LEGAL LANDSCAPE AFTER *AMERICAN SHIPBUILDING*

A. When Employees Are Deemed to Be Locked Out

One would think, at least initially, that employees know when they are locked out. Occasionally, however, employers, in order to avoid their reinstatement obligation to strikers, will claim that employees have been locked out when, in fact, they have not been. Accordingly, the Board has adopted fairly clear guidelines to determine when employees are deemed to be locked out.

As noted above, a lockout, for labor law purposes, exists when an employer denies his employees the opportunity to work under any circumstances until they agree to his bargaining proposal. *See American Ship Bldg. Co. v. NLRB*, 380 U.S. at 308 (1965); *Brady v. Nat'l Football League*, 644 F.3d at 674. In *Brady, supra,* the Court noted that there was no uniform definition of the term "lockout," but one definition utilized by the court in past cases is "a refusal by [an employer] to furnish available work to its regular employees." *Id. (*citing *Laclede Gas Co. v. NLRB*, 421 F.2d 610, 615 and n.9 (8th Cir. 1970)). For there to be a lockout, the employer must notify the employees that they are, in fact, locked out, and the employer must make the union aware of the employer's bargaining position – so the union can decide whether to reject the employer's demands or accept them and avoid the lockout. *See Dietrich Industries,* 353 NLRB 57, 60-61 (2008); *Boehringer Ingelheim Vetmedica, Inc.*, 350 NLRB 678, 679 (2007); *Dayton Newspapers*, 339 NLRB 650, 656 (2003), enf'd in relevant part 402 F.3d 651 (6th Cir. 2009); *Ancor Concepts, Inc.*, 323 NLRB 742, 744 (1997); *Eads Transfer*, 304 NLRB 711, 713 (1991), enf'd sub nom. *Eads Transfer, Inc. v. NLRB*, 989 F.2d 373 (9th Cir. 1993).

Obviously, the timing and declaration of a lockout lies with the employer, not the union involved. Similarly, a union may declare that it has been "locked out," for whatever political purposes that this may accomplish with its members or for the unemployment compensation authorities in certain states, but merely claiming that employees are locked out does not make it so. The Board has also made it clear that this rule applies, whether the context is one involving reinstatement of strikers or bargaining over a reopener on healthcare. *Alden Leeds, Inc.*, 357 NLRB No. 20 (2011), slip op. at 10-11; *Boehringer Ingelheim Vetmedica, Inc., supra,* at 679 (2007) (defensive lockout in absence of no-strike pledge by employees).

B. Lockout in Support of Unlawful Bargaining Position

While *American Shipbuilding* made the use of lockouts as an economic weapon to exert pressure in support of a lawful bargaining position, it did not change the longstanding law that an employer cannot lockout employees in support of an unlawful bargaining.[24]

In *KLB Industries*,[25] a recent case, the Board and the D.C. Circuit Court of Appeals both agreed that the employer's failure to adequately respond to an information request from the union tainted the employer's lockout so as to make it unlawful. KLB Industries began negotiating a fourth agreement with its union ten days prior to the expiration of the parties' previous agreement.[26] The employer demanded wage reductions and based its bargaining position on the assertion that the wage reductions were necessary for the company to be competitive with Asian manufacturers, which were an increasing threat to the company's business.[27] Once the employer made its final offer, the union responded with a request for

24 *See, e.g., Valley Central Emergency Veterinary Hospital*, 349 NLRB 1126 (2007); *Schenk Packing Co.*, 301 NLRB 487 (1991); *United Chrome Products*, 288 NLRB 1176 (1988); *Eddy Potash, Inc.*, 331 NLRB 552 (2000).

25 357 NLRB No. 8 (2011) *enfd. KLB Industries Inc. v. NLRB*, 700 F.3d 551 (D.C. Cir. 2012).

26 700 F.3d at 553.

27 *Id.*

information tailored to verifying the employer's assertions concerning the purported economic threat posed by its competitors.[28]

KLB refused to provide the information and, instead, gave only generalized estimates of the savings from the proposed wage reductions, without providing their underlying calculations.[29] Along with its response to the information request, the employer informed the union of its intent to lockout employees if an agreement was not reached. The employer followed through with a lockout of unit employees.[30]

Both the Board and the D.C. Circuit found that the employer's failure to provide the information specifically targeted at verifying the company's competitiveness claims tainted the lockout, rendering it unlawful.[31] "The information withholding made the lockout unlawful notwithstanding KLB's otherwise good faith bargaining."[32] *KLB Industries* makes clear that a lockout is not lawful if it is implemented to compel acceptance of unlawful bargaining conduct.[33] In such cases, the lockout becomes a weapon to enforce unlawful bargaining and a means of evading a duty to negotiate in good faith.[34] The Board and the D.C. Circuit Court of Appeals both concluded that, in this case, the failure to provide relevant information necessary to the union's evaluation of the employer's bargaining position was unlawful conduct, and the lockout was used to compel acceptance of such conduct, which is not permitted under the Act.[35]

In *Dresser Rand Company*,[36] the Board found that, even though the employer was able to articulate a legitimate business justification for locking out striking employees and continuing operations with permanent replacements, the various other unfair labor practices committed by the employer provided ample evidence for the Board to find that the lockout was discriminatorily motivated.[37] "The Respondent's unlawful conduct was…a reaction to the employees' protected strike that ended without a resolution of the underlying disagreements. The Respondent's failure to bargain about recall procedures and, in particular, the Respondent's discriminatorily preferential recall of the cross-overs, both of which followed immediately upon the cessation of the lockout, had a pervasive impact on the unit."[38]

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28 *Id.*

29 *Id.*

30 *Id*. at 554.

31 *Id.* at 558-59.

32 700 F.3d at 559.

33 357 NLRB No. 8, 191 LRRM 1275 (2011), *enforcement granted, KLB Industries Inc. v. NLRB*, 700 F.3d 551 (D.C. Cir. 2012).

34 *Id.*

35 *Id.*

36 358 NLRB No. 34, 193 LRRM 1077 (2012)

37 *Id.*

38 *Id.* at n.1.

In *Alden Leeds, Incorporated*, the Board upheld the ALJ's determination that a lockout which was illegal at the outset due to the employer's failure to provide the union a complete contract proposal could not be cured of its illegality by providing the union the complete contract proposal after the lockout began. "[I]t is well established that 'a lockout unlawful at its inception retains its initial taint of illegality until it is terminated and the affected employees are made whole.'"[39]

The Board similarly found the employer's lockout to be unlawful in *Allen Storage and Moving Company, Incorporated*.[40] There, the employer locked out employees in support of their bargaining proposal to provide each employee with a $30,000 group term life insurance plan rather than the existing death benefit.[41] The Board found the employer's proposal to be unlawful because it was advanced in the face of the employer's unlawful termination of the employees' death benefit bargain.[42] Because the proposal was found unlawful, the lockout was not "in support of a legitimate bargaining position" under *American Shipbuilding* and was declared unlawful as well.[43] In other cases, however, the Board has found that an employer's unfair labor practices did not effect the lawfulness of a lockout.[44]

C. **Pre-Impasse Lockout**

American Ship Building left open the question of whether an employer could engage in a pre-impasse lockout. The first case to address this issue was *Darling & Co.*,[45] where the Board found a pre-impasse lockout lawful under the circumstances. In *Darling & Co.*, the parties had engaged in extensive negotiations but could not come to an agreement on wages, insurance, and work assignments.[46] As the employer approached the busiest time of the year for its operations, the employer grew concerned that the employees would strike, which would have a significant impact on the employer's ability to service its customers.[47] The employer's fears were not far-fetched, as the record reflected that the union had previously struck in 1962, causing the employer to lose its entire shipping season.[48] Thus, the employer acted preemptively and locked

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39 *Id.* at n.2 (quoting *Movers and Warehousemen's Assn of Washington DC*, 224 NLRB 356, 357 (1976), *enfd.* 550 F.2d 962 (4th Cir. 1977), *cert. denied*, 434 U.S. 826 (1977)).

40 342 NLRB 501.

41 *Id.*

42 *Id.*

43 *Id.*

44 *See, e.g., Paccar, Inc.*, 357 NLRB No. 13 (the Board held that the employer's lockout, which was lawful at its inception, was not converted to an unlawful lockout by a refusal to furnish information relevant to collective bargaining when the refusal did not prevent the union from evaluating the employer's proposals or forming counterproposals and therefore "did not materially affect the progress of negotiations").

45 *Darling & Co.*, 171 NLRB 801 (1968), *enfd. sub nom*., *Lane v. NLRB*, 418 F.2d 1208 (D.C. Cir. 1969).

46 *Id*. at 801.

47 *Id.*

48 *Id.*

out the employees prior to reaching an impasse in negotiations in order to exert economic pressure on the employees.[49]

The parties continued to negotiate after the lockout, however the union filed an unfair labor practice charge challenging the employer's the pre-impasse lockout.[50] The ALJ found that the employer had committed an unfair labor practice and held that *American Ship Building* was inapplicable because the employer had not bargained to impasse *prior* to the lockout. The Board reversed the ALJ, and adopted the *American Ship Building* analytical framework for determining the lawfulness of a pre-impasse lockout:[51]

> While we recognize that the Court's holding [in *American Ship Building*] *was* limited to a situation involving a lockout after an impasse in bargaining, we do not find that the absence of an impasse renders the test *per se* inapplicable. The Court indicated that a careful evaluations of all the surrounding circumstances must be made to determine whether there was *unlawful* motivation in the lockout. The absence of an impasse is one of the surrounding circumstances, but it does not necessarily require a conclusion that the lockout was unlawful on that ground alone. While the finding of an impasse in negotiations may be a factor supporting a determination that a particular lockout is lawful, the absence of an impasse does not itself make a lockout unlawful any more than the mere existence of an impasse renders a lockout lawful. Accordingly, we conclude that the test of a lockout's legality, enunciated by the Supreme Court in *American Ship Building*, is properly applicable to situations involving a lockout of employees prior to an impasse in negotiations.[52]

Thus, the test for determining the lawfulness of a pre-impasse lockout, as recognized by *Darling & Company*, and as enunciated in *American Ship Building*, is as follows:

> Assuming no motive to discourage union activity or to evade bargaining exists, the test is whether the lockout is inherently so prejudicial to union interests and so devoid of significant economic justification that no specific evidence of intent is required.[53]

The Board found that there was no evidence in the record of unlawful motivation by the employer to discourage union activity or to avoid its bargaining obligation, and that there was substantial evidence to support a finding that the employer locked out its employees in support of

49 *Id.* at 802.

50 171 NLRB at 802.

51 *Id.* at 802-803.

52 *Id.* at 803 (emphasis added).

53 *Id.*

a bargaining position and to avoid a strike.[54] Since the decision in *Darling & Company*, the extension of *American Ship Building* to pre-impasse lockouts has continued to be the rule.[55]

D. **Partial Lockouts**

It was inevitable following *American Shipbuilding* that employers might use lockouts to restrict only certain employees from working while continuing the employment of others, a practice commonly known as a "partial" lockout. Below is a brief review of notable cases addressing the legality of partial lockouts and certain related limitations established by the Board and the courts. As these cases show, the inquiry on the legality generally turns on two factors: (i) whether the employer had a legitimate objective for the partial lockout; and (ii) whether the employer acted with anti-union animus in selecting the employees to be laid off.

In *Laclede Gas Company*,[56] the employer commenced a post-impasse partial lockout by laying off all employees working on its construction crews while retaining the employees who worked in other roles. The union claimed the employer committed an unfair labor practice by carrying out the partial lockout without regard to the employees' seniority or bumping rights.

The Board held that the employer's disregard of the employee's seniority and bumping rights was not a *per se* violation of the Act, and that the partial lockout was lawful because it was based on work assignments, rather than union membership; importantly, the employer's disregard of the employee's seniority and bumping rights was not a *per se* violation of the Act. In reaching this decision, the Board relied on the following principles established by the Supreme Court in *NLRB v. Great Dane Trailers, Inc.*: [57]

> [I]f it can reasonably be concluded that the employer's discriminatory conduct was "inherently destructive" of important employee rights, no proof of an antiunion motivation is needed to find an unfair labor practice even if there is evidence of motivation by business considerations; but where the adverse effect on employee rights is "comparatively slight," an antiunion motivation must be proved to sustain the charge if the employer adduces evidence of legitimate and substantial business justifications; in either situation, however, once discriminatory conduct which could adversely affect employee rights to some extent has been proved, the burden is upon the employer to establish that it was motivated by legitimate objectives.[58]

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54 *Id.*

55 *See, e.g.*, *Harter Equipment Inc.*, 280 NLRB 597, 598 n.6 (1986) , *aff'd sub nom., Operating Eng'rs Local 825 v. NLRB*, 829 F.2d 458 (3d Cir. 1987); *In re Drew Div. of Ashland Chemical Co.*, 336 NLRB 477, 482 (2001); *Anderson Enterprises,* 329 NLRB 760 (1999); *Jefferson Smurfit Corp.*, 311 NLRB 41 (1993).

56 187 NLRB 243 (1970), *supplementing* 173 NLRB 243 (1968).

57 388 U.S. 26 (1967).

58 187 NLRB at 244. By way of background, the Board initially held in *Laclede Gas Co.*, 173 NLRB 243 (1968) that, unlawfully laid off the bargaining members without regard to their seniority and bumping rights, in violation of Section 8(a)(5) of the Act. In *Laclede Gas Co. v. NLRB*, 421 F.2d 610 (8th Cir. 1970), the Eighth Circuit reversed the Board's conclusion and determined that the employer's selective

The Board concluded that the adverse effect of the partial lockout on employee rights was "comparatively slight," and that the employer satisfied its burden of proving that the partial lockout was based on legitimate objectives, "particularly when one considers that the layoffs were intended to be, and were, temporary and incidental to what the court of appeals has held to be a lawful, tactical bargaining maneuver."[59]

In *General Portland Inc.*,[60] the Board adopted the ALJ's decision that, under certain circumstances, an employer may place conditions on a partial lockout. The facts of the case are somewhat cumbersome but can be summarized as follows: The company, a cement manufacturer, operated three enormous rotary kilns that burned at temperatures of about 2700 degrees. Despite their massive size, the kilns were delicate equipment and posed a significant risk of explosion and other safety concerns to both person and property. Moreover, given the extreme temperatures in which a kiln operated, shutting down a kiln required between 12 hours and 3 days.

During collective bargaining negotiations, the company suspended several kiln operators who staged a walkout based on the safety risks arising from their sudden abandonment of the kilns. The union subsequently commenced a "quickie" strike, without prior notice to the company, to protest the employees' suspensions. During the strike, several employees crossed the picket line and returned to work to operate the kilns. When the union ended its strike, the striking employees made an unconditional offer to return to work. The company, however, rejected the offer and locked out the striking employees, while permitting those who had crossed the picket line to continue working. The company then conditioned its partial lockout on the union's agreement to provide advance notice before engaging in future work stoppages.

The Board and ALJ ultimately concluded that the company did not violate Sections 8(a)(1) and (3) of the Act because it had "legitimate and substantial business justifications" for placing the advance notice condition on the lockout given the clear and considerable safety concerns relating to sudden abandonment of the kilns and related plant equipment, which the condition was tailored to prevent.

The Board reached a similar conclusion in *Bali Blinds Midwest*, another cornerstone case regarding the partial lockouts.[61] There, the company, a custom blinds manufacturer that had to produce and deliver its customer orders within seven days, enacted a partial lockout of certain union members based on product line, classification, and seniority to reduce the workforce by half in anticipation of a "quickie" strike by the union. The union had engaged in such a strike days earlier, and the company anticipated a repeated work stoppage. In the end, the Board and the ALJ sided with the company, concluding that the company's partial lockout was lawful because the company's selection process was nondiscriminatory, and the company had a

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reduction in workforce was a partial "lockout," rather than a traditional "layoff." The Eighth Circuit then remanded the case to the Board to consider, *inter alia*, whether the lockout violated Section 8(a)(1) and (3) of the Act.

59 *Id.*

60 283 NLRB 826 (1987).

61 292 NLRB 243 (1988).

legitimate and reasonable purpose of preventing a repeated "quickie" work stoppage that would delay production and result in a loss of and to customers.

The Board continues to reinforce the holdings of *General Portland* and *Bali Blinds Midwest.* For example, in *Hercules Drawn Steel Corp.*,[62] an employer enacted a full lockout initially but, in the interest of maintaining its operations during the lockout, later recalled certain union members specifically skilled in operating and maintaining various production machines and equipment; however, the layoff of the other union members continued. The Board affirmed the ALJ's determination that the company had a legitimate and substantial business justification for the partial lockout, because the company showed that it could not maintain its production without employees specifically skilled with its machinery and, relatedly, the partial recall was necessary to fulfill that business need. The Board further noted that there was no showing that the employer acted with anti-union animus; in fact, the employer recalled bargaining unit members including, in particular, two members of the union's contract negotiating committee.[63] Thus, the company did not violate Section 8(a)(1) or (3) of the Act.

Despite the foregoing, some significant limitations have been placed on the holdings of *General Portland* and *Bali Blinds Midwest*. For example, in *Caterpillar, Inc.*,[64] the union commenced a strike to protest the discharge of another union member and, before the strike concluded, made an unconditional offer to return to work. The employer rejected the union's offer and enforced a partial lockout until "the underlying dispute [was] resolved or the company [was] otherwise satisfied that there [would] be no further recurrence of unannounced and sporadic interruptions in [the company's] operations by these strikers as a result of this issue."[65] The Board adopted the ALJ's conclusion that, in placing such a condition on the partial lockout, the company had violated the Sections 8(a)(1) and (3) of the Act. The Board explained that *General Portland* and *Bali Blinds Midwest*, which the ALJ cited in his opinion, were "clearly distinguishable from the instant case because they involved economic strikes rather than an unfair labor practice strike. An employer cannot lawfully restrict the reinstatement of employees engaged in a lawful unfair labor practice strike who have unconditionally offered to return."[66]

The courts too have provided guidance in distinguishing lawful and unlawful partial lockouts. In *Local 15, AFL-CIO v. NLRB*,[67] the union commenced an economic strike after bargaining negotiations stalled, resulting in a work stoppage involving approximately 1,150 bargaining unit employees. During the strike, the company permitted dozens of employees who refused to strike or crossed the picket line to return to work. When the union ended its strike, it made an unconditional offer to return all its members to work. The company rejected the

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62 352 NLRB 53 (2008).

63 352 NLRB at 54 n. 1

64 322 NLRB 690 (1996), *clarified by* 322 NLRB 920 (1997), *remanded pursuant to settlement sub nom. Caterpillar, Inc. v. NLRB*, 138 F.3d 1105 (7th Cir. 1998).

65 *Id.* at 692.

66 322 NLRB at 691 n. 1.

67 429 F.3d 651 (7th Cir. 2005). See footnote 13 for full case history.

union's offer and instituted a partial lockout of the striking employees while allowing the non-striking and crossover employees to continue working.

The matter was brought before the Board in *Midwest Generation,*[68] where the Board, relying on *General Portland* and *Bali Blinds Midwest*, concluded that the company had not violated the Act. Specifically, the Board found that the company had a legitimate and substantial business interest in continuing its operations during the strike by using the non-striking and crossover union members, and that the partial nature of the lockout was not motivated by anti-union animus given that the some of the employees who returned to work were union members.

In *Local 15, AFL-CIO v. NLRB*, the Seventh Circuit reversed the Board's decision upholding an employer's use of a partial lockout. In doing so, the Court boiled down the central question of the case as follows:

> Simply put, to justify a partial lockout on the basis of operational need, an employer must provide a reasonable basis for finding some employees necessary to continue operations and others unnecessary.[69]

Applying this principle to the facts of the case, the Court determined that the company failed to show the necessity of the non-striking crossover employees in continuing its operations. As the Court found, the company successfully maintained operations throughout the strike before using the dozens of non-striking and crossover employees employed during the partial lockout. However, some of the crossover employees did not return to work until after the union made its unconditional offer to return to work. The Seventh Circuit went on to distinguish its case from *Laclede Gas, General Portland*, and *Bali Blinds Midwest*, stating that "these cases illustrate the extreme business exigencies necessary to justify a partial lockout based upon operational needs."[70]

Beyond finding that the company failed to show an adequate operational need for the partial lockout, the Seventh Circuit also found that the only credible distinction between the locked out employees and the working employees was their participation in the strike, which demonstrated that the company acted with anti-union animus. Consequently, the Seventh Circuit determined that the company's partial lockout violated the Act.

In *Bunting Bearings Corp*.,[71] the Board, while hearing the case on remand from the D.C. Circuit, adopted the Court's determination that the employer unlawfully enforced a post-impasse partial lockout as the law of the case. By way of background, after the parties reached the impasse, the non-probationary employees represented by the union voted to authorize a strike. The company subsequently locked out the non-probationary employees while permitting the

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68 343 NLRB 69 (2004), *rev'd sub nom. Local 15, AFL-CIO v. NLRB*, 429 F.3d 651 (7th Cir. 2005), *cert. denied* 127 S.Ct. 42.

69 429 F.3d at 659.

70 *Id.* at 658.

71 349 NLRB 1070 (2007), *supplementing* 343 NLRB 479 (2004), *enf. denied sub nom. United Steel, Paper and Forestry, Rubber, Mfg., Energy, Allied Indus. and Service Workers Intern. Union, AFL-CIO v. NLRB,* 179 Fed. Appx. 61 (D.C. Cir 2006).

probationary employees – none of whom participated in the strike vote – to continue working. When the Board initially heard the case, it concluded that the company based its lockout on a legitimate business purpose to "pressure [the] union to accept [Bunting's] bargaining proposals," and that it had a legitimate business reason for targeting the non-probationary employees because that group controlled the vote to accept the company's bargaining proposal.

The D.C. Circuit, however, reversed the Board's initial holding on grounds that the company presented no evidence that it had legitimate objective for its partial lockout after the union satisfied its burden of proving a correlation between the partial lockout and union membership.[72] Upon remand, the Board accepted the D.C. Circuit's determination that the partial lockout violated Sections 8(a)(1) and (3) of the Act and further concluded that the unlawful lockout tainted the subsequent decertification process in violation of Section 8(a)(5).

E. <u>Lockouts as a Response to Unprotected Activity</u>

Thus far, we have primarily addressed an employer's use of lockouts as a response to protected activity. But in what ways, if any, has the Board viewed lockouts differently when enacted in response to potentially unprotected activity – for example, "work-to-rule" and "inside game" activities by a union?[73]

In *Central Illinois Public Service Co.,*[74] the Board, reversing the ALJ, held that the employer did not violate Sections 8(a)(1) and (3) of the Act in locking out collective bargaining employees two units in response to "inside game" tactics. The company engaged in contract negotiations with two local unions simultaneously. After the local unions rejected the company's "final" contract offers, the local unions voted not to strike. Instead, to place pressure on the company during the negotiations, the local unions commenced an "inside game" campaign in which the bargaining unit employees employed "work-to-rule" tactics designed to

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[72] 179 Fed.Appx. at 62-63. The D.C. Circuit specifically stated: "Although we give deference to Board decisions, we cannot uphold a decision that is inconsistent with controlling precedent. [Citation omitted.] Because the Board's conclusion that the lockout was lawful is inconsistent with the controlling precedent the Supreme Court set forth in *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 33, 87 S.Ct. 1792, 18 L.Ed.2d 1027 (1967), we grant the Union's petition and remand for further proceedings. In *Great Dane*, the Supreme Court held that if an employer has 'engaged in discriminatory conduct which could have adversely affected employee rights to some extent,' the employer must 'establish that he was motivated by legitimate objectives.' *Id.* at 34, 87 S.Ct. 1792. We reject the Board majority's contention that the Union failed to establish that Bunting's conduct was discriminatory – as the dissenting Board member explained, 'no authority holds that [the Union] must initially do more than what [it] has done here: show a (perfect) correlation between union membership and which employees were locked out.' *Bunting Bearings Corp.*, [343 NLRB at 486] (Liebman, dissenting). There can also be no question that the lockout 'could have adversely affected employee rights to some extent.' [Citation omitted.] Accordingly, the burden was on Bunting to present evidence showing that the lockout was motivated by legitimate objectives. Bunting did not even attempt to do this. In the absence of such an attempt, it was not appropriate for the ALJ or the Board to 'speculate upon what might have motivated' Bunting. *Great Dane*, 388 U.S. at 34-35, 87 S.Ct. 1792. We therefore grant the petition for review."

[73] In an early case, the Board had held that a temporary shutdown of a department and the layoff of employees in response to a refusal by employees who engaged in a "sitdown" strike to allow their foreman to enter the department, was lawful. *Link-Belt Company*, 26 NLRB 207, 264-265 (1940)

[74] 326 NLRB 928 (1998), *review denied sub nom. Local 702, Int'l Bhd. Of Elec. Workers, AFL-CIO v. NLRB,* 215 F.3d 11 (D.C. Cir. 2000), *cert. denied* 531 U.S. 1051 (2000).

stifle productivity, refused to work overtime, performed only the minimum work required of them, presented "mass grievances" collectively, advised nonemployees to report unsafe conditions, and advised customers of their rights to certain company information. Shortly thereafter, the company instituted a full lockout.

The Board began its analysis by raising the question of whether the local unions' "work-to-rule" and "inside game" tactics constituted protected activity. In doing so, the Board noted that "if they were not, a lockout in response to unprotected activity would presumably not be unlawful."[75]

The ALJ had determined that the local unions' "work-to-rule" activities were protected under the circumstances, reasoning that:

> If . . . employees have a protected right to refuse to perform tasks which for safety or other reasons, they reasonably believe, whether correctly or not, they are not required to perform, then it follows that employees have a protected right to follow work practices which they reasonably believe, are required by public or Company safety or other rules or regulations. As found, the employees in the present case did just that.[76]

The Board, however, declined to answer its preliminary question or review the ALJ's determination on the merits. Instead, the Board simply assumed *arguendo* that "work-to-rule" activities were protected.[77]

With that premise established, the Board focused its analysis of the lawfulness of the company's lockout within the purview of the aforementioned framework established in *Great Dane Trailers*.[78] First, the Board determined that, because the purpose of the lockout was to apply pressure on the local unions during a bargaining dispute, it was not "one of those acts which are demonstrably so destructive of collective bargaining that the Board need not inquire into employer motivation" but, instead, had a "comparatively slight" impact on the employees' rights.[79] Then, contrary to the ALJ,[80] the Board determined that the company had a legitimate objective for the lockout based on two grounds: (i) the company's use of the lockout to stop the local unions' inside game tactics "is not an impermissible business objective"; and (ii) the company also used the lockout to resolve issues dividing the parties during their negotiations and

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75 326 NLRB at 929.

76 326 NLRB at 991.

77 *Id.* at 929. The Board, citing *Caterpillar, Inc.,* 324 NLRB 201 (1997), and *Caterpillar, Inc.,* 322 NLRB 674 (1996), stated: "For the purpose of the following analysis, we shall start by taking the same approach that the Board took in two recent cases involving inside game tactics. We shall assume, without deciding, that the judge is correct in finding that the conduct encompassed by the inside game constituted activity protected by the Act."

78 388 U.S. 26 (1967); *see* discussion in Part II.D., *supra*..

79 326 NLRB at 930-31 (quoting *American Ship Building,* 380 U.S. at 309).

80 The ALJ found that the company had no legitimate and substantial business justification for lockout because, according to the ALJ, the sole purpose of the lockout was to end the "inside game" campaign rather than in anticipation of an imminent strike or to renew bargaining negotiations.

to affect the outcome of the negotiations. Finally, the Board concluded that the lockout was not motivated by antiunion animus based on the grounds that: (i) there was no claim that the company locked out only union members or conditioned the members' return to work on their resignation from the union; (ii) the union members had no reasonable grounds to fear any adverse effect beyond the labor dispute; (iii) during the pre-lockout bargaining, the company agreed to continue the union-security clauses from the expiring collective bargaining agreement; and (iv) the lockout was "in the service of designs inimical to the process of collective bargaining."[81] Based on these findings, the Board found that the company's lockout did not violate the Act.

The local unions subsequently petitioned the D.C. Circuit for review of the Board's decision and order.[82] The Court, however, denied the local unions' petition. Notably, the Court rejected the local unions' argument that precedent required that the Board find the lockout unlawful because it was intended to restrict the local unions' "protected" inside game campaign.[83] On that point, the Court unequivocally stated, in agreement with the Board: "As the Board correctly observed, however, that activity may be protected does not insulate it from counteraction by an employer." In the end, the Court agreed with the Board's findings and analysis, specifically concluding that: (i) the lockout alone was not inherently destructive of the bargaining unit employees' rights; (ii) the Board reasonably found that the company had a legitimate business objective for the lockout; and (iii) the Board reasonably concluded that the company acted without anti-union animus.

F. Use of Replacements During Lockout

Since *American Ship Building*, the Board and courts have also addressed the lawfulness of using replacement workers during a lockout. While the use of temporary workers during a

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81 326 NLRB at 933.

82 *Local 702, Int'l Bhd. Of Elec. Workers, AFL-CIO v. NLRB*, 215 F.3d 11 (D.C. Cir. 2000), *cert. denied* 531 U.S. 1051 (2000).

83 In making the above argument, the local unions relied on *Riverside Cement Co.*, 296 N.L.R.B. 840 (1989), *Thrift Drug Co.*, 204 N.L.R.B. 41 (1973), and *Carlson Roofing*, 245 N.L.R.B. 13 (1979). The D.C. Circuit concluded that those cases were inapposite to the local unions' case, stating: "The Board reasonably distinguished *Riverside* on the ground that the action taken there was not in furtherance of 'lawful bargaining' but was an attempt to implement 'a unilateral change in the employees' contractual terms of employment' by requiring employees to furnish specific personal tools which, under their collective bargaining agreement, they were expressly exempted from furnishing. [Citation omitted.] Any worker who did not provide his own tools was locked out. In finding a section 8(a)(3) violation, the *Riverside* Board stressed that the 'denial of work was limited to only those employees who engaged in action they were entitled to take under the contract' and therefore 'was not a lawful lockout,' which is 'generally permissible in anticipation of a strike or in support of an employer's legitimate bargaining position.' 296 N.L.R.B. at 841. Similarly, in *Thrift Drug Co.*, the Board found a section 8(a)(3) violation where the employer suspended a single picketing employee solely on the ground the employee 'was unlawfully selected for suspension because of her activities on behalf of the Union.' 204 N.L.R.B. at 41. In contrast to *Riverside* and *Thrift Drug*, the lockout here was directed unit-wide, not to specific employees engaged in specific acts. Finally, *Carlson Roofing* is inapposite because the Board's finding that the lockout there violated section 8(a)(3) was overturned on review by the Seventh Circuit. *See Carlson Roofing Co. v. NLRB*, 627 F.2d 77, 82 (7th Cir. 1980)." *Local 702*, 215 F.3d at 18.

lockout is generally considered to be lawful, the lawfulness of hiring permanent replacement employees is almost always unlawful, except in limited cases, some of which are noted below.

1. **Temporary versus Permanent Replacements**

In *Harter Equipment*, [84] the Board found it lawful for an employer to use temporary employees during a pre-impasse lockout.[85] As discussed above, the Supreme Court held in *Brown Food Store*[86] that an employer did not violate the Act by continuing operations with temporary replacements after lawfully locking out regular employees as a defensive response to a whipsaw strike against one member of a multiemployer association. In *Harter*, the Board held that "[t]he legal analyses in *American Ship Building* and *Brown Food Store* were complementary. The Court found sufficient business justification for both employer weapons [a lockout and use of temporary replacements] in the course of economic conflicts."[87]

Based on the foregoing legal precedent, the Board found the use of temporary replacement workers during a single employer lockout to be no more destructive of employee rights than the lockout itself:

> [T]he use of temporary employees reasonably serves precisely the same purpose served by the lockout, i.e. bringing economic pressure to bear in support of a legitimate bargaining position. After *American Ship Building* the validity of such a business purpose is unassailable. We do not perceive any persuasive reason why coupling this purpose with a desire to remain in operation with temporary employees would impermissibly color an employer's otherwise legitimate interests. There can be no more fundamental employer interest than the continuation of business operations. Exercising the right to lockout in a bargaining dispute does not necessitate foregoing the option to secure business earnings any more than exercising the right to strike requires employees to forgo attempts to secure income by temporary alternative employment, strike benefits, or unemployment compensation (where permitted by state law). In sum, the use of temporary employees to remain in operation after a lawful lockout is 'a measure reasonably adapted to the achievement of a legitimate end.'[88]

In another case, the D.C. Circuit approved the Board's reasoning in *Harter Equipment*, and held that the hiring of temporary workers during a lockout was not unlawful and that the employer's strengthening of its bargaining power by hiring temporary workers does not bear on the lawfulness of the practice.[89] Relevant to the issue of utilizing replacement employees during

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84 *Harter Equipment*, 280 NLRB 597 (1986).

85 *Id.* at 599.

86 380 U.S. 278 (1975). *See* discussion in Part II, *supra*.

87 280 NLRB at 597.

88 *Id.* at 598 (quoting *Brown Food Store*, 380 U.S. at 289); *see also Boilermakers Local 88* v. NLRB, 858 F.2d 756 (D.C. Cir. 1988) (no violation where employer continued to operate with temporary employees after a lockout where there had been no proof of any specific antiunion motivation).

89 *See Boilermakers Local 88 v. NLRB*, *supra*.

a lockout, the D.C. Circuit, in *Boilermakers Local 88 v. NLRB*, provided its thoughts as to whether the hiring of permanent replacement employees would be considered lawful under the Act:

> [W]e do not mean to suggest a lockout followed by permanent replacements would necessarily be a lawful tactic under the Labor Act; we express no opinion on that question, as it is not before us today, except to note that it raises somewhat different concerns than those suggested by a *strike* with permanent replacements. Although it may be possible for an employer to provoke a strike in a particular case, it is still the employees who must decide whether to resort to that tactic. If the labor market is such that an employer might be able to find permanent replacements, then employees may choose not to strike, no matter what the provocation. The decision to lock out, on the other hand, is entirely in the hands of the employer. Thus…a lockout followed by permanent replacements might too easily become a device for union busting, successfully disguised as an effort to protect the employer's bargaining position and his legitimate interests in maintaining operations.[90]

Consistent with the above rationale of the D.C. Circuit in *Boilermakers*, the Board and courts have been reluctant to approve the hiring of permanent replacements during a lockout. Indeed, the author is aware of no cases where the Board has ever approved of the practice following a lawful economic lockout.[91] However, the Board and courts have found ways to avoid addressing the lawfulness of hiring permanent replacements during a lockout – thus addressing the lawfulness of hiring permanent replacement to be used in certain cases. *Johns-Manville Products Corp. v. NLRB*, 557 F.2d 1126 (5th Cir. 1977), is one such example.

In *Johns-Manville*, the parties had engaged in prolonged, contentious negotiations during which the company experienced several equipment malfunctions that were determined to be intentionally inflicted by employees.[92] The equipment malfunctions resulted in multiple work stoppages, causing a substantial reduction in productivity for the employer.[93] The negotiations eventually reached impasse and, shortly thereafter, it locked out its employees and temporarily shut down operations due in part to the equipment issues the employer had been experiencing,.[94]

After two weeks passed without an agreement, the employer decided to restart operations, but did so with temporary employees.[95] The employer quickly realized that the operations could not be sustained with the temporary replacement workers and thus decided to hire permanent replacement employees, without notice to the union.[96] Once the union learned of the permanent

90 *Id.* at 769.

91 It is, of course, true, as discussed above, that a struck employer in a multiemployer unit in a whipsaw situation could certainly hire permanent replacements.

92 557 F.2d at 1128-29.

93 *Id.* at 1129-30.

94 *Id.* at 1131.

95 *Id.* at 1132.

96 *Id.*

replacements, it filed an unfair labor practice charge, claiming that the employer's hiring of permanent replacement employees without notifying the union violated Sections 8(a)(1), (a)(3) and (a)(5) of the Act.

The ALJ and the Board sided with the union, finding that the company's unilateral hiring of permanent replacements without notifying the union was inherently discriminatory and destructive of the employee's protected rights.[97] The ALJ and the Board rejected the company's argument that the employee's conduct amounted to an in-plant strike, which would render the company's hiring of permanent replacements lawful.[98]

The Fifth Circuit disagreed with the Board, finding that, as a matter of law, the employees had engaged in an in-plant strike and thus the company's hiring of permanent replacement was lawful under Sections 8(a)(1), (a)(3) and (a)(5) of the Act.[99] The Court held: "Although employees and employers are permitted to choose their own weapons in the bargaining battle, the employees in the instant case *went too far*. Since we find their actions amounted to a strike, the Company's subsequent lockout and hiring of permanent replacements were not violative of the [Act]."[100] By determining that the employees had instituted an in-plant strike, the Fifth Circuit was able to side-step the question of whether the hiring of the permanent replacement employees without notice to the union would violate Sections 8(a)(1),(3) and (5) of the Act.[101]

In another case involving permanent replacement employees, the Board held that an otherwise lawful lockout was not tainted by an employer's threat to permanently replace locked-out employees.[102] In *Harborlite*, the Board found that the employer had effectively withdrawn the threat to permanently replace the locked-out employees by informing the union that the replacements would only be temporary.[103]

2. <u>Permanent Subcontracting of Unit Work During a Lockout</u>

While using permanent replacements during a lockout is likely to be impermissible, the D.C. Circuit Court of Appeals has found the permanent subcontracting of a portion of bargaining unit work during a lockout to be lawful.[104] In *International Paper Co*, the employer had negotiated an agreement at its Mobile, Alabama plant, where the company's production and maintenance employees were jointly represented by two unions. Negotiations between the

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97 *Johns-Manville Products*, 223 NLRB 1317 (1976).

98 *Id.* at 1318. The Board premised its Section 8(a)(5) violation on a theory that the employer's failure to notify the locked out employees of its intent to permanently replace them amounted to a withdrawal of recognition. *Id.*

99 557 F.2d at 1133.

100 *Id.* (Emphasis added.)

101 *Id.* at 1133-34.

102 *Harborlite Corp.*, 357 NLRB No. 151 (2011).

103 *Id.*, slip op. at 2.

104 *Int'l Paper Co., v. NLRB*, 115 F.3d 1045 (D.C. Cir. 1997).

parties had resulted in impasse, and the employer presented its final offer and stated its intention to lockout the employees if the offer was not accepted.[105] The unions rejected the employer's offer, which it then unilaterally implemented.[106]

In order to avoid a coordinated strike by the unions across several of the employer's other facilities, the employer locked out both the production and maintenance employees from the Mobile, Alabama facility, and hired temporary maintenance workers.[107] The employer discovered that it was saving a considerable amount of money by using the temporary replacements to perform the maintenance work—estimated at $7.2 million per year if the employer were to permanently replace the maintenance workers with a subcontract.[108] After receiving the proposal from the maintenance subcontractor, the employer introduced a proposal that would allow it to permanently subcontract the maintenance work.[109] The parties bargained to impasse on the subcontracting proposal, and the employer unilaterally implemented the subcontracting proposal.[110]

The Board found that the employer's permanent subcontracting of bargaining unit work during the lockout produced harm to employees and their exercise of their Section 7 rights, which the employers avoided in cases such as *Brown Food Store*[111] and *Harter Equipment*[112] by utilizing temporary replacements.[113] The Board held that the employer's "permanent subcontracting rendered nugatory the exercise of these statutory rights by those unit employees faced with permanent loss of employment and employee status. There can, of course, be no greater obstacle to the exercise of employee rights than permanent loss of employment and employee status."[114]

The D.C. Circuit disagreed with the Board and held that permanently subcontracting a portion of work normally conducted by bargaining unit employees during a lockout was not inherently destructive of the employees' Section 7 rights, provided that the employer fulfilled its bargaining obligations.[115] The Court found that the employer and the union had reached impasse on the permanent subcontracting of bargaining unit work, and that the employer had submitted a proposal to the union on that matter.[116] Once impasse was reached, the employer was permitted

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105 *Id.* at 1047.

106 *Id.*

107 *Id.*

108 *Id.*

109 *Id.* at 1047.

110 *Id.*

111 380 U.S. 278 (1975).

112 280 NLRB 597, 598 n.6 (1986) , *aff'd sub nom., Operating Eng'rs Local 825 v. NLRB*, 829 F.2d 458 (3d Cir. 1987).

113 *International Paper Co.,* 319 NLRB 1253, 1268-1270 (1995).

114 *Id.* at 1270 (1995).

115 115 F.3d at 1049.

116 *Id.* at 1050.

under the Act to implement its last proposal. "Implementation during lockout is not so different from a proposal during lockout or implementation outside lockout to produce the prohibited employee futility resulting from inherently destructive employer conduct."[117] The Court emphasized that, because "[t]he same result would have occurred, however, had [the employer] implemented the permanent subcontract (after [a] bargaining impasse) outside the lockout context—a lawful action," the employer's unilateral implementation should not be considered inherently destructive of the employees' Section 7 rights in the lockout context.[118]

In concluding that the permanent subcontracting was not inherently destructive of the employee's Section 7 rights, the Court emphasized that the employer was not hiring replacement *employees*: "[A]ssuming subcontractors remained after the lockout, there would be no divide *among employees* because the subcontractors would not be employees. The distinction is an important one."[119] In addition, the Court found that the employer had a legitimate business justification for its action given that the cost savings recognized by permanently subcontracting the work was estimated to be $7.2 million per year.[120]

G. Common Interest Lockouts and Mutual Strike Assistance Agreements

1. Common Interest Lockouts

No discussion of the subject of lockouts would be complete without a discussion of what is sometimes referred to as a "common interest" or "common issue" lockout which takes place when a group of employers, bargaining either jointly or independently, coordinate their efforts. Also included in this discussion are recent developments in the area of mutual strike assistance agreements in the context of multiemployer bargaining units.

Although *American Ship Building* obliterated the distinction between offensive and defensive lockouts, it was not readily apparent, at the time of the Court's decision whether a lockout by a group of employers in support of another employer could be effectuated except in the context of multiemployer bargaining.[121] As we now know, that is not the case.

Following *American Ship Building,* the Board petitioned the Sixth Circuit to remand to it its prior decision in *The Evening News Association,* 145 NLRB 996 (1964) for reconsideration. The Sixth Circuit denied the Board's request.[122] Ultimately, however, the Supreme Court vacated the Sixth Circuit's decision and directed that the case be remanded to the Board.

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117 *Id.*

118 *Id.*

119 115 F.3d at 1049.

120 *Id.* at 1052.

121 For an early example of a common interest lockout in the construction industry that predates *American Ship Building, see Associated General Contractors of America, Inc.,* 105 NLRB 767 (1953). Member Murdock's concurring opinion is interesting for its reliance, *inter alia*, on the striking union's illegal conduct as a justification for a defensive lockout. 105 NLRB at 769-770.

122 *Detroit Newspaper Publisher Assn. v. NLRB,* 346 F.2d 526 (6th Cir. 1965).

On remand, the Board applied the principles of *American Ship Building* to the situation involving the Detroit Free Press ("Free Press") and the Detroit Evening News (the "News"). *The Evening News Association*, 166 NLRB 219 (1967), *enf'd sub nom. Newspaper Drivers & Handlers' Local No. 372 v. NLRB*, 404 F.2d 1159 (6th Cir. 1968). While the two papers bargained as a multiemployer group with respect to several unions, each newspaper bargained individually with the Teamsters local union that represented their respective drivers. The two newspapers agreed that in the event that one newspaper was struck by the Teamsters, the other newspaper would cease publishing.

The Teamsters eventually struck the Press after the parties reached an impasse. The Board found that, of the 18 issues that remained between the Teamsters and the Press, ten were also of interest to the News and, of those ten issues, three were considered as being *vital* to the News' bargaining objectives. Thus, when the Teamsters struck the Press, the News also suspended its publication. Following a four-day lockout, the disputed issues were resolved and the News resumed its publication.

The sole issue before the Board was whether the News' lockout of its employees violated Sections 8(a)(1) and (3) of the Act. The Board held:

> We believe the facts of this case plainly warranted the conclusion that [the News'] lockout was predominantly designed to force the Union to accept the Company's bargaining proposals and we so find. As shown by the facts, *supra*, the parties had been bargaining for an extensive period of time before the lockout occurred, and only because of the Union's refusal to honor the Company's request to meet was there any hiatus in the bargaining negotiations. Furthermore, the Teamsters had taken a position on certain issues – and struck the Free Press over those issues – which the news was determined to resist. Indeed, Teamster President Hoffa told news negotiator Dorris that he considered the News' offer as its "last proposal" and "final best offer." Hoffa also told Association Secretary Butts while arranging a meeting on the free press contract that the News had better be present because the issues that the News would have to be settled or they'd be on strike also." It is thus evident that, from the News' standpoint, the central issues dividing the parties were clearly identified and Hoffa threatened the News with a strike stating that he regarded the Company's proposal as a final offer. In these circumstances, we are satisfied that both parties viewed their negotiations as being deadlocked on key issues, and that neither doubted that the work stoppage would be required to break the deadlock. . . .
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> We are convinced that the circumstances of this case show both a significant economic justification for the lockout, and a lack of conduct significantly prejudicial to union (or employee) interests. Here, Respondent News had bargained for many months with the Union, and the parties were deadlocked on significant issues. Apart from the interest of the News in supporting the Free Press, the News, like the Free Press, was engaged in bargaining at the same time, with its contract having expired on the same date, and with the key demands of

> the Union being pressed upon each employer simultaneously. The Union had suspended negotiations with the News, and Teamster President Hoffa had explicitly threatened a strike against the News, armed at the time with a strike authorization by the Teamsters membership against both papers. The interest of the News in using economic pressure to implement its own bargaining was thus grounded upon a very real, direct, and immediate bargaining motivation in its own behalf.

166 NLRB at 221-222. [123]

Beyond its decision in *Evening News Association,* the Board has taken an unsettled position in regard to so-called common interest lockouts, both rejecting its use in some circumstances and finding it to be a lawful tactic in others, thus demonstrating that there are no black and white rules with this subject matter.

In *David Friedland Painting Co. Inc.*, 158 NLRB 571 (1966) *enf'd.* 377 F.2d 983 (3d Cir. 1967), the Board adopted the Trial Examiner's decision that the employer had unlawfully locked out a local union's members because its sister local union had engaged in a strike against an association that represented the employer's competitors; notably, the employer was not a member of the association. That the employer's interest could be affected economically by the outcome of contract negotiations between that association and the sister local was not a sufficient justification for the lockout. Thus, the Board held:

> As already appears, [the employer] was not in bargaining negotiations with the union representing its employees, and so by its lockout here, because it was in a bargaining relationship with another union, albeit a sister local. Stated differently, [the employer] was seeking to intrude in a labor dispute not its own, involving a union other than the one with which it was then in an untroubled relationship, for the reason that a settlement of the labor dispute favorable to that union would have an economic affect upon it. To allow this collateral or indirect interest in a labor dispute to be deemed a legitimate business interest sufficient to serve as justification for the lockout of [the employer's] own employees is to arrive at a far reaching result never intended by the Supreme Court in *American Ship Building*. It would lead to proliferation of the use of the lockout so as to render it lawful in any situation where the employer making use of it against members of a certain union could arguably be affected economically by the outcome of particular negotiations between the union and another employer. It would be an invitation to industrial chaos rather than to industrial stability which the Act is designed to foster.

158 NLRB at 578 (emphasis in original).

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[123] The Board was careful to point out that it was not suggesting "either that all supported lockouts are lawful or that all lockouts which are intended to pressure a union into accepting an employer's legitimate proposals are necessarily lawful. Rather, the legality of any lockout must be determined with regard to the criteria laid out by the Supreme Court. *America Ship Building* cautions against the promulgation of any hard and fast rule for determining whether a particular lockout is lawful." Thus, the absence of a "bad motive" does not insulate a lockout from illegality solely. 166 NLRB at 222.

The Board's decision in *David Freelander* was followed recently in *Abbott Northwestern Hospital,* 344 NLRB 498 (2004). There, a group of hospitals that formerly bargained as a multiemployer unit, but had since abandoned multiemployer bargaining, entered into an agreement for coordinated bargaining with a union representing all of the hospitals' nurses. Also included in the group, however, was a hospital whose nurses were not represented by the union. Through an advisory committee which was formed to share information, bargaining goals, and negotiating strategy, all of the employers agreed that, if the union struck any of them, the other members would refuse to employ any of the striking nurses during the course of the strike.

All of the hospitals conducted separate negotiations, with the exception of the nonunionized hospital. Further, all reached agreement, with the exception of one, by the strike deadline imposed by the union. Each of the collective bargaining agreements concluded with the hospitals contained no-strike/no-lockout clauses.

The union subsequently commenced a strike against the one hospital with whom it had not settled. The other hospitals, holding to their agreement on coordinated bargaining, repeatedly refused to hire any nurses who worked at the struck hospital because of the fact that they were on strike. The employers justified their conduct on the grounds that it was for the purpose of supporting their coordinated bargaining partner and advancing their own economic interest to ensure that the one remaining hospital obtained the same agreement as a coordinated bargaining partner.

The ALJ found that the employers were motivated by antiunion animus and that their conduct was therefore unlawful. 344 NLRB at 536-538. The non-struck hospitals intended that their policy of refusing to hire striking nurses constituted "a legitimate economic weapon." In a two-to-one decision, a majority of the Board (Members Meisberg and Liebman) found that the employers violated the law. The Board majority held as follows:

> If the Respondent hospitals (other than nonunion Unity) want to protect themselves from the consequences of what any other area hospital might agree to, a mechanism existed (and, with the Union's consent, still exists) that would allow them to accomplish what they wanted in terms of mutual self-protection. The Respondents had only to remain in their longstanding multiemployer bargaining relationship with the Union, but each of them deliberately chose to withdraw from the multiemployer unit in the period from 1995 to 1998, thus, creating the competitive individual bargaining situation from which the Respondents now seek relief. This is one more reason not to permit their dispute-widening conduct here, even if motivated by common economic concerns.
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> Although this case involves employers in a coordinated bargaining group, the dissent's logic would effectively permit any employer, or at least any employer who reasonably feared an adverse impact on its business as the result of another employer's higher wage settlement with a union, to discriminate against job applicants solely because they were engaged in a protected economic strike

> against that other employer. We cannot reconcile this result with the Act's prohibition of discrimination against persons who engage in protected concerted activity, including a lawful economic strike.
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> * * *
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> We find the Respondents, having concluded their own negotiations, have no legitimate justification for disrupting the peaceful relations thereby established with the Union by using the refusal-to-hire weapon to coerce the Union and its employee supporters in negotiations with another employer.

343 NLRB at 500-501 (footnotes omitted).

An opposite result was reached in *Capital District Sheet Metal,* 185 NLRB 702 (1970), a case arising in the construction industry. There, an overall umbrella association and various employers were bargaining with approximately eight different craft unions. The various unions involved were all seeking to shorten the individual workday from eight hours to seven hours. The association and the various employers' subgroups unanimously opposed any shortening of the workday. Indeed, the chairmen of the various employer/union bargaining groups agreed that they would absolutely refuse, in their specific craft negotiations, to sign any agreement that shortened either the workday or the workweek. 185 NLRB at 707, 711.

To understand the complexity of this case, a brief review of the Trial Examiner's summary of the negotiations is helpful. 185 NLRB at 716. He found that seven of eight craft unions initially proposed a shortening of the workday. *Id.* However, there was a variance among the different union crafts as to the degree of their commitment to obtaining this provision – some were adamant. Some were simply strongly in favor of pressing for the proposal, and others were not as strong on the issue, and two other unions frankly admitted that they would not strike to obtain it. *Id.* Similarly, despite their unanimous front, the employers were also mixed in the degree of their individual willingness to oppose the shortening of the workday. *Id.*

The Trial Examiner believed that the factual situation in this case was governed by the Board's prior decision in the *Detroit News* and *Darling & Company* decisions.[124] Specifically, the judge found that the interests of the various employers was more than just parallel, as they were in the *Detroit News* case. Rather, the judge found that the employer' interests were inextricably interwoven based on the "interrelated activities of the different crafts in the construction of a building," *i.e.,* the close interdependence and operational sequencing of the various craft functions that exist on a commercial construction project. 185 NLRB at 717-718. The Trial Examiner further found that a variance in the length of working days among the different crafts would disrupt construction procedures and impracticably limit the hours of the workday to the hours of the union with the lowest common denominator or shortest workday. His words here are instructive:

> Furthermore, it is obvious that any variance in the length of the working day among the several crafts would be disruptive of construction procedures and

[124] *The Evening News Association,* 166 NLRB 219 (1967) and *Darling & Company,* 171 NLRB 801 (1968).

> would, in its effect, limit the workday substantially to the hours of those employees working the shortest time. The power and light obtained through the services of the electricians is vital to the performance of services by most of the workers, the operation of lifts and other machinery by the operating engineers is also necessary for much of the work on the flow of materials; the carpenters must build and disassemble the forms into which concrete is poured by laborers after being brought to the place of pouring by engineers, while the concrete finishers (masons) treat the poured concrete so that it may serve as a foundation for another layer. While the record shows that some crafts can perform such work in the absence of others, a general inner dependence is sufficiently shown to justify the employer's contention that operation of staggered hours would be both difficult and expensive. Accordingly, I find that the interest of the employers and the several crafts involved in this case are sufficiently interwoven to justify their taking common action in their *common interest*."

Id. at 1715 (emphasis added).

The Trial Examiner also found that lockouts by those employers of various craft unions whose agreements had not expired for the same reason did not violate the Act because the lockouts weren't shown to be for the express purpose of either terminating or modifying the agreements, in violation of Section 8(d) of the Act. 185 NLRB at 718-720.

2. <u>Mutual Strike Assistance Agreements</u>

The southern California food stores strike beginning in 2003 was the source of both complex and important litigation on the subject of mutual strike and/or assistance pacts in connection with a lockout. In *California ex rel. Lockyer v. Safeway, Inc.*, 371 F.Supp. 2d 1179 (C.D. Cal. 2005), a federal district court held that certain aspects of a mutual strike assistance agreement ("MSAA") were outside the non-statutory labor exemption and subject to potential antitrust liability. The case was brought by the California Attorney General alleging that the MSAA's revenue-sharing provisions violated Section 1 of the Sherman Act. The defendant employers all claimed that their actions were immune from antitrust scrutiny based on the non-statutory labor exemption and sought summary judgment in the district court. The district court denied their motion.

By way of background, the MSAA was between three major supermarket chains in Southern California bargaining together in a multiemployer unit with various locals of the United Food and Commercial Workers. 371 F.Supp. 2d at 1182. Shortly before their collective bargaining agreements with the union were scheduled to expire, the employers entered into a pair of mutual strike assistance agreements. *Id.* Under the terms of the MSAA, the chains agreed to lock out all union employees within 48 hours in the event that any of their stores were the object of a strike. They also agreed to share revenue according to a fixed formula under which the revenue sharing would begin at "12:01 a.m. on the Monday at the start of the week in which the strike or lockout . . . commences and continuing for two . . . full weeks following the week in which each strike or lockout ends." *Id.* Moreover, the revenue-sharing provision covered not only the three chains in the multiemployer unit, but also another chain that was not a signatory to the multiemployer unit's agreement and was bargaining with one of the unions separately. *Id.*[125] When the unions struck one of the chain stores in the multiemployer unit, the other two chains locked out their employees the following day. The unions initially picketed all three supermarket chains in the multiemployer unit, but later instituted a campaign of selective picketing of two of the three chains in the multiemployer unit. *Id.* Ultimately, one of the members of the multiemployer unit and the employer outside the unit paid approximately $142 million in revenue-sharing for the strike period, and another $4.2 million for the two-week period following the strike (the so-called "tail" period) to the two chains who were the object of the unions' continued picketing. *Id.*

After discussing the development by the Supreme Court of the non-statutory exemption, the Court held that the Supreme Court's decision in *Brown v. Pro Football Inc., supra,* provided the controlling analysis of the issues presented in this case. In particular, it noted the four factors established by the *Brown* court: (1) whether the conduct at issue took place during or immediately after collective bargaining; (2) whether it grew out of, or was directly related to, the lawful operation of the bargaining process; (3) whether it involved a matter that the parties were required to negotiate collectively; and (4) whether it only concerned the parties to the collective bargaining relationship. *Id.* at 1185. While the Court did not view *Brown* as "declaring rigid factors that must be found in every case for the exemption to apply," the Court stated that the Supreme Court "signaled the importance of these considerations in determining whether there [was] an actual or potential conflict between labor and antitrust law that require[d] accommodation through the application of the exemption." *Id.* According to the Court,

> Each of the considerations described in *Brown* relates in some way to the scope of the exemption. While none is controlling, together they provide a valuable analytical tool for us to use in deciding whether the challenged conduct merits application of the exemption in this case.

Id.

Applying the *Brown* factors to the facts relating to the MSAA, the Court found that the MSAA was not protected by the non-statutory labor exemption under antitrust laws. First, as to the timing of the MSAA, the Court found that while the MSAA was entered into before the contract expired and was triggered by a strike or lockout, the complicating factor for it was the fact that the "tail" provision survived the end of the labor dispute and the employer's entry into a new collective bargaining agreement. The Court concluded that the "tail" provision was not "sufficiently temporally connected to the collective bargaining process to favor application of the exemption because the conduct at issue transpired not merely at an impasse in negotiations, but after the bargaining process itself had concluded successfully. The timing of this conduct weighs against application of the exemption to the tail period." *Id.* at 1187.[126]

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[125] The labor agreement governing the non-multiemployer group member expired at a later date. *California ex rel. Harris v. Safeway, Inc.*, 651 F.3d 1118, 1123 (2011).

[126] The *Brown* court had indicated that the exemption might not apply to those agreements sufficiently distant from the collective bargaining process. The court also indicated that it was not suggesting that national labor policy would support the use of a revenue-sharing agreement during the strike. 371 F.Supp. 2d at 1187 n.6. The court simply wished to make clear that "once the strike is over and a new CBA is agreed

With respect to the second *Brown* factor – *i.e.,* the connection of the challenged provision to the lawful operation of the collective bargaining process – the Court held that the MSAA's reallocation of the revenues during the strike was a core concern of the Sherman Act. *Id.* at 1187-1188. The Court felt that the implications of the revenue-sharing provisions of the MSAA for labor policy would, at best, be only indirectly supported by encouraging unity during bargaining. *Id.* at 1188. In the court's view, there was a direct effect on market competition by freezing the employers' (who were, in fact, competitors in the marketplace) relevant market shares at pre-strike levels and redistributing revenues from one competitor to another. *Id.* In the court's view, the anticompetitive effects of the revenue-sharing provision did not come from the elimination of wage competition in the labor market, but as a result of direct restraints on the business market. *Id.*

Also of particular importance to the discussion, the Court also rejected the employers' arguments that there was no difference between revenue-sharing and a lockout because, according to the employers, they both had the purpose of preventing whipsawing by the unions. *Id.* at 1188-1189. To be sure, both were undertaken to strengthen the employers' hands in the labor dispute with the unions, but, in the court's view, there were significant differences. *Id.* at 1185-1190. Although the court believed that lockouts were the "flip-side" of a strike under the Act (a proposition with which labor lawyers have had considerable disagreement), the court held that revenue-sharing had no analog in labor law. *Id.* at 1190-1191. While the lockout restrained competition in the labor market by the employers' halting the purchase of labor services, the imposition of the revenue-sharing provisions primarily affected competition between employers who were otherwise competitors in the marketplace. *Id.* at 1191-1192.

With regard to the third *Brown* factor – *i.e.,* whether the MSAA was a mandatory subject of bargaining – the court found that the MSAA did not constitute mandatory subjects of bargaining. *Id.* at 1192.

Turning to the final factor in the *Brown* analysis – *i.e.,* whether the employers' agreement concerned only the parties to the collective bargaining relationship – the court again found that the MSAA did not meet the non-statutory exemption because it involved an employer outside the collective bargaining relationship. While it conceded that the three chains in the multiemployer unit were "indisputably parties to the collective bargaining process," the fourth participating chain was not part of the multiemployer bargaining unit. *Id.* In other words, the cross-sharing of revenue beyond bargaining unit lines with a non-unit employer was fatal to application of the exemption because its status as a "party outside the . . . collective bargaining unit [could not] be disconnected from its status as a competitor of the stores within [the multiemployer] bargaining unit. . . ." *Id.* at 1193.

Finally, the court rejected the employers' parity argument: That as long as the revenue-sharing agreement was designed to counter a union tactic protected by the statutory exemption, it should receive immunity from the antitrust laws under the non-statutory exemption. In other words, because the MSAA's revenue-sharing provision was adopted to combat whipsawing by

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upon, there is not even an arguable case for reliance on the collective bargaining process to justify an exemption from the antitrust laws." *Id.* The court gave no indication as to what the result might be if the strike was over but the parties had not reached agreement on a new contract.

the unions, the non-statutory immunity was applicable to it. The court found that the employers' position amounted to reading a *per se* rule of parity that represented a fundamental misunderstanding of the "interplay between the statutory and non-statutory exemptions." *Id.* at 1195. In the court's view, while *Brown* extended the non-statutory exemption to encompass certain employer-only agreements made in the context of collective bargaining, it did not fundamentally alter the dynamics of the relationship between the statutory and non-statutory exemptions." *Id.* In the court's view, any application of the non-statutory exemption "must be limited to those instances where the exemption is necessary to carry out Congress' intent as expressed in national labor policy." *Id.* The court was not prepared, in essence, to legislate on this issue of whether MSAAs were fundamental to national labor policy.[127]

On appeal, a panel of the Ninth Circuit affirmed in part, reversed in part, and remanded the case to the district court. *California ex rel Brown v. Safeway, Inc.,* 615 F.3d 1171 (2010). Forgetting for the moment the intricacies of antitrust analysis,[128] the Court of Appeals essentially agreed with the district court's analysis of the labor law issue (there was not one in the Court's view) – that the MSAA did not relate to a core issue of collective bargaining and was itself not a mandatory subject of bargaining. 615 F.3d at 1198. Yet, the Court conceded that the employers entered into the agreement solely to strengthen "their hands in a labor dispute, so as to allow them to reduce the economic impact of a strike, a lawful tool of collective bargaining, and ultimately, to be able to limit the wage and benefits of their employees . . . The [employers] assert only that the agreement would help them protect themselves against a whipsaw tactic in which unions are permitted to engage under [the Act]." 615 F.3d at 1199. Based on this concession by the Court panel, the employers sought *en banc* review by the full Court of Appeals, which was granted. *California ex rel Brown v. Safeway, Inc.,* 633 F.2d 1210 (9th Cir. 2011).

On review *en banc,* the full Court of Appeals also upheld the district court. *California ex rel Harris v. Safeway, Inc.,* 651 F.3d 1118 (9th Cir. 2011). The employers again took the position that the MSAA was an economic weapon and the deployment of economic weapons is an integral part of the collective bargaining process. 651 F.3d at 1128. The State of California, however, urged a narrow reading of the labor exemption for agreements among employers: Were such agreements required to make the process of collective bargaining work? 615 F.3d at 1128-1129. In the State's view, the revenue sharing provisions of the MSAA were unnecessary "to allow meaningful collective bargaining to take place and collective bargaining should not be defined so broadly as to include financial weapons like [the revenue sharing provision]." 651 F.3d at 1129. Like the district court and the prior Ninth Circuit panel, of the Court of Appeals concluded that the revenue sharing provision had no relation to any core subject matter of collective bargaining, *i.e.,* wages, hours, or working conditions, but related only to the "temporary artificial evidence of those revenues" during any labor dispute. 615 F.2d at 1130. Rather, the Court held that:

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127 The Court also rejected the argument that this presented a situation where an antitrust court should not police the tactics used by parties in collective bargaining and should defer to the expertise of the NLRB as to whether the challenged revenue sharing provision was a lawful tactic by the employers involved under labor law. *Id.* at 1196.

128 Much of the Court's opinion is focused there, before ever considering the question of whether the non-statutory labor exemption applied. 615 F.3d at 1177-1193.

> The use of revenue sharing as an economic weapon during a labor dispute does not enjoy any such endorsement, much less a history of careful regulation, from the realm of labor law and policy. Neither party points to a body of regulatory or judicial decisions that establishes revenue sharing among employers in a bargaining unit as an accepted economic weapon during a labor dispute.[6] From the outset of our analysis, therefore, the RSP is on different footing than the agreement between the NFL club owners in *Brown*.
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> [6] The grocers rely on a decision from the Denver region of the NLRB, suggesting that a similar revenue sharing provision was a permissible practice, *see* Supp. Excerpts of Record (Vol. 3) 429-32, and on two courts of appeals decisions, *Air Line Pilots Ass'n International v. Civil Aeronautics Board*, 502 F.2d 453, 456-57 (D.C. Cir. 1974) (holding that revenue sharing among airline employers did not violate the Railway Labor Act) and *Kennedy v. Long Island Rail Road Co.*, 319 F.2d 366, 368 (2d Cir. 1963) (holding that a joint strike insurance plan among leading railroads did not violate the Railway Labor Act, the Interstate Commerce Act, or the Sherman Act), for the proposition that revenue sharing is an accepted economic weapon. But a decision of a regional NLRB tribunal and the two appellate cases implicating, respectively, a different statutory regime and a difference type of arrangement, are not sufficiently prevalent authority to demonstrate the acceptability of the practice. To the contrary, these few cases show that revenue sharing in this context is sufficiently rare that it has not been widely examined by agencies and courts as a labor practice.

One must wonder whether principles of labor law were sacrificed on the altar of antitrust.[129] If, as the Court noted in the above-quoted footnote, both the Board's General Counsel[130] and the other federal courts looking at similar financial arrangements under the Railway Labor Act, one would have to seriously question the court's analysis – that because such

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[129] As Chief Judge Kozinski pointed out in his dissent, the majority's "groundbreaking ruling" on the non-statutory labor exemption was "very likely an advisory opinion" because of the peculiar posture of the case. 651 F.3d at 1140. Because the State had stipulated to a dismissal of its complaint if the district court's opinion on the application of the rule of reason was upheld, no antitrust violation could in fact ever be established. Therefore, in Judge Kozinski's view, there was no reason for the court's majority to reach the labor exemption issue. *Id.* Judge Kozinski goes on to excoriate the majority for their decision on the labor exemption issue: "I seriously doubt the majority decides the labor exemption correctly because it fails to grapple with the complex dynamics of this case. Had it done so, it would have realized that each and any factor the Supreme Court found relevant in *Brown v. Pro Football, Inc.* . . . supports finding the revenue-sharing provision (RSP) protected by the labor exemption. *Id.* In a detailed analysis, Judge Kozinski finds that each of the *Brown* factors is met and the court's majority misread *Brown*. *Id.* at 1140-1143. Thus, [a] fair reading of the RSP can leave no doubt that all the relevant *Brown* factors weigh heavily in favor of exempting the RSP from antitrust review. We are not dealing with employers who were using a labor dispute as a pretext to engage in price-fixing; it is perfectly clear that the employers were responding to union tactics in the course of a strike, and only to the degree the tactics were effectively deployed by the union." *Id.* at 1143.

[130] The reference is to the NLRB Advice Memorandum in *King Soopers,* Case 27–CA-19325, *et al.* (February 17, 2005).

arrangements have been rare – they must not therefore be part and parcel of the collective bargaining process.[131] It bears repeating that the Act neither defines nor sets forth the range of economic weapons available to labor and management. *NLRB v. Insurance Agents,* 361 NLRB 477, 490-496 (1960).

IV. CONCLUSION

Hopefully, this paper has met its objective of providing a basic understanding of the lockout for the beginning practitioner. For the experienced practitioner, it is hoped that this paper has provided a deeper insight into its subject matter and an appreciation that use of the lockout as an economic weapon requires careful thought and evaluation of the costs versus benefits of employing this high visibility, high risk option.

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[131] Judge Kozinski finds the majority's relegation of this point to a footnote as fatally undermining "the majority's claim that the precaution adopted by the employers here [was] too novel and exotic to fall within the labor exemption." 651 F.3d at 1142. He further stated: "The very fact that the union did not challenge the RSP as an unfair labor practice, despite having raised a procedural dispute before the NLRB itself is proof that the RSP is unobjectionable as a matter of labor policy." *Id.*