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Labor Law - Use of Lockout and Temporary Employees by Multi-Employer Bargaining Group after Whipsaw Strike Not Unfair Labor Practice

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In the future, debtors such as Sun Oil, having on their books liabilities to which they claim no interest, will be free to pay the amounts owed to a state when escheated in a manner consistent with the Court's opinion without fear of being subjected to double escheat. Only a factual question need be determined and the costly litigation previously required to determine the merits of individual claims can be avoided.

PAUL C. KOMADA

LABOR LAW—USE OF LOCKOUT AND TEMPORARY EMPLOYEES BY MULTI-EMPLOYER BARGAINING GROUP AFTER WHIPSAW STRIKE NOT UNFAIR LABOR PRACTICE.—In N.L.R.B. v. Brown, 380 U.S. 278, 85 Sup. Ct. 980 (1965), the United States Supreme Court was asked to decide whether the use of the lockout and the use of temporary employees by a multi-employer bargaining group was an unfair labor practice. The Court held that the members of the bargaining group could lawfully employ the lockout technique and hire temporary employees to counteract the effect of a whipsaw strike against them.

In the Brown case, respondents were members of a multi-employer bargaining group which was comprised of six retail food stores in Carlsbad, New Mexico. The stores had bargained unsuccessfully with the union for a new contract. When the union struck Food Jet, one of the multi-employer bargaining group, the other members of the group immediately locked out all their union employees and informed them that all employees would be recalled to work when the strike against Food Jet ended. All of the stores involved remained open by using executive personnel and hiring temporary replacements. Upon a complaint filed by the union, the National Labor Relations Board found that the lockout, in conjunction with the hiring of temporary replacements was an unfair labor practice under section 8(a)(1) and 8(a)(3)\(^1\) of the National Labor Relations Act, which prohibits coercive and discriminatory conduct toward union employees. On appeal, the Court of Appeals reversed, holding that, in the absence of an unlawful intent, the non-struck members of a multi-employer bargaining group may lock out their employees and use temporary replacements to combat a whipsaw

\(^1\) Section 8(a) Provides that it shall be an unfair labor practice for an employer:

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7 (see below) . . .

(2) 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. . . .

Section 7 provides in part that:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing and to engage in other connected activities for the purpose of collective bargaining.
DISCUSSION OF RECENT DECISIONS

One of the first cases to deal with the problem of a whipsaw strike (a strike against one of the members of a multi-employer group) and a lockout was *Morand Brothers v. N.L.R.B.*\(^4\) In *Morand Brothers*, the court, in defining lockouts, said:

> The lockout should be recognized for what it actually is—the employers' means of exerting economic pressure on the union, a corollary of the unions' right to strike.\(^5\)

Thus, the court, in *Morand Brothers*, by way of dicta, accepted not only that a lockout can be lawful but also that a lockout is a right of the employer.

Later, in *N.L.R.B. v. Truck Drivers Union*,\(^6\) the Supreme Court for the first time was faced with the clear issue of whether or not a lockout by non-struck members of a multi-employer bargaining group was lawful. In this case the union struck one of the members of the multi-employer group. Immediately all members of the group locked out their union employees and closed down completely. The Court held that an economic lockout, one instituted solely for business reasons,\(^7\) was lawful in the absence of an unlawful intent. The Court saw the ultimate problem as a balancing of conflicting interests, *i.e.* the employees' right to strike versus the employers' right to maintain his business. The *Truck Drivers Union* case recognized that the employer has certain rights just as the employee has certain rights. In referring to the employers' rights under the National Labor Relations Act, the court said:

> 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 employers and employees 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 non-uniform contractual terms.\(^8\)

In addition, it was pointed out in both the *Morand Brothers* case and the *Truck Drivers Union* case that the lockout itself is a legitimate economic

\(^4\)190 F.2d 576 (7th Cir., 1951).
\(^5\)Id. at 582.
weapon used by the employer as a strike is used by the employees, and does not in itself show a hostile motivation.

In the Brown case, the Court further elaborated on the rights of the employer where they said:

Even the Board concedes that an employer may legitimately blunt the effectiveness of an anticipated strike by stockpiling inventories, readjusting contract schedules, or transferring work from one plant to another, even if he thereby makes himself virtually strikeproof.

The Truck Drivers Union case was the principal case relied upon by the majority in the Brown case. The facts of the two cases are similar, but different in that during the lockout in the Truck Drivers Union case all of the members of the multi-employer group closed down, while in the Brown case all of the members of the group remained open by using temporary employees. In the Brown case, the fact that the employers remained open by using temporary employees did not necessarily denote a hostile motivation. When the union struck Food Jet, the other members of the multi-employer bargaining group locked out all of their union employees. Food Jet and the others remained open for business. Had the other members of the bargaining group closed their stores, they would have lost business to Food Jet, which remained open. Such a continuous loss of business would have pressured the closed members of the group to come to terms with the union and thus break up the bargaining group. With all members of the bargaining group in operation the multi-employer bargaining group was preserved and the equality of each member retained. Therefore, the use of temporary employees during the economic lockout was consistent with a legitimate business purpose and did not constitute a violation of section 8(a)(1) of the National Labor Relations Act.

Similarly, the Court noted in the Brown case that the element of intent is also required for a violation of section 8(a)(3) of the Act. If the employer's acts are inherently destructive of employee rights, the acts themselves show the required intent. But here the respondent's acts were done

9 Morand Brothers Beverage Co. v. N.L.R.B., 190 F.2d 576 (7th Cir., 1951).
10 In N.L.R.B. v. Truck Drivers Union, supra note 6, at 92, 77 Sup. Ct. at 645-6, the Court said:
   Although, as the Court of Appeals correctly noted, there is no express provision in the law either prohibiting or authorizing the lockout. The Act does not make the lockout unlawful per se. Legislative history of the Wagner Act, 49 Stat. 449, indicates that there was no intent to prohibit strikes or lockouts as such.
12 Food Jet had the right to hire replacements for the striking employees on the basis of what was said in N.L.R.B. v. Mackay Radio & Telegraph Co., 304 U.S. 333, 58 Sup. Ct. 904 (1938), at page 343: "Nor was it an unfair labor practice to replace the striking employees with others in an effort to carry on business." See also Meltzer, Single Employer and Multi-Employer Lockouts Under the Taft-Hartley Act, 24 U. Chi. L. Rev. 70 (1956).
with a legitimate business purpose. The respondent's conduct during the whole incident did not discourage union membership because: First, the replacements for the regular union employees were hired and used for the duration of the dispute only. When the replacements were hired they were told that they would be terminated as soon as a union contract would be reached. Second, the union could have ended the dispute anytime by giving in to the employers' conditions and the temporary employees would have been discharged immediately. Third, in light of the union shop provision in the new union contract a union member would have nothing to gain and much to lose by leaving the union. Since the acts of the respondents' did not themselves show the necessary intent and since no assertion of a motivation by antiunion animus was made either by the National Labor Relations Board or the Union, there was no evidence to show that the respondents violated section 8(a)(3).15

This decision will have a marked effect upon multi-employer group-union relations. One of the chief weapons of the union in dealing with multi-employer groups has been the whipsaw strike, for although only one of the employers is struck, the effect of the strike is felt by all members of the multi-employer group. The union, by calling a whipsaw strike, puts each of the members of the group on a different economic basis. Since the advantage of remaining open is with the non-struck member, the common front essential in a multi-employer bargaining group is therefore destroyed. If, as the Court has held in the Brown case, all employers can lock out their employees and still remain open the coercive effect of the whipsaw strike is nullified because the common front of the multi-employer bargaining group is kept intact with no economic loss to any of the members. This decision gives the multi-employer bargaining group a greater advantage and is another step toward increasing an employer's bargaining position without violating the National Labor Relations Act. The Brown case has equalized the positions of labor and management by increasing the rights of the employer while leaving the rights of the union intact. The union still has the right to use a whipsaw strike, but as long as the nonstruck employers can lock out their union employees, the whipsaw strike has the same effect on the union as a general strike—all of the union members are out of work. The total effect of this equalization will be to aid collective bargaining, because now the union will not call a whipsaw strike as readily, knowing that it may result in all union members being left out of work.

JAMES R. TRUSCHKE

15 For a discussion of the theory that to hold a lockout an unfair labor practice would be contrary to the intent of the National Labor Relations Act, see Brauer, Labor Law, 12 Kan. L. Rev. 565 (1964).