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

Advice Memorandum

DATE: November 28, 2001

TO : Elizabeth Kinney, Regional Director
Harvey A. Roth, Regional Attorney
Gail Moran, Assistant to Regional Director
Region 13

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

SUBJECT: Midwest Generation, EME, LLC
Case 13-CA-39643 512-5036-6745
512-5036-8325
512-5072-4400
524-5056-3200
524-5056-3200

This case was submitted for advice as to whether the Employer violated Section 8(a)(1) and (3) by locking out striking employees, but not non-strikers and those employees who made individual offers to return to work.

FACTS

Electrical Workers IBEW Local 15 (the Union) represents the production and maintenance employees at 12 power-generating stations owned by Midwest Generation, EME, LLC (the Employer). There are approximately 1200 bargaining unit employees.

In Spring 2001,[1] the Union attempted to engage the Employer in negotiations for a successor agreement; the Employer apparently refused to meet. In May, as a response to the Employer's bad-faith bargaining,[2] member-employees voted to authorize a strike. The Union initiated an economic strike on June 28 after that violation was

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[1] All dates are in 2001 unless otherwise noted.

[2] The Region found merit to the Union's allegations in Case 13-CA-39189 that the Employer violated Section 8(a)(5) by refusing to meet. The Region sought and received authorization to seek 10(j) relief in that case, but the matter was settled informally on June 8. Investigation of a subsequent charge, 13-CA-39555, has failed to disclose evidence of subsequent bad-faith bargaining by the Employer. The Region dismissed those allegations; the Union intends to appeal that decision.

remedied (see fn. 2); the strike lasted until the Union made an unconditional offer to return to work on August 31. During that time, 62 of the 1200 unit employees either did not strike or made individual, unconditional offers to return to work. Most of the 62 employees who crossed the picket line resigned their Union membership.[3] There is no evidence that the Employer conditioned its acceptance of an employee's offer to return to work on whether the employee resigned from the Union.

The Union and the Employer engaged in negotiations during the strike. After weeks of negotiations, the Union announced plans to conduct a vote to end the strike on August 31; the Employer was aware that the Union intended to conduct that vote. In conjunction with the planned vote, a Union representative waited near the Employer's corporate headquarters in downtown Chicago to convey the Union's unconditional offer for employees to return to work, if necessary. Union members voted to end the strike that afternoon and at approximately 3:30 p.m. the Union representative attempted to convey the Union's unconditional offer to the Employer, but the Employer's offices were closed. The Union representative eventually slipped the letter conveying the Union's offer under the door.

Later on August 31, at about 4 p.m., the Union's attorney tried to convey the Union's offer by telephoning the law firm representing the Employer, but the telephone call was abruptly cut off once the Union's attorney stated the purpose for his call. The Union's attorney immediately called the law firm back, but was told that all the firm's labor attorneys had left for the day. The Union's attorney then sent a copy of the Union's offer to the Employer's law firm via facsimile.

The Employer claims that it did not receive the Union's offer until Tuesday, September 4,[4] and did not reject the offer until September 6. At that time, the Employer notified the Union by letter that the Employer could not agree to the Union's offer and would lock out employees until a new contract was ratified. The Employer also advised the Union, however, that employees "who already returned or were scheduled to return to work, prior

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[3] The Region does not specify how many of the returning strikers resigned their Union membership.

[4] The Employer asserts that, due to the Labor Day holiday, its offices and its law firm's offices closed early on Friday and did not conduct any business until September 4.

to August 31, 2001, will be allowed to continue to work." Thirteen employees who individually offered to return to work before the Union's offer did return to work on or after August 31. It is undisputed that the Employer only locked out those employees who did not make individual offers to return to work before August 31.

ACTION

Complaint should issue, absent settlement, alleging that the Employer violated Section 8(1) and (3) by locking out striking employees, but not non-strikers and those employees who made individual offers to return to work.

An employer does not violate the Act by locking out its bargaining unit employees for "legitimate and substantial business reasons."[5] Thus, it is lawful for employers to temporarily lock employees out for the sole purpose of pressuring them to accept the employer's bargaining proposals,[6] or to insulate itself from anticipated disruption caused by further strikes, if the adverse effect on employees' rights is comparatively slight.[7] However, an employer violates the Act if a purpose of the lockout is to discourage union activity, or is "inherently so prejudicial to union interests and so devoid of economic justification that no specific evidence of intent . . . is required."[8]

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[5] 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).

[6] 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).

[7] 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).

[8] 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).

An employer seeking to lock out its employees must timely notify the union of that decision. Absent timely notification to the union of a claimed lockout, an employer's failure to reinstate economic strikers on their unconditional offer to return to work is inherently destructive of employees' Laidlaw rights and violates Section 8(a)(3) and (1) of the Act.[9] Thus, for an employer to rely on a lockout effectively to suspend strikers' reinstatement rights, it must declare the lockout before, or in immediate response to, the strikers' unconditional offers to return to work.[10] The purpose of such a requirement is to allow strikers to make informed decisions whether to accept the employer's terms and end the strike or to take other appropriate action.[11]

Here, the Employer received the Union's unconditional offer to return to work on either August 31 or September 4; it responded by announcing the lockout on September 6. We agree with the Region that regardless of which date is correct, the Employer's notification to the Union within two working days was timely and permitted the strikers to evaluate their bargaining position.[12]

We further conclude, however, that the Employer, through its lockout, has unlawfully discriminated against strikers. An employer violates Section 8(a)(1) and (3) of the Act when it locks out only those employees who supported a strike or otherwise discriminates against employees based on their union sympathies.[13] For example,

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[9] Ancor Concepts, above, 323 NLRB at 724, citing Eads Transfer, above, 304 NLRB at 713. See also Tidewater Construction, above, 333 NLRB No. 147, slip op. at 8.

[10] Eads Transfer, above, at 713; Ancor Concepts, above, at 744.

[11] Eads Transfer, above, at 712.

[12] See Ancor Concepts, above, 323 NLRB at 744 (employer failed to use formal words to announce lockout, but timely informed striking employees they were being locked out in support of employer's bargaining position at the same time the union offered to return); Tidewater Construction, above, 333 NLRB No. 147, slip op. at 8 (Board adopted without comment ALJ finding that 17-day silence was timely). But see, Eads Transfer, above, 302 NLRB at 713 (employer's two-month silence regarding its reason for failing to reinstate strikers unlawful).

[13] McGwier Co., above, 204 NLRB at 496; O'Daniel Oldsmobile, above, 179 NLRB 401-402.

in O'Daniel Oldsmobile[14] the Board adopted the administrative law judge's finding of "obvious, disparate treatment of employees in that [the employer] locked out only those employees who, by striking, identified themselves as union adherents" but continued its operations using those employees who did not strike and new hires.[15] There, one of the purposes of the lockout may have been to bring pressure on the union to modify its bargaining demands. However, an additional, and unlawful, "purpose and effect of the lockout [was] to undermine adherence to the union, by demonstrating to the employees, by the disparate treatment accorded union and non-union employees, the advantages from the standpoint of job security of rejecting the union or of refraining from concerted action in support of the Union."[16] The judge went on to find that "by deliberately limiting the impact of the lockout to those employees who struck, Respondent in effect discriminated against them for striking and violated Section 8(a)(1) and (3) of the Act."[17]

The holding in McGwier[18] closely tracked that of O'Daniel as the judge noted the "obvious disparate treatment of employees" there. As in O'Daniel, the employer only locked out striking employees while continuing its operation using non-strikers and later with replacements.[19] The Board adopted the ALJ's finding that a purpose of the lockout was to undermine adherence to the union by demonstrating to the employees "the advantages . . . of rejecting the Union or of refraining from concerted action in support of the Union." By deliberately limiting the impact of the lockout to striking employees, the employer in McGwier violated Section 8(a)(1) and (3) of the Act.[20]

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[14] 179 NLRB 398.

[15] Id. at 402.

[16] Id.

[17] Id.

[18] 204 NLRB at 496.

[19] Id.

[20] Id. See also, Field Bridge Associates, 306 NLRB 322, 334 (1992), enfd. sub nom. Local 32B-32J, SEIU v. NLRB, 982 F.2d 85 (2d Cir. 1993), cert. denied 509 U.S. 904 (1993) (absent legitimate business justification, employer

In the instant case, the Employer only locked out those employees who honored the Union's strike until the unconditional offer of August 31, and did not lock out employees who either did not strike, or who had made prior individual offers to return to work. Under McGwier and O'Daniel, the Employer's disparate treatment of strikers is clearly unlawful as the Employer has determined whether employees could resume working based on their Section 7 activity and not its legitimate business concerns. In fact, the Employer has not advanced any business concern for selectively locking out employees (e.g., fear of additional strikes). Rather, the Employer's clear message to locked out employees is that those who eschew Union activity can expect to be treated more favorably than those who do not. Such a message is inherently destructive of employees' free exercise of their Section 7 rights. Accordingly, complaint should issue, absent settlement.

We reject the Employer's argument that Tidewater Construction Corp.,[21] warrants a different result. In that case, the employer locked out striking employees, but allowed one employee who crossed the picket line during the strike and prior to the lockout to continue working. In response to the General Counsel's argument that such a selective lockout was unlawful, the judge stated, without reference to Board law:

> It was proper for Respondent to distinguish between him, a current employee who *apparently* was willing to abandon the union's demands, and those who were strikers and still opposed Respondent's contract demands. If the rationale underlying the allowance of a lockout is to put pressure on a union to accept the employer's bargaining demands, it would hardly serve that purpose to lock out [the employee], who worked, despite the strike, and did not support the union's strike.[22] (Emphasis added.)

The Board did not specifically address the judge's conclusion in this regard, although the Region filed

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violated Section 8(a)(3) by failing to offer reinstatement to all locked out strikers upon ending the lockout).

[21] 333 NLRB No. 147, above.

[22] Id., slip op. at 6.

exceptions and the Board adopted the ALJ's decision.[23] Rather, the panel dealt primarily with the issue of whether the employer unlawfully locked out those employees who engaged in the strike, as well as several former employees whose names appeared on the Excelsior[24] list for an election held 9 months prior to the lockout. Indeed, the Board did not specifically address the questions of the selective lockout; whether the announcement of the lockout was timely; whether the expiration of the employer's final offer rendered the lockout unlawful; and whether the lockout was unnecessary after the employer implemented the terms of its final offer.

Given the Board's silence regarding the lawfulness of a selective, and therefore discriminatory, lockout, we would argue that Tidewater neither expressly nor implicitly overruled McGwier or O'Daniel and, if the Board meant to do so, it should articulate its rationale for disturbing such well-established precedent. The judge cited no case authority to support his conclusion that an employer may treat employees differently based on their Section 7 activity.

We also would argue that Tidewater is distinguishable, noting that the judge's holding is based on his inference that the employee in question was willing to abandon the union's demands. There is no evidence that the 62 employees at issue here "abandoned the Union's demands," and such an assumption would ignore the "long recognized" fact that employees cross picket lines for numerous reasons, many of which have no bearing on whether they support their union or its bargaining position.[25]

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[23] The Board merely concluded its discussion of the ALJD by stating, "Based on foregoing, and for the reasons stated in the judge's decision, we agree with his conclusion that the Respondent's lockout remained lawful in all respects." 333 NLRB No. 147, slip op at 2.

[24] Excelsior Underwear, 156 NLRB 1236 (1966).

[25] See Ashe Brick, 280 NLRB 1383, 1389 (1986) (employees may cross picket lines for financial reasons and other reasons wholly unrelated to their support for their union); Johns-Manville Sales Corp., 289 NLRB 358, 361 (1988), enf. denied 906 F.2d 1428 (10th Cir. 1990), citing Station KKHI, 284 NLRB 1339, 1344 (1987) (permanent replacements, like other workers who cross a picket line, may do so because they are forced to work for financial reasons but support the union and other union initiatives).

Absent express Board law to the contrary, we conclude that Tidewater does not stand for the extraordinary proposition that an employer may lawfully discriminate against employees for engaging in protected concerted activity. Thus, the Employer's interpretation of Tidewater is contrary to extant Board law as well as the unambiguous language of Section 8(a)(3). Complaint should issue, absent settlement.[26]

In sum, the Region should issue complaint, absent settlement, alleging that the Employer unlawfully discriminated against employees by locking out only those employees who refused to cross the picket line or otherwise refused to engage in Union activities. The Region should dismiss allegations regarding the timeliness of the Employer's announcement of the lockout, and hold in abeyance pending resolution of the appealed dismissal of Case 13-CA-39555 the allegations regarding the Employer's failure to reinstate unfair labor practice strikers.[27]

B.J.K.

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[26] We likewise conclude that Schenk Packing Co., 301 NLRB 487 (1991), is inapplicable here. There the employer unlawfully locked out only union members and suggested that no union member would be considered for employment as a replacement worker, unless and until he resigned his membership. There is no evidence to suggest that the Employer similarly coerced or induced the 62 employees at issue here. On the contrary, as the Region points out, some of the reinstated employees retained their Union membership.

[27] We agree with the Region that, absent the Union's successful appeal of the dismissed 8(a)(5) charge, the strike was an economic strike. Accordingly, the Union's argument that the strike was an unfair labor practice strike and, therefore, the Employer unlawfully refused to accept the Union's unconditional offer to return to work, currently is without merit. If the Union prevails on its appeal, the Region should ascertain whether the strike was caused or prolonged by the Employer's violation.