LABOR LAW: BARGAINING LOCKOUT HELD LAWFUL ABSENT INTERFERENCE WITH PROTECTED RIGHTS OR A PROSCRIBED PURPOSE

The Sixth Circuit Court of Appeals recently extended the limits within which an employer might lock out his employees. While the Supreme Court has allowed a lockout initiated after an impasse in negotiations between the employer and the union, the Sixth Circuit held that a lockout prior to an impasse for the purpose of supporting the employer's bargaining position was not an unfair labor practice.

In implementing the Taft-Hartley Act's policy of maintaining bargaining equality between employers and employees, the NLRB and the courts have permitted only the most restricted use of the lockout. However, the general proscription of lockouts was significantly altered in the recent case of American Ship Bldg. Co. v. NLRB. That case held that an employer who had reached a bargaining impasse with his employees' bargaining representative did not commit an unfair labor practice by resorting to the lockout for the sole purpose of supporting his bargaining position. In Detroit Newspaper Publishers Ass'n v. NLRB, the first lockout case decided since American Ship Bldg., the Sixth Circuit Court of

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2 See note 15 infra and accompanying text.


3 380 U.S. 300 (1965).

4 Id. at 318.

Appeals held a bargaining lockout to be lawful even though no impasse had been reached.

The Detroit News and the Detroit Free Press are the only large daily newspapers in Detroit. Contract renewal negotiations with the Teamsters were in progress at both newspapers when the Teamsters threatened the Free Press with strike action if a satisfactory offer was not forthcoming. The two newspapers met and agreed that if the Free Press were struck for its refusal to accede to certain union demands on which the News considered a strong stand essential to its own bargaining position, the News would support the Free Press and would not publish. The Teamsters struck the Free Press and the News ceased publication forthwith, notifying its employees not to report for work until further notice.

The NLRB found that the News' lockout of its employees violated sections 8(a)(1) and 8(a)(3) of the Taft-Hartley Act. Accepting the trial examiner's finding that the two newspapers had not bargained as a unit with the Teamsters, the Board reaffirmed its established position that a lockout not justified by "special circumstances" is presumed to infringe on collective bargaining rights.

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9 The News and the Free Press bargained as a unit with nine unions through their agent, the Detroit Newspaper Publishers Association. However, each newspaper bargained individually with the Teamsters. Evening News Ass'n, 145 N.L.R.B. 996, 997-98 (1964).

7 These demands related to a wage increase, re-definition of a "fair week's work," and mandatory negotiation of changes during the life of the contract. Brief for Petitioners, p. 20.

8 346 F.2d at 529-30.


Under § 8(a), "it shall be an unfair labor practice for an employer—(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . ." Labor Management Relations Act § 8(a)(3), 61 Stat. 140 (1947), as amended, 29 U.S.C. § 158(a)(3) (1964).

10 "Special circumstances" include situations in which the employer will suffer undue economic hardship if he continues to operate in the face of an imminent strike. Evening News Ass'n, 145 N.L.R.B. 996, 1020 (1964) (Trial Examiner's Intermediate Report). See Betts Cadillac Olds, Inc., 96 N.L.R.B. 268 (1951) (lockout to avoid strike while repair work in progress); International Shoe Co., 93 N.L.R.B. 907 (1951) (lockout to avoid disruptive effect of strike in one department of an integrated plant); Duluth Bottling Ass'n, 48 N.L.R.B. 1335 (1943) (lockout to avoid spoilage of materials
of employees in violation of section 8 (a) (1) and amounts to discrimination proscribed by section 8 (a) (3). The court of appeals reversed, holding that an employer lockout does not constitute an unfair labor practice absent a finding of unlawful interference with protected employee rights or of employer intent to discourage unionism.

Since the enactment of the Wagner Act, the employer's right to lock out has not proven susceptible of precise definition. However, in more recent years the Board enunciated the general rule that the lockout was presumptively unlawful. It was reasoned that such employer action constituted violations of sections 8 (a) (1) and 8 (a) (3) in that it necessarily interfered with employees' protected rights to strike and to bargain collectively and therefore gave rise to an inference that the employer intended to discriminate for the purpose of discouraging unionism. This general presumption of occasioned by unannounced strike). "Special circumstances" also encompass the multi-employer lockout conducted in response to a union's "whipsaw" strike. Evening News Ass'n, supra at 1020. See note 18 infra.

14 145 N.L.R.B. at 1000-1001.
12 346 F.2d at 531.
18 This imprecision is a reflection of the confusion which has arisen in the absence of a universally accepted definition of the term "lockout." There is no statutory definition and the NLRB has denoted as "lockouts" employer actions which vary widely in purpose, effect, and legal consequences. See, e.g., International Shoe Co., 93 N.L.R.B. 907 (1951) (shutdown in response to strike in one department of an integrated plant); Duluth Bottling Ass'n., 48 N.L.R.B. 1325 (1949) (temporary cessation of operations to avoid spoilage of materials); Lengel-Fencil Co., 8 N.L.R.B. 988 (1938) (shutdown initiated by plant manager angered by union's demands); Hopwood Retinning Co., 4 N.L.R.B. 922 (1938) (plant closed down and moved to new location to avoid unionization). See generally Johannesen, note 2 supra, at 264-66.
13 The employer's right to lock out was first restricted in Morand Bros. Beverage Co., 91 N.L.R.B. 409, 412 (1950), remanded, 190 F.2d 576 (7th Cir. 1951), subsequent proceedings, 99 N.L.R.B. 1448, 1460-65 (1952), enforced, 204 F.2d 529 (7th Cir.), cert. denied, 346 U.S. 909 (1953). Policy reasons for limiting the employer's right to lock out were set forth in Davis Furniture Co., 94 N.L.R.B. 279, 281 (1951), remanded sub nom. Leonard v. NLRB, 197 F.2d 435 (9th Cir. 1952), subsequent proceedings, 100 N.L.R.B. 1016, 1019-21 (1952), enforcement denied, 205 F.2d 355 (9th Cir. 1953). In the latter case, the Board noted that because the employer controls the terms of employment as long as production continues, when faced with a bargaining impasse he may continue production under the existing terms without a contract or unilaterally institute any changes previously proposed. Also, if the union strikes, he may legally replace the strikers and continue to operate. Thus, to permit the employer to lock out would unduly advantage him and upset the balance of bargaining power. 100 N.L.R.B. 1016 at 1020-21.
17 It is apparent that the lockout does in fact interfere with the maximum effectiveness of a strike, since the union's control over timing of the work stoppage is pre-empted by the employer. Also, the threat of a lockout has been
illegality was rebuttable, however. In certain situations in which it was shown that the employer had instituted the lockout for primarily “defensive” purposes, the inference of his intent to discriminate has been overcome. Thus, an employer’s interest in the survival of his business or in his ability to combat union “whipsaw” tactics as a member of a multi-employer bargaining unit have been found to outweigh the effect of the lockout’s interference with protected employee rights.18

Discriminatory intent to discourage unionism is inferred from the foreseeable consequences of the lockout. The purported effect of the lockout is to undermine the union by discouraging members from pressing their demands and dissuading nonmembers from joining. See Dalton Brick & Tile Corp., supra at 482; American Brake Shoe Co., supra at 826; cf. NLRB v. Erie Resistor Corp., 373 U.S. 221, 228 (1963); Local 357, Teamsters Union v. NLRB, 365 U.S. 667, 675 (1961); Radio Officers’ Union v. NLRB, 347 U.S. 17, 45 (1954).

Several courts of appeals have accepted the Board’s view of the lockout as presumptively unlawful in the absence of special circumstances. Body & Tank Corp. v. NLRB, 339 F.2d 76 (2d Cir. 1964); Utah Plumbing & Heating Contractors Ass’n v. NLRB, 294 F.2d 165 (10th Cir. 1961); Quaker State Oil Ref. Corp. v. NLRB, 270 F.2d 40 (3d Cir. 1959). Contra, NLRB v. Dalton Brick & Tile Corp., 301 F.2d 886 (5th Cir. 1962); Morand Bros. Beverage Co. v. NLRB, 190 F.2d 576 (7th Cir. 1951).

Where the consequences of an unplanned work stoppage due to a strike would have jeopardized the employer’s business or involved undue economic hardship, the lockout was generally deemed to have been “defensive” and lawful. See, e.g., American Brake Shoe Co. v. NLRB, 244 F.2d 489 (7th Cir. 1957); Packard Bell Electronics Corp., 180 N.L.R.B. 1122 (1961); Associated Gen. Contractors of America, 105 N.L.R.B. 767 (1953); Betts Cadillac Olds, Inc., 96 N.L.R.B. 268 (1951); International Shoe Co., 93 N.L.R.B. 907 (1951); Duluth Bottling Ass’n, 43 N.L.R.B. 135 (1943). But see Meltzer, Lockouts under the LMRA: New Shadows on an Old Terrain, 28 U. CHI. L. REV. 614, 623-28 (1961).

In addition, lockouts initiated by nonstruck members of a multi-employer bargaining unit in response to a union’s “whipsawing” strike tactics have been held lawful. Buffalo Linen Supply Co., 109 N.L.R.B. 447 (1954), enforcement denied sub nom. Local 449, Teamsters Union v. NLRB, 231 F.2d 110 (2d Cir. 1956), rev’d, 353 U.S. 87 (1957). A multi-employer unit will be certified as such by the Board where there has been a history of joint bargaining with the union and this group bargaining has been undertaken voluntarily by the employers and the union. See, e.g., Chester County Beer Distributors Ass’n, 133 N.L.R.B. 771, 773 (1961); American Publishing Corp., 121 N.L.R.B. 115, 121 (1958); Associated Shoe Indus., 81 N.L.R.B. 224, 229 (1949); Shipowners’ Ass’n, 7 N.L.R.B. 1002, 1022-25 (1938); 27 NLRB ANN. REP. 65-66 (1962). The “whipsawing” technique consists of successive strikes on individual members of the unit, designed to isolate the struck member and subject him to the economic pressure of his operating competitors. The union may finance the strike with wages paid to the employees of the nonstruck firms, so that the ordinary economic burdens of the work stoppage are borne by the employers rather than the striking employees. To prevent the divisive effects of the “whipsaw” the nonstruck employers have been permitted to lock out, thereby preserving the basis for group bargaining. See Buffalo Linen Supply
Under these established NLRB criteria the bargaining lockout—one in which the employer's sole purpose is to exert economic pressure on his employees in support of his bargaining position—would be held unlawful.\(^1\) However, the Supreme Court by its recent decision in *American Ship Bldg.*\(^2\) has significantly extended the lawful bounds of the lockout. In that case the employer had locked out his employees after extended negotiations failed to resolve substantial economic differences between the company and the bargaining representatives of his employees.\(^21\) The Court accepted the Board's finding that the employer's sole purpose in locking out his employees was to exert economic pressure to secure prompt settlement of the dispute on favorable terms,\(^22\) but disagreed that such a finding, without more, warranted the conclusion that the employer had committed an unfair labor practice.\(^23\) Noting that while some employer practices may give rise to the inference of an intent to

\(^{1}\) Cf. *NLRB v. Great Atl. & Pac. Tea Co.*, 240 F.2d 690 (2d Cir. 1965); *New York Mailers' Union v. NLRB*, 327 F.2d 292 (2d Cir. 1964) (*Publishers' Ass'n of New York City*); *NLRB v. Anchorage Businessmen's Ass'n*, 289 F.2d 619 (9th Cir. 1961); *Great Falls Employers Council v. NLRB*, 277 F.2d 772 (9th Cir. 1960). See also *Meltzer*, *supra* at 620-23.

\(^{2}\) *Body & Tank Corp. v. NLRB*, 239 F.2d 76 (2d Cir. 1964); *Utah Plumbing & Heating Contractors Ass'n v. NLRB*, 294 F.2d 165 (10th Cir. 1961); *Quaker State Oil Ref. Corp. v. NLRB*, 279 F.2d 40 (3d Cir. 1961). Contra, *NLRB v. Dalton Brick & Tile Corp.*, 301 F.2d 886 (5th Cir. 1952); *Morand Bros. Beverage Co. v. NLRB*, 190 F.2d 576 (7th Cir. 1951).

\(^{20}\) 380 U.S. 300 (1965).

\(^{21}\) "The parties separated without having resolved substantial differences on the central [economic] issues dividing them and without having specific plans for further attempts to resolve them—a situation which the trial examiner found was an impasse." *Id.* at 303.

\(^{22}\) The Board rejected the trial examiner's findings that the employer was warranted in fearing a strike and that the lockout was used defensively to avoid severe economic hardship. *American Ship Bldg. Co.*, 142 N.L.R.B. 1362, 1364 (1965). The employer's business of repairing ships was highly seasonal, and a strike while a ship was in the yards could have resulted in particularly harmful economic consequences for the employer and his customers. Further, the employer had contracted with these same unions on five previous occasions, and each agreement had been preceded by a strike. On these grounds, despite the fact that the chief union negotiator had expressed the desire that an agreement might be reached without a strike, the examiner had concluded that the employer reasonably feared a strike timed to have a particularly ruinous effect on his business. *Id.* at 1375-77.

Mr. Justice Goldberg, in a concurring opinion joined by Mr. Chief Justice Warren, found not "a scintilla of evidence" to support the Board's finding that the employer's fear of a strike was unreasonable. Goldberg found the lockout justified on economic grounds alone. 380 U.S. at 335. In a separate concurring opinion, Mr. Justice White likewise concluded that the majority need not have reached the broad question of the legality of the bargaining lockout, since there was sufficient evidence of economic justification. 380 U.S. at 322.

\(^{23}\) *Id.* at 310-11, 313.
discriminate for the purpose of discouraging unionism, the Court stated that there is a wide range of employer actions which, though possibly having a "discouraging" effect, do serve a legitimate business interest of the employer and therefore do not warrant the inference of unlawful intent. In this case, the Court held that the bargaining lockout did not "carry with it any necessary implication" of intent to discriminate. Since there had been no specific evidence of such an intent, the Board's finding of a violation of section 8(a)(3) was reversed.

In addition, the majority in American Ship Bldg. disagreed with the Board's finding that the bargaining lockout in that case was a proscribed interference with employee rights protected by section 8(a)(1). While it shared the Board's view that the bargaining lockout does deny the employees some of the economic power which would otherwise inhere in the strike weapon, the Court rejected the notion that such employer action constituted an inter-

\[\text{24} \text{"If an employer permanently discharged his unionized staff and replaced them with employees known to be possessed of a violent antiunion animus," the Court indicated that an intent to discriminate could justifiably be inferred. 380 U.S. at 309 (dictum); accord, NLRB v. Erie Resistor Corp., 373 U.S. 221 (1963).}
\[\text{25} 380 U.S. at 311. Where the employer's action is prompted by business exigency, unlawful intent may not be inferred solely on the basis of a possible discouragement of union membership. See NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333, 345-46 (1938); cf. NLRB v. Tex-Tan, Inc., 318 F.2d 472, 481 (5th Cir. 1963). However, where the foreseeable consequences of a particular action are patently destructive of employee rights, unlawful intent may be inferred despite the employer's protestations of innocent purpose. 380 U.S. at 311-12. See note 24 supra. Moreover, even where the action is ostensibly taken for a legitimate business purpose a specific finding of unlawful intent will constitute an 8(a)(3) violation. Textile Workers v. Darlington Mfg. Co. 380 U.S. 263, 274-75 (1965). In the latter case the Court conceded that an individual employer might liquidate his business without committing an unfair labor practice, but held that if one plant of an integrated enterprise were closed for the purpose of chilling unionism in the remaining plants, the closing would constitute an 8(a)(3) violation if the employer might reasonably have foreseen that the closing would have this effect. Ibid. In such instances the Board is charged with making the findings of fact as to the purpose and effect of the employer action. Id. at 277.}
\[\text{380 U.S. at 312.}
\[\text{31 Id. at 313.}
\[\text{28 Id. at 310-11.}
\[\text{29 The lockout deprives the union of control of the timing of the economic contest. To conduct an effective strike the membership must be aroused, and the proper emotional state must be maintained. Depriving the union of the power to initiate the work stoppage at the time of its choosing impairs the strike weapon both with respect to stimulation of the membership and to the pressure which might be brought to bear on the employer. For these reasons the Board had previously held the lockout unlawful as an interference with protected concerted activity. See note 17 supra and accompanying text.}

ference with the right to strike guaranteed by the act, which it defined as "the right to cease work—nothing more." \[^{30}\] Nor did the Court find that the lockout in this case had interfered with the employees' protected right to bargain collectively. \[^{31}\] Although the lockout might dissuade employees from adhering to their original bargaining position, the right to bargain does not entail the "'right' to insist on one's position free from economic disadvantage." \[^{32}\] Having thus concluded that the bargaining lockout in *American Ship Bldg.* did not constitute specific violations of either section 8 (a) (3) or section 8 (a) (1) of the act, the Court concluded that an employer infringes neither of these provisions "when, after a bargaining impasse has been reached, he temporarily shuts down his plant and lays off his employees for the sole purpose of bringing

\[^{30}\] 380 U.S. at 310. (Emphasis added.) The NLRB and the lower courts had previously assumed that the right to strike involved more than the right to cease work. One of the bases upon which the lockout had formerly been held unlawful was its "blunting" of the strike weapon and consequent diminution of the right to strike, thus constituting an 8 (a) (1) interference with the protected right to strike. See, e.g., Body & Tank Corp. v. NLRB, 339 F.2d 76, 78 (2d Cir. 1964); Quaker State Oil Ref. Corp. v. NLRB, 270 F.2d 40, 45 (3d Cir. 1959); Meltzer, *Lockouts: Licit and Illicit*, N.Y.U. 16TH ANN. CONF. ON LABOR 19, 20-21 (1963).

The Court stated that the Board is not the arbiter of economic weapons to be used by labor and management, 380 U.S. at 317. However, by its redefinition of the incidents of the right to strike, the Court in effect has reformulated former conceptions as to what economic weapons were legally available to employers and employees. However, the Court does not expose itself to the same criticism of balancing economic power, for the opinion indicates that its view of the strike has always prevailed but the applicable standards under the act had previously been misinterpreted by the Board. *Id.* at 317-18.

\[^{31}\] *Id.* at 310. The fact situation in *American Ship Bldg.* did not appear to present actual interference with the collective bargaining process, as there had been extensive good faith bargaining which led to an impasse prior to institution of the lockout. See note 21 *supra*. Nevertheless, the Court did discuss the impact of a bargaining lockout on the right to bargain. In answer to the Board's conclusion that the lockout "punishes" employees for adhering to their representative's demands and therefore coerces them in the exercise of their right to bargain collectively, the Court stated that in this case there had been no allegation that the employer had used the lockout in the service of "designs inimical to the process of collective bargaining." 380 U.S. at 308. The Court also indicated that to support a finding of interference or coercion under § 8 (a) (1) there would have to be evidence that the employer intended to destroy or frustrate the process of collective bargaining. *Id.* at 309. Normally it is the effect of the employer action which is dispositive under § 8(a)(1). See NLRB v. Burnup & Sims, Inc., 379 U.S. 21, 23 (1964). The employer's intention had previously been considered important in an 8 (a) (1) context only in cases requiring resolution of a conflict between his legitimate business interest and the effect of the lockout on protected concerted activity. American Ship Bldg. Co. v. NLRB, 380 U.S. 300, 339 (1965) (concurring opinion); see, e.g., NLRB v. Local 449, Teamsters Union, 353 U.S. 87, 96 (1957); NLRB v. Babcock & Wilcox Co., 351 U.S. 105, 112 (1956).

\[^{32}\] 380 U.S. at 309.
economic pressure to bear in support of his legitimate bargaining position."

*Detroit Newspaper Publishers* has applied the Supreme Court's reasoning to a similar fact situation, distinguishable chiefly by the absence of a bargaining impasse. The court of appeals recognized this distinction but did not deem it controlling, stating that it did not view *American Ship Bldg.* as merely establishing another exception to the Board's general proscription of lockouts. Quoting extensively from *American Ship Bldg.* and a companion case, the Sixth Circuit held that the News' lockout did not violate section 8 (a) (3), reasoning that the actions taken by the News did not warrant the inference of intent to discriminate. Without specific evidence of such intent, this finding of an unfair labor practice could not be sustained. The court also reversed the Board's finding of an 8 (a) (1) violation, again relying entirely upon the language of *American Ship Bldg.*

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23 *Id.* at 318. (Emphasis added.)
24 346 F.2d at 529.

The two cases are also distinguishable in that *American Ship Bldg.* involved a lockout which might have been held lawful because of the employer's fear of a particularly harmful strike. See discussion note 22 supra. The rationale of *Detroit Newspaper Publishers* does not seem amenable to this theory of defensive justification, for there was no evidence that a strike on the News would have involved economic consequences beyond those which normally attend such an unplanned work stoppage. *But see* Meltzer, supra note 18, at 623-28.

25 "While in *American Ship Building* there was an impasse in the negotiations between the employer and the union, we do not think the teaching of that case merely adds another exception to the Board's category of permissible lockouts." 346 F.2d at 530.

26 NLRB v. Brown, 380 U.S. 278 (1965). *Brown*, decided the same day as *American Ship Bldg.*, also significantly redefined the permissible limits of lockout actions. In *Brown* the Supreme Court held that the nonstruck members of a multi-employer bargaining unit did not commit unfair labor practices in securing temporary replacements for employees whom they had locked out in response to the union's whipsaw strike. The struck employer had managed to continue operating with replacements, so that it was necessary for the nonstruck employers to hire replacements to maintain equilibrium within the bargaining unit. The Court reasoned that the "right" to lock out recognized in *Buffalo Linen* (Local 449, Teamsters Union v. NLRB, 353 U.S. 87 (1957)) would be "largely illusory" were the nonstruck employers not permitted to hire replacements, for they would otherwise be subject to the economic pressure of their operating competitor and the union's whipsaw would succeed despite the lockout. 380 U.S. at 285.

27 346 F.2d at 531-32.

Due to its reliance upon the rationale of *American Ship Bldg.*, the Sixth Circuit did not have occasion to consider the argument presented by the Publishers Association that the lockout had been conducted in response to the Teamsters' alleged "whipsaw" strike and was therefore lawful within the rule of
It would seem, however, that the lack of a bargaining impasse in *Detroit Newspaper Publishers* does give rise to considerations not present in *American Ship Bldg.* In the absence of an impasse, a lockout necessarily occasions some interference with the protected right of employees to bargain collectively, for until negotiations have become deadlocked there exists the possibility of further bargaining.\(^{39}\) *American Ship Bldg.* did not decide this question, but held only that a bargaining lockout effectuated after negotiations had reached an impasse was not such an interference with protected rights.\(^{40}\) Indeed, the Supreme Court explicitly framed both its statement of the question presented and its holding in terms of a lockout instituted after a bargaining impasse had been reached.\(^{41}\) Thus, it is arguable that the lockout in *Detroit Newspaper Publishers* constituted an interference with protected rights in violation of section 8(a)(1) and that *American Ship Bldg.* did not dictate a contrary result.

\(^{39}\) *Buffalo Linen* (Local 449, Teamsters Union v. NLRB, 353 U.S. 87 (1957)). Brief for Petitioners, pp. 67-76. See note 18 *supra.* As in *Buffalo Linen,* the effect of the newspaper strike would have been to "whipsaw" the employers—play one against the other, exploiting their competitive relationship and enhancing the union's bargaining power. However, *Buffalo Linen* is distinguishable in terms of the impact of the lockout on protected employee rights. In *Buffalo Linen,* the employers had been bargaining as a unit with a common employee representative. As a result, although the lockout affected the employees' right to strike, it did not interfere with their right to bargain collectively since all of the employees affected by the lockout had been represented at the negotiations which preceded the lockout. Local 449, Teamsters Union v. NLRB, *supra* at 90. In *Detroit Newspaper Publishers,* however, the employees of the *News* were not involved in the Teamsters' negotiations with the *Free Press,* 145 N.L.R.B. at 1019, nor did they participate in the decision of the *Free Press* employees to strike, 346 F.2d at 529. Thus, to the employees of the *News,* the lockout constituted a curtailment of collective bargaining and ostensible interference with a protected right which was not present in *Buffalo Linen.*

\(^{40}\) While it is true, as the Sixth Circuit noted, that there was "no finding that the *News* was hostile to the Teamsters" or that it "in any way attempted to interfere with the Teamsters' right to collective bargaining," 346 F.2d at 531, the lockout did curtail bargaining with respect to the demands of the employees of the *News.* In concentrating on the intent of the employer vis-a-vis the union the court appears to have overlooked what might constitute proscribed interference with the rights of the employees under § 8(a)(1) of the act. Although the majority opinion in *American Ship Bldg.* did discuss the effect of a bargaining lockout on the union's ability effectively to represent the employees, it did so in the context of discrediting the view that the lockout necessarily coerces employees in the exercise of their collective bargaining rights. 380 U.S. at 308-09. This discussion did not deal with the problem presented in *Detroit Newspaper Publishers* of actual curtailment of collective bargaining. See note 21 *supra* and accompanying text.

\(^{41}\) 380 U.S. at 318.
On the other hand, the opinion in *American Ship Bldg.* seems to require more than a finding that a bargaining lockout has the effect of cutting short collective bargaining.42 The Court in *American Ship Bldg.* noted that there was no finding of employer hostility toward collective bargaining and that there had been no allegation of employer intent to destroy or frustrate collective bargaining.43 The Court also stated that the lockout is not so destructive of collective bargaining that the Board may find a violation without inquiring into the employer's motivation.44 Applied literally, these statements support the holding of the court in *Detroit Newspaper Publishers*. Taken in context, however, the Court's language may not be so sweeping in its effect. The statement noting the absence of any finding of employer hostility toward collective bargaining was made in refuting the Board's view that the employer had used the lockout to "punish" his employees for adhering to their demands.45 Granting the validity of the view that the bargaining lockout is not inherently coercive, it does not necessarily follow that proof of anti-union animus will be required in all instances in which Sec. 8(a)(1) interference with bargaining might otherwise be established.46 In addition, all of the Supreme Court's expressions on this point may be limited by its statement that the question presented—and the only issue decided—was the legality of a bargaining lockout instituted after an impasse in negotiations has been reached.47

The Sixth Circuit Court of Appeals, however, did not consider the impasse limitation central to the Supreme Court's rationale in *American Ship Bldg.* Moreover, by focusing upon the em-

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42 See note 31 supra.
43 380 U.S. at 308-09.
44 Id. at 309.
45 Id. at 308. See note 31 supra.
46 Any lockout initiated prior to an impasse would have the effect of curtailing bargaining. Absent a showing of anti-union motive, such a lockout might be held an interference with the right to bargain on the ground that the employer's interest in obtaining a bargaining victory did not outweigh the employees' interest in exhausting negotiations before the resort to economic weapons. It is the Board's function to balance such conflicting legitimate interests and determine whether employer self-help constitutes that interference with protected rights which is proscribed by the act. See NLRB v. Local 449, Teamsters Union, 353 U.S. 87, 96 (1957).
47 "What we are here concerned with is the use of the temporary layoff of employees solely as a means to bring economic pressure to bear in support of the employer's bargaining position, after an impasse has been reached. This is the only issue before us, and all we decide." 380 U.S. at 308.
ployer's intent the court of appeals summarily dismissed the allegation of interference with the protected employee right to bargain collectively without making an adequate inquiry into the effect of the lockout on the particular employees who were actually foreclosed from further bargaining.