

**United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL**

Advice Memorandum

DATE: September 23, 2003

TO : Dorothy L. Moore-Duncan, Regional Director
Region 4

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: AmerGen Energy Company, LLC, 506-6050-7560
an Exelov/British Energy Company 512-5012-0133-4800
Case 4-CA-32186

This case was submitted for advice as to whether the Employer, which operates a nuclear power generating facility, unlawfully threatened its employees with discipline for engaging in a sudden strike.

In agreement with the Region, we conclude that the Employer unlawfully threatened to discipline all unit employees working at its nuclear generating station should they go out on strike with minimal notice. The Employer issued an overly-broad threat to the entire bargaining unit, without regard to individual employees' status as employees who arguably must take "reasonable precautions" to protect the Employer's property under Marshall Car Wheel & Foundry Co.¹ First, the entire bargaining unit is not obliged, solely because of the nature of the facility, to provide advance notice of a strike. Second, the Employer failed to provide evidence that any specific strikers, including employees with responsibilities during a potential emergency, failed to take "reasonable precautions" sufficient to deprive them of their Section 7 right to strike with minimal notice.

FACTS

AmerGen operates a nuclear power plant in Lacey Township, New Jersey known as Oyster Creek Nuclear Generating Station. The Charging Party International Brotherhood of Electrical Workers, Local 1289 represents a production and maintenance unit of approximately 220 employees at Oyster Creek. The unit includes a variety of job classifications including, among others, plant clericals, control room operators, technicians, mechanics, and supply clerks.

¹ 107 NLRB 314 (1953).

Federal and Employer regulations require minimum staffing levels for personnel with certain jobs or specific responsibilities. For instance, control room operators must be relieved from duty in such a manner as to ensure full staffing of the control room at all times. The Employer has also assigned duties to specific employees under its "Emergency Plan" in order to prepare for a radiological or other catastrophic emergency. Under the Emergency Plan, at least three radiological control technicians (known as "rad techs") must be on-duty at all times to monitor and assess potential radiological emissions during an emergency. In addition, at least five employees who are trained to perform fire-safety duties must be on-duty at all times as part of a "Fire Brigade."² Fire Brigade duties are not permanently assigned to any Oyster Creek personnel, but rather rotate among trained employees throughout the year. Both unit employees and non-unit supervisors and managers have control room, rad tech and Fire Brigade duties. Employees in the control room operator and rad tech positions, and those with Fire Brigade responsibilities, comprise approximately 15% of the bargaining unit.

The Employer purchased the Oyster Creek plant in 2000 and have been negotiating for a collective-bargaining agreement with the Union since that time. The parties have not been able to reach agreement.

Employees began an economic strike against the Employer on May 22, 2003. Union president Stroup notified Employer vice president Harkness at approximately 11:45 am of the planned strike at noon.³ In response, various supervisors and managers told departing employees that they would be subject to discipline, up to and including termination, if they did not return to work by the end of their lunch break. For instance, supervisors made such statements to a records clerk, a senior supply clerk, a senior radiation protection technician, and a maintenance mechanic.

² Members of the Fire Brigade are trained to extinguish some types of fires at the facility, such as a propane fire. Professional firemen employed by the surrounding jurisdictions apparently have most fire-fighting responsibilities.

³ Evidence indicates that some supervisors knew of the strike plans as early as 11:15 am.

Although many employees left work at noon, the control room operators stayed at their stations past the noon strike deadline until they were properly relieved. However, two employees with Fire Brigade responsibilities ignored a manager's instructions to return to work in lieu of striking. Two or more rad techs with Emergency Plan duties also engaged in the strike, which the Employer contends resulted in a one-person shortage of rad techs for an unspecified amount of time. It is unclear whether a sufficient number of supervisors were available to replace the missing rad techs and Fire Brigade members. Despite its threat, the Employer has not disciplined any employee for engaging in the walkout.

At the time of the strike, Oyster Creek was shut down under an unplanned "outage" status due to an electrical problem which rendered two of the three cooling towers inoperable. In addition, the nation was under an "Orange" Homeland Security Threat Level status, warning of a "High Risk of Terrorist Attack."

ACTION

We conclude that the Employer unlawfully threatened to discipline unit employees working at its nuclear generating station should they go out on strike with minimal notice. Specifically, the Employer issued an overly-broad threat to the entire bargaining unit, without regard to individual employees' status as employees who arguably must take "reasonable precautions" to protect the Employer's property under Marshall Car Wheel & Foundry Co.⁴ Thus, the entire bargaining unit is not obliged, solely because of the nature of the facility, to provide advance notice of a strike. Further, the Employer failed to satisfy its burden under Marshall Car Wheel to provide evidence that any specific striking employee, including employees with responsibilities during a potential emergency, failed to take "reasonable precautions" sufficient to deprive them of their Section 7 right to strike with minimal notice.

Employees of public utilities, like all statutory employees, enjoy the basic right to strike afforded by Section 7.⁵ Of course, this right is subject to certain limitations, including the Board's imposition of advance

⁴ 107 NLRB 314 (1953), enf. den. 218 F.2d 409 (7th Cir. 1955).

⁵ See, e.g., Metropolitan Edison Co., 279 NLRB 313, 319 (1986).

strike notice requirements on some employees who, because of the nature of their jobs, have a "duty to take reasonable precautions to protect the employer's physical plant from such imminent damage as foreseeably would result from their sudden cessation of work."⁶ Employees who strike in breach of such obligation engage in unprotected activity for which they may be disciplined or discharged.⁷ However, employees need not act as an insurer and need not take every precaution to secure the employer's property for an indefinite period of time.⁸ In fact, the Board has found walkouts protected where employees have given little or no advance notice to employers, notwithstanding that the walkout resulted in some foreseeable risk of damage or actual damage to the Employer's property.⁹

We conclude that the Employer issued an overly broad threat of discipline to the entire bargaining unit, without regard to the need for employees with specific job functions to exercise "reasonable precautions" to protect the Employer's property from "imminent danger." As they left for lunch, management officials threatened to discipline such employees as a records clerk, a senior supply clerk, and a maintenance mechanic (along with similarly situated employees) should they go out on strike. The Employer has provided no evidence how the sudden absence of these plant clerical and maintenance employees – along with approximately 85% of the unit employees who are not control room operators and who have no Fire Brigade or

⁶ Marshall Car Wheel & Foundry Co., 107 NLRB at 315.

⁷ Id. at 315.

⁸ Reynolds & Manley Lumber Co., 104 NLRB 827, 828-829 (1953), enf. den. 212 F.2d 155 (5th Cir. 1954).

⁹ Columbia Portland Cement Co., 294 NLRB 410, 422 (1989), modified on other grounds 915 F.2d 253 (6th Cir. 1990) (strike protected where employees gave less than 30 minutes notice and took reasonable precautions, notwithstanding damage to equipment); Hennepin Broadcasting Associates, Inc., 225 NLRB 486 (1976), enfd. mem. 96 LRRM 2585 (8th Cir. 1977) (30 minutes notice prior to walkout of radio engineer operators during broadcast); Montefiore Hospital & Medical Center, 243 NLRB 681, 682, 691-692 (1979), modified on other grds 621 F.2d 510 (2d Cir. 1980) (no advance notice prior to sympathy strike by doctors involved in direct patient care).

Emergency Plan duties – threatened "imminent damage" to the Oyster Creek facility. Further, there is no precedent to support the Employer's assertion that all employees at a nuclear generating station have safety-sensitive positions, and thus they all should be subject to Marshall Car Wheel strictures. The argument is implausible in light of the Board's rejection of analogous arguments that employees with health and safety-related responsibilities should not have the same right to strike as employees in other industries. See Bethany Medical Center, 328 NLRB 1094 (1999).¹⁰ Moreover, the Union ensured a smooth turnover in the control room; striking operators delayed their walkout until they were properly relieved.

Accordingly, the Employer's overly-broad threat against the entire bargaining unit was unlawful. The Employer cannot justify its unit-wide threat of discipline even if it demonstrated that certain specific employees with Emergency Plan or rad tech duties arguably fall under the Marshall Car Wheel rules. The Employer's over-broad threat is not lawful merely because a narrower, unarticulated threat might not have violated Section 8(a)(1).¹¹ Finally, the nation's Orange Alert Homeland Security level constitutes a generalized threat to American interests at home and abroad, which, absent specific application to the Oyster Creek facility, does not serve to extinguish rights under the Act.

Accordingly, complaint should issue absent settlement.

B.J.K.

¹⁰ Furthermore, since the previous collective-bargaining agreement has expired, the strike was not in violation of an extant no-strike clause.

¹¹ See E & L Transport Company, L.L.C., 331 NLRB 640 (2000) (employer promulgated overly broad rule prohibiting wearing of union buttons; immaterial that employer might demonstrate special circumstances that would justify a narrower rule).