

**Midwest Generation, EME, LLC and International Brotherhood of Electrical Workers, Local 15, AFL-CIO.** Case 13-CA-39643-1

March 17, 2008

SUPPLEMENTAL DECISION AND ORDER

BY MEMBERS LIEBMAN AND SCHAUMBER

On September 30, 2004, the National Labor Relations Board issued its Decision and Order in this proceeding finding, by a 2-1 panel vote, that the Respondent, Midwest Generation, EME, LLC, did not violate Section 8(a)(3) and (1) of the Act by implementing a partial lockout of bargaining unit employees during the parties' negotiations for a successor collective-bargaining agreement.<sup>1</sup> The Union, International Brotherhood of Electrical Workers, Local 15, AFL-CIO, petitioned the United States Court of Appeals for the Seventh Circuit for review of the Board's Order.

On October 31, 2005, the court granted the petition for review, reversed the findings of the Board, and remanded the case to the Board with instructions to find that the partial lockout was an unfair labor practice.<sup>2</sup> The court further directed the Board to consider whether that unfair labor practice coerced the Union and its members into ratifying the Respondent's contract offer, thereby voiding the collective-bargaining agreement reached by the parties.<sup>3</sup>

By letter dated January 12, 2007, the Board notified the parties that it had decided to accept the court's remand and invited them to file statements of position with respect to the issues raised by the court's opinion. The Respondent, the General Counsel, and the Union each filed a statement of position. The Respondent filed an answering brief to the statements of position filed by the General Counsel and the Union. The Union filed an answering brief to the Respondent's statement of position, and the Respondent filed a reply brief.

We accept the court's remand as the law of the case.<sup>4</sup> Accordingly, as instructed by the court, we find that the Respondent's partial lockout violated Section 8(a)(3) and (1) of the Act. As discussed below, we further find it

<sup>1</sup> 343 NLRB 69 (2004).

<sup>2</sup> *Electrical Workers Local 15 v. NLRB*, 429 F.3d 651, 662 (7th Cir. 2005), cert. denied 127 S.Ct. 42 (2006).

<sup>3</sup> Id.

<sup>4</sup> Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Members Liebman and Schaumber constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act.

appropriate to remand to an administrative law judge the issues of whether that unfair labor practice coerced the Union and its members into ratifying the Respondent's contract offer, thereby voiding the parties' collective-bargaining agreement, and whether other remedial relief is appropriate.<sup>5</sup>

Factual Background

The Union commenced an economic strike against the Respondent on June 28, 2001,<sup>6</sup> following unsuccessful negotiations with the Respondent for a successor collective-bargaining agreement. On August 31, the Union notified the Respondent that it was terminating the strike, and made an unconditional offer to return to work on behalf of all strikers.

On September 6, the Respondent declined the Union's offer to return to work and instituted a lockout. The Respondent, however, locked out only those employees who remained on strike when the strike ended. The Respondent did not lock out employees who refrained from participating in the strike or who initially participated in the strike but later abandoned it.

During the lockout, the Respondent and the Union continued to meet and negotiate for a new contract. On October 16, after the Union accepted the Respondent's then-pending offer, the union membership voted to ratify that agreement. The parties then executed a collective-bargaining agreement, effective October 22, 2001, through December 31, 2005.

Prior to the ratification, however, the Union informed the Respondent that, in its view, if the Board later found that the Respondent had committed an unfair labor practice during the lockout, the contract would be "void because the Company's unfair labor practice[s] . . . coerced the employees into accepting it," and that "[n]othing the Union or its representatives say or do should be interpreted as a waiver of this position." See *Electrical Workers Local 15*, supra, 429 F.3d at 655.

The Respondent ended the lockout on October 22. Commencing on that date, all formerly locked-out employees who chose to do so returned to work. Four years later, following the expiration of the parties' collective-bargaining agreement on December 31, 2005, the parties reached agreement on a successor collective-bargaining

<sup>5</sup> On January 28, 2008, the Union and the General Counsel filed a joint motion to sever claims. On February 19, 2008, the Respondent filed a response to the motion. The joint motion requests that the Board sever the issue of appropriate remedial relief for the unlawful partial lockout from the issue of whether the parties' collective-bargaining agreement should be voided. We deny the joint motion as moot, in light of our decision here.

<sup>6</sup> All dates are in 2001, unless otherwise noted.

agreement, effective March 6, 2006, through December 31, 2009.

#### The Board's Decision on Remand

As stated, we have found that the Respondent's partial lockout was unlawful. We have carefully considered the court's further directive that we determine whether the unlawful partial lockout coerced the Union and its members into ratifying the Respondent's contract offer, thereby voiding the parties' 2001–2005 collective-bargaining agreement. We observe, however, that the parties initially submitted this case to the Board on a stipulation of facts, and the stipulation appears not to fully address that issue. Indeed, both the Respondent and the Union have sought to adduce additional evidence in their postremand briefs to the Board, and the parties have filed cross-motions to strike much of that evidence as being outside the stipulation of facts.<sup>7</sup> We find it appropriate in these circumstances to remand this issue to an administrative law judge to reopen the record. The parties may then present evidence concerning the issue of whether the Respondent's unlawful partial lockout coerced the Union and its members into ratifying the Respondent's contract offer.

The Union also asserts that the Board should void the parties' 2006–2009 collective-bargaining agreement because the Respondent's unlawful partial lockout coerced the Union and its members into agreeing to that contract as well. Nothing in any Board proceeding or the court's decision, which predates the 2006–2009 agreement, addresses that issue; nor has any unfair labor practice charge alleged such coercion. Accordingly, without passing on the viability of the Union's assertion, our remand to the administrative law judge will permit the parties to present argument and evidence on whether voiding of the 2006–2009 agreement is within the Board's remedial authority and, if so, whether it is an appropriate remedy in the circumstances of this case. The judge shall make findings and recommendations on this issue, subject ultimately to Board review.

Having found that the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act, we shall order it to cease and desist from engaging in such conduct, and post an appropriate notice. We shall also order the Respondent to take certain affirmative action designed to effectuate the policies of the Act.

<sup>7</sup> The Respondent filed a motion to strike portions of the Union's statement of position. The Union filed a reply and a motion to strike portions of the respondent's statement of position. Consistent with this decision, we deny both motions as moot.

#### REMEDY

To remedy the Respondent's unlawful lockout of its employees from September 6 to October 22, the Respondent will be required to make those employees whole for any loss of pay and other benefits incurred by them as a result of the lockout, with the amounts owed to be determined in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest on such amounts to be computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987). See *Schenk Packing Co.*, 301 NLRB 487, 492 (1991).<sup>8</sup>

#### ORDER

The National Labor Relations Board orders that the Respondent, Midwest Generation, EME, LLC, Chicago, Illinois, its officers, agents, successors, and assigns, shall

##### 1. Cease and desist from

(a) Discouraging membership in the Union by discriminatorily locking out only employees who participated in the Union's strike for its full duration, while not locking out employees who refrained from participating in the strike or those employees who initially participated in the strike but then abandoned it.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

##### 2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make whole those employees who were unlawfully locked out from September 6 to October 22, 2001, for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of this decision.

(b) Within 14 days from the date of this Order, remove from its files any reference to its unlawful lockout of those employees, and within 3 days thereafter notify the employees in writing that this has been done and that the unlawful lockout will not be used against them in any way.

<sup>8</sup> The Respondent argues that make-whole relief is not appropriate in this case. We find no basis here for departing from the Board's usual remedy for an unlawful lockout: to make employees whole for any loss of earnings and other benefits suffered as a result of being unlawfully locked out. See, e.g., *Bunting Bearings Corp.*, 349 NLRB 1070, 1073 (2007); *Allen Storage & Moving Co.*, 342 NLRB 501, 504, 519 (2004); *Schenk Packing Co.*, supra, 301 NLRB at 492.

We also find no merit to the Union's contention that make-whole relief should commence on August 31, the date the Union ended the strike and made an unconditional offer to return to work. Make-whole relief customarily encompasses the duration of the unlawful lockout. See, e.g., *Bunting Bearings Corp.*, supra at 1073, 1075; *Schenk Packing Co.*, supra at 492. There has been no finding in this proceeding that the Respondent's waiting until September 6 to implement the lockout was unlawful. For this reason, we have provided that the backpay period shall begin on September 6.

(c) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its office in Chicago, Illinois, and its other facilities located in the State of Illinois where bargaining unit employees are employed, copies of the attached notice marked "Appendix."<sup>9</sup> Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facilities involved in these proceedings, it shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 6, 2001.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that this proceeding is remanded for further appropriate action as set forth above. Because this proceeding was initially adjudicated by the Board upon a stipulation of facts, we shall remand this proceeding to the chief administrative law judge for assignment.

IT IS FURTHER ORDERED that the judge to whom the case is assigned shall afford the parties an opportunity to present evidence on the remanded issues and shall pre-

<sup>9</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

pare a supplemental decision setting forth credibility resolutions, findings of fact, conclusions of law, and a recommended Order. Copies of the supplemental decision shall be served on all parties, after which the provisions of Section 102.46 of the Board's Rules and Regulations shall be applicable.

#### APPENDIX

NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD  
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

#### FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT discourage membership in the Union by discriminatorily locking out only employees who participated in the Union's strike for its full duration, while not locking out employees who refrained from participating in the strike or those employees who initially participated in the strike but then abandoned it.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights set forth above.

WE WILL make whole those employees who were unlawfully locked out from September 6 to October 22, 2001, for any loss of earnings and other benefits suffered as a result of the discrimination against them, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to our unlawful lockout of those employees, and WE WILL, within 3 days thereafter, notify each employee in writing that this has been done and that the unlawful lockout will not be used against them in any way.

MIDWEST GENERATION, EME, LLC