

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

DRESSER-RAND COMPANY

and

**Cases 3-CA-26543
3-CA-26595
3-CA-26711
3-CA-26943**

IUE-CWA, AFL-CIO, LOCAL 313

**GENERAL COUNSEL'S CROSS-EXCEPTION TO THE
DECISION OF THE ADMINISTRATIVE LAW JUDGE
AND BRIEF IN SUPPORT OF CROSS-EXCEPTION**

Administrative Law Judge Mark D. Rubin issued a Decision and Recommended Order in these cases on January 29, 2010.

Respondent filed exceptions and a brief in support of its exceptions on March 19, 2010.

Pursuant to Section 102.46(e) of the Board's Rules and Regulations, the General Counsel hereby takes cross-exception to the finding and conclusion of the Administrative Law Judge that:

1. Respondent demonstrated a legitimate and substantial business justification for its partial lockout of employees. (Decision at p. 49, line 40 to p. 52, line 23).¹

Respectfully submitted,

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¹ The Judge found that the partial lockout violated Section 8(a)(3), notwithstanding the Respondent's business justification, because the General Counsel demonstrated that Respondent's the lockout was motivated by antiunion animus. Respondent has excepted to the Judge's finding in that regard. The General Counsel addresses that issue in his Answering Brief.

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**BRIEF IN SUPPORT OF THE GENERAL COUNSEL'S
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ADMINISTRATIVE LAW JUDGE**

I

FACTS

The facts surrounding the partial lockout in November 2007 have never been in dispute.² The facts are set forth from page 6, line 27 to page 8, line 29 of the Administrative Law Judge's Decision.

II

ARGUMENT

The Judge found that the Union's return to work offer of November 19 was unconditional (Decision, page 45, line 5 to page 48, line 42). Respondent does not except to this finding. As a matter of law, Respondent's permanent replacement employees

² Unless otherwise stated, all dates are in 2007.

became members of the bargaining unit on November 19. Grinnell Fire Protection, 332 NLRB 1257 (2000);³ *accord*, Pan American Grain Co., 343 NLRB 318, 343 (2004); Detroit Newspapers, 327 NLRB 871 (1999). The instant matter therefore presents a partial lockout.

The Judge found that the partial lockout was unlawful because it was motivated by antiunion animus. (Decision at page 52, line 24 to page 54, line 33). The General Counsel does not except to that finding. Rather, exception is taken to the Judge's finding that Respondent had a "legitimate and substantial business justification" for the partial lockout. (Decision, page 49, line 40 to page 52, line 9).

In the absence of antiunion animus, an employer does not violate the Act by locking out, in full or in part, its employees for "legitimate and substantial business reasons." Eads Transfer, 304 NLRB 711, 712 (1991); Tidewater Construction Corp., 333 NLRB 1264 (2001), citing American Ship Building Co. v. NLRB, 380 U.S. 300 (1965). See also Allen Storage and Moving, 342 NLRB 501 (2004). In order for a lockout to be lawful under American Ship Building, *supra*, "it must be for the sole purpose of bringing economic pressure to bear in support of (the employer's) legitimate bargaining position." An employer bears the burden of going forward with evidence of "legitimate and substantial business justification." Central Illinois Public Service Co., 326 NLRB 928, 930 (1998). If an employer comes forward with such evidence, an affirmative showing of antiunion motivation must be made to sustain a violation. NLRB v. Great Dane Trailers, 388 U.S. 26, 34 (1967). However, an employer's purported business justification is undermined where it engages in conduct inconsistent with that

³ "Once the strike has ended...any replacements who remain employed assume the same status as other unit employees. They are no longer strike replacements, and the terms under which they work will be governed by any newly bargained contract." 332 NLRB at 1257.

justification. Field Bridge Associates, 306 NLRB 322, 334 (1992); *accord*, Ancor Concepts, Inc., 323 NLRB 742, 744 (1997); Allen Storage, *supra* at 514-515.⁴

Respondent proffered several reasons for retaining the permanent replacement employees during the lockout: to pressure the Union to accept its bargaining demands; its operational needs; contractual commitments to the permanent replacements; and fear of “inside game” tactics by the Union. As to the latter two reasons, the Judge rejected Respondent’s arguments regarding its contracts with the permanent replacements, and Respondent’s asserted fear of possible “inside game” tactics. (Decision at 49-50, fn 152; at 50, fn 153) Respondent does not except to those findings.

Economic pressure

Respondent’s letter to the Union announcing the lockout stated, in part, that: “To end the lockout and return to work, the Union need only agree to the company’s last offer...” (GC 4). The Judge found that “[b]y communicating this single demand to the Union, the Respondent clearly demonstrated that its purpose in imposing the lockout was to apply sufficient economic pressure to induce the Union to agree to its proposals.” (Decision at 50, lines 31-34). Nevertheless, following a declaration of a lawful lockout, an employer must refrain from engaging in conduct inconsistent with an economic lockout. Field Bridge Associates, *supra*; Ancor Concepts, Inc., *supra*. Here, the Respondent engaged in conduct inconsistent with an economic lockout when it locked out the crossover employees. If the purpose of the lockout was to bring economic pressure to bear on the Union, there was no need to lock out the crossovers, who had abandoned the strike. In this case, each of the crossovers, in abandoning the strike, also

⁴ The Judge viewed Field Bridge and Ancor as factually distinct from the instant case, (Decision at 51, lines 7-19), and they are. They were cited to the ALJ, and are cited here, for the legal proposition that an employer’s inconsistent action tends to undermine an its asserted business justification.

resigned their Union membership. (Tr. 262). Having resigned from the Union, the crossovers relinquished the right to vote on whether the Union should agree to Respondent's bargaining demands. Thus, locking out the crossovers did not further Respondent's cause in bringing pressure on the Union to change its bargaining position.⁵

In Midwest Generation, EME, LLC, 343 NLRB 69, 73 (2004), the Board found lawful the employer's retention of nonstrikers and crossovers during a partial lockout, because it was no longer necessary to exert pressure on them to achieve its bargaining goals. The Board found that the employer did not need to exert economic pressure on the crossover employees because they had "eschewed the strike weapon." 343 NLRB at 72-73.⁶ Under the same rationale, the lockout of the crossovers herein was unnecessary for Respondent to exert pressure on the Union to accept its bargaining demands, because the crossovers had abandoned the strike.⁷ Locking out the crossovers was therefore inconsistent with Respondent's asserted need to bring economic pressure to bear on the Union.

⁵ Well before the lockout, in October, two of the crossovers publicized their resignations from the Union in a letter to the local newspapers (R 23).

⁶ It is noted that Midwest involved no other unfair labor practices, and the parties in Midwest stipulated that the employer had bargained in good faith. By contrast, in the instant case, the Judge has found that Respondent violated Section 8(a)(1) and (3) by suspending Marion Cook, by discharging Kelvin Brown, by giving preferential treatment to the crossovers in recalling them to work after the lockout, and by denying accrued vacation to returning strikers. The Judge also found that Respondent violated Section 8(a)(1) and (5) by making unilateral changes in certain terms and conditions of employment, and by failing to bargain with the Union about the process of recalling employees to work after the lockout was ended.

⁷ The Seventh Circuit Court of Appeals refused to enforce the Board's Order in Midwest, and remanded the case to the Board with instructions to find a violation. The Board accepted the Court's decision as the law of the case, and found a violation. The Board's decision on remand is published at 352 NLRB 243 (2008). The Court criticized the Board for relying upon Midwest's "post-hoc subjective beliefs to find that crossovers and nonstrikers did not back the Union's bargaining position," and the "common sense notion that employees who cross a picket line have abandoned the Union's position." While the Court viewed this as "not an unreasonable conclusion," it found that such conclusion was "not supported by any evidence beyond mere conjecture." Local 15, International Brotherhood of Electrical Workers, AFL-CIO v. NLRB, 429 F.3d 651, 660 (2005). The instant case presents more than "mere conjecture."

The Board's reasoning in Bunting Bearings Corp., 343 NLRB 479 (2004), similarly refutes any claim by Respondent that the lockout was solely to exert bargaining pressure on the Union. In Bunting, the Board found that the employer lawfully locked out non-probationary employees, but did not lock out probationary employees because the latter had been excluded from the union's strike vote, had lesser contractual rights and the employer's contract proposals were of less vital interest to them.⁸ 343 LRB at 481-482.⁹

Powers testified that Respondent was concerned that an unfair labor practice charge might result if it did not lock the crossovers out. (Tr. 1076). This defense is irrelevant. Respondent might have kept the crossovers in the plant and argued in its defense that it was necessary to maintain operations, as it argues with respect to the permanent replacement employees. This is not to say what choice Respondent should have made. The salient fact is that the choice Respondent did make (i.e., locking out the crossovers) is inconsistent with a lockout designed with the sole purpose of forcing acceptance of its bargaining demands, because locking out the crossovers did not place pressure where it would be most effective. On the contrary, keeping the crossovers in the plant arguably would have put more pressure on the Union than locking them out did, as

⁸ The permanent replacement employees herein are not necessarily in the same position as the probationary employees in Bunting. Local 313 president Steve Coates testified that the permanent replacements would have been eligible to vote on a proposed contract if they joined the Union. (Tr. 263).

⁹ The Court of Appeals for the D.C. Circuit, in an unpublished opinion, refused to enforce the Board's Order. United Steel, Paper and Forestry, rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO v. NLRB, 179 Fed. Appx. 61 (D.C. Cir. 2004). The Court found that a showing of a "perfect correlation" between union membership and those locked out was sufficient evidence of discriminatory motive, and that the employer had made no attempt to show that it had legitimate and substantial business justification for locking out employees. The Board accepted the Court's remand as the law of the case, and found that the partial lockout violated the Act. The Board's Decision and Order on Remand in Bunting is reported at 349 NLRB 1070 (2007).

Respondent would have been more productive with them than without them, and better able to operate during the lockout.

Operational needs

Respondent's then-vice president and chief administrative officer Elizabeth Powers testified that Respondent did not lock out its permanent replacement employees because:

We had an absolute necessity to keep them, in terms of continuing to ship product to our customers and meeting our customer commitments, and we -- and in terms of having people there who had learned a lot of the jobs, and that we felt, you know, would continue to meet our business needs. We just thought that there wasn't a way we could continue to be viable without them.

(Tr. 1078)

Witnesses for Respondent testified that its experience with temporary replacement employees had not been good due to the high expense involved, and the frequent turnover among temporary replacements, whose contractual commitments were for renewable periods of 45 days.¹⁰ (Tr. 838-839, 842, 961, 963). Thus, Respondent argues that in order to limit its costs, maintain production, and meet customer commitments, it was necessary to keep the permanent replacements during the lockout. Again, however, locking out the crossovers (who were obviously more experienced than the permanent replacements and who required no training to perform their pre-strike duties) is inconsistent with Respondent's asserted justification.

If Respondent's justification was to limit costs while maintaining operations, it would not have locked out the same crossover employees it had used to maintain operations during the strike. Moreover, this justification is contradicted by Midwest,

¹⁰ No documentary evidence regarding turnover was offered by Respondent.

supra, where the Board found that the employer had *augmented* its operations by *retaining* the crossover employees during a lockout of all other strikers. 343 NLRB at 72-73.¹¹

As with the asserted justification of exerting economic pressure, discussed above, any justification based on operational needs is also refuted by Respondent's decision to end the lockout after less than a week. Indeed, the Judge failed to consider the brevity of the lockout in finding merit to Respondent's asserted business justification. The lockout lasted from the end of the second shift on Friday, November 23, until noon on Thursday, November 29. (GC 4, 6). Thus, Respondent's employees were locked out on part of the first day, November 23, and part of the last day, November 29. Only five full days, Saturday, November 24 through Wednesday, November 28, were encompassed by the lockout.¹²

Witnesses for Respondent testified that they did not know how long the lockout would last. (Tr. 1076-1077; 1177). Respondent may not have known the precise day and hour when it would end its lockout, but the record reveals that Respondent knew that the lockout would be brief, and in fact, it planned on a brief lockout. And the brevity of the lockout contradicts Respondent's position that it could not operate during the lockout without the services of the permanent replacements.

Further, Respondent summarily ended the lockout after only six days, without obtaining the Union's agreement to its proposals. Instead, Respondent declared a

¹¹ Compare Bali Blinds Midwest, 292 NLRB 243, 246-247 (1988)(employer lawfully locked out all but a stable base of employees needed to meet minimum production goals and avoid potential disruption where future strikes appeared imminent); Hercules Drawn Steel Corp., 352 NLRB 53, 53-54 (2008)(employer lawfully distinguished between striking employees based on their possession of special skills necessary to maintain production); *accord*, Laclede Gas Co., 187 NLRB 243 (1970).

¹² The record does not reveal the extent of weekend overtime, if any, on Saturday, November 24 and Sunday, November 25.

bargaining impasse on November 29 and implemented its terms. Thus, the brevity of the lockout further undermines any conclusion that it was justified as a means of exerting pressure on the Union and to achieve Respondent's bargaining goals.

Respondent's lead negotiator, DiLorenzo, had asserted that the parties were at impasse on October 25, almost a month before the lockout. (Tr. 1000, R 44). He testified that he held a good faith belief as to impasse at that time. (Tr. 1045). The Union, in his view, was doing everything it could to forestall a declaration of impasse. (Tr. 1015). DiLorenzo testified that he "had a plan" to reach impasse, implement Respondent's terms and lift the lockout, in relatively short order. (Tr. 1027). Although he believed that the parties had been at impasse for some time, he had in the past had "several disagreements with (Region 3)," and did not want to risk a charge alleging a premature declaration of impasse. (Tr. 1047). But he also believed that:

Once we met consecutive days, to me, it would appear obvious that we'd be at impasse. (Murray) kept telling me he wouldn't change his position, I wasn't changing mine. Didn't seem to me that impasse could be avoided much longer.

(Tr. 1015-1016).

Consecutive days of bargaining, beginning on November 26, had been scheduled since November 14, or at least Respondent believed so. (R 49). Whether or not that was the case, the parties clearly had agreed to meet, and did meet on at least two dates, November 26 and 27, the Monday and Tuesday after the lockout commenced. (Tr. 176-177, 1029; R 50). DiLorenzo testified that he:

...had said to the Company, "Since we now have an agreement to meet on consecutive days, we're either going to reach an agreement or we're definitely going to reach impasse."

(Tr. 1047).

Thus, one of two things would happen, as a result of those two days of bargaining: (1) the Union would capitulate, agree to Respondent's terms, and there would be a collective-bargaining agreement; or (2) impasse would be reached, Respondent's terms implemented, and the lockout would be lifted.¹³

Respondent knew exactly where it was going, and knew that it would not take long to get there.¹⁴ Given the state of negotiations as perceived by Respondent since at least October, how many consecutive days of bargaining could it possibly have taken to reach impasse?¹⁵ Having known that the lockout would end quickly, Respondent can not claim a legitimate and substantial business justification for partially locking out the bargaining unit.

This is not a case where Respondent's entire operation would have come to a halt, for some indeterminate period of time, if it had locked out the permanent replacements for less than a week.¹⁶ Cf. Bali Blinds Midwest, 292 NLRB 243, 244 (1988)(employer producing custom blinds, delivery of which was required within 7 days of customer orders, was justified in locking out all but a "reasonably dependable base work force.").

¹³ DiLorenzo also testified that "After (the Union) breached the agreement to meet consecutive days for reasons I thought were demonstrated in bad faith, I was sure we were at impasse." (Tr. 1047-1048). The breach, if breach it was, occurred not later than the end of the meeting on November 27. (GC 6, pp. 3-4). But Respondent was notified that the Union planned to meet only on November 26 and 27, in a letter dated November 21, from Murray to DiLorenzo. (R 50). Thus, Respondent knew that it would shortly declare impasse, thereby achieving its bargaining goals.

¹⁴ As noted above, in announcing the lockout, Respondent told the Union that: "To end the lockout...the Union need only agree to the Company's last offer..." (R 4). Respondent had already told the crossovers, during meetings Respondent held with them just before locking them out, that another event -- impasse -- would also end the lockout. (Tr. 747-748, 1177). "Impasse" appears to have been a code word used in text messages, from Respondent to the crossovers, and from one crossover to another, signifying that the lockout was over. (Tr. 762, 803).

¹⁵ The state of negotiations, from Respondent's point of view, was summarized in DiLorenzo's letter of November 29 to Murray. (GC 6).

¹⁶ Temporary replacements continued to work until the lockout was ended, and salaried employees and supervisors assisted with production throughout the strike and the lockout. (Tr. 1023).

This case is well distinguishable from those wherein the Board has found partial lockouts to be lawful based on the employer's operational needs. See Laclede Gas Co., 187 NLRB 243 (1970)(reasonable fear of recurring strike and public safety concerns justified partial lockout based on which crews were most needed to work); Bali Blinds, *supra*; Hercules Drawn Steel Corp., 352 NLRB 53, 53-54 (2008).) In Hercules Drawn Steel, the selective recall of locked out employees based on special skills needed to maintain production was found by the Board to be justified. In the instant case, Respondent does not claim that the permanent replacements had special skills, let alone that they were retained for that reason. (Tr. 102).

III

CONCLUSION

The Judge found that the partial lockout was motivated by antiunion animus, and therefore violated Section 8(a)(1) and (3). (Decision at 53, line 42 to 54, line 33) The General Counsel agrees with that finding, but respectfully excepts to the Judge's finding that Respondent demonstrated a legitimate and substantial business justification for the partial lockout.

Respondent, by locking out the crossovers, engaged in conduct inconsistent with its asserted business justifications. Respondent's justifications are further undermined by the brevity of the lockout, especially where the evidence shows that Respondent intended a brief lockout.

Respectfully submitted,

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