

National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

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Watson Industries, Inc., Case 3-CA-16045

177-2456-5000, 177-2456-6700, 501-8437, 625-4450-7590

This case was submitted for advice as to whether the Employer's layoff proposal violates Title VII of the Civil Rights Act of 1964; and whether, if the proposal is lawful, it constitutes a mandatory subject of bargaining such that the Employer was privileged to insist on this provision to impasse.

FACTS

From April to September 1990, [1] Watson Industries., Inc. (the Employer) and Local 1895 of the International Association of Machinists and Aerospace Workers (the Union) were engaged in negotiations for a new collective-bargaining agreement. During negotiations the Employer proposed a layoff policy that was calculated to maintain 40 percent minority and female representation in the workforce. Thus, nonminority employees would be laid off before minority employees with less seniority, if necessary to maintain the 60/40 balance. The Union rejected this proposal and refused to agree to any policy which contained a quota or which favored one group of employees over another.

The Employer continued to insist on its layoff proposal and the parties ultimately reached impasse as a result of their failure to agree on a layoff policy. The unit employees voted to reject the Employer's final offer, which contained the layoff proposal, on August 23 and began a strike on August 25. The strike continues to date. The Region has concluded that the strike was caused, at least in part, by the Employer's insistence on the layoff proposal. Thus, if the layoff proposal was unlawful, the employees were engaged in an unfair labor practice strike.

The Union filed the instant charge alleging, inter alia, that the Employer violated Section 8(a)(1) and (5) by insisting to impasse upon a discriminatory and unlawful proposal.

In September 1991, the Region forwarded to Advice copies of correspondence between the parties which demonstrate that the Employer has unequivocally withdrawn its layoff proposal.

In a memorandum dated October 22, 1991, we asked the Region to give us its views, inter alia, as to whether, assuming the proposal to be unlawful, the Employer's withdrawal of the proposal has changed the nature of the strike from unfair labor practice to economic.

ACTION

We have concluded that, even if the layoff proposal were unlawful, the Employer's unequivocal withdrawal of this proposal constitutes a sufficient remedy of that alleged Section 8(a)(5) violation to convert the strike from unfair labor practice to economic as to this subject.[2] Consequently, in this case we do not need to reach the issue of whether the layoff proposal was unlawful.

Initially, we note that in deciding whether an unfair labor practice strike has converted to an economic strike by virtue of new employer conduct arguably remedying the unfair labor practice, the Board considers whether this employer conduct met the Passavant[3] standards.[4]

In *Passavant*, the Board concluded that in order for an employer's voluntary repudiation of unlawful conduct to be effective, it must be timely, unambiguous, and specific in nature to the misconduct.[5] In addition, there must be adequate publication of the disavowal, the misconduct must be free from other illegal acts, the employer must not engage in illegal conduct following the repudiation and, finally, there must be some assurance that the employer will not thereafter interfere with the exercise of Section 7 rights or that the particular misconduct will not recur.[6]

Here, the Employer stated, in a letter sent to the Union, that it withdrew the layoff proposal. We concluded that this conduct met the *Passavant* standards because the vice of the Employer's unlawful conduct has been fully remedied by its removing the proposal from bargaining. Also, the party affected by this unlawful conduct was the Union, which is the party to whom the Employer sent its letter seeking to remedy its alleged unlawful conduct. We realize that the Employer did not give assurances that it will not make this proposal again. [7] We concluded, however, that since the alleged unfair labor practice is that the Employer insisted to impasse on an illegal subject, such assurances are not needed. There is no lingering coercive atmosphere in this case as there is with Section 8(a)(1) or (3) violations.[8]

We conclude that, in the instant case, the status quo ante was effectively restored by the Employer's withdrawal of the objectionable bargaining proposal. Thus, the *Passavant* requirements are met in the instant case and the withdrawal of the proposal is sufficient to convert the purpose of the strike from unfair labor practice, concerning the layoff proposal, to economic.[9] As to any additional Employer violations which the Region may find prolonged the unfair labor practice strike, we will leave those issues to the Region.[10]

R.E.A.

[1] All dates are in 1990, unless stated otherwise.

[2] Accordingly, the Region should not seek to settle this issue, but should dismiss the charge as to it.

[3] *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978), where the Board found that a remedial order should issue as to an employer unfair labor practice even though the employer had attempted to disavow that conduct.

[4] See *Gloversville Embossing Corp.*, 297 NLRB No. 21 (October 30, 1990); *Mohawk Liqueur Company*, 300 NLRB No. 146 (December 31, 1990).

[5] *Passavant supra*, at 138-139.

[6] *Ibid*.

[7] See *Gloversville Embossing Corp.*, *supra*, slip op. at 3, where the Board relied on the employer's failure to give such assurances as a reason to find that the *Passavant* criteria were not met and that, accordingly, the unfair labor practice strike did not convert to an economic one.

[8] Accordingly, this case is distinguishable from *Gloversville Embossing Corp.*, *supra*, for this reason.

[9] Further, even if the *Passavant* criteria are not met, the Board may find that an unfair labor practice strike was converted to an economic strike. Thus, in *Mohawk Liqueur*, *supra*, the Board found that an unfair labor practice strike converted into an economic strike even though the employer's effort to cure the unfair labor practice did not meet most of the *Passavant* standards, because there was evidence that the employees decided to continue the strike for a completely different reason from the unfair labor practice.

[10] Of course, if the Region has questions for Advice as to these new issues, it may resubmit this case on those issues.