

Boehringer Ingelheim Vetmedica, Inc. and United Food and Commercial Workers, District Union Local Two. Case 17–CA–22964

August 13, 2007

DECISION AND ORDER

BY MEMBERS SCHAUMBER, KIRSANOW, AND WALSH

On October 21, 2005, Administrative Law Judge Gregory Z. Meyerson issued the attached decision. The Respondent filed exceptions and a supporting brief,¹ the General Counsel filed an answering brief, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The judge found that the Respondent violated Section 8(a)(1), (3), and (5) of the Act when it purportedly engaged in direct dealing by presenting locked-out employees with individual no-strike forms, although he found that the lockout was initially lawful. Contrary to the judge, we find that the Respondent did not engage in unlawful direct dealing and that its lockout did not otherwise violate the Act. Accordingly, for the reasons discussed below, we reverse the judge's decision and dismiss the complaint.

Facts

The material facts are undisputed. *Boehringer Ingelheim Vetmedica, Inc.* (the Respondent) and *United Food and Commercial Workers, District Union Local 2* (the Union) have a more than 20-year history of collective bargaining. The parties were unable to agree on a successor contract before the expiration of their collective-bargaining agreement at midnight, November 12, 2004.² Shortly before the agreement's expiration, unit employees rejected the Respondent's last, best offer and voted to authorize a strike.

The Union's strike process is as follows. Bargaining-unit members immediately vote on a strike authorization resolution upon the failure of a contract ratification vote (i.e., if 50 percent or fewer members vote to accept the offer). If a two-thirds majority votes in favor of the strike resolution, and if the International Union subsequently grants approval, the local union president has the

authority to call a strike. The judge credited the testimony of union negotiator John Lewis that he had explained this process to the Respondent's representatives several times.

Lewis telephoned the Respondent's negotiator, Daniel Nowalk, and informed him of the vote result. In response, Nowalk told Lewis that the Respondent would cease work as of midnight, November 12, when the collective-bargaining agreement expired. During this conversation and several followup conversations, Nowalk asserted that bargaining unit employees were on strike; union representatives insisted that they were not on strike and that the Respondent was locking employees out. Nowalk declined Lewis' request to continue negotiations and extend the collective-bargaining agreement.³

In connection with the Respondent's decision to cease work as of midnight November 12, its vice president of biological research and development, Dr. Phillip Hayes, testified about the nature of the Respondent's business. According to Dr. Hayes, the process of manufacturing vaccines and pharmaceuticals for protecting animal health is delicate and requires freedom from interruptions or interference to avoid contamination of the product. Disruption of the manufacturing process could have serious consequences, such as considerable financial loss or the jeopardizing of public health (in the case of food-producing animals). The Respondent was concerned that the potential for employee sabotage or even merely inadequate staffing due to labor unrest could bring about these "potentially catastrophic" consequences. In light of these concerns, the Respondent sought assurances that the Union would not engage in a work stoppage for a certain period of time. The Union declined to provide such assurances.

On November 13, the Respondent gave the Union two options for returning bargaining unit employees to work: (1) the Union could give the Respondent a written no-strike assurance; or (2) employees who wished to work could submit individually signed unconditional offers to return to work. The Union declined both options and reiterated its previously-rejected offer to indefinitely extend the collective-bargaining agreement. Employees reported for their normal work shifts, as the Union had instructed them, and the Respondent presented these employees with no-strike forms,⁴ advising them that they

¹ The Respondent filed a motion to file corrected brief in support of its exceptions. The corrected brief contains several minor, nonsubstantive corrections of typographical errors. We grant the Respondent's unopposed motion, and we have considered the corrected version of its brief.

² All dates are in 2004.

³ We find it unnecessary to determine whether the parties were at impasse. The complaint did not allege that the parties were at impasse, and the judge made no finding in this regard.

⁴ The form states:

I understand that my collective-bargaining agent, Local 2 of the United Food and Commercial Workers, has authorized a strike and/or is currently on strike in support of their demands in connection with the current negotiations for a new collective-

would have to sign them if they wished to work. All of the regular employees declined to sign the form, and the Respondent sent them home. The judge found that these conversations generally were businesslike and nonconfrontational, and there is no evidence that the Respondent questioned employees or engaged in substantive discussions with them regarding the terms of its contract proposal.⁵ In fact, the Respondent advised employees to seek advice from the Union before deciding whether to sign the form.⁶ Subsequently, negotiations resumed. The employees ratified a final collective-bargaining agreement on November 20 and returned to work on November 22.

Legal Principles

Employer lockouts in support of legitimate bargaining demands (i.e., “offensive lockouts”) are lawful. *American Ship Building Co. v. NLRB*, 380 U.S. 300, 310–313 (1965); *NLRB v. Brown*, 380 U.S. 278, 284 (1965). Lockouts in anticipation of threatened strikes, which are intended to avoid severe and unusual hardships (i.e., “defensive lockouts”), have also been found to be lawful. See, e.g., cases cited in *American Ship Building*, supra, 380 U.S. at 307. To find a violation of Section 8(a)(3), the Board must be presented with independent evidence that antiunion animus was a primary motive of the lockout. *NLRB v. Brown*, supra, 380 U.S. at 288. Proof of an employer’s unlawful motive can convert an initially lawful lockout into an unlawfully motivated lockout that violates the Act. *R. E. Dietz Co.*, 311 NLRB 1259, 1264, 1267 (1993).⁷ Further, “a fundamental principle underlying a lawful lockout is that the Union must be informed

bargaining agreement. I freely and voluntarily choose NOT to participate in this strike in support of the union’s contract demands.

Therefore, I give Boehringer Ingelheim Vetmedica, Inc., my unconditional offer to return to work. This means that I will not strike or otherwise withhold services or fail to perform my work responsibilities to the fullest of my abilities in support of the union’s demands in connection with the current negotiations for a new collective-bargaining agreement. I understand that if I violate this unconditional offer to return to work, I may be subject to discipline.

⁵ Although the judge found that the Respondent did not notify the Union of its intent to use the no-strike form or offer to negotiate its language with the Union, the General Counsel acknowledges that the Union had learned about the form from its members, and the judge credited an employee witness who testified that the Union was familiar with the form by November 14.

⁶ Although the judge did not discuss this fact, no witness disputed testimony by Vice President Hayes that he communicated this advice to employees when he presented the no-strike form to them.

⁷ See also *NLRB v. Brown*, supra, 380 U.S. at 288 (citing *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 227 (1963)) (“[A]ntiunion motivation will convert an otherwise ordinary business act into an unfair labor practice.”).

of the employer’s demands, so that the Union can evaluate whether to accept them and obtain reinstatement.” *Dayton Newspapers, Inc.*, 339 NLRB 650, 656 (2003), enfd. in relevant part 402 F.3d 651 (6th Cir. 2005).

Judge’s Decision

The judge found clear evidence that the Union did not strike and that the Respondent engaged in a lockout. He further found no evidence of antiunion animus. The judge found that there was no allegation or evidence of bad-faith or surface bargaining, and no suggestion that the Respondent was not interested in reaching a successor agreement with the Union (indeed, as noted above, it promptly did so). Therefore, the judge found that the lockout was not unlawful from its inception; in other words, it was not a violation of the Act because it was (at least initially) in furtherance of a legitimate objective.⁸

The judge also found that the lockout did not become unlawful due to any failure by the Respondent to meet its legal obligation to inform the Union of the reasons for the lockout and of what the Union could do to end it. To the contrary, he found that the Respondent’s demands were sufficiently clear, and the Union knew how to end the lockout. The judge, however, found that the lockout became unlawful beginning November 13 when the Respondent presented the no-strike forms to employees. In the judge’s view, the presentation of these forms constituted direct dealing in violation of Section 8(a)(5) because the Respondent sought individual waivers of employees’ Section 7 rights. The judge recognized that seeking such waivers is not unlawful per se, stating that the Board has found such conduct violative of the Act “in certain circumstances.” However, he analogized this case to *Dayton Newspapers*, supra, and *C-E Natco*, 272 NLRB 502 (1984), in both of which the Board found unlawful direct dealing in the context of a lockout. In finding that the Respondent’s direct dealing converted a lawful lockout into an unlawful one, the judge reasoned that the lockout at that point became one in furtherance of direct dealing rather than of any legitimate proposal offered to the Union, or protection against an imminent strike. The judge also found that the Respondent’s conduct violated Section 8(a)(3), reasoning that locking out employees for refusing to sign a no-strike form would have a chilling effect on employee willingness to engage in union activity in support of the Union’s contract proposals.⁹

⁸ The judge did not determine whether the lockout was “defensive” or “offensive,” but he pointed out that, in any event, both types of lockouts are lawful under *American Ship Building*, supra.

⁹ Additionally, although the judge found a derivative 8(a)(1) violation, he found no merit to the allegation that the Respondent independ-

The Respondent excepts to the judge's findings that it violated Section 8(a)(1), (3), and (5). As explained below, we find merit in these exceptions.

Discussion

There is no dispute that the lockout was lawful at its outset and that it was instituted in furtherance of the Respondent's legitimate business objectives. Unlike the judge, we find that the Respondent did not engage in unlawful direct dealing. Correspondingly, in the absence of direct dealing or any evidence of unlawful motive, we find that the lockout was lawful throughout its duration.

Contrary to the judge, we find *Dayton Newspapers* and *C-E Natco*, supra, distinguishable. In *Dayton Newspapers*, a senior management official warned employees that if they engaged in a strike, they "[wouldn't] be working here any more, and that would be it for you." The same official told employees on the picket line that the union had "cost all you guys your jobs." When employees reported for work following the union's unconditional offer of return, management stated that the respondent was "not in need of [the union's] services," and that the problem was not with the employees, but with the union. 339 NLRB at 650. The respondent also contacted locked-out employees to schedule one-on-one meetings with managers. During these meetings, the respondent sought individual commitments from employees to work without interruption. Significantly, one employee was asked to agree not to honor *any* job action called by the union. At the time of these meetings, the respondent had made a vague and general demand for an "acceptable commitment" from the union to make deliveries without disruption, without clarifying to the union what an "acceptable commitment" would involve. Moreover, the respondent had rejected an offer by the union to return employees to work under the same conditions agreed to by individual employees whom the respondent allowed to return to work. The Board found that the respondent engaged in unlawful direct dealing by this conduct. 339 NLRB at 653. The Board concluded that the respondent "went far beyond merely communicating an offer of reinstatement" when it bypassed the union and sought a "broad and open-ended waiver" of employees' Section 7 rights to support any future union strikes or picketing. Id.

The Board in *Dayton Newspapers* also found that the respondent's conduct violated Section 8(a)(3), reasoning that the respondent provided the union with "unclear and changing conditions" for employees' reinstatement that "became a 'moving target.'" Id. at 656, 658. As a result

of these unclear demands, "the Union was unable to intelligently evaluate its position, and therefore was powerless to end the lockout and obtain reinstatement of the drivers." Id. at 658.

C-E Natco is also distinguishable. In *C-E Natco*, the respondent sent letters to locked-out employees that extended individual offers of reinstatement on terms different from those previously offered to the union. The respondent never replied to the union's subsequent proposal to accept the respondent's new offer on behalf of all unit employees. The Board found that the respondent violated Section 8(a)(1), (3), and (5) by bargaining individually with employees and conditioning their employment on their willingness to sign a "Letter of Understanding" that was "a clear interference with statutory rights." 272 NLRB at 506.

Unlike the employers in those cases, the Respondent did not bypass the Union in violation of Section 8(a)(5). Rather, the Respondent timely informed the Union of its intentions, giving it two clear and specific options for ending the lockout. In the face of the Union's refusal to provide a no-strike assurance, the Respondent allowed employees the opportunity to return to work by providing individual assurances, as referred to in the second option given to the Union. In doing so, the Respondent did nothing to derogate from the Union's representative status or to undermine its legitimate role. On the contrary, the Respondent told a number of employees to talk to their union representatives before deciding whether to sign the no-strike assurances.¹⁰

Unlike the employers in *Dayton Newspapers* and *C-E Natco*, the Respondent did not offer employees different terms than it had previously offered to the Union. The Respondent did not offer more favorable terms to individual employees, nor did it reject any offer by the Union to return employees to work on the same terms it then agreed to with individual employees.¹¹ The Respondent did not ask for an "open-ended waiver of rights" as in *Dayton Newspapers*; rather, the Respondent's limited request for no-strike assurances referred only to the then-current negotiations for a successor agreement. Finally, unlike the "moving target" that the Board described in

¹⁰ This fact, like other aspects of the Respondent's conduct, reinforces our determination that the Respondent did not set out to circumvent the Union or erode its status as bargaining representative.

¹¹ Our colleague's contention that the Respondent offered materially different terms to employees than it offered to the Union, because the no-strike forms contained a provision for potential discipline for violating a signed no-strike agreement, is a red herring. Implicit in any offer to enter into an agreement is a presumption that the agreement will be enforceable. It cannot seriously be contended that the Union thought the Respondent was proposing that the parties enter into an unenforceable no-strike agreement with no consequences for violating it.

ently violated Sec. 8(a)(1) by interrogating employees through its presentation of the no-strike form. There are no exceptions to this finding.

Dayton Newspapers, the Respondent did not refuse to clearly define what the Union could do to end the lockout. Indeed, the General Counsel does not except to the judge's finding that the Union was aware of the Respondent's clear demands for ending the lockout.

Although not precisely on point, we find the facts of the case before us far more closely analogous to those in *U.S. Ecology Corp.*, 331 NLRB 223 (2000), enf. mem. 26 Fed.Appx. 435 (6th Cir. 2001), than to either *Dayton Newspapers* or *C-E Natco*. In *U.S. Ecology*, the respondent sent letters to striking employees in response to their questions about returning to work, informing them that they could return to work and "for the time being" receive the same wages and benefits as they had received before the strike. Upon the union's subsequent offer to return all employees to work under the conditions stated in the letter, the respondent allowed the employees to return to work.

The Board reversed the judge's finding of unlawful direct dealing, reasoning that the respondent's communications with individual employees were not likely to erode the union's position as bargaining representative. 331 NLRB at 226–227. The Board relied in part on the fact that the respondent did not initiate the communications, but rather sent the letter in response to employee inquiries. *Id.* at 226. The Board agreed with the respondent that the letter merely stated the only employment conditions that the respondent could lawfully offer under the circumstances (because the parties had not bargained to impasse or reached a new agreement).¹² *Id.*

In this case, the employees did not verbally inquire about returning to work, but they did so nonverbally by presenting themselves for work despite having been informed of the lockout. At that time, the Respondent offered employees an opportunity to return to work. Although the Respondent did not expressly confirm that employees would receive prelockout wages and benefits, it in no way suggested that it was offering different wages or benefits. The Respondent's no-strike form simply was silent on that score, and neither the parties nor the judge suggests that the Respondent sought to bypass the Union in this respect. Indeed, far from eroding the Union's position as bargaining representative, the Respondent encouraged employees to consult with the Union before deciding whether to accept the Respondent's

¹² The dissent faults our discussion of *U.S. Ecology* because the Respondent was not legally obligated to end the lockout. We compare this case to *U.S. Ecology* to illustrate that, in response to the employees' showing up for work despite the lockout, the Respondent's actions were reasonable and contained no hint of the gratuitous overreaching engaged in by employers that the Board has found to have engaged in direct dealing.

offer. Under these circumstances, we find no unlawful direct dealing.

Finally, we do not agree with the judge's finding that the Respondent's actions converted the lockout from lawful to unlawful. Rather, we find that the purpose of the lockout at all times remained the Respondent's desire to avoid a potentially catastrophic work stoppage. Further, we reiterate that the judge found no evidence of antiunion animus, and that there was no allegation or evidence of bad-faith bargaining.¹³

Conclusion

In sum, under the circumstances of this case, we disagree with the judge's conclusion that the Respondent engaged in direct dealing and thereby converted its lawful lockout into an unlawful one. Further, we find no other evidence of antiunion animus or unlawful motive. Accordingly, we reverse the judge's finding that the Respondent violated Section 8(a)(1), (3), and (5), and we dismiss the complaint.

ORDER

The complaint is dismissed.

MEMBER WALSH, dissenting.

Undisputed evidence supports the judge's finding that the Respondent bypassed the Union and dealt directly with bargaining unit employees by requiring them to individually sign written no-strike assurances as a condition of working during the Respondent's lockout. Accordingly, the judge properly found that the Respondent's conduct violated Section 8(a)(5) and (1) of the Act. The judge's further finding—that the Respondent's unlawful conduct converted its lockout, lawful at its inception, into an unlawful lockout—is also supported by the record and settled precedent.

I.

The Respondent and the Union had been engaged in ongoing negotiations for a successor contract when their collective-bargaining agreement expired at midnight, Friday, November 12, 2004. The Respondent commenced a lockout of bargaining unit employees upon the contract's expiration. When those employees scheduled for weekend or overtime shifts arrived for work early Saturday morning, November 13, the Respondent presented each of them with its no-strike form and the requirement that they sign the form in order to go to work.

¹³ Although the judge at one point referred to "bad-faith" bargaining in comparing this case to *R. E. Deitz Co.*, supra, 311 NLRB at 1259, regarding the conversion of a lawful lockout to an unlawful one, we note that he earlier found no evidence of bad faith or animus. Therefore, we find it more likely that he intended to refer to his finding of direct dealing or failure to bargain with the Union.

The record clearly establishes, as the judge found, that the Respondent never notified the Union of its intent to present the no-strike form to individual employees. In addition, the Respondent neither showed the form to the Union nor offered to negotiate with it over the language of the form prior to presenting the form directly to unit employees.

“It is well settled that the Act requires an employer to meet and bargain exclusively with the bargaining representative of its employees. An employer who deals directly with its unionized employees or with any representative other than the designated bargaining agent regarding terms and conditions of employment violates Section 8(a)(5) and (1).” *Armored Transport, Inc.*, 339 NLRB 374, 376 (2003); *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678, 683–684 (1944). The vice of direct dealing with employees, which is forbidden by the principle of exclusive representation set forth in Section 9(a) of the Act, is that it undermines a key goal of national labor policy: stability in collective-bargaining relationships.

The exclusivity principle prevents employers from positioning one faction of employees against another, or against the majority representative itself. *Id.* at 683–685. Further, by requiring the employer to look exclusively to the union to represent the employees’ interests, the Act maximizes the potential effectiveness of that representation by allowing the union to speak with one voice. See *Emporium Capwell Co. v. Western Addition Community Organization*, 420 U.S. 50, 70 (1975). This is particularly important when parties are engaged, as here, in negotiations for a collective-bargaining agreement. See *NLRB v. Roll & Hold*, 162 F.3d 513, 520 (7th Cir. 1998) (direct dealing makes it more difficult for the union to present a united front during negotiations).

The Respondent’s total exclusion of the Union from its dealings with employees over the no-strike waiver contravened those established principles. There is no doubt that the no-strike waiver was a mandatory subject of bargaining. See, e.g., *C-E Natco/C-E Invalco*, 272 NLRB 502, 524 (1984) (“[T]he mandatory subjects of collective bargaining include the conditions under which the locked-out unit employees could return to work, and their conditions of employment upon their return and before the execution of a new contract.”).¹ The Respondent’s direct communication with locked-out unit employees, bypassing and excluding the exclusive bargaining representative regarding the conditions under which they could return to work, plainly constitutes unlawful direct dealing. *Georgia Power Co.*, 342 NLRB 192

¹ The no-strike form provided for discipline for noncompliance, but did not specify the penalty or applicable disciplinary procedure.

(2004) (direct dealing found when the employer communicated directly with union-represented employees, to the exclusion of the union, with the aim or effort of establishing or changing terms and conditions of employment or undercutting the union’s role in bargaining), *enfd.* 427 F.3d 1354 (11th Cir. 2005); *Southern California Gas Co.*, 316 NLRB 979, 982 (1995).

The Respondent had ample opportunity to raise the issues related to the no-strike waiver with the Union but failed to do so. The Respondent’s negotiator, Daniel Nowalk, had several telephone conversations with the Union’s chief negotiator, John D. Lewis, on Friday, November 12, with the contract set to expire that night. But Nowalk never mentioned to Lewis the Respondent’s plan to present the no-strike form to individual employees as they reported for work. The Respondent offers no explanation whatsoever for its failure to raise this issue with the Union.

II.

On the afternoon of November 13, after engaging in its first round of direct dealing with unit employees, the Respondent offered the Union two options for returning the locked-out employees to work: the Union could execute a written no-strike assurance on behalf of all bargaining unit members, or the Union could permit individual employees to sign individual no-strike waivers. The Union declined both options.²

The Respondent’s after-the-fact negotiation with the Union did not cure its unlawful conduct, nor did it mark the end of it. Rather, when the Union declined the Respondent’s offer, the Respondent persisted in direct dealing with individual employees. On Monday morning, November 15, when the bulk of the bargaining unit employees arrived for work as scheduled, the Respondent presented them individually with the no-strike form and the requirement they sign it in order to return to work, even though their bargaining representative had rejected such an arrangement. The Respondent never informed the Union of its plan to continue directly presenting individual employees with the no-strike form, contrary to the majority’s assertion.³

When an employer’s bargaining offer is not accepted by the union, the employer may not then directly make

² The Union counteroffered to extend the expired contract—which contained a no-strike, no-lockout provision—while negotiations continued. The Respondent declined.

³ The Respondent’s continued direct dealing with employees was not inadvertent. Despite the Union’s rejection of the Respondent’s offer on November 13, the Respondent held a training meeting the following day for management officials to prepare them to meet employees as they arrived for work on November 15, and to present them with the no-strike form.

the offer to employees. As the Second Circuit Court of Appeals explained in *NLRB v. General Electric Co.*,⁴ direct dealing will be found when the employer has chosen “to deal with the Union through the employees, rather than with the employees through the Union.” That is precisely what the Respondent did here.

The majority’s contention that the Respondent’s conduct did not undermine the Union’s position as exclusive bargaining representative, because its Vice President Phillip Hayes advised employees to talk with their union representatives before signing the no-strike form, is without factual or legal foundation. Hayes gave this “advice” to only about 7 employees—out of a bargaining unit of 150 employees—who worked at the Respondent’s Cosby Farm location. No such message was conveyed at the Respondent’s St. Joseph location—where almost the entire bargaining unit is employed—when the Respondent presented the bulk of the bargaining unit with the no-strike form. In any event, Hayes’ supposed affirmation of the Union’s representative role notably did not include advising the Union of the Respondent’s plan to present the form directly to employees or showing it the form. These were particularly egregious omissions given Hayes’ role as chief spokesperson for the Respondent’s negotiating committee.

There can be little doubt that the Respondent’s direct dealing with employees concerning the no-strike waiver was likely to erode the Union’s position as exclusive representative. See *Central Management Co.*, 314 NLRB 763, 767 (1994); *Allied-Signal, Inc.*, 307 NLRB 752, 753 (1992). The Respondent’s direct solicitation of individual employees at a critical juncture in negotiations—the contract expired, several key bargaining issues unresolved, and the Respondent having chosen to lock out employees—could only serve to drive a wedge between the Union and the employees it represented. Moreover, Hayes contributed to that corrosive effect through the “advice” the record shows he actually gave to employees: he cautioned them that “as part of their consideration in making their decision [regarding the form], that they should consider [whether] it would be appropriate for them to talk with representatives of their union because the union . . . could find fault with any decision that they might make.”

III.

The judge properly likened this case to *C-E Natco/C-E Invalco*⁵ and *Dayton Newspapers*,⁶ both of which in-

involved a lockout. In *C-E Natco/C-E Invalco*, the Board found that the employer unlawfully bargained directly with employees by mailing to their homes individual offers to return to work, which included a no-strike waiver. The employer did not apprise the union of its direct offers to individual employees, and initiated the contact with employees rather than responding to inquiries from them. Those key circumstances parallel those presented in the instant case. In addition, in *C-E Natco/C-E Invalco*, the Board relied on the fact that the individual offers of reinstatement were different from those that the employer had previously offered to the union. 272 NLRB at 506. Similarly, in the present case, the no-strike waiver that the Respondent presented directly to employees did not match the options it offered to the Union. Even the individual-employee option that the Respondent belatedly presented to the Union was materially different from what it presented to the employees: only the latter contained a penalty for noncompliance.

The key facts in *Dayton Newspapers* are likewise similar to those presented here. In that case, the employer unlawfully bypassed the union and dealt directly with locked-out employees by initiating individual meetings with each employee and requiring an individual no-strike commitment as a condition for returning to work. The employer did not inform the union of its intent to meet with employees individually, did not discuss the relevant issues with the union beforehand, and did not include the union in the meetings.⁷ The majority does not dispute those similarities to the instant case. Rather, the majority distinguishes *Dayton Newspapers* because there, (1) the aim of the employer’s direct dealing was a broader no-strike waiver than here, and (2) the employer committed several unfair labor practices in addition to direct dealing. That *Dayton Newspapers* involved more egregious conduct than the instant case is a distinction, but one that does not diminish the essence of the direct-dealing violation in both cases: the employer’s circumvention of the union, at a critical time, eroding the union’s position as exclusive bargaining representative and thereby undermining the collective-bargaining process. See *Medo Photo Supply Corp. v. NLRB*, supra, 321 U.S. at 684, and discussion above at pp. 2–3.

By contrast, the majority’s attempt to analogize this case to *U.S. Ecology Corp.*,⁸ is wholly unpersuasive. In that case, the employer sent letters to striking workers in response to their questions concerning how they could return to work. The letters answered the strikers’ inquir-

⁴ 418 F.2d 736, 759 (2d Cir. 1969), cert. denied 397 U.S. 965 (1970).

⁵ Supra, 272 NLRB 502.

⁶ 339 NLRB 650 (2003), enfd. in relevant part 402 F.3d 651 (6th Cir. 2005).

⁷ See 402 F.3d at 661.

⁸ 331 NLRB 223 (2000), enfd. mem. 26 Fed.Appx. 435 (6th Cir. 2001).

ies, stating that, “for the time being” they could return to work at the prestrike wage and benefit levels. Although the employer did not send the letter to the union, the Board found the employer’s conduct did not constitute unlawful direct dealing with employees. The Board emphasized that the employer “did not initiate these communications, but instead sent its letter in response to employees’ questions.” 331 NLRB at 226. The Board also observed that the employer could not lawfully offer the strikers any terms other than those that prevailed before the strike, because the parties had not bargained to impasse or reached a new contract. The Board concluded:

We do not believe that, merely by stating (in response to employee inquiries) the only employment conditions it could lawfully offer under the circumstances, the Respondent can reasonably be found to have “eroded the Union’s position as exclusive representative.” *Id.*

The differences between that case and the one before us are self-evident: in the present case, there were *no* employee inquiries; the Respondent plainly initiated the direct contact with employees, unlike the employer in *U.S. Ecology*. In addition, here, the Respondent was not merely informing the employees of the terms and conditions of employment that it was legally obligated to offer them. The Respondent had no legal obligation to end the lockout or invite individual offers to return to work. Indeed, the no-strike waiver that the Respondent presented to individual employees was something entirely new and, of course, something that the Respondent had not communicated to the Union.

The majority’s contention that the Respondent’s employees “nonverbally” made inquiries, comparable to those in *U.S. Ecology*, by arriving for their scheduled work shift, is meritless. The employees here were not on strike, but unexpectedly locked out. To suggest that they initiated a dialogue merely by reporting for work is simply wrong.

IV.

The judge’s further finding, that the Respondent’s unlawful direct dealing converted its lockout, lawful at its inception, into an unlawful lockout, is supported by both the evidence and applicable law. Under *American Ship Building Co. v. NLRB*, 380 U.S. 300 (1965), for a lockout to be permissible it must be for the “sole purpose of bringing economic pressure to bear in support of [the employer’s] legitimate bargaining position,” and not brought with an unlawful motive. *Id.* at 318, 313. In addition, once the employer has begun a lockout, any subsequent employer action inconsistent with an initially lawful lockout converts the lockout into unlawful con-

duct. *R. E. Dietz Co.*, 311 NLRB 1259, 1264, 1267 (1993) (lockout became unlawful when employer illegally bargained to impasse over nonmandatory subjects of bargaining). Accord: *Ancor Concepts, Inc.*, 323 NLRB 742, 744–745 (1997), enf. denied 166 F.3d 55 (2d Cir. 1999); *Field Bridge Associates*, 306 NLRB 322, 334 (1992), enf. sub nom. *Service Employees Local 32B-32J, v. NLRB*, 982 F.2d 845 (2d Cir. 1993), cert. denied 509 U.S. 904 (1993).

In the present case, the Respondent’s direct dealing with its employees over the no-strike waiver rendered the lockout unlawful, for it then depended on the employees’ willingness to abandon their protected right to strike. Simply stated, if employees signed the no-strike form, they would not have been locked out, regardless of the Respondent’s desire to support its legitimate bargaining position. Ultimately, then, the Respondent was locking out employees because of their refusal to sign the no-strike form, the product of the Respondent’s unlawful direct dealing. Accordingly, the Respondent converted the lockout from a lawful effort to support its legitimate bargaining position to an unlawful effort to compel employees to accept the respondent’s unlawful direct dealing. *Allen Storage & Moving Co.*, 342 NLRB 501 (2004) (lockout unlawful because of requirement that employees accept employer’s unlawful conduct in order to end the lockout); *Teamsters Local 639 v. NLRB*, 924 F.2d 1078, 1085 (D.C. Cir. 1991) (lockout to compel acceptance of unfair labor practice unlawful).

V.

The majority’s unwarranted reversal of the judge’s direct dealing finding is yet another example of my colleagues’ “simply refus[ing] to face up to the key facts” presented. *AG Communication Systems Corp.*, 350 NLRB 168, 177 (2007) (Member Walsh, dissenting). The majority’s further refusal to consider the effect of that unfair labor practice on the Respondent’s use of a lockout during negotiations cannot be reconciled with the Board’s fundamental duty to oversee a fair process for collective bargaining. See *H. K. Porter Co. v. NLRB*, 397 U.S. 99, 108 (1970). I dissent.

Susan Wade-Wilhoit, Esq., for the General Counsel.

Anthony B. Byergo, Esq., of Kansas City, Missouri, for the Respondent.

Thomas Marshall, Esq., of Kansas City, Kansas, for the Charging Party.

DECISION

STATEMENT OF THE CASE

GREGORY Z. MEYERSON, Administrative Law Judge. Pursuant to notice, I heard this case in Overland Park, Kansas, on August 16 and 17, 2005. United Food and Commercial Work-

ers, District Union Local Two (the Union or the Charging Party) filed an original and an amended unfair labor practice charge in this case on November 19, 2004, and January 25, 2005, respectively. Based on that charge as amended, The Regional Director for Region 17 of the National Labor Relations Board (the Board) issued a complaint on January 28, 2005. The complaint alleges that Boehringer Ingelheim Vetmedica, Inc. (the Respondent or the Employer) violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act). The Respondent filed a timely answer to the complaint denying the commission of the alleged unfair labor practices.¹

All parties appeared at the hearing, and I provided them with the full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, and to argue orally and file briefs. Based upon the record, my consideration of the briefs filed by counsel for the General Counsel, counsel for the Respondent, and counsel for the Union, and my observation of the demeanor of the witnesses, I now make the following.²

FINDINGS OF FACT

I. JURISDICTION

The complaint alleges, the answer admits, and I find that the Respondent is a corporation with an office and place of business in St. Joseph, Missouri, (the St. Joseph facility), and a farm in Cosby, Missouri, the Cosby farm, and has been engaged in the manufacture and wholesale distribution of veterinary pharmaceuticals. Further, I find that during the 12-month period ending November 30, 2004, the Respondent, in the course and conduct of its business operations, sold and shipped from its St. Joseph facility goods valued in excess of \$50,000 directly to points located outside the State of Missouri.

Accordingly, I conclude that the Respondent is now, and at all times material herein has been, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

The complaint alleges, the answer admits, and I find that at all times material herein, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

III. ALLEGED UNFAIR LABOR PRACTICES

A. *The Dispute*

The Employer and the Union have had a long history of collective-bargaining. Unfortunately, they were not able to reach agreement on the terms of a successor collective-bargaining agreement prior to the expiration of their contract on midnight

¹ All pleadings reflect the complaint and answer as those documents were finally amended.

² The credibility resolutions made in this decision are based on a review of the testimonial record and exhibits, with consideration given for reasonable probability and the demeanor of the witnesses. See *NLRB v. Walton Mfg. Co.* 369 U.S. 404, 408 (1962). Where witnesses have testified in contradiction to the findings herein, I have discredited their testimony, as either being in conflict with credited documentary or testimonial evidence, or because it was inherently incredible and unworthy of belief.

November 12, 2004.³ Shortly before the expiration of the contract, the employees in the bargaining unit rejected the Employer's last offer and authorized a strike.

The General Counsel contends that at midnight on that date, the Respondent engaged in a "lockout" of its bargaining unit employees. According to counsel for the General Counsel, this lockout occurred even though the Union had not called a strike, and at a time when the bargaining unit employees were willing to continue working. The General Counsel is not alleging that this lockout was a per se violation of the Act.⁴ Rather, counsel for the General Counsel alleges that the Respondent violated the Act when, beginning on November 13, it required that any bargaining unit employee who wished to continue working must first sign a written "no-strike assurance." Allegedly, such conduct constituted unlawful interrogation and interfered with the Section 7 activities of its employees by locking them out for refusing to sign the no-strike assurance. This conduct is alleged as a violation of Section 8(a)(1) of the Act.

Further, the complaint alleges that the Respondent submitted the no-strike form to its employees without first notifying the Union of its desire and intent to offer the form to employees, and without offering to negotiate with the Union over the substance of the form. The General Counsel contends that the Respondent's actions constituted direct dealing with employees and a refusal to bargain with the Union in violation of Section 8(a)(5) of the Act.

Finally, the General Counsel alleges that the Respondent violated Section 8(a)(3) and (1) of the Act from November 13, 2004, when the lockout became unlawful because of the requirement that employees sign the no-strike form, until November 22, 2004, when employees were allowed to return to work following the ratification of a successor collective-bargaining agreement. The General Counsel seeks a "make whole remedy" for the employees adversely affected during this period of time.

Counsel for the Charging Party submitted a posthearing brief in which he "incorporates and adopts by this reference the arguments, authorities and brief of counsel for the General Counsel." However, in that same brief, counsel for the Charging Party takes a position that is specifically rejected by the General Counsel. According to counsel for the Charging Party, the Respondent's lockout of bargaining unit employees was unlawful from its inception, because the Respondent never notified the Union of the reasons for the lockout, or what the Union could do to return the employees to work. As noted above, the General Counsel does not contend that the lockout was a per se violation of the Act, and only became unlawful with the Respondent's requirement that bargaining unit employees sign the no-strike form in order to continue working.

It is the position of counsel for the Respondent that the actions of the Respondent in ceasing operations on midnight No-

³ All dates are in 2004, unless otherwise indicated.

⁴ At the hearing, in response to a question from me, counsel for the General Counsel articulated her theory that the Respondent's lockout was not a per se violation of the Act. While counsel's posthearing brief is silent as to issue, it appears implicit from the other arguments she makes that the General Counsel's theory of the case continues to be that the lockout was not unlawful from its inception.

ember 12 were in anticipation of a “threatened or eminent strike” called by the Union among the employees in the bargaining unit. Counsel contends that this was nothing more than a “defensive lockout,” which the Board and the courts have long held to constitute a legitimate form of economic pressure. According to counsel, in such circumstances, where the Union had not yet called a strike, the Respondent was not required to permit employees to return to work, even if they provided an unconditional offer not to strike.

Concomitantly, counsel argues that under such a scenario, where the Union has not yet called a strike, but the Employer has locked out the employees, allowing those employees to return upon signing a no-strike form can not be a violation of the Act. He equates this action with the requirement that striking employees, who make an unconditional offer to return to work, foregoing their right to strike, generally must be reinstated, absent a lockout.

Further, counsel for the Respondent argues that the use by employers of a form for employees upon which to indicate their unconditional offers to return to work is a well accepted device to facilitate the employees’ exercise of their Section 7 right to abandon the strike, or to refrain from doing so. He contends that as such, the no-strike form used by the Respondent constitutes neither unlawful interrogation nor direct dealing with employees. Counsel points out that the form in question does not require that employees cease supporting the Union, but merely agree that they are willing to return to work and commit to remain during the course of the current negotiations. In counsel’s view, advising employees that they can return to work, assuming they sign the no-strike form, merely constitutes advising them of their legal rights under the Act, and can not be construed as either direct dealing or a refusal to negotiate with the Union.

B. The Undisputed Facts

With the exception of some minor discrepancies, the facts in this case are undisputed. The Employer and the Union have had a collective-bargaining relationship for over 20 years. Currently, the Union represents the Respondent’s employees in the following unit, which the parties all agree constitutes an appropriate unit for the purposes of collective bargaining:

All full-time and regular part-time production, maintenance, and warehousing employees, employed by Boehringer Ingelheim Vetmedica Inc., at its facility located at 2621 N. Belt Highway, St. Joseph, Missouri and at its farm facility located in Cosby, Missouri but EXCLUDING guards and supervisors as defined in the Act, and all other employees.

There are approximately 150 employees in the unit, which I concur is a unit appropriate for collective-bargaining purposes.

Phillip Wayne Hayes testified on behalf of the Respondent. Dr. Hayes is the Respondent’s vice president of biological research and development and a doctor of veterinary medicine. His principal duties are to oversee the research and development of new vaccines and pharmaceuticals for the Respondent. He also served as the chief spokesperson for the Respondent’s negotiating committee during the recent collective-bargaining negotiations with the Union.

Dr. Hayes testified at length about the nature of the Respondent’s business. In summary, he testified that the Respondent manufactures vaccines and pharmaceuticals for use in protecting and treating the health of animals. Animals treated with the Respondent’s vaccines and pharmaceuticals include dogs, cats, horses, as well as food producing animals, such as beef cattle, dairy cattle, sheep, and pigs. In the St. Joseph, Missouri area the Respondent employs approximately 425 employees in the manufacturing process at three locations known as the campus, the farm, and the warehouse.

While it is not necessary for the purposes to this decision to go into great detail, Dr. Hayes testified that the manufacture of vaccines is essentially a “fermentation process.” According to Hayes, it is a delicate process, which if interrupted or interfered with can have serious consequences, including a contamination of the vaccine resulting in its complete loss. The Respondent has a fiduciary and regulatory obligation to produce products in a certain way. The consequences of contaminated vaccine could be very significant, which in the case of food producing animals could potentially jeopardize public health. The products manufactured at the St. Joseph sites are exported throughout the Americas, to Europe, and Asia. Also, a complete destruction of a “batch” of product could result in a financial loss in the tens of thousands to a few hundred thousand dollars. At any one time, the Employer may have as many as 10 different “batches” of vaccine in production, for a combined value of product in production in excess of \$1 million.

According to Dr. Hayes, it would be a rather simple matter for a disgruntled employee to engage in sabotage and contaminate the product during the manufacturing process. He characterized such a scenario as “regrettable” and “potentially catastrophic.” Similarly, merely failing to follow regulated protocols in the monitoring of animals under experimental treatment could cause a multimonth experiment to be invalidated. Implicit in his testimony was the Respondent’s concern that during a period of labor unrest, where the employees in the bargaining unit had authorized a strike, an unhappy employee might seek to cause financial injury to the Employer by tampering with the product or failing to conduct the monitoring protocols. Even an inability to adequately staff the Respondent’s facilities because of a labor dispute could have similar serious consequences. Hayes testified that under these circumstances, he wanted employees to make an informed decision about whether to report for work following the expiration of the contract at midnight on November 12. According to Hayes, it was with these concerns in mind that employees arriving for work after midnight were asked to sign the no-strike assurance form.

The Union and the Employer had been meeting and negotiating for several weeks prior to the expiration of the contract. Despite considerable efforts, the parties remained divided on several significant issues, principally the use of seniority in promotions, transfers, subcontracting, and work jurisdiction, and the issue of supervisors and nonunit technical employees performing bargaining unit work. As the contract expiration date approached, there was no sign of potential compromise.⁵

⁵ It should be noted that the complaint does not allege an impasse in bargaining, and I specifically make no finding that the parties were

The chief negotiator on behalf of the Union, John D. Lewis, union representative, testified that as the negotiations approached the expiration of the contract, he was of the view that the parties “weren’t getting anywhere and we were not going to get there.” The Respondent’s director of human resources and public relations, and a member of management’s bargaining committee, Daniel Nowalk, testified that on November 9, Lewis asked for the Respondent’s last, best offer so that it could be taken to the bargaining unit members for a vote. Nowalk testified that at this point, as well as throughout the course of negotiations, Lewis explained the procedures that the Union was required to go through prior to calling a strike.

Lewis credibly testified that he repeatedly explained to management’s representatives the mechanics of the ratification/strike process. He explained that the Union would present the Employer’s last, best offer to the members. In order for the contract offer to be ratified, the bargaining unit members voting would have to accept the offer by a vote of 50 percent, plus one. In the event that the offer was rejected, the membership would immediately vote on a strike authorization resolution. In order to authorize the calling of a strike, the vote to authorize a work stoppage required a two-third’s majority of the votes in favor of the resolution. Lewis explained to Nowalk and other management representatives that even following such a resolution, a strike could not be conducted until the International Union had given its approval, and the Local Union president, Tommy Price, had called the membership out on strike. According to Nowalk, in explaining the process, Lewis indicated that even with a strike authorization vote, “the trigger wouldn’t be pulled right away.” However, Nowalk was apparently dissatisfied with Lewis’ explanation, as Lewis never indicated when “the trigger” might be pulled.

On November 11, the Respondent presented the Union with what it characterized as its “last, best, and final offer.” At approximately the same time, according to Dr. Hayes, he asked Lewis whether the Union had any proposals, suggestions, or could offer anything else, which might help bridge the gap between the parties. Lewis responded, “Nothing whatsoever.” Finally, it should be noted that throughout this period of time, neither the Union nor the Employer had expressed any interest in extending the contract, during which the parties could continue to negotiate.

The Union held a meeting for the bargaining unit employees on Friday, November 12, at about 4:30 p.m. The members voted to reject the Employer’s “final” offer, and immediately voted to authorize a strike. Following the tabulation of the votes, Lewis called Nowalk and informed him of the outcome of the votes. In response to the news that the members had voted to authorize a strike, Nowalk advised that the Employer was going to cease work as of midnight that night (the expiration of the contract). There then ensued some back and forth debate between Nowalk and Lewis, with Lewis taking the position that the Respondent was locking out the employees and Nowalk arguing that the employees were on strike. Lewis insisting that the employees were not on strike, asked whether the

legally at impasse. The issues before me do not require that I make a finding as to whether such a condition existed.

Employer would agree to extend the contract, and continue to negotiate the following week. Nowalk indicated that the Employer would not agree to extend the contract and was not in a position at that time to schedule further negotiations.

There were several additional telephone conversations that evening between Nowalk and Lewis and between Nowalk and Price. However, the substance of the conversations was the same as in the earlier conversation. Nowalk took the position that the employees were on strike and Lewis and Price contended that the employees were being locked out. The union representatives argued that no strike had been called and could not be until the International Union gave its approval and Price called the employees out on strike. However, neither Lewis nor Price gave Nowalk any assurance of how long it would be before the employees were called out, with Price saying that he would tell Nowalk “if and when there was a strike.”

According to Nowalk’s credible testimony, the following day, Saturday, November 13, he had additional telephone conversations with both Lewis and Price, during which he gave the Union two options for returning the employees to work. The Employer would allow its employees to return to work in the event that either the Union gave a written no-strike assurance on behalf of the bargaining unit members or, alternatively, employees who wished to return would first sign an individual no-strike agreement. Nowalk testified that Price’s only response was to offer to extend the expired contract, which the Employer was not willing to do.⁶

The following Monday, November 15, as bargaining unit employees reported for work on their regular shifts, the Respondent’s managers presented them with a form to sign, before the employees were to be permitted to work. A small number of employees, who had previously volunteered for overtime or were otherwise scheduled to work over the weekend on Saturday and Sunday, November 13 and 14, were also advised of the Employer’s requirement that they sign the form if they wished to work. The form (GC Exh. 2), which required a signature, printed name, and date, reads as follows:

I understand that my collective bargaining agent, Local 2 of the United Food and Commercial Workers, has authorized a strike and/or is currently on strike in support of their demands in connection with the current negotiations for a new collective-bargaining agreement. I freely and voluntarily choose NOT to participate in this strike in support of the union’s contract demands.

Therefore, I give Boehringer Ingelheim Vetmedica, Inc., my unconditional offer to return to work. This means that I will not strike or otherwise withhold services or fail to perform my work responsibilities to the fullest of my abilities in support of the union’s demands in connection with the current negotiations for a new collective-bargaining agreement. I understand that if I violate this unconditional offer to return to work, I may be subject to discipline.

It is the position of the Respondent that because of the sensi-

⁶ The expired contract contained a no-strike, no-lockout provision. (GC Exh. 4.)

tive nature of its research and development and production process, an unpredictable loss of labor or sabotage could result in huge financial losses, adverse regulatory consequences, and threats to public and animal health. The Respondent contends that since the Union refused to offer a no-strike pledge or even a promise not to strike for a particular period of time, the Respondent had no recourse but to offer individual employees an opportunity to make such a promise, in return for which they would be allowed to return to work. The Respondent acknowledges that it did not notify the Union of its intent to use the no-strike form, nor show it to the Union, nor offer to negotiate over the language of the form, prior to its use. However, as the Respondent points out, by Sunday, November, 14, the Union was familiar with the form. The Union called a meeting of its members on that date, at which Lewis told employees to report for work as normal on Monday, November 15, but not to sign the no-strike form, which form allegedly required that they “give up their union rights.”

For some reason, unknown to the undersigned, when testifying, Lewis seemed reluctant to acknowledge the obvious, that he had seen a copy of the form by the Sunday meeting. In any event, a number of employee witnesses credibly testified so.

It is undisputed that the employees in the bargaining unit who reported to work following the expiration of the old contract were given the opportunity to sign the form. However, none of the regular employees in the bargaining unit did so, and were, therefore, sent home without being permitted to perform their normal work duties.⁷ The parties so stipulated at the hearing.

As employees reported for work following the expiration of the contract, they were met by various supervisors and agents of the Respondent who informed them directly that unless they signed the form and agreed not to participate in a strike or withhold their services during the current contract negotiations, they would not be permitted to work. For the most part, these conversations appear to have occurred in a business like, non-confrontational atmosphere. Significantly, there is no evidence that any representative of the Respondent questioned employees as to whether or not they supported the Union’s bargaining position, how they felt about a possible strike, nor engaged in any substantive discussion of the terms of the Respondent’s final contract proposal. The employees uniformly declined to sign the no-strike form, were refused admission to the facilities, and peacefully left the property.

Negotiations resumed on Wednesday, November 17, and a tentative agreement was reached the following day. The Union then held a new ratification vote on Saturday, November 20, where the tentative agreement was ratified.⁸ Employees returned to work on their regular schedules starting Monday, November 22.

⁷ There is some question as to whether any of the probationary employees signed the no-strike form. In any event, Nowalk’s testimony was clear that unless probationary employees signed the form and made the requested promise, they were not returned to work. Thus, the probationary employees were treated in the exact same manner as the regular employees.

⁸ The new collective-bargaining agreement contains a no-strike, no-lockout provision. (GC Exh. 3.)

C. Legal Analysis and Conclusions

For the most part, the parties agree as to the background facts in this case. However, they strongly disagree as to the law of the case. They also seem to have some semantic disagreements, the resolution of which, I believe is fairly obvious. The Respondent’s position from the time the previous contract expired until the time the employees returned to work under the terms of the new contract was that the employees were “on strike.” The Respondent never formally abandons this position, even though counsel for the Respondent at the hearing and in his posthearing brief seems to concede the point that a strike was never called by the Union. In any event, let me clean up any lingering confusion. The record evidence is clear. The Union did not call a strike and the employees in the bargaining unit were not on strike. Throughout the period of time in question, the employees in the bargaining unit remained ready and willing to report for work, and attempted to do so. They were refused entry into the Respondent’s facilities. There was no “strike” or work stoppage by the Respondent’s employees in this case.

The employees were prevented from going to work by the Respondent. This evidence is also clear. In refusing to permit its employees to work, the Respondent was engaged in a “lockout” of its employees. This lockout began on November 13 and continued throughout the period in question, because the Respondent insisted that its employees sign a no-strike agreement prior to being permitted to work, which they refused to do.

Now, as to the legal issues, historically, the Board has recognized the concept of a “defensive lockout.” However, originally, such a lockout was found to be lawful only if its purpose was the avoidance of “unusual operative problems or economic losses over and beyond the ordinary loss of business normally attendant upon any strike.” *American Brake Shoe Co.*, 116 NLRB 820, 831 (1956), vacated 244 F.2d 489 (7th Cir. 1957). Thus, lockouts in anticipation of a threatened strike, intended to avoid severe hardships, beyond what would normally occur in a strike, were found to be lawful. See *Stokely-Van Camp, Inc.*, 186 NLRB 440 (1970) (during harvest season, vegetable canner locked out employees while bargaining continued in order to avoid loss from anticipated strike); *Botsford Concrete Co.*, 185 NLRB 804 (1970) (lockout at ready-mix concrete plants following labor disputes at construction sites which reduced demand for delivery of concrete).

In any event, the concept of a lawful lockout was considerably expanded by the Supreme Court in *American Ship Building Co. v. NLRB*, 380 U.S. 300 (1965). In that case, the Court legitimated the “offensive lockout” as a device in the collective-bargaining process. Relying on economic justification alone, the Court rejected the Board’s per se approach to offensive lockouts. The employer’s action in locking out its employees was deemed lawful even though it was merely intended to resist the demands made by the union in the negotiations and to secure modification of those demands. Further, the Court held that absent any evidence of union animus by the employer, its intention to resist the union’s contract demands was not inconsistent with its employees’ collective-bargaining rights. The Court rejected the argument that a lockout interferes with the right of employees to strike. It held that “there is nothing in the

statute which would imply that the right to strike carries with it the right exclusively to determine the timing and duration of all work stoppages.” Id at 310. Where there existed no evidence that the employer acted for a proscribed purpose, but, rather, the employer’s intention in locking out its employees “is merely to bring about a settlement of a labor dispute on favorable terms, no violation of Section 8(a)(3) is shown.” Id. at 313.

Following *American Ship Building Co.*, supra, the lines between an “offensive” and “defensive” lockout have blurred, with the Board and the courts concerned primarily with whether the employer’s action in locking out its employees demonstrated animus and was in support of an unlawful purpose. See *Central Illinois Public Service Co.*, 326 NLRB 928 (1998), request for review denied sub nom. *Electrical Workers Local 702 v. NLRB*, 215 F.3d 11 (D.C. Cir. 2000), cert. denied 531 U.S. 1051 (2000) (employer did not act unlawfully when it locked out its employees in response to the union’s “inside game” tactics, as well as to pressure the union to reach agreement). See also *CII Carbon*, 331 NLRB 1157 (2000) (employer had a legitimate and substantial business justification for a lockout because of suspected employee sabotage).

In the matter before me, there is no evidence of any union animus on the part of the Respondent. To the contrary, for over 20 years the Employer and the Union have apparently had an amicable and successful collective-bargaining relationship. Unfortunately, they were unable to reach agreement on the terms of a new contract as of the time the old contract expired. However, there has been no allegation or any evidence that the Employer was in some way dilatory in its collective-bargaining negotiations. In general, no claim has been made of bad faith or surface bargaining by the Employer, nor any suggestion that the Employer was not interested in reaching agreement on the terms of a successor contract.

On the evening of November 12, with John Lewis’ call to Daniel Nowalk, the Respondent received notice that its employees had rejected the Respondent’s final offer and had authorized a strike. However, the Respondent also knew that a strike was not about to immediately commence. Lewis had repeatedly explained to the Respondent’s managers the Union’s process for going out on strike. In subsequent telephone conversations with Lewis and Tommy Price, Nowalk attempted to get a commitment from the Union that they would not strike for a particular period of time, but the Union offered no such assurance. Instead, the Union offered to extend the terms of the expired contract. Not being successful in getting the Respondent to extend the contract terms while negotiations continued, the Union preferred to leave the issue of when it might strike “up in the air.” This level of uncertainty benefited the Union and would perhaps contribute to a successful adoption of its collective-bargaining proposals in a new contract. It appears that this was part of the Unions negotiating strategy.

The Respondent attempted to “level the playing field” and to shift the economic leverage back in its favor by locking out its employees. This is precisely what the Supreme Court has said that employers have the right to do under *American Ship Building Co.*, supra and its progeny. Whether the Respondent’s

lockout is viewed as “defensive”⁹ or “offensive,” it is obvious to me that its actions were intended primarily to bring about a settlement of its labor dispute with the Union on terms favorable to the Respondent. Such conduct is not violative of the Act. Id at 313. Thus, I conclude that the lockout called by the Respondent’s agent Nowalk to begin at midnight on November 12 was not a per se violation of the Act. It constituted a lawful exercise of the Respondent’s ability to control the production of its products. However, the more difficult question which remains is whether the Respondent’s subsequent actions caused its lockout to become unlawful.

Both counsel for the General Counsel and counsel for the Charging Party argue that the Respondent had a legal obligation at the time that it called the lockout to inform the Union as to the reasons for the lockout and what it could do to end the lockout and return the employees to their jobs. In support of this position they cite *Dayton Newspapers*, 339 NLRB 650 (2003), and *Eads Transfer*, 304 NLRB 711 (1991). However, I find the argument that the Union was unaware of why the lockout had been called or what it could do to end the lockout somewhat disingenuous.

As of the evening of November 12, the members of the bargaining unit had voted to authorize a strike. Lewis immediately called Nowalk to inform him of this fact. Previously, Lewis had explained to Nowalk the steps required before a strike could be called by the Union, and had told Nowalk that even with a strike authorization vote by the employees, “the trigger” would not be pulled immediately. Lewis certainly knew that this issue of timing was of particular concern to the Respondent, and he undoubtedly left the matter intentionally vague. He did so in order to exert the maximum amount of economic pressure he could upon the Respondent. There was certainly nothing unlawful about doing so. However, the Union understood that this uncertainty put the Respondent’s negotiators in a difficult position.

As of the time of the initial telephone conversation between Lewis and Nowalk following the strike authorization vote, it does not appear that Nowalk specifically told Lewis that a lockout could be avoided with a commitment from the Union not to strike for a certain period of time. However, I have no doubt that Lewis, as an experienced negotiator, understood this to be the case. He had previously discussed these matters with the Respondent’s negotiators and knew that the issue of when “the trigger” could be pulled and a strike actually commence was of great concern to the Respondent. Further, as early as the next day, November 13, in conversations with both Lewis and Price, Nowalk explained that there were two options for returning the employees to work. He advised that either the Union must provide a written no-strike assurance or, alternately, individual employees could provide their individual agreement not to strike during a period of continued contract negotiations.

⁹ Although not essential to a resolution of this issue, an argument could certainly be made to justify the Respondent’s lockout as “defensive” in nature. The sensitivity of the production process for pharmaceuticals is such that the Respondent is susceptible to very significant economic loss or even to a revocation of its right to produce its product unless it can with some degree of certainty control the availability of labor to its facilities.

It is important to recall that these conversations on November 13 occurred before most of the bargaining unit employees reported to work on their regular shifts on Monday, November 15. At most only a handful of employees would have been scheduled for work between the time the Respondent called for the lockout to begin on November 12 at midnight and the telephone conversations on November 13 between Nowalk and Price or Lewis.¹⁰

Lewis and Price were experienced union negotiators. There was no mystery here. Both men understood that what most concerned the Employer's negotiators was not knowing whether and when a strike would commence. The lockout was intended to bring some certainty to the Respondent's production facilities. It would be naive to assume that the union negotiators did not know how to end the lockout. It was implicit in the Respondent's call for the lockout that it could be ended with an understanding that there would be no strike for a certain period of time. However, the Union was unwilling to give such an assurance except in the context of extending the expired contract, which the Respondent refused to do. Further, as of the time of their conversations on November 13, Nowalk made it explicitly clear to Price and Lewis what it would take to end the lockout. Therefore, I conclude that the Respondent's demands in connection with the lockout were sufficiently understood by the union representatives for them to make an intelligent determination as to whether to accede to those demands so that the employees might return to work. *Dayton Newspapers*, supra; *Eads Transfer*, supra.

Having concluded that the Respondent's lockout was not unlawful from inception and did not become unlawful by reason of any uncertainty about what demands the Respondent was making, I now will address the issue of the requirement that employees sign the no-strike form prior to being allowed to work. Regarding the no-strike form, I part company with the Respondent's counsel and agree with counsel for the General Counsel and counsel for the Union that the submission of this form to the employees constituted direct dealing with those employees and sought a waiver of their Section 7 rights. It caused the lockout to become unlawful with the first presentation of the form to employees in the early morning hours of November 13.

The Respondent's admitted supervisors and/or agents met employees at the Respondent's respective facilities as they began reporting for work on November 13 and the days thereafter. Employees were on those occasions shown and/or given the no-strike form to sign and were informed that unless they signed the form they would not be permitted to work. A common sense reading of that form would advise employees that upon executing the form they would be waiving their right to strike or engage in work stoppages during the current contract negotiations, and would be subjecting themselves to possible

¹⁰ Specifically, it appears that at just prior to midnight on November 12, employee Ron Prawitz was turned away from the Respondent's St. Joseph's facility. Also, at about 5 a.m. on November 13, at the Respondent's Cosby farm, employees Michael Bonnett, Jesse Curtis, Larry Pelcher, and Pat Poteroff were offered the opportunity to sign the no-strike form. They refused to do so and were not permitted to work. This was apparently the first use of the form by the Respondent.

discipline if they engaged in such work stoppages. (GC Exh. 2.) However, the Board has held that in certain circumstances requiring employees to agree to such conditions as a prerequisite to being allowed to work is a violation of the Act.

In *Dayton Newspapers*, 339 NLRB 650 (2003), the Board held that seeking to obtain such no-strike assurances individually from employees in exchange for allowing them to return to work constitutes direct dealing in violation of Section 8(a)(1) and (5) of the Act. In that case, following a one day strike by its employees and an unconditional offer by the Union to return to work, the employer locked out its employees. The employer then called employees and asked them to come in for individual meetings. It was during those meetings that the employees were told that they could return to work only if they promised to work without interruption, including agreeing not to cross future picket lines. The Board concluded that these individual meetings were unlawful direct dealing, and went "far beyond merely communicating an offer of reinstatement." The Board found that rather than seriously discussing this issue with the Union, the employer took the matter directly to its employees, and sought a "broad, open-ended waiver of their Section 7 right to support future union strikes or picketing." It was the Board's conclusion that such conduct by an employer "clearly erodes the union's position as exclusive representative." *Id.* at 653.

Additionally, the Board's decision in *C-E Natco I*, 272 NLRB 502 (1984), supports a finding of a violation. In that case, employees voted to reject their employer's final contract proposal and gave the union the authority to call a strike if necessary. The employees reported for work, but were locked out by the employer. Subsequently, the employer mailed a "Letter of Understanding" to each employee's home. In a memorandum accompanying the "Letter," the employer explained that it was tendering employees' offers of employment. The union advised the employees not to sign the Letters. The Board concluded that by soliciting employees to sign the Letters, the employer violated Section 8(a)(1) and (5) of the Act, and by conditioning employment on the signing of the Letters, the employer unlawfully "invaded" the employees' right to union representation in violation of Section 8(a)(3) of the Act. *Id.* at 505. Further, the Board adopted the findings of the administrative law judge who concluded that the conditions under which the locked out unit employees could return to work were mandatory subjects of bargaining, and, thus, the employer was under a duty to bargain with the union about those conditions, and not with the individual employees. The judge, with whom the Board agreed, left no doubt that bargaining with the individual employees violated Section 8(a)(1) and (5) of the Act, and that seeking individual agreements constituted an "invasion" of the employees' statutory right to union representation in violation of Section 8(a)(1) and (3) of the Act. *Id.* at 524.

I am of the view that the Board's holding in *Dayton*, supra and *C-E Natco I*, supra, are dispositive of the issues before me. The facts in *C-E Natco I* are remarkably similar to those in the matter at hand. The Respondent before me submitted the no-strike forms to locked out employees before the Union had seen the forms or was even aware that employees were going to be asked to sign a promise not to engage in a work stoppage during the current negotiations. In taking the issue of the condi-

tions under which employees would continue to work directly to the employees, rather than to their collective-bargaining representative, the Respondent was engaging in direct dealing with employees and bypassing the Union in violation of Section 8(a)(1) and (5) of the Act.

Further, by the Respondent's conduct in soliciting a promise from individual employees not to engage in a work stoppage in support of the Union's contract demands; the Respondent was seeking the employees' waiver of their Section 7 right to support the Union's actions. This promise was being sought at a time when the Union was not on strike and the employees were not withholding their services. This, I believe, significantly distinguishes this case from others where already striking employees are asked for an unconditional promise to return to work prior to being permitted to do so. Certainly, the Respondent's actions in locking out its employees for refusing to sign the no-strike form would have a chilling effect upon the willingness of those employees to engage in union activity in support of the Union's contract proposals. As such, the Respondent has also violated Section 8(a)(1) and (3) of the Act.¹¹

In an effort to clarify its position as to the appropriate remedy in the *C-E Natco I* case, the Board revisited the issue in *C-E Natco II*, 282 NLRB 314 (1986). In this second case, the Board clarified that for the violation involved, a make-whole remedy was warranted. The Board held that as a result of the Employer's direct dealing, those employees who insisted on their right to union representation on the matter of resuming work suffered a loss of pay. Therefore, the Board concluded that a make-whole remedy for the employees was required to "undo the effects of the Respondent's unlawful conduct." Id.

Let me make it clear that I conclude that the Respondent's lockout of its employees, which began on midnight on November 12, was initially a lawful exercise of the Respondent's right to influence the course of contract negotiations on terms favorable to it, or, at a minimum, to protect its production process in the face of a perceived imminent strike by the Union. However, the Respondent's direct dealing with its employees, by submitting to them the no-strike forms and requiring that the forms be signed as a prerequisite to work, converted this lawful lockout into an unlawful one. The lockout became in furtherance of the Respondent's unlawful direct dealing, rather than any legitimate proposal offered to the Union, or protection against an imminent strike.

The Board has held that lockouts lawfully engaged in by employers, both offensive and defensive, become unlawful when employers engage in bad-faith bargaining. In *R. E. Dietz*

Co., 311 NLRB 1259 (1993), the Board adopted the administrative law judge's decision, which held that the employer violated Section 8(a)(1) and (5) of the Act by creating an impasse when it insisted on bargaining over nonmandatory subjects. Of specific significance was the finding that the employer's bad-faith bargaining converted a lawful lockout then in existence into an unlawfully motivated one. Further, with that conversion, the lockout unlawfully deprived the employees of their employment in violation of Section 8(a)(1) and (3) of the Act.

In the matter before me, the Respondent's direct dealing with its employees involved offering them the opportunity to continue working, assuming they signed the no-strike form. This form, which included a disciplinary penalty for noncompliance, had not been previously shown by the Employer to, or discussed with, the Union, thus, effectively removing the Union from the collective-bargaining process. This bad-faith bargaining on the part of the Respondent was inconsistent with a lawful lockout and served to convert the lockout into one in support of the Respondent's unlawful conduct. *R. E. Dietz Company*, supra.

In summary, I find that the Respondent violated Section 8(a)(1), (3), and (5) of the Act when it engaged in direct dealing with its employees by soliciting no-strike assurances from them, at a time when they were not withholding their services, and locking them out, denying them the opportunity to work, for refusing to sign such assurances.

Paragraph 5 of the complaint alleges that the Respondent interrogated its employees about their union activities and sympathies by requiring them to sign no-strike assurances as a condition of permitting them to work. As has been discussed earlier, there is no dispute that beginning in the early morning hours of November 13, all bargaining unit employees who reported for work were offered the no-strike form by the Respondent's agents. Each employee who refused to sign the form was denied permission to work. It also appears undisputed that the employees were not questioned by management about their support for the Union or any activity undertaken on the Union's behalf. At most the form was explained to the employees and they were advised that they would have to agree and sign the form if they wished to work.

It is the General Counsel's contention that these alleged interrogations should be analyzed under the "totality of the circumstances" standard as established in *Rossmore House*, 269 NLRB 1176 (1984), affd. sub nom. *Hotel & Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). However, the cases cited by counsel to stand for this proposition are not on point with the facts in this case.¹² In the matter before me, the Respondent's agents tendered to employees who appeared at the Respondent's facilities to work a written form which asked those employees whether they would do so without resorting to a work stoppage during current contract nego-

¹¹ Counsel for the General Counsel amended the complaint at the hearing to add the 8(a)(3) allegation. I permitted this amendment over counsel for the Respondent's objection, because such an amendment did not prejudice the Respondent. Assuming the Respondent violated Sec. 8(a)(1) and (5) of the Act by engaging in direct dealing with its employees and locking them out for refusing to sign the no-strike form, a make whole remedy would be appropriate, whether there was an 8(a)(3) violation alleged or not. Typically, the Board has ordered make-whole remedies of 8(a)(5) violations such as an unlawful layoff of employees. See *Ebenezer Rail Car Services*, 333 NLRB 167 (2001). Thus, the Respondent suffers no addition adverse consequences from the addition of an 8(a)(3) allegation.

¹² The cases cited by counsel for the General Counsel involve interrogations about strike activity in the context of threatening statements, *Hotel Roanoke*, 293 NLRB 182, 225 (1989), or where the person being questioned is being interviewed for a job, *Slapco, Inc.*, 315 NLRB 717, 719 (1994). Both situations are very different from, and not analogous to, the case at hand.

tiations with the Union. For all practical purposes, employees were being asked to make a choice to either sign the no-strike assurance form and go to work, or to refuse to do so and not work. In my view, there is nothing inherently coercive about asking employees to make such a choice.

In this instance, I agree with counsel for the Respondent that giving employees this choice can not be viewed as unlawful interrogation. As counsel points out in his posthearing brief, these same facts present themselves in virtually every strike or lockout where employees at some point face the choice of either offering to return to work or staying out in support of the Union's bargaining demands.

Even assuming, for the sake of this discussion, that the "totality of the circumstances" standard applies in this situation, I do not believe that what occurred would constitute impermissible interrogation. In *Westwood Health Care Center*, 330 NLRB 935 (2000), the Board listed a number of factors considered in determining whether alleged interrogations under *Rossmore House* were coercive. These are referred to as "*Bourne* factors," so named because they were first set forth in *Bourne v. NLRB*, 332 F.2d 47, 48 (2d Cir. 1964). These factors include the background of the parties' relationship, the nature of the information sought, the identity of the questioner, the place and method of interrogation, and the truthfulness of the reply.

Applying the *Bourne* factors in this case, I do not believe that the presentation of the no-strike form to employees was coercive or otherwise impermissible interrogation. There was nothing confrontational about the context in which the meetings occurred. Typically, they were informal, open, group-like settings where in a fairly friendly atmosphere the employees were presented with the no-strike form and their options explained to them by various Respondent's managers. The employees were not questioned about the extent of their union activity or support, or about the Union's contract proposals, and there is no suggestion or allegation that any threats were made against employees who declined to sign the form. In fact, as noted earlier, it appears that no regular employee signed the form, despite their understanding that they would not be able to work without doing so. Thus, it appears that the employees were not intimidated by the form or the prospect of not working until they signed it. Perhaps the most significant factor to consider is the absence of any union animus on the part of the Respondent. This was an employer with a long and fairly amicable relationship with the Union. Under these circumstances, there is no evidence that the tendering of the no-strike forms to employees constituted coercion or unlawful interrogation.

Accordingly, I find that the Respondent's action in presenting the no-strike form to employees since on or after November 13 did not constitute unlawful interrogation. Therefore, I shall recommend that paragraph 5 of the complaint be dismissed.

CONCLUSIONS OF LAW

1. The Respondent, Boehringer Ingelheim Vetmedica, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union, United Food and Commercial Workers, District Union Local Two, is a labor organization within the meaning of Section 2(5) of the Act.

3. By the following acts and conduct the Respondent has violated Section 8(a)(1) of the Act:

(a) Converting an ongoing lockout into an unlawful lockout by requiring its employees to sign written no-strike assurances as a condition of working.

4. By the following acts and conduct the Respondent has violated Section 8(a)(3) and (1) of the Act:

(a) Converting an ongoing lockout into an unlawful lockout by requiring its employees to sign written no-strike assurances as a condition of working.

5. The following employees of the Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time production, maintenance, and warehousing employees, employed by Boehringer Ingelheim Vetmedica, Inc., at its facility located at 2621 N. Belt Highway, St. Joseph, Missouri and at its farm facility located in Cosby, Missouri but EXCLUDING guards and supervisors as defined in the Act, and all other employees.

6. At all times material, the Union has been the exclusive collective-bargaining representative of the employees in the unit described above within the meaning of Section 9(a) of the Act.

7. Since on about November 13, and continuing through November 21, 2004, the Respondent has been failing and refusing to bargain collectively and in good faith with the Union as the exclusive collective-bargaining representative of the employees in the unit described above by bypassing the Union and dealing directly with those employees by requiring them to sign written no-strike assurances as a condition of working, and by unlawfully locking out those employees who refused to sign such assurances. The Respondent has thereby violated Section 8(a)(5) and (1) of the Act.

8. The above-unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

9. The Respondent has not violated the Act except as set forth above.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having unlawfully locked out its employees from November 13 through November 21, 2004, my recommended order requires the Respondent to make the employees whole for any loss of earnings and other benefits, less any interim earnings as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).¹³

Having bypassed the Union and engaged in direct dealing with its employees, the Respondent is ordered to recognize and bargain in good faith with the Union as the exclusive collective-bargaining representative of its employees in the unit de-

¹³ It appears that all the bargaining unit employees locked out by the Respondent went back to work with the commencement of their normal shifts as of Monday, November 22. Therefore, an order of reinstatement would not be appropriate.

scribed above with respect to wages, hours, and working conditions.

Further, the Respondent shall be required to post a notice that assures its employees that it will respect their rights under

the Act.

[Recommended Order omitted from publication.]