

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

# Advice Memorandum

DATE: November 26, 2008

TO : Ralph R. Tremain, Regional Director  
Region 14

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

SUBJECT: Heartland Human Services, Inc.  
Case 14-CA-29397, 14-CA-29447

524-5056-0175

524-5056-0800

This case was submitted for advice on whether the Employer violated Section 8(a)(1) and (5) by locking out bargaining unit employees who participated in a strike, while not locking out employees who never participated in the strike. We agree with the Region that the Employer's conduct was not unlawful because the decision was based on operational need and not Union animus.

### FACTS

Heartland Human Services (the Employer) operates a nonprofit mental health and substance abuse outpatient treatment and residential services center for severely mentally ill adults, as well as specialized services for HIV/AIDS patients. On February 1, 2006, American Federal of State, County and Municipal Employees, Council 31, Local 3494 (the Union) was certified as the representative of the Employer's approximately 48 employees. The classifications of unit employees include addiction counselors, caregiver advisor, case managers, client accounts and service representatives, day treatment coordinator, maintenance specialist, prevention coordinator, program secretary, records clerk, data records specialist, job coaches, and therapist. Since certification, the parties have met 37 times to negotiate a contract but have not reached agreement.

On July 2, 2007, the Union began an economic strike, but eight unit employees did not participate. Three of the eight nonstrikers quit their employment shortly after the strike began, leaving five nonstrikers working. In February 2008, one striker crossed the picket line and returned to work.

The Employer asserts that it attempted to obtain temporary employees through staffing agencies, but only one agency was qualified to refer employees. That temporary agency, after being contacted by the Union, refused to supply additional employees. The Employer therefore had to train and hire replacements individually and was not fully operational until January 2008. As a result of the strike, the Employer cut back on its client services and provided continued but limited mental health care and substance abuse services to its existing clients and residents.

In June 2008, the Union made an unconditional offer to return to work on behalf of the striking employees. The Employer advised the Union that if the employees were not agreeing to return to work under the Employer's most recent proposals, it would lock out striking employees in support of its proposals until the parties reached a complete agreement. The Employer included a list of all tentative agreements and its current proposals on the open issues. The Union did not agree to the Employer's proposals.

The Employer locked out all former striking employees and the crossover striker. After the lockout began, one former striker and the crossover striker notified the Employer that they had resigned their membership but they remained locked out.

The lockout did not include the five employees who were still employed when the strike ended and who had never participated in the strike. Those employees included: two residential case managers; the prevention coordinator; the client accounts representative; and the client services representatives.

The Employer contends that the lockout is aimed at pressuring the Union to accept its bargaining demands. The Employer also claims that it did not lockout nonstriking employees because those unit employees remain the backbone of its limited operations, and locking them out would have required the Employer to terminate services to its clients and residents.

The five nonstriking employees perform the following work:

- Two residential case managers. Residential case managers are responsible for direct and indirect care of residential, mentally ill clients. The managers assist clients with daily living skills, community integration, crisis intervention, and other aspects of day-to-day care and emotional support. The manager to client ratio is 1 to 8, and the care required is 24 hours. The clients are housed at 3 facilities, requiring a total of 16 to 18 residential case managers. The residential clients represent a fragile part of the clientele, and stability of caregiver and treatment is essential.

The two nonstriking residential case managers maintained contact with former residents throughout the strike, even when those clients had to be housed in alternative locations. By the end of 2007, a sufficient number of temporary residential case managers had been hired such that eight resident clients were able to return to their home. By January 2008, a sufficient number of case managers had been hired and trained such that all three residential facilities were fully operational.

The turnover of temporary residential case managers has been high. The nonstriking case managers have maintained consistency and trained new staff.

- Prevention Coordinator. The Employer employs only one prevention coordinator who has served in the position since 1997. He is responsible for providing alcohol, tobacco, and drug prevention training and educational seminars to at-risk populations throughout the county. The position is directly tied to a Substance Abuse Prevention Program grant from the Illinois Department of Human Services. Pursuant to the grant, the Prevention Coordinator is required to attend various training seminars and conferences. The Prevention Coordinator is known and highly visible in the community and is the only employee who has attended the mandatory trainings required to do his job and receive the state grant.

- Client Accounts Representative. The Billing Department is comprised of the Client Accounts Representative and a Billing Supervisor. The representative must ensure that the billing conforms to insurance, Medicare, and Medicaid requirements. The representative bills clients to set fees; interfaces with existing clients

to respond to billing questions and/or explain codes and fees; reviews client's information and identifies any billing issues; and submits the billing. Seven months before the strike, the Employer eliminated a second Client Accounts Representative position.

- Client Services Representative/Data Records Specialist. The Client Services Representative/Data Records Specialist performs secretarial duties, maintains client records, and completes compliance with Employer procedures to ensure compliance and reimbursement. She types and processes all correspondence with medical staff, phones in doctor orders, and has attended mandatory trainings on blood born pathogens, ethics, and patient confidentiality.

The Union filed a charge in late June 2008, alleging that the Employer has engaged in surface bargaining (14-CA-29397). The Region has determined that the charge should be dismissed and has not submitted this issue to Advice. The Union then filed a charge alleging that the Employer's partial lockout was unlawful (14-CA-29447).

#### **ACTION**

We agree with the Region that, absent withdrawal, the Region should dismiss the charge because the Employer has demonstrated that its lockout was for a legitimate business purpose and was not motivated by animus.

An employer does not violate the Act by locking out its bargaining unit employees for "legitimate and substantial business reasons."<sup>1</sup> Such reasons include pressuring employees to accept the employer's bargaining proposals,<sup>2</sup> or insulating the employer from anticipated disruption caused by further strikes.<sup>3</sup>

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<sup>1</sup> Eads Transfer, 304 NLRB 711, 712 (1991), enfd. 989 F.2d 373 (9th Cir. 1993), citing Laidlaw Corp., 171 NLRB 1366, 1370 (1968), enfd. 414 F.2d 99 (7th Cir. 1969).

<sup>2</sup> American Ship Building Co. v. NLRB, 380 U.S. 300, 318 (1965) (lockout to pressure union during bargaining dispute is not inherently destructive of employees rights).

An employer violates the Act, however, if a purpose of the lockout is to discriminate against or discourage union activity.<sup>4</sup> Specifically, an employer may not discriminate against employees because they chose to participate or not to participate in a strike.<sup>5</sup> A partial lockout, however, is not sufficient to prove unlawful discrimination where the Employer offers a substantial and legitimate reason for the disparate treatment and where the lockout is justified by operational needs.<sup>6</sup>

While the Board does not apply different standards to lockouts at health care facilities, it has acknowledged that the industry has "legitimate operative concerns."<sup>7</sup> In Sociedad Espanola, the Board found that the hospital's demonstrated concern about staffing difficulties justified a lockout where the union had threatened but canceled a strike.

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<sup>3</sup> See Bali Blinds Midwest, 292 NLRB 243, 246-47 (1989), overruled on other grounds sub nom. Electronic Data Systems Corp., 305 NLRB 219 (1991).

<sup>4</sup> American Ship Building, 380 U.S. at 311. See McGwier Co., 204 NLRB 492, 496 (1973).

<sup>5</sup> See McGwier Co., 204 NLRB at 496 (partial lockout of strikers was unlawful where employer's action was clearly not taken to advance bargaining position); O'Daniel Oldsmobile, 179 NLRB 398, 401 (1969) (partial lockout of strikers and "abundant" union animus showed that lockout was not solely to pressure union to modify demands but also to undermine adherence to union).

<sup>6</sup> See Bali Blinds Midwest, 292 NLRB at 246-47 (fear of recurring strike justified partial lockout based on production line, classification, and seniority); Laclede Gas Co., 187 NLRB 243 (1970) (fear of recurring strike justified partial layoff of strikers based on which crews were needed to work), enf. denied 421 F.2d 610 (8th Cir. 1970).

<sup>7</sup> See Sociedad Espanola de Auxilio Mutuo y Beneficencia de P.R., 342 NLRB 458, 462 (2004).

Here, we conclude that the Employer's lockout was justified by substantial and legitimate business justifications. The Employer informed the employees of the lockout and its bargaining position before it locked out the employees.<sup>8</sup> And locking out the employees to pressure them to accept the employer's bargaining positions on open issues, as the Employer did here, is a "substantial and legitimate" business justification.<sup>9</sup>

While it allowed the five nonstrikers to continue working, the Employer has presented substantial and legitimate reasons for why the five nonstrikers, who all had specialized skills, training, or experience, were needed to maintain its health care operations during the lockout. The Employer deals with a fragile population and, as in Sociedad Espanola, had difficulty finding replacement workers. This resulted in limited operations for over six months during the strike. The two residential case managers and the prevention coordinator provide direct, relationship-based care. The other two individuals, the client services representative and the client services representative, are the only individuals serving in their roles, and, in the latter case, have specifically required training. Thus, the Employer has articulated significant and specific operating needs that justify not including these employees in the lockout.

Further, there is no evidence that the Employer's action was designed to undermine the Union or was otherwise unlawfully motivated. The Region has concluded that the surface bargaining charge lacks merit, and no other ULPs are alleged. Further, that the Employer locked out a former striker who had returned to work, as well as another individual who resigned Union membership, shows that the

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<sup>8</sup> Eads Transfer, 304 NLRB at 712 (employer can justify failure to reinstate economic strikers only after it has informed them of lockout so that they can decide whether to accept terms and conditions).

<sup>9</sup> See Central Illinois Public Service Co., 326 NLRB 928, 932-933 (1998), rev. denied sub nom. Local 702, IBEW, AFL-CIO v. NLRB, 214 F.3d 11 (D.C. Cir. 2000).

Employer based its decisions on legitimate operating reasons, not to discriminate along Section 7 lines.

Accordingly, absent withdrawal, the Region should dismiss the charge.

B.J.K.