UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

DRESSER-RAND COMPANY,	§		
	§		
Respondent	§		
	§	**Cases:**	**3-CA-26543**
and	§		**3-CA-26595**
	§		**3-CA-26711**
IUE-CWA, AFL-CIO, LOCAL 313,	§		**3-CA-26943**
	§		
Charging Party	§		

RESPONDENT'S EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S DECISION AND RECOMMENDED ORDER

On January 29, 2010, Administrative Law Judge Mark D. Rubin issued his Decision and Recommended Order concerning a strike, a lockout and related matters occurring at Respondent, Dresser-Rand Company's (the "Company") facility in Painted Post, New York. Pursuant to Section 102.46 of the Board's Rules and Regulations, the Company Excepts to that Decision and Order as follows:

General Exceptions to ALJ's Conclusions of Law

1. To the Conclusions of Law that the Company violated Sections 8(a)(3) and 8(a)(1) of the Act by:

   (a) implementing a lock out motivated by union animus;

   (b) discharging and failing to recall Kelvin Brown to work;

   (c) denying accrued vacation leave to recalled employees who participated in the strike;

   (d) imposing a disciplinary suspension on employee Marion Cook; and

(e) recalling crossovers after the end of the lockout ahead of full-term strikers. (ALJD at 60, L. 31-46).[1]

2. To the Conclusions of Law that the Company violated Section 8(a)(5) of the Act by:

(a) unilaterally eliminating paid lunch breaks on voluntary weekend overtime shifts; and

(b) unilaterally implementing a procedure for recalling striking employees to work. (ALJD at 60, L. 48-52; 61, L. 1-5).

3. To the Conclusion of Law that the alleged unfair labor practices affect commerce within the meaning of the Act. (ALJD at 61, L. 7-8).

Exceptions to the ALJ's Recommended Remedy and Order

4. To the Recommended Remedy that, among other things, the Company make whole all unit employees locked out, denied vacation benefits, and impacted by a unilateral change affecting paid weekend overtime lunch breaks; and that the Company be ordered to cease and desist from certain conduct and to bargain with the Union concerning the determination of a method of recall to restore the *status quo ante*. (ALJD at 61, L. 16-32).

5. To the lack of clarity contained in the Recommended Remedy regarding "restoration of the status quo-ante" and the language that states: "as I found the [Company's] imposition of a method of recalling unit employees violated the Act, I will order a cease and desist remedy, along with an affirmative bargaining order, and will defer to the compliance stage the determination of a method of recall which would have obviated the commission of the unfair labor practice, as this would have the result of restoring the status quo-ante, to the extent

[1] References to the Administrative Law Judge's Decision and Order are designated by the letters ALJD followed by the appropriate page and line (L.) number.

feasible, as a setting for bargaining, and would provide a basis for establishing the details of the recall, including that of the crossovers who, I determined, received preferential treatment as to the recall, and the make whole remedies which I am also ordering." (ALJD at 61, L. 20-30).

6. To the ALJ's finding that *Alaska Pulp Corp.* is applicable to the remedy in this case. (ALJD at 61, L. 20-27, fn. 170, L. 44-47).

7. To the cease and desist provisions of the Recommended Order labeled as subparagraphs (a)–(i) including provisions addressing the circumstances of crossover employees, locked out employees, suspended or discharged employees, the denial of vacation benefits to former strikers, the implementation of a process of recalling employees from a strike or lockout, and a change in lunch breaks for weekend overtime shifts, and the further provisions making the cease and desist order applicable to conduct that in any like or related manner constitute interference with Section 7, Section 8(a)(3), or Section 8(a)(5). (ALJD at 61, L. 37-40; 62, L. 1-21).

8. To the provisions of the Recommended Order directing that the Company take certain affirmative action including reinstating Kelvin Brown, rescinding the suspension of Marion Cook, making Kelvin Brown and Marion Cook whole, making all former strikers whole for any accrued vacation benefits denied them, making whole employees who were unlawfully locked out for any loss of earnings and benefits suffered by them as a result of the lockout, making whole employees who would have been recalled from the 2007 lockout at an earlier date if it is determined they would have been so recalled but for the Company's unilateral implementation of a recall procedure, and to offer recall to any employees who have not been recalled and to make them whole if it is determined that but for the Company's unilateral implementation of a recall procedure, such employees would have been recalled earlier, and to

take certain other actions in compliance with the Order. (ALJD at 62, L. 21-52 and at 63, L. 1-28).

In addition to these general exceptions, the Company specifically excepts as follows:

Factual Exceptions: The Union Offers to Return, Lockout, Impasse, and Return

9. To the ALJ's conclusion that Coates said, in response to statements by the Company that it was necessary to undertake a manpower assessment to decide how many people to return, that the Company "needed to negotiate a process with us [the Union] but that everybody should be recalled by seniority." (ALJD at 9, L. 34-35).

10. To the ALJ's conclusion that Coates was a reliable witness and his further conclusion choosing to credit Coates generally even though other witnesses, according to the ALJ, answered forthrightly and explained and displayed the demeanor of witnesses striving to truthfully answer the questions put to them when there are significant discrepancies in the testimony. (ALJD at 10, L. 50-51).

11. To the conclusion that the crossovers generally learned of the end of the lockout from the Company's managers. (ALJD at 11, L. 10-11).

12. To the paraphrase of the faxed and emailed letter from DiLorenzo to Murray dated December 2, 2007, that omitted reference to additional language in that letter that stated: "the Company is in the process of reviewing various procedures for getting the most qualified people into the positions that will become available. However, with all the demands that have been placed on management to accomplish a smooth phase 1 transition, more time is needed." (ALJD at 12, L. 13-19).

13. To the finding that Coates first saw "these return process and preferential hiring documents on December 3." (ALJD at 13, L.5-6).

14. To the finding that Coates received the document in question on December 3 even though he testified he could not recall when he received the transmission and further admitted that it was close in time to the date of December 2. (ALJD at 13, fn. 36, L. 34-37; Tr. 259).[2]

15. To the finding that there was no evidence that Murray's testimony pertained to bargaining over return to work. (ALJD at 13, L. 47-49).

Factual Exceptions: Suspension of Marion Cook

16. To the ALJ's relying solely on Hillock's testimony at the end of his cross-examination stating that he understood Cook's comments to be "a safety-related complaint" without evaluating the rest of Hillock's testimony wherein he clearly states that Cook never made a safety-related complaint regarding the replacement workers. (ALJD at 29, L. 2-3; Tr. 701, 702-03).

Exceptions to Conclusions of Law: Discharge of Kelvin Brown

17. To the ALJ's conclusion that Brown's conduct did not constitute serious strike misconduct that would reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act. (ALJD at 33, L. 22-26).

18. To the ALJ's finding that, under *Gem Urethane* and *Clear Pine Mouldings*, the test for whether strike misconduct exists turns on whether the striker possesses or brandishes weapons or issues threats. (ALJD at 33, L. 21-26).

19. To the finding that Brown did not commit strike misconduct merely because he did not possess or brandish weapons or issue threats. (ALJD at 33, L. 21-26).

20. To the ALJ's implicit conclusion that *Medite of New Mexico, Inc*. is factually analogous to the instant case. (ALJD at 33, L. 8-10; L. 19-26).

[2] References to the hearing transcript are designated by the letters Tr. and are followed by the appropriate page number(s).

21. To the ALJ's conclusion that Brown's actions resulted in "slight delay, if any" for the van attempting to enter the Company's facility. (ALJD at 33, L. 3-4).

22. To the ALJ's conclusion that "there is no evidence of other incidents involving picket line misconduct." (ALJD at 33, L. 5-6).

23. To the ALJ's failure to properly credit Officer Slowinski's testimony regarding Brown's laying on the van despite the ALJ's own finding that he was the "only witness to the incident without an apparent ax to grind" and his statement that he "credits [the officer's] testimony as to what occurred at the truck gate on September 20." (ALJD at 32, L. 4-5, L. 28-29).

24. To the ALJ's conclusion that Officer's Slowinski's testimony stating that Brown "laid on the fender" was unlikely and making a factual determination outside of the testimony and evidence that Brown's leaning against the van "would seem at least as likely, and not greatly at variance with the officer's testimony." (ALJD at 33, fn. 124, L. 37-41).

25. To the ALJ's determination that the "Town Justice's ruling finding Brown guilty of disorderly conduct was clearly based on Brown's asserted stepping in front of a vehicle" and failing to consider that the Justice specifically states that Brown's jeopardizing his own safety—"recklessly creat[ing] a risk for [his] own personal well-being"—was an important consideration. (ALJD at 32, L. 33-35, fn. 119, L. 45-47).

Exceptions to Conclusions of Law: Suspension of Marion Cook

26. To the finding that Cook's comments were "directed to his belief that assertedly unsafe procedures engaged in by replacement employees and salaried employees in the plant were causing safety concerns." (ALJD at 38, L. 30-33).

27. To the ALJ's conclusion that the only issue to decide is whether Cook's comments are protected activity under the Act but then failing to analyze whether or not Cook's comments constitute protected concerted activity. (ALJD at 39, L. 5-7).

28. To the ALJ's determination that Cook's comment was made in the context of a meeting of employees called by the Company and that Cook's comment therefore constituted protected concerted activity. (ALJD at 39, L. 14-15).

29. To the ALJ's determination that Cook's comment was directed at safety-related concerns and the Company's attending supervisor so understood the comment. (ALJD at 39, L. 16-17).

Exceptions to Conclusions of Law: Paid Lunch Break During Weekend Overtime

30. To the ALJ's finding that "the evidence demonstrated that the paid lunch break provision of the overtime section of the expired contract never applied to weekend overtime shifts and the parties never treated said provision as if it did." (ALJD at 40, L. 43-45).

31. To the ALJ's determination that "[s]ubstituting 'in any given day' in the imposed terms" did not change the contract provision dealing with paid breaks during overtime. (ALJD at 40, L. 45-47).

32. To the ALJ's finding that "to link [the new imposed terms addressing paid breaks during overtime] to weekend overtime shifts would produce [an] anomalous result." (ALJD at 40, L. 47-48; 41, L. 1-2).

33. To the ALJ's conclusion that the Company had an obligation to bargain with the Union before making a change to the provision addressing paid lunch breaks during weekend overtime. (ALJD at 41, L. 4-8).

34. To the ALJ's determination that the Company violated Section 8(a)(5) of the Act by failing to bargain over the provision addressing paid lunch breaks during weekend overtime. (ALJD at 41, L. 6-8).

Exceptions to Conclusions of Law: Denial of Vacation Benefit to Returning Strikers

35. To the finding that *Swift Adhesives* is "factually analogous to the instant case." (ALJD at 43, L.33-35).

36. To the finding that the vacation benefit accrued to the 23 strikers "prior to the strike and prior to the contract's expiration." (ALJD at 44, L. 7-9).

37. To the finding that the denial of the vacation benefit was "a direct result of the strike." (ALJD at 44, L. 9).

38. To the finding that the Company "failed to meet its burden of showing that it denied the vacation benefit based on a legitimate and substantial business justification." (ALJD at 44, L. 23-24).

39. To the finding that the Company failed to argue that its denial of the vacation benefit was based on a legitimate and substantial business justification." (ALJD at 44, L. 28-30).

40. To the finding that the Company violated Section 8(a)(3) by withholding the paid vacation benefit to the 23 returning strikers. (ALJD at 44-45, L. 33-2).

Exceptions to Conclusions of Law: The Lockout and Anti-Union Animus

41. To the conclusion that the General Counsel had proved anti-union motivation for the lockout based on:

(a) the ALJ's findings of 8(a)(3) violations as a result of the Brown discharge, the Cook suspension, the preferential treatment accorded crossovers at the conclusion of the lockout in favor of fulltime strikers, and the denial of vacation benefits to certain returning strikers; and

(b) the ALJ's finding of a Section 8(a)(5) violation because of the alleged failure to bargain over the recall procedure. (ALJD at 54, L. 4-33).

42. The conclusion that the "found unfair labor practices" were sufficient to support an inference of motive of an unlawful purpose in initiating the lockout, and the conclusion that such unfair labor practices had a substantial and pervasive impact on bargaining unit members. (ALJD at 54, L. 23-24).

43. The conclusion that the Company had given preferential treatment to the crossovers at the conclusion of the lockout, and that such preferential treatment justified a finding of animus regarding the lockout. (ALJD at 54, L. 25).

44. To the finding that the providing of preferential treatment to the crossovers at the conclusion of the lockout and the failure of the Company to bargain over the method of their return was directly connected to the lockout and that all of the "found violations" were directly related to the labor dispute. (ALJD at 54, L. 26-28).

45. To the conclusion that the alleged unfair labor practices had a pervasive effect on the bargaining unit at the time of the lockout and therefore was sufficient to support an inference of unlawful motivation for the lockout. (ALJD at 54, L. 32-33).

46. To the ALJ's finding that *Peerless Pump* is "directly analogous to the instant circumstances" and his subsequent analysis disregarding Supreme Court and Board precedent. (ALJD at 55, L. 37-46).

47. To the conclusion that the Company "clearly discriminated" against the full-term strikers by not applying the seniority and performance ranking criteria to the crossovers. (ALJD at 55, L. 43-46).

48. To the conclusion that all of the locked out employees maintained equal entitlement to return. (ALJD at 56, L. 10-11).

49. To the conclusion that Respondent provided favorable treatment to the crossover employees in terms of recall on the basis of returning to work during the strike. (ALJD at 56, L. 13-16).

50. To the conclusion that giving preference to the crossovers violated 8(a)(3). (ALJD at 56, L. 16-18).

51. To the inconsistency in finding that the lockout was unlawfully motivated while also finding that the Company had substantial and legitimate reasons for the lockout and that the Company's decision not to lock out permanent replacements did not imply any hostile motivation. (ALJD at 52, L. 1-9).

Exceptions to Conclusions of Law: Bargaining Over the Method of Return

52. To the conclusion, in the context of this case, that it is obvious that the terms of the recall process which determine which employees will be called back, and in what order, have a substantial and material impact on their terms and conditions of employment. (ALJD at 56, L. 36-39).

53. To the conclusion that what happened during the telephone conference between representatives of the Union and the Company at about 4:40 pm on November 29, 2007 is central to the resolution of the issue as to whether the Union requested bargaining over the return to work process. (ALJD at 57, L. 6, 7 and 8).

54. To the conclusion that Murray and the Union saw the list regarding the ranking of former strikers that the Company intended to recall for the first time on Monday, December 3. (ALJD at 57, L. 34-36).

55. To the conclusion that the letter of November 30, 2007 was the first notification to the Union that the Company intended to use a basis other than seniority for the return to work. (ALJD at 57, L. 50-51; ALJD at 59, L. 1-3).

56. To the findings that the Union had made a timely request to bargain. (ALJD at 58, L. 16 and 17).

57. To the findings that, even if it is concluded that the Union did not make such a bargaining request, the Company's return to work process was presented to the Union as a fait accompli. (ALJD at 58, L. 21-23; ; ALJD at 60, L. 16-21).

58. To the ALJ's implicit conclusion that a union's initial demand to bargain coupled with a proposal precludes further inquiry into union waiver. (ALJD at 58, L. 46-50; ALJD 59, L. 1-14).

59. To the ALJ's statement that his analysis of the fait accompli issue takes into account "all the circumstances" of the instant case. (ALJD at 59, L. 7).

60. To the finding and conclusion that, under the circumstances, the Company presented the return to work process to the Union as a fait accompli. (ALJD at 59, L. 6 and 7).

61. To the conclusion that the Union was allowed less than 48 hours over a weekend to analyze the Company's return process and to offer counter-proposals. (ALJD at 59, L. 17-19).

62. To the conclusion that an allowance of 48 hours over a weekend was not reasonably adequate to allow the Union to respond or to offer counter-proposals under the circumstances of this case. (ALJD at 59, L. 16-19).

63. To the conclusion that the Company's proposal did not allow a reasonably adequate period of time because the Company knew before providing the Union with its return to

work process that the Union objected to anything other than seniority as a basis for recall. (ALJD at 59, L. 19-23).

64. To the implicit conclusion that the Company's communications to the Union foreclosed bargaining even thought it invited questions because nothing in such communications affirmatively indicated that the process was subject to negotiations or that the Company was prepared to engage the Union in the already requested bargaining as to the return process. (ALJD at 59, L. 25-28).

65. To the conclusion that the cases cited by the Company were inapposite to the instant case. (ALJD at 59, L. 30-40 and 60, L. 1-15).

66. To the conclusion that the Union in fact requested bargaining and that the Company violated Section 8(a)(5) by unilaterally instituting a process for returning the strikers to work. (ALJD at 60, L. 16-19).

67. To the failure to find that the Union waived its bargaining rights as a result of a lack of due diligence and inaction. (ALJD at 59, L. 44-46).

68. To the conclusion that "as of November 29 a successful argument that the Union waived its bargaining rights cannot be made, because the Union explicitly requested bargaining as to the return process on that date." (ALJD at 59, L. 44-46).

Dated: March 19, 2010

Respectfully submitted,

/s/ Arthur T. Carter

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CERTIFICATE OF SERVICE

This is to certify that the **RESPONDENT'S EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S DECISION AND RECOMMENDED ORDER** in Case Nos. 3-CA-26543, 3-CA-26595, 3-CA-26711, and 3-CA-26943 has been filed electronically and that an original and eight copies of the Motion have been sent by certified mail, return receipt requested, to the party listed below on this 19th day of March, 2010:

Lester A. Heltzer, Executive Secretary
NLRB Office of the Executive Secretary
1099 14th Street, N.W.
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Further, this same day, a copy of Respondent's Motion has been sent by email and certified mail to the following:

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