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

Advice Memorandum

DATE: July 31, 1996

TO : Ralph R. Tremain, Regional Director
Region 14

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice 530-6067-2030-2500
530-6067-2050-7000

SUBJECT: Trailmobile, Inc. 530-6067-2060-1800
Case 14-CA-24025 530-6067-2060-9400

This case was submitted for advice as to whether following a lockout of its employees, the Employer has good cause to withdraw from previously-made tentative agreements or otherwise to withdraw previous proposals and propose less favorable contract provisions, based on monetary losses suffered during the lockout, as well as on the success of certain operational changes the Employer put into effect during the lockout.

FACTS

The Employer manufactures trailers for semi-trucks, such as vans, flat beds and refrigerated trailers at its Charleston, Illinois plant. From 1971 until about January 1993, the Employer's production and maintenance employees were represented by Local 591 Allied Industrial Workers of America. As a result of a merger with the United Paperworkers International Union, since January 1993, Local 7591, United Paperworkers International Union, herein referred to as the Union, has represented those employees, and the Employer does not contest its status as bargaining representative. There has been a series of collective-bargaining agreements, the most recent of which was effective from January 17, 1992 through January 16, 1996. As of December 1995, the Employer had about 950 active employees and another 170 on layoff.

In late November 1995, the Employer and the Union commenced negotiations for a successor contract to replace the one set to expire on January 16, 1996. In the initial meetings, the parties agreed that tentative agreements on contract proposals would be initialed and dated by each party but were subject to final agreement between the parties. In the various meetings that followed in November, December and early January 1996, the parties made

various proposals and counter-proposals, all on non-economic subjects. By the time of its meeting on January 9, the parties had reached agreement on several matters, including agreement on 22 job classifications. The Employer's representative asked that the parties sign off on the tentative agreements reached up to that date. Those agreements included job award and job preference, job classifications, and shift preference. All the tentative agreements were signed and dated. Economic proposals were then placed on the table for the first time, with the Union proposing wage increases of 50 cents/hour each year for 3 years; Employer funding of employee insurance cost; increased pension contributions of $1.00/month for each year of service; a new 401(k) plan; cost of living; and adding grandchildren to bereavement pay. The Employer's economic proposal was a cost savings bonus plan with a wage freeze in a 3-year contract and a change that would make the birthday holiday the same day for all employees.

With apparently no agreement having been reached regarding any of the economic proposals, on January 16, the Union held a ratification vote and the employees rejected the Employer's offer by a vote of 865-72. The existing contract expired that night, and on January 17, the parties met and agreed to work under the expired agreement except for the no strike/no lockout and arbitration provisions. The parties also agreed to use a mediator in future negotiations. At that same meeting, the Employer warned that if slow downs or vandalism continued, the Employer would lock out the employees.

The Employer contends that on January 17, 18, and 19, production was abnormally low and that there were incidents of sabotage and violence (of unknown orgin). At 10:30 p.m., the beginning of the third shift, on Sunday, January 21, the Employer locked out the bargaining unit employees. About January 23, the Union began picketing the Employer.

Following the lockout, the parties continued to meet and negotiate, with the Employer offering improvements to its proposed economic bonus plan offered in lieu of wage increases, offering guaranteed bonus payments regardless of calculated cost savings. On January 25, the parties met with a mediator present and the parties advised the mediator that the open issues were overtime and the economic issues. The parties met again on January 26,

February 6 and 7. There was no discussion of the items on which tentative agreement had previously been reached. Rather, the discussion at those meetings focused on vacation scheduling, overtime, bereavement, leave, holiday scheduling, group insurance, pension, and wage increases versus the proposed bonus plan. The Employer made a new proposal on February 7 with some marginal improvements, but on February 9 the Union's membership decided not to take a ratification vote on that offer.

On February 17, representatives of the Union traveled to Chicago and picketed Trailmobile's corporate headquarters and distributed leaflets in the subdivision where Employer President Edward Ismanto Wanandi resides. The leaflets were entitled "The Wanandis, Indonesian Atrocites & Trailmobile". The leaflet related the lockout and also referred to connections of the Wanandi family to the Indonesian military and described Indonesiam Atrocites to residents of the island nation of East Timor. Two days later, on February 19, the Employer brought in about 60 temporary replacements. Then, following intervention by Congressman Glen Poschard and Charleston Mayor Dan Courgil, the parties resumed negotiations again on February 27 at which time the Employer's February 7 offer was placed back on the table. On March 1, the Employer's attorney demanded an apology from the Union for the leaflet distribution. The parties met again on March 5 and 6. None of the discussions or proposals, however, related to matters on which tentative agreement had previously been reached. At a union meeting on March 8, the members voted to reject the Employer's March 6 proposal which was basically the same as its February 7 proposal and contained no changes with regard to the matters on which tentative agreement had been reached.

On March 28, the Employer changed its proposed bonus plan by withdrawing the quarterly per hour bonus of 25, 35 and 45 cents in the first, second and third years of the contract. The Employer also proposed consolidating 23 job classifications upon which agreement had been reached in January to 8 classification. The net effect of this latter change was to reduce the wages of 11 classifications from 19 to 50 cents per hour. The Employer further proposed less favorable terms with regard to the tentative agreements on shift and job preference bidding. Specifically, with regard to job award and preference, the

Employer added language that would have provided that when an employee declines a position he initially applied for, the employee would not be allowed to exercise a preference into that job for 12 months. In addition, the Employer added language providing that if the employee accepted the position, he would be required to remain there for 12 months rather than only 6 months as had been previously agreed to. With regard to shift preference, the Employer added language providing that an employee who transferred to a new shift would be prohibited from transferring again for 12 instead of 6 months.

The Employer concedes that tentative agreements had previously been reached with respect to job classifications, job award and preference, and shift preference. Regarding job classifications, the Employer asserts that the 23 job classification previously agreed to created cumbersome work rules that severely inhibited production efficiency. With regard to the job award and preference system, the Employer asserts that changes were made to reduce the costs attendant to administering the system. The Employer asserts that the shift preference language previously agreed upon allowed senior employees to change shifts within their job classification by "bumping" less senior employees and as a result, as less experienced employee could transfer into a new position, bump a more experienced employee and thereafter receive extensive training before transferring out of that position 6 months later. The Employer asserts that management received between 30 and 40 of these requests each week, the system promoted a high amount of turnover, increased the Employer's training costs, and resulted in "certain other inefficiencies."

With respect to the change in its bonus plan, the Employer asserts that its fiscal year-to-date (as of the end of March) financial losses amount to $7.8 million with 81% of those losses occurring during the current labor dispute, from January to March 1996.[1] Specifically, the

[1] The 81% figure "for losses occurring during the labor dispute" was calculated by the Employer using the entire $1,972,000 loss for January, notwithstanding that the contract did not expire until January 16 and the lock-out did not commence until January 21. At most the Employer

Employer contends that it lost $1,972,000 in January, $2,145,000 in February, and $2,277,000 in March. The Employer attributes these losses to (1) the fact that it has been unable to fill customer orders on a timely basis; (2) that the Employer has not been able to promise customers delivery dates of future orders and as a result has had difficulty obtaining those orders; (3) that the Employer has found it extremely difficult to obtain standard credit terms from vendors; and (4) the entire trailer industry has suffered a substantial decline in production and revenues. The Employer also notes that the Union has engaged in an aggressive negative publicity campaign against the Employer, which may be a factor in the Employer's losses.

The Employer further asserts that in addition to the changed economic conditions, when it began using temporary replacements, it discovered more efficient ways to produce trailers. It reduced the number of job classifications, which gave management greater flexibility in directing its workforce and created a more efficient production process. The Employer further asserts that it has restricted the number of times an employee can transfer or request a transfer from one job to another. The Employer also asserts that it learned from the experiences of other companies with fewer job classifications that they operate more efficiently. The Employer summarizes its positions as follows:

> ...the Employer's March 28 proposals were justified by the changed economic and operational circumstances that occurred over the course of approximately three months. The entire backdrop within which these negotiations were conducted changed dramatically from January to March. Since January 9, when the parties tentatively agreed on job classifications, job transfers and shift transfers, the Employer suffered millions of dollars in losses. The Employer was thereafter forced to find ways to reduce its operational and administrative costs. The bargaining proposals submitted to the Union

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arguably should have used only 1/2 of its January loss in its calculation to demonstrate its contention.

on March 28 were therefore clearly justified by the changed circumstances that had occurred over the course of this labor dispute.

ACTION

In agreement with the Region, we conclude that the Region should issue complaint, absent settlement, alleging that the Employer's withdrawal from its previous tentative agreements and its making of new regressive proposals were without good cause and thus evidenced an intent not to reach agreement with the Union.

As the Region points out in its Request for Advice, Atlanta Hilton and Tower, 271 NLRB 1600, 1603 (1984), stands for the proposition that withdrawal from tentative agreements which are subject to final contract ratification is not a per se violation of the Act, but such withdrawal may evidence lack of good faith. Moreover, an employer must have "good cause" to withdraw from its previous tentative agreements. Transit Service Corp., 312 NLRB 477, 483 (1993). See also Natico, Inc., 302 NLRB 668, 671 (1991). The question arises, then, can there be "good cause" when the economic situation in which the Employer finds himself appears to be, at least in part, of his own making. To allow the Employer to use economic losses suffered as a result of a lockout to be "good cause" justifying its withdrawal from previous tentative agreements and the making of new regressive proposals would be tantamount to allowing the Employer to be in a win/win position where, if it can maintain operations without losses during the lockout, it has successfully pressured the employees to accept its terms and has lost nothing. And if the Employer instead loses money during the lockout, it may seek to withdraw from its prior agreements and urge regressive terms to the Union, thereby prolonging negotiations and the lockout.

It has long been held that reneging on prior agreements and making regressive proposals, without good cause, are indicia of bad-faith bargaining. The General Athletic Products Co., 227 NLRB 1565, 1574 (1977); American Seating Company of Mississippi v. N.L.R.B., 424 F.2d 106 (C.A. 5, 1970); San Antonio Machine & Supply Corp., 147 NLRB 1112 (1964), enfd. 363 F.2d 633 (C.A. 5, 1966); The Marley Company, 150 NLRB 919 (1965); Borg Compressed Steel

Corporation, 165 NLRB 394 (1967); F. & J. Wire Products Co., 174 NLRB 340 (1969). We were unable to find any Board case permitting withdrawal from tentative agreements for "good cause" in a lockout situation. Likewise, there does not appear to be any Board case permitting regressive bargaining in the context of a lockout where the regressive proposals have been made because of new-found economic strength from successfully "weathering" the lockout or because of "good cause" due to substantial losses incurred during the lockout. Accordingly, while the Board has long recognized that "where an employer's economic power increases through the successful weathering of a strike, it is not unlawful for the employer to use its new-found strength to secure contract terms that it deems beneficial," and that an employer can accordingly substitute proposals more desirable to it during a strike without being found to have engaged in unlawful regressive bargaining,[2] the Board appears to have never ruled as to whether the same considerations apply in a lockout situation. Certainly it would seem that an employer's regressive bargaining in the context of a lockout does not involve quite the same considerations. As noted above, to allow it seems to put such an employer in a win/win situation with the Union necessarily being put in a lose/lose posture. Moreover, while the factor of enhanced employer bargaining power based on ability to hire replacements is present in both situations, in a strike the employer is said to be "weathering" an action initiated by the union. In a lockout the action is initiated by the employer, which can hardly be said to be "weathering" an action initiated by itself.[3]

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[2] See O'Malley Lumber Co., 234 NLRB 1171, 1179 (1978); Pipe Line Development Co., 272 NLRB 48 (1984).

[3] Here, of course, it could be argued that the Employer, having incurred substantial losses into the millions of dollars during the lockout, hasn't "weathered" anything. In any event, as noted above, since the Board appears never to have ruled on the validity of withdrawing from tentative agreements and engaging in regressive bargaining (for whatever reason) in a lockout context, the case should go forward so that the Board can consider the issue. In

Accordingly, it was concluded that complaint should issue alleging as unlawful the Employer's withdrawal from tentative agreements and alleging its new proposals as unlawful regressive bargaining and thus give the Board an opportunity to decide if O'Malley and Pipe Line should apply in a lockout situation, or whether the Employer's losses constitute "good cause" for its actions.[4]

B.J.K.

Peerless Steel Co., Case 7-CA-34559, Appeals Minute dated August 24, 1994, [*FOIA Exemptions* 2 and 5

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[4] We have noted the Region's supplemental memorandum regarding the fact that the parties have reached agreement on the contract and the lockout has ended. [*FOIA Exemptions* 2 and 5

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