

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 6

Tecnocap LLC,

Respondent  
and

Case 06-CA-216499

United Steel, Paper and Forestry,  
Rubber, Manufacturing, Energy,  
Allied Industrial and Service Workers  
International Union (USW), AFL-CIO, CLC,

Judge Michael A. Rosas

Charging Party.

**POST-HEARING BRIEF OF CHARGING PARTY UNION**

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## I. INTRODUCTION

From March 13, 2018 through March 21, 2018, Tecnocap LLC (“Company”) committed a cardinal sin of economic weaponry – it instituted a partial lockout directed at only those bargaining unit members who maintained their membership in the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union and its Local 152M (“Union” or “USW” or “GMP”<sup>1</sup>), while allowing those who resigned their membership in the Union to continue to work. But the Company managed to further misfire its weaponry when it 1) locked out the Union members in support of a proposal that unlawfully insisted on a permissive subject of bargaining, and which the Company unlawfully implemented prior to a valid, good-faith impasse, and then 2) withdrew that proposal after initiating the lockout, leaving the Union with no notice of what terms it needed to accept to end the lockout.

As the Union explains *infra*, the Company’s conduct clearly violated the Act. At the February 12, 2019 hearing on the General Counsel’s Complaint, the Company offered no cognizable defense to a ULP finding, and, in fact, there is none to offer. As such, the ALJ must find that the Company violated the Act due to its unlawful partial lockout, and issue an appropriate make-whole remedy.

This Brief will discuss each of the three bases for finding the Company’s partial lockout unlawful in turn.<sup>2</sup>

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<sup>1</sup> The bargaining unit at Tecnocap was represented by the Glass, Molders, Pottery, Plastics & Allied Workers International Union (“GMP”) and its Local 152 until the GMP merged with the USW on January 1, 2018.

<sup>2</sup> The Union submits this Post-Hearing Brief in support of the General Counsel. Accordingly, the Union concurs and endorses all arguments made by Counsel for General Counsel on brief, including those that the Union does not present in its Brief.

II. THE COMPANY UNLAWFULLY DISCRIMINATED AGAINST UNION AFFILIATION AND ACTIVITY IN VIOLATION OF SECTION 8(A)(3) BY INSTITUTING A PARTIAL LOCKOUT OF ONLY THE UNION MEMBERS WITHIN THE BARGAINING UNIT

A. **Relevant Facts**<sup>3</sup>

The Company and Union began bargaining for a successor agreement on October 30, 2017. (Jt. Stip. 13). An extension for the then-current agreement ended on February 28, 2018<sup>4</sup>. (Jt. Stip. 6; JX 2). As the parties did not reach a successor agreement by that date, the agreement expired on said date. (See Jt. Stip. 13).

On March 5, 2018 the Company posted a “Lock-Out Notice GMP Bargaining Unit” in the facilities. (JX 15). This Notice was directed to “GMP Union Members” and was carbon copied to “Pete Jacks – Executive Officer GMP Council of the USW”, “IAM Members”, and “Non-Union Member”. The Notice, among other statements, read, “We regret to inform that decision is made to exercise the employer lock-out right effective next Tuesday March 13<sup>th</sup>. Unless notified otherwise, GMP Union members won’t be allowed to enter into the property from that date on and until an agreement between the parties is reached.” (Ibid, emphasis in original). That same date, Jacks sent a letter to Darrick Doty, the Company’s director of human resources, that, in part, warned the Company that it was about to undertake an unlawful lockout. (CPX 2; Tr. 20). Doty never responded to the Union’s assertion regarding the legality of the Company’s proposed lockout. (Tr. 64).

On March 6, Lisa Wilds, president of USW Local 152M, posted an article on the Union bulletin board in the facility regarding lockouts. (CPX 1; Tr. 66, 90). The Union bulletin board

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<sup>3</sup> “JX” refers to a Joint Exhibit. “Jt. Stip.” refers to a numbered Joint Stipulation contained in JX 34. “GCX” refers to a General Counsel Exhibit, and “CPX” refers to a Union Exhibit. “Tr.” refers to hearing transcript.

<sup>4</sup> Further dates will be 2018 unless otherwise stated.

is easily visible to management. (Tr. 93). The article included several highlighted parts, the most important of which stated that a “lockout must include all employees in the bargaining unit as well as any permanent striker replacements.” (CPX 1, p. 2; Tr. 92-93). Wilds posted the article because there were rumors in the plant that those who resigned from the Union would be allowed to work during the lockout. (*See* Tr. 80, 90-91).

The following day, the Company posted another notice that stated, among other things, that the “Lockout applies only to GMP union members. Members of the IAM, salaried personnel, and others are expected to continue to work.” (JX 16; Jt. Stip. 31).

On March 12, the Company posted another “Lockout Notice.” (JX 18; Jt. Stip. 34). In relevant part, this Notice read

[A] lockout of the GMP will begin tonight, March 12, 2018, at 11PM. As stated in the Company’s earlier posting about Lockouts, The (sic) Lockout applies only to GMP union members. Members of the IAM, salaried personnel, and others are expected to continue to work.

The Company will be hiring temporary employees during the lockout. If you wish to apply for a position, please see Darrick Doty.

(JX 18). Doty posted this notice after USW-represented employees asked him whether they could work during the lockout if they resigned from the Union. (Tr. 26-27). Three bargaining unit members resigned from the Union on March 12. (JX 32, p. 260-62).

That same day, the Union sent the Company another letter warning it that its proposed lockout would be unlawful. (JX 21). Again, the Company never directly responded to this assertion. (*See* JX 22).

On the night of March 12, the Company began its lockout. (Tr. 81). Six bargaining unit members had resigned from the Union at this point. (JX 32). The Company permitted those employees to work throughout the lockout. (Jt. Stip. 45-47; Tr. 82-83; JX 25, 29). During the

lockout, each of these employees worked in the positions they held before the lockout; and each continued performing that same work after the lockout ended. (Tr. 35).

On March 13, Union's counsel sent the Company a letter that stated that the Company's lockout was unlawful because it was allowing bargaining unit members who had resigned their USW membership to work, and that demanded that the Company either lock out the entire USW bargaining unit or end its unlawful lockout. (JX 24). The letter also requested information related to those bargaining unit members who were allowed to work. (Ibid). In a letter dated March 16, the Company's attorney, Brad Schafer, responded to Union counsel, and confirmed that "individuals that ended their affiliation with the Union... are currently working." (JX 25, p. 1). These individuals were identified as Chris Williams, Jr., Peggy Stachura, Danny Robertson, Jeff Mealy, Joseph Birkheimer, and Chris Williams, Sr. (Ibid). Attached to Shafer's letter were forms signed by the six bargaining unit members indicating that the Company was offering them an "at-will" position for the duration of the lockout. (Id. at 2-7). Shafer's letter in no way addresses the Union's assertions regarding the legality of the lockout.

Once the lockout commenced, Union members attempted to report to work. (Tr. 82). Security guards only allowed access to employees listed on a form. (Tr. 34, 82). Union members were not permitted to enter the plant during the lockout. (Tr. 33). The six bargaining unit members who had resigned their membership were allowed access to the plant throughout the lockout, including to sign their at-will position forms. (Tr. 33-34, 82-83).

**B. The Company's Discriminatory Partial Lockout of Only Union Members Violates 8(a)(3)**

Section 8(a)(3) of the Act makes it an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." 29 U.S.C. § 158(a)(3). "The

statutory language ‘discrimination... to... discourage’ means that the finding of a violation normally turns on whether the discriminatory conduct was motivated by an antiunion purpose.” *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 33 (1967). Therefore, “for a lockout to be permissible..., it must be for the sole purpose of bringing economic pressure to bear in support of [the employer’s] legitimate bargaining position,” *Allen Storage and Moving Co., Inc.*, 342 NLRB 501, 501 (2004) (quoting *American Ship Building Co. v. NLRB*, 380 U.S. 300, 318 (1965)), and “is unlawful under the Labor Act... if [it is] motivate[d] by antiunion animus,” *Operating Engineers Local 147 v. NLRB*, 294 F.3d 186, 189 (D.C. Cir. 2002). Where locked out employees in a partial lockout “were chosen on the basis of their Union activities[,]” “the action [is] based upon invalid anti-union motivations.” *Local 15, Int’l Broth. of Electrical Workers, AFL-CIO v. NLRB*, 429 F.3d 651, 660 (D.C. Cir. 2005); see also *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 701 (1983) (“discriminat[ion] solely on the basis of union status” is “inherently destructive” of Section 7 rights under *Great Dane Trailers*). “An employer’s discriminatory lockout on the basis of protected activity is unlawful even when it is [also] supportive of an employer’s bargaining position.” *Id.* at 661.

These principles explain why the Supreme Court in *American Ship Building Co.* took care to state that, while as a general matter “use of the lockout does not carry with it any necessary implication the employer acted to discourage union membership or otherwise discriminate against union members as such,” that was *not* the case where there is a credible “claim that the employer locked out only union members, or locked out any employee simply because he was a union member.” 380 U.S. at 312. The Board has repeatedly pointed to this language in *American Ship Building Co.* to identify what would render a lockout unlawful. See, e.g., *Harter Equipment, Inc.*, 280 NLRB 597, 598, 600 (1986) (the Board explained the

*American Ship Building Co.* Court “rejected the notion that the lockout [in that case] had any natural tendency severely to discourage union membership” as “[t]he lockout did not target only union members[,]” which informs its later statement that a lawful lockout, including the use of temporary employees, does not violate 8(a)(3) “absent specific proof of antiunion motivation”), *Sargent-Welch Scientific Co.*, 208 NLRB 811, 817 (1974) (discussing *American Ship Building Co.*’s 8(a)(3) analysis, and finding the lockout to be lawful because “the record shows that Respondent was careful to include in the lockout 20 seasonal employees, hired shortly before July 3, who were exempt from the application of the union-security clause, thereby avoiding the appearance of discrimination on account of union membership.”). Therefore, where “[t]he *only* distinction between [ ] two groups of employees[, i.e., those locked out and those not,] at the time of the lockout was their participation in Union activities[,]” an employer has “[d]iscriminat[ed] in a way that has a natural tendency to discourage participation in concerted union activities” and has “violat[ed] section 8(a)(3).” *Local 15, Int’l Broth. of Electrical Workers, AFL-CIO*, 429 F.3d at 661. Specific to the instant case, an employer’s “lockout... on the basis of [ ] union membership... [is] motivated by animus toward union members.” *Tidewater Construction Corp.*, 341 NLRB 456, 458 (2004).

The Board’s decision in *Schenk Packing Co.*, a case that closely mirrors the instant one, offers significant guidance on these points. 301 NLRB 487 (1991). There, an employer issued a memorandum that announced the employer would be locking out “all Union employees”; that “no Union members will be employed as replacement”; that the employer would only “use temporary non-union employees as replacement during the lockout”; and “if locked out Union employees become non-union members of the labor market, it is possible for them to be hired

temporarily for the duration of the lockout.” 301 NLRB at 488. Ten unit members resigned their union membership and were permitted to work during the employer’s partial lockout. *Ibid.*

The Board first determined that the employer’s memorandum was an unlawful solicitation to give up union membership. *Id.* at 489. It then turned to the legality of the lockout. Citing the *American Ship Building Co.* language quoted above, the Board noted that “[t]he situation the Supreme Court distinguished in *American Ship Building* is before us in the present case.” *Id.* at 490. The Board determined that the facts of the case “clearly establish a clear basis for finding that discouragement of the unit employees’ union membership was a fundamental objective in the [employer’s] decision to conduct the... lockout.” *Ibid.* The Board rejected the employer’s justification for its partial lockout (“to avoid the spoilage of meat”) as that reason did not “provide[ ] even a remote justification for a lockout which, in its initial announcement to unit employees, expressly conditioned reinstatement on resignation from union membership.” *Ibid.* Ultimately, the Board “concluded... that an unavoidable effect and, hence, unstated purpose of the lockout was to discourage unit employees’ membership in the Union by denying employment to those who maintained that status[,]” which “violated 8(a)(3) and (1).” *Ibid.* The Board further indicated a rejection of the employer’s scheme of referring to the unit members who resigned their membership in the union and were allowed to work as “temporary replacements,” comparing it to *United Chrome Products*, 288 NLRB 1176, 1176 fn. 2 (1988), where the Board concluded “that the employer’s lockout of unit employees followed by their rehire as new, probationary employees was a device to implement unlawfully a unilateral change in seniority rights.” *Ibid.*

*Schenk Packing* is directly on point with the instant case. Just as the employer in *Schenk Packing* did through its memorandum, the Company here solicited resignation of union

membership to continue working during the lockout through its lockout notices. The March 5 notice is entitled “Lock-Out Notice GMP *Bargaining Unit*” but is addressed directly to “GMP *Union Members*,” and copied to, among others, “Non-Union *Member*.” (emphases added). The reference to “Non-Union Member” must be to non-Union members of the “GMP Bargaining Unit,” in contrast to “GMP Union Members.” Otherwise, the use of the word “member” would make no sense; the only membership the use of the word could be referencing is the bargaining unit. Employees outside of a bargaining unit would not be referred to as “member.” Therefore, when the notice says “GMP Union members won’t be allowed to enter into the property from th[e] date [of the lockout] on,” the bargaining unit employees understood that to mean only the “GMP Union members” of the “GMP Bargaining Unit” would be locked out, but not the “Non-Union Member[s]” of the “GMP Bargaining Unit.”

Similarly, the Company’s clarifying notice of March 7 stated that the “Lockout applies only to GMP union members.” This notice was posted a day after Wilds posted and highlighted an article that specifically indicated that, for a lockout to be lawful, the Company would have to lockout the entire bargaining unit. Nowhere in the Company’s March 7 notice does it state that anyone other than GMP union members would be locked out.

This reading of the notices is confirmed by the Company’s March 12 notice. Leading up to the lockout, Doty testified that he was receiving questions from bargaining unit members about whether they could continue to work if they resigned their memberships in the Union. (Tr. 26). He ultimately posted the March 12 notice, which states, “The Lockout applies only to GMP union members. Members of the IAM, salaried personnel, and others are expected to continue to work. The Company will be hiring temporary employees during the lockout. If you wish to apply for a position, please see Darrick Doty.” This notice explicitly invites unit members to

apply for temporary replacement positions, but since “GMP union members” were to be locked out, these temporary replacement positions were conditioned on not being a “GMP union member.” This solicitation is almost exactly the same as that made in *Schenk Packing*. And just like in that case, it resulted in several unit members resigning their membership and then being allowed to work during the lockout.

Under *Schenk Packing*, these facts are sufficient to establish a violation of 8(a)(3), unless the Company can offer sufficient justification for its discriminatory partial lockout. It cannot. It is difficult to imagine what justification the Company can offer “for a lockout which, in its initial announcement to unit employees, expressly conditioned reinstatement on resignation from union membership.” *Schenk Packing, supra*. As discussed earlier, in a partial strike where “[t]he only distinction between [ ] two groups of employees at the time of the lockout was their participation in Union activities[,]” an employer “violat[es] section 8(a)(3).” *Local 15, Int’l Broth. of Electrical Workers, AFL-CIO, supra*. There is simply no justification that would allow the Company to draw the dividing line between those locked out and those not at whether or not they are Union members, and the Company can show no other defining characteristic of these six unit members that would justify their selection for work during the lockout. *See Hercules Drawn Steel Corp.*, 352 NLRB 53, 53, fn. 1 (2008), *abrogated by New Process Steel, L.P. v. NLRB*, 560 U.S. 674 (2010) (selective recall of employees from lockout was not unlawful as employer demonstrated that it could not maintain production during lockout without specific “skilled” employees and “[t]here was also no showing that the Respondent based its selection of employees for recall on their union affiliation or activity.”); *Quickway Transportation, Inc.*, 355 NLRB 678 (2010), *affirming and adopting*, 354 NLRB 560, 624 (2009), *originally abrogated by New Process Steel, L.P. v. NLRB*, 560 U.S. 674 (2010) (lockout of only bargaining unit members

who participated in strike unlawful where employer could offer no legitimate justification for discriminatory partial lockout, as two non-striking bargaining unit employees who were allowed to work had “no special skills” “that separated them from the rest of the drivers justifying their recall.”).<sup>5</sup> Therefore, there is no Company justification that would preclude *Schenk Packing* from controlling the determination of this matter.<sup>6</sup>

In addition to cases where a partial lockout was found unlawfully based on union membership (*see, e.g., Schenk Packing, supra; Tidewater Construction Corp., supra; Bunting Bearing Corp.*, 349 NLRB 1070 (2007)), partial lockouts of only those employees who engage in other protected activity have consistently been held to be unlawful. *See, e.g., Allen Storage and Moving Co.*, 342 NLRB at 501 (Board held unlawful lockout where employer allowed the only bargaining unit member who did not participate in a strike to work during a lockout of the former strikers, finding “[s]uch disparate treatment of former strikers is... evidence of discriminatory motive.”); *McGwier Co., Inc.*, 204 NLRB 492, 496 (1973) (unlawful partial lockout where “there is an obvious disparate treatment of employees in that the Company locked out only those employees who, by striking, had identified themselves as union adherents, while continue to operate with those employees who had not joined the strike”); *Thrift Drug Co.*, 204 NLRB 41, 43 (1973) (unlawful partial lockout of one employee who picketed trucks entering plant, stating

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<sup>5</sup> Tellingly, the Company offered no justification at the hearing for allowing these six bargaining unit members to work other than, possibly, that they “could not afford not to work[.]” (Tr. 27). This is not a cognizable business justification that would justify a partial lockout of only Union members. Additionally, Union members also attempted to work during the lockout, presumably because they also could not afford not to work. (Tr. 82-83).

<sup>6</sup> In fact, the instant case is likely more violative of the Act because, as will be discussed *infra*, the Company withdrew its bargaining proposal on the second day of the lockout, meaning, for the majority of the lockout, the *only* possible way to gain reinstatement was to resign one’s membership in the Union and accept a temporary replacement position. *See McGwier Co., Inc.*, 204 NLRB 492, 496 (1973) (lockout of only former strikers, and not nonstrikers, while employer had no bargaining proposal on the table violated 8(a)(3)).

the “*American Ship Building* rule does not give the employer license to pick and choose among its employees and suspend those whose protected... activities are most damaging to it. The mere selection of such an employee from among all those in the unit for [lockout] is *per se* discriminatory.”); *Quickway Transportation, Inc.*, 354 NLRB at 624 (“Another indicia that... lockout was discriminatorily motivated was [employer’s] allowing prestrike bargaining unit employees... who had worked throughout the strike to continue to work after the lockout.”); *Local 15, Int’l Broth. of Electrical Workers*, 429 F.3d at 661-2 (finding partial lockout of only former strikers unlawfully discriminatory).

Supreme Court, federal appellate court, and Board precedent are all consistent that a discriminatory partial lockout based solely on union membership, affiliation, or activities violates 8(a)(3) and (1) of the Act.<sup>7</sup> In the face of this precedent, the only discernible defense the Company offered at the hearing was that it “did not believe that [it] engaged in conduct that solicited or encouraged people to resign from the [U]nion, [as] th[ose employees who resigned] made that decision of their own free will[.]” (Tr. 17 [Co. counsel opening statement]; *see also* Tr. 49, testimony of Doty that he did not approach and encourage any of the six bargaining unit members to resign). As described above, *Schenk Packing* and similar cases do show that the Company’s conduct solicited and encouraged people to resign from the Union; nothing about

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<sup>7</sup> During the Region’s investigation of the Union’s charge in this matter, the Company cited *NLRB v. Martin A. Gleason, Inc.*, 534 F.2d 466 (2d Cir. 1976) to support its position that it may lawfully discriminate between union members and nonmembers when instituting a partial lockout. Presuming that the Company will cite this case in its post-hearing brief, *Schenk Packing* again offers guidance. The Board explicitly distinguishes the situation at issue in *Schenk Packing* – and therefore in the instant case due to its similarities – from that in *Gleason*, as *Gleason* involved a lockout called by members of a multiemployer bargaining association in response to a whipsaw strike and the inducement to resign from the union occurred subsequent to the initiation of the lockout. 301 NLRB at 490 fn. 5. The Board added that it “has never endorsed the Second Circuit’s views expressed in that opinion concerning what an employer lawfully may say or do in the context of a lockout.” *Ibid.*

these cases requires the Company's conduct to be coercive nor do they require management representatives to approach union members and explicitly encourage them to resign for the conduct to run afoul of Section 8(a)(3).

But more importantly, the Company's implied claims of innocence and naiveté are undermined by the fact that, despite numerous assertions by the Union, it never indicated that it would do anything but lock out the Union members but allow those that resigned their membership to work. The Union repeatedly informed the Company in letters and through Wilds' article posting that the Company could not institute a partial lockout of only dues-paying Union members. The Company never acknowledged these assertions, never responded to them, and continued posting notices that stated that the lockout would only affect Union members. The Company acted deliberately and intentionally to send a constant message to the bargaining unit and Union that it intended to reward bargaining unit members who resigned their membership in the Union by allowing them to work during the lockout, regardless of the legality of that conduct.<sup>8</sup> Therefore, the Company assertion that it "did not believe" its conduct amounted to unlawful solicitation or encouragement to resign Union membership is simply not credible.

Accordingly, the ALJ must find that the Company's partial lockout of all USW members, but not of members of the bargaining unit who resigned their membership in the USW, violates Section 8(a)(3) and (1), and solicited bargaining unit members to resign their membership in violation of Section 8(a)(1).

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<sup>8</sup> This reward for resignation of membership was reinforced by the fact that the Company paid a "performance bonus" to these employees. (JX 30).

III. THE COMPANY'S PARTIAL LOCKOUT VIOLATED SECTIONS 8(A)(3) AND (5) OF THE ACT BECAUSE IT WAS IN SUPPORT OF AN UNLAWFUL BARGAINING POSITION

**A. Relevant Facts**

Since at least 2006, the USW has represented a bargaining unit of “all hourly related production and maintenance employees, including warehousemen,” and excepting, among other classifications, “employees on jobs covered by contracts with other unions.” (JX 1, p. 3; Jt. Stip. 3). At the time bargaining began in October 2017, the USW bargaining unit was subject to the terms of a collective bargaining agreement (“GMP CBA”) between the Company and Union, effective by its terms from November 29, 2015 through and including November 18, 2017, and voluntarily extended through and including February 28, 2018. (Jt. Stip. 6; JX 1, p. 1; JX 2).

Also since at least 2006, the International Association of Machinists and Aerospace Workers Local 818 of District 51 (“IAM”) has represented a separate bargaining unit of employees within the Company’s facility. (JX 3, p. 3; Jt. Stip. 7). The IAM bargaining unit included the job of die setter. (Ibid). At all relevant times, the IAM bargaining unit was subject to the terms of a collective bargaining agreement (“IAM CBA”) between the Company and IAM, effective by its terms from April 6, 2015 through and including April 8, 2018. (JX 3, p. 1; Jt. Stip. 8).

During the negotiations for the IAM CBA, the IAM and Company agreed that, for the sake of production continuity, die setters could provide lunch and break coverage for GMP-represented production employees, but only in the event that the GMP agreed to such coverage. (JX 3, p. 75; Jt. Stip. 9). On March 28, 2016, the Company met with the IAM and GMP to discuss the issue of continuous production, but were not able to reach agreement. (Jt. Stip. 9). Regardless, between March 31, 2016 and May 11, 2016, the Company assigned die setters to

provide lunch and break coverage for GMP-represented production employees. (Id. at 10). Both unions filed grievances in response, and on December 10, 2016, an arbitrator agreed with the IAM that the Company's actions violated the IAM CBA. (Jt. Stip. 12; JX 5).

Having failed to secure agreement from both unions to utilize die setters to maintain continuous production through the course of the unions' previous agreements, the Company took the position that no successor contract would be acceptable to it that did not address continuous production through GMP-employee break times. (*See* JX 22 [“the current contract language is unacceptable to the Company as it prevents the operation of lines and continuation of production during break time” and so “simply continu[ing to] work under the old, expired contract is not a feasible solution”]). This was clearly a significant issue for the Company, as it cost the Company an estimated \$50,000 per shift to not run production continuously through production-employee breaks. (Tr. 37). The Company sought to address the issue by moving the die setter job from the IAM bargaining unit to the USW bargaining unit during the latest round of contract negotiations. Because the USW contract was set to expire first, the Company began the process in its negotiations with the USW. (JX 1; Jt. Stip. 13; JX 22, p. 259 [March 13 letter from Doty stating that “[n]egotiations with the IAM have no yet commenced”]).

At some point in the negotiations with the USW, the Company provided the USW with descriptions for jobs titled Operator I, Operator II, and Operator III, which are dated October 25, 2017. (JX 4; Jt. Stip. 16). The Operator III job description included many duties performed at the time by IAM-represented die setters. (JX 4, p. 5; Tr. 71-72). On November 9, 2017, the Company proposed to reduce the number of job classifications in the unit to the three Operator I, II, and III job classifications. (Jt. Stip. 17). The Company proposed placing all USW-represented employees into either Operator I or II, and placing some employees currently in the IAM-

presented die setter job as well as the Die Setter duties into the Operator III position. (Jt. Stip. 17; Tr. 21-22, 59, 71-72, 75, 78, 101-02). “[I]t [was] the Company’s intention to move the die setters to Class III Operator” throughout the bargaining. (JX 22, p. 259; Jt. Stip. 18). The Union responded to this proposal by explaining that the die setters and their work were under the jurisdiction of the IAM, and the Union could not discuss the Company’s proposal to place them into the USW unit. (Tr. 72).

On November 15, 2017, the parties entered into an agreement to extend the GMP CBA through February 28, 2018. (JX 2). This agreement states that the “Union accepts the three job classes of Operator I, Operator II, and Operator III.” (Ibid). However, the agreement continues, “Negotiations will continue as to red-circling, grandfathering, and who falls in what class.” (Ibid). Thus, the Union agreed to the concept of three job classifications, but did not agree as to what jobs would go into each classification, and did not agree to accept the die setter work into Operator III. (Tr. 78, 98).<sup>9</sup>

Throughout the bargaining, the Company maintained its proposal that Operator III was reserved for the die setters and their work. The Company’s proposals on February 15, February

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<sup>9</sup> At the hearing, the Company suggested that the Union moved away from its agreement to the concept of three classifications, which led it to have to lockout the USW members. (Tr. 17 [Co. counsel opening statement], 55-56). According to Doty, the evidence that the USW backtracked on its agreement to the concept of the three classifications was that its proposal in JX 13 did not include classification 3. (Tr. 55-56). This testimony is not credible. As Doty later testified, the Union did previously propose both a wage rate for and certain jobs to fall within the classification 3. (Tr. 58; *see* GCX 3). After the Union proposed placing unit jobs that it had jurisdiction over into the classification 3, the Company rejected the proposal and stated that the classification 3 was solely reserved for the die setters and their work. (Tr. 74-75). It is clear from this evidence that the Union’s subsequent proposals did not include a classification 3 because the Union was making proposals to place those jobs it had jurisdiction over into the classification 1 or 2, and to bargain those classifications’ wage rates. This was because those were the classifications that affected its bargaining unit members. The Union’s proposals were responsive to the Company’s position, and sought to reach a mutually acceptable agreement. That the Company would paint these proposals as somehow an effort to escape agreement, and consequently a motivation for the lockout, is baseless.

26, and March 9 all maintained its proposal that the Operator III classification would only include jobs that fit the previously-provided job description. (JX 7, 13, 17). As noted, that job description mostly included duties die setters performed. Additionally, when the Company provided the Union proposed wages for bargaining unit member under its proposed job classifications, it awarded Scott Shimp Operator III wages. (JX 7; Jt. Stip. 21). Shimp had been a die setter in the IAM unit who was moved back into the USW bargaining unit in lieu of layoff, and performed USW-unit work while in that unit. (Tr. 24-25, 73-74). The Company proposed that Shimp would be an Operator III because of his die setter training. (Tr. 74).

Also throughout the bargaining, the Union pushed back on the Company's attempts to bargain over the Union's acceptance of the IAM-represented employees and work. When the Company proposed its job descriptions, Pete Jacks told Doty that the Union did not have jurisdiction over the die setter work, that the IAM did, and the Union could not discuss the matter. (Tr. 72). On February 28, Jacks handed Doty a written statement of the Union's position on the Operator III classification. In it, the Union states that it

has repeatedly advised the Company that there is no basis for the parties to bargain over this third job classification which does not belong to the [Union]. This is an improper subject of bargaining. To the extent that the Company considers this a permissive subject of bargaining you are advised that the [Union] does not wish to bargain on this issue. You appear to believe that the Company can bargain to impasse over this issue. You are incorrect.

(GC 2). Jacks provided this statement because, after repeatedly verbalizing its position through bargaining, the Company continued to propose the shift of the IAM-represented employees and their work into the USW bargaining unit. (Tr. 101).

On March 14, Jacks sent Doty a letter that read, in part,

As you know, since the IAM members are not members of our bargaining unit, th[e Company's proposal to move Die Setters to Operator III in the USW unit] is clearly a permissive subject of bargaining and one which we have advised you in the past we are

unwilling – and unable – to bargain over in connection with the successor agreement. However, I have also made clear that the [Union] would be willing to negotiate with the Company on all issues relevant to the die setters *if* the following occurs in a lawful manner: (1) the Company is able to get the IAM to agree to relinquish jurisdiction over the die setters, (2) the die setters join the [Union] so that we represent their interests; and (3) the Company recognizes the [Union] as the authorized bargaining representative of the die setters.

JX 23 (emphasis in original).

On February 27, Doty sent Jacks an email in which the Company claimed to “register impasse” on three bargaining items, including the Operator I, II, and III job classifications. (JX 11). The Company’s proposal included placing the die setters and their work into the Operator III classification. (JX 13). On March 1, the Company declared impasse and implemented certain proposals, including its Operator I, II, and III proposal, which included the die setters and their work in the Operator III classification. (JX 14). On March 13, the Company locked out the bargaining unit in support of its March 9 bargaining proposal, which included its proposal to place the die setters and their work in the Operator III classification. (JX 17).

**B. The Company’s Partial Lockout in Support of its Permissive Proposal to Change the Scope of the Bargaining Unit Violated Sections 8(a)(3) and (5)**

1. *The Company Unlawfully Insisted to Impasse on and Implemented its Proposal to Move the IAM-represented Die Setters and Their Work to the USW Bargaining Unit, which was a Permissive Subject of Bargaining*

“[U]nit scope is not a mandatory subject of bargaining, [and] a change in unit scope [is] not a matter on which [an employer] c[an] insist to impasse or implement.” *United Technologies Corp.*, 292 NLRB 248, 249 fn. 8 (1989), *see also Boston Edison Co.*, 290 NLRB 549, 553 (1988) (“The scope of an established bargaining unit is a nonmandatory subject of bargaining that either party may propose changing so long as it does not insist on its proposal to impasse.”), John E. Higgins, Jr., et al, *THE DEVELOPING LABOR LAW* 16-124 (7th Ed. 2017) (“As a general rule, it is an unfair labor practice for either party to insist that employees be added to or excluded from a

certified unit.”). “[N]either party may attempt to force on the other an enlargement, alteration, or merger of an established unit or units. Thus, an employer (or a union) may lawfully insist on confining bargaining within established unit borders.” *Boston Edison Co.* at 553 fn. 4.

Additionally, “when a party unilaterally changes the scope of the unit, it is irrelevant whether impasse has been reached. Then only question is whether the other party consented to the change.” *Howard Elec. & Mechanical, Inc.*, 293 NLRB 472, 475 (1989).

There is no dispute that the Company sought to enlarge the size of the Union’s bargaining unit. The parties stipulated that “Respondent [ ] proposed placing some Die Setter employees represented by the IAM and their duties into the Operator III classification” and that from the beginning of successor bargaining, “Respondent informed the Union it intended to move into the unit represented by the Union some of the duties performed by IAM-represented employees in the Die Setter classification.” (Jt. Stip. 17-18; *see also* Tr. 44 [Shafer: “We wanted to move some of the assignments from one union to another.”]). On March 13, Doty wrote that the Union is “fully aware that it is the Company’s intention to move the die setters to Class III Operator, something that has been discussed at length in negotiations.” (JX 22, p. 259). Furthermore, the GMP contract specifically excludes any “employees on jobs covered by contracts with other unions[.]” (JX 1, p. 3). Throughout the course of the parties’ successor bargaining, the IAM contract remained in effect, and contained a “Union Recognition” provision that included “Die Setters” in the IAM bargaining unit. (JX 3, p. 3). During the course of negotiations between the Company and the USW, the Company had not even begun bargaining with the IAM. (*see* JX 22, p. 259 [“Negotiations with the IAM have not yet commenced as the IAM is presently unavailable”]).

There is also no doubt that the Company insisted to impasse on its proposal to move the die setters and their work to the USW bargaining unit. On February 27, Doty wrote in an email that one of the three “main points” on which it “register[ed] impasse” was its “[t]hree job classification” proposal. (JX 11). On March 1, the Company posted a notice entitled “GMP Contract – Impasse”, in which it announced the implementation of its three job classification proposal. (GC 2, JX 14).

There is also no doubt that the Company implemented its proposal related to the three job classifications and the movement of the die setters without the consent of the Union. On February 28, the Union put in writing what had been expressed a number of times, that it “d[id] not wish to bargain on the” Company’s Operator III proposal. (GC 2). As mentioned above, on March 1, the Company implemented its three job classification proposal.

Accordingly, it is clear that the Company’s proposal to create an Operator III classification and to move IAM-represented die setters and their work into that classification was a permissive subject of bargaining over which the Company unlawfully bargained to impasse and implemented without consent of the Union. This conduct violated Section 8(a)(5) and (1) of the Act.

2. *The Company Unlawfully Locked Out the Union Members in Support of its Illegitimate Bargaining Position*

“[F]or a lockout to be permissible..., it must be for the sole purpose of bringing economic pressure to bear in support of [the employer’s] *legitimate bargaining position*.” *Allen Storage and Moving Co., Inc.*, 342 NLRB 501, 501 (2004) (quoting *American Ship Building Co. v. NLRB*, 380 U.S. 300, 318 (1965)) (emphasis added). Axiomatically, a lockout is unlawful if the bargaining position it is in support of is not legitimate. See *Eddy Potash, Inc.*, 331 NLRB 552, 552 (2000) (violation of 8(a)(5) to lock out employees “in support of [] unlawful bargaining

demands”). Accordingly, the Board has held that a lockout in support of an insistence to impasse on a proposal to change the scope of the bargaining unit is unlawful. *Greensburg Coca-Cola Bottling Co. Inc.*, 311 NLRB 1022, 1023-4 (1993), *enf. denied*, *NLRB v. Greensburg Coca-Cola Bottling Co., Inc.*, 40 F.3d 669, 674 (3d Cir. 1994) (denied on basis of finding that the record showed the Company was not insisting on a proposal to impasse and through the lockout, but that the issue was a disagreement over the interpretation of current language). Therefore, the Company’s lockout in support of its March 9 proposal (at least initially), which included the unlawfully insisted on permissive subject of bargaining, violated Sections 8(a)(3), (5) and (1). *Id.* at 1022, 1028.

3. *The Company Unlawfully Locked Out Union Members in an Attempt to Force the Union to Accept the Company’s Unfair Labor Practices*

“The Board has held... that an employer violates 8(a)(5) and (1) of the Act when it locks out employees for the purpose of... compelling acceptance of its unfair labor practices.” *Royal Motor Sales*, 329 NLRB 760, 765 (1999), citing, *Teamsters Local 639 v. NLRB*, 924 F.2d 1078, 1085 (D.C. Cir. 1991) (employers violated 8(a)(3) by locking out employees in an attempt to coerce the union to accept the unlawfully implemented final offer). Accordingly, the Board has determined that a lockout in support of a bargaining position that includes provisions that it has already unilaterally changed prior to a valid impasse is unlawful. *E.g.*, *Royal Motor Sales*, 329 NLRB at 765, 777 (“We further find that [Respondent] locked out its employees with the intent of coercing the Teamsters to accept its unilaterally implemented final offer. Because, [Respondent’s] unilateral, pre-impasse implementation of its final offer constituted an unfair labor practice, the final offer does not constitute a ‘legitimate bargaining proposal’ that [Respondent] was free to pursue through the use of a lockout.”), *Allen Storage and Moving Company, Inc.*, 342 NLRB at 501 (lockout unlawful, in part, because employer’s bargaining

position was related to an unlawful unilateral change, which meant its proposal would have “required the employees to accept the Respondent’s unlawful conduct in order to end the lockouts.”).

As discussed above, the Company unlawfully implemented its expansion of the USW bargaining unit proposal on March 1. The Company’s March 9 proposal, which it locked out the bargaining unit in support of (at least initially), continued to include this proposal. Therefore, the Company violated 8(a)(3), (5), and (1) of the Act by locking out the Union members in an effort to force the Union to accept the unfair labor practice of implementation of its job classification proposal.

IV. WITHDRAWAL OF THE COMPANY’S BARGAINING PROPOSAL DURING THE PARTIAL LOCKOUT RENDERED THE PARTIAL LOCKOUT UNLAWFUL

**A. Relevant Facts**

At about 10AM on March 13, 2018, the morning after the partial lockout began, Darrick Doty sent Lisa Wilds an email that read, in relevant part, “Please be informed that the last, best and final offer from the company has been given to the union and will expire at 11pm on March 13, 2018.” (JX 20). On March 14, Pete Jacks sent a letter to Doty that read, in relevant part, “[I]t is the Union’s understanding that the Company withdrew its ‘last, best and final’ offer (‘LBF’) as of 11:00 p.m. March 13, 2018? Can you confirm that is the case?”. (JX 23, p. 2). The Company never answered Jacks’ question. (Jt. Stip. 40). It was not until the morning of March 19 did the Company finally provide the Union with a revised proposal. (Tr. 84). After some bargaining, the Union agreed to take a revised proposal to a ratification vote. (JX 27). The membership ratified the proposal on March 21, and the members were called back to work on March 22. (Jt. Stip. 50-51).

**B. The Partial Lockout Was Unlawful Because the Company Failed to Clarify What Terms the Union Had to Accept to End the Lockout**

“[A] fundamental principle underlying a lawful lockout is that the Union must be informed of the employer’s demands, so that the Union can evaluate whether to accept them and obtain reinstatement.” *Dayton Newspaper, Inc.*, 339 NLRB 650, 656 (2003). This is such a fundamental principle that the *Dayton Newspaper, Inc.* Board felt the need to reiterate it: “[A] fundamental principle underlying any lawful lockout is that the union may end the lockout, and return the employees to work, by agreeing to the employer’s demands. Therefore, the union must be fully informed of those demands.” *Id.* at 658. Thus, “timely notification of the terms of the employer’s offer... [is] essential for any lockout to be lawful.” *Alden Leeds, Inc.*, 357 NLRB 84, 93 (2011); *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.”). This is so, since, as stated above, “for a lockout to be permissible..., it must be for the sole purpose of bringing economic pressure to bear in support of [the employer’s] legitimate bargaining position.” *Allen Storage and Moving Co., Inc.*, 342 NLRB at 501. Where an employer fails to properly inform the union of its legitimate bargaining position, the lockout is no longer “bringing economic pressure to bear in support” of the bargaining position.

The Company clearly violated these requirements. By withdrawing its proposal as of 11 PM on March 13, the Company was no longer locking out union members to bring economic pressure to bear in support of its legitimate bargaining position – there was no bargaining position to support. The Union could not “end the lockout... by agreeing to the employer’s demands” – the Company was no longer making any demands. When the Union asked for clarification as to the status of the Company’s proposal on March 14, it got nothing but silence until March 19. Therefore, the Company “had not clearly and fully set forth th[e] conditions” the

Union could accept to end the lockout, and instead “presented the Union with unclear and changing conditions [such] that... the Union could not intelligently evaluate its position and obtain reinstatement.” *Dayton Newspaper, Inc.*, 339 NLRB at 656.

In *Alden Leeds, Inc.*, the Board held that the employer failed to provide timely notice of the terms the union had to accept to avoid or end the lockout because the employer’s position contained an unclear and ambiguous proposal on healthcare. 357 NLRB at 84, 94. If failure to clarify a part of the proposal that an employer locks out the bargaining unit in support of renders the lockout unlawful, then surely the failure to clarify whether a proposal exists at all renders the Company’s partial lockout unlawful.

Moreover, the fact that the Company finally offered a new proposal on March 19 does not cure the lockout from that point on. The Board in *Alden Leeds Inc.* found that “the lockout’s initial illegality was not cured when the Respondent provided the Union with a complete contract proposal... almost 1 week after the lockout began... [I]t is well established that a lockout unlawful at its inception retains its initial taint of illegality until it is terminated and the affected employees are made whole.” 357 NLRB at 84, 84 fn. 3, quoting, *Movers and Warehousemen’s Assn. of Washington, DC*, 224 NLRB 356, 357 (1976) (internal quotation marks omitted). The Board went on to state that “the burden must be on Respondent to show that its failure to restore the status quo ante had no adverse impact on the subsequent collective bargaining.” *Ibid*, quoting *Movers*, 224 NLRB at 358. Looking at *Movers*, such a showing would require the Company to prove, rather than speculate, that the collective bargaining outcome would have been the same had the Company ended the lockout and made the locked out employees whole prior to continuing bargaining. *Movers*, 224 NLRB at 358. The Company did not present sufficient evidence at the hearing to meet this burden.

Just as the employer's delayed proposal in *Alden Leeds, Inc.* did not cure the unlawful lockout, the Company's proposal on March 19 did not cure its unlawful partial lockout for failure to provide timely notice of the terms to end the lockout.<sup>10</sup> Therefore, the Company's withdrawal of its proposal on March 13 rendered the partial lockout unlawful for its remainder, and rendered the partial lockout a violation of Sections 8(a)(3) and (1). *Alden Leeds*, 357 NLRB at 95 and 95 fn. 12.

#### V. PROPOSED REMEDY

The Company's violations warrant the standard remedies, such as a notice posting and make-whole remedy for the locked out Union members for the period of March 12 through their return to work on March 22. However, the Company's conduct is so egregious that it also calls for extraordinary remedies. The Company intentionally targeted and punished those bargaining unit members who supported the Union, while rewarding those that abandoned the Union by allowing them to work through the partial lockout and then providing them performance bonuses for that work. Nothing about the Company's conduct or their presentation at the hearing suggest the Company is contrite. It presented no cognizable defense of its conduct at the hearing, yet refused to even engage in settlement negotiations. This is a Company that has no intention of moderating its unlawful behavior without significant incentive.

The Company has "engaged in such egregious or widespread misconduct as to demonstrate a general disregard for the employees' fundamental statutory rights." *Hickmott Foods*, 242 NLRB 1357, 1357 (1979). Additionally, the Company's defenses, or lack therefore,

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<sup>10</sup> The fact that *Alden Leeds, Inc.* involves a failure to provide timely notice at the inception of the lockout, as opposed to the day after the inception of the lockout, does not distinguish it from the instant case. There is no analytical reason that an employer would not have to terminate a lockout that becomes unlawful after its inception and make locked out employees whole for the period the lockout was unlawful to remove its unlawful taint, if it would be required to do so if the lockout was unlawful from inception.

amount to “truly frivolous litigation[.]” *Frontier Hotel & Casino*, 318 NLRB 857, 864 (1995). Therefore, the Union urges the ALJ to grant the following extraordinary remedies: 1) a broad cease-and-desist order against violations of the Act in any other manner other than those identified in the instant Complaint; 2) the Union’s and NLRB’s litigations expenses; and 3) a reading of the Notice to be posted to a gathering, or gatherings, of all USW bargaining unit members by President Paolo Ghigo.

VI. CONCLUSION

For all the reasons stated above, the Union urges the ALJ to find that the Company has violated Sections 8(a)(1), (3), and (5) of the Act, and to recommend the requested remedies.

Respectfully submitted,

s/ Maneesh Sharma

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**CERTIFICATE OF SERVICE**

This is to certify that a true copy of the Post-Hearing Brief for Charging Party Union was served via electronic mail and first-class, postage-paid mail this 2<sup>nd</sup> day of April, 2019 upon:

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