

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

I

BACKGROUND

On April 2, 2010, the General Counsel filed a Cross-Exception to the Decision of Administrative Law Judge Mark D. Rubin in the above-captioned matters. On April 16, 2010, Respondent filed an Answering Brief. Pursuant to Section 102.46(h) of the Board's Rules and Regulations, the General Counsel, by the undersigned, submits this Reply Brief.

II ISSUE

The issue presented by the General Counsel's Cross-Exception is whether the Administrative Law Judge was correct in finding that 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). The General Counsel respectfully submits that the Administrative Law Judge's finding was error.

III ARGUMENT

Contrary to Respondent's assertion in its Answering Brief,¹ the General Counsel's theory of a violation is clear. Respondent is correct that the General Counsel has not and does not proceed on an "inherently destructive" theory, either overtly or in some indirect way. The General Counsel recognizes that in the absence of conduct that is inherently destructive of Section 7 rights and in the absence of antiunion animus, an employer does not violate the Act by locking out employees for "legitimate and substantial business reasons." The Board may, however, find a violation where, as in this proceeding, the employer's asserted reasons are called into question by conduct that is inconsistent with those reasons.² Specifically, Respondent's decisions to lock out the crossover employees (those employees who had returned to work during the course of the strike) and to end the lockout after only six days were inconsistent with, and therefore undermine, its asserted business justifications.

¹Ans. Br. at 4-5.

²Field Bridge Associates, 306 NLRB 322, 334 (1992); *accord*, Ancor Concepts, Inc., 323 NLRB 742, 744 (1997); Allen Storage, *supra* at 514-515.

Respondent's contentions at page 5 of its Answering Brief are only partially correct. The General Counsel, as stated above, contends that Respondent's conduct is inconsistent with its proffered justifications. Respondent wrongly suggests, however, that the General Counsel takes the position that "an employer can never use permanent replacements hired during an economic strike to operate during a subsequent lockout." That is not and has never been the General Counsel's position. Rather, the General Counsel maintains that Respondent's decision to retain the permanent replacements is inconsistent with its asserted business justification for locking out the crossover employees.³

More specifically, when the crossovers abandoned the strike and returned to work, all of them 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. Locking out the crossovers did not bring pressure to bear on the Union's bargaining position. Thus, there was no need for Respondent to lock out the crossovers, who had abandoned the strike.

Respondent claims that in deciding to lock the crossovers out, it relied upon the appellate courts' remand decisions and the Board's Supplemental Decisions in Midwest Generation⁴ and Bunting Bearings.⁵ The Circuit Courts had decided Midwest and

³Respondent assumes that a charge filed by the Union in that event would have been found by the Regional Director to have merit. But this is not a foregone conclusion. For example, in a case where no striking employees had ever crossed the picket line, there would be nothing inconsistent with a legitimate and substantial business justification about locking out former strikers and operating with permanent replacements. Also, had Respondent not locked the crossovers out, its retention of the permanent replacements would have been consistent with a business justification of operational need.

⁴Local 15, International Brotherhood of Electrical Workers, AFL-CIO v. NLRB, 429 F.3d 651 (7th Cir. 2005); on remand, 352 NLRB 243 (2008).

⁵United 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); on remand, 349 NLRB 1070 (2007).

Bunting before the lockout herein, and in both cases the Courts remanded to the Board with instructions to find that the respondents had unlawfully locked out employees. However, the facts in Bunting did not dictate that Respondent lock the crossovers out. In reversing the Board and finding the lockout unlawful, the D.C. Circuit relied in large part on Bunting's failure to present any evidence of a "legitimate and specific business objective" for locking out only non-probationary employees (and union members). 179 Fed. Appx. at 62 – 63. Here, on the other hand, the Respondent has vigorously asserted a business justification, even where its actions were inconsistent with its assertion.

In Midwest, *supra*, the respondent locked out all employees who were on strike at the time of the union's unconditional offer to return to work, but did not lock out non-strikers or crossover employees. Reversing the Board, the Seventh Circuit found that:

Prior to the Board's decision, Midwest offered no proof that its operational needs justified the partial lockout.

429 F.3d at 657.

Again, Respondent herein has vigorously asserted that its operational needs justified retaining the permanent replacements during the lockout. It could therefore have retained the crossovers as well, and argued in defense of any unfair labor practice charge that Midwest is distinguishable. Again, we can not hypothesize what the outcome of such a charge would have been. The point is that neither Midwest nor Bunting, *supra*, *compelled* a decision to lock out the crossovers, a decision that is inconsistent with Respondent's position that its operational needs required it to retain the permanent replacements during the lockout.

Respondent also misstates the General Counsel's position as requiring an employer to demonstrate business justification not only for the decision to engage in a lockout, but also to continue operations during a lockout. (Answering Brief at 5). Nothing in the General Counsel's Complaint or in his theory of the case would require Respondent to have ceased operations entirely during the lockout. As the record evidence reveals, Respondent operated during the lockout not only with permanent replacements, but also with temporary replacements, supervisors and salaried employees.⁶

In its Answering Brief, at pp. 8, 15-16, Respondent argues that it is not self-evident, (it is not), nor has it been explained by the General Counsel (it has been) why the brief duration of Respondent's lockout undermines its asserted justifications for the lockout.⁷ The evidence that Respondent contemplated a brief lockout, and the argument that Respondent's conduct was inconsistent with its proffered justifications, are set forth at pages 9-11 of the General Counsel's Brief in support of his Cross-Exception.

Again, the question is not whether Respondent has advanced sufficient justification for continuing to operate *at all* during the lockout. Respondent unquestionably had the right to continue its operation. The question is whether sufficient justification has been advanced for the *partial* lockout, i.e., the Respondent's decision not to lock out the permanent replacements, for a period of time that encompassed parts of two days and five full days, two of which were a Saturday and a Sunday.

⁶Tr. 1023.

⁷The Administrative Law Judge did not address the significance of the lockout's duration in his Decision.

Respondent states that “(T)he use of economic weapons (is) fraught with uncertainty, and there were no guarantees here that the lockout would be short...the Union could have just as well gone on strike after the lockout and DRC’s implementation of its offer.” (Answering Brief at 16). However, as the Administrative Law Judge has found, the Union’s November 19 return to work offer was unconditional.⁸ The Union made clear on November 19 that the offer was to return under the terms of the expired contract. However, Respondent never inquired of the Union whether its offer to return to work would stand in the event of impasse and implementation by Respondent of its final offer, until after Respondent had declared impasse and implemented its final offer.⁹ Thus, the uncertainty of the situation and the fear of a repeat strike are overstated.

Finally, to find a violation in this matter would not, as Respondent suggests, “effectively destroy the viability of a lockout.” (Answering Brief at 17). Respondent states that [i]t 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.” (Id. at 17, citing Boilermakers Local 88 v. NLRB, 858 F.2d 756 (D.C. Cir. 1988)). The General Counsel does not quarrel with this general proposition. But to find a violation on the facts of this case would not unequivocally require an employer to lock out permanent replacements hired during a strike, during a subsequent lockout. The violation herein stems from the inconsistency between Respondent’s proffered business justifications and

⁸An unconditional offer to end a strike and return to work remains valid until and unless it is expressly rescinded. Marlene Industries Corporation, 255 NLRB 1446, 1469-1470 (1981), enf. den. on other grounds and remanded, 712 F.2d 1011 (6th Cir. 1983). IUE-CWA Industrial Division President James Clark’s testimony that the November 19 offer was never rescinded (Tr. 146-147) is uncontroverted.

⁹Where an employer is uncertain about the meaning of an offer, the burden is on the employer to seek clarification from the union. Home Insulation Service, 255 NLRB 311, 312 (1981); Dold Foods, 289 NLRB 1323, 1333 (1998).

its conduct.¹⁰ For these reasons, the Administrative Law Judge erred in finding that Respondent demonstrated a legitimate and substantial business justification for its partial lockout.

IV

CONCLUSION

While the General Counsel agrees with the Administrative Law Judge that the partial lockout was motivated by antiunion animus, the Administrative Law Judge's finding that Respondent demonstrated a legitimate and substantial business justification was in error. Accordingly, Respondent's partial lockout violated Section 8(a)(1) and (3) of the Act under both theories articulated by the General Counsel.

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Respectfully submitted,

/s/ _____

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¹⁰Additionally, there is a violation because, as the Administrative Law Judge correctly has found, the evidence shows that the lockout was motivated by antiunion animus.