

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

DATE: November 21, 2008

TO : Helen E. Marsh, Regional Director
Region 3

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

SUBJECT: Dresser-Rand Company
Cases 3-CA-26543 and 3-CA-26595

Lockout Chron
501-5079-2881
506-4033-4100
506-4067-8700
512-5036-6745
512-5036-8325
512-5072-4400
524-5056-3200
524-5084-8700
530-6067-4001

These cases were submitted for advice on whether the Employer:

1. violated Section 8(a)(3) by locking out economic strikers but not their nonstriking permanent replacements;
2. violated Section 8(a)(5) by unilaterally implementing a procedure for returning strikers after the lockout;
3. violated Section 8(a)(3) by returning to work crossover employees before returning employees who had remained on strike for its duration;
4. condoned alleged striker misconduct; or
5. discharged (b) (6), (b) (7)(C) for engaging in protected activity, and if (b) (6), (b) (7)(C) activity was protected, whether (b) (6), (b) (7)(C) lost that protection because of alleged misconduct.

We conclude that the Employer:

1. violated Section 8(a)(3) by locking out economic strikers and not nonstriking permanent replacements;
2. violated Section 8(a)(5) by unilaterally implementing a procedure for returning strikers;
3. violated Section 8(a)(3) by returning crossover employees to work before returning the remaining strikers;
4. did not condone alleged striker misconduct; and
5. discharged (b) (6), (b) (7)(C) for engaging in protected activity where (b) (6), (b) (7)(C) did not lose the Act's protection.

1. The Discriminatory Lockout

FACTS

Local 313, IUE-CWA (the Union) represents a unit of approximately 417 production and maintenance employees at the Painted Post, New York Facility of Dresser-Rand Company (the Employer). The employees were covered by a bargaining agreement that expired on August 3, 2007. After more than a dozen negotiation sessions failed to result in a new agreement, the Employer, on August 4, 2007, presented the Union with its final offer. The Union rejected the offer and all unit employees went out on an economic strike. The Employer used subcontracting, temporary replacements, and supervisors to perform unit work at this time.

On September 6, the Employer presented the Union with what was essentially its August 4 final offer, stating that if the Union did not accept it the Employer would hire permanent striker replacements. The Union again rejected the proposal. The Employer began hiring permanent replacements, the first of whom began work on September 17.

On November 19, the Union made an unconditional offer on behalf of all strikers return to work. By that day, the Employer had hired about 90 permanent and 180 temporary replacements. In addition, while the strike was in progress, 13 unit employees returned to work after resigning their Union membership.

The Employer stated that it would respond soon to the Union's November 19 offer to return to work and that it wanted to continue the negotiation sessions that the parties had scheduled for November 26 and 27. The Union replied that it wanted to meet on those dates but wanted to focus on the return of all the striking employees.

On November 23, the Employer informed the Union that it was locking out the striking employees in support of its bargaining demands. The Employer stated that the Union could end the lockout by agreeing to the Employer's last offer but that the Employer was willing to continue negotiating. The lockout included the 13 crossover employees who had resigned their membership and returned to work. The lock out did not, however, include any of its permanent replacements.

At the parties' November 27 meeting, the Employer declared that they were at an impasse. On November 29, six days after the Employer had instituted the lockout, the Employer ended the lockout even though the Union had not agreed to the Employer's bargaining demands.

ACTION

The Employer violated Section 8(a)(3) because it provided insufficient business justification for locking out only striking employees and not nonstriking permanent replacements.

1. The Permanent Replacements Became Unit Employees at the End of the Strike

The Region and both the Charging and Charged Parties have treated this case as involving a partial lockout of unit employees, i.e., have treated the permanent replacements as unit employees after the strike ended. The Board has held that permanent replacements become unit employees where they remain employed when the strike ends.¹ We thus also conclude that the permanent replacements had become unit employees six days before the lockout.² Accordingly, the Employer engaged in a partial lockout of only those unit employees who had participated in the strike.

2. The Employer Has Not Demonstrated Legitimate and Substantial Business Justification for Locking Out Only Former Strikers

An employer does not violate the Act by locking out its bargaining unit employees for "legitimate and substantial business reasons."³ Thus, it is lawful for employers to lock employees out for the sole purpose of pressuring them to accept the employer's bargaining

¹ See Grinnell Fire Protection, 332 NLRB 1257, 1257 (2000) ("Once the strike has ended . . . any replacements who remain employed assume the same status as other unit employees. They are no longer strike replacements, and the terms under which they work will be governed by any newly bargained contract."); accord Pan American Grain Co., 343 NLRB 318, 343 (2004); Detroit Newspapers, 327 NLRB 871, 871 (1999); Service Electric Co., 281 NLRB 633, 639-40 (1986)).

² We note that the permanent replacements were unit employees even though they may have been within their 90-day probationary period when the lockout began on November 23. Nothing in the bargaining agreement excludes probationary employees from the unit nor has any party argued that they were not unit employees.

³ Eads Transfer, 304 NLRB 711, 712 (1991), enfd. 989 F.2d 373 (9th Cir. 1993), citing Laidlaw Corp., 171 NLRB 1366, 1370 (1968), enfd. 414 F.2d 99 (7th Cir. 1969), cert. denied 397 U.S. 920 (1970).

proposals,⁴ to maintain business operations, or to insulate itself from anticipated disruption caused by further strikes, if the adverse effect on employees' rights is comparatively slight.⁵ However, an employer violates the Act if a purpose of the lockout is to discourage union activity, or if the lockout is "inherently so prejudicial to union interests and so devoid of economic justification that no specific evidence of intent . . . is required."⁶

The Board examines surrounding circumstances to determine whether a lockout was implemented solely for a lawful purpose.⁷ Although the Board has long held that a lockout's disparate treatment of former strikers is evidence of discriminatory motive, discriminatory lockouts found by the Board typically turn on evidence of animus beyond the partial lockout itself,⁸ the absence of any justification for the disparate treatment,⁹ or employer

⁴ Tidewater Construction Corp., 333 NLRB No. 147 slip op. at 1 (2001), citing American Ship Building Co. v. NLRB, 380 U.S. 300, 318 (1965).

⁵ See Bali Blinds Midwest, 292 NLRB 243, 246-247 (1989) overruled on other grounds sub nom. Electronic Data Systems Corp., 305 NLRB 219 (1991) (partial lockout was lawful where object was to avoid potential disruption of future strikes and meet production goals). See also, Harter Equipment, 280 NLRB 597 (1986), rev. denied sub nom. Local 825 IUOE v. NLRB, 829 F.2d 458 (3d Cir. 1987).

⁶ American Ship Building v. NLRB, above, 380 U.S. at 311. See Ancor Concepts, 323 NLRB 742, 744 (1997), enf. denied 166 F.3d 55 (2d Cir. 1999); Eads Transfer, 304 NLRB at 712; Schenk Packing, 301 NLRB 487, 489-490 (1991); McGwier Co., 204 NLRB 492, 496 (1973).

⁷ Allen Storage and Moving Co., 342 NLRB 501, 513 (2004), citing Darling & Co., 171 NLRB 801, 802-03 (1968).

⁸ See McGwier Co., 204 NLRB at 496 (partial lockout of strikers was unlawful where employer's action was clearly not taken to advance bargaining position); O'Daniel Oldsmobile, 179 NLRB 398, 401 (1969) (partial lockout of strikers and "abundant" union animus showed that lockout was not solely to pressure union to modify demands but also to undermine adherence to union).

⁹ See Allen Storage, 342 NLRB at 501, 514-15 (employer's partial lockout unlawful where employer permitted the only non-striker to continue working during the lockout, without explanation or justification, while barring former strikers from working, and attempted to induce employees to abandon the union and return to work as owner/operators).

conduct that conflicted with its stated justification for the lockout.¹⁰

In two recent cases, the Board iterated that a partial lockout along Section 7 lines, standing alone, is not sufficient to prove unlawful discrimination where the Employer offers a substantial and legitimate reason for the lockout.¹¹ In Midwest Generation, the Board reasoned that the employer was lawfully exerting bargaining pressure when it locked out full-term strikers, but not non-strikers and crossover employees, because the latter had already "eschewed" the strike weapon during the strike, and thus the Employer no longer needed to place bargaining pressure on them. The Board also noted that the lockout in Midwest lasted six weeks and the employer ended it only after achieving its bargaining objectives, i.e., a new agreement.¹² The Board found the lockout was also justified by the Employer's operational needs because the crossovers augmented the employer's effort to maintain production.¹³ Finally, the Board found that the lockout was not motivated by anti-union animus noting that the employer had bargained in good faith and committed no other violations. The Board distinguished Midwest from earlier cases holding partial lockouts to be unlawful based on evidence, other than the partial lockout itself, that the employer was motivated by anti-union animus.¹⁴

¹⁰ See Ancor Concepts, 323 NLRB at 742, 744 (employer's purported justification is undermined when its conduct is inconsistent with that justification); accord Field Bridge, 306 NLRB 322, 334 (1992).

¹¹ Midwest Generation, EME, LLC, 343 NLRB 69, 71-72 (2004), enf. denied and remanded 429 F.3d 651 (7th Cir. 2005); Bunting Bearings Corp., 343 NLRB 479, 481-82 (2004), enf. denied 179 Fed. Appx. 61 (D.C. Cir. 2006)(unpublished).

¹² Midwest Generation, 343 NLRB at 70.

¹³ 343 NLRB at 72-73, citing Bali Blinds Midwest, 292 NLRB at 246-47 (1988) (fear of recurring strike justified partial lockout based on production line, classification, and seniority); Laclede Gas Co., 187 NLRB 243 (1970) (fear of recurring strike justified partial layoff of strikers based on which crews were needed to work), enf. denied 421 F.2d 610 (8th Cir. 1970).

¹⁴ 343 NLRB at 73, distinguishing O'Daniel Oldsmobile, 179 NLRB at 402 (partial lockout unlawful where "abundant" evidence of antiunion animus present); ABCO Engineering Corp., 201 NLRB 686, 689 (1973), enfd. 505 F.2d 735 (8th Cir. 1974) (anti-union remarks by company president

In Bunting Bearings, the Board found that the employer properly exerted bargaining pressure when it locked out its non-probationary employees, but not its probationary employees whom it thought were not union members, and continued to operate with the assistance of temporary employees.¹⁵ The Board noted that it made sense to target only the non-probationary employees because they had greater contractual rights, and thus a more vital interest in the contract proposals, and because the probationary employees had been excluded from the Union's strike vote.¹⁶

In sum, a partial lock out of unit employees based on strike participation can be lawful if the Employer establishes a legitimate and substantial business justification. Below, we consider and reject the Employer's four asserted business justifications for its partial lockout of only former striking employees.

(a) Exerting Bargaining Pressure

The Employer primarily claims that it locked out the strikers, but not their permanent replacements, to urge acceptance of its bargaining proposal. This justification fails because it is contradicted by the Employer's locking out the crossover employees. When the crossovers abandoned the strike and returned to work, they resigned their Union membership, giving up any right to vote on whether the Union should agree to the Employer's bargaining demands. Thus the Employer's locking out the crossovers did not bring pressure on the Union's bargaining position.

The Employer's claim that it locked out the crossovers to exert bargaining pressure on the Union directly conflicts with the Board's view in Midwest. There, the

supported finding unlawful shutdown of plant to all employees but one non-striker). The Seventh Circuit denied enforcement of the Board's decision in Midwest Generation, reasoning that there was no evidence that employees who crossed the picket line did not support the union's position. Electrical Workers Local 15 v. NLRB, 429 F.3d 651 (7th Cir. 2005).

¹⁵ 343 NLRB at 481-82.

¹⁶ Id. The Court of Appeals reversed, finding the lockout was discriminatory given the "perfect correlation" between union membership and the locked out employees, and the Court's view that the employer had not even attempted to meet its burden of showing that the lockout was motivated by legitimate objectives. 179 Fed. Appx. 61.

Board found that the employer did *not* need to exert bargaining pressure on crossover employees because they had "eschewed" the strike weapon.¹⁷

The Board's reasoning in Bunting Bearings similarly refutes the Employer's claimed need to exert bargaining pressure on the Union. In Bunting, the Board found that the employer lawfully exerted bargaining pressure when it locked out non-probationary employees, but not probationary employees, because the latter had been excluded from the union's strike vote and had lesser contractual rights and thus a less vital interest in the contract proposals.¹⁸ In contrast, the Employer here locked out disenfranchised crossover employees and thus did not "place pressure where it will be most effective."¹⁹

Finally, the Employer summarily ended the lockout after only six days, without Union agreement to the Employer's bargaining demands. In marked contrast, the lockout in Midwest lasted six weeks, ending only after the union agreed to the employer's bargaining demands. The extreme brevity of the lockout further refutes the Employer's claim that the lockout was justified to exert bargaining pressure on the Union.²⁰

(b) Meeting operational needs

The Employer claims that the partial lockout was justified to cut costs and maintain production. It asserts

¹⁷ 343 NLRB at 72-73. We note that Midwest is also distinguishable as it involved no other unfair labor practices and an employer who otherwise engaged in good faith bargaining. In contrast, the Region has found that the Employer here violated Section 8(a)(3) in discharging an employee and violated Section 8(a)(5) by unilaterally changing weekend overtime hours. We also note the Employer's additional violations found infra.

¹⁸ 343 NLRB at 481-82.

¹⁹ Id.

²⁰ See Ancor Concepts, 323 NLRB at 744 (employer's purported justification for lockout was undermined by conduct inconsistent with that justification); Field Bridge, 306 NLRB at 331, 333-34 (employer undermined claim that it was continuing to lock out employees to pressure union to accept bargaining demands by reinstating some employees at a time when its bargaining demands had not been accepted and it was still refusing to reinstate other employees).

that did not lockout the permanent replacements because doing so would require hiring more temporary replacements which are more expensive and less stable than permanent replacements. We reject this justification as refuted by the locking out of the crossovers.

If the Employer's justification were to limit costs while maintaining operations, the Employer would not have locked out the same crossover employees it had used to maintain operations during the strike. Moreover, this justification is contradicted by Midwest, where the Board found that the Employer had *augmented* its operations by *retaining* the crossover employees during a lockout of all other strikers.²¹ As with the exerting bargaining pressure justification above, this justification is also refuted by the Employer's decision to end the lockout after just six days, without any explanation of why or how its operational needs had been served.²²

Finally, this case is unlike those where the employer demonstrated that it had lawfully retained certain employees during a lockout on non-discriminatory grounds, such as their irreplaceable job skills, or a demonstrated need to avoid harm that could flow from a repeat strike that was reasonably expected to occur.²³ The Employer does not claim that the permanent replacements had special skills, much less that they were retained for that reason. Nor is there any evidence that the Employer needed to retain the permanent replacements and lock out the

²¹ 343 NLRB at 72-73 (employer maintained operations both during strike and subsequent lockout with same crossovers, temps and other employees).

²² Compare Bali Blinds, 292 NLRB 243, 246-47 (1988) (employer lawfully locked out all but a stable base of employees needed to meet minimum production goals and avoid potential disruption where future strikes appeared imminent); Hercules Drawn Steel Corp, 352 NLRB No. 10 (2008)(employer lawfully distinguished striking employees based on their possession of special skills "necessary" to maintain production); Laclede Gas Co., 187 NLRB 243 (1970) (fear of recurring strike and need to avoid public hazard justified partial layoff of strikers based on which crews were needed to work), enf. denied 421 F.2d 610 (8th Cir. 1970).

²³ See note 20, supra.

crossovers and other strikers in order to avoid harm from an imminent repeat strike.²⁴

(c) Breaching the contracts of permanent replacements

The Employer asserts that it had to make contractual promises to potential replacements in order to call them "permanent replacements."²⁵ The Employer then appears to argue that it would have breached these contracts if it had locked out the permanent replacements. This justification fails because the replacements' contracts contain no promise that would have precluded the Employer from locking them out. The individual contracts signed by the permanent replacements not only do not mention lockouts, they allow the Employer to lay off permanent replacements for "any legitimate reason."

(d) Avoiding inside tactics by the Union

Finally, the Employer claims that the Union only sought to return to work so that it could wage war against the Employer from the "inside." We reject this justification because it lacks evidentiary support. While a lockout may be justified where the union threatens to use "inside game" or "work to rule" tactics,²⁶ there is no evidence here of any such threat, nor evidence of any threat of additional strike activity.²⁷ To the contrary, the Union simply stated that it could better pursue fair contract terms after the employees returned to work.

²⁴ See Caterpillar, Inc., 322 NLRB 690 (1996) (the mere possibility of harm from a strike does not justify a partial lockout.)

²⁵ We note, however, that current Board law holds that permanent replacements' "at will" status, without more, does not detract from an employer's otherwise valid showing that they permanently replaced striking employees. Jones Plastic, 351 NLRB No. 11 (2007).

²⁶ Local 702, IBEW v. NLRB, 215 F.3d 11 (D.C. Cir. 2000) (employer may lockout employees in response to union's use of "inside game" and "work to rule" tactics).

²⁷ Compare Bali Blinds, supra (partial lockout lawful where facts indicated likelihood of repeat strike); General Portland, 283 NLRB 826, 826 n.2, 838, 840 (1987) (Employer reasonably feared and sought assurances against "quickie strikes," and the employees still on strike refused to give such assurances).

In sum, the Employer's inclusion of the crossovers in its partial lockout and the lockout's extremely short duration refute the Employer's claimed justifications of bargaining pressure and operational needs, and there is no evidence supporting the Employer's two other business justifications. Accordingly, complaint should issue, absent settlement, alleging that the Employer violated Section 8(a)(3) by locking out striking employees, but not their permanent replacements.

2. Unilaterally Implemented Procedure for Returning Strikers

FACTS

During the lockout, the parties met briefly on November 25 and 27, but no agreements were reached. At the latter meeting, the Employer declared impasse and the Union at that time did not disagree. On November 29, the Employer ended the lockout and invited the employees to return to work. During a telephone conference later that day, the Union demanded bargaining, i.e., asserted that the return-to-work process needed to be negotiated, was not up to the company, and that the company did not get to make the decision. The Employer responded that the decision would be made by Union and company counsel.

The next morning, November 30, company counsel informed Union counsel that he hoped to provide detailed information regarding the return-to-work process later that day. Later that afternoon, company counsel wrote Union counsel that the Employer was developing a return to work process that would rank employees based on a mixture of performance and seniority, and that it planned to send the Union a description of that process. Company counsel also noted that the Employer planned to begin calling employees on December 2 for their return to work on December 4, and invited any questions. Union counsel replied that the Company should send the promised documents by e-mail and fax.

Around 5 p.m. on December 2, the Employer sent the Union a description of the Employer's return to work procedure which ranked employees based in part on their performance evaluations. The Employer at that time also stated that it planned to begin contacting employees, and invited the Union to ask questions. In fact, within minutes of sending its return-to-work procedure to the Union, the Employer began calling employees about returning.

The next day, December 3, the Union asked the Employer whether it intended to send certified letters to those employees that could not be reached in accordance

with the plant-wide seniority provisions of the expired bargaining agreement and the Employer's implemented final offer. The Employer replied that it would look into it. By letter to the Employer dated December 4, Union counsel denied that the parties were at impasse, and stated that the recall was discriminatory and that the Union was filing charges with the Board. As of late June 2008, about 46 of the approximately 417 unit employees remained out of work.

ACTION

The Employer violated Section 8(a)(5) by unilaterally implementing its procedure to return strikers to work because the Union did not "clearly and unmistakably" waive its right to bargain over this subject.

The Employer argues that the Union did not demand bargaining or did not act with due diligence in demanding bargaining and thus effectively waived its right to bargain. We conclude first that the Union did demand bargaining over how to return the strikers from the lockout.

The Union made it clear, *ab initio*, that it was demanding bargaining over that process.²⁸ Nothing in the Union's later conduct, from November 29 through December 2, negated that explicit bargaining demand. The Employer replied to that demand on November 29 stating that the decision would be made by Union and company counsel, which confirmed that both parties would be involved. By this time the Employer had not indicated that it would use performance evaluations in the return to work process. Since the Union thus lacked any notice of that proposal and had already clearly demanded bargaining, the Union exercised due diligence and reasonably waited until December 2 to see the Employer's proposal. We also conclude that the Union did not subsequently waive its right to bargain over this subject.

The Board may find that a union has waived its right to bargain over a mandatory subject, like the return-to-work process here if the waiver is "clear and unmistakable."²⁹ The standard is a strict one. A waiver

²⁸ During the November 29 conference call, the Union asserted that the return-to-work process needed to be negotiated, and was not up to the company who did not get to make the decision. Cf. Emhart Indus., 297 NLRB 215 (1989) (Union made no attempt to bargain over the return-to-work process despite having three to four days to do so).

²⁹ Metropolitan Edison Co. v. NLRB, 460 U.S. 693, 705, 708 (1983).

may be inferred from union inaction only if the union had sufficient notice of the specific proposal in question.³⁰ Sufficient notice is that which gives the Union both the time and information necessary "to evaluate the proposals and present counterproposals before implementing [the] change."³¹ Accordingly, where the time between notice and implementation is too short, or the union receives notice at the same time as the employees it represents, the Board has found that the proposal is a *fait accompli* resulting in no union waiver.³²

The Union did not waive its right to bargain over the return-to-work process because the Employer's proposal essentially was a *fait accompli* when the Union finally received it on December 2. Moments after the Union received the proposal, the Employer began calling employees to arrange their return to work. The Employer gave the Union almost no time to evaluate the written proposal and present counterproposals before the Employer essentially began implementing it.³³ In sum, because the time between notice and implementation was so short, and the Union received notice at the same time as the employees it represents, the December 2 proposal essentially was a *fait accompli* resulting in no Union waiver.³⁴

³⁰ See Pan Am. Grain, Co., 343 NLRB 318, 318 (2004) (employer's general statements regarding anticipated changes do not constitute sufficient notice); Bunker Hill, Co., 208 NLRB 27, 33 (1973), modified, 210 NLRB 346 (1974) (requiring that the specific matter allegedly waived was "fully discussed" and "conscientiously explored").

³¹ Pan Am. Grain, 343 NLRB at 318, quoting Gannett Co., 333 NLRB 355, 357 (2001).

³² See Ciba-Geigy Pharmaceutical Div., 264 NLRB 1013, 1017 (1982), *enfd.* 722 F. 2d 1120 (3d Cir. 1983) (*fait accompli* where union notified of change at same time as employees and objected to change and sought time to study proposal); accord Windstream Corp., 352 NLRB No. 9 (2008) (new policy *fait accompli* where union received notice same time as employees and nothing in notice indicated that it would not be implemented); Champion Int'l Corp., 339 NLRB 672, 687-88 (2003) (employer notified union of change evening before implementation); Laro Maintenance Corp., 335 NLRB No. 118 (2001) (notice given the day before implementation).

³³ See notes 30-31, *supra*, and cases cited therein.

³⁴ See Ciba-Geigy, 264 NLRB at 1017 (finding *fait accompli* where union was notified of change at the same time as employees); Champion Int'l, 339 NLRB at 687-88 (same where

We reject the argument against a *fait accompli* based on the fact that, when the Employer informed the Union on November 30 that it planned to use performance evaluations in the recall process, the Employer added that it planned to initiate that process on December 2 and invited the Union to ask questions at that time. We recognize that this invitation arguably provided the Union with two days to object to the timing, if not the specific substance, of the December 2 implementation.

Two days may or may not be sufficient notice to respond to a bargaining proposal.³⁵ Here however, the Employer previously only generally described its return proposal, providing no significant details. The Union thus lacked any meaningful opportunity to object or form counterproposals until it received the Employer's written proposal on December 2. The Employer, however, then implemented the proposal a few minutes later, depriving the Union of any meaningful opportunity to respond.

Accordingly, Section 8(a)(5) complaint should issue, absent settlement, alleging that the Employer unilaterally implemented its striker return to work procedure.

3. Preferential Treatment Given to Crossover Employees

FACTS

After the 13 crossovers abandoned the strike and returned to work, the Union on November 19 made an unconditional offer to return on behalf of all the

employer notified union of change the evening before implementation); Laro Maintenance, 335 NLRB No.118 (2001) (one-day notice insufficient). See also Peerless Pump Co., 345 NLRB 371, 389-91 (2005)(same-day notice and implementation of return-to-work procedure was *fait accompli*).

³⁵ Board cases do not clearly demark whether when a few days' time constitutes adequate notice of a proposal. Compare Emsing's Supermarket v. NLRB, 872 F.2d 1279, 1287 (7th Cir 1989) (3-4 days insufficient notice for effects bargaining over decision to close) and Southwest Forest Indus., supra (3 days notice insufficient) with Emhart Indus., supra (3-4 days sufficient time to bargain over return to work process); and Lenz and Ricker, 340 NLRB No. 21 (2003) (finding four days was sufficient time to demand effects bargaining, but noting that four days might be insufficient in other contexts).

strikers. The Employer rejected that offer and locked out all of the strikers including the crossovers.

On November 29, the Employer notified the Union that it was declaring impasse, implementing its September 6 final offer and ending the lockout that day. The Employer then developed a preferential recall list, which it finalized on December 2, that ranked former strikers based on their performance and seniority.

The 13 crossovers, however, were not placed on that list. Rather, they were recalled *immediately* to their former positions on November 29.³⁶ By contrast, the Employer placed the full-term strikers on its recall list and began contacting them for recall on December 2.

ACTION

The Employer's recall preference for the crossovers violated Section 8(a)(3) under the rationale of Peerless Pump Co³⁷, where the Board found unlawful a 2-tiered recall from strike procedure. The employer there placed at the top of its recall list crossovers who had signed the recall list prior to end of the strike ensuring their immediate reinstatement. As the Board explained, this practice favored crossovers based on their degree of union support and violated the well settled rule that all economic strikers are equally entitled to recall per the union's offer to return.³⁸ Similarly here, the Employer's immediate return of the crossovers favored them based on their degree of support of the Union's strike.³⁹

This case is unlike Bancroft Cap Co.,⁴⁰ where the Board held that the employer did not violate the Act when, after a short layoff due to a material shortage, it recalled crossovers and permanent replacements rather than more senior strikers. Prior recall of the laid-off crossovers

³⁶ 12 of the 13 crossovers returned to work that day. The other returned on November 30.

³⁷ 345 NLRB 371, 376 (2005).

³⁸ Id.

³⁹ We apply the Peerless finding of discriminatory recall here, following the lockout, because the underlying rationale of that case applies here. The full-term strikers were not immediately recalled because of the extent of their protected strike activity.

⁴⁰ 245 NLRB 547 (1979).

and replacements was lawful because these laid-off employees had a reasonable expectation of recall, and thus their temporary absence did not leave any "vacancies" that had to be offered to strikers.⁴¹ In contrast, the crossovers' 6-day absence here was not due to a material shortage, but rather due to the Employer's decision to lockout them out along with the full-term strikers.

Finally, we find no merit to the Employer's claim that the Union's November 19 offer to return the employees to work had expired by the time the crossovers returned to work on November 29. To the contrary, the Union made a previous unconditional offer to return to work, which remained in effect because the Union had not retracted it.⁴²

Accordingly, Section 8(a)(3) complaint should issue, absent settlement, alleging that the Employer discriminatorily delayed in recalling the noncrossover strikers.

4. Condonation of Striker Misconduct

FACTS

The Union alleges that the Employer terminated three employees, (b) (6), (b) (7)(C), (b) (6), (b) (7)(C), and (b) (6), (b) (7)(C), for participating in a strike and other protected activities. The Employer contends that it lawfully discharged them for strike misconduct.

Concerning the misconduct, on (b) (6), (b) (7)(C), (b) (6), (b) (7)(C) followed a replacement employee leaving the plant and threatened to assault (b) (6), (b) (7)(C). When the employee returned to the plant accompanied by a supervisor, (b) (6), (b) (7)(C) threatened to assault the supervisor. On (b) (6), (b) (7)(C), (b) (6), (b) (7)(C) spilled a drink on one of two crossover employees and then threatened them. On (b) (6), (b) (7)(C), (b) (6), (b) (7)(C) was on the picket line when (b) (6), (b) (7)(C) allegedly landed on a vehicle after jumping out of the way to avoid being struck.⁴³

⁴¹ Id.

⁴² See Marlene Indus Corp., 255 NLRB 1446, 1469-70 (1981) (offer to return to work valid until expressly rescinded); Dold Foods, 289 NLRB 1323, 1333 (1988) (employer unsure about meaning of offer must seek clarification from union).

⁴³ The Region has concluded that the above misconduct was sufficient to warrant termination. We note that these employees each received a criminal citation or entered a guilty plea and (b) (6), (b) (7)(C) and (b) (6), (b) (7)(C) misconduct was the subject of a state court proceeding to obtain an injunction to limit picketing activity.

The Employer learned about these incidents shortly after they occurred. The facts showing that the Employer condoned the above misconduct involve the mass mailing of the following three letters to all striking employees.

On October 17, 2007, while the strike was in progress and after the Employer was aware of the misconduct, the Employer sent a letter to all of the over 400 strikers, including (b) (6), (b) (7)(C), (b) (6), (b) (7)(C), and (b) (6), (b) (7)(C), encouraging all the strikers to come back to work. On November 29, after the Employer ended the lockout, it sent two additional letters to all former striking employees. The first stated that any or all Union employees are free to return to work. The second iterated that anyone who wished to return to work would be accepted and welcomed back under the terms implemented by the Employer. Of these three letters made any specific mention of (b) (6), (b) (7)(C), (b) (6), (b) (7)(C), or (b) (6), (b) (7)(C) nor addressed the issue of strike misconduct.

When the Employer on November 29 and 30 told the Union that it would assess its manpower needs and develop a recall list, it did not mention any striker misconduct. The preferential recall list that the Employer eventually sent the Union on December 2 did not include (b) (6), (b) (7)(C), (b) (6), (b) (7)(C), or (b) (6), (b) (7)(C). The Employer later explained that it omitted the employees because the Employer was investigating their alleged strike misconduct. The three employees heard nothing further until the Employer terminated them on January 7, 2008.

ACTION

We conclude that the Employer's three mass mailed letters to all employees containing no mention of the three employees, much less any mention of their misconduct, are insufficient evidence that the employer clearly agreed to forgive their misconduct.

Condonation is established by "clear and convincing evidence that the employer has agreed to forgive the misconduct, wipe the slate clean, and resume . . . the employment relationship as though no misconduct has occurred."⁴⁴ The Board has applied this standard strictly, noting that "condonation may not be lightly presumed from mere silence or equivocal statements, but must clearly

⁴⁴ United Parcel Service, Inc., 301 NLRB 1142, 1143 (1991); accord Fineberg Packing Co., Inc., 349 NLRB No. 29 (2007), enfd. sub nom. Exum v. NLRB, (6th Cir. No. 07-2070, Nov. 7, 2008).

appear from some positive act by the employer indicating forgiveness and an intention of treating the guilty employees as if their misconduct had not occurred."⁴⁵ Thus, the Board has refused to infer condonation from employer statements to the effect that all strikers will be reinstated, where those statements did not specifically address the subject of individual striker misconduct.⁴⁶

The only evidence arguably showing Employer condonation consists of three mass mailings to over 400 employees, asking them to consider returning to work. None of the letters mentions the subject of individual striker misconduct much less indicates any clear intent to forgive it and move on as if it had not occurred. Thus, this case is similar to Southern Florida Hotel, supra, where the Board found no striker misconduct condonation arising from a settlement agreement that only accorded blanket reinstatement for all strikers.⁴⁷

This case is distinguishable from those finding condonation where the employer spoke personally to the guilty individuals to discuss their continued employment. For example, in Harry Hoffman & Son Printing,⁴⁸ the Board found condonation where the employer's vice president, knowing of an employee's misconduct, not only included [REDACTED] on a mailing of letters advising all employees of their placement on a recall list, but also personally called [REDACTED] as part of phone survey to determine the employees' availability to return to work. In Virginia Manufacturing Co, Inc.,⁴⁹ a manager who had personally observed the misconduct held an in-person meeting in a break room with 20 employees, including those guilty of misconduct. During

⁴⁵ Fineberg Packing Co., 349 NLRB No. 29 (quoting Board and court decisions).

⁴⁶ See Southern Fla. Hotel, 245 NLRB 561, 563-64, 607 (1979), mod. on other grounds, 751 F.2d 1571 (11th Cir. 1985) (no condonation of individual striker misconduct from a strike settlement agreement that required employer to reinstate all strikers but did not address the subject of individual striker misconduct).

⁴⁷ We note that the settlement agreement in Southern Florida Hotel was insufficient to show condonation even though it *required* the reinstatement of strikers. The mass mailings here are weaker evidence of condonation because they merely *encouraged* strikers to return.

⁴⁸ 278 NLRB 671, 673-74 (1986).

⁴⁹ 310 NLRB 261, 1262 n. 2, 1277 (1993).

that meeting, the manager said that (b) (6), (b) (7)(C) would have work for all of the assembled employees.⁵⁰ The Board found condonation based not only on that statement, but also on the fact that the manager had undermined (b) (6), (b) (7)(C) credibility at the hearing by admitting that (b) (6), (b) (7)(C) had initially intended to bring everyone back, but then changed (b) (6), (b) (7)(C) mind after (b) (6), (b) (7)(C) realized (b) (6), (b) (7)(C) could fire certain employees for their misconduct.⁵¹ In sum, a promise of future work to a small group during a face-to-face meeting, i.e., an individualized indication of forgiveness, is wholly unlike the mass mailing to over 400 employees here.⁵²

Finally, the Employer's mass mailings do not constitute condonation in light of Fineberg Packing, supra. There the Board declined to find condonation even though the employer repeatedly told the guilty employees, at a face-to-face gathering, that they were "not fired" for their participation in an unprotected strike and should "come back tomorrow." The Board reasoned that even these explicit statements may have only indicated that the employer had not yet decided whether to discipline the guilty employees. Similarly here, the mass-mailing of these letters making no reference to individual misconduct may only have indicated that the Employer had not yet decided whether to allow these employees to return.

5. The Termination of (b) (6), (b) (7)(C)

The Employer unlawfully discharged (b) (6), (b) (7)(C) for the protected activity of confronting (b) (6), (b) (7)(C) supervisor, i.e., protesting to the supervisor that (b) (6), (b) (7)(C) had not been paid bargaining agreement rates and protesting the supervisor's belligerent behavior.

FACTS

⁵⁰ Id.

⁵¹ 310 NLRB at 1277.

⁵² The Board has found condonation in other cases based on statements which, unlike the mass mailings here, specifically targeted the guilty individuals and expressly forgave the misconduct. See, e.g., UPS, supra, 301 NLRB at 1143 (employer condoned driver's refusal to complete hazardous route by telling (b) (6), (b) (7)(C) to punch out and take sick day as an authorized absence); Asbestos Removal, 293 NLRB 352, 356-57 (1989) (employer told employees health officials had shut the job down, but there would be work in a few days and (b) (6), (b) (7)(C) would call them individually); General Elec. Co., 292 NLRB 843 (1989) (employer allowed employee to return to work for a week after initial warning, without further mention of discipline).

When (b) (6), (b) (7)(C) returned to work from the strike in mid-(b) (6), (b) (7)(C), (b) (6), (b) (7)(C) was concerned that (b) (6), (b) (7)(C) might violate new work rules that the Employer had enacted through its implemented final offer (IFO). Unlike the strikers who had returned to work in December, (b) (6), (b) (7)(C) had not received a copy of the IFO upon (b) (6), (b) (7)(C) return to work. Among the rules that the IFO changed were those pertaining to paid lunch breaks and voluntary overtime.

On (b) (6), (b) (7)(C), (b) (6), (b) (7)(C) worked a 12-hour shift of voluntary overtime at the request of Supervisor (b) (6), (b) (7)(C). The expired bargaining agreement provided 12 hours pay for such a 12-hour shift. When (b) (6), (b) (7)(C) earlier had asked (b) (6), (b) (7)(C) to work the shift, (b) (6), (b) (7)(C) had not told (b) (6), (b) (7)(C) that this rule was changed under the IFO. The IFO provided for only 11.5 hours pay.

According to (b) (6), (b) (7)(C), (b) (6), (b) (7)(C) approached (b) (6), (b) (7)(C) the next day in (b) (6), (b) (7)(C) of other employees to obtain a copy of the (b) (6), (b) (7)(C) (b) (6), (b) (7)(C) asked (b) (6), (b) (7)(C) why (b) (6), (b) (7)(C) needed a copy, and (b) (6), (b) (7)(C) responded that (b) (6), (b) (7)(C) needed to know the rules. (b) (6), (b) (7)(C) then complained to (b) (6), (b) (7)(C) that (b) (6), (b) (7)(C) had lied and that (b) (6), (b) (7)(C) had received only 11.5 hours pay for a 12-hour shift and would no longer volunteer for such shifts.

According to (b) (6), (b) (7)(C), (b) (6), (b) (7)(C) returned a few minutes (b) (6), (b) (7)(C) yelled at (b) (6), (b) (7)(C) demanding to know if (b) (6), (b) (7)(C) thought that the Company owed (b) (6), (b) (7)(C) anything.⁵³ (b) (6), (b) (7)(C) asked (b) (6), (b) (7)(C) why (b) (6), (b) (7)(C) had "lied" to (b) (6), (b) (7)(C), (b) (6), (b) (7)(C) screamed at (b) (6), (b) (7)(C) who told (b) (6), (b) (7)(C) not to try and intimidate (b) (6), (b) (7)(C). The altercation ended a minute later when (b) (6), (b) (7)(C) walked away. Immediately afterwards, (b) (6), (b) (7)(C) explained to employee witness (b) (6), (b) (7)(C) that (b) (6), (b) (7)(C) "lie" had been asking (b) (6), (b) (7)(C) to work a 12-hour shift without telling (b) (6), (b) (7)(C) that (b) (6), (b) (7)(C) would not be paid for 12 hours as (b) (6), (b) (7)(C) had in the past.

About 20 minutes later in the presence of other employees, (b) (6), (b) (7)(C) asked (b) (6), (b) (7)(C) if they could talk stating that (b) (6), (b) (7)(C) did not like the way (b) (6), (b) (7)(C) had tried to intimidate (b) (6), (b) (7)(C) in front of other employees. (b) (6), (b) (7)(C) again began yelling. (b) (6), (b) (7)(C) also raised (b) (6), (b) (7)(C) voice, replying that (b) (6), (b) (7)(C) didn't have to yell and that (b) (6), (b) (7)(C) just wanted to talk. (b) (6), (b) (7)(C) then walked away.

Two employee witnesses confirmed (b) (6), (b) (7)(C) description of the two confrontations, except that one

⁵³ (b) (6), (b) (7)(C) reportedly has an exp (b) (6), (b) (7)(C) employer. The Union has filed numerous grievances over (b) (6), (b) (7)(C) behavior towards employees.

asserted that (b) (6), (b) (7)(C) used profanity.⁵⁴ (b) (6), (b) (7)(C) submitted (b) (6), (b) (7)(C) employer a short written, incident report. (b) (6), (b) (7)(C) report did not state that (b) (6), (b) (7)(C) had used any profanity.

That week (b) (6), (b) (7)(C) and (b) (6), (b) (7)(C) Union steward met with (b) (6), (b) (7)(C) of Human Relations. (b) (6), (b) (7)(C) relayed (b) (6), (b) (7)(C) version of the events, denying that (b) (6), (b) (7)(C) had raised (b) (6), (b) (7)(C) voice or used profanity. (b) (6), (b) (7)(C) stated that (b) (6), (b) (7)(C) would look into the situation but that (b) (6), (b) (7)(C) would be discharged if (b) (6), (b) (7)(C) had lied during the investigation. A few days later, the Employer discharged (b) (6), (b) (7)(C) for violating common decency, i.e., confronting (b) (6), (b) (7)(C) supervisor, and also for failing to comply with the investigation, i.e., lying to (b) (6), (b) (7)(C).

ACTION

a. (b) (6), (b) (7)(C) was engaged in protected, concerted activity

An employee engages in protected, concerted activity when (b) (6), (b) (7)(C) reasonably invokes a bargaining agreement right, regardless of whether (b) (6), (b) (7)(C) correctly believed that the right was violated.⁵⁵ The Employer discharged (b) (6), (b) (7)(C) for "confronting" (b) (6), (b) (7)(C). The Employer thus discharged (b) (6), (b) (7)(C) in part because of (b) (6), (b) (7)(C) complaint that (b) (6), (b) (7)(C) had lied by asking (b) (6), (b) (7)(C) to work overtime without telling (b) (6), (b) (7)(C) that (b) (6), (b) (7)(C) would not be paid under the underlying bargaining agreement.

The parties' expired bargaining agreement terms applied except where the Employer's IFO replaced them. (b) (6), (b) (7)(C) knew (b) (6), (b) (7)(C) was returning to work under the IFO, but did not know which underlying bargaining agreement terms still remained in effect. When (b) (6), (b) (7)(C) agreed to (b) (6), (b) (7)(C) request that (b) (6), (b) (7)(C) work voluntary overtime, (b) (6), (b) (7)(C) clearly believed, albeit mistakenly, that (b) (6), (b) (7)(C) would be paid under the underlying bargaining agreement. When (b) (6), (b) (7)(C) protested (b) (6), (b) (7)(C) "lie", i.e., (b) (6), (b) (7)(C) to tell (b) (6), (b) (7)(C) that (b) (6), (b) (7)(C) would not be so paid, (b) (6), (b) (7)(C) essentially was protesting that (b) (6), (b) (7)(C) had not been

⁵⁴ However, the witness was unsure of how (b) (6), (b) (7)(C) used profanity, asserting that (b) (6), (b) (7)(C) may have directed profanity at (b) (6), (b) (7)(C) or may have just used profanity.

⁵⁵ See NLRB v. City Disposal Sys., 465 U.S. 822, 840 (1984) (employee's reasonable expectation of collectively bargained right to not drive truck (b) (6), (b) (7)(C) believed to be unsafe was protected concerted activity); accord Interboro Contractors, 157 NLRB 1295 (1966).

paid under the bargaining agreement. (b) (6), (b) (7)(C) protest was protected, even though it was mistaken.⁵⁶

(b) (6), (b) (7)(C) in both (b) (6), (b) (7)(C) confrontations with (b) (6), (b) (7)(C) also protested, in front of other employees, (b) (6), (b) (7)(C) yelling at and trying to intimidate (b) (6), (b) (7)(C). Thus the Employer's discharge for (b) (6), (b) (7)(C) "confrontation" also included (b) (6), (b) (7)(C) protest of (b) (6), (b) (7)(C) belligerent behavior. Protesting supervisory belligerence toward employees is protected activity.⁵⁷ Although (b) (6), (b) (7)(C) was alone when (b) (6), (b) (7)(C) protested (b) (6), (b) (7)(C) behavior, other employees previously had similarly complained and the Union also had filed grievances over (b) (6), (b) (7)(C) abusive behavior. (b) (6), (b) (7)(C) thus (b) (6), (b) (7)(C) engaged in concerted as well as protected activity when (b) (6), (b) (7)(C) protested (b) (6), (b) (7)(C) abusive yelling.⁵⁸

b. (b) (6), (b) (7)(C) did not lose the Act's protection

(b) (6), (b) (7)(C) behavior in allegedly using profanity and raising (b) (6), (b) (7)(C) voice during the confrontation with (b) (6), (b) (7)(C) was (b) (6), (b) (7)(C) so "egregious" as lose the Act's protection. Rather, (b) (6), (b) (7)(C) allegedly brief use of profanity is no worse than the profanity found not to forfeit the Act's protection in other cases.⁵⁹

⁵⁶ "[A]n employee's 'honest and reasonable invocation' of a collective bargaining contract is concerted activity 'regardless of whether the employee turns out to have been correct in his belief that his right was violated.'" Regency Electronics, 276 NLRB 4, note 3 (1985), citing NLRB v. City Disposal, supra.

⁵⁷ See Arrow Electric Co., 323 NLRB 968 (1997) (employees' protest of supervisor's belligerent, disrespectful and rude attitude protected); In re Trompler, 335 NLRB 478 (2001)(employees' concerted protest of supervisor's conduct protected where supervisor's conduct affected their terms of employment).

⁵⁸ See Dayton Typographical Services, Inc., 273 NLRB 1205 (1984) (individual employee complaint concerted as "continuation" of same complaint previously made by several employees); JMC Transport, 272 NLRB 545, note 2 (1984)(individual employee complaint about paycheck discrepancy concerted as a "continuation" of prior concerted complaint about wage payment calculations).

⁵⁹ See, e.g., Union Carbide, supra (employee's effort to learn his contractual service date protected even though he called supervisor a "f----- liar"); accord Tampa Tribune, 351 NLRB No. 96 (2007).

We reach the same conclusion applying the four-part test set out in Atlantic Steel, 245 NLRB 814 (1979), which balances (1) the place of the discussion; (2) its subject matter; (3) the nature of the outburst; and (4) whether it was in any way provoked by employer unfair labor practices. Here, the first two factors, the place and content of the discussion, support finding the activity protected. (b) (6), (b) (7)(C) was engaged in protected conduct on the shop floor in front of other employees. The third factor, the nature of the outburst, does not weigh against protection here, and in any event is not dispositive.⁶⁰ Even if (b) (6), (b) (7)(C) raised (b) (6), (b) (7)(C) voice and used profanity, the confrontation was both initiated and escalated by (b) (6), (b) (7)(C) who returned to yell at (b) (6), (b) (7)(C) in front of other employees. (b) (6), (b) (7)(C) did not respond with any threats but rather tried to diffuse the situation by walking away.⁶¹ The fourth factor, provocation by employer unfair labor practices does not weigh in favor of protection. However, while (b) (6), (b) (7)(C) outburst was not provoked by a violation of the Act, it was provoked by (b) (6), (b) (7)(C) hostility which the Union had previously grieved.

Finally, the Employer asserted that it discharged (b) (6), (b) (7)(C) also in part for not complying with the investigation, i.e., lying to (b) (6), (b) (7)(C) about using profanity. We conclude that this alternative ground for discharge is pretextual. The Region found that the Employer routinely imposed lesser than discharge discipline when other employees have been disrespectful or belligerent to supervisors. Thus the Employer's first reason for discharging (b) (6), (b) (7)(C) is pretextual. In addition, (b) (6), (b) (7)(C) own written version of the confrontation did not cite any profanity. One of the impartial witnesses also did not refer to any profanity and the other witness was unclear about how (b) (6), (b) (7)(C) allegedly used it. Substantial evidence thus indicated that (b) (6), (b) (7)(C) did not use profanity and thus did not lie about its use. Given the Employer's first pretextual ground for this discharge, and the Employer's ignoring without explanation substantial evidence contrary to this second ground for the discharge, we conclude that this ground is pretextual as well.

⁶⁰ See Union Carbide and Tampa Tribune, cited above.

⁶¹ Compare Waste Mgmt. of Arizona, 345 NLRB 1339 (2005) (employee cursed repeatedly in a loud and threatening manner and refused to move discussion to supervisor's office); Catepillar, Inc., 322 NLRB 674 (1996) (employee called super "mother f---ing liar, struck him with his finger, and threatened to deal with him outside).

In sum, the Employer violated Section 8(a)(3) by locking out economic strikers, but not their permanent replacements; violated Section 8(a)(5) by failing to bargain over the return-to-work process; violated Section 8(a)(3) by giving recall preferences to crossover employees; did not condone alleged striker misconduct; and discharged (b) (6), (b) (7)(C) for engaging in protected activity where (b) (6), (b) (7)(C) did not lose the Act's protection.

B.J.K.

ROF (BOX)

H: ADV.03-CA-26543. Response.DresserRand. (b) (6), (b) (7)(C)