

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

DATE: March 22, 2013

TO: Kathleen M. McKinney, Regional Director
Region 15

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

SUBJECT: Entergy Operations, Inc. 524-5056-2000
Case 15-CA-090752 524-5056-7800
530-6001-5000

The Region submitted this case for advice regarding whether the Employer's lockout violated the Act. We conclude that the lockout did not violate Section 8(a)(1) and (3) because the Employer had a legitimate and substantial business justification for its actions and there is no evidence of anti-union animus or that the asserted justification was pretextual. We further conclude that the Employer did not taint the lockout by refusing to allow employees entry to the plant six hours before the contract expired or by stating that it could not predict how long it would take to reintegrate employees once the lockout ended.

FACTS

Entergy Operations, Inc. ("Employer") operates a nuclear power plant in Port Gibson, Mississippi. The Employer previously contracted out its security work, but in 2009 it brought in-house the approximately 122 security guards and entered into a collective-bargaining agreement with their representative, the United Government Security Officers of America Local 36 and its affiliated International ("Union"). This collective-bargaining agreement was effective through August 31, 2012, and was extended through September 30, 2012, by mutual agreement during unsuccessful contract negotiations.

The Employer is subject to extensive regulation by the Nuclear Regulatory Commission, which requires total and uninterrupted security protection at the facility at all times.¹ Security guards must be fully trained and complete various certifications before they can work, and have to be retrained and recertified after any

¹ See, e.g., 10 C.F.R. § 73.55(k) (2012).

significant absence, the length of which determines how much retraining and recertification is necessary.²

The collective-bargaining agreement between the Employer and the Union included a no-strike, no-lockout clause that acknowledged that there must be an uninterrupted security presence at all times, and also stated that the “Company agrees that during the term of this Agreement there shall be no lockout on the part of the Company.” The contract also included a management rights clause that gave the Employer the exclusive right to, among other things, “establish and change work schedules” and to reassign bargaining-unit work to employees within the company.

Toward the end of September it became increasingly apparent the parties would not arrive at an agreement before the contract expired. During this time, several supervisors approached some employees one-on-one to urge ratification of the Employer’s last offer, and two inquired about employees’ Union membership. In addition, the Employer readied temporary replacement security guards and informed the bargaining unit employees that there would not be another contract extension and that it would not allow employees to work in the absence of a ratified collective-bargaining agreement. The Employer collected the guards’ key cards as well, and held a debriefing on sensitive information they would not be allowed to discuss in the event of a lockout. The Employer also began using other employees to shadow the security guards in anticipation of the lockout. The Union offered a seven-day contract extension, but the Employer refused. The Employer directed the guards scheduled to work the last six-hour shift on September 30 not to report to work, but informed them that they would still receive pay and benefits for those six hours. The Employer temporarily replaced the bargaining unit employees with supervisors and temporary workers as of that time. Soon following the beginning of the lockout, several employees observed an Employer spokeswoman taking pictures of the picket line with her pink iPhone as she drove by.

In October, the Employer sent each bargaining unit employee a letter about the lockout, which, among other things, stated that:

The Employer expects the lockout will continue until a new CBA is ratified by the Union membership and implemented. The Employer is not in a position to predict how long the lockout will last, and the Employer is not in a position to predict how long a reintegration of the workforce (once the lockout ends) will take.

² Nuclear Regulatory Comm’n, NRC Inspection Manual, Inspection Procedure 92712, Resumption of Normal Operations After a Strike (1992), *available at* <http://www.nrc.gov/reading-rm/doc-collections/insp-manual/inspection-procedure/ip92712.pdf>.

Though the last strike by guards at the plant was in 1993, and the Union had given no indication that it had any interest in striking, the Employer issued press releases stating that it locked out the guards because it was concerned about safety and security in the absence of a no-strike provision.

On November 16, the bargaining unit employees ratified a new collective-bargaining agreement and slowly returned to work as they were retrained and recertified. The retraining and recertification process was agreed to by the Employer and the Union in a memorandum of understanding.

During the Region's investigation, the Employer reaffirmed that the purpose of the lockout was to prevent safety and security problems that could arise in the event of a sudden strike. The Employer added that it was necessary to have the temporary replacement guards on standby in the absence of a no-strike clause, and that it did not make sense to pay both the temporary replacements and the bargaining unit employees.

The Region found merit to allegations that the Employer unlawfully interrogated and threatened employees when supervisors urged them to accept the Employer's last offer, and that the spokeswoman's pictures constituted unlawful surveillance.³

ACTION

We conclude that the Employer had a legitimate and substantial business justification for locking out the guards, that there is no evidence of anti-union animus or that the asserted justification was pretextual, and that the Employer did not taint the legality of the lockout by beginning the lockout early with pay or by informing employees there could be some delay in fully reintegrating them following the lockout.

In *NLRB v. Great Dane Trailers, Inc.*, the Supreme Court set forth a general framework for determining when an employer's discriminatory actions are unlawfully motivated by anti-union animus.⁴ Under that framework, where the employer's conduct is "inherently destructive" of important employee rights, no proof of anti-union motivation is needed.⁵ However, where the employer's actions are not inherently destructive, the harm to employee rights is comparatively slight, and a substantial and legitimate business end is served, an affirmative showing of improper

³ These charge allegations were not submitted to Advice.

⁴ 388 U.S. 26, 33–34 (1967).

⁵ *Id.* at 33.

motive must be made in order to find a violation of the Act.⁶ The Supreme Court has also held that lockouts are not inherently destructive of employee rights and that therefore no anti-union animus can be inferred from a lockout.⁷ The Board has further confirmed that such lockouts are not inherently destructive even when the employer hires temporary replacements to continue operations.⁸ Accordingly, if an employer can show it had a substantial and legitimate business reason for a lockout, and if the General Counsel cannot demonstrate that the lockout was unlawfully motivated, then there is no violation of the Act.

In determining whether a business reason is substantial and legitimate, the Board has noted that “substantial” means nothing more than “nonfrivolous.”⁹ For instance, the Board has found that a lockout implemented in order to put pressure on the union to gain a bargaining advantage is substantial and legitimate.¹⁰ Other substantial and legitimate reasons for lockouts have included the existence of a delicate manufacturing process vulnerable to sudden work stoppages,¹¹ a healthcare provider’s reasonable concern about finding the requisite personnel in the event of a possible strike,¹² the need to avoid further employee sabotage,¹³ and a public utility’s

⁶ *Id.* at 34.

⁷ *Am. Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 309, 312 (1965); *NLRB v. Brown*, 380 U.S. 278, 284 (1965).

⁸ *Harter Equipment*, 280 NLRB 597, 600 (1986), *enforced sub nom. Local 825, IOUE v. NLRB*, 829 F.2d 458 (3d Cir. 1987).

⁹ *Harter Equipment*, 280 NLRB at 600 n.9.

¹⁰ *Id.* at 599 (holding also that the use of temporary replacements serves same legitimate purpose as the lockout: applying bargaining pressure to the union).

¹¹ *Boehringer Ingelheim Vetmedica, Inc.*, 350 NLRB 678, 678 (2007) (finding lockout to prevent “potentially catastrophic work stoppage” lawful).

¹² *Sociedad Española de Auxilio Mutuo y Beneficencia de P.R.*, 342 NLRB 458, 462 (2004) (holding lawful lockout and hiring of temporary employees in response to imminent threat of strike during holiday season), *enforced*, 414 F.3d 158 (1st Cir. 2005).

¹³ *CII Carbon, LLC*, 331 NLRB 1157, 1163 (2000) (holding lawful lockout in response to employees’ contamination of employer’s product).

defense against a union's "inside game" tactics.¹⁴

Even if an employer comes forward with a substantial and legitimate business justification, the Board will find a lockout unlawful if the General Counsel can show that the employer acted out of an unlawful motive, and that the proffered business justification for the lockout is pretextual.¹⁵ For instance, in *Dresser-Rand Co.*, an employer claimed it locked out its employees after they ended a strike to apply bargaining pressure to the union—usually a substantial and legitimate business reason.¹⁶ However, the Board found that because the employer had also unlawfully discharged and suspended some striking workers, and committed other violations of the Act, the lockout was discriminatorily motivated.¹⁷ Likewise, in *Allen Storage & Moving Co.*, the Board held that a lockout was instituted for unlawful discriminatory motives because only employees who had been on strike were locked out, and because the employer made unlawful unilateral changes that the union would have had to accept in order to end the lockout.¹⁸

Here, the Employer has demonstrated that it acted for substantial and legitimate business reasons when it locked out the security guards and hired temporary replacements. Due to extensive regulation of the nuclear power industry requiring that nuclear facilities be guarded at all times, a sudden strike could be crippling to

¹⁴ *Central Illinois Public Service Co.*, 326 NLRB 928, 931 (1998) (finding lawful lockout in response to employees' refusal to work overtime and "work-to-rule" tactics), *enforced sub nom. Local 702, IBEW v. NLRB*, 215 F.3d 11 (D.C. Cir. 2000).

¹⁵ *National Extrusion & Mfg. Co.*, 357 NLRB No. 8, slip op. at 4 (July 26, 2011) (finding that a lockout in support of an unlawful bargaining position is itself unlawful), *enforced sub nom. KLB Indus., Inc. v. NLRB*, 700 F.3d 551 (D.C. Cir. 2012); *Techno Construction Corp.*, 333 NLRB 75, 75 (2001) (finding that a lockout coming immediately after the employer discovered a majority of its employees supported the union warranted an inference of anti-union animus and that the asserted justification was pretextual); *Clemson Bros.*, 290 NLRB 944, 945 (1988) (holding that lockout initiated while employer was engaged in bad faith bargaining was unlawful).

¹⁶ *Dresser-Rand Co.*, 358 NLRB No. 97, slip op. at 31 (Aug. 6, 2012).

¹⁷ *Id.* at 1 n.1.

¹⁸ *Allen Storage & Moving Co.*, 342 NLRB 501, 501 (2004).

the Employer as well as endanger public safety.¹⁹ Though there was no evidence that a strike was imminent, there was also no guarantee there would not be a strike in the absence of a no-strike clause.²⁰ While the Employer's concerns about a strike may reveal an overabundance of caution, it is not unreasonable for a nuclear power operator to be very risk averse given its obligations under federal regulations. Moreover, due to the time required to train and certify replacement guards, the Employer's decision to have replacements at the ready in the event of a work stoppage was reasonable, as was the Employer's subsequent decision to not pay two groups of workers to do one job.²¹ Thus, the Employer's reasons for the lockout were substantial and legitimate.

Moreover, there is no evidence that the Employer's actions were unlawfully motivated. The Employer's actions were consistent with the concern it articulated to the Union at the time of the lockout about having to cope with the security issues that would result from a strike. While the Region found evidence the Employer engaged in some isolated Section 8(a)(1) violations around the time of the lockout, the nature of the violations do not indicate the lockout was motivated by anti-union animus.²² Instead, there is no reason to disbelieve the Employer's stated business justifications due to the Section 8(a)(1) violations.

In addition, the Employer's initiation of the lockout six hours prior to the expiration of the contract did not taint the lockout. We conclude that this was not an unlawful mid-term contract modification. Where an employer has a "sound arguable

¹⁹ See *Boehringer Ingelheim Vetmedica, Inc.*, 350 NLRB at 678 (finding concern that sudden interruption in manufacture of vaccines and pharmaceuticals could create substantial loss and jeopardize public health was legitimate business justification).

²⁰ *Sociedad Española de Auxilio Mutuo y Beneficencia de P.R.*, 342 NLRB at 461–62 (finding a healthcare provider was justified in locking out its employees over a potential strike when it was reasonably concerned it would not be able to find the requisite replacement personnel on short notice, even though the union had cancelled its Section 8(g) strike notice).

²¹ See *Pacific Mutual Door Co.*, 278 NLRB 854, 856 n.12 (1986) (ruling that an employer's need to sign a contract for temporary replacement workers for a fixed amount of time was a substantial and legitimate business justification to delay reinstating striking workers until that period of time ended).

²² See *Delhi-Taylor Refining Division*, 167 NLRB 115, 117 (1967) (holding that employer's unfair labor practices did not necessarily indicate its lockout was due to anti-union animus), *enforced*, 415 F.2d 440 (5th Cir. 1969).

basis” that its actions are in conformity with the contract, the Board will not enter the dispute to determine which party’s interpretation is correct and find a violation.²³ Given the broad management rights clause in the contract, and the fact that the Employer paid the employees who missed their last shift, the Employer had a sound reasonable basis for its position that its actions were not precluded by the no-lockout clause in the contract.²⁴

Finally, the Employer’s intimation that there would be delays in reintegrating employees after the conclusion of the lockout did not render the lockout unlawful. When instituting a lockout, an employer must “clearly state the conditions the [u]nion must meet to end the lockout.”²⁵ That is, an employer must give employees the information necessary for those employees to reconsider their position, evaluate their bargaining strength, and decide whether to accept the employer’s terms.²⁶ If the employer is unclear about what conditions will result in the immediate reinstatement of the employees, then the union will be unable to accurately assess where it stands.²⁷ However, a lockout will be lawful even if an employer makes some ambiguous statements so long as employees can still intelligently evaluate their position.²⁸ For

²³ *Bath Iron Works Corp.*, 345 NLRB 499, 502 (2005), *enforced sub nom. Bath Marine Draftsmen’s Ass’n v. NLRB*, 475 F.3d 14 (1st Cir. 2007); *NCR Corp.*, 271 NLRB 1212, 1213 (1984) (quoting *Vickers, Inc.*, 153 NLRB 561 (1965)).

²⁴ Even if this interpretation of the contract were unreasonable, the early start would not necessarily taint the lockout. In *Paragon Paint* the Board found that a lockout in violation of a no-lockout clause was a violation of Section 8(a)(5) but did not rely on that finding for support when it held for other reasons that the lockout was unlawful. 317 NLRB 747, 770 (1995). *Cf. Movers and Warehousemen’s Assn. of Washington, D.C.*, 224 NLRB 356, 357 (1976) (ruling that a lockout unlawful at its inception retains its illegality until it is terminated), *enforced*, 550 F.2d 962 (4th Cir. 1977).

²⁵ *Dayton Newspapers*, 339 NLRB 650, 656 (2003), *enforced in relevant part*, 402 F.3d 651 (6th Cir. 2005). *See also Alden Leeds, Inc.*, 357 NLRB No. 20, slip op. at 1 n.3 (July 19, 2011) (agreeing with ALJ that lockout was unlawful since employer did not provide union with a complete contract proposal until one week after lockout commenced).

²⁶ *Dayton Newspapers*, 339 NLRB at 656 (finding employer “presented the [u]nion with unclear and changing conditions that, in our view, became a ‘moving target’”).

²⁷ *See id.*; *Alden Leeds, Inc.*, 357 NLRB No. 20, slip op. at 1 n.3.

²⁸ *Harborlite Corp.*, 357 NLRB No. 151, slip op. at 3 (Dec. 22, 2011).

instance, in *Harborlite Corp.* an employer who had previously unlawfully threatened to lock out and permanently replace its employees informed them at the time the lockout began that, as a “gesture of goodwill,” it would make the replacements temporary “until further notice.”²⁹ The Board found that despite the earlier unlawful threat, the lockout was lawful since employees knew they had not been permanently replaced, and could thus “unambiguously evaluate their bargaining position.”³⁰

Although here the Employer said that the reintegration process might take some time, that statement neither was inaccurate nor did it prevent employees from accurately assessing their bargaining position. Due to federal regulation, the amount of retraining and recertification necessary to reintegrate employees after the lockout depended on the length of the work stoppage. Indeed, the Union recognized this problem at the conclusion of the lockout when it signed a memorandum of understanding accepting the Employer’s retraining and recertification process. To the extent that the Employer’s statement created any ambiguity, nothing about it could have reasonably caused employees to form an inaccurate assessment of their bargaining position.

Accordingly, we conclude that the lockout here was lawful and the Region should dismiss the charge allegations pertaining to the lockout, absent withdrawal.

/s/
B.J.K.

²⁹ *Id.* at 2.

³⁰ *Id.*