LOCKOUTS

AN EMPLOYER'S PREEMPTIVE OPTION WHEN FACING STRIKES AND WORK STOPPAGES



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The concept of a work stoppage or labor dispute leading to lost work time is often associated with the employee-initiated strike. However, the National Labor Relations Board has long-recognized an employer's ability to exert pressure on a union by withholding work opportunities through a lockout. In comparison to a strike, a lockout presents an employer with an option that presents a higher degree of control compared to a strike, may surprise the bargaining adversary, and can impact the dispute discourse. This important strategic option can be a useful tool to develop the negotiating leverage necessary to obtain tolerable agreements at the bargaining table.

I. Types of Lockouts

There are two types of lockouts: (1) a lockout in anticipation of an economic strike to avoid severe and unusual hardships (i.e., "defensive lockout"); and (2) a lockout designed to exert pressure upon the Union to agree to the employer's good faith bargaining proposals (i.e., "offensive lockout").[1]

The general rule under the National Labor Relations Act (NLRA) is that a lockout may be deemed unlawful if the Board determines that the employer's real purpose for locking out employees is to discourage union activities or undermine the collective bargaining process.[2] The test for an offensive lockout is whether the employer can demonstrate that it is in support of a legitimate bargaining position; the test for a defensive lockout is whether the employer can show it has a legitimate and substantial business justification for the lockout.[3] However, even if an employer meets its burden, a lockout will still be deemed unlawful if the union can prove that anti-union animus was a factor in the employer's decision.[4]

A. Offensive Lockouts

As noted above, the Company may lock out employees in furtherance of its legitimate bargaining positions. In evaluating the legality of an offensive lockout, the Board generally examines four factors:

1. Impasse – Although the existence of impasse in negotiations is a *significant* factor in determining the lawfulness of a lockout, the Board has no *per se* rule requiring impasse.[5]

2. Good Faith Bargaining – An employer's refusal to bargain or failure to bargain in good faith with the union is fatal to an attempted lockout. The Board consistently finds lockouts unlawful when they are instituted by employers that have violated their duty to bargain in good faith.[6] To determine whether an employer has bargained in good faith, the Board examines factors such as (i) the employer's proposals; (ii) the employer's bargaining tactics; and (iii) the length of negotiations. No one factor is dispositive; the ultimate test is whether the totality of circumstances evinces a real intent to reach agreement.[7]

3. Legitimate Bargaining Position – A lockout instituted by the Company in support of its proposals must be instituted in support of *legitimate* bargaining

positions.[8] Otherwise, the lockout may constitute an unlawful refusal to bargain. Legitimate bargaining positions have included: (i) pressuring a union to accept a lawfully implemented last offer; (ii) urging consideration of one's bargaining proposals; and (iii) obtaining a union's agreement to concessionary bargaining demands.[9] An employer may lock out employees over regressive proposals, so long as the employer is not engaged in bad faith bargaining.[10] However, it is a violation of the Act to lock employees out to force a union to agree to a permissive subject of bargaining.[11]

4. Antiunion Animus – Even if an employer bargains in good faith with the union and locks out its employees in support of a legitimate bargaining position, the lockout will be held unlawful if the union can show anti-union animus.[12] An employer may have a dual purpose in locking out employees, but the fact that one of those motives is legitimate does not prevent a finding that the other is unlawful. Thus, the Board generally finds that if the employer's motive is *at all* tainted by anti-union animus, the lockout is illegal. Although anti-union evidence may be shown through a number of factors, unfair labor practices committed by an employer are often regarded as evidence of animus rendering a lockout illegal.[13]

B. Defensive Lockouts

Depending on the circumstances, the Company also may have a legitimate business reason for engaging in a defensive lockout. For reasons discussed below, in the absence of safety or operational reasons for a lockout, this option would probably have less traction under the law if the Company waits to announce the lockout until after the union calls off any strike.

The Board's analysis of an employer's asserted legitimate business justification for a defensive lockout turns on the specific facts of a given case.[14] Importantly, an employer engaging in a defensive lockout must do more than assert a legitimate business justification – *it must prove it.* So, for example, it may not be enough to claim a concern about safety or sabotage unless there is evidence to support the claim.

It also is important to note that when the employer's reason for the lockout is because it feared a strike, the Board will still examine whether the employer has bargained in good faith and whether the employer's actions were based on union animus. Evidence of either could render the lockout unlawful. For example, although locking employees out following a hospital strike to preserve continuity of patient care *may* be lawful, locking employees out merely *because they engaged in a strike* would be unlawful, because engaging in a lawful strike is protected activity under the Act.[15]

It is also possible that waiting to announce the lockout until after the union calls off any strike would undermine the Company's ability to argue that it had a legitimate business justification (for example, threats to safety, sabotage, or damage to property) for locking out employees. Nevertheless, although the Company's primary reason for the lockout may be offensive – i.e., in furtherance of a legitimate collective bargaining position – it could be helpful

to include the argument that the lockout was also defensive because it was taken as a protective measure in anticipation of an imminent strike.[16] Given the Board's general disfavor of lockouts, it is prudent to be able to make as many arguments as possible to support the lockout.

II. Pre-Impasse Lockout

In certain situations, an employer can engage in an "offensive lockout" before an impasse has been reached to exert bargaining pressure on the union. The Board and courts have long held that an employer may "lockout" its bargaining unit employees *temporarily*[17] in an effort to pressure them to accept bargaining proposals – even before impasse has been reached,[18] provided that the employer can demonstrate a substantial justification for locking out, such as strike threats to occur during an approaching busy selling season or "inside game" tactics engaged in by employees, including "working to rule" and refusing to work overtime.[19] During such a lockout, an employer may use temporary replacements to continue its operation.[20] When analyzing the lawfulness of an employer's imposition of a lockout in such a circumstance, the Board has held that while "defining of an impasse in negotiations may be a factor supporting a determination that a particular lockout is lawful, the absence of an impasse does not itself make a lockout unlawful any more than a mere existence of an impasse automatically renders a lockout lawful."[21] Because the current Board majority is hostile to management, caution is advised before implementing a pre-impasse lockout.

III. Limiting the Lockout to Select Employees

With respect to the permissibility of locking out only select employees or departments, the Board has found a partial lockout lawful. It has done so where the employer has been able to demonstrate a legitimate and substantial business interest in doing so.

Thus, for example in *Laclede Gas Company*, 187 NLRB 243 (1970), the employer laid off certain construction crew employees in the face of a possible strike. Other employees remained on the job. The employees selected for layoff were chosen because they would have been involved in work projects that, once started, would pose a danger to continued operations and the public if they were not completed because of a strike. The Board ultimately ruled that the employer was justified in implementing the layoff on a partial basis.[22]

A similar result was reached in *Bali Blinds Midwest*, 292 NLRB 243 (1988). In that case the employer locked out a limited number of its employees following a strike by its employees the day before. The union had offered no assurances that the employees would not go out on strike the next day. The employer continued to operate with other unit employees while the work of the locked-out employees was temporarily transferred to other plants so that customer orders could be met. Rejecting the General Counsel's claim that the partial lockout was in violation of Sections 8(a)(3) and (1), the ALJ, whose decision was adopted by the Board, found that the partial lockout was motivated by a desire to minimize the adverse effects on its business occasioned by the uncertainty of whether employees would strike again.[23]

These cases thus seem to indicate that the employer's justification for limiting its lockout must be supported by some substantial business reason. Thus, if the Company implements a partial lockout to gain a tactical advantage in negotiations, it must be prepared to demonstrate a substantial business need for limiting the lockout to particular employees.

IV. Additional Considerations

Even if the Company institutes a lawful lockout, it must ensure that its conduct in furtherance of the lockout does not render the lockout unlawful.

A. Notice

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.[24] Therefore, if the Company decides to lock out its employees, it must provide the union with a timely notice explaining the specific reasons for the lockout (including the employer's specific bargaining position(s)), and the circumstances under which employees may return to work. A deficient lockout notice cannot be cured once the lockout begins.[25] As a practical matter, once the Company provides the union with the requisite rationale for the lockout, it should avoid providing any additional or different bases for the lockout to bargaining unit employees, other Company employees, the public, or the press. Such shifting rationales could be considered evidence that the asserted rationale for the lockout is a sham, which would be evidence of anti-union animus. For this reason, all communication concerning the lockout should be handled by a single designated individual, and all requests for information concerning the lockout should be directed to that person.[26]

B. Replacement Employees

It is well-established that absent specific proof of antiunion motivation, an employer does not violate the law by hiring *temporary* replacements in order to engage in business operations during an otherwise lawful lockout.[27] However, an employer cannot hire permanent replacements for locked-out employees.[28] In fact, the Board recently stated that "[i]t is well settled that locked-out employees cannot be permanently replaced."[29]

ENDNOTES

[1] *See, e.g., American Ship Building Co. v. NLRB*, 380 U.S. 300, 307 (1965); *International Shoe Co.*, 93 NLRB 907 (1951).
[2] *See Century Plaza Hotel & Towers*, 21-CA-36539 (G.C. Advice Memorandum, Aug. 24, 2005).
[3] *See NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26 (1967).
[4] The Board does not apply a different standard to lockouts instituted during first contract negotiations. *Stern Produce Co., Inc.*, 368 NLRB No. 31 (2019).
[5] *Darling & Co.*, 171 NLRB 801, 802-03 (1968) (whether lockout is effected pre-impasse or in absence of threatened strike is not violative of the Act per se, but those factors are relevant when considering the employer's business justification and motive).
[6] *Port Norris Express Co.*, 174 NLRB 684 (1969).
[7] *Prentice-Hall, Inc.*, 290 NLRB 646 (1988). For example, in *Brewery Products, Inc.*, 302 NLRB 98, 102 (1991), the Board found a lawful lockout when it was "instituted to put pressure on the Union to speed the pace of negotiations and was only expected to last a few weeks," where the parties had been negotiating for a year and had met for negotiations approximately 27 times, and the Board found that an impasse existed at the time of the lockout.
[8] *See Harter Equip., Inc.*, 280 NLRB 597 (1986).
[9] *Liquor Wholesalers*, 292 NLRB 1234 (1989); *Central Illinois Public Service Co.*, 326 NLRB 928 (1998); *Harter Equip., Inc.*, 280 NLRB 597 (1986). By contrast, non-legitimate bargaining positions include: (i) a lockout to compel a union to remove non-employees from its bargaining committee, *Madison Glass Spec. Co.*, 135 NLRB 901 (1962); (ii) using a lockout to deprive employees of bargained-for wage rate increases, *Scott Mfg. Co.*, 133 NLRB 1012 (1961); and (iii) locking out at one plant and subsequently reopening operations at another plant without giving notice to the bargaining representative, *NLRB v. Rapid Bindery, Inc.*, 293 F.2d 170 (2d Cir. 1961).
[10] *Graphic Communications Local 458-3m v. NLRB*, 206 F.3d 22 (D.C. Cir. 2000).
[11] *C-E Natco/C-E Invalco*, 272 NLRB 502, 505 (1984).
[12] *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300 (1965).
[13] *Royal Motor Sales*, 329 NLRB 760 (1999) (lockout unlawful because the parties were not at impasse and there could not have been an impasse given the existence of unremedied unfair labor practices).
[14] *See Wayneview Care Ctr. & Vict. Health Care Ctr.*, 356 NLRB No. 30 (2010).
[15] *See Highland Superstores, Inc.*, 314 NLRB at 146.
[16] *See Sociedad Espanola de Auxilio Mutuo y Beneficencia de P.R.*, 342 NLRB 458 (2004)(upholding employer's lockout, despite union's "11th hour" cancellation of strike, where the employer had reasonable grounds for believing that a strike was imminent, the intended strikes were "massive" – covering about 500 employees, continuity of patient care was a primary concern, and 40-50 replacements had already been hired to cover during the holiday season).
[17] It is important to note that an employer may only use temporary replacements during a lockout and must return bargaining unit employees to work if they agree to the employer's proposals and make an unconditional offer to return to work.
[18] *See Tidewater Construction Corp.*, 333 NLRB 1264 (2001) and *American Ship Building Co. v. NLRB*, 380 U.S. 300 (1965) (emphasis added).
[19] *Darling & Co.,* 171 NLRB 801 (1968), *enforced sub nom. Lane v. NLRB,* 418 F.2d 1208 (D.C. Cir. 1969); *Central Illinois Public Service Co.,* 326 NLRB 928 (1998).
[20] The Board has held that absent specific proof of anti-union motivation, an employer does not violate the NLRA by hiring temporary replacements in order to engage in business operation during an otherwise lawful lockout. *Harter Equipment*, 280 NLRB 597 (1986).
[21] *Darling & Co.*, 171 NLRB 801 (1968).
[22] *Laclede* has a lengthy history. In the Board's original decision, *Laclede Gas Company*, 173 NLRB 243 (1968), the Board ruled that the layoff of employees was not a lockout and, therefore, had to be negotiated over with the union first before it could be implemented. The Board, therefore, ruled that the employer violated Section 8(a)(5) because it did not negotiate with the union and did not follow the seniority provisions of the contract. On appeal, the Eighth Circuit denied enforcement to the Board's order ruling that the layoff was a lockout, that the company was not obligated to bargain with the union or to follow the terms of the contract and that it had a sufficient business justification for the lockout. *See Laclede Gas Co. v. NLRB*, 421 F.2d 610 (8th Cir. 1970). The Court of Appeals, however, remanded the case to the Board for it to determine whether the lockout violated Section 8(a)(3). On remand

the Board ruled that the company had established legitimate objectives for its partial layoff and found no basis for either a Section 8(a)(1) or a Section 8(a)(3) violation. *Laclede Gas Company*, 187 NLRB 243 (1970).

[23] See also *Royal Packing Company*, 198 NLRB 1060 (1972) (finding partial layoffs lawful where implemented to salvage perishable items); *Schenk Packing Co.*, Advice Memorandum, June 27, 1989 (holding that a partial lockout of only two departments was lawful where it was necessary to save perishable foods which the employer could not process in the event of a strike); *Hedaya Brothers, Inc.*, 12 AMR ¶ 22001 (GC Memo, Sept. 5, 1984) (finding that a partial day lockout implemented in response to unprotected employee conduct was not unlawful where the action taken by the employer was not out of proportion with the severity of the employees' unprotected conduct). *But see Romo Paper Products*, 208 NLRB 644 (1974) (where a partial lockout was ruled unlawful where the employer's justification of trying to avoid production problems in the event of a strike was rejected where the evidence showed that the employer planned to continue operating at full production during a strike).

[24] *Dayton Newspapers, Inc.*, 339 NLRB No. 79 (2003).

[25] *Macy's Inc.,* 372 NLRB No. 42 (2023) (observing a "lockout unlawful at its inception retains its initial taint of illegality until it is terminated and the affected employees are made whole").

[26] *See Schenk Packing Co.*, 301 NLRB 487 (1991) (employer's statement, in a memorandum to employees informing them of the lockout, that it would reemploy those employees who gave up their union membership rendered lockout unlawful).

[27] *Harter Equip., Inc.*, 280 NLRB 597, 597 (1986).

[28] According to the Board, the Supreme Court implicitly foreclosed the option of permanent replacements when it specifically described an employer's options at impasse as including only the right to "lock out their workers [and either shut down or hire temporary replacements]." *Brown v. Pro Football, Inc.*, 116 S.Ct. 2116, 2124 (1996); *accord Pankratz Forest Indus., Inc.*, 269 NLRB 33, 38 (1984) (finding that the employer violated the Act by discriminatorily replacing two employees on a permanent basis after it had locked them out).

[29] *Bud Antle, Inc.*, 347 NLRB No. 9 (2006).

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Jesse focuses on traditional labor relations under the National Labor Relations Act (NLRA) along with class and collective matters under the Fair Labor Standards Act (FLSA) and state wage and hour laws. He has cost-effectively obtained successful judgments, decisions, and resolutions for his clients in a wide array of forums, including federal and state courts, arbitration proceedings, and administrative hearings before the Equal Rights Division. Jesse also represents indigent parties in federal jury trials through the Eastern District of Wisconsin Pro Bono Program.

Jesse's experience includes serving as chief negotiator in collective bargaining agreement negotiations, supporting clients to enforce collective bargaining agreement terms, and managing and counseling clients through organizing and decertification petition campaigns. He has represented clients at hearings before the National Labor Relations Board and in arbitration proceedings. Jesse also defends clients against unfair labor practice charges, including in union and non-union settings.

Jesse is an experienced speaker and a recognized voice for labor and employment law. He regularly presents in-house and to organizations

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Jesse is an active participant in legal and civic communities. He represents indigent parties in federal jury trials through the Eastern District of Wisconsin Pro Bono Program, is a fellow with the Wisconsin Law Foundation, and a former board member of the State Bar of Wisconsin's Labor and Employment Law Section.

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Tim is a shareholder in the Milwaukee office of Ogletree Deakins. He has a career-long focus on representing employers in all aspects of traditional labor relations. Tim's traditional labor practice is national in scope. He has extensive experience representing management in collective bargaining negotiations, having served as lead spokesperson in the negotiation of dozens of labor contracts, including many successor agreements, first contract situations and closing agreements. He has represented employers in more than one hundred labor arbitrations, including discipline / discharge cases as well as in complex, contract interpretation matters. Tim has appeared on behalf of employers in numerous proceedings before the National Labor Relations Board, both in unfair labor practice cases and representation proceedings, including at the investigation stage, in litigation through hearing, exceptions before the Board in Washington, D.C., and federal circuit court review of Board decisions. He also has significant experience in providing successful guidance through union organizing campaigns and elections.

Tim also has successfully counseled clients in a broad range of labor law issues, including long-range strategies, strike preparation and related injunction proceedings, advising and assisting in labor-related

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