

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

ALDEN LEEDS, INC.

Respondent

And

Case: 22-CA-29188

UNITED FOOD AND COMMERCIAL
WORKERS UNION, LOCAL 1245

Charging Party

Charging Party

**ACTING GENERAL COUNSEL'S BRIEF IN OPPOSITION TO
RESPONDENT'S EXCEPTIONS**

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Dated: November 4, 2010

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PROCEDURAL HISTORY

On November 5, 2009, United Food & Commercial Workers, Local 1245 (herein "the Union") filed the charge in case number 22-CA-29188 alleging that Alden Leeds, Inc. (herein "Respondent") unlawfully locked out bargaining unit employees (GC1a).¹ On December 9, 2009, the Union filed its first amended charge against Respondent, alleging additional unlawful activity (GC-1c). On January 11, 2010, the Union filed its second amended charge against Respondent in case 22-CA-26988, alleging a threat against employees (GC-1e).

On March 31, 2010, the Region issued a Complaint and Notice of Hearing against Respondent, based on the most recently amended charge (GC-1g). The Hearing was scheduled for May 18, 2010. On April 6, 2010, Respondent filed an Answer to the Complaint (GC-1i). On May 7, 2010, Respondent filed an Amended Answer to the Complaint (GC-1m).

The Hearing in this matter took place over two days, May 18 and May 22, 2010 (Tr1-365). At Hearing, Counsel for the General Counsel made amendments to the Complaint, which the Administrative Law Judge granted (Tr7-8).

The Administrative Law Judge issued his decision on August 30, 2010, finding that Respondent violated the Act when it unlawfully locked out its employees.

On October 12, 2010, Respondent filed Exceptions to the Administrative Law Judge's Decision, and the time for filing Opposition to Exceptions was extended to November 5, 2010.

¹ This Brief relies upon the Transcript of the hearing before Administrative Law Judge Steven Fish and the Exhibits introduced at that hearing, as well as Judge Fish's August 30, 2010 Decision. The Transcript is referred to as "Tr" followed by the page number. General Counsel's Exhibits are referred to as "GC" and Respondent's Exhibits are referred to as "R" - both followed by the exhibit number. The Decision is referred to as "Op" followed by the page and line number.

STATEMENT OF FACTS²

A. Background

Respondent is in the business of manufacturing and distributing pool chemicals. The Union represents a unit of about 45 production workers employed by Respondent at its two South Kearny, NJ facilities (Tr24). The unit has been represented by the Union since approximately 8-9 years ago (Tr23). The parties are bargaining over a successor collective bargaining agreement, with the prior agreement having expired in October 2009 (Tr24; GC4A-C). Bargaining continues, slowly, despite the fact that employees have been locked out since early November 2009.

B. The Parties' Bargaining

In advance of the expiration of the parties' contract, the Union sent a letter to the Employer requesting to reopen the contract for negotiations over a successor CBA (Tr24; GC2). The Union Representative assigned to the negotiations was Tom Cunningham, who was familiar with Respondent, having been the Union's rep for the shop for the last decade (Tr58). Cunningham attempted by phone and in writing to schedule an initial bargaining session with the Employer's owner, Mark Epstein³ (Tr 60; GC5).

After hearing back from Epstein (GC6), the parties agreed to meet for the first time to bargain over a successor CBA on September 30, 2009 (Tr60-62). Prior to that September 30 bargaining session, Cunningham emailed Epstein a set of Union proposals (Tr64-65; GC7). Respondent did not provide the Union with any proposals at that time, or any response (Tr65).

Cunningham attended the September 30 bargaining session, along with Epstein, who opened the meeting by telling Cunningham about a litany of problems causing

² All dates herein refer to 2009 unless otherwise indicated.

financial hardship to Respondent, including “the unseasonably cold and wet spring season” that “drastically effected [sic] his swimming pool chemical sales,” and an issue Respondent was having with the Government (Tr67). Specifically, Respondent was being assessed “dumping fees” by the Department of Commerce “to the tune of approximately \$600,000 (Tr67). Epstein gave Cunningham a summary sheet of information about the dumping fees at that meeting (Tr67-69; GC9A-B). Epstein went on to say something to the effect of “things weren’t that good at the company” (Tr70), and specifically “that the company was experiencing hardship” (Tr71).

During the September 30 meeting, Cunningham provided Respondent with a hardcopy of the Union’s initial proposals that were earlier emailed to Epstein (Tr71-73). The hardcopy contained additional numbers, added by Cunningham, which were the healthcare contribution rates. When the discussion turned to these healthcare rates, Epstein performed some calculations on his laptop of what the proposal would cost Respondent (Tr74).

No additional substantive bargaining took place that day. Epstein indicated that he would “go shopping” for a more affordable health plan (Tr75). Then, the parties discussed the pending expiration of the contract, which was due to expire on October 3 (Tr76). Cunningham requested that the parties sign an extension agreement, and Epstein refused (Tr76). Near the end of the meeting, Epstein’s brother, Andy Epstein, entered and asked Cunningham some questions about the pension plan, but no information was exchanged on that (Tr77). The parties did agree to meet again the following week.

The parties’ next meeting was on October 5, again with just Cunningham and Epstein. At this meeting, the main point of discussion was whether to sign an extension

³ References to “Epstein” in this brief will refer to Mark Epstein, who was the primary spokesperson for Respondent during bargaining, and who testified at Hearing. Other Epstein family members will be identified by first and last name.

(Tr78). In addition, Epstein brought some health plan information for alternative plans that his broker had provided, which the parties discussed briefly (Tr78). The plan information consisted of a spreadsheet, with three different plans and some of the terms associated with each of those plans (Tr78; GC11). Respondent didn't propose any particular one of these plans, but rather, simply conveyed the information about them that it had received from its broker (Tr79).

Also at this meeting, Epstein stated that all he was looking for is to keep everything the same for one year (Tr80). Specifically, Epstein said "I can't do anything. I want everything the same for one year" (Tr154). Cunningham responded by pointing out that the health contributions Respondent was paying would not sustain the existing coverage for that year, so everything could not stay the same (Tr80). The parties ended that meeting with Epstein again indicating he would keep looking for additional health care information, and that he would forward same to the Union (Tr81).

The parties next met, for the third time, on October 8, 2009, this time with Epstein, Cunningham, and Union Secretary-Treasurer John Troccoli (Tr82). Troccoli had been asked to join by Cunningham to assist in obtaining an extension agreement. The parties discussed an extension agreement at the start of the session, but Epstein was still refusing to sign an extension (Tr82).

At this October 8 meeting, the subject of Respondent's financial condition arose, specifically Respondent's being assessed \$600,000 by the Federal Government (Tr83). After Epstein complained about the dumping fees leading to that assessment, Troccoli asked if there was any documentation that would help explain what the dumping fees were, and Epstein showed Troccoli the documents that had been given to Cunningham earlier (Tr172; GC9A-B).

Epstein went on to talk about another financial issue – the Town of Kearny was

allegedly harassing the employer over certain repairs it wanted the employer to make (Tr157). Epstein said that between the Union's cost and other issues, he was considering moving his operation to Oklahoma (Tr157). Troccoli responded to Epstein's threat to move to Oklahoma with a joke to lighten the mood – saying he could not picture Epstein in a cowboy hat (Tr174-176).

Just before the end of the meeting, the subject of an extension was raised again, and this time, Epstein agreed to sign the extension agreement which the Union had brought to that meeting, although Epstein insisted that the retroactivity language contained in the agreement be stricken (Tr 84; GC12). The meeting ended with Epstein saying he was still working on finding a better health plan, which he would forward to the Union (Tr84).

Respondent did not provide the Union with any written proposals at any of the three above described negotiation sessions, and the parties would not meet again until after the lockout. Instead, communications from this point were by email and phone, beginning with two emails dated October 21 (Tr87-88). The first email attached another spreadsheet, this time with four health care options (GC13). The second email attached plan information from "Simplicity Health Plans," which the parties had never before discussed (Tr88). Neither email identified which of these plans the Employer was proposing to actually use (GC13-14).

Thereafter, on October 22, Respondent emailed the Union a summary sheet of a health insurance plan, and posed a series of questions involving different hypotheticals (Tr90; GC15). The email stated that the analysis was being provided "in advance of our next meeting," although there was no meeting scheduled at that time (Tr91; GC15). Finally, the email concluded by saying that more information would be coming later that day (GC15). In fact, Epstein sent another email, containing information about yet another

health plan (GC16).

The next communication between the parties was on Friday, October 30, when the parties spoke by telephone – Troccoli for the Union, Epstein for Respondent - and again discussed the health plan (Tr181). Troccoli had discussed with DeVito that morning what the Union could do to move the contract forward (Tr181-182). They agreed to proposed to Respondent that it could keep the same medical plan at the same contribution rates, but that the plan benefits could potentially be cut, at the discretion of the plan's trustees (Tr182). The idea was to move the discussions on to the other terms of the Union's contract proposal (Tr182).

That day, Friday, October 30, Troccoli called Epstein and spoke with him (Tr183). Troccoli told Epstein that it did not appear that the various health plans he had researched were going to work, given the high deductibles and medical review requirement, and then offered the modified health plan version he had discussed with DeVito (Tr183). Epstein's response was to tell Troccoli, "you don't understand, I just want to keep everything the same" (Tr184).

At that point, Epstein made reference to a meeting, which he alleged Cunningham was supposed to have had with the employees to vote on something, but Troccoli did not know what Epstein was referring to, as there was nothing in writing to actually vote on (Tr184). Epstein told Troccoli that if the parties did not have an agreement, he would lock the people out (Tr197). Troccoli testified that he had no idea what the Union was being asked to agree to, and advised Epstein as much (Tr184). Epstein closed the conversation by telling Troccoli that he would provide something in writing by the end of the day (Tr184).

Later that day, Epstein sent an email to the Union in which he threatened to lock out the workers (GC3). Epstein mentions that his best efforts resulted in a plan, though it

was unclear to the Union what plan he was referring to (Tr160; GC3). Epstein did not provide any clear explanation of Respondent's bargaining proposal or what conditions the Union was required to accept in order to avert a lockout (GC3). Rather, Epstein simply said in referring to his own unsuccessful efforts to secure an alternative medical plan 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 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, November 3, 2009.

(GC3).

Epstein makes reference in the October 30 email to his claimed conversation with Cunningham about meeting with employees (GC3). However, Cunningham denies ever having such a conversation with Epstein (Tr97). Indeed, both Cunningham and Troccoli were adamant on the point that there could never have been such a meeting scheduled, as there would be nothing to meet about, and nothing to agree to (Tr97; Tr).

The October 30 email also purported to seek, for the first time, a freeze on wages for an indeterminant number of years (GC3). This was different from the "freeze" that Epstein had earlier suggested to Cunningham, i.e., keeping everything the same, not specifically wages (Tr99; Tr139). This Friday afternoon email was the first time Respondent had ever suggested a freeze solely on wages.

C. The Lockout

It is undisputed that Respondent locked out its bargaining unit employees no later than November 3, and has not permitted them to return since that time (GC1m, Paragraph 14). In addition, shop steward Simon Hemby testified at the hearing, and it was not disputed, that employees were advised as early as the afternoon of November 2, 2009, that they were locked out (Tr246). Hemby testified that he was called into Epstein's

office, as the shop steward, and told by Epstein that the lockout was “effective immediately” (Tr253). Epstein told Hemby to inform the other employees at both locations of the lockout, which he did (Tr253).

On the morning of November 3, employees arrived to the facility, together with representatives of the Union, Cunningham, Troccoli and DeVito (Tr99). Most of them sought to enter the premises, and were encountered by Supervisor Steve Belvin, who instructed that the employees could not enter, that there was no work for them (Tr99). Nevertheless, the employees attempted to punch in, and some were successful, though Belvin stated that the time clock would not register their punches, and indeed the light did not come on when they punched (Tr100; Tr256). About a dozen of the employees, who work at Respondent’s second nearby plant (“Kearny East”), left to go there and were encountered by Supervisor Jose “Pepe” Rodriguez, who told them the same thing Belvin had said – that there was no work for them (Tr193). They returned to the main plant about 20 minutes later, and joined the others (Tr193).

The employees and Union representatives then proceeded into the building where Epstein’s office is located, and asked to see Epstein (Tr100). A secretary advised that Epstein would see them, and they, all 40-something employees and the Union representatives, all proceeded down the hallway toward Epstein’s office (Tr101). When they arrived to Epstein’s office, he became very agitated, and ordered them out of the building, accusing the Union of putting on “a stunt” (Tr101). At that point, Troccoli escorted the employees out to the parking lot, leaving only DeVito, Cunningham and shop steward Simon Hemby behind to meet with Epstein (Tr102).

DeVito did the talking for the Union, asking Epstein to put the people back to work, and the parties could sit down and try to come to some common ground (Tr102). Epstein replied by saying that he would not return the employees to work (Tr102). Even

at this meeting, after the lockout had begun, Epstein still did not say anything regarding the terms it would have taken to avert a lockout (Tr134). The parties talked about setting up another meeting, which they did.

The following day, November 4, the parties met for a bargaining session, with Respondent being represented for the first time by counsel, Steven Glassman (Tr291). However, it was not until November 9 that Respondent provided the Union with a list of terms and conditions which it could accept in order to end the lockout (GC19).

ARGUMENT

POINT I

THE ADMINISTRATIVE LAW JUDGE CORRECTLY FOUND THE LOCKOUT UNLAWFUL BECAUSE RESPONDENT FAILED TO GIVE PROPER NOTICE TO THE UNION OF THE CONDITIONS IT MUST ACCEPT IN ORDER TO AVERT THE LOCKOUT

In its Exceptions 1-11, Respondent argues that the Judge erred in applying well-settled law to the facts of this case “too strictly,” and seeks to relitigate the well-reasoned conclusions made by the Judge with regard to Respondent’s failure to provide proper notice to the Union of the conditions needed to avert a lockout. These Exceptions should be dismissed in their entirety.

While an Employer is privileged to lock out employees in support of a legitimate bargaining position absent evidence of unlawful motive or hostility to the bargaining process, *American Ship Building*, 380 U.S. 300 (1965), it may not do so without first providing the union with notice of the conditions that must be met to avert lockout. *See, e.g., Dayton Newspapers, Inc.*, 339 NLRB 650 (2003); *Dietrich Industries*, 353 NLRB No. 7, slip op. at 1, 4-7 (2008) (ALJ, affirmed by the Board, concluding that lockout was unlawful from inception in part because of employer’s failure to present union with offer capable of union’s acceptance).

Indeed, a lockout can only be lawful where the union is clearly informed of the employer’s demands so it can evaluate whether to accept them. *Dayton, supra*. The employer must have “clearly and fully” informed the employees of the conditions they must accept to avert the lockout, so they can “knowingly evaluate their position.” *Eads Transfer*, 204 NLRB 711 (1991), *enfd.*, 989 F.2d 373 (9th Cir. 1993).

Here, the Judge properly found that Respondent commenced its lockout in the absence of a legitimate, or even a substantive, bargaining proposal. Indeed, Respondent neglected to provide the Union with any written proposal at any time prior to locking out

its employees. By failing to provide the Union and the employees with advance notice of the conditions that they could accept in order to avert the lockout, Respondent was not privileged to lockout its employees. *Dayton Newspapers, supra* at 662.

Respondent had also not provided the Union with a complete proposal for a new contract. Rather, the only written proposal Respondent had provided to the Union was a summary sheet of a plan for a new health insurer, sent in the October 22 e-mail, which, significantly, advised that more analysis would be provided for discussion at a subsequent meeting. However, no additional meeting was scheduled, and no additional meeting was ever held prior to the lockout.

Instead, in the telephone conversation between Epstein and Troccoli on October 30, Epstein stated he wanted to keep “everything” the same, that he would not negotiate about anything else, and that the parties needed to have “an agreement” by close of business November 2 or else he would lock the employees out. That conversation was followed by an email from Epstein setting out a series of alternatives and hypotheticals, and a repeat of the threat to lock out the employees if the parties did not have an “agreement.”

Respondent’s October 30 email was objectively and subjectively confusing, incomplete, internally inconsistent, and incapable of being agreed to. Both Cunningham and Troccoli for the Union, and Epstein for Respondent, were unable to explain what Respondent’s October 30 email meant, or to reconcile its inconsistencies. Moreover, it was sent on a Friday afternoon, and carried a deadline of the following Tuesday. Thus, the Union was given only three days, and only one business day, to consider Respondent’s confusing email. That cannot be considered sufficient notice to allow the Union to “knowingly evaluate their position” *see Eads Transfer, supra*.

Respondent’s first complete proposal to the Union – labeled “Final Offer Dated

November 9, 2009” – was delivered for the first time to the Union on November 9, after the employees had been locked out for almost a week and after the instant charge had been filed. Thus, Respondent’s lockout was made prior to its having a legitimate bargaining position on which to rely to lockout its employees. It was, therefore, unlawful at its inception. As argued above, in *Movers and Warehousemen’s Ass’n*, 224 NLRB 356 (1976), enforced at 550 F.2d 962 (4th Cir. 1977), cert denied 434 U.S. 826 (1977), the Board held that “a lockout unlawful at its inception retains its initial taint of illegality until it is terminated and the affected employees are made whole” *Id.* at 357.

The fact that no strike had taken place prior to Respondent’s unlawful lockout does not change the analysis. The Board has applied the same law in an earlier case which did not involved a strike. *See Boehringer Ingelheim*, 350 NLRB 678 (2007). More importantly, the notion that employees who have ended a strike would or should be treated differently from employees who had not been involved in a strike flies in the face of the most basic Section 7 rights protected by the Act. The law applies to all Employers who seek to lock out their employees, and the Judge here correctly found that Respondent’s lockout was unlawful.

Accordingly, Respondent’s November 3 lockout was unlawful from its inception and violates Section 8(a)(1) and (3) of the Act. As such, the Board should deny Respondent’s Exceptions 1-11 in their entirety.

POINT II

THE ADMINISTRATIVE LAW JUDGE'S CREDIBILITY DETERMINATIONS SHOULD NOT BE DISTURBED

In its Exceptions 12 and 13, Respondent argues that the Judge's credibility findings should be overturned with regard to specific facts. Specifically, Respondent argues that the Administrative Law Judge erred as a matter of law in crediting any testimony by the Union's witnesses Vincent DeVito, John Troccoli or Tom Cunningham because it argues that the Judge did not credit all of their testimony. There is no sound legal basis for this contention.

Indeed, in *Vanguard Oil & Service, Inc.*, 231 NLRB 146 (1977), which the Board cited with approval in *Double D Construction Group*, 339 NLRB 303, 306 (2003), the Administrative Law Judge credited the discriminatee's testimony despite not crediting certain portions of that testimony. Like the ALJ here, the judge in Vanguard evaluated the witnesses' demeanor, and concluded that their testimony on certain points was credible. There is no basis for finding otherwise here.

Accordingly, the Board should deny Respondent's Exceptions 12 and 13, and adopt the Administrative Law Judge's factual findings in their entirety.

POINT III

THIS MATTER SHOULD BE EXPEDITED AS AN INJUNCTION UNDER SECTION 10J IS CURRENTLY PENDING IN DISTRICT COURT

By Order dated July 21, 2010, Section 10(j) injunctive relief was granted by the Hon. Katharine S. Hayden, District Court of the District of New Jersey, who ordered the immediate reinstatement of the locked out employees, pending a final resolution of this matter.

The Third Circuit limits the duration of any Section 10(j) injunction pending the issuance of the ALJD and, thereafter, the final Board decision and Order. See *Eisenberg v. Hartz Mountain Corporation*, 519 F.2d 138, 144 (3d Cir. 1975), reaffirmed in *Eisenberg v. Holland Rantos Co., Inc.* 583 F.2d 100, 103 (3d Cir. 1978). Specifically, the Third Circuit provides for Section 10(j) injunctions to expire six months from the date of issuance, absent the Court's grant of an extension on Motion by the General Counsel.

General Counsel will be filing a Motion with the District Court on November 12, 2010 to extend the injunction pursuant to a Scheduling Order issued by U.S. Magistrate Judge Patty Schwartz.

As such, Counsel for the Acting General Counsel respectfully requests that the Board Order in this matter be expedited to the extent possible.

CONCLUSION

It is hereby requested that the Board adopt the decision of the Administrative Law Judge in its entirety, requiring Respondent to cease and desist engaging in the unlawful conduct alleged herein; making Charging Party, and the affected members, whole; and granting such other affirmative relief, including the posting of an appropriate notice, as is necessary to rectify the effects of the violations.

Dated at Newark, New Jersey, this 4th day of November 2010.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Jeff Gardner", written over a horizontal line.

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CERTIFICATION OF SERVICE

This is to certify that copies of the foregoing Acting General Counsel's Brief in Opposition to Respondent's Exceptions have been duly served on this date as follows:

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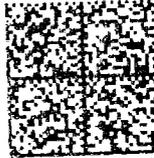
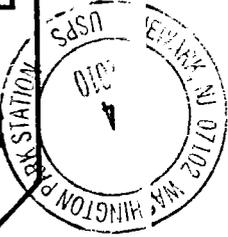
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this 4th day of November, 2010

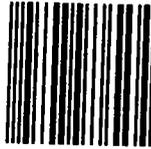


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