

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

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ALDEN LEEDS, INC.	:	
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Respondent,	:	
-and-	:	
	:	
UNITED FOOD AND COMMERCIAL WORKERS	:	Case No. 22-CA-29188
UNION, LOCAL 1245	:	
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Charging Party.	:	
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ANSWERING BRIEF OF CHARGING PARTY UNITED FOOD
AND COMMERCIAL WORKERS UNION LOCAL 1245 TO RESPONDENT'S
EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

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PRELIMINARY STATEMENT

Charging Party United Food and Commercial Workers Union, Local 1245 (“Charging Party” or “the Union”) respectfully submits this Answering Brief to the Exceptions to the August 30, 2010 Decision of the Administrative Law Judge Steven Fish (“the ALJ”) submitted by Respondent Alden Leeds.¹ For the reasons set forth in the ALJ’s thorough and well-reasoned Decision, and for the additional reasons stated herein, Respondent violated the Act as the ALJ concluded and Respondent’s exceptions are without merit.²

On November 3, 2009,³ Respondent abruptly locked out its employees following the expiration of a 30-day extension agreement that ran through November 2. (Tr. 24, 30-31); Cmpl’t ¶14 & Amd. Answer ¶14.

In his decision, the ALJ concluded that the lockout was unlawful because Respondent locked out the employees without providing them with clear and timely notice of the conditions they needed to accept to avert the lockout. ALJD 21:35-37.

FACTS

All relevant, material facts have been fully and adequately set forth in the ALJ’s Decision.

¹ We have simultaneously filed a motion to strike certain of Respondent’s Exceptions and portions of its brief in support thereof.

² Citations herein to the ALJ’s Decision are to “ALJD page:line”. Citations to the transcript of proceedings in this case are to “Tr. ___”. Citations to exhibits are to “GC Ex. ___”. Citations to Respondent’s brief are to “R.Br. ___”.

³ All dates referred to are in 2009 unless otherwise indicated.

ARGUMENT

- I. The ALJ correctly held that Alden Leeds violated the Act by locking out its employees on November 3, 2009 without providing its employees with proper notice of the conditions they must accept to avoid the lockout.
 - A. The ALJ applied the correct legal standard in finding that Respondent failed to provide the employees with clear and timely notice before the November 3 lockout.

The ALJ correctly concluded that Respondent was obligated to provide the Union with clear and timely notice of the conditions it must accept in order to avert the November 3 lockout. ALJD 17:48-52.

A lockout is only lawful if the union is clearly informed of the employer's demands so it can evaluate whether to accept them. *Dayton Newspaper Inc.*, 339 NLRB 650, 658 (2003), *aff'd* in rel. part, 402 F.3d 651 (6th Cir 2005). The employer must have "clearly and fully" informed employees of the conditions they must accept to avert the lockout, so they can "knowingly evaluate their position." *Eads Transfer Inc.*, 304 NLRB 711, 712 (1991), *enfd*, 989 F.2d 373 (9th Cir. 1993). See also, *Dietrich Industries Inc.*, 353 NLRB 57, 60-61 (2008) (finding lockout unlawful where, prior to the lockout, employer failed to present a complete contract offer and had made revisions to its offer). Also, the employer's announcement of conditions employees must accept to avert a lockout must be timely – providing sufficient time to evaluate its terms before the lockout. *Eads Transfer Inc.*, 304 NLRB at 712.

Respondent excepts to the ALJ's application of the notice requirement here because, unlike the cases cited above, the instant case does not involve a lockout following a request for reinstatement after a strike. R. Br. at 16-25. This argument was rejected by the ALJ and the Board should do the same.

In a carefully reasoned analysis, the ALJ soundly rejected Respondent's argument that the clear and timely notice requirement applies only where employers announce lockouts in

response to employees seeking to return following a strike. ALJD 16:32-17-52. The ALJ correctly noted that nothing in the lead cases -- *Dayton Newspaper Inc*, *Eads Transfer* and *Dietrich Industries* --- limited the requirement's applicability to lockouts following strikes. On the contrary, the language in all three decisions is broad and predicates lawful offensive lockouts upon clear notice. For example, *Dayton Newspaper* is clear that "any lawful lockout" requires notice. *Id.* at 658. Nothing in the cited decisions suggests a limitation to post-strike situations. No legal principal regarding strikes and lockouts suggest they that should be treated differently. On the contrary, as the ALJ reasoned, the Board has explicitly eliminated distinctions in offensive and defensive lockouts. ALJD 16:40-46. See *Harter Equipment*, 280 NLRB 597, 600 (1986).

Moreover, as the ALJ emphasizes, in *Boehringer Ingelheim Vetmedica*, 350 NLRB 678 (2007), a case involving an offensive lockout that did not follow a strike, the Board explicitly stated that a fundamental principle of a lawful lockout is the clear notice requirement as set forth in *Dayton Newspapers*. ALJD 17:34-40; see *Boehringer Ingelheim*, 350 NLRB at 679.

Respondent's attempt to discount this case as mere dicta is pure folly. There, the ALJ, with Board approval, analyzed the facts of the case and found that there had been proper notice under *Dayton Newspaper*. Respondent's attempt to distinguish *Boehringer Ingelheim* on the grounds that, unlike here, employees had authorized a strike is similarly a distinction without any meaning.

Respondent essentially has conceded the notice requirement. While Respondent spends pages citing text to show that these cited cases involved post-strike situations, Respondent never explains why this distinction should matter. R.Br. 16-24. Similarly, its attempts to discount *Boehringer Ingelheim* make no sense. The employee rights relied upon in the cited cases, which

allow employees to assess their options when their livelihood is at stake, are no less important in an offensive lockout situation than in a post-strike situation. Respondent has cited no Board precedent for any contrary proposition.

Finally, Respondent argues that, if the Board upholds the ALJ and applies the clear and timely notice requirement to a lockout in the absence of a strike, it can do so only prospectively because the Board would be establishing new law. R.Br. at 24-25. In light of the cases cited above, this argument is specious. First, as set forth by the ALJ and above, proper notice is a longstanding requirement should an employer seek to use the lockout as an economic weapon. Second, even assuming a notice requirement in these circumstances could be viewed as new, the Board's long-standing policy is to apply new standards and policies retroactively, absent a showing of "manifest injustice." *SNE Enterprises Inc.*, 344 NLRB 673 (2005). Under the facts of this case, and given the significant employee interests at stake, Respondent cannot meet that standard.

- B. The ALJ correctly found that Respondent had not provided clear and timely notice to the employees of the conditions they must accept to avert the lockout.

The ALJ found that Respondent did not provide the requisite "timely and complete" notice to the Union of the proposals it must accept to avert the lockout. ALJD 18:1-5. Respondent excepts to the ALJ's determination. R. Ex. Nos. 3-10; R. Br. at 27-39. Respondent argues that it did provide such notice and, moreover, that the Union representatives understood it. R. Br. at 27-35. Respondent is wrong on both counts. The record supports the ALJ's determination that Respondent failed to provide the notice.

It is undisputed that the final communication from the Respondent to the Union prior to the lockout was Respondent's email of October 30. It was sent by Epstein in response to Troccoli's request to "notify the Union precisely what contract terms that Respondent was

demanding that the employees agree to in order to avoid the threatened lockout.” ALJD 10:9-12;

Tr. 184, 238. It reads as follows:

During the 30 days since the Agreement between the parties expired we at the Company have tried our best to come up with an alternative medical plan that would cost the same or less than the proposed increase for the Union plan. Our best efforts resulted in a plan that 1) requires medical interview for coverage 2) does not include dental 3) does not include optical 4) did not cost less than the expiring plan. However if we were to eliminate the family coverage and go to single coverage for all Union members then this plan would cost less than the expiring Union plan. There would be enough of a savings that the Company would provide \$400 to each member to go toward their deductibles. John Traccoli [sic] stated that he had been unaware of this option but regardless that the Union will keep to the existing plan and would cut benefits to keep the cost to the Company the same as the expiring plan. Tom had stated that he would meet with the members by today, Friday October 30 however that meeting did not take place. I stated that with all of the above taken into consideration the Company still wants a freeze on wages for a one or two year Agreement. If two years is out of the question then a one year Agreement is the only other option. If we have no Agreement between the parties by close of business on Monday then the Company will lock out the Union members on Tuesday morning Nov 3, 2009.”

ALJD 9:9-40; GC Ex. 3.

The record supports the ALJ’s conclusion that the October 30 email was “confusing, incomplete and internally inconsistent, and fails to provide the Union and Respondent’s employees with timely and complete notification of the terms that the employees must accept to avert the lockout.” ALJD 18:3-5.

The email on its face is confusing and not a clear proposal. Epstein ruminates on the deficiencies of an unspecified health plan and repeats the Union’s most recent health plan proposal. Epstein neither accepted nor rejected either the Union’s proposal or the unspecified

plan to which he referred.⁴ ALJD 19:1-7; GC Ex. 3. Thus, the ALJ correctly reasoned that Respondent's position on health care could not be readily determined. ALJD 18:31-52.

Also, toward the end of the email, Epstein states, "with all of the above taken into consideration the Company *still wants a freeze on wages for a one or two year Agreement.*" (emphasis supplied) GC Ex. 3. As the ALJ correctly concluded, the email leaves unclear how this applies to health care benefits or any of the other terms of an agreement besides wages. ALJD 19:1-13. The email was confusing also because it presented the choice of either a one year or two year agreement without any explanation as to who makes that determination and how this relates to Epstein's previous statements that he wanted a one year agreement. ALJD10:20-29; Tr. 128, 186-90, 224-25, 238.

To add to the confusion, the email stated that Cunningham had failed to meet with the workers by October 30, a reference that made no sense to Troccoli or Cunningham. (ALJD 18:25-28; Tr. 97, 122, 187).

Given all the confusion and uncertainty in the email, it reads like a confused call to negotiate, not a clear proposal. It concludes, "[i]f we have no Agreement... the Company will lock out the Union." As Epstein credibly testified, he was "open to discussing the other issues." ALJD 19:15-20; Tr. 355-56. The ALJ correctly concluded that Epstein conceded the email was not a complete proposal. ALJD 19:18-20.

The ALJ rejected Respondent's argument that the email reiterated its prior offer for a one year freeze. ALJD 19:32-35. The ALJ carefully compared the email with prior communications between the parties and correctly concluded that "[t]he email differed from Respondent's prior proposal of a one-year "freeze" with respect to health care, the length of the contract and the

⁴ Throughout October, Respondent had forwarded approximately 13 different plans. See GC Ex. 11, 14, 16.

issues other than wages.” ALJD 19:32-35. The ALJ, having credited Troccoli’s testimony that no agreement on health benefits was reached in his telephone conversation with Epstein earlier that day, ALJD 19:45-52, correctly found that the email gave the impression that several health care proposals were still in play. ALJD 18:14-15, 31-52. Also, this was the first time Epstein mentioned a freeze on wages only, or offered a two year option. As the ALJ concluded, such vague, shifting conditions constitute a “moving target” which does not satisfy the Employer’s burden under the law. ALJD 20:14-17; *Dayton Newspaper*, supra at 658.

The ALJ also correctly found that John Troccoli and Tom Cunningham did not understand the email.⁵ ALJD 10:16-28; 19:22-23; Tr. 97-99, 122, 187. The ALJ properly credited Troccoli and Cunningham’s testimony that the email was confusing and made no sense to them.⁶ ALJD 10:16-28. Troccoli, who had just spoken with Epstein, did not understand it. Tr. 185-90. Troccoli interpreted it as “mentioning dribs and drabs of a health plan.” ALJD 10:19; Tr. 186. Troccoli testified that the email repeated that Cunningham was supposed to meet with the people, which Troccoli in an earlier telephone call had told Epstein was premature. Tr. 184. The email referred to discussions about health plans of which Troccoli had not been aware. Tr. 188. The email also referred to wanting a freeze on wages for one or two years. As far as Troccoli knew, this was the first time Epstein had made such a proposal. Troccoli had only heard Epstein say he wanted “everything” the same for one year. ALJD 10:20-21; Tr. 190

Cunningham was equally befuddled by the email when he saw it. He testified that he had not previously discussed with Epstein either the \$400 contribution toward deductibles or the

⁵ Respondent fails to specifically urge that this finding be overruled. Thus, pursuant to the Board’s Rules & Regulations 102.46(b)(2), it is waived.

⁶ Respondent’s Exceptions # 12 and 13 take general exception to the ALJ’s credibility resolutions regarding Union witnesses. We have moved to strike these exceptions in our Motion filed November 5, 2010, on grounds that they do not conform with the Board’s Rules. However, we note that ALJs often credit selected portions of witness *(footnote continued)*

elimination of family coverage described in the email. Tr. 98, 160-61. Cunningham noted that the email proposed a freeze on wages for one or two years, which was different than the one year freeze on “everything” that Epstein had previously demanded. ALJD 10:26-28, Tr. 99, 155.

Respondent here repeats the same arguments rejected by the ALJ: that the October 30 email merely reiterated the same offer made at prior bargaining sessions and that the Union was well aware that Respondent’s offer was “a one-year freeze on all terms of the agreement” R. Br. 27-31. As shown above, these arguments fail. The ALJ found, and the record supports, that Epstein’s email was not consistent with his credited testimony that he wanted a total freeze. ALJD 19:10. As argued above, the ALJ clearly demonstrated that the plain language of the email contradicted Epstein’s previous statements as to what he wanted. The credited testimony is that Epstein had previously stated that he wanted a one year freeze or a one year contract. ALJD 4:2; 5:4-5; 8:48-49; Tr. 184. In contrast, the October 30 email proposes a one or two year agreement and a freeze on wages. These are not the same proposals.

Moreover, whether or not Epstein clearly stated his position at previous sessions that he wanted a one year freeze on everything, and whether or not the Union representatives understood that to be his position, what matters is what the October 30 email said because those were the conditions to avert lockout that Troccoli could take to the members. As the ALJ correctly found, Epstein sent this email following his telephone conversation with Troccoli earlier that day in which Epstein first threatened to lockout employees.⁷ ALJD 10:9-12. According to the credited testimony of Troccoli, Epstein had expressed dismay that the employees had not voted on a

testimony and such practice is proper.

⁷ The ALJ found this telephone conversation occurred on October 30. ALJD 9:49-10:12. Respondent improperly argues throughout its brief that this conversation took place on October 26. Charging Party has simultaneously filed a motion to strike all such references. See motion submitted November 5, 2010.

contract and Troccoli had exclaimed, “vote on what? I have no idea what we’re voting on.”

ALJD 8:52-9:1; Tr. 238. Epstein agreed to send a proposal. ALJD 8:51-9:7 Tr. 184, 238.

October 30 was the first time the Employer put a proposal in writing to the Union. In response to Troccoli’s stated uncertainty regarding Respondent’s position, and in the face of the lockout threat, Epstein sent a confused “proposal” that among other problems outlined above, changed his “proposal” from a one year freeze on everything to a one or two year freeze on wages.

Respondent excepts to the ALJ’s finding that Respondent’s position in the October 30 email with regard to health proposals was uncertain. R. Ex. 4 and 6; R Br 36-41. As demonstrated above, the ALJ correctly found that the text of the October 30 email left Respondent’s position unknown. Also, the ALJ in crediting Troccoli’s version of the October 30 telephone conversation found that no prior agreement on health benefits had been reached. ALJD 19:45-52. Finally, such a claim is belied by the constant stream of varying plans Epstein sent to Cunningham throughout October. ALJD 3:43-45; 7:33-8:23; Tr. 79, 81, GC. Ex. 11, 13, 14, 15, 16.

In support of Exceptions 4 & 6 regarding its position on health care, Respondent, while acknowledging that it sent numerous health plans to the Union in the weeks before the lockout, makes the incredible argument that the various plans and emails it sent to the Union involving health benefits, “in no way represented a change in its clear unambiguous position throughout negotiations that the amount of its contributions to employee health care costs would be ‘frozen’ or ‘*status quo*’”. R. Br. at 36. Rather, Respondent claims that it sent the plans to the Union merely to “assist the Union in maximizing coverage for its members.” R. Br. at 36. This after the fact explanation has no merit. Epstein never gave such an explanation when he forwarded health plans to Cunningham. See Tr. 79, 81, GC. Ex. 11, 13, 14, 15, 16. In fact, the record shows that

Epstein discussed in detail the components of some of the health care plans. ALJD 3:43-45; 7:33-8:23; GC Ex. 15, 16. Most significant, Epstein specifically testified that he offered the plans as alternative proposals. Tr. 341, 349-50. To argue that Epstein's diligence in finding lower cost plans for his employees was done as a favor to the Union cannot be taken seriously. In any event, the plain language of the October 30 email negates such a claim.

Finally, the ALJ correctly found that Respondent's October 30 proposal was not "timely" under the law. ALJD 20:7-12. Respondent cannot escape the undisputed facts: Epstein sent the unclear email -- his purported notice -- late in the day on Friday before the weekend, which gave the Union only one business day to evaluate it, consult with counsel, and decide on a course of action before the lockout on Tuesday, November 3. Given the ambiguous and confusing nature of the email, it did not constitute sufficient notice. ALJD 10:7-12 & n.11. The law requires the Union and workers have time to "intelligently evaluate" the employer's proposals. *Dayton Newspaper*, supra at 658. One business day notice does not meet that standard.

Respondent's claim that the Board approved a shorter notice period in *Boehringer Ingelheim* is incorrect and ignores the context. See R. Br. 42-43. In *Boehringer Ingelheim*, the employees had voted down a full contract proposal and authorized a strike. The only condition to which the workers had to agree to avert a lockout was a no-strike commitment. This single, and clearly-communicated condition was known to the Union several days before the vast majority of the workforce was to be locked out. *Boehringer Ingelheim*, 350 NLRB at 689-90. This stands in stark contrast to the facts here where employees were not presented with a final proposal on which they could vote; and Respondent sent a confusing email that failed to set forth any clear conditions that must be accepted to avert lockout.

The ALJ also correctly held that the Union did not have the burden upon receipt of the email to seek clarification prior to the lockout. ALJD 19:37-42. He reasoned that because Respondent sent the email only one business day prior to the lockout, the Union had insufficient time to assess the notice, seek necessary clarification and put it to a vote of the membership. ALJD 20:10-12 & n.11. He found that the Union's course of action under the circumstances was reasonable. ALJD 10:10-12 & n.11. Respondent attacks this finding by questioning DeVito's judgment and impugning his credibility. R. Br. at 50 n. 14. This gratuitous analysis is false, as the ALJD credits DeVito's testimony in all material respects. Further, the argument is completely irrelevant to the ALJ's reasoning.⁸

Therefore, as the ALJ concluded, by failing to provide the Union and employees with a clear statement of the conditions the workers must accept to avert lockout, and the time in which to intelligently consider those conditions, Respondent violated Sections 8(a)(3) when it locked out its employees on November 3.

⁸ Respondent's argument here is subject to the Union's motion to strike filed November 5, 2010, as Respondent did not except to the ALJ's credibility resolutions.

CONCLUSION

For the foregoing reasons, we respectfully request that the Board reject Respondent's exceptions in their entirety and adopt the ALJ's conclusion, remedy, and recommended order.

Dated: New York, New York
November 5, 2010

Respectfully submitted,

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CERTIFICATE OF SERVICE

I herby certify that I caused a true and correct copy of the foregoing Answering Brief to Respondent's Exceptions of United Food and Commercial Workers Union Local 1245 to be serviced by e-mail upon:

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this 5th day of November, 2010

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