

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

S.A.M.

DATE: February 7, 2017

TO: Paul Murphy, Regional Director
Region 3

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

SUBJECT: Honeywell
Case Nos: 03-CA-176218 and 03-CA-180669

The Region submitted this case for Advice as to whether the Employer violated the Act by locking out its employees in support of a bargaining position that would give the Employer considerable discretion over key terms and conditions of employment. We conclude that such a lockout is an example of the type of economic warfare that is so damaging to collective bargaining that the Board should prohibit its use. We therefore conclude that the Employer violated the Act by locking out its employees to compel the Union to waive its right to bargain over the parties' health and welfare plans.

FACTS

The Employer, Honeywell International, manufactures airplane equipment at various facilities across the country. The Union, the UAW, represents employees at several of the Employer's facilities; in particular, UAW Local 9 has represented a unit of production and maintenance employees at the Employer's South Bend, Indiana site since 1936 and UAW Local 1508 has represented a similar unit at the Green Island, NY facility since 1967. There are currently 320 and 41 unit members at the South Bend and Green Island sites, respectively. The parties have negotiated a master agreement covering both units as well as separate local agreements. All contracts ran from May 3, 2011 to May 3, 2016.

The parties began negotiating for their successor agreements on April 12, 2016¹ in South Bend. Throughout the course of negotiations, the Employer repeatedly offered proposals that as to virtually all of its health and welfare coverage—most

¹ All dates are in 2016 unless otherwise specified.

notably medical and dental insurance and pensions²—employees would transition to the same plans that “Honeywell offers to non-bargaining unit employees at the site and as they may change from time to time,” effective January 1, 2017.³ The proposals all specified that “[n]o matter respecting the Plans shall be subject to the Grievance Procedure established in the Collective Bargaining Agreement between the Company and the Union.” The Union consistently rejected such proposals, explaining that it would never agree to allow the Employer to reserve the right to make changes at its sole discretion.⁴ The Employer’s proposals also included language reserving to itself some discretion on hours of work,⁵ leaves of absences,⁶ and rates of production.⁷ In

² This type of language that twinned the unit employee benefits to those enjoyed by non-unit employees which could be changed at the Employer’s discretion also reached supplemental life insurance, AD&D, Dependent Life Insurance, Short and Long Term Disability, the FSA, the EAP, Identity Theft Services, Business Travel Insurance, 401(k), Bravo (a reward recognition program), Employee Discount Program, and the Employee Referral Program.

³ The Employer explained that the plans are offered corporate-wide and apply to all locations, but the health insurance premiums vary regionally.

⁴ According to the Employer, the UAW accepted similar discretionary language earlier this year in a collective-bargaining agreement covering its Boyne City, Michigan facility.

⁵ “The Company retains the right to set standard hours of work, break times, meal times, clean-up times and shift schedules locally, which may vary by classification, department or product line. Local management will provide the local Union advance notice and an opportunity to discuss any change in standard hours of work, break times, meal times, clean-up times and shift schedules.”

⁶ “Employees covered by this Agreement are eligible for all leaves of absence available to other employees at their work site, on the same terms and conditions applicable to those other employees and as the Company may change them from time to time. . . . By making the foregoing applicable to bargaining unit employees the same as other Honeywell employees, including as they may change from time to time, the parties do not waive any other rights under this Agreement.”

⁷ “The Company agrees that the rates of production will be set on the basis of fairness and equity and they shall be consistent with the quality of workmanship, efficiency of operation and reasonable working capacities of normal operators. Allowance will be made for personal time and other elements such as tool allowances where these are factors. When the Company decides to study a job, it will give advance notice to the

the interest of obtaining an agreement, the Union has tentatively agreed to the Employer's proposals regarding leaves of absence and rates of production. Although it has not agreed to the Employer's proposal on hours of work, the Union has focused its objections on the health and welfare proposal rather than the hours of work proposal.

The parties negotiated almost daily from April 12 until May 3 when the Employer presented the Union with what it described as its last, best, and final offer (LBFO). The LBFO included the same language about health and welfare benefits that the Union had objected to throughout the negotiations. On May 7, the unit members voted overwhelmingly to reject the LBFO. The Employer locked out the employees on May 9, informing the Union and employees that it had made "the difficult decision to not allow members of the bargaining unit to work until an agreement on a new contract is reached." In the letter informing the Union of the lockout, the Employer stated that "[e]mployees will be permitted to return to work upon union ratification of a new collective bargaining agreement."

The parties have held multiple bargaining sessions since the lockout began: on May 18, June 7, June 8, the week of September 12, and November 2. The Employer presented a new proposed agreement at the November negotiation that included modifications to its health and welfare provisions. Most significantly, the new proposal provided that employee contributions to health insurance premiums would increase no more than 15 percent per year. The Union presented the new proposal to its members on November 12, but reports that the members once again rejected the proposed agreement "by a wide margin." Sometime in December, the Employer presented a new proposal that included a ratification bonus.⁸ According to the Employer, the Green Island unit reportedly voted to accept the Employer's proposal, but the South Bend unit rejected it and ratification failed. As of this date, the parties have no additional bargaining dates scheduled. However, the Union reportedly plans to review a collective-bargaining agreement that the Employer recently signed with a different union.

employee who works on the job. The supervisor will instruct in the method of performing the operation. The Company shall then notify both the supervisor and the employee of the standard on the job after the study has been completed. In the event of a dispute over the new standard, the Company will review the study and the new standard with the Union."

⁸ The Region has asked the parties whether the Employer's December proposal included any changes to its health and welfare benefits language but has not yet received a response.

The Region concluded that the Employer engaged in hard bargaining but was not bargaining in bad faith. The Employer's proposed agreement includes wage increases throughout the term of the agreement and incorporates the parties' extant grievance-arbitration procedure and dues check-off. As of this date, neither party has declared impasse and the Employer has expressed its willingness to continue bargaining. The Employer maintains a public website dedicated to the status of negotiations for both the South Bend (<http://southbend.honeywell.com/negotiations>) and Green Island (<http://greenisland.honeywell.com/>) facilities.

ACTION

We conclude that a lockout violates the Act when it is used to force a union to waive its right to bargain over crucial terms and conditions of employment that the Employer could not lawfully implement if the parties went to impasse. The use of an economic weapon such as a lockout to compel a union to yield its statutory role as bargaining representative is so destructive of the collective-bargaining process that its use in this manner constitutes an unfair labor practice. We therefore conclude that the Employer unlawfully locked out its employees in an attempt to force the Union to agree to a contract giving it broad discretion over the parties' health and welfare provisions.

As an initial matter, we note that the Employer did not violate the Act by proposing contract terms under which it retained a good deal of discretion over mandatory subjects of bargaining. It is lawful for an employer to insist to impasse upon contract clauses giving it broad discretion over mandatory subjects, provided it is otherwise bargaining in good faith.⁹ In *NLRB v. American National Insurance Co.*,

⁹ See, e.g., *St. George Warehouse, Inc.*, 341 NLRB 904, 907 (2004) (not unlawful for employer to demand broad management rights clause absent indicia that union was left with fewer rights than it would have had absent a contract (citing *A-1 King Size Sandwiches*, 265 NLRB 850 (1982), enforced 732 F.2d 872 (11th Cir. 1984)), enforced 420 F.3d 294 (3rd Cir. 2005). Compare *Reichhold Chemicals, Inc.*, 288 NLRB 69, 70 (1988) (employer's demand for comprehensive management rights and no-strike clauses was lawful hard bargaining) with *Hydrotherm, Inc.*, 302 NLRB 990, 994 (1991) (employer's insistence on management rights provision giving it unfettered discretion over wages and most terms and conditions amounted to unlawful demand that the union surrender its rights as exclusive representative). See also *Intermountain Power Service Corp.*, Case 27-CA-16791-1, Advice Memorandum (Nov. 15, 2000) (concluding that employer's insistence on provisions requiring the union to waive right to bargain over certain mandatory subjects did not constitute bad-faith bargaining).

the Supreme Court held that an employer's insistence on contract clauses that gave the employer complete discretion on promotions, discipline, and work scheduling was not a per se violation of Section 8(a)(5).¹⁰ The Court noted that such flexible contract clauses were quite common, and that Congress intended that the Board should not disrupt the way collective bargaining had been practiced.

Since the Court's decision in *American National Insurance*, the Board has held that it is "lawful for an employer to insist on the retention of discretion under a management rights clause over certain mandatory subjects of bargaining."¹¹ The Board in *McClatchy Newspapers* specifically noted that an employer may lawfully "attempt[] to negotiate [an] agreement on retaining discretion over wage increases."¹² In *KSM Industries*,¹³ the Board extended the *McClatchy* rationale to a non-wage proposal, holding that the employer lawfully bargained to impasse over a discretionary medical and dental insurance proposal.¹⁴ That proposal, on its face, permitted the employer to unilaterally change virtually every aspect of the health benefit, including the provider, the plan design, the level of benefits, and the administrator; the sole limitations were requirements that changes would be company-wide and that employee premiums would be capped at a specified dollar amount.¹⁵ The Employer's proposed health and welfare terms are nearly identical to

¹⁰ 343 U.S. 395, 397, 409 (1952).

¹¹ *McClatchy Newspapers, Inc.*, 321 NLRB 1386, 1388 (1996), *enforced*, 131 F.3d 1026 (D.C. Cir. 1997). The Board also held that, although the employer's insistence on the merit pay proposal was lawful, its implementation of discretionary pay increases, as permitted by its proposal, was unlawful.

¹² *Id.* at 1391.

¹³ 336 NLRB 133 (2001).

¹⁴ *Id.* at 135. Noting that health insurance, like wages, is a mandatory subject of bargaining and an important term and condition of employment, the Board found KSM's proposal akin to the merit wage proposals in *McClatchy* and stated that there was "no principled reason" to distinguish *McClatchy* on the basis that health insurance rather than wages were involved. *Id.* at n.6.

¹⁵ *Id.* at 135. Although the proposal called for discussions with the union, the employer admitted that it did not intend to negotiate changes in the plan.

those at issue in *KSM Industries* and thus the Employer is entitled to insist upon them to impasse, provided it continues to bargain in good faith.¹⁶

Likewise, the Employer's use of economic pressure to compel the Union to capitulate to its terms is not *per se* unlawful. In *American Ship Building Co. v. NLRB*, the Supreme Court held that an employer does not violate Section 8(a)(1) or (3) when, following a bargaining impasse, it temporarily shuts down the plant and brings economic pressure to bear in support of its legitimate bargaining position.¹⁷ The Board later expanded *American Ship* to hold that, even in the absence of impasse or threat of imminent strike, a lockout for the sole purpose of bringing economic pressure to bear in support of the employer's legitimate bargaining position is lawful and not inherently destructive of employee rights.¹⁸ And an employer's statutory duty to maintain the status quo during post-expiration bargaining is temporarily suspended once the parties reach good-faith impasse, permitting the employer to make unilateral changes "that are reasonably comprehended within [its] preimpasse proposals."¹⁹

But an employer's right to wield its economic weapons is not absolute. The Supreme Court has held that the Board may limit an employer's application of economic pressure, provided it does so in the interest of promoting labor peace and stable collective bargaining rather than based on its assessment of the parties'

¹⁶ The fact that the parties here have not declared impasse appears to be a distinction without a difference. The principles of law cited herein are applicable to the instant case. See, e.g., *Kaiser Aluminum*, Case 32-CA-017041, JD(SF)-021-02 at 48–49, May 10, 2002.

¹⁷ 380 U.S. 300 (1965). In reaching this conclusion, the Court also stated that "[t]his is the only issue before us, and all that we decide," intimating "no view whatever as to the consequences which would follow had the employer replaced his employees with permanent replacements or even temporary help." (380 U.S. at 308, 308 n.8).

¹⁸ See *Darling & Co.*, 171 NLRB 801, 802–803 (1968) (neither absence of impasse or threat of imminent strike precludes finding that lockout in support of legitimate bargaining position is lawful), *enforced sub nom. Lane v. NLRB*, 418 F.2d 1208 (D.C. Cir. 1969); *Harter Equipment (Harter I)*, 280 NLRB 597 (1986) (employer's use of temporary replacements during an offensive lockout had only a "comparatively slight" effect on employee rights and did not violate the Act), *enforced sub nom. Operating Engineers Local 825 v. NLRB*, 829 F.2d 458 (3rd Cir. 1987).

¹⁹ *Am. Fed. of Television & Radio Artists v. NLRB*, 395 F.2d 622, 624 (D.C. Cir. 1968).

respective bargaining strength.²⁰ Indeed, the Board may order a party to cease use of an economic weapon that “directly obstructs or inhibits the actual process of discussion”²¹ It has both the authority and the expertise to “den[y] the employer a particular economic tactic for the sake of preserving the stability of the collective bargaining process.”²²

One way that the Board has limited an employers’ use of economic warfare is found in the *McClatchy*²³ line of cases, where the Board carved out an exception to the implementation after impasse doctrine. Under *McClatchy* and its progeny, an employer may not lawfully implement any discretionary changes to certain key terms and conditions of employment, even after reaching good-faith impasse, because the Board deems the unilateral imposition of discretionary terms “inimical to the postimpasse, ongoing collective-bargaining process.”²⁴ The Board in *McClatchy* held that, once implemented, such discretionary proposals are so inherently destructive of the fundamental principles of collective bargaining that they cannot be sanctioned as part of a doctrine created to break impasse and restore active collective bargaining.²⁵ The Board reasoned that the ongoing exclusion of the union from meaningful bargaining over a significant term such as wages, leaving that key term of employment entirely within the employer’s discretion, would impact all future negotiations on this issue and would disparage the union by demonstrating its

²⁰ See *Charles D. Bonanno Linen Svce. v. NLRB*, 454 U.S. 404, 412, 419 (1982) (upholding Board order barring an employer from withdrawing from multi-employer bargaining after impasse in the interest of maintaining the stability of the multiemployer bargaining unit); *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 230–31, 235–37 (1963) (upholding Board decision prohibiting employer from granting “super-seniority” to strikebreakers but not strikers because of the likely detrimental effect on future collective bargaining). See also *NLRB v. Insurance Agents’ International Union*, 361 U.S. 477, 488 (1960) (noting that the “unique character” of certain economic pressure tactics might be inconsistent with collective bargaining).

²¹ *NLRB v. Katz*, 369 U.S. 736, 747 (1962).

²² *McClatchy Newspapers, Inc. v. NLRB*, 131 F.3d at 1032.

²³ *McClatchy Newspapers, Inc.*, 321 NLRB 1386.

²⁴ *KSM Industries*, 336 NLRB at 135. See also *McClatchy Newspapers, Inc.*, 321 NLRB at 1389–91.

²⁵ 321 NLRB at 1391.

complete inability to act for the employees in this regard.²⁶ The Board subsequently extended the *McClatchy* rationale to a non-wage proposal in *KSM Industries*, holding that an employer violated the Act when, after declaring impasse, it unilaterally implemented a health care proposal and exercised its discretion to unilaterally change the benefits therein without notifying and bargaining with the union.²⁷ Relying on *McClatchy*, the Board held that the employer's post-impasse implementation of changes to the health care plan without bargaining with the union violated Section 8(a)(5) because it nullified the union's authority to bargain over a key term and condition of employment.²⁸

In the instant case, the Employer's conduct threatens and disrupts the collective-bargaining relationship in much the same way as the unilateral implementation of discretionary terms that the Board found unlawful in *McClatchy*. It is using a formidable form of economic pressure to compel the Union to agree to terms that it could not lawfully implement at impasse under the *McClatchy* doctrine. The Employer has made clear that it is unwilling to end the lockout without a signed collective-bargaining agreement and has refused to entertain an agreement that does not contain the discretionary benefit terms. Thus, in order to return the employees to work, the Union must cede a significant aspect of its role as bargaining representative: its right to negotiate over future changes to health and welfare benefits.²⁹ In essence, the Employer is attempting to use the lockout to force the

²⁶ *Id.* (citing *NLRB v. Katz*, 369 U.S. 736, 746–47 (1962)).

²⁷ 336 NLRB at 133.

²⁸ *Id.* at 135. *Cf. E.I. DuPont & Co.*, 346 NLRB 553, 558–60 (2006) (employer's post-impasse implementation of healthcare plan not unlawful because the implemented term was a narrow clause that set limits on the employer's exercise of discretion), *enforced* 489 F.3d 1310 (D.C. Cir. 2007); *Monterey Newspapers*, 334 NLRB 1019, 1021 (1991) (successor's setting "tightly circumscribed" pay band system for new hires distinguishable from Board merit-pay cases involving unfettered employer discretion).

²⁹ Not all mandatory subjects of bargaining are recognized as being as important as wages or health benefits, and therefore would not pose the same threat to the collective bargaining process if unilaterally implemented postimpasse. *See, e.g., McClatchy Newspapers, Inc. v. NLRB*, 131 F.3d at 1035 (recognizing the distinction between wages, which must be set bilaterally through collective bargaining, and "scheduling or a host of other decisions generally thought closely tied to management operations"). *Cf. KSM Industries*, 336 NLRB at 135 n.6 (finding that there is no reason to distinguish health insurance from wages as an "important term and condition of employment" that may not be unilaterally implemented postimpasse).

Union to waive its right to have any input into changes to significant terms and conditions of employment for the duration of the agreement, conduct that is surely as “inimical to the . . . ongoing bargaining process” as post-impasse implementation of these same proposals.³⁰

The likely harm to the collective-bargaining relationship is exacerbated because, were the Union to accede to the Employer’s demands and agree to a collective-bargaining agreement waiving its right to bargain over certain key terms, future negotiations would occur under a “discretionary cloud.”³¹ With no objective criteria to limit the employer’s discretion, there would be no status quo for the union to bargain from, and the union would be unable to bargain knowledgeably.³² Moreover, the Union is unable to bargain effectively now to end the lockout when the Employer is demanding that it accept the proverbial “pig in a poke.” A union’s power to end a lockout rests entirely on its ability to reach an agreement that is acceptable to the employer, and the locked-out employees cannot return to work until such time as the union and a majority of unit employees accede to the employer’s terms. Thus, an employer that has locked out its employees must notify the union of the bargaining demands that precipitated the lockout so that the employees can evaluate whether to accept the terms and return to work.³³ But where one of the terms upon which the Employer insists is the right to redefine *ad nauseum* a crucial term and condition of employment without the Union’s input, it is nearly impossible for the Union and employees to weigh the loss of any input into future changes in essential terms and conditions against any proposed Employer concessions.

We further note the underlying policy considerations that have traditionally informed the Board’s waiver analysis: “[n]ational labor policy disfavors waivers of

³⁰ *KSM Industries*, 336 NLRB at 135.

³¹ *McClatchy Newspapers, Inc. v. NLRB*, 131 F.3d at 1032 (noting that allowing an employer to unilaterally implement discretionary changes after impasse could “irreparably undermine” the union’s ability to bargain).

³² *McClatchy Newspapers*, 321 NLRB at 1391. *See also Royal Motor Sales*, 329 NLRB 760, 778–79 (1999) (employers violated Section 8(a)(5) by unilaterally implementing merit wage proposals with no definable objective criteria or procedures for application), *enforced.*, 2 F. App’x 1 (D.C. Cir. 2001).

³³ *See Dayton Newspapers, Inc.*, 339 NLRB 650, 657–58 (2003), *enforced in relevant part* 402 F.3d 651 (6th Cir. 2005); *Eads Transfer, Inc.*, 304 NLRB 711, 712 (1991) (locked-out employees must be able to knowingly reevaluate their position and decide whether to accept the employer’s terms”), *enforced* 989 F.2d 373 (9th Cir. 1993).

statutory rights by a union . . . ”³⁴ and, as the Supreme Court observed in *NLRB v. C & C Plywood Corp.*, the Act places a “clear emphasis upon the protection of free collective bargaining.”³⁵ If the Union is compelled to agree to the Employer’s proposed terms in order to end the lockout and return the employees to work, it will not have engaged in the sort of conscious voluntary *yielding* contemplated in the Board’s waiver standard.³⁶ Rather than ceding some of its bargaining power in exchange for some other collectively-bargained concession, the Union will be surrendering statutory rights in a bid for survival.³⁷ Although it is true that “the right to bargain collectively does not entail any ‘right’ to insist on one’s position free from economic disadvantage,”³⁸ this is hardly an example of the “free collective bargaining” that the Act intends to secure. In sum, the Employer’s use of the lockout is so “destructive of collective bargaining” that it should be deemed to violate the Act.³⁹

Accordingly, we conclude that the Region should issue complaint alleging that the Employer violated the Act by locking out its employees in support of a bargaining

³⁴ *Suffolk Child Development Center*, 277 NLRB 1345, 1349 (1985) (quoting *C & P Telephone Co. v. NLRB*, 687 F.2d 633, 636 (2d Cir. 1982).

³⁵ 385 U.S. 421, 430 (1967).

³⁶ *See, e.g., Trojan Yacht*, 319 NLRB 741, 742 (1995) (an employer arguing waiver must show “that the matter sought to be waived was fully discussed and consciously explored and that the waiving party thereupon *consciously yielded* its interest in the matter”) (emphasis added).

³⁷ *See Revisiting the Offensive Bargaining Lockout on the Fiftieth Anniversary of American Ship Building Company v. NLRB*, Douglas E. Ray & Christopher David Ruiz Cameron, 31 ABA Journal of Law & Employment Law 325, 329 (2016) (employers, “[e]ncouraged by *American Ship* and its progeny, are increasingly using the lockout weapon to seek takeaways and give-backs at the bargaining table.” The article further notes (at 328) that because of the lockout’s ability to wreak havoc on employees and their communities, “these doctrinal expansions of the offensive lockout have turned this economic weapon into a nuclear option...”).

http://www.americanbar.org/content/dam/aba/publishing/aba_journal_labor_employment_law/v31n2/abajlel31-2_05ray.authcheckdam.pdf.

³⁸ *American Ship Building Co.*, 380 U.S. at 309.

³⁹ *McClatchy*, 321 NLRB at 1392 (quoting *American Ship Building Co. v. NLRB*, 380 U.S. 300, 309 (1965)).

position that allows it to retain broad discretion over crucial terms and condition of employment.

/s/
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