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

Advice Memorandum

DATE: October 9, 2009

TO : Ralph R. Tremain, Regional Director
Region 14

Will J. Vance, Officer-in-Charge
Subregion 33

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

SUBJECT: Grain Processing Corporation
Case 33-CA-15755

524-5056-0800
524-5056-3900

This case was submitted for advice on whether the Employer's recall of six unit employees to purported supervisory positions during a lockout violated Section 8(a)(3). We agree with the Region that the Employer's conduct was not unlawful because (1) there is no evidence that the recall of the six unit employees was based on Union animus, (2) the Employer's conduct was not inherently destructive of employee rights, and (3) the Employer established a legitimate and substantial business justification for its conduct.

FACTS

Grain Processing Corporation (the Employer) manufactures, sells, and distributes ethyl alcohol, food products, and other products from its facility in Muscatine, Iowa. Food and Commercial Workers Local 86D (the Union) has represented a unit of about 360 production and maintenance employees at the Muscatine plant for over 60 years. About 300 of the 360 unit employees are Union members.[1] The most recent collective-bargaining agreement between the parties expired on August 23, 2008.

[1] The facility is located in Iowa, a "right-to-work" state.

The Union and the Employer began bargaining for a new contract in July 2008.[2] On August 19, the parties reached an agreement based upon the Employer's "last, best, and final" offer, which would have increased employee pay but also added a management rights clause and increased the work day from 8 to 12 hours. The Union members unanimously rejected the proposal.

On August 23, the Employer locked out all 360 unit employees. The Employer continued its operations during the lockout by using temporary replacements, including employees from suppliers of temporary labor; former unit employees who had retired; maintenance contractors; nonunit employees, supervisors, and managers from the facility; and employees, supervisors, and managers from an unrepresented Employer facility located in Indiana.

In September, after the lockout had begun, the Employer determined that it required more supervisors at the Muscatine facility to train the temporary replacements and oversee their work.[3] The Employer states that it needed additional supervision because many replacements were unfamiliar with the plant's operations; there was a high degree of turnover among replacements; existing supervisors had to perform unit work and therefore had less time to train and oversee the other replacements; and various areas of the plant were critical to the Employer's operation or had harmful chemicals or other inherent dangers that required careful and skilled monitoring, troubleshooting, and oversight.[4] The Employer contacted nine locked out employees regarding their willingness to work as "supervisors" during the lockout and to remain in those positions afterwards. The Employer states that it

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[2] All dates are in 2008 unless otherwise indicated.

[3] In fact, the Employer contends that it had been operating with reduced supervision before the lockout and had been considering increasing the number of supervisors. The lockout, it contends, exacerbated the preexisting need for additional supervisors.

[4] Many areas of the plant utilize relatively old, labor-intensive technology, such as coal fired boilers.

determined which employees to contact based on rankings of employees compiled by its division and department superintendents.

The parties held three bargaining sessions in September, but did not reach an agreement. On September 25, the Employer sent the Union a letter expressing its disappointment that the Union had not agreed to its contract terms and withdrawing the offer that it had presented in August. The letter also stated that the Employer had been able to operate flexibly and efficiently using replacement employees and that productivity was "high and improving every day" because the operational changes it instituted during the lockout had freed it from "inefficient, unproductive methods" required by the collective bargaining agreement.

In October, six employees accepted the Employer's offer and returned to the plant, receiving improved pay and benefits.[5] Three of these six employees were Union members. All six had prior experience as crew leaders, relief supervisors, and/or employee trainers in the areas of the plant to which they were recalled. During the lockout, the recalled employees' duties have including overseeing replacements' work and providing them with operational and safety training.[6] For example, the employee who was recalled to the Employer's maltrodextrin warehouse trained replacements in the Employer's lock-out/tag-out procedures, which are designed to prevent injury when accessing electrical equipment.

On October 23, the Employer presented the Union with a revised contract offer, which the Union considered to be

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[5] One of the nine employees did not respond to the Employer's contacts and the other two rejected the offers after speaking with the Employer.

[6] The six recalled employees have also performed unit work during the lockout. As mentioned above, even the supervisors whose Section 2(11) status the Union does not challenge have regularly performed unit work during the lockout.

less favorable than the August offer. The Union membership rejected the new offer. The lockout continues to this day.

The Region has determined that the initial lockout of employees was lawful because its sole purpose was to pressure employees into accepting the Employer's contract proposals.[7] The Region also has determined that the evidence of supervisory authority of the six putative supervisors is inconclusive, and that the Employer has not satisfied its burden under Section 2(11).[8]

ACTION

We agree with the Region that the charge should be dismissed, absent withdrawal, because (1) there is no evidence that the recall of the six unit employees was based on Union animus, (2) the Employer's conduct was not inherently destructive of employee rights, and (3) the Employer established a legitimate and substantial business justification for its conduct.[9]

An employer violates the Act if it locks out its bargaining unit employees in order to discourage union activity, injure the bargaining representative, or evade a bargaining obligation.[10] A lockout also will be found

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[7] See American Ship Building Co., 380 U.S. 300 (1965).

[8] No charges alleging direct dealing have been filed. The Region concluded that any allegation that the Employer committed a direct dealing violation by bypassing the Union and offering unit employees an opportunity to return to work during the lockout at higher rates of pay and with improved benefits would be time-barred under Section 10(b).

[9] For purposes of this memorandum, we assume that the recalled employees are not Section 2(11) supervisors.

[10] American Ship Building Co., 380 U.S. at 308, 311-12. See, e.g., Allen Storage & Moving Co., 342 NLRB 501, 501 (2004) (discriminatory lockout based on employees' strike participation unlawful); Clemson Bros., 290 NLRB 944, 945 (1988) (lockout in furtherance of bad-faith bargaining found unlawful).

unlawful, even without specific evidence that it was motivated by union animus or in furtherance of a bargaining violation, if it is "inherently destructive" of employees' Section 7 rights.[11] Even if the lockout only has a "comparatively slight" impact on Section 7 rights, it will be found unlawful if the employer cannot demonstrate a legitimate and substantial business justification for its conduct.[12] The Board applies the same standards to determine whether a partial lockout or selective recall from a lockout violates the Act.[13]

Here, there is no evidence that the Employer's recall of six unit employees during the lockout was motivated by Union animus. Thus, half of the recalled employees were Union members, and the Employer has not required them to resign their Union membership even though it considers them to be statutory supervisors.[14] Moreover, all six employees had prior experience as crew leaders, relief supervisors, and/or employee trainers in the areas of the plant to which

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[11] American Ship Building Co. v. NLRB, 380 U.S. at 311-312. See also Central Illinois Public Service Co., 326 NLRB 928, 930 (1998), review denied 215 F.3d 11 (D.C. Cir. 2000), cert. denied 531 U.S. 1051 (2000).

[12] Id.

[13] See, e.g., Hercules Drawn Steel Corp., 352 NLRB 53, 53, 69-70 (2008) (finding lockout and partial recall of employees to be lawful, because there was no evidence of union animus; conduct had comparatively slight, rather than inherently destructive, impact on employee rights; and employer had legitimate and substantial business justification for its conduct).

[14] Hercules Drawn Steel Corp., 352 NLRB at 53 n.1 (finding that union animus did not motivate partial lockout and noting that two of the recalled employees were members of the union's contract negotiating committee). Compare Schenk Packing Co., 301 NLRB 487, 490 (1991) (partial lockout unlawful where employer expressly conditioned reinstatement on resignation from union membership and where the only unit employees reinstated during lockout were those who resigned membership).

they were recalled. Further, the Employer has engaged in no other conduct evidencing Union animus.

Nor was the Employer's conduct so inherently destructive of employee interests that it may be deemed proscribed by Section 8(a)(3) without independent proof of an improper motive. The Board has found employer conduct in the context of a lockout to be inherently destructive only in rare circumstances, e.g. where the employer discharged or permanently replaced locked out employees or permanently subcontracted their bargaining unit work.[15] Unlike those cases, the Employer's conduct here had no such severe or permanent prejudicial effects on employees' statutory rights. Thus, the six recalled employees made up less than 2 percent of the employees in the bargaining unit, and the Employer has stated that their former jobs will remain in the unit after the lockout. Moreover, there is no evidence that the three Union members selected for recall were Union leaders such that their removal from the unit would diminish the Union's standing. Nor is there any evidence that the Employer's conduct has caused any erosion of employee support for the Union. Indeed, after the selective recall in October, the membership voted down the Employer's revised contract proposal. Accordingly, the partial lockout's impact on employee rights was comparatively slight.

We also agree that the Employer has shown a legitimate and substantial business justification for its conduct. The Board has found a partial lockout to have a legitimate and substantial business justification when its purpose was to maintain business operations.[16] In Hercules Drawn

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[15] Loomis Courier Service, 235 NLRB 534, 535-36 (1978), enf. denied 595 F.2d 491 (9th Cir. 1979) (discharge); Ancor Concepts, Inc., 323 NLRB 742, 744-45 (1997), enf. denied 166 F.3d 55 (2d Cir. 1999) (permanent replacement); International Paper Co., 319 NLRB 1253, 1266 (1995), enf. denied 115 F.3d 1045 (D.C. Cir. 1997) (permanent subcontract).

[16] Hercules Drawn Steel Corp., 352 NLRB at 53, 69-70; Bali Blinds Midwest, 292 NLRB 243, 246-47 (1989); General Portland Inc., 283 NLRB 826, 826 n.1, 838-39 (1987); Laclede Gas Co., 187 NLRB 243, 244 (1970).

Steel,[17] for example, the Board found that an employer's selective recall of "skilled" employees from an otherwise lawful lockout, while continuing to lock out "unskilled" employees, had a legitimate and substantial business justification, because the employer had little or no success in finding temporary replacements who could adequately perform the skilled work. And, in General Portland Inc.,[18] an employer was justified in partially locking out strikers who had unconditionally offered to return to work because the union would not commit to providing sufficient notice before future strikes, where the employer had legitimate concerns about the amount of time needed to safely shut down its kilns, as well as additional time to minimize equipment damage, the loss of product, and the loss of business resulting from such a shutdown and subsequent restart of operations using replacements.[19] Here, the Employer has demonstrated a legitimate and substantial business justification for its conduct based on operational need, particularly its safety concerns. Thus, the Employer recalled the six unit employees during the lockout because many of the temporary replacements could not safely perform the work without additional training and oversight.[20] Even some of the replacements who came from the Employer's more modern Indiana facility required such training and oversight because the Muscatine plant produced different products and

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[17] 352 NLRB at 53, 69-70.

[18] 283 NLRB at 826 n.1, 838-39.

[19] Id. at 839.

[20] The Employer's September 25 letter stating that it has improved efficiency and productivity during the lockout does not negate the Employer's business justification. The Employer's conduct was not only justified by a need for efficiency and productivity, but also by safety concerns, an issue the letter does not address. Moreover, viewed in context, the letter is more likely an attempt to apply bargaining pressure on the Union than an accurate representation of the temporary replacements' skill and ability.

used older technology with more complex and labor intensive controls. All of the recalled employees had prior experience as trainers, crew leaders, or relief supervisors. During the lockout, they have trained and overseen replacement employees with respect to the Employer's operating methods and safety needs. The Union has offered no evidence to refute the Employer's claim that it recalled the six employees to address legitimate safety concerns regarding many of the replacement employees' lack of experience. Rather, the Union merely asserts that some of the replacement employees did not require additional training or oversight and that the recalled employees were not performing the work of a statutory supervisor.

Finally, the supervisory status of the recalled employees has no bearing on whether the Employer had a legitimate and substantial business justification for its conduct. The Employer's business justification is based on its need to train and oversee temporary employees during the lockout in order to safely and effectively run its business. So long as the recalled employees are performing those tasks during the lockout, it is irrelevant whether the strictures of Section 2(11) have been satisfied.

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

B.J.K.