

CII Carbon, L.L.C. and United Steelworkers of America, AFL-CIO, CLC. Cases 15-CA-14487-2, 15-CA-14487-3, 15-CA-14566, and 15-CA-14937

August 25, 2000

DECISION AND ORDER

BY MEMBERS FOX, LIEBMAN, AND HURTGEN

On December 22, 1999, Administrative Law Judge George Carson II issued the attached decision. The Charging Party filed exceptions and a supporting brief, the Respondent filed an answering brief, and the Charging Party filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions² and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

Patricia A. Adams, Esq., for the General Counsel.

James D. Morgan, Esq., for the Respondent.

Richard P. Rouco, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

GEORGE CARSON II, Administrative Law Judge. This case was tried in New Orleans, Louisiana, on October 18, 19, 20, and 21, 1999.¹ The second consolidated complaint issued on January 27, 1999.² The complaint alleges that Respondent

¹ Member Hurtgen agrees that the Respondent did not violate Sec. 8(a)(5) of the Act by making unilateral changes to the Operations Performance and Market Economics Program (OPME) bonus program. Under a "contract coverage" analysis, rather than a "waiver" analysis, the Respondent's conduct was privileged by the actual terms of the OPME agreement. See *NLRB v. Postal Service*, 8 F.3d 832 (D.C. Cir. 1993). The agreement clearly states that "Management will establish Performance Criteria and their respective ranges." Furthermore, since the implementation of the plan in 1992, the Respondent has consistently made changes to the performance criteria without first negotiating with the Union. Thus, in Member Hurtgen's view, the past practice of the parties, as well as the language of the agreement itself, establish that the Respondent was entitled to make unilateral changes to the bonus program.

² In adopting the judge's conclusion that the permanent subcontracting of the dock work did not violate Sec. 8(a)(5), Member Hurtgen does not rely on the judge's rationale that the Respondent's conduct was privileged because it was consistent with the terms of the offer that Respondent lawfully implemented after the bargaining impasse between the Respondent and the Union. Rather, Member Hurtgen relies on the fact that no bargaining unit employees were laid off or otherwise adversely affected as a result of the subcontracting. Since the subcontracting therefore had no "material, substantial and significant" impact on the employees, the Respondent's decision to subcontract the dock work was not unlawful. See *Peerless Food Products*, 236 NLRB 161 (1978).

¹ All dates are 1997 unless otherwise indicated.

² The charge in Case 15-CA-14487-2 was filed on September 22 and was amended on January 14 and April 30, 1998. The charge in

violated Section 8(a)(3) of the National Labor Relations Act (the Act) by locking out employees, violated Section 8(a)(3) and (5) of the Act by unilaterally changing terms and conditions of employment, and violated Section 8(a)(5) by refusing to arbitrate grievances. Respondent's answer denies any violation of the Act.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by all parties,³ I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, CII Carbon, L.L.C. a limited liability company, is engaged in the manufacture and processing of calcined coke at facilities in Mississippi and Louisiana at which it annually purchases and receives raw materials valued in excess of \$50,000 directly from points located outside the State of Louisiana and from which it annually sells and ships products valued in excess of \$50,000 directly to points located outside the State of Louisiana. The Respondent admits, and I find and conclude, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Respondent admits, and I find and conclude, that United Steelworkers of America, AFL-CIO, CLC, the Union, is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

Respondent operates four facilities, one in Purvis, Mississippi, and the others in Chalmette, Norco, and Gramercy, Louisiana, respectively, all of which produce calcined coke. Calcined coke is obtained from untreated coke, referred to as green coke, which is a byproduct of petroleum refining. At Respondent's facilities, the green coke is processed through rotating kilns which heat it to over 2000 degrees, thereby removing moisture and volatile content. The calcined coke thus produced is shipped to aluminum smelters throughout the world where it is further processed into anodes that are used in the production of aluminum.

Respondent's facility at Gramercy is located on the north bank of the Mississippi River. It is Respondent's only facility with a dock. The dock on the river provides access to barges that bring green coke to the facility and take calcined coke from the facility. The facility covers approximately 40 acres. The western portion of the facility, well over half of the total acreage, is covered with thousands of tons of green coke. The processing portion of the facility consists of the kiln in which the green coke is converted to calcined coke, two large storage silos, referred to as domes, in which the calcined coke is stored prior to shipment, and multiple conveyor belts to carry the green coke to the kiln and the calcined coke from the kiln to the two large storage domes. Both green and calcined coke are also received by truck, the green coke coming from nearby petroleum refineries and the calcined coke coming from Respon-

Case 15-CA-14487-3 was filed on October 6 and amended on April 30, 1998. The charge in Case 15-CA-14566 was filed on December 2 and amended on April 30, 1998. The charge in Case 15-CA-14937 was filed on July 24, 1998, and amended on January 4, 1999. Case 15-CA-14487-4 was amended out of the complaint at the hearing. Charles G. Vicknair was deleted as an alleged discriminatee.

³ Respondent's motion to file a reply brief is denied.

dent's other facilities. Green coke is dumped in an area of the green coke storage area. Trucks carrying calcined coke dump it onto a grate in a garage-like building referred to as the "load-out building." A conveyer beneath the grate transports this calcined coke to the storage domes. The conveyors that transport the calcined coke from the kiln and from under the load-out building to the domes rise to a control tower where an operator directs the placement of the calcined coke into dome 1 or 2. The domes are filled from the top, producing conical piles that contain thousands of tons of calcined coke. When a dome is sufficiently full, a barge comes to the dock and is filled from the domes by a conveyor that runs to the dock.

Respondent has recognized the Union as the exclusive collective-bargaining representative for the approximately 80 production and maintenance employees at all four locations since it acquired the plants in 1989.⁴ In 1997, there were 28 unit employees at the Gramercy plant. Four employees per shift were involved in the operation of the control tower and conveyers. On weekends, during the 12-hour night shift from 6 p.m. until 6 a.m., only the four operating employees assigned to that shift would be working. Operators not working and the maintenance employees who comprise the rest of the unit at Gramercy would not normally be present. Supervision on this shift was minimal or nonexistent.

The parties successfully negotiated collective-bargaining agreements in 1991 and 1994. The 1994 contract, by its terms, expired on April 30. In February, the parties began negotiations for a new contract. Union Staff Representative James Pepitone characterized the negotiations as "tense." Respondent made several proposals that were unacceptable to the Union, including changes in the subcontracting and seniority clauses of the contract. The parties failed to reach agreement and, upon expiration of the contract, the Union engaged in a strike. After 1 day, the Union made an unconditional offer to return to work. Scheduling the return to work resulted in the unit employees losing a second day of work. The contract was extended until May 22.

On May 2, after the employees had returned to work, several employees at the Norco plant were advised of a short layoff for operational reasons. On May 3, property damage to an electrical control panel and air-conditioner was discovered at the Norco plant. Law enforcement authorities were notified, but the investigation conducted at that time did not result in the perpetrators being identified.

Prior to the expiration of the contract, at the Gramercy plant, employees had begun demonstrating their support for the Union's bargaining position by eating their lunch together at the flagpole. Following the strike, these employees began engaging in informational picketing in support of the Union's bargaining demands before and after work. Shop Steward Bill Fleming advised Plant Manager Dick Holmes of what the union members were going to be doing. Union members at the Norco and Chalmette plants engaged in similar activity. There was no interference in any of the foregoing protected activity.

⁴ The recognized appropriate unit is: All hourly production and maintenance employees at the Gramercy, Norco, Chalmette, and Purvis plants of the Company, but excluding managers, officers, superintendents, assistant superintendents, foremen, security guards, salesmen, office clerical employees, and any other supervisory employees with authority to hire, promote, discharge, discipline, or otherwise effect changes in the status of employees or effectively recommend such action.

On May 22, the date of expiration of the agreed on extension, Respondent made a final offer to the Union. At the request of Staff Representative Pepitone, Respondent forwarded its final offer in writing to the Union on May 27.

On July 1 employees at the Gramercy plant walked off the job following an incident on the dock when a ship was being tied up. The employees alleged that a supervisor was being abusive to one employee. The supervisor contended that the employee was purposefully not properly using an electric winch; therefore, he turned off the winch and told the employee to "use your back." No employee was disciplined.

Beginning in May there had been a series of unusual incidents at the Gramercy plant. On May 3 the incinerator would not operate. Investigation disclosed that the wire to the igniter had been cut. On June 4 coke was found in the oil filler tube of a welding machine. On June 22 a conveyor belt was found to have been cut approximately half its width from the side. Maintenance Supervisor Kent Louque explained that he would have expected to find a tear or jagged cut if the belt had been caught by a piece of equipment. The cut was a razor sharp cut that appeared to have been made deliberately. On August 14 a production sample of coke taken at the kiln was found to have a 4-percent silicone content, more than 100 times the acceptable .03-percent content, indicating deliberate contamination. The contaminant was "black beauty," a material used for sandblasting. At the time of the discovery, "black beauty" was being used by an outside maintenance contractor performing sandblasting work at the plant. Sampling of the calcined coke in the dome established that none of it was contaminated, only the sample. On September 6 the gearbox on the screw conveyor that feeds the kiln froze. It was replaced. During this same period, the six trunnions on which the kiln turns were overheating and making squealing noises. In order to inspect the trunnions, the kiln would have to be allowed to cool and then the sealed trunnion would have to be opened. This procedure would take a minimum of 4 days. Since a major maintenance "turnaround" was scheduled for October, Louque kept adding lubricants to the trunnions in order to keep them operating until October.

On September 15 Respondent declared impasse. Respondent implemented its final offer on September 22. The complaint contains no allegations relating to bargaining or impasse. The implementation of the terms of the final offer is not alleged as an unfair labor practice.

On September 26 or 27, at the Norco plant, a typed statement signed by Shop Steward Tim Miller and another employee had been posted. The statement criticized Respondent for "cheating its employees" out of a raise and then questioning "what incentives do the employees now have to continue producing a quality product. Will CII lose its I.S.O. [International Standards Organization] registration?"

On Monday, September 29, at the Gramercy plant, it was discovered that a large pile of calcined coke in dome 1 had been contaminated with green coke. On September 30 Respondent locked out the 28 unit employees at the Gramercy plant. The lockout was lifted in May 1998 and, on May 26, 1998, 24 unit employees returned to work.

B. The Lockout

1. Facts

On Monday morning, September 29, Process Coordinator Ricky Oubre discovered that green coke had been introduced into dome 1. His observation, confirmed by all witnesses who

testified on this point as well as photographs, reveal that green coke had been poured over the conical pile of calcined coke. The result, to give a descriptive analogy, would be as if chocolate syrup had been poured over a vanilla ice cream cone. Since green coke is different in color and texture from calcined coke, the contamination was obvious.

Oubre immediately reported the contamination to Plant Manager Dick Holmes, who notified his superiors. Union Shop Steward Bill Fleming heard from other employees that members of management were congregating around dome 1. Shortly after this, Fleming was called and conferred with Plant Manager Holmes and Oubre. Holmes explained what had been discovered and the three went to dome 1. They entered the dome, and Fleming observed what looked like green coke that would have had to have come off the conveyor, "coming from the top like that." Holmes informed Fleming that he intended to question the employees who worked over the weekend, a total of eight employees, four on each 12-hour shift. Fleming requested to see the questions Holmes intended to ask, and Holmes showed the questions to him. Fleming attended the interviews of the eight employees. None admitted being responsible for the contamination or having any knowledge regarding who was responsible.

Respondent notified the sheriff's department of St. James Parish, and Detective Lou Landry assumed responsibility for the investigation. Preliminary investigation revealed residue of green coke in the load-out building that is used exclusively for the dumping of calcined coke. Witnesses confirmed that, on the morning of September 29, the load-out building was exceptionally clean, suggesting that whoever was responsible had sought to remove all traces of green coke. Tire tracks inside dome 1 and several small piles of green coke pushed to the side of the contaminated pile of calcined coke suggested that whoever was responsible had sought to remove the most obvious traces of green coke that had fallen onto the floor at the bottom of the pile. If the contamination had not been discovered, the evidence of contamination would have been covered the very next time that calcined coke was poured over the pile in the course of Respondent's normal production process.

On September 30 Respondent decided to lock out the unit employees at Gramercy. Senior Vice President Bob Tonti, who was in charge of operations and engineering at that time, testified that Respondent explored three alternatives: locking out all the facilities, discharging a number of employees at Gramercy, and locking out the employees at Gramercy. The first alternative was rejected because the event was isolated to Gramercy. The second alternative was rejected because Respondent did not know who was responsible. Additionally, Respondent was aware that the Union "didn't like contractors being in the plant." Thus, a partial lockout necessitating the use of subcontractors "wouldn't have been a good idea." This was confirmed by comments made by Pepitone on May 1, 1998, when Respondent offered to lift the lockout.

Chief Executive Officer and President Van Sheets explained that Respondent was confronted with "an escalating pattern of sabotage, with the contamination being the latest in a series of events, by far the most serious. The others were highly disturbing, but the contamination in the coke dome threatened the existence of the company." In determining what action to take, Sheets "[w]anted to affect as few employees as possible but still protect the company." He decided against locking out the Norco employees. Although aware of the May property damage

at Norco, several months had passed and there appeared to be no day-to-day threat. There had been no contaminated coke at Norco. He considered the statement signed by Miller referring to quality and Respondent's I.S.O. certification to be a threat to the Gramercy facility where the contamination occurred. In view of the denials from the employees who had worked over the weekend, Respondent did not know who was responsible. It appeared that the contamination had occurred on the night shift when only the four operators on that shift and one guard were present. Even if the employees on that shift were not responsible, the conveyor had been run and those employees would have knowledge of who was responsible. As Sheets explained, "We . . . didn't know who did it, but we knew it could not have been done without the knowledge of the employees on that shift. . . . Even though we knew who was supposed to be on that shift, it didn't tell us that they did it." Thus, the decision was made to lock out all unit employees at Gramercy.

On September 30, Sheets wrote the Union's district director, Homer Wilson, apprising him of the contamination, the denial of any knowledge by the employees who had been working, and the statement signed by Miller and posted at Norco. The letter, which was sent by facsimile, states, "We are watching for action demonstrating that the USWA neither has orchestrated nor condones these actions." Sheets concluded by stating that, if Wilson contacted him, he would respond immediately. Also on September 30, Tonti sent, by facsimile, a memorandum to Staff Representative Pepitone advising him of the decision to lock out the employees effective at 8 p.m. and stating, "This defensive lockout is necessary following the discovery [of contamination] . . . Investigations by CII and outside experts determined the cause to be deliberate sabotage. The investigations did not reveal the person or person responsible." The memorandum notes that this was the third incident of sabotage at Gramercy. It appears that Respondent was referring to the cut conveyor belt and contaminated sample, but the letter does not specify. Respondent also distributed a memorandum advising the affected employees of the lockout and the reason for it. The final paragraph of this memorandum notes that CII is convinced that its bargaining position "is best for CII's future strength" and that CII recognizes that "many employees honestly disagree." It expresses appreciation for the professionalism most employees have shown, and concludes, "It is tragic that a minority of employees would sabotage CII and threaten everyone's future."

On October 2 Respondent, represented by Sheets, Tonti, and Melody Cortez, who at the time was Respondent's compensation administrator and keeper of the minutes of negotiating sessions, met with the Union, represented by Wilson, Pepitone, and Julius Laiche, the Union's local calcine industry chairman. Respondent confirmed the lockout and the reason for it. Wilson stated that the Union did not condone violence or sabotage and that the Union would cooperate in attempting to learn what had occurred. Pepitone noted that he had not been permitted onto the property to observe the contamination and asked if Respondent had questioned the guards, supervisors, and the truckdrivers. Sheets responded that the investigation led to the weekend shift and mainly the night shift. A similar comment had been made to Fleming by Plant Manager Holmes on October 1. Pepitone stated that, if that were the case, "terminate the individuals that they suspected, and we would handle that through the grievance and arbitration procedure." Laiche started to relate some information that had been reported to him, and Tonti

demanded to know what he knew. Laiche responded, "You tell me what you know and I'll tell you what I know." Tonti responded that it would be left up to the investigators. Wilson stated that, if Respondent could find a way to resolve the matter, he would cancel or change his schedule to be available.

Respondent hired Dillmann Professional Services to investigate the incident. Investigator Ron Frazier was assigned the case on October 6. He coordinated with Detective Landry. Frazier matched sets of tire tracks found inside dome 1 which established that a "bobcat," a utility tractor with a scoop on the front, had been inside the dome. He interviewed security personnel and the truckdrivers that had come to the Gramercy plant over the weekend. It was determined that no green coke had been delivered over the weekend, thus eliminating the possibility that green coke had been dumped by mistake in the load-out building. A pile in the green coke storage area was identified as being the source of the green coke used to contaminate the dome. Frazier conducted interviews with employees, none of whom admitted responsibility. On October 22, one employee did state that he suspected that one of the four nightshift employees, whom he named, was a perpetrator. Separate interviews with the four employees on the nightshift revealed inconsistencies in their accounts; however, none admitted involvement in the contamination nor did they implicate any of their fellow workers. The four employees all declined to submit to polygraph examinations. On November 11 one of the four employees advised that he would not talk any further about the contamination. Frazier concluded that the contamination was not accidental. Analysis revealed that between 7 and 10 tons of green coke had been poured over a pile of 10,000 tons of calcined coke. Approximately 180 tons of calcined coke with a value of over \$35,000 was lost in reprocessing. The reprocessing cost exceeded \$40,000. Salvage of the remainder cost over \$27,000. Total damages exceeded \$225,000. Respondent was insured with a deductible of \$100,000.

CEO Sheets explained that, if the contaminated coke had not been discovered and had been sent to a customer operating an aluminum smelter, it could have resulted in a shutdown of the smelter with a restart costing millions of dollars. "The implications of sending contaminated coke . . . would have been devastating. . . . It threatened the very viability of the company."

During the second week of October, the Gramercy plant began a scheduled "turnaround," when all production ceased and major maintenance was performed on all production equipment. On October 16 the trunnions that had been overheating and squealing were inspected. When the seals were removed, coke was discovered in two of the trunnions. Coke was also discovered in the screw conveyor gearbox that had ceased to operate and been replaced on September 6. The trunnions and the gearbox are sealed units. The coke discovered inside these pieces of equipment had to have been intentionally introduced through their oil filler tubes. Since the gearbox had ceased to operate on September 6 and the trunnions had been overheating for several weeks, the coke had to have been introduced into these pieces of equipment at some unknown time well prior to the lockout. Replacement of the two trunnions and trunnion bearings cost \$20,627.

Following the discovery of coke in the trunnions, Detective Landry interviewed 22 employees in October and November in an effort to find out who was responsible. The individual or individuals responsible were not identified. Investigator Frazier testified that discovery of coke in the trunnions and gearbox

precluded narrowing the list of suspects; rather, it expanded the list. Frazier's report of November 19 reflects that an employee, not one of the four on the nightshift, denied responsibility for the coke in the trunnions but refused to take a polygraph. He initially told Frazier that the Union had advised him not to take the polygraph. He then retracted this. Frazier's report of January 7, 1998, reflects that a clerical employee reported overhearing that, if Frazier was looking at the four nightshift employees in relation to the coke in the trunnions, he was "looking at the wrong people."

On December 4 Frazier and Landry briefed Sheriff Willie Martin of the status of the investigation. Their report implicates three of the employees on the nightshift. The employee not implicated quit his employment at some point (the record does not establish the date) during the lockout. The sheriff stated that he would report the matter to the district attorney.

On January 7, 1998, the district attorney stated to Sheriff Martin and Investigator Frazier that he intended to "break the case" by taking it before a grand jury.

On January 14, 1998, Respondent and the Union met at the request of the mediator who had become involved in the contractual negotiations prior to the expiration of the contract. Although the purpose of the meeting was to address contractual issues, Pepitone raised the lockout, stating that he was not convinced that union members were responsible for the contamination, and even if they were, it would not have been all of them. Tonti stated his belief that at least "some" of the unit members were responsible. Pepitone questioned why, if the Company thought it happened on a particular shift, the Company did not fire those employees. Tonti replied that Respondent had to protect the facility and that the sabotage consisted of more than the contaminated coke.

On February 19, 1998, the district attorney presented witnesses to a grand jury. No indictment was returned. The testimony, or lack thereof, is not public. Following the hearing, Frazier heard the district attorney state that he believed the Respondent's ability to continue the lockout had improved since no one could doubt that a crime had been committed, that union employees committed the crime, but that "others would not testify about it."

Shortly after the grand jury proceeding, Sheets called Wilson to set up a private meeting. They were finally able to meet on April 9, 1998. Sheets flew to Birmingham, Alabama, for the meeting. At the meeting, Sheet expressed his desire to end the lockout and his concern for the safety of the plant. Wilson acknowledged that the lockout had been justified at the outset but stated that it had gone on too long. He suggested that Respondent terminate the four employees on the nightshift who had not been forthcoming with any information. Sheets responded that he had thought of that, but that Wilson was effectively asking him "to reach a conclusion that an experienced sheriff had not been able to reach and that an experienced DA and a grand jury had not been able to reach, and furthermore, to . . . bet the company on it." Following the meeting, Sheets wrote a memorandum to himself stating "this is about power," that the Union "wants to control us and our employees."

Following the meeting with Wilson, Sheets arranged a meeting with the district attorney. At that meeting, on April 27, 1998, Sheets stated that he knew the district attorney could not violate the confidentiality of a grand jury, but that he would appreciate learning whatever he could "that could resolve this situation." The district attorney did not reveal any specifics

from the grand jury. He did talk with Sheets. As a result of that conversation, Sheets was satisfied that three employees were responsible for the contamination as well as the other acts of sabotage and that he could safely lift the lockout.⁵ Sheets testified to his conversation with the district attorney over the objection of the General Counsel. At that time, I ruled that I was not accepting the testimony for the truth of the report that Sheets purportedly received, rather I was accepting the testimony for the purpose of establishing that Sheets received a report and acted upon it. Consistent with this ruling, I have found that Sheets received information that caused him to be satisfied that three employees were responsible for both the contamination and the other acts of sabotage. In so finding, I am not relying on the truth of the report that Sheets received. *Midland Hilton & Towers*, 324 NLRB 1141 fn. 1 (1997). There is no evidence that the meeting to which Sheets testified did not occur. No party called the district attorney to testify to the content of the report. In the absence of such testimony, I credit the uncontradicted evidence that Sheets received a report and, following receipt of that report, took action to lift the lockout.

On May 1, Respondent met with the Union to discuss ending the lockout. Ron Gabarino, who had become vice president of operations, stated that three employees would not be recalled, that since only 24 employees were being recalled, work on the dock would be performed by a subcontractor, and that, because new equipment had been installed, Respondent would schedule 1 day of retraining. Pepitone stated that if union members came in contact with subcontractor employees, they would be abusive, noting that union members would be wearing shirts stating, "Scabs Suck." The Union demanded a 100-percent recall, restitution, and payment for travel time to the training. Gabarino reiterated that three employees would not be recalled, and stated that there would be no restitution since the Respondent considered the lockout to be legal. He then asked whether the Union would tell the employees not to attend the training if Respondent did not agree to pay for travel time. Pepitone responded that he would not tell the employees not to attend, but would tell them that they did not have to be attentive, if they wanted to take a nap, "it's okay." Gabarino inquired about assuring a safe environment. Pepitone responded that the Union could not "guarantee anything."

After receiving a report of that meeting, Sheets called Wilson on May 6. Sheets testified that his relations with Wilson had always been "quite cordial and constructive." Wilson assured Sheets that he would seek to keep a calm environment and "would ensure that Mr. Pepitone and others acted in a way that was more responsible than they were speaking at that meeting." Wilson agreed to call Sheets back the following day, but did not do so. On May 8 Sheets sent a letter by facsimile to Wilson inviting him to call, even over the weekend at his home. Thereafter, they spoke by telephone three or four times. Sheets understood that Wilson actually came to Louisiana and met with the local union leadership. On May 12 Respondent decided to end the lockout. The critical factors, according to Sheets, were the information he received from the district attorney and the commitment that Wilson made to keep a calm environment and enable Respondent to operate securely. Sheets

⁵ Contrary to statements in the briefs of the General Counsel and the Union, there was no contention that the district attorney revealed "new evidence." Sheets clearly stated that the report he received constituted "new information."

specifically denied that the issuance of the complaint on May 11 affected his decision. I credit this testimony.

Pepitone did not deny the statements attributed to him at the May 1 meeting. Those statements confirm that Respondent's initial concerns with locking out only part of the bargaining unit at Gramercy and assigning that work to subcontractors were well-founded. Wilson did not testify. The district attorney did not testify.

Lonnie Trent Sanford, Respondent's chief financial officer, prepared documents for this litigation reflecting the costs incurred by Respondent in operating during the lockout. Those documents reflect that labor costs for overtime for salaried personnel and firms hired to provide labor exceeded what would have been incurred in normal operations by over \$700,000. The cost of additional security also exceeded \$700,000.

2. Analysis and concluding findings

In *NLRB v. Great Dane Trailers*, 388 U.S. 26 (1967), the Court held that there are actions that an employer may take that are so inherently destructive of employee rights that a showing of anti-union animus is not required to establish a violation of the Act. In the instant case, only the employees at the location where the contamination was discovered were locked out, and the lockout occurred only after the employees on the shifts that had been on duty denied responsibility for or knowledge of the contamination. The General Counsel concedes that this case falls under the second category identified in *Great Dane* since not all unit employees were locked out. Although the Union argues that this case is one of inherently destructive conduct, I find otherwise. Thus, I shall analyze this case pursuant to the second category of case identified in *Great Dane*, cases in which the impact upon employee rights is "comparatively slight." The analysis applicable in these situations requires a determination of whether "the Respondent possessed a legitimate and substantial business justification for the lockout." *Central Illinois Public Service Co.*, 326 NLRB 928 (1999). In *Central Illinois*, the Board held that the respondent did have such a justification, even though the "inside game" activities of the union were a protected economic weapon. The instant case involved sabotage, an unprotected activity. If contaminated coal had been shipped, the potential damage that could be caused to an aluminum smelter would threaten the existence of Respondent. Although the Union disavowed violence or sabotage, Wilson, on April 9, 1998, conceded that the lockout had been justified, but that it had lasted too long. Respondent's preliminary investigation disclosed that whatever occurred had to have occurred with either the knowledge or complicity of unit employees on the night shift. No supervisor was present on the night shift, and the employees on duty did not attribute the contamination to a supervisor. Since those employees denied responsibility or knowledge and no supervisor was implicated, Respondent had a legitimate and substantial business justification for locking out all the bargaining unit employees.

The General Counsel and the Union argue that only the four employees on the night shift should have been locked out from the inception of the lockout because Respondent knew "almost immediately when and by whom the contamination . . . occurred." The record does not support this argument. It was obvious that the four employees were the prime suspects. Plant Manager Holmes stated this to Fleming, and CEO Sheets stated this to Wilson and Pepitone. Each of the four night-shift employees had denied any knowledge of, or involvement in, the green coke incident when interviewed in the presence of their shop steward. There was no evidence establishing their actual involvement in the incident. As-

suming they were truthfully denying involvement in the incident, but lying to protect the actual perpetrators, locking out only the four risked returning the actual perpetrators to the scene. I find that Respondent had a legitimate and substantial business justification for locking out all Gramercy employees.

Respondent's legitimate and substantial business justification for locking out all Gramercy employees continued until late April when CEO Sheets received new information that convinced him that he would not be jeopardizing the safety of the company if he lifted the lockout. His willingness to lift the lockout at that time was thwarted by the Union's demand that he not refuse to recall the three night-shift employees coupled with a demand for restitution, threats to be abusive and to wear provocative shirts, and inability to "guarantee anything."

The General Counsel and the Union argue that, even if a lockout of all employees was initially justified, it ceased to be justified in December when Frazier and Landry reported the results of their investigation up to that point to the sheriff. That report implicates three of the employees on the night shift. If, at that time, the only sabotage discovered had been the contamination in dome 1, it might be debatable as to whether continuation of the lockout of all employees at Gramercy was justified. This argument, however, does not take into account the introduction of coke into the trunnions and gearbox which occurred prior to the lockout but was not discovered until October. This sabotage caused Frazier's list of suspects to become longer. His case summary identifies only one of the nightshift employees as a prime suspect with regard to the coke in the trunnions, and it specifically identifies another employee, not on the nightshift, as a prime suspect. Notwithstanding the identification of these two employees as suspects, the report contains no evidence establishing their responsibility, only suspicion.⁶ As late as January 7, 1998, Investigator Frazier received a hearsay report that, if he was looking at the four night-shift employees in relation to the coke in the trunnions, he was "looking at the wrong people." Despite the foregoing, the General Counsel and the Union argue that Respondent had enough information to be assured that the plant could be operated safely. The record does not support this contention. Respondent did not know how many employees were perpetrators.

The General Counsel and the Union argue that continuation of the lockout after December was not justified and, using 20/20 hindsight, they point out that no new evidence came to light. Although the statement that no new evidence came to light is factually correct, the conclusion that continuation of the lockout was unjustified is erroneous. It was not unreasonable for Respondent to believe that the intervention of the district attorney would result in the discovery of new evidence. Respondent had no evidence establishing who had put coke in the trunnions and the sheriff had not made an arrest on the basis of the evidence that he had been presented regarding the contamination in the dome. The sheriff stated that he was going to present the evidence he had been given to the district attorney and, on January 7, 1998, the district attorney stated his intention to "break the case" by taking it before a grand jury. Following the presentation of the case to the grand jury, the district attorney commented that Respondent's ability to continue the lockout had improved since no one could doubt that a crime had been committed, that union employees committed the crime, but that

"others would not testify about it." The General Counsel asserts that this comment suggests that Respondent had communicated a desire to keep the employees locked out. Rather than relating to a desire to continue the lockout, I find that the comment was apropos to Pepitone's comment on January 14, 1998, that no union member was responsible. The grand jury did not indict anyone. At this point, Sheets contacted Wilson and traveled to Birmingham to meet with him. Sheets expressed his desire to end the lockout as well as his unwillingness to "bet the company" on Respondent identifying perpetrators against whom an experienced sheriff did not have enough evidence to justify arrest and whom a grand jury had failed to indict. Wilson offered no solution other than the Union's previously stated position that Respondent should terminate the employees on night shift, one of whom had already quit.

Although the General Counsel and counsel for the Charging Party argue that Respondent could have operated safely if it terminated the nightshift, this argument fails to note that the Union has never conceded that those employees were responsible. At the hearing, Pepitone and Fleming both denied knowing who was responsible for the contamination of dome 1. So far as the record shows, the Union never questioned its members regarding who was responsible. At no time did it implicate any member. Although the Union urged Respondent to take action on its suspicions, when action was taken against the three remaining night-shift employees, the Union protested that the action was improper. On May 1 Pepitone objected when Respondent proposed less than a 100-percent recall, and, on May 12, the Union filed grievances on behalf of the three unrecalled employees stating that the action taken against them was unjust.

Counsel for the General Counsel argues that Respondent's unlawful continuation of the lockout is established by the evidence that Respondent lifted the lockout after the complaint issued and without receiving any new information. Contrary to counsel's argument that the record is "devoid of evidence" of new information, I have credited Sheets' testimony that he received new information from the district attorney. That information caused him to be satisfied that three employees were responsible for all of the sabotage. That report and the commitment that Wilson made to keep a calm environment permitted Respondent to lift the lockout. There is no probative evidence that the issuance of the complaint on May 11 played any part in Respondent's decision. Respondent had met with the Union on May 1, 10 days before the complaint issued, to discuss ending the lockout. Following the Union's unsatisfactory response, Sheets called Wilson who assured that he would act to keep a calm environment and ensure responsible action by local union officials.

There is no probative evidence establishing antiunion motivation on the part of the Respondent. Although the General Counsel argues that the Gramercy employees were more active in their support of the Union's bargaining position than employees at other facilities, there is no evidence of any interference with those activities or retaliation against any employee who engaged in them. No employee was disciplined for the walkout on July 1, which related to treatment of an employee, not contractual demands. The Union argues that Frazier's investigative notes reflect that the Gramercy and Norco employees were obstacles to contract ratification, and that Respondent's continuation of the lockout "can only be explained by a desire to injure the Union." This argument ignores Respondent's implementation of the contract on September 22. Respondent was operating on the terms it wanted. The General

⁶ Neither the General Counsel nor the Union, in their briefs, acknowledge that an employee not on the nightshift was identified as a prime suspect regarding coke in the trunnions and gearbox.

Counsel argues that the letter to Wilson on September 30 reveals animus. I do not agree. The letter apprised Wilson of the contamination and the contemporaneous discovery of a note that rhetorically referred to loss of Respondent's I.S.O. registration. The note was signed by Shop Steward Tim Miller and another employee. I can draw no inference of animus from Sheets stating, in view of what had occurred, that Respondent was "watching for action demonstrating that the USWA neither has orchestrated nor condones these actions." Cf. *Caterpillar, Inc.*, 322 NLRB 674 (1996), in which the union did orchestrate a "work-to-rule" campaign. I infer no animus from Sheets' notes following his meeting with Wilson on April 9, 1998, which state that "this is about power" and that the Union "wants to control us and our employees." The word "power" certainly does not imply animus; Section 1 of the Act refers to "inequality of bargaining power." The request that Sheets lift the lockout and reinstate all but the night-shift employees reflected the resolution the Union wanted. Sheets refused to give up control, responding that he was unwilling to "bet the company" on doing what Wilson asked. Sheets' testimony that his dealings with Wilson were "cordial and constructive" is uncontradicted and corroborated by Wilson's intervention in May. The lockout cost Respondent more than \$1 million. I credit Sheets' testimony that the idea that he would spend more than a million dollars "for some cause other than the success of the business is ridiculous." Respondent had a legitimate and substantial business justification for the action that it took. There is no probative evidence establishing an antiunion motivation behind Respondent's actions.

C. The Additional Allegations

1. OPME program

a. Facts

Pursuant to an agreement in 1991, the parties jointly developed and agreed upon an incentive program called the Operations Performance and Market Economics Program (OPME). Section II of the program relates to the performance factor, which is defined as "Percentages attained for each of the Performance Criteria times the weighting factor." Section II,C,1, provides that performance criteria and/or their respective ranges are subject to change prior to the commencement of an OPME Period. (OPME Periods are 3-month periods beginning in January, April, July, and October, respectively.) Section II,C,2, states: "Management will establish Performance Criteria and their respective ranges." Respondent, on at least two occasions, in 1995 and by telephone on August 20, 1996, consulted the Union prior to establishing new performance criteria. A memorandum dated May 15, 1995, from Tonti to Pepitone expresses appreciation for the Union's support of changes which "[w]e hope to implement . . . toward the end of the 3rd quarter." Notwithstanding these occasions, there were other times that Respondent acted without consultation. The Union filed a grievance that was referred to step 2 on June 4, 1996 stating, *inter alia*, "All changes in the OPME program have been unilateral. The Union concerns have always fallen upon uncaring management." The grievance does not assert a violation of the OPME agreement; it requests access to company books or restoration of COLA. On June 30 prior to the OPME period beginning in July, Respondent issued a memorandum that cited the damage discovered at Norco and Gramercy in May and June and introduced a new performance criterion of damage to any facility due to gross negligence or willful misconduct. On

December 29 recordable injuries were deleted as a criterion, and adjustments were made to several ranges. There was no notice to or consultation with the Union prior to implementing these changes in the performance criteria.

b. Analysis and concluding findings

The complaint alleges that the foregoing unilateral changes violated Section 8(a)(3) and (5) of the Act. The General Counsel argues that the language in section II,C,2, must be evaluated in view of the evidence that Respondent discussed proposed changes to the OPME program with the Union in 1995 and 1996. Citing *Register-Guard*, 301 NLRB 494 (1991), and *Johnson-Bateman Co.*, 295 NLRB 180 (1989), the General Counsel argues that the contractual provision does not establish a "clear and unmistakable" waiver. I disagree. A waiver will not be inferred from a contract clause "couched in general terms." *Register-Guard*, *supra* at 495. The provision at issue here is not couched in general terms. It states unequivocally: "Management will establish Performance Criteria and their respective ranges." There is no evidence that only agreed on changes were implemented, and it is undisputed that Respondent did not always consult the Union prior to making changes. The May 15, 1995 memorandum simply thanks the Union for its support and states Respondent's intention to implement, in the third quarter, the change that was "discussed." Contrary to the Union's argument that the 1996 grievance confirms that the Union never waived its right to bargain about changes, I find the grievance establishes that Respondent historically exercised its unilateral right to set performance criteria. The grievance does not assert a violation of the OPME agreement. I shall recommend that this allegation be dismissed.

2. Health insurance

a. Facts

Respondent is self-insured up to \$35,000 per employee for insurance claims. Claims in excess of \$35,000 are paid pursuant to a "stop loss" policy that Respondent carries with Canada Life. Respondent contracts with Blue Cross/Blue Shield to administer its health insurance pursuant to a benefit policy. That policy provides benefits for employees "actively at work." On November 7 Canada Life advised Respondent's local insurance broker that it would continue stop-loss insurance for "the earlier of three months or until such time as a decision is made regarding" the status of the locked out employees. On November 25 Respondent's insurance broker sent a letter to Respondent's compensation administrator, Melody Cortez, in which she advised that "it would be in CII's best interest to revisit the current plan's policies and provisions" due to the "actively at work" clause, noting that continuation of coverage could result in "potential liability." Respondent did so, and on November 28, advised the locked out employees that Respondent would no longer pay the premiums for their insurance. There was no notice to or bargaining with the Union concerning the cessation of benefits.

b. Analysis and concluding findings

There is no evidence regarding why the broker, on November 25, cautioned Respondent regarding potential liability. The General Counsel adduced no evidence establishing that the letter was written at the behest of Respondent. There is no evidence that the tardy consideration of the "actively at work" clause by the broker was other than an oversight. That clause confirms that insurance was a benefit dependent upon the performance of work. In strike situations, the Board draws a dis-

inction between benefits dependent on the performance of services, which can be withheld, and accrued benefits, which cannot be withheld. *Texaco, Inc.*, 285 NLRB 241, 245 (1987). In *Goldsmith Motors Corp.*, 310 NLRB 1279, 1285 (1993), the employer locked out its employees and paid wages lower than the contractual rate to the temporary replacement workers it hired, an action it would have been privileged to take if there had been a strike. The Board held that it “could discern no meaningful reason” that the strike situation and lockout situation should be treated differently. *Ibid.* I find no precedent justifying different treatment of benefits that are dependent on the performance of services in strike or lockout situations. See *Sargent-Welch Scientific Co.*, 208 NLRB 811, 821 (1974). I shall, therefore, recommend that this allegation be dismissed.

3. Subcontracting

From shortly after the inception of the lockout until it ended, Respondent hired a local contractor, Johnston’s of Chalmette, to perform work formerly performed by its unit employees. The contract with Johnston’s was an “open contract” to provide the labor that Respondent needed to operate. Contrary to statements in the Union’s brief, there is no evidence that the subcontracting was permanent. The General Counsel adduced no evidence that this arrangement was permanent and argues only that the subcontracting was illegal because the lockout was illegal. During a lawful lockout, an employer is privileged to use temporary replacements. *Harter Equipment*, 280 NLRB 597 (1986). When Respondent advised the Union of its intent to lift the lockout, it informed the Union that, since there were only 24 employees returning, it would have the work on the dock performed by Johnston’s. The implemented terms of Respondent’s contract proposal provide that Respondent may subcontract “so long as no bargaining unit employee at that location is laid off as a direct result of the contracting out.” Since the subcontracting was permitted by the implemented terms, I find no basis for finding any violation of the Act. I shall recommend that the allegation relating to subcontracting be dismissed.

4. Failure to arbitrate grievances

a. Facts

Between April 30, 1998, and June 5, 1998, the Union appealed a total of seven grievances to arbitration, including the grievances filed on behalf of the three employees not recalled at Gramercy. Respondent, by letter dated June 18, 1998, acknowledged receipt of these seven appeals and refused to arbitrate stating that the actions underlying the grievances occurred after expiration of the prior contract. Thereafter, the Union filed an additional 14 appeals to arbitration which Respondent denied for the same reason on July 12, 1999. At a meeting on January 14, 1998, Laiche, referring to job actions (strikes) stated, “There has been no action at the other plants.” He did not state that there would be none. The Union has

not disavowed its right to strike. It is undisputed that the Union has not agreed to the terms of the final proposal that Respondent implemented on September 22. The Union never signed Respondent’s proposed contract.

b. Analysis and concluding findings

Notwithstanding the Union’s refusal to enter the contract, the complaint alleges that Respondent has violated Section 8(a)(5) of the Act by failing to arbitrate grievances. The General Counsel and the Union argue that the Union, by submitting grievances for arbitration, effectively accepted this provision of the proposed collective-bargaining agreement and created an interim agreement to arbitrate. Thus, it is argued, by refusing to do so, Respondent deviated from the terms of its implemented final offer. This specific argument has been rejected by the Board. *McKesson Drug Co.*, 291 NLRB 747, 753 (1988). The grievance procedure in the implemented terms provides that the term grievance “shall mean any dispute or request or violation which involves the interpretation, application of, or compliance with, the provisions of the contract.” In this case, as in *McKesson*, “[T]he Union never entered into such a contract so neither the Union’s no-strike agreement nor [the Respondent’s] arbitration agreement ever became viable.” *Id.* at 754. *Loral Defense Systems-Akron*, 320 NLRB 755 (1996), cited by the General Counsel and the Union is inapposite. In *Loral*, the respondent notified the union that it would enforce the no-strike agreement and had contended, “in other cases,” that the arbitration provision was in effect. Thereafter, respondent refused “to submit certain grievances to arbitration.” *Id.* at 759. In the instant case, Respondent has consistently refused to submit any grievance to arbitration and has never contended that the arbitration provision was in effect or that it would enforce the no-strike clause. The Union has not disavowed its right to strike. In this case, as in *McKesson*, there is no viable contract, and I shall recommend that this allegation be dismissed.

CONCLUSIONS OF LAW

The Respondent has not engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1), (3), and (5) and Section 2(6) and (7) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁷

ORDER

The complaint is dismissed.

⁷ If no exceptions are filed as provided by Sec. 102.46 of the Board’s Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.