United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: November 12, 1999

TO : Richard L. Ahearn, Regional Director
Region 9

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Dayton Newspapers, Inc.
dba Cox Ohio Publishing
Case 9-CA-36894

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524-5029-3733
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This case was submitted to Advice as to whether: 1) the Employer[1] unlawfully conditioned striking employees' return to work on their assurance that they would not engage in additional strikes prior to the transition to a new facility; and 2) whether employees who were unwilling to give such assurances are entitled to the "stay to the end" bonus.

This case raises an additional issue regarding whether the Employer engaged in direct dealing by soliciting individual employees to return to work on the condition that they would refrain from additional strikes and agree to cross their Union's picket line.

FACTS

The Employer produces and distributes a daily newspaper in the Dayton, Ohio area. The Union[2] represents employees in several different bargaining units, including

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[1] Dayton Newspapers, Inc., D/B/A Cox Ohio Publishing

[2] General Truck Drivers, Chauffeurs, Warehousemen and Helpers Local Union No. 957, AFL-CIO.

a unit comprised of the approximately 30 employees who have been employed at the Dayton facility as drivers, expeditors and garage employees.

The parties have had a long bargaining relationship and numerous collective-bargaining agreements covering the drivers' unit, the most recent of which expired on November 15, 1998. Since August 1998, the parties have engaged in extensive negotiations for a new agreement, but have been unable to reach agreement on a new contract.[3]

For over a year, the Employer has been engaged in the planning and implementation of a transfer of its production operations from downtown Dayton, Ohio to a facility located approximately 20 miles away in Franklin, Ohio. All of the affected labor organizations and employees were notified of the transfer in a timely manner. The Employer informed the Union that as a result of the transfer, certain full-time bargaining unit positions would be eliminated. Specifically, the Employer by letter dated January 18, 1999,[4] informed Union agent John Burns that "the driver unit will be reduced from 33 to 18." The 18 drivers not to be laid off or terminated were those who had guaranteed employment under the recently-expired contract.[5] The letter also states:

> [t]he layoffs will be permanent. The first layoffs will occur on or about April 1, 1999. Additional layoffs are expected to occur, on dates as yet to be determined, throughout the rest of 1999. Layoff, bumping, recall and transfer rights will occur as negotiated….

Due to delays in the transition, no layoffs in the drivers' unit were required as of April 1, but the parties engaged in bargaining over various aspects of the transition. The parties agreed, among other things, that

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[3] The Union has not alleged that the Employer is engaged in course of conduct bad faith bargaining.

[4] All dates herein are 1999 unless otherwise noted.

[5] This guarantee is set forth in Article 28 of the expired contract which states that "all employees with the service date September 24, 1982 have guaranteed jobs for life and shall not be laid off for any reason except that the layoff shall be permitted whenever, and only so long as publication is discontinued."

all employees in the drivers' unit who would be permanently laid off as a result of the transition to the Franklin facility would be eligible for a $10,000 "stay to the end" bonus. The agreement further provides:

> This offer is contingent upon the employees staying actively at work, and in good standing, until their release date. Release dates will be determined periodically, by seniority, based on operational needs in the transition schedule. As now planned, release dates should be in July 1999.

As of June, the Employer had not yet transferred the work performed by the drivers' unit to the Franklin facility. Thus, none of the drivers' unit employees had been permanently laid off.

According to Union agent Burns, the Union was extremely concerned in May that negotiations were not proceeding and Burns was upset over statements allegedly made by the Employer's negotiator that employees were not behind the Union and that they would go down in flames with the Union. On May 17, Burns held a strike vote among the drivers' unit and a majority authorized a strike. [*FOIA Exemptions* 6, 7(C), and 7(D)]the 1-day strike was solely for the purpose of sending the message that the employees were behind the Union. The vote did not set a specific strike date because, as Burns explains, he didn't want the Employer to know [the date], so that we would have an effective strike. After the June 21 bargaining session, which Burns believed was unproductive, Burns decided to call the strike for June 26 at 10:00 p.m. According to Burns, this is a busy time for the Employer. It is the Sunday paper [distribution]. The Union did not inform the Employer of the impending strike.

The strike began on June 26 and lasted 24 hours. All but three unit employees participated. Temporary employees and supervisors delivered the bulk bundles of newspapers. On June 27, the Union informed the Employer, in writing, that the Union "…is making an offer to return to work on behalf of all its [driver] members employed by Dayton Newspapers."

When the drivers appeared at the Dayton facility on June 27 to return to work, Management informed them that their services were not needed and that they were to go home until further notice. The Employer admits that it locked out the drivers following the one-day strike.

A few days after the strike, several drivers were called to the plant to discuss their employment status.

Guaranteed driver Peter Thompson asserts that on or about July 1, he met with Director of Operations Mike Joseph and Supervisor Mike Manzo. Joseph told Thompson that the Employer was concerned about future strikes if the drivers were returned to work. Thompson states that Joseph told me that if I could give him a guarantee that I would come back to work no matter what...I would be put back to work. Joseph told me that if we had a picket line up, I'd have to cross it. Thompson answered that he would have to think about it, but he did not contact Joseph after that date.

Guaranteed driver Kenneth Marshall asserts that he met with Joseph on July 2, at which time Joseph asked him to give a verbal agreement that if [the Union] would call any additional work stoppage that I would still continue to work. Marshall refused to give the requested assurance, and he has not been recalled to work. Similarly, guaranteed driver Dale Dorsten states that on or about July 1, he met with Joseph at the plant, at which time Joseph said that …the Company could not keep working with interruptions in work… and …that I could come back to work if I guaranteed him that I would cross a picket line if another one was set up. Dorsten refused to give such assurances and he has not been recalled to work.

Between June 26 and July 1, the Employer handled the bulk delivery of daily newspapers by utilizing leased vehicles and a substitute driver force, in addition to supervisors and the few unit drivers who worked during the strike. [*FOIA Exemptions* 6, 7(C), and 7(D)] sometime after June 26, he was approached by several drivers concerning how they could come back to work; and that after requesting and obtaining assurances from six drivers that they would not engage in further work stoppages, they were allowed to return to work. Five of the returning drivers had guaranteed jobs and were not covered by the stay to the end bonus agreement. One nonguaranteed driver who had been laid off was rehired as a permanent replacement.

By letter of July 1, the Employer informed the Union that it had declined the Union's June 27 offer to return to work and that as a result of operational changes necessitated by "recent events," it had laid off 13 employees in the drivers' unit, by seniority.[6] The Employer also sent a letter to each of those 13 employees, stating that the Employer was "forced by recent events to make a

[6] These were the employees who did not hold "guaranteed" jobs.

number of changes to our operation" and that the employees were laid off from their employment.

Also on July 1, the Employer sent a letter to each of the 18 guaranteed employees who had not already returned to work. The letter states that the Employer

> has retained an alternate source for delivery of its newspapers until we receive an acceptable commitment from Teamster Local 957 to make our deliveries without disruption. Therefore, work will not be available to drivers unless they can be relied upon.

The letter further states that "[y]ou have been placed on unpaid leave effective June 27, 1999." The Employer accompanied its July 1 communication to the Union with copies of each of these two letters to employees.

The Employer completed the physical transition of the drivers' unit work shortly after July 1. At that time, only 18 employees in the drivers' unit were required at the Franklin facility, although the Employer is using additional drivers until all the routes are stabilized.

On July 19, at a negotiating session, the Union asked Employer representative Thurman about the status of the "stay to the end" package.[7] Thurman stated that the "stay to the end" bonus spoke for itself and that the Employer did not get what it wanted out of the bonus. At an August 9 bargaining session, Thurman reiterated its position that employees who engaged in the strike resulting in their being locked out were not entitled to the "stay to the end" package, and the Employer would not pay that money or provide the CDL training to those employees.

ACTION

We concluded that the charge alleging that the Employer unlawfully conditioned striking employees' return to work on their assurance that they would not engage in additional strikes should be dismissed, absent withdrawal. We further concluded that the Employer violated Section 8(a)(3) and (5) of the Act by denying "stay to the end" contractual bonuses to nonguaranteed employees, unless the Region determines that the "stay to the end" agreement clearly and unequivocally waived the employees' right to

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[7] As discussed above, the "stay to the end" bonus was intended for those non-guaranteed employees who were to be permanently laid off as a result of the transition.

strike. Finally, the Employer, in violation of 8(a)(5) and (1) of the Act, engaged in direct dealing by soliciting individual employees to return to work on the condition that they would not engage in additional strikes and would cross their Union's picket line.

1. The Employer lawfully conditioned striking employees' return to work on their assurance that they would not engage in additional strikes

An employer may lawfully condition the return of economic strikers if the employer has a legitimate and substantial business justification. Thus, in Bali Blinds Midwest,[8] the employer, after experiencing a one-day strike without notice, laid off the striking employees, leaving a core group of employees who would not strike and would enable the employer to meet its production schedule and customer demands. The Union had unconditionally returned, but did not agree to the Employer's demand that it forego future strikes during the parties' bargaining process. The Board found that the employer had a business justification which made its actions lawful. The ALJ, adopted by the Board, noted that "the Supreme Court in American Ship Building v. NLRB,[9] set forth the following test of a lockout's legality: assuming no motive to discourage union activity or to evade bargaining, is the lockout "inherently so prejudicial to union interests and so devoid of significant economic justification that no specific evidence of intent… is required?" The ALJ noted that "the temporary layoff of employees [was] little different in terms of adverse effect on employee rights than their temporary replacement, as in Harter…"[10] The ALJ concluded that the partial lockout of employees in strike sensitive positions was similarly lawful because it had only a "comparatively slight impact upon employee rights."[11]

It is the Employer's burden to show that it possessed a legitimate and substantial business justification for placing restrictions on the reinstatement of economic

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[8] 292 NLRB 243, 246 (1988).

[9] 380 U.S. 300, 311 (1965).

[10] Harter Equipment, Inc., 280 NLRB 597 (1986), Ptn. for review den. 829 F.2d 458 (3d Cir. 1987).

[11] 292 NLRB at 246.

strikers.[12] The Employer's legitimate and substantial business justification depends upon a finding that it reasonably feared strike recurrences which would significantly harm its business.[13] Thus, in the instant case, the lockout was lawful if the Employer can demonstrate a legitimate and substantial business justification for conditioning reinstatement on the striking employees' assurance that they would not strike again prior to the transition to a new facility.

Here, the Employer had a reasonable fear that the Union would engage in activities intended to disrupt delivery of the newspaper. The timely delivery of the newspaper was the equivalent of a "perishable commodity" resulting in significant economic loss to the Employer if the newspaper failed to be delivered on time.[14] The Union had already struck and interfered with delivery of the Employer's Sunday paper.[15] The Employer reasonably feared that another strike by the Union would result in substantial harm to the Employer's business. The Union did not agree to refrain from additional strike activity.[16] In

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[12] NLRB v. Fleetwood Trailer Co., 389 U.S. 375, 380-81 (1967); Eads Transfer, 304 NLRB 711, 712 (1991), enfd. 989 F.2d 373 (9th Cir. 1993); Laidlaw Corp., 171 NLRB 1366, 1368 (1968), enfd. 414 F.2d 99 (7th Cir. 1969), cert. denied, 357 U.S. 920 (1970).

[13] See Bali Blinds Midwest, 292 NLRB at 246 (1988); General Portland Inc., 283 NLRB 826 n. 2, 838-40 (1987).

[14] See Newspaper Drivers & Handlers Local No. 372 v. NLRB, 404 F.2d 1159 (6th Cir. 1968). The Board has found similar lockouts to be lawful in a variety of settings. See Bali Blinds Midwest, supra, 292 NLRB 243, where the employer had to meet seven-day delivery schedules promised to customers; Birkenwald Distributing Co., 282 NLRB 954 (1987), where the union voted in favor of a strike before the October-January busy period for the employer, a liquor distributor; Georgia-Pacific Corp., 281 NLRB 1 (1986), where an employer with integrated operations locked out employees to help it continue operations and fulfill obligations to customers.

[15] See, e.g., Bali Blinds Midwest, supra.

[16] See ibid.

these circumstances, the Employer was privileged to lock out the employees.

2. The Employer unlawfully denied contractual bonuses to nonguaranteed employees because of their one-day strike, unless the Region finds that the "stay to the end" agreement contained a clear and unequivocal waiver of their right to strike.

In NLRB v. Great Dane Trailers, Inc.,[17] the Supreme Court concluded that Section 8(a)(3) does not require proof of antiunion motivation where the employer's discriminatory conduct was "inherently destructive" of important employee rights. Further, where the adverse effect of the discriminatory conduct is "comparatively slight," rather than inherently destructive, no proof of antiunion motivation is needed, unless the employer presents evidence of "legitimate and substantial business justification for the conduct."[18]

In Texaco,[19] the Board adopted a framework, based on Great Dane, for determining whether an employer violates Section 8(a)(3) of the Act by refusing to make benefit payments to strikers or former strikers. That test requires a showing that (1) there actually was a benefit owing (that it had "accrued"), and (2) the employer's refusal to pay that benefit had at least an "apparent" connection with the strike, such that employee rights would be adversely affected to some extent. Once that showing is made, the employer must come forward with proof of a "legitimate and substantial business justification" for its conduct.[20] The Board explained in Texaco that an employer may meet that burden by proving that the collective-bargaining representative has waived the employees' statutory rights to be free of such discrimination, or "by demonstrating reliance on a nondiscriminatory contract interpretation" that arguably permitted the discriminatory action.[21]

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[17] 388 U.S. 26, 34 (1967).

[18] Id. at 34.

[19] 285 NLRB 241, 245 (1987).

[20] Texaco, 285 NLRB at 246.

[21] Ibid.

Applying these principles, we conclude that on its face the "stay to the end" bonus was a benefit owing to the employees and that the Employer's refusal to pay the bonus had at least an apparent connection to the strike. The Employer's business justification for the layoff depends on a finding, which can not be made on the present facts, that the Union waived its right to strike in the negotiated "stay to the end" agreement.

a. The "stay-to-the-end bonus" was a benefit that was owing to the nonguaranteed employees

The negotiated agreement concerning the nonguaranteed drivers provided that they would receive a "stay-to-the-end" bonus if they continued working for the Employer until the Employer laid them off. The agreement states in relevant part:

> This offer is contingent upon the employees staying actively at work, and in good standing, until their release date. Release dates will be determined periodically, by seniority, based on operational needs and the transition schedule.

The Employer responded to the Union's one-day strike by notifying the Union by faxed letter on July 1 that it had decided to lay off all 13 of the nonguaranteed drivers. The Employer simultaneously sent a letter to each of the 13 drivers, which it attached to the Union's July 1 fax, informing them that they were laid off. The letter stated:

> We have been forced by recent events to make a number of changes to our operation. These changes mean you are now laid off from your employment….We appreciate your service and are disappointed we were forced to make these changes.

In sum, on July 1, the Employer permanently laid off the nonguaranteed employees. Until the layoff, and despite the one-day strike, the employees had remained "actively at work," as required by the agreement.[22] By thus remaining

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[22] See Frick Co., 161 NLRB 1089, 1108 (1966)(In equating strike time to unexcused absence, employer contravened the right of employees to engage in protected strike activity); Quality Castings Company, 139 NLRB 928 (1962), enf. den. 325 F.2d 36 (6th Cir. 1963)(employer may not equate strike time to other forms of absence for purpose of forfeiting employees' right in a profit sharing plan); National Seal, 141 NLRB 661, 663 (1963)(Employer can't equate strike time

actively at work until the Employer decided to "release" them on July 1, the employees met their obligations under the "stay to the end" bonus agreement. Further, the Employer cannot lawfully claim that the "stay to the end" bonuses were not owing, when it was the Employer's lockout, and subsequent layoff, that prevented the employees from remaining actively at work until completion of the transition to the new facility. Accordingly, the bonus was a benefit that was owing to the nonguaranteed employees.

b. The Employer's refusal to pay the bonus had at least an "apparent" connection with the strike

There is little question that the Employer's refusal to pay the "stay to the end" benefit had at least an "apparent" connection with the strike.[23] The Employer's notice to the Union specifically stated that the "changes to our operation" resulting in the layoffs were "due to recent events." In a letter to the Region on August 5, the Employer's attorney confirmed that the layoffs were in response to the strike. The letter states that the employees were "laid off due to the altered and accelerated operational changes which were implemented as a result of the strike."[24] Thus, it was the strike that led the Employer to impose the layoff which prevented employees from staying "to the end" and collecting their bonuses. As the Employer states in its position paper:

> …these benefits were always contingent on the drivers remaining throughout the transition to minimize disruptions in the distribution of the paper….The money was offered to induce employees to stay until transition was achieved, and those employees who did not engage in the desired behavior, regardless of their reasons, did not earn the bonus and have no claim to the money.

In addition, by reneging on its obligation to provide bonuses to employees upon their release by the Employer, the Employer unilaterally changed terms and conditions of

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to normal absence for purpose of depriving probationary employees of jobs).

[23] Texaco, supra, 285 NLRB at 245-246.

[24] August 5 letter from Employer attorney Woods to the Region.

employment without bargaining with the Union in violation of Section 8(a)(5) of the Act.[25]

3. The Employer unlawfully engaged in direct dealing by soliciting individual employees to return to work on the condition that they would not strike and would cross their Union's picket line

An employer violates Section 8(a)(5) and (1) of the Act when it disregards the bargaining representative by negotiating with individual employees . . . with respect to wages, hours and working conditions . . . ."[26] In the absence of steps to protect the bargaining representative's role, an employer's direct solicitation of employee sentiment over working conditions is likely to erode "the Union's position as exclusive representative."[27] Going behind the back of the exclusive bargaining representative . . . plainly erodes the position of the designated representative and impairs employees' ability to enjoy "the benefits of their collective strength and bargaining power . . ."[28] Further, by engaging in direct dealing, an employer adversely may affect employees' views before the union can consult with the employees.[29] This is true

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[25] The Daily News of Los Angeles, 315 NLRB 1236 (1994), enfd. 73 F.3d 406 (D.C. Cir. 1996), cert. den. 519 U.S. 1090. (citing NLRB v. Katz, 369 U.S. 736 (1962)).

[26] Medo Photo Supply Corp. v. NLRB, 321 U.S. 678, 684 (1944).

[27] Modern Merchandising, 284 NLRB 1377, 1379 (1987), quoted with approval in Allied-Signal, Inc., 307 NLRB 752, 753 (1992), and authorities cited therein.

[28] Emporium Capwell Co. v. Western Addition Community Org., 420 U.S. 50, 62 (1975).

[29] See, e.g., E.W. Grobbel Sons, Inc., 322 NLRB 304, 310 (1996), enf. den., rev'd and remanded, 149 F.3d 1183 (6th Cir. 1998)(employer's statements to strikers that if they came back she could help them, but she could not help them so long as they were on strike, constitutes direct dealing with the employees and a promise to them of something of value if they would abandon their strike); Beaumont Glass Co., 310 NLRB 710, 718-19 (1933)(Direct dealing is a violation which by its nature has a reasonable tendency to prolong a strike); Friederich Truck Serv., Inc., 259 NLRB

whether the direct dealing concerns a decision which is contemplated or whether it concerns a decision that has already been made by the Employer.[30]

The Board will also find unlawful direct dealing if an employer presents a bargaining proposal to employees without having given the union an adequate time to respond to the employer's proposal.[31] In Detroit Edison Co., the employer presented the union representative with a proposal concerning a change in job classifications which contained more beneficial job security provisions than had previously been proposed. The employer delivered the new proposal to the business representative at his home while he was on vacation. A few days later, without the union's consent, the employer presented the new proposal directly to its employees. The Board held that the employer unlawfully dealt directly with the unit employees by presenting them with the new proposal without giving the union an adequate opportunity to respond.

In the instant case, the Employer's decision to condition an end to the lockout on the Union's agreement not to strike was a mandatory subject of bargaining. Thus, the Employer's July 1 letter to the Union was, in effect, a bargaining proposal. As the Region concluded, the faxed letter to the Union which attached the letter to guaranteed employees conditioning their return to work on no-strike assurances constituted a request made to the Union . . .[32]

1294, 1299 (1982)(employer's direct dealing with employees resulted in "dividing the workers and playing upon their individual fears"; Toledo Typographical Union No. 63 v. NLRB, 907 F.2d 1220, 1224 (D.C. Cir. 1990)(direct dealing can "exert a highly divisive force among the members of [a] bargaining unit" and can "give[] the [e]mployer the opportunity to destroy the cohesiveness of the [u]nion's membership"), cert. denied, 498 U.S. 1053 (1991).

[30] Master Plastering Co., 314 NLRB 349, 351 (1994); Medo Photo Supply Corp., supra, 321 U.S. 678; Ad-Art, Inc., 290 NLRB 590 (1988); General Electric Co., 150 NLRB 192, 195 (1964).

[31] Detroit Edison Co., 310 NLRB 564 (1993).

[32] The Region also concluded that this faxed request was made before employees could have received the mailed letters. It was not, however, made before the Employer called individual employees into its office on July 1 and

The Employer was privileged to condition its decision to end its lockout on the Union's agreement not to strike. The Employer was not, however, privileged to bypass the Union and negotiate with individual employees concerning conditions for ending the lockout. Yet that is what it did. The Employer called employees into its office and solicited their return to work on a waiver of their right to strike and an agreement to cross their Union's picket line. With respect to guaranteed employees, acceptance of the Employer's conditions meant an end to the lockout and an immediate return to work. With respect to nonguaranteed drivers, acceptance of the Employer's conditions meant a reversal of the Employer's decision to lay them off, and restoration of important contractually provided "stay to the end" bonuses.[33] Under these circumstances, the Employer's decision to go behind the back of the exclusive bargaining representative plainly threatened to erode the position of the designated representative and impair the employees' ability to enjoy "the benefits of their collective strength and bargaining power . . ."[34]

Thus, the Employer's actions in calling individual guaranteed employees into its offices on about July 1 - the same day that it apprised the Union of its conditions for ending the lockout - clearly threatened to "divid[e]" the workers and play[] upon their individual fears".

Therefore, if the Region determines that the Union did not clearly and unequivocally waive its right to strike in the "stay to the end" agreement, complaint should issue, absent settlement, alleging that the Employer violated Section 8(a)(3) and (5) by depriving nonguaranteed employees their "stay to the end" bonus. Complaint should also issue, absent settlement, alleging that the Employer engaged in direct dealing, in violation of Section 8(a)(5),

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conditioned their return to work on an agreement to cross a picket line.

[33] The exact context in which the Employer directly solicited nonguaranteed employees is not clear, since there are no affidavits from nonguaranteed employees. The record does show, however, that one nonguaranteed employee was hired as a permanent replacement after agreeing to cross the picket line; and that, according to the Employer, he is eligible for the "stay to the end" bonus.

[34] Emporium Capwell Co. v. Western Addition Community Org., supra, 420 U.S. at 62.

by soliciting individual employees to return to work on the condition that they would not strike and would cross their Union's picket line. The charge alleging that the Employer unlawfully conditioned striking employees' return to work on their assurance that they would not engage in additional strikes should be dismissed, absent withdrawal.

B.J.K.