

**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 ANSWERING BRIEF TO
GENERAL COUNSEL'S CROSS-EXCEPTION**

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I. PRELIMINARY STATEMENT

As detailed more fully in the Administrative Law Judge's ("ALJ") Decision and Order and Respondent Dresser-Rand Company's ("DRC" or the "Company") Brief in Support of its Exceptions to the Decision of the ALJ, this case arises from a fifteen-week strike by Charging Party, IUE-CWA, AFL-CIO, Local 313 (the "Union") commencing on August 4, 2007, and a subsequent six-day lockout at DRC's Painted Post, New York facility. The Complaint alleged, pertinent to the General Counsel's ("GC") cross-exception and this reply, that DRC violated Sections 8(a)(3) and (1) by locking out full-term strikers and those employees that had abandoned the strike ("crossovers") but not locking out permanent replacements hired during the strike. The GC's only cross-exception is to the ALJ's conclusion that DRC demonstrated a legitimate and substantial business justification for its lockout.¹ The ALJ's finding of a legitimate and substantial business justification for the lockout is supported by substantial evidence in the record and should be upheld by the Board.

II. FACTS PERTINENT TO THE LOCKOUT ALLEGATIONS

DRC instituted the lockout on November 23, 2007, subsequent to the Union's offer to end the strike and return to work.² Louis DiLorenzo ("DiLorenzo"), DRC's chief spokesman for the negotiations, informed the Union by letter that DRC was instituting the lockout in support of its bargaining demands.³ The letter continued, stating that the lockout would end if the Union agreed to DRC's contract proposals.⁴

¹ ALJD p. 49, L. 40 - p. 52, L. 23.

² Tr. 1174-75.

³ GC Ex. 4.

⁴ *Id.*

Thereafter, DRC locked out both the full-term strikers and the crossovers⁵ and continued operations using a mixture of permanent replacements (all of whom had been hired during the strike), temporary replacements, salaried employees, and supervisors.⁶

During the lockout, DRC continued negotiations with the Union.⁷ However, on November 29th, after bargaining sessions on November 26th and 27th failed to result in any movement on either side, DRC declared impasse, implemented its final offer, and ended the lockout.⁸

III. ARGUMENTS AND AUTHORITY

It is well settled that a lockout is lawful if: 1) it is not inherently destructive of Section 7 rights; 2) the employer has proffered a legitimate and substantial business justification for the lockout; and 3) an antiunion motivation has not been established.⁹ The GC repeatedly stated, both in the trial and in his post-hearing brief, that he is not pursuing an “inherently destructive” theory.¹⁰ Thus, using the framework set out in *Great Dane*, the ALJ first determined whether

⁵ DRC locked out the crossovers because it determined that this was required by case law holding that failing to lock out the crossovers constituted a violation of Section 8(a)(3).

⁶ Tr. 1023.

⁷ Tr. 1029.

⁸ Tr. 1178; GC Ex. 11a. The GC declined to issue complaint concerning DRC’s declaration of impasse and implementation of its last, best, and final offer.

⁹ See *NLRB v. Great Dane Trailers*, 388 U.S. 26, 34 (1967); *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 309 (1965); *NLRB v. Brown Food Stores*, 380 U.S. 279, 294 (1965); *Central Ill. Pub. Serv. Co.*, 326 NLRB 928, 930 (1998).

¹⁰ Tr. 845-46; 939-40. Although the GC stated he was not pursuing an “inherently destructive” theory, as explained below, it is unclear exactly what theory the GC is pursuing. Some of the GC’s statements and arguments, however, lead to the conclusion that he is in fact contending that DRC’s conduct was inherently destructive of employee rights. In any case, such theory is untenable and, especially in light of the GC’s repeated disclaimers, cannot be revived at this stage.

DRC presented a legitimate and substantial business justification for the lockout.¹¹ The GC's sole cross-exception is to the ALJ's finding that DRC proved such justification.¹²

A. DRC'S LOCKOUT WAS LAWFULLY DESIGNED TO FURTHER ITS BARGAINING POSITION.

A lockout is commonly used by an employer as an economic weapon designed to compel a union to accede to its bargaining demands. Such a purpose constitutes a legitimate and substantial business justification for a lockout.¹³

At trial, DRC presented evidence that proved beyond peradventure that the lockout was instituted in furtherance of its bargaining position. By the time of the lockout, the parties had already participated in numerous bargaining sessions over a 6 month period and exchanged various proposals and counter-proposals.¹⁴ These meetings failed to result in agreement.¹⁵ The Union then chose to strike, and DRC responded by lawfully hiring permanent replacements.¹⁶ These economic weapons also failed to result in agreement. Next, the Union offered to return to work, but only under the terms of the expired contract.¹⁷

DRC, in turn, exercised one of its last remaining, sanctioned economic weapons in hopes of compelling agreement – the lockout.¹⁸ In the letter informing the Union of the lockout, DRC

¹¹ ALJD p. 50, L. 6 - p. 51, L. 5.

¹² GC Cross-Exception 1.

¹³ *Central Ill.*, 326 NLRB at 932 (“Urging consideration and acceptance of one’s bargaining proposals is clearly a legitimate bargaining position, and we find that application of economic pressure in support of this bargaining position constitutes a legitimate and substantial business reason for the lockout within the meaning of *Great Dane*”).

¹⁴ Tr. 926-27.

¹⁵ Tr. 952.

¹⁶ Tr. 834-36, 952.

¹⁷ GC Ex. 9.

¹⁸ Tr. 1074-75.

specifically stated that: “[t]o end the lockout and return to work, the Union need only agree to the Company’s last offer...”¹⁹ This was the only demand DRC ever communicated to the Union.

From the fact that the lockout was a continuation of the parties’ to-that-point unsuccessful negotiations and use of economic weapons, coupled with the fact that DRC expressly tied the lockout (and the Union’s option to end the lockout) to its bargaining demands, the ALJ concluded that DRC “clearly demonstrated that its purpose in imposing the lockout was to apply sufficient pressure to induce the Union to agree to its proposals.”²⁰ Indeed, DRC’s letter leaves no room for an alternative conclusion.²¹

B. THE GC’S CROSS-EXCEPTION AND ARGUMENTS FAIL TO PROVIDE ANY BASIS TO OVERTURN THE ALJ’S CONCLUSION.

The GC’s arguments have the distinct feel of a violation in search of a theory. The GC’s only clear position is that DRC violated the law because it did not lock out the permanent replacements hired during the preceding strike. This position (no matter the theory supporting it) ignores the employer’s legally-protected rights to take countermeasures in the face of a strike, by hiring permanent replacements, and also the rights of permanent replacements as set forth in *Mackay Radio*²² and *Fleetwood Trailer*.²³ Stated simply, permanent replacements have greater

¹⁹ GC Ex. 4.

²⁰ ALJD, p. 50, L. 32-34.

²¹ Tying the end of the lockout to accepting the employer’s bargaining proposals is, in and of itself, sufficient to show a substantial and legitimate business justification for the lockout. *See International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers, AFL-CIO, Local 88 v. NLRB*, 858 F.2d 756, 767-68 (D.C. Cir. 1988) (holding that because the employer’s sole purpose in locking out its employees was to secure a new collective bargaining agreement, the lockout was lawful and stating, “[t]his purpose, this business justification, is, as the Board correctly noted, “unassailable” in light of *American Ship Building*”); *Central Ill.*, 326 NLRB at 931-32 (accepting as a substantial and legitimate business justification the employer’s explanation that the lockout was solely used to support its bargaining objectives and oppose the union’s attempt to support its bargaining objectives through the use of inside games).

²² *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333, 345-46 (1938) (holding that an employer need not displace permanent replacements hired to fill job vacancies left by employees participating in an economic strike).

rights to their jobs than striking employees. Specifically, permanent replacements are protected from displacement by strikers, who have only the right to be reinstated to vacant positions. The GC's position, however, would make it an unfair labor practice for an employer to continue employing, during a subsequent lockout, permanent replacements hired during a strike, in derogation of the rights of both employers and permanent replacements. There is absolutely no authority for the GC's position.

Perhaps recognizing this fact, the GC does not set forth any coherent theory to support his views and declines a frontal assault on DRC's actions. Rather, the GC's arguments are more a strained and disjointed collection of thoughts and inferences that could represent reliance on any one of three theories: 1) DRC's actions are inconsistent with its proffered justification, and its stated justification (namely, supporting its bargaining position) is therefore not the true motivation for the lockout; 2) an employer can never use permanent replacements hired during an economic strike to operate during a subsequent lockout; or 3) DRC did not provide operational justification for its decision to continue operations during the lockout. Regardless of the theory, the GC's arguments do not establish the absence of a justification for the lockout.

1. DRC's actions were not inconsistent with its lockout justification.

This theory stems from the GC's assertion that certain actions of DRC were inconsistent with its proffered justification of pressuring the Union to accept its bargaining proposals, namely: 1) DRC's lockout of the crossovers; and 2) DRC's decision to end the lockout after only one week.

²³ *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 379 (1967) (employers may refuse to reinstate economic strikers when their jobs have been filled by permanent replacements).

a. Locking Out the Crossovers.

The GC's premise is simple enough: DRC had no need to lock out the crossovers because they had abandoned the strike, and the Union, thus, would not care if they were locked out.²⁴ While this may (or may not) be true, nothing requires an employer, if it decides to apply pressure to a union, to act only to apply the maximum amount of possible pressure. Both Board opinions cited by the GC²⁵ stand for the proposition that an employer's lockout is not unlawful merely because the employer chooses not to lock out certain employees whose lockout would not pressure the Union - not for the proposition that employers must refuse to lock out those employees. In *Midwest Generation, EME, LLC*,²⁶ the Board held that the employer acted lawfully when it did not lock out crossovers, accepting the employer's argument that locking out the crossovers would not place any additional pressure on the Union because those employees had abandoned the Union's strike. Similarly, in *Bunting Bearings Corp.*,²⁷ the Board accepted the employer's argument that not locking out probationary employees, who had lesser contractual rights and had been excluded from the union's strike vote, was lawful because locking them out would not have applied pressure on the union. In no way do either of these cases stand for the proposition that an employer must use the broadest lockout possible for it to be lawful.

²⁴ GC Cross-Exception Brief p. 5-6. This premise was rejected by the Seventh Circuit Court of Appeals in *Local 15, International Brotherhood of Electrical Workers, AFL-CIO v. NLRB* ("*Midwest Generation*"), 429 F.3d 651 (7th Cir. 2005).

²⁵ GC Cross-Exception Brief p. 6-7.

²⁶ 343 NLRB 69, 72-73 (2004).

²⁷ 343 NLRB 479, 481-82 (2004).

Further, both Board decisions were overturned at the circuit court level and remanded to the Board,²⁸ and in both cases, the Board accepted the circuit court decisions as the law of the case and found the lockouts unlawful.²⁹ Accordingly, after considering the state of the law at the time, DRC decided that it must lock out the crossovers or suffer an unfair labor practice charge.³⁰

The GC nevertheless argues that it is irrelevant that locking out the crossovers would be unlawful, and contends that the only pertinent question is whether the lockout is implemented in a manner that puts maximum pressure on the union, *i.e.*, the employer's failure to do so is inconsistent with a stated justification of pressuring the union, and the employer's lockout is unlawful.³¹ Taking this argument to its logical conclusion reveals its absurdity. It would certainly place greater pressure on the Union to not only lock out the employees but to also engage in piecemeal implementation of regressive proposals each day until the Union accepted DRC's bargaining demands. Obviously, such implementation would be unlawful. Yet, under the GC's manner of thinking, it matters not if the action is unlawful so long as it puts pressure on the Union to capitulate.

In short, accepting the GC's argument puts an employer, who chooses to use an economic weapon long-sanctioned by the Supreme Court, in a classic Catch-22 situation: (i) lockout the crossovers and suffer unfair labor practice charges that the lockout was unlawfully motivated

²⁸ See *Local 15, International Brotherhood of Electrical Workers, AFL-CIO v. NLRB* ("Midwest Generation"), 429 F.3d 651, 660 (7th Cir. 2005); *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).

²⁹ See *Midwest Generation, EME, LLC*, 352 NLRB 243 (2008); *Bunting Bearings Corp.*, 349 NLRB 1070 (2007).

³⁰ Tr. 1075-77. To be sure, DRC did not want to lock out the crossovers. It did so only because the law compelled it, and DRC hoped to avoid precisely what it now faces – an unfair labor practice charge claiming that it engaged in a discriminatory lockout. Thus, even assuming the GC is correct in stating that DRC's action in locking out the crossovers is inconsistent with its stated justification of pressuring the Union, DRC should not be penalized for its reasonable reliance on, and actions in accordance with, the law.

³¹ GC Cross-Exception Brief p. 7.

because the action of locking out the crossovers is inconsistent with a desire to pressure the union by use of a lockout; or (ii) fail to lockout the crossovers and suffer unfair labor practice charges that the lockout discriminatorily favored employees that abandoned the strike. The former is clearly unlawful. The latter cannot be as well.

b. Ending the Lockout After a Week

The GC, in conclusory fashion, contends that DRC's decision to end the lockout after only one week is inconsistent with a desire to pressure the Union to accept its proposals.³² It is not self-evident how the length of the lockout is at all probative of the justification for the lockout. In any event, the GC's own statements show that this was not the case.

The GC details the testimony of DiLorenzo stating that DRC's plan was to implement the lockout and schedule bargaining with the Union during the lockout in hopes of achieving agreement or reaching impasse in relatively short order.³³ The GC correctly pointed out that DRC intended the combination of the lockout and bargaining to lead to one of two results: 1) the Union would agree to DRC's terms; or 2) DRC would declare impasse and implement its terms.³⁴ Whether the lockout was brief or lengthy, both of these results are consistent with DRC's stated justification of pressuring the Union to accept its terms. The brevity of the lockout is of no moment – except to show that DRC was successful in achieving its legitimate goal. There is no warrant for penalizing an employer that effectively uses its economic weapons to achieve its stated bargaining goals simply because they are achieved with alacrity.

³² GC Cross-Exception Brief p. 9-10 (“Further, Respondent summarily ended the lockout after only six days, without obtaining the Union’s agreement to its proposals. Instead, Respondent declared a 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.”)

³³ GC Cross-Exception Brief p. 10.

³⁴ GC Cross-Exception Brief p. 11.

2. DRC lawfully used permanent replacements to continue operations during the lockout.

The second potential theory comes from the allegation itself (namely, that DRC violated Sections 8(a)(3) and (1) by locking out full-term strikers and crossovers, but not permanent replacements); statements from the GC stressing that the alleged violation stems not from the fact of the lockout itself or which employees were locked out, but rather which employees were not locked out; and the GC's citation to authority holding that permanent replacements become members of the bargaining unit upon a union's offer to return.³⁵ Again, the GC's premise is simple: an employer can never operate during a lockout with previously-hired permanent replacements if the lockout follows a union's offer to return to work from a strike.

Framed in this manner, the question is one of "inherently destructive" conduct. If using lawfully hired permanent replacements to continue operations during a lockout is inherently destructive of Section 7 rights, DRC's lockout was unlawful. If, on the other hand, such actions have merely a "comparatively slight" impact on employee rights, DRC's lockout (while continuing operations using permanent replacements) is lawful due to its legitimate and substantial business justification, *i.e.*, bringing economic pressure to bear in support of its bargaining demands.

Inherently destructive conduct is that which "carries with it unavoidable consequences which the employer not only foresaw but which he must have intended and thus bears its own

³⁵ GC Cross-Exception Brief p. 4. The GC's contention that permanent replacements become members of the bargaining unit upon the union's offer to return to work is not necessarily correct. It could also be said that the bargaining unit expands to include permanent replacements at the time they are hired. *See Nat'l Upholstering Co.*, 311 NLRB 1204, 1210 (1993) ("the bargaining unit for the purpose of determining the Union's majority status in a case where the employer hired striker replacements consists of the total number of non-strikers, strikers, returning strikers, and striker replacements"). Nevertheless, it makes no difference here, as DRC does not contend that the replacements were not members of the bargaining unit but, rather, only that it is lawful to use such employees to continue operations during the lockout.

indicia of intent.”³⁶ Stated another way, it is conduct “that [] creates visible and continuing obstacles to the future exercise of employee rights.”³⁷ Such cases are “relatively rare.”³⁸

The D.C. Circuit’s opinion in *Boilermakers Local 88 v. NLRB*³⁹ is particularly instructive on this point because it dealt with an analogous set of facts and issue and contains an extended discussion of the impact that using replacements during a lockout has on employees’ Section 7 rights. Specifically, the issue addressed by the court in *Boilermakers* is whether continuing operations with temporary replacements hired during a lockout in support of the employer’s bargaining position (like DRC’s lockout here) is inherently destructive.⁴⁰ There, the court noted that the Act protects the “process of bargaining,” but does not guarantee employees “a bargain.”⁴¹ Therefore, the court had to determine whether the employer’s conduct was inherently destructive of the process of bargaining or whether it had some lesser, or no, impact on that process.⁴²

In finding no effect on the bargaining process, the D.C. Circuit pointed out that hiring temporary employees neither created a cleavage between the temporary replacements and the locked out employees that would endure after the locked out employees returned to work nor discouraged collective bargaining in the sense of making it seem a futile exercise in the eyes of

³⁶ *Great Dane*, 388 U.S. at 33 (internal quotations omitted).

³⁷ *Inter-Collegiate Press, Graphic Arts Div. v. NLRB*, 486 F.2d 837, 845 (8th Cir. 1973).

³⁸ *Loomis Courier Serv., Inc. v. NLRB*, 595 F.2d 491, 495 (9th Cir. 1979).

³⁹ 858 F.2d 756 (D.C. Cir. 1988).

⁴⁰ Of course, there is a distinction between hiring temporary replacements during a lockout and hiring permanent replacements during the lockout. However, it is important to note that DRC lawfully hired the permanent replacements during an economic strike launched by the Union prior to the lockout. This case does not present the issue of whether it is unlawful for an employer to lock out its employees and *then* hire permanent replacements, a situation with quite different ramifications on the bargaining unit. As detailed below, in the instant case, a temporary replacement and a lawfully hired permanent replacement are substantially similar.

⁴¹ *Id.* at 763.

⁴² *Id.*

the bargaining unit employees.⁴³ It is no different here. If there is some cleavage between the permanent replacements and the locked out employees or some discouragement of collective bargaining, it arose when the permanent replacements were hired during the strike, not by their continued employment during the post-strike lockout.⁴⁴ Since there is, and can be, no question as to the lawfulness of hiring the permanent replacements during the strike, there also cannot be any destructive impact on the bargaining process when they are later retained during the lockout.⁴⁵

The *Boilermakers* court then reviewed *NLRB v. Brown Food Stores*,⁴⁶ in which the Supreme Court held that the use of temporary replacements to continue operations during a defensive lockout was not inherently destructive conduct based on three factors: 1) because the replacements were to be kept only for the duration of the labor dispute, the locked out employees were not faced with the threat of losing their jobs; 2) by accepting the employer's terms, the employees could end the lockout and return to work; and 3) the employer was not seeking to alter the union shop provision, and the union members would therefore have "nothing to gain, and much to lose, by quitting the union."⁴⁷ The latter two factors are the same here. The Union could end the lockout by accepting DRC's terms, and there was no change to the contractual union shop provision.⁴⁸ Thus, there was no change in the cost/benefit analysis of employees deciding whether to abandon the union.

⁴³ *Id.* at 764.

⁴⁴ There is no change in the relationship between the permanent replacements and the locked out employees at the point in time when the lockout is implemented. The permanent replacements simply remain in the plant working while the locked out employees remain off work.

⁴⁵ The court noted that merely because the employer's economic weapon may have been effective does not mean that it unlawfully impaired the bargaining process.

⁴⁶ 380 U.S. 279 (1965).

⁴⁷ 858 F.2d at 764-66.

⁴⁸ GC Ex. 4.

The first factor is present as well, albeit in slightly modified fashion. In *Brown*, the locked out employees were not faced with losing their jobs because the replacements were only temporary. Here, the use of permanent replacements during the lockout did not affect the locked out employees' reinstatement rights that they had after participating in the preceding economic strike. Indeed, after DRC ended the lockout, the locked out employees returned to their jobs consistent with their reinstatement rights, just as if the labor dispute ended with the conclusion of the strike and there had been no lockout at all.⁴⁹

Granted, a lockout is a powerful weapon, made all the more powerful when an employer can reject a union's offer to return to work and continue operations, but, as the *Boilermakers* court recognized:

“[T]he use of [] replacements, unlike the initial lockout, does not itself deprive the employees of work or otherwise impose a cost upon them. Rather, if it works, it only strengthens the employer's bargaining power by decreasing the cost to it of resisting the employees' demands or of insisting upon its own. It is clear, however, that any effect on the parties' relative bargaining power – so long as it does not substantially impair the employees' ability to organize and to engage in concerted activity – is simply outside the scope of proper inquiry under sections 8(a)(1) and (3)...Even if the Union had been forced to capitulate...we would not be free to disregard the Supreme Court's persistent admonition that the Labor Act does not prohibit use of an economic weapon simply because it appears to be 'too powerful.' Unless the weapon is inherently destructive of the process rights secured to employees by law, and is not justified by compelling business interests, the Board is not free to order the employer unilaterally to disarm.”⁵⁰

The GC's sole argument on this point is that the permanent replacements became members of the bargaining unit at the time of the Union's return to work offer.⁵¹ Because the GC does not advance any coherent theory, it is assumed by DRC that the purported relevance of

⁴⁹ Tr. 1387.

⁵⁰ *Id.* at 765, 767.

⁵¹ GC Cross-Exception Brief p. 4.

this is that the lockout then appears to have a “perfect correlation” between rewarding (retaining) the non-strikers and punishing (locking out) the strikers. Allegedly, this has the effect of either rendering DRC’s conduct inherently destructive⁵² or showing DRC’s lockout was motivated by union animus. This “perfect correlation” theory, however, ignores many relevant facts, including that: 1) DRC locked out the crossovers, who had abandoned the strike; 2) the permanent replacements could not have struck because they were not employed at the time of the strike, and indeed were hired in response to the strike, so no reasonable employee would view their continued employment during the lockout as a reward for not striking; and 3) between the offer to return by the Union and the lockout by DRC, there was functionally no change in the relationship between and among DRC, the full-term strikers, and the permanent replacements. The GC’s reliance on a hyper-technicality in an attempt to locate a theory for his alleged violation should be dismissed.

3. DRC proffered sufficient justification for its decision to continue operations.

The final potential theory is cobbled together from the GC’s citation to authority stating that permanent replacements become members of the bargaining unit upon an offer to return to work by the union and statements regarding the GC’s view that DRC’s actions of locking out the crossovers and ending the lockout after only a week are inconsistent with its stated operational necessity justification for continuing to employ permanent replacements during the lockout. DRC assumes that these statements represent the GC’s position that, having provided justification for the decision to institute a lockout, DRC must provide additional operational justification for continuing operations with the permanent replacements during the lockout.⁵³

⁵² A theory the GC disclaimed advancing.

⁵³ GC Cross-Exception Brief p. 8-9. This third possible theory could be considered an offshoot of the second, inasmuch as the first premise of such a theory would be that operating with permanent replacements is inherently destructive, or in the alternative, if such conduct is not inherently destructive, the employer must provide

To combat any assertion that it did not have a business justification for operating during the lockout with the permanent replacements, DRC presented undisputed evidence that market share in its industry is based in large part upon being an on-time supplier for its customers and that any loss or delay of orders would likely become a permanent loss of market share.⁵⁴ DRC also presented undisputed testimony that the end of 2007 was busy and consistent production was needed to cover demand.⁵⁵

Undisputed record evidence further showed that consistent production could only be achieved using permanent replacement employees because the temporary employees were only committed for 45 day stints (resulting in high turnover/loss of expertise), utilizing only temporary employees was cost-prohibitive, open slots for temporary employees were difficult to fill, there was no further work that could have been subcontracted, and DRC's other facilities were not able to perform the work.⁵⁶ In addition, DRC had informed the permanent replacements that their jobs were, in fact, permanent and entered into contracts with them that limited the situations in which their employment could be terminated.⁵⁷ As a lockout was not one of those reasons, DRC felt obligated to retain the permanent replacements during the lockout.⁵⁸ The foregoing evidence compels the conclusion that DRC's decision to continue

additional justification for continuing its operations. Neither the Board, the *Boilermakers* court, nor any other court has required additional operational justification for an employer's decision to continue operations during a lockout, and have instead relied only on the employer's justification for instituting a lockout in the first place, *i.e.*, to further its bargaining position.

⁵⁴ Tr. 829; 850.

⁵⁵ Tr. 827-28.

⁵⁶ Tr. 838-42.

⁵⁷ Tr. 1027-28.

⁵⁸ *Id.* The GC incorrectly states that the ALJ rejected DRC's contractual reasons for retaining the permanent replacements. In fact, the ALJ chose not to address this issue because he found that DRC had a legitimate and substantial business justification for its lockout on other grounds.

operations during the lockout using permanent replacements was justified by operational concerns and requirements.

Rather than directly attacking DRC's legitimate operational concerns, the GC merely surmises that all of DRC's legitimate reasons are undermined by its purportedly inconsistent actions, namely, that DRC locked out the crossovers and ended the lockout after only a week. These actions were not inconsistent with DRC's stated justifications.

First, DRC's decision to lock out the crossovers was based on its fear that, if it did not lock them out, it would be faced with (likely meritorious) unfair labor practice charges claiming that the lockout discriminatorily treated employees that had abandoned the strike more favorably than the full-term strikers.⁵⁹ It is true, as the GC points out, that the crossovers would have augmented production, but DRC could not meet the high burden set forth in the Seventh Circuit's opinion in *Midwest Generation*, which requires an employer to prove, in order to be able to lawfully retain crossovers during a lockout, that those employees are absolutely necessary to production.⁶⁰ DRC retained approximately 98 permanent replacements during the lockout and had no legitimate argument as to why the 13 crossovers would be necessary to production, especially in light of the fact that the 13 crossovers did not have specialized skill sets.⁶¹ Fear of substantial litigation resulting from the decision not to lock out the crossovers is not inconsistent with DRC's stated operational needs.

Second, the GC states that "any justification based on operational needs is also refuted by [DRC]'s decision to end the lockout after less than a week."⁶² It is unclear, and unexplained by

⁵⁹ Tr. 1075-76.

⁶⁰ GC Cross-Exception Brief p. 8-9.

⁶¹ Tr. 1166.

⁶² GC Cross-Exception Brief p. 9.

the GC, how a brief lockout refutes DRC's operational justifications. If anything, this fact only illustrates that DRC's lockout was successful after just a brief period.⁶³ Surely, the GC does not contend that an employer must continue its lockout after achieving its objectives (which would transform it into an unlawful lockout) in order to prove that the lockout was lawful in the first place. To the extent that the GC argues there was no need to continue production during the (what turned out to be short) lockout, he similarly fails to explain how production needs change depending on the length of the lockout.⁶⁴ Orders from customers must be filled in a timely manner whether the lockout lasts a week, a month, a year, or longer. Therefore, even assuming that DRC planned (and perfectly executed its plan) to lockout the employees for a brief period, the GC has failed to explain why that fact undermines DRC's justification for the lockout. There is certainly no authority that supports that proposition.

Further, the use of economic weapons creates a situation fraught with uncertainty, and there were no guarantees here that the lockout would be short (regardless of DRC's plans). For example, while the lockout might have softened the Union's bargaining position, the Union could just as well have chosen to go back out on strike after the lockout and DRC's implementation of its offer. In short, there were no guarantees that the lockout would be brief or, ultimately, successful. The fact that it was successful in a short amount of time, if anything, demonstrates the effectiveness of DRC's lockout to lawfully place pressure on the Union.⁶⁵

⁶³ Had DRC not continued its operations during the lockout, its leverage may have been weakened, prolonging the lockout. That, more than its decision to continue its operations using permanent replacements, would have been inconsistent with its purpose for the lockout – to put pressure on the Union to accede to its bargaining demands.

⁶⁴ GC Cross-Exception Brief p. 11-12.

⁶⁵ It is unclear how the cases cited by the GC – *Hercules Drawn Steel Corp.*, 352 NLRB 53 (2008), *Bali Blinds Midwest*, 292 NLRB 243 (1988), and *Laclede Gas Co.*, 187 NLRB 243 (1970) – support any of the three potential theories. Each case involved a lockout during which the employer recalled certain of the locked out employees to continue operations. None dealt with a lockout following a strike, nor do any of them discuss the use

4. *Accepting the GC's position effectively destroys the viability of a lockout following a strike and undermines the collective bargaining process.*

Under any of the three theories, accepting the GC's position effectively renders useless a lockout implemented following a union's offer to return to work from a strike. Clearly, full-term strikers will be locked out. Further, the law requires (at least in cases like that here) an employer to lock out crossovers. If, as the GC asserts, the employer is also forced to lock out the permanent replacements it hired specifically to combat the union's strike, it becomes exceedingly difficult to subsequently implement an effective lockout.⁶⁶

In that case, an employer would be forced to use only temporary replacements and/or non-bargaining unit personnel to continue operations (an option rejected by the employer when it hired permanent replacements during the strike). This would rob the employer of its leverage and greatly tip the scales in favor of the union, making the employer much less likely to implement a lockout in the first instance. Yet, it is well-settled that an employer has the right to implement a lockout in support of its bargaining position, and it is not the Board's place to temper the effectiveness and viability of economic weapons, only to ensure that they are not used in a discriminatory manner.⁶⁷ The GC's position has the effect of the former (tempering the effectiveness and viability of a lockout) without showing the latter (discrimination). Thus, the GC's position should be rejected.

of permanent replacements (who were hired during a preceding strike) to continue operations during a lockout, which is the case here.

⁶⁶ The constraint that would result from the GC's approach is hardly insignificant. Not only would the union know that the employer's weapons had been severely circumscribed, but the employer would also know that the value in hiring permanent replacements would be severely limited if the employer was obligated to lock out those replacements. Under the GC's logic, all 98 permanent replacements here had to be locked out. Further, accepting the GC's contention concerning the crossovers and applying it to locked out permanent replacements would mean that the permanent replacements, once locked out, merely have *Laidlaw* rights similar to the full-term strikers (and the crossovers). This would essentially eliminate the utility of hiring permanent replacements and would transform the lockout from an economic weapon to a hindrance.

⁶⁷ *Boilermakers*, 858 F.2d at 767.

Further, the burden of the GC's position is borne by more than just the employer, it also impinges on the collective bargaining process generally. Collective bargaining works because of the potential and actual ability of the parties to use economic weapons. A union threatens to go on strike, or actually strikes, to pressure the employer to accede to its demands; and the employer threatens or uses countermeasures, such as the hiring of temporary or permanent replacements, to resist those demands. Many contracts are settled with the mere threat of the use of these economic weapons, while others cannot be settled until after those weapons have been used. There are, however, cases like the one here where the parties, having used these economic weapons, nevertheless remain deadlocked. In such a situation, even when a union has offered to abandon the strike, the matter may not be resolvable from the employer's perspective. Hence, it may be necessary to use the further economic weapon of a lockout to end the deadlock, as DRC did here.⁶⁸

Accepting the GC's view, however, eliminates the use of an effectual lockout – the sole remaining weapon at the parties' disposal – to break the deadlock in negotiations. An employer, in implementing a lockout, is in a “cut-its-nose-off-to-spite-its-face” quandary. Locking out the permanent replacements means loss of production and economic harm, but not implementing a lockout means the employer has no way to continue pressuring the union to secure a contract (especially where, as here, the union's offer to return from a strike is under the terms of the expired contract). This will create a natural inhibition against implementing a lockout. The risk, then, is a perpetual deadlock in negotiations, because neither party has sufficient power to

⁶⁸ ALJD p. 50, l. 6-16.

compel the other to accede to its demands. Rather than fostering collective bargaining, this would bring it to a halt.⁶⁹

IV. CONCLUSION

Based on the record evidence in this case and for the reasons set forth above, the Respondent, Dresser-Rand Company, requests that the GC's cross-exception be dismissed and the ALJ's finding that DRC demonstrated a legitimate and substantial business justification for its lockout be adopted by the Board.

Dated: April 16, 2010

Respectfully submitted,

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⁶⁹ Given the current economic circumstances, including high levels of unemployment, it is certainly an open question as to whether a continuing deadlock, which the union itself was unable to break, would serve the union's interests.

CERTIFICATE OF SERVICE

This is to certify that the **RESPONDENT'S ANSWERING BRIEF TO GENERAL COUNSEL'S CROSS-EXCEPTION** 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 16th day of April, 2010:

Lester A. Heltzer, Executive Secretary
NLRB Office of the Executive Secretary
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Further, this same day, a copy of Respondent's Answering Brief has been sent by email and certified mail to the following:

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