

ALBERT LEONARD, ARNOLD DAVIS, SIDNEY DAVIS AND WILLIAM GITZES, CO-PARTNERS, JOINTLY AND SEVERALLY D/B/A DAVIS FURNITURE Co.; DOYLE FURNITURE Co., INC., A CORPORATION; LACHMAN BROS., A CORPORATION; HARRY FRANK, AN INDIVIDUAL, D/B/A MILWAUKEE FURNITURE COMPANY; A. EUGENE PAGANO AND M. DE CASTRO, CO-PARTNERS, JOINTLY AND SEVERALLY, D/B/A MISSION CARPET AND FURNITURE Co.; FRANK NEWMAN Co., A CORPORATION; REDLICK-NEWMAN Co., A CORPORATION; SHAFF'S FURNITURE Co., A CORPORATION; JOSEPH H. SPIEGELMAN AND LEON SPIEGELMAN, CO-PARTNERS, JOINTLY AND SEVERALLY, D/B/A SAN FRANCISCO FURNITURE Co.; STERLING FURNITURE COMPANY, A CORPORATION; JAMES F. WILEY AND VERNA M. GARDNER, CO-PARTNERS, JOINTLY AND SEVERALLY, D/B/A J. H. WILEY THE FURNITURE MAN and CARROLL, DAVIS & FREIDENRICH, BY ROLAND C. DAVIS. *Cases Nos. 20-CA-250, 20-CA-264, 20-CA-252, 20-CA-249, 20-CA-246, 20-CA-245, 20-CA-247, 20-CA-253, 20-CA-254, 20-CA-248, and 20-CA-251. September 5, 1952*

Supplemental Decision and Order

On May 3, 1951, the Board issued a Decision and Order in this case,¹ finding that the Respondents, herein also referred to as the Dealers, had discriminated in regard to the hire and tenure of employment of their employees in violation of Section 8 (a) (3) and (1) of the National Labor Relations Act, as amended, and ordering, among other things, that the Respondents make the employees whole for any loss of pay they had suffered by reason of such discrimination.

More specifically, the Board, in its Decision, found unlawful conduct of the Respondents, 11 furniture dealing firms organized in a multiemployer organization, in temporarily locking out their employees, all of them members of a single labor organization, because employee-members of the same labor organization, employed by Union Furniture Company, another member of the same multiemployer organization, engaged in a strike in the midst of collective bargaining negotiations on a multiemployer basis.

In its Decision, the Board concluded that "The layoffs thus served notice on all members of the bargaining unit, the laid-off employees as well as the strikers and nonstrikers, that resort to lawful protected concerted activity by the employees of any employer-member of the bargaining unit would subject other employee-members of the bargaining unit to the reprisal of a temporary loss of employment," and thus "The Respondents' conduct thereby directly interfered with, re-

¹ 94 NLRB 279.

strained, and coerced all the employees in the bargaining unit in the exercise of their rights guaranteed by Section 7 of the Act, in violation of Section 8 (a) (1).” The Board further concluded that “The layoffs also constituted discrimination in the hire and tenure of employment of the Respondents’ employees because of the union-sponsored strike against Union Furniture Company, thereby discouraging membership in the Union in violation of Section 8 (a) (3) of the Act.” Finally, the Board found that “Whether the Respondents’ conduct be viewed as a violation of Section 8 (a) (1) or of 8 (a) (3), . . . effectuation of the policies of the Act requires that the Respondents’ employees be made whole. . . .”

A petition for review of this Decision was filed by the Respondents in the United States Court of Appeals for the Ninth Circuit. A cross-petition for enforcement of the Order was filed by the Board.

On May 29, 1952, the court held that the evidence did not sustain the Board’s finding that “the lockout was a mere reprisal against the Union Furniture Company strikers and the other employees aiding the strikers.”² In reaching this conclusion, the court cited evidence in the record that the purpose of the strike against Union Furniture Company was to undermine the bargaining power of the Dealers as a group, and thereby obtain more favorable contract terms from the Dealers, and that the purpose of the lockout was to defeat this strategy and protect the bargaining position of the employer-group.

The court then stated :

Since we have held that the finding of the Board is not sustained by the evidence, the question arises whether we should determine if the Board’s order may be sustained on the ground that it is illegal for the Dealers to use the temporary lockout as a counter-economic power to that of the strike in a dispute between employer and employee involving wages and labor conditions.

The court reviewed the legislative history of the Taft-Hartley Act, particularly noting the various references therein to restrictions upon resort to “strikes and lockouts,” and concluded :

From the above expressions in the statute and the linking of the terms “strike” and “lockout,” it is arguable that Congress has recognized strikes and lockouts as correlative powers, to be employed by the adversaries in collective bargaining when an impasse in negotiations is reached.

The court, however, declined to resolve in the instant case the ultimate question of the legality of the lockout considered “as counter-economic power to that of the strike,” but remanded the case to the Board for determination of that question upon the present record.

² *Leonard et al. d/b/a Davis Furniture Co. et al. v. N. L. R. B.*, 30 LRRM 2294.

After carefully reviewing the entire record in this case in the light of the court's opinion, and accepting the court's finding that the lockout was not a mere reprisal for the strike, we are constrained to find, as we have before, that the lockout violated Section 8 (a) (1) and (3) of the Act.

As we read the court's opinion, the sole question before us for consideration at this time is whether the lockout by all the Dealers in this case was justifiable as a use of economic power to offset the Union's economic action in calling a strike against Union Furniture.

The identical question was recently considered by the Board in its Supplemental Decision and Order in the *Morand* case.³ There, as in the instant case, the union, after reaching an impasse in negotiations with a multiemployer group, struck against one member of the group. Thereupon, as the Board found, all the members of the group discharged all of their employees who were members of the union, in violation of the Act. The majority⁴ of the Board found further that even if the employees had not been discharged, but merely temporarily laid off in order to counteract the union's resort to a strike, the employers' action would still have been unlawful.

The reasons for our conclusion on this point in the *Morand* case apply with equal force here.

As we said there, a temporary layoff is unlawful "even if it were true that its purpose was to bring temporary economic pressure on the union and its members solely in order to break the bargaining impasse."

It is not disputed that a *discharge* of the Dealers' employees in this case would have violated Section 8 (a) (1) and (3) of the Act,⁵ the only question here being whether the temporary layoff in this case likewise violated the Act. But neither Section 8 (a) (1) nor Section 8 (a) (3) of the Act draws any distinction between a discharge and a layoff, but proscribes any interruption of the employment relation when directed against protected concerted activity. No limitation of this broad proscription is warranted unless clearly required by other sections of the Act.

There is no such clear requirement elsewhere in the Act. Section 8 (d) (4) does not expressly sanction lockouts. While it is arguable that by forbidding resort to lockouts under certain circumstances, it impliedly recognizes a right to lockout under other circumstances, such an implication is not sufficient to overcome the positive and sweeping language of Section 8 (a) (3) and (1). Similarly, other provi-

³ *Morand Brothers Beverage Co.*, 99 NLRB 1448. This Decision was rendered pursuant to a decree of the Court of Appeals for the Seventh Circuit remanding the case to the Board for findings on this point among others. See *Morand Bros. Beverage Co. v. N. L. R. B.*, 190 F. 2d 576.

⁴ *Chairman Herzog* did not join in this finding, reserving judgment thereon.

⁵ See the court decision in the *Morand* case, footnote 3, *supra*.

sions of the Act *curtailing* resort to lockouts (Sections 203 (c), 206, and 208 (a)) do not sufficiently demonstrate congressional intent to strike down the safeguards of employees' rights in Section 8 (a) (3) and (1).

The court in the instant case suggests that in view of the linking of the term "strike" and "lockout" in Sections 8 (d) (4), 203 (a), 206, and 208 (a) of the Act, it is arguable that Congress intended to equate lockouts with strikes as "correlative economic powers." However, we note that in each instance referred to where "strike" and "lockout" are linked, it is where particular strike activity is proscribed as *unlawful*; the specific inclusion of "lockout" in this context may well have stemmed only from a desire to emphasize even-handed justice when union activity was being restricted. We find nothing in the Act which equates *lawful* strikes and lockouts. On the contrary, only the right to strike is expressly preserved by Congress in Section 13 of the Act. The absence of any similar express reservation of the right to lockout argues strongly against any intent to establish that right.

We reject the argument of our dissenting colleague that the lockout in this case does not violate the Act because the only purpose of the Dealers was, not to destroy the Union, but to destroy the threat to their bargaining position by defeating the strike.

The strike was clearly a form of concerted activity for the mutual aid and protection of the employees of Union Furniture, and the mass layoff of union members in this case, depriving them of their means of livelihood for an indefinite period, in order to counteract the strike was necessarily designed to interfere with, restrain, and coerce the employees in the exercise of their right to strike, and to discourage membership in the Union which called the strike. Moreover, even in cases where there was a lack of an intent to interfere with employee rights guaranteed by the Act, the principle has long been recognized that such absence does not excuse conduct which does in fact interfere.⁶ The fact that the strike in this case threatened to impair the bargaining position of the Dealers or that the Dealers acted to protect their bargaining position affords no basis for distinguishing this strike from any other work stoppage permitted by the Act. It might be urged with equal force that a strike called by a union for recognition or to protest a grievance imperils the bargaining position of the employer, as, in each case, the purpose of the strike is, by its very nature, to undermine the employer's resistance to the union's demands. It is not contended, however, that the employer in those cases would be privileged to defend his bargaining position (or "counteract" the strike) by a mass layoff of union members not involved in the strike.

⁶ See, e. g., *Le Tourneau Co. v. N. L. R. B.*, 324 U. S. 793; *Republic Aviation Corp. v. N. L. R. B.*, 324 U. S. 793.

The only other basis suggested for distinguishing the strike in this case from other strikes is that it occurred after an impasse in bargaining. But, obviously, a strike does not cease to be a concerted activity merely because it occurs after an impasse, and any layoff of employees to counteract such a strike interferes with concerted activities to the same degree as if the strike had occurred before the impasse.

Our dissenting colleague further asserts that the Union "took the initiative in selecting the particular weapons of economic combat" and that the Employers did no more than defend themselves with "commensurate weapons" in their "attempt to resist, to do battle, and to win."⁷ Although this argument may have a superficial plausibility, it ignores the facts of economic life. The suggestion that the Union had a whole arsenal of weapons from which to choose is utterly unrealistic. When the impasse occurred, the Union had only *one* effective weapon—its ancient and protected right to strike.⁸ Nor is the notion correct that strikes and lockouts are "commensurate weapons" in collective bargaining and that without the right of lockout an employer has no comparable economic weapon.⁹ Faced with an impasse in bargaining, the employer still retains control of the terms of employment so long as production continues. He is free to continue the existing terms without any contract or, indeed, unilaterally to institute any previously proposed changes in those terms. These courses of action are obviously not available to the union. If the union resorts to an economic strike, the employer may lawfully meet the challenge by replacing the strikers. Thus, he may continue to operate on his own terms without any diminution of profits while the strikers suffer partial, if not complete, loss of wages. Even if the employer is unable to get replacements to permit continued operations in the face of the strike, he is generally in no worse position than the strikers. Both adversaries in the conflict would in such a case be under the same economic pressure to terminate the strike and restore the flow of wages and profits. We see no reason in equity or justice to give to employers the privilege of extending the hardship

⁷ We would agree that if the lockout here used is to be accorded the status of a lawful weapon against a protected strike, there is little question as to the "winner"—the strike is foredoomed.

⁸ ". . . unionism succeeds in collective bargaining only because it can threaten to strike." Hoxie, *Trade Unionism in the United States*, p. 190.

⁹ "But as methods of bargaining, these two [the strike and lockout] are not equivalent. To the employer the right to lockout is comparatively unimportant. He may use it to discipline an unruly set of employees, to discourage unionization in his factory, or to 'get the start' of his men. But in the usual bargaining he has no need of it. He can keep his factory gates open even though, at the same time, he may be reducing wages or refusing demands for higher wages. He is not forced to lock out and he can force his employees to strike or submit. Legislation which prohibits or restricts the lock out does not greatly weaken the bargaining power of the employer.

But to the employees there can be no collective bargaining without the right to strike." Commons-Andrews, *Principles of Labor Legislation*, p. 161.

and deprivations of industrial conflict to areas not directly involved, nor could such a privilege be squared with the basic policy of the statute to minimize industrial strife and interruptions to commerce.¹⁰

Finally, there is no contention here that the Dealers could not have continued to operate without a contract or without assurance against being struck, so that this case does not fall within the rule of the *Betts Cadillac* case¹¹ and similar cases.

For all the foregoing reasons,¹² and upon the entire record in the case, we reaffirm our original Decision and Order herein.

CHAIRMAN HERZOG, dissenting:

Having reserved decision in the recent *Morand* case¹³ on the issue which is more squarely before us here, I have reconsidered that issue in the light of the courts' opinions in both the *Morand* and the *Davis* cases. These opinions impel me to conclude that, in this context, the majority errs in adhering to the view that this temporary lockout, motivated by a desire to counteract a union-directed stoppage rather than by an intent to interfere with concerted activity, constituted a violation of the amended Act.

Here the parties had reached an impasse, and it was the Union which took the initiative in selecting the particular weapons of economic combat. The Employers did no more than defend themselves with commensurate weapons; they refrained from using the ultimate, and to my mind unlawful, instrument of discharge. I am unwilling to infer a wish to destroy from an attempt to resist, to do battle, and to win.

MEMBER PETERSON took no part in the consideration of the above Supplemental Decision and Order.

¹⁰ Compare Section 8 (b) (4) of the Act, which implements this policy by forbidding unions to extend the area of industrial conflict beyond the plant of the primary employer.

¹¹ *Betts Cadillac Olds, Inc.*, 96 NLRB 268.

¹² As more fully explicated in section II of our Supplemental Decision in *Morand Brothers*, 99 NLRB 1448.

¹³ *Morand Brothers*, 99 NLRB 1448, at footnote 20 of the Supplemental Decision (1952).

BIGELOW-SANFORD CARPET COMPANY, INC. and LOCAL 2188, UNITED TEXTILE WORKERS OF AMERICA, AFL, PETITIONER. *Case No. 1-RC-2810. September 5, 1952*

Decision and Order

Upon a petition duly filed, a hearing was held before a hearing officer of the National Labor Relations Board. The hearing officer's 100 NLRB No. 163.