TOWN OF BRAINTREE AND UTILITY WORKERS OF AMERICA, LOCAL 466, MUP-4337 (2/10/82).

(10 Definitions)
16.3 lockout
(100 Impasse)
108.4 setting requirements under Chapter 150E, Section 9
108.7 lockout

Commissioners participating:

Phillips Axten, Chairman
Joan G. Dolan, Commissioner
Gary D. Altman, Commissioner

Appearances:

Gabriel O. Dumont, Jr. - Counsel for Utility Workers of America, Local 466

Andrew L. Eisenberg - Counsel for Town of Braintree

DECISION

Statement of the Case

This case concerns the issue of whether the Town of Braintree committed a prohibited practice by preventing its employees from working for two days following an illegal work stoppage.

On May 1, 1981 the Utility Workers of America, Local 466 (Union) filed a charge with the Labor Relations Commission (Commission) alleging that the Town of Braintree (Town or Employer) had engaged in prohibited practices within the meaning of Sections 10(a)(1), (3), (4), and (5) of General Laws Chapter 150E (the Law) by locking out employees of the Braintree Water and Sewer Departments. After a preliminary investigation, the Commission issued a complaint of prohibited practice on May 15, 1981 alleging that the Town had locked out employees in violation of Sections 10(a)(1) and (5) of the Law. The Section 10(a)(3) and (4) charges were dismissed.

Formal hearings took place on June 29 and August 13, 1981 before Hearing Officer Robert M. Schwartz. All parties had full opportunity to be heard, to examine and cross-examine witnesses, and to submit evidence. Both parties submitted briefs, which we have considered together with the rest of the record. Based on the record we conclude that the Town's actions did not constitute a violation of Section 10(a)(1) or (5) of the Law.

Jurisdictional Findings

The Town of Braintree is a public employer within the meaning of Section 1 of the Law. The Union is an employee organization within the meaning of Section 1 of the Law and represents certain employees in the Braintree Water and Sewer Departments for the purpose of collective bargaining.

Town of Braintree and Utility Workers of America, Local 466, 8 MLC 1825

Findings of Fact

Local 466 represents blue collar workers in the Waste Disposal and Water Departments in the Town of Braintree. The most recent collective bargaining agreement between the parties expired on June 30, 1980. At the time of the hearing in this case, the parties had been negotiating for at least one and a half years for a successor agreement.

On the night of April 28, 1981,[1] without giving the Town any prior notice, all employees on the 11:00 p.m. shift at the Town incinerator called in sick. The purpose of this work stoppage was to protest delays in contract negotiations. Off-shift employees who were called refused to fill in. Consequently, management operated the incinerator during the shift. Similarly, in the Water Department employees scheduled to work the midnight to 8:00 a.m. shift called in sick and replacements refused to come in.

The morning shifts in both departments also failed to report to work. Picket lines were set up and both facilities were run by management personnel for the remainder of the day. The Union does not dispute that this work stoppage violated Section 9A(a) of the Law.[2] Several incidents of vandalism occurred at the Water Department during the work stoppage. Three locks were tampered with or gummed-up. The tires of an Assistant Superintendent's car were slashed. The Town replaced the locks which had been tampered with, put new locks on certain gates to protect equipment, and had police stationed at the picketing locations.

Early in the morning of April 29, the general manager of the Waste Disposal Department, Edward Courchene, called the Town's consultant on incinerator operations, Charles M. Geilich, to notify him of the work stoppage. Geilich had served as consultant for several years and had authority to make decisions relating to the major users of the incinerator, including the City of Boston. Geilich began making arrangements with other processors to handle the refuse normally burned in Braintree. In order to get commitments from alternative facilities and long distance haulers, Geilich had to bind the Town to the alternative arrangements for at least one week.

During the morning of April 29, Joseph D. Cleggett, a Braintree selectman, had several conversations with picketers. Cleggett is the liaison with the Waste Department, and he is also a Water Commissioner. When Cleggett was told that the strike concerned contract negotiations, he informed the strikers that on the evening of April 28 the Selectmen had authorized the Personnel Board, which was conducting negotiations for the Town, to make a new contract offer.

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[1] Unless noted otherwise, all dates refer to 1981.

[2] Section 9A(a) reads:

> No public employee or employee organization shall engage in a strike, and no public employee or employee organization shall induce, encourage or condone any strike, work stoppage, slowdown, or withholding of services by such public employees.

Also during the morning of April 29th the national representative of the Union, Daniel F. Madden, came on the scene. He was informed of the Selectmen's decision to make a new offer. Madden agreed to address the offer at a bargaining session on May 7. Madden met with the employees at 3:00 p.m. By consensus at this meeting the employees decided to return to work on the night shifts. Town officials had no knowledge of this meeting and up to this point had received no assurances as to when the work stoppage would end. Cleggett returned to the picket line at approximately 5:30 p.m. but was not told of the Union meeting or the decision to return to work.

The Union decision to return to work was communicated to the Town at approximately 6:15 p.m. Union officers and Madden informed the Superintendent of the Water Department, William Ewing, that "the strike was over" and the employees on the midnight shift would be reporting. Ewing called Cleggett who called the Chairman of the Water Commissioners, a Mr. Cusack. Cleggett and Cusack discussed the situation and decided that the men would not be allowed to return that night. Cleggett testified that the decision was based on uncertainty as to whether the men would really return and concern over the vandalism that had taken place at the Water Department. At this point Cleggett and Cusack were unaware that the decision to return was made at a Union meeting. Cleggett advised Ewing to refuse admission to employees who showed up for the midnight to 8:00 a.m. and 8:00 a.m. to 4:00 p.m. shifts.

With regard to the incinerator, during the day on April 29 the Selectmen decided that employees would not be permitted to return until the Selectmen had an opportunity to confer with the Town counsel, who was away. During the evening of the 28th the Union informed the Town that the employees would be returning on the 11:00 p.m. to 7:00 a.m. shift. At this point Cleggett polled the Selectmen by phone and a vote was taken not to allow the employees to return until further notice.

On Thursday, April 30, Town officials met to discuss the situation. They affirmed their decision not to permit employees to return. That day and on Friday, May 1, the two departments were operated by management personnel. The incinerator was run on a limited basis because of the lack of Boston refuse. Also on Friday, May 1, the Town suspended all the striking employees for one week for their participation in an illegal work stoppage. The suspension began on Monday, May 4, and continued through Sunday, May 10. At no time during the Union's job action did the Town resort to the Commission's processes for relief.

Further Background Facts

The Town established the following background facts to explain its decision to prohibit employees from working on April 30 and May 1.

A. The Waste Disposal Plant

The Braintree incinerator has been in operation since at least 1971. Around 1972 a large sum of money was invested to put in air quality machinery required by the federal government. For several years the incinerator ran significantly in the red, losing approximately one million dollars a year. In 1978 the Town hired

Charles Geilich as a consultant to increase incinerator revenue. Geilich's main contribution was to secure a $450,000 contract with the City of Boston for refuse disposal. This contract supplies approximately 50% of the revenue produced by the incinerator. Despite the Boston contract, the incinerator's financial health remains precarious and the facility operates at a loss.

Reliability was a crucial factor in securing and maintaining the Boston contract. Failure to take refuse as promised would jeopardize the contract. On two occasions within the past two years labor disputes threatened operations at the incinerator. In June of 1980 a work stoppage prevented burning Boston trash for three days. Alternate arrangements were found in the town of Bridgewater. In February 1981 a temporary work stoppage also threatened operations but management personnel were able to maintain burning.

On April 29 Geilich made arrangements for diverting Boston trash for a one week period because the volume of refuse (150 tons) required significant commitments of vehicles and personnel by alternative haulers and burners.

B. The Water Department

The Water Department is the sole provider of Braintree's water for industrial and domestic use and fire protection. Due to the age and size of the water mains connecting the Town to neighboring towns, no viable alternative source of water exists. The Water Department has experienced employee vandalism as well as the above-mentioned work stoppages. In June 1980 the Town installed timeclocks in the Water Department. The Union filed a grievance over this action. The clocks were then destroyed by vandalism.

Opinion

The Union argues that the Town's actions in refusing to allow employees to work on April 30 and May 1 violated Sections 10(a)(1) and (5) of the Law. Specifically, the Union contends that it is mandatory under the provisions of Section 9A(b) for an employer to petition the Commission for an order directing employees to stop striking; in the absence of such a petition, a lockout is illegal. The Union also asserts that the reasons advanced by the Town for locking out its employees are "unpersuasive." Lastly, the Union contends that lockouts are per se violations of Sections 10(a)(1) and (5) of the Law.

In response, the Town argues that the measures taken by it did not constitute a lockout. Furthermore, the Town states, Section 9A(a) does not prohibit lockouts -- especially when their purpose is to preserve essential public services. In addition, the Town contends that its actions were taken to protect its legitimate health, safety and economic interests. Lastly, the Town argues that it could not practically use Section 9A(b) procedures to avert possible dangers from a continued work stoppage.

In the first place we have no problem characterizing the Town's actions as a "lockout." The employees reported for duty, work was available (at least in the Water Department), but the employer refused to permit the employees to come to work.

The employer in its brief urges a more narrow definition of lockout -- "an employer's keeping its employees from working in order to gain a bargaining advantage over them." Such a definition would not be consistent with several National Labor Relations Board (NLRB) decisions using the word lockout to describe employer work refusals which are not designed to coerce employees. For example, the NLRB has used the word lockout when an employer's work refusal was motivated solely to prevent inordinate harm to its property, Duluth Bottling Association, 48 NLRB 1335 (1943) (spoilage of soft drink syrup); Betts Cadillac Olds Incorp., 96 NLRB 268 (1951) (to prevent the stranding of customers' cars). The NLRB has also applied the term to a shut-down following the conclusion of a strike so that the employer can make arrangements necessary to restore a plant to its pre-strike condition. Drug Package Company, 228 MLRB 108 (1978), modified on other grounds sub nom Drug Package Company v. NLRB, 570 F.2d 1340 (8th Cir. (1978). We consider the Town's definition unnecessarily restrictive.

This is our first case considering the legality of lockouts. The NLRB has dealt with the issue on numerous occasions. Under the National Labor Relations Act (NLRA) lockouts, even when used as a coercive weapon, are not per se illegal. Legality depends on whether any provisions of Section 8(a) of the NLRA apply to the facts. A lockout violates Section 8(a)(3) if it is designed to punish employees for engaging in protected activity, Tonkin Corp., 158 NLRB 1223 (1976), enf'd. 352 F.2d 509 (9th Cir. 1968), cert. denied 393 U.S. 838 (1968). Section 8(a)(5) is violated if the purpose of the lockout is to evade the duty to bargain or to force acquiescence to an illegal bargaining position. See, NLRB v. Worcester Division of Borg-Warner Corp., 356 U.S. 342 (1958).

On the other hand, lockouts have been found legal in several situations. The NLRB has held, with judicial approval, that an employer may lock out employees for defensive reasons such as to prevent inordinate harm to business property, goods/or goodwill. Duluth Bottling Association, supra; Betts Cadillac Olds Inc., supra or to respond to "whip-saw" strikes against multi-employer bargaining units, NLRB v. Truck Drivers Local 499 (Buffalo Linen) 353 U.S. 87 (1957). The NLRB originally held that "offensive" lockouts designed to pressure a union into accepting the employer's terms were illegal. This position was overturned by the U.S. Supreme Court in American Ship Building Company v. NLRB, 380 U.S. 300 (1965). The NLRB's present position is that lockouts are illegal only if they are motivated by a desire to punish employees for protected concerted activities, to destroy the union, to evade the duty to bargain, or if "the lockout in all the circumstances was inherently prejudicial to union interests and so devoid of significant economic justification that no specific evidence of intent is required." Darling and Company, 171 NlRB 801, 803 (1968), enf'd 418 F.2d 1208 (D.C. Cir. 1969).

Turning to Chapter 150E, we note initially that the word lockout does not appear in the statute. The Union contends that the Town's action in this case is implicitly prohibited by Section 9A of the Law, the second paragraph of which refers to employees:

> (b) Whenever a strike occurs or is about to occur, the employer shall petition the Commission to make an investigation. If, after investigation, the Commission determines that any provision

> of paragraph (a) of this section has been or is about to be violated, it shall immediately set requirements that must be complied with, including, but not limited to, instituting appropriate proceedings in the Superior Court for the County wherein such violation has occurred or is about to occur for enforcement of such requirements.

The Union contends that this cluase is mandatory, requiring employers to follow statutory procedures in response to all strikes. Failure to do so, the Union argues, violates Section 9A(b) and therefore Sections 10(a)(1) and (5). Cf. Stoneham School Committee, 7 MLC 1412 (1980).

The Town did not file a strike petition with the Commission before it determined to lock out its employees for two days. Nonetheless, we do not read Section 9A(b) to require public employees to petition the Commission as a precondition to the implementation of measures to protect public services threatened by illegal job actions. Commission procedures to resolve strikes are not instantaneous. As long as it acts in good faith, a public employer must be permitted to take emergency actions to prevent public services from being disrupted, including a lockout of employees until the employer determines that it can operate its facilities securely. We read the word "shall" in Section 9A(b) to be mandatory only in the sense that it obligates employers to proceed to the Commission before injunctions are sought in court for violations of Section 9A(a). An employer seeking administrative or judicial relief from an illegal work stoppage must follow the procedures of Section 9A(b).

The Union next argues that the Town's reasons for the lockout are "unpersuasive." Apparently, this argument goes to the reasoning in the NLRB's Darling decision, supra, declaring lockouts illegal when devoid of "significant economic justification."

The Union in the instant case did not establish a pretextual nature to this lockout. It did not present any evidence that the Town was motivated by the desire to improve its bargaining position vis a vis the Union or to punish employees. On the contrary, the Town creditably explained its actions as based on what it perceived to be necessary to preserve public services. The walkout on the evening of April 28 was a surprise to the Town. Vital services were threatened. When Union leaders announced the intention of employees to return to work on April 29, they did not explain that a union vote had endorsed this decision. Moreover, the Town had already made a decision to divert over 50% of the refuse at the incinerator for a one week period, thereby obviating the need for most employees in that department. Furthermore, Town officials, on the basis of present and past experiences, were concerned with the possibility of further vandalism if the employees were allowed to return before the Town was assured that the strike would not be repeated on a hit-and-run basis with further vandalism to the equipment in the Waste and Water Departments.

The issue is not whether the Town officials were right or wrong in their perceptions. The issue, rather, is whether they acted in good faith in making the decision. We see nothing in the record that impeaches the testimony of Town officials that they honestly viewed the situation as volative and unstable, and that

they believed valid economic and security considerations necessitated keeping employees out until decisions could be made on the long-range handling of the situation.

Dealing with the Union's third argument, we are unpersuaded that lockouts are prohibited per se under the Law. The Union contends that since the ultimate economic weapon of labor, the strike, is prohibited in Section 9A(a), the countervailing employer weapon, the lockout, must also be considered prohibited. As noted above, lockouts are nowhere mentioned in the statute. We are hesitant to add broad proscriptions to a statute which the legislature could have easily included if such were its intent. Moreover, this case does not present a situation where the employer is using the lockout as a weapon to achieve a bargaining advantage. The purpose of the lockout in this case was to preserve and protect public services. As such we believe that it was not prohibited by either the plain language or the necessary implication of Section 9A(a).[3] Nor do we view it as an act of bad faith bargaining in violation of Section 10(a)(5).

For the above reasons the Complaint is DISMISSED.

COMMONWEALTH OF MASSACHUSETTS
LABOR RELATIONS COMMISSION

PHILLIPS AXTEN, Chairman

JOAN G. DOLAN, Commissioner

[3]Given the facts of this case, we need not now decide whether an "offensive" lockout to achieve a bargaining advantage is implicitly prohibited by Section 9A(a). We have very serious doubts, however, that such conduct would be valid under the Law.