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Labor Law—Defensive Lockout as Unfair Labor Practice

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that the statute defining the power to punish summarily must be strictly interpreted and its application narrowly limited. See *Nye v. United States,* 313 U. S. 32 (1940).

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LABOR LAW—DEFENSIVE LOCKOUT AS UNFAIR LABOR PRACTICE

When negotiations between a multi-employer association and union had reached an impasse, over an association-wide contract, the union struck against one member. The other eleven members immediately notified their employees that their stores were closed because of the union's action. The National Labor Relations Board ruled that the employers had committed an unfair labor practice. *Davis Furniture Co.,* 94 N. L. R. B. 279 (1951). On appeal, the Court of Appeals held that the evidence upon which the Board relied did not support its finding that such action was a mere reprisal to defeat the strike, and remanded the case to the Board for a determination of whether such a temporary lockout was lawful when used in a labor dispute solely as a counter-economic force to resist the strike. *Davis Furniture Co. v. N. L. R. B.* __ F. 2d __, 30 L. R. R. M. 2294 (9th Cir. May 29, 1952). The Board again found that this temporary lockout violated §8 (a) (1) and (3) of the LABOR MANAGEMENT RELATIONS ACT, June 23, 1947, 29 U. S. C. §158 (a) (1) and (3). *Davis Furniture Co.,* 100 N. L. R. B. No. 158 (Sept. 5, 1952).

At common law the lockout was considered a lawful device to resist the threat of the labor movement. *Iron Moulders Union v. Allis Chalmers Co.,* 166 Fed. 46 (7th Cir. 1908); *Sinsheimer v. United Garment Workers,* 77 Hun 215, 28 N. Y. Supp. 321 (Sup. Ct. 1894); see also Millis and Montgomery, ORGANIZED LABOR 555, (1945). The NATIONAL LABOR RELATIONS ACT, 49 STAT. 449 (1935), 29 U. S. C. §§151-166 (1947) which proscribes as unfair labor practices any interference with protected union activity does not expressly forbid *or* sanction lockouts. The Board has declared a lockout to be in violation of the Act where the plant was closed by the employer in circumstances that indicated that the real reason for the closing was to avoid and destroy the rights of the employees as provided by the Act. *N. L. R. B. v. Hopwood Retinning Co.,* 98 F. 2d 97 (2d Cir. 1939); *N. L. R. B. v. Stremel,* 141 F. 2d 317 (10th Cir. 1944). See also, Teller, LABOR DISPUTES AND COLLECTIVE BARGAINING (1940 ed.), I, 247, 494, and II, 771-772.

Lockouts have been permitted where the employer would otherwise be subjected to undue economic hardship, *e. g.:* (1) until

a union signed a no-strike pledge to prevent continued business losses that resulted from repeated strikes, *International Shoe Co.*, 93 N. L. R. B. No. 159 (March 26, 1951); (2) where there was a threatened sit down strike which would cause syrup spoilage. *Duluth Bottling Ass'n.*, 48 N. L. R. B. 1335 (1943); (3) to prevent loss of customer *good will* which would have resulted from a closing of repair shops while cars were dismantled. *Betts Cadillac Olds., Inc.*, 96 N. L. R. B. No. 46 (September 21, 1951).

In *Morand Bros. Beverage Co. v. N. L. R. B.*, 190 F. 2d 576, 582 (7th Cir. 1951), with facts identical to those of instant case the Court, in remanding to the Board said, "(E)mployers should be able to counter the economic force of a strike with the economic force of a lockout". Before the Board, however, the action of the employer was found to be a complete discharge and illegal on such grounds. *Morand Bros. Beverage Co.*, 30 L. R. R. M. 1178 (June 30, 1952). The question posed by the Court as to whether a lockout quoted above would be legal if used *defensively* was not met by the Board, and stands as but an indication of the judicial attitude on it.

In the instant case the Court said,

> (B)y the linking of the terms "strike" and "lockout" in the statute, 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. ___ F. 2d ___, 30 L. R. R. M. 2294, 2299 (9th Cir. May 29, 1952).

Together, these remarks indicate that the Courts may now sustain a lockout in the absence of circumstances creating an undue hardship to the employer, when they find that the employer was not trying to break the union or interfere with the protected concerted activity but was only resisting, with an economic force. the economic pressure of the strike. They reach this result on the ground that the bona fide motive or purpose of the lockout keeps it from violating the proscriptions of the Act.

However, the Board in the instant case, found that this temporary lockout constituted interference with protected union activity, despite the good motives of the employer. In its determination, the Board was primarily concerned not with the motives involved, but rather with the results of the employer's acts. Therefore, the lack of intent to interfere was held not to excuse conduct which in fact did interfere. *N. L. R. B. v. Hopwood Retinning Co., supra; N. L. R. B. v. Somerset Shoe Co., supra.* In so holding, the Board continues to appraise a lockout from the point of view of its results. In the *Morand* case, *supra,* the Court

in formulating a test based on intent was attempting to equalize what they considered to be the inferior bargaining position of an employer. Such an approach was contrary to the test traditionally employed by the Board.

The decision of the instant case, in repudiating the test formulated by the Court in the *Morand* case illustrates the Board's apparent determination to retain policy formulation on the administrative level.

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ARBITRATION—AWARD OF CONDITIONAL PENALTY BY ARBITRATION BOARD HELD UNENFORCEABLE

An arbitration award against a union for striking in violation of its collective bargaining agreement was affirmed by the supreme court under N. Y. CIVIL PRACTICE ACT §1461. The award provided for $2000 actual damages and a conditional penalty of $5000, payable if the arbitration board finds that the union has again violated its non-strike provision. The contract gave the arbitrators express authority to make this agreement effective, including the power "to impose damages, money or other penalties" upon any party found guilty of a violation. HELD (3-2): Penalty vacated on the grounds that (1) the penalty provision of the agreement is unenforceable at law and (2) the award is not final and definite within CIVIL PRACTICE ACT §1462 (4). *Matter of Publishers' Assn. (Newspaper Union)*, 280 App. Div. 500, 114 N. Y. S. 2d 401 (1st Dep't 1952).

The New York courts have consistently adhered to the general rule that the award of an arbitrator cannot be set aside for errors of judgment either as to the law or the facts if the arbitrator keeps within his jurisdiction and is not guilty of fraud, corruption or other misconduct. *Matter of Wilkins*, 169 N. Y. 494, 62 N. E. 575 (1902); *Matter of Delma Engineering Corp.*, 293 N. Y. 653, 56 N. E. 2d 253 (1944). An award becomes enforceable except where grounds exist as specifically provided in CIVIL PRACTICE ACT §1462 for vacating the award. Errors, mistakes, and departures from strict legal rules are included in the arbitration risk. *Pine Street Realty Co. v. Coutrouios*, 233 App. Div. 404, 253 N. Y. S. 2d 309 (1st Dep't 1931). In general the courts are reluctant to reconsider the merits of arbitration awards. *Morris White Fashions, Inc. v. Susquehanna Mills, Inc.*, 295 N. Y. 450, 68 N. E. 2d 437 (1946). Courts would defeat the chief advantages of arbitration by reviewing the merits of an award. See Scoles, *Review of Labor Arbitration Awards on Jurisdictional Grounds*, 17 U. OF