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

Advice Memorandum

DATE: August 4, 2005

TO : Joseph P. Norelli, Acting Regional Director
Region 20

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

SUBJECT: Sutter Health Inc./Sutter Solano Medical Center,
Case 20-CA-32315;
Sutter Health Inc./California Pacific Medical Center,
Case 20-CA-32310;
Sutter Health Inc./Sutter Lakeside Hospital,
Case 20-CA-32314;
Sutter Health Inc./Sutter Medical Center of Santa Rosa
and Sutter Warrack Hospital,
Case 20-CA-32319;
Sutter Health Inc./Sutter Delta Medical Center, 524-5056-0175
Case 20-CA-32344; 524-5079-2874
Sutter Health Inc./Sutter Eden Medical Center, 524-5084-8700
Case 20-CA-32345; 524-8365-2000
Sutter Health Inc./St. Luke's Hospital,
Case 20-CA-32311;
Sutter Health Inc./Alta Bates Summit Medical Center,
Case 20-CA-32343

These cases were submitted for advice on the issue of whether the Employers violated Section 8(a)(3) of the Act by refusing to reinstate for five days all bargaining unit employees who did not work during a one-day strike.

We conclude that the Employers violated Section 8(a)(3), as they have not demonstrated a legitimate and substantial business justification for their refusal to reinstate employees who did not work during the strike.

FACTS

The Charged Parties are eight hospitals (the Employers) owned by Sutter Health, each of which is separately incorporated and licensed.[1] The Charging Parties, SEIU Locals 250 and 707 (the Unions), represent

[1] The Unions allege that the individual hospitals constitute a single employer with Sutter Health. The single employer issue has not being submitted for advice.

several classifications of service, maintenance, patient care, technical, and office clerical employees at the various charged hospitals. All of the parties' collective-bargaining agreements expired between April 30, 2004, and November 22, 2004, and the parties have been engaged in negotiations for successor agreements since February 2004.[2] The parties have not been engaged in multi-employer bargaining, but instead have bargained separately at each hospital.

In early and mid-November, the Unions' members employed at the various hospitals voted to strike. While the strike ballot said that it was for an unfair labor practice strike, the Unions' pre-strike literature discusses both economic and unfair labor practice issues as the basis for the strike, using language such as, "Vote Yes – We deserve the same pay for the same work," "Now is Our Time to Win the Best Contract Ever & Change Our Relationship with Sutter," and "We demand a fair contract and an end to unfair labor practices."

The Unions have alleged that the hospital Employers committed numerous violations of the Act.[3] The Regions have determined to dismiss all charges against at least two of the hospitals, and have determined that, even with regard to the allegations where a prima facie case has been established, these putative unfair labor practices were not a contributing cause for the one-day strike on December 1.

On November 19, the Unions provided Section 8(g) notice to the respective hospitals and the FMCS that the Unions would engage in a one-day strike on December 1 at each of the Employers' facilities. There are no allegations that the notices were defective. On the same day, the Unions faxed the hospitals the strikers'

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[2] All dates hereinafter are in 2004, unless otherwise noted.

[3] While Region 20 is responsible for coordinating all of the cases involving these parties, and is responsible for dealing with the lockout and single employer allegations, both it and Region 32 are making their own determinations on the other issues presented by charges arising in each region, including on the merits of the allegations that the Employers committed unfair labor practices leading up to the strike.

unconditional offer to return on December 2, the day after the strike.[4]

Thereafter, each hospital distributed fliers and letters telling employees that they would not be able to return to work until December 6 unless they worked on December 1, whether they were scheduled to work December 1 or not. These communications at each hospital also stated that the hospital would replace strikers for 5 days in order to maintain quality care for its patients and bring closure to the negotiations. While the hospitals' communications to employees uniformly imparted the above reasons that employees who did not work on December 1 would not be able to return to work until December 6, at least one hospital's bargaining spokesperson stated that employees would be locked out "because they are going on strike." In addition, the Employers were reported in a local newspaper to have said that they were locking out employees because they "wanted to deter the unions from staging walkouts in the future."

The Employers entered into contracts with employment agencies for temporary replacement workers to work from December 1 through 5. The Employers have not claimed that they were required to enter 5-day contracts. Rather, they indicate that they chose such a commitment to the employment agencies as an economic weapon.

The Unions claim that, after the Employers threatened the five-day lockout, the Unions requested to bargain, even offering in writing to bargain "around the clock" December 2 through 6, but that the Employers refused this offer.[5] The parties did not meet during the lockout period.

A large number of employees scheduled to work on December 1 engaged in the one-day strike, and a number of other employees not scheduled to work that day did not come in to work. All employees who did not work on December 1 were not permitted to return to work until December 6, whether or not they had been scheduled to work on December

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[4] On the day of the strike, the Unions faxed another unconditional offer to return the next morning, December 2.

[5] This claim has not been fully investigated.

1. There is no evidence, nor are there allegations, that managers or supervisors performed any bargaining-unit work during the December 1-5 period.

On various dates in January 2005, the Unions filed the charges in the instant cases, alleging, inter alia, that the Employers violated the Act by locking out for four days all bargaining unit employees who failed to report for work on December 1, the day of the one-day strike. In particular, the Unions allege that the Employers did not have a legitimate and substantial business justification for their lockout or failure to reinstate employees until December 6.

The Employers contend that the strike was unprotected because of the Unions' failure to bargain in good faith in violation of Section 8(b)(3) of the Act. They also argue that they had legitimate and substantial business justification for locking out employees until December 6, namely maintaining continuity of patient care and putting economic pressure on the Unions, and that they could lawfully lock out only those employees who participated in the strike pursuant to the Board's decision in Midwest Generation, EME, LLC.[6] Finally, the Employers maintain that they were privileged to wait until December 6 to return strikers to work under Drug Package Co.[7]

ACTION

We conclude that the Employers violated Section 8(a)(3) as they have not demonstrated a legitimate and substantial business justification for their refusal to reinstate employees who did not work during the strike.

The Unions' Strike Was Protected

Initially, we conclude that the Unions' strike was protected, despite our conclusion in a recent Advice Memorandum that the Unions violated Section 8(b)(3) of the Act by failing to meet with the Employers at reasonable

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[6] 343 NLRB No. 12 (2004).

[7] 228 NLRB 108 (1977), enf. denied on other grounds 570 F.2d 1340 (8th Cir. 1978).

times prior to the strike.[8] The circumstances under which the Board has found a strike unprotected are not present here. Primary strikers may be unprotected by the Act where: (1) they employ unlawful means, such as a partial or intermittent strike,[9] strike violence,[10] or a sit-down strike;[11] or (2) where the strike has an unlawful objective, such as to further a union's unlawful bargaining position or insistence on a non-mandatory subject of bargaining.[12] In the instant cases, there is not even an allegation of any unlawful means employed by the Unions that would make the strike unprotected, and we have previously concluded that the Unions were not unlawfully insisting on a non-mandatory bargaining subject.[13] Thus, the Employers' claim that the strike was unlawful on that basis is unfounded.

We also concluded in the same memorandum, however, that the Unions violated Section 8(b)(3) of the Act by failing to meet with the Employers at reasonable times prior to the strike, beginning at the first bargaining session with one of the Employers on February 20 and continuing until shortly after expiration of the last Employer's contract on November 22.[14] We noted in that memorandum that there is some indication that the Union's reason for its unlawful bargaining strategy was to delay bargaining until all of the contracts with the Employers

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[8] SEIU, Local 250 (St. Luke's Hospital), et al., Case 20-CB-12281, et al., Advice Memorandum dated June 27, 2005.

[9] See, e.g., Pacific Tel. & Tel. Co., 107 NLRB 1547 (1954).

[10] See, e.g., Clear Pine Mouldings, 268 NLRB 1044, 1045-1048 (1984), enfd. 765 F.2d 148 (9th Cir. 1985), cert. denied 474 U.S. 1105 (1986).

[11] See, e.g., Peck, Inc., 226 NLRB 1174 (1976). See generally NLRB v. Fansteel Metallurgical Corp., 306 U.S. 240 (1939).

[12] See, e.g., Nassau Insurance Co., 280 NLRB 878, 878 n.3, 891 (1986)

[13] SEIU, Local 250 (St. Luke's Hospital), et al., Case 20-CB-12281, et al., Advice Memorandum dated June 27, 2005, at 14.

[14] Id., at 11.

expired. We did not definitively resolve there whether that was the Unions' motive in its delay, though, as it would not have altered the remedy in those cases.[15]

Here, however, for the purposes of this analysis, we would conclude that the Unions' unlawful delaying tactics amounted to subjective bad faith bargaining, designed to avoid reaching agreement with the Employers. That is, we conclude the Unions adopted this strategy of delay to better position themselves to obtain a system–wide contract. By avoiding agreement in any of the individual bargaining units until after all of the units' collective-bargaining agreements had expired, they created the opportunity for a system-wide contract and increased their economic strength in bargaining. This intent is clear from: (1) the Unions' open admission of their desire for a system–wide contract both in their repeated attempts to discuss a master contract at the bargaining table and the Unions' emphasis of this object in its pre-strike literature, using language such as, "We deserve the same pay for the same work," and "Now is Our Time to . . . Change Our Relationship with Sutter;" and (2) the timing of the Unions' unlawful delay -- from the commencement of bargaining until just after the last collective-bargaining agreement expired, with no evidence of delay after that time. Taken together, these factors are more than sufficient to support the inference that the Unions engaged in their unlawful bargaining posture in order to delay any agreement until the last of their collective-bargaining agreements with the Employers had expired on November 22.

After November 22, of course, this intent was fully achieved, and the Unions abandoned their dilatory tactics; there is no evidence after this time of any intent to delay bargaining by the Unions. Thus, by the date of the one-day strike, December 1, the Unions had no motive for engaging in further delay and had ceased their unlawful bargaining conduct. Hence, the strike was intended to further the Unions' bargaining proposals and thereby move the parties toward agreement, the opposite of the Unions' intent in their previous unlawful avoidance of any collective-bargaining agreement. Therefore, we conclude that the Unions' strike was not in furtherance of any unlawful bargaining position

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[15] Id., at 10, fn. 8.

and that it did not lose the protection of the Act, despite the Unions' prior unlawful dilatory tactics in bargaining.

The Employers Have Not Demonstrated a Legitimate and Substantial Business Justification for their Conduct

It is well established that an employer violates Sections 8(a)(1) and (3) when it fails or refuses to reinstate strikers upon their unconditional offer to return, unless the employer can establish a legitimate and substantial business justification for its failure or refusal to reinstate the striking employees.[16] While the Employers assert several legitimate and substantial business justifications or other legal bases for their conduct, as set forth below, we conclude that they have failed to demonstrate any such justification.

First, the Employers claim that the lockout was intended to maintain continuity of patient care. The Board has held that where a health care employer has legitimate concerns about maintaining continuous quality patient care, it may be entitled to lock out its regular employees and operate with replacements.[17] Thus, in Sociedad Espanola de Auxillo de Puerto Rico, the Board found that a hospital's

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[16] NLRB v. Fleetwood Trailer Co., 389 U.S. 375, 378 (1967); Laidlaw Corp., 171 NLRB 1366 (1968), enfd. 414 F.2d 99 (7th Cir. 1969), cert. denied 397 U.S. 920 (1970). We recognize that not all of the affected employees were themselves strikers, as some of them were not scheduled to work the day of the strike, and communicated to the Employers legitimate reasons for their absence other than the strike. Compare Marathon Electric Mfg. Corp., 106 NLRB 1171 (1953), enfd. 223 F.2d 338 (D.C. Cir. 1955), cert. den. 350 U.S. 981 (1956) and Bechtel Corporation, 200 NLRB 503 (1972) with Brinkerhoff Signal Drilling Co., 264 NLRB 348 (1982), which, taken together, make clear that, where an employer has reason to know that the employees are withholding their labor for non-strike related reasons, the employer is not entitled to treat the employees as strikers. As the Employers in the instant cases unlawfully retaliated against these employees because they considered them to be strikers, however, we need not treat them separately from the actual strikers.

[17] See Sociedad Espanola de Auxillo de Puerto Rico, 342 NLRB No. 40, slip op. at 4-5 (2004).

decision to lock out employees following the union's announcement that it intended to conduct two two-day strikes did not violate the Act, even after the union withdrew its second strike notice, as the hospital's decision was based on its legitimate concern that it could not find enough replacements during the Christmas holiday season.

Here, in contrast, the Employers have not contended that they had any reason to believe that any striking employees would not return to work on December 2, consistent with the Unions' unconditional offer to return to work on that date, and there is no evidence to support any such contention. Moreover, the Employers have made no claim that they were required to enter 5-day contracts with the temporary employment agencies in order to recruit sufficient replacement employees.[18] Rather, they admit that they themselves chose to make such a commitment as an economic weapon. Therefore, we conclude that the Employers had no legitimate basis for retaining the replacements, and locking out the strikers, in order to maintain continuous patient care, and that they have not shown a legitimate and substantial business justification on this ground.

Second, the Employers assert that they locked out striking employees to urge acceptance of their bargaining proposals.[19] In this regard, we note that the Board has recently reiterated in Midwest Generation that application of economic pressure in support of an employer's bargaining position constitutes a legitimate and substantial business

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[18] Cf., e.g., Pacific Mutual Door Co., 278 NLRB 854, 856 (1986) (employer lawfully refused to reinstate returning economic strikers until fulfillment of contract obligations with employment agency which had referred temporary employee striker replacements). Compare Harvey Mfg., 309 NLRB 465, 469 (1992) (noting, in finding no legitimate and substantial business justification for failing to immediately reinstate strikers, that there was no basis to find that contractual provisions that guaranteed a period of continued employment to temporary strike replacements were necessary in order to induce the employment agency to supply the replacements).

[19] See American Ship Building Co. v. NLRB, 380 U.S. 300 (1965).

justification for a lockout[20] and that, given this legitimate and substantial business justification, the employer there did not violate the Act by indefinitely locking out striking employees after the union had made an unconditional offer to return while not locking out those employees who either did not strike at all or had previously crossed the picket line prior to the union's unconditional offer to return.[21]

In the instant cases, however, while the Employers may have given lip service to this objective for their lockout, the circumstances belie any such claim. In particular we note that the lockout was established to be for a predetermined period of only four days, during which no bargaining sessions were scheduled (despite the Unions' having requested bargaining during the period). Further, the Employers expressly connected the lockout with the employees' strike; on several occasions they even explained that they imposed the lockout because of the strike, either to dissuade employees from participating in the strike or to deter the Unions and employees from engaging in future strikes. Thus, it is clear that the lockout would not have happened but for the strike, and that it was not sincerely intended to cause the Unions to accept the Employers' bargaining proposals, but was instead intended to retaliate against the employees' exercise of their protected right to strike.[22]

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[20] 343 NLRB No. 12, slip op. at 3.

[21] Id., at 5 ("it was no longer necessary for the Respondent to place additional pressure upon [non-strikers and crossovers] in order for Respondent to achieve its bargaining goals, for these employees had already eschewed the strike weapon during the strike. To be sure the Respondent could have locked them out as well. However, there is nothing in the law that requires an employer to use the maximum economic pressure").

[22] Nor does the Employers' asserted intention to deter future strikes demonstrate a legitimate and substantial business justification; instead it provides further indication of the retaliatory nature of the Employers' conduct. While the Board indicated in the particular circumstances of Central Illinois Public Service Co., 326 NLRB 928 (1990), review denied 215 F.3d 11 (D.C. Cir. 2000), cert. denied 531 U.S. 1051 (2000), that it might be permissible for an employer to initiate a lockout as an

Moreover, in marked contrast to Midwest Generation, the Employers here based their distinction between those employees who were permitted to work and those who were locked out not on the employees' pre-existing status, but on their decision, made after the Employers' lockout threat, whether to exercise their Section 7 right to strike or not. Thus, while it may have been reasonable for the Board in Midwest Generation to permit the employer to consider the nonstrikers' and crossover employees' prior disassociation from the union's position, the Employers' coercive lockout in the instant cases intentionally influenced that decision and was unlawful on that basis.[23]

Finally, the Employers claim that, irrespective of any legitimate and substantial business justification for their lockout, they were privileged not to reinstate these economic strikers for up to five days after their one-day strike, based on the Board's decision in Drug Package Co., supra.

While we agree with the Employers that this was an economic strike, we continue to adhere to the conclusion that the Drug Package 5-day grace period is not to be applied to economic strikes, as the timing of reinstatement rights for economic strikers, who may be permanently replaced, are substantively different from the immediate reinstatement rights of unfair labor practice strikers.[24]

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economic weapon to defend itself against a union's use of the economic weapon of an ongoing campaign of "inside games," it has never provided any indication that an employer can lock out employees after they have completed their strike in order to deter them from exercising their Section 7 right to strike in the future.

[23] The significance of the timing of the lockout announcement vis-à-vis the employees' decision to strike or refrain from striking was underscored in Midwest Generation itself, where the majority expressly based its holding upon the lack of evidence that the employer there had timed the lockout announcement to allow several employees to return to work beforehand. 343 NLRB No. 12, slip op. at 5.

[24] A complaint based on this distinction is currently pending before the Board on exceptions, after the

In agreeing with the Region that the Unions' strike was not an unfair labor practice strike, but was instead an economic strike, we rely upon: (1) the lack of significant pre-strike unfair labor practices committed by any of the Employers (indeed, the Region has found no meritorious ULP allegations against two of the Employers); (2) the timing of the strike, after the last of the collective-bargaining agreements had expired, months after some of the handful of alleged unfair labor practices were committed; and (3) the Union's literature and statements regarding the strikes, which focused on bargaining goals, particularly establishing uniform terms and conditions of employment for employees at all Sutter Health facilities. Taken together, these factors make it clear that the Unions were striking to further their economic bargaining goals, not to protest any Employer unfair labor practices.

In Drug Package, the Board's order required the backpay period to commence five days after the date that unfair labor practice strikers had made unconditional offers to return to work. In explaining the rationale for this 5-day "grace period," the Board stated:

> We believe that a 5-day hiatus in the backpay obligation strikes the appropriate balance between the administrative problems faced by the employer, the right of the strikers to reinstatement upon request, and the interests of the lawfully hired replacements who must be terminated to permit return of the strikers. Thus, the unfair labor practice strikers have voluntarily left their jobs, albeit in protest of their employer's unfair labor practices, and the time when they apply for reinstatement is solely within their control. On the other hand, the employer and the replacements, if any, have no such control . . .[25]

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administrative law judge agreed with our conclusion that the Drug Package grace period is not applicable to economic strikers. Sutter Roseville, JD(SF)-29-04 (2004). In that case, Administrative Law Judge Clifford Anderson flatly stated, "there is no 5-day rule for the reinstatement of economic strikers." Id., ALJD slip op. at 11.

[25] 228 NLRB at 114.

The Employers here assert that, as a matter of law, they are entitled to this grace period even though the strike was an economic strike, not an unfair labor practice strike. Thus, they contend that in both cases a temporary workforce is being replaced and therefore the same rule should apply. Moreover, they argue that their conduct should be found lawful based on the rationale underlying Drug Package, namely that the disruption and chaos attendant to reinstating an entire workforce without prior notice warrants allowing employers to take a five-day period of time to manage reinstatement in an orderly fashion.

We reject these contentions. The Board has never applied the five-day grace period to economic strikers. The Board in Drug Package acted based on the administrative difficulties likely to arise when an employer is required to reinstate an entire striking workforce on short notice, and the displacement of an entire temporary replacement workforce. In an economic strike, of course, an employer may lessen or obviate these difficulties by exercising its right of permanent replacement. The considerations present in replacing a temporary workforce at the end of an unfair labor practice strike are not present when replacing temporary employees after an economic strike.

The Board explained its five-day grace period as based on a "recognition of the practical difficulties [the employer] may face in reinstating the employees, when [the employer] is not in a position to know exactly when they may seek to return."[26] The Employer here not only knew exactly when the strikers would return to work, it received 13 days advance notice of this fact. The Employers' prior understanding of the duration of the strike is confirmed by their consistent characterization of the strike as for one-day, as well as by the Unions' reiteration of its offer to return to work after one day. Thus, far from being surprised (and prevented from undertaking organized reinstatement planning) by offers to return to work made at a time solely within the control of the Unions, the Employers here had ample advance notice of the strikers' return. Significantly, there is no evidence, or even any

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[26] Ibid.

specific contention, of any problem or disruption that would have been caused by reinstating the strikers on the day after their one-day strike. Indeed, any contention as to the difficulty, chaos, or disruption of bringing back all of the strikers at the same time one day later is clearly belied by the Employers' doing exactly that four days later, after their retaliatory lockout. For all these reasons, we continue to adhere to the conclusion that the Drug Package 5-day grace period is not to be applied to economic strikes such as here.

Accordingly, the Region should issue complaint, absent settlement, alleging that the Employers violated Section 8(a)(3) by refusing to reinstate employees who did not work during the strike.

B.J.K.