

TO: ALL CONSULTANTS
FROM: WARREN C. OGDEN
DATE: September 15, 1978
RE: PREVENTING NEEDLESS STRIKES

Each year, literally thousands of needless strikes are undertaken by unions. The cost in loss to both employer and employees from such needless strikes is a major concern for any economy. At our level, West Coast regards it as one of its major objectives to prevent such needless strikes.

Sometimes it is difficult to establish when a strike is "needless". One definition might be a strike in which the union concludes the strike with the same benefits that it would have gotten had no strike ever occurred. Yet such strikes occur time and time again. Often, in fact, it is known before negotiations even commence that the union will settle for a specific amount. The employer offers that specific amount but the union decides to strike anyway. At the conclusion of the strike, the employees are not better off than they were at the beginning. But either union or management has "proved

something". Such strikes can occur as a result of personal animosity between the union and the employer. They can occur because the union is determined that the employer will comply with a "pattern" in negotiations. They can occur because the union's trust fund requires that the employer pay under the trust fund monies which the employer feels could better be paid directly to the employees. They can occur because the employer has, for one reason or another, crossed the union business agent.

There are a number of devices which management has traditionally used to prevent such needless strikes. One of those, which we at West Coast have often used, is the implementation of a wage adjustment to the level that is anticipated to satisfy the employee just before the conclusion of the contract term. A typical situation might be one in which a 3-year contract was in existence. The contract was to terminate December 31 of a given year. The employer, after initial negotiations with the union, recognized that it would be necessary to "settle" on a 7 percent wage increase in order to get another contract. Yet it was also known that the union

intended to strike regardless of the employer proposals because the union demanded that 2 percent of that wage increase go into trust fund allocations. But the employer considered the union trust fund an imprudent investment of employee monies. Accordingly, there is no argument that the ultimate terms will result in a 7 percent increase to the employees. Yet the union was going to strike over the allocation of those funds because it had an institutional objective of supporting its trust fund. In such a situation, the employer would often implement the 7 percent wage increase on December 1. The employees would be satisfied, there would be no reason to strike, but the union, undoubtedly, would be missed.

There are certain prerequisites to implementing a wage increase during contract terms. Normally speaking, the contract prevents the employer from implementing such a wage increase. However, as employers become somewhat more sophisticated in their labor negotiations, they commence to add "management rights" and "zipper" clauses to the contract. The management rights clause often proposed by West Coast is over 2-1/2 pages long. Quite often, however, management unknowingly forgets

the need for management rights or a zipper clause on the theory that this is needless "legalistic" language. But if the employer wished to prevent the strike in the situation we have posited above, the best way to do is to have a zipper clause. Such a clause says that for the term of the contract the union has foregone any right to engage in collective bargaining. It also states, in many cases, that the employer is free to pay wages in excess of those in the contract term, at any time, without notification to the union.

Use of such a management technique was recently called into question by an NLRB decision in a case called Harvey's Wagon Wheel, 236 NLRB No. 217, 98 LRRM 1501 (1978). In that case, the Board found that while the employer was privileged to change the terms and conditions of employment within the meaning of the contract, since the employer was desirous of preventing a strike under such circumstances, he nonetheless committed an unfair labor practice. The Board reported that "whether or not the union waived its right to bargain about increases and employee benefits during the term of the contract, Respondent (the company)

was still subject to the provisions of Section 8(a)(1) of the Act. It could not lawfully grant benefits in order to induce employees to abandon their support for the union." Of course, what the Board was talking about was the fact that the employer had implemented the wage increase to prevent a strike from occurring.

The result of this decision of the National Labor Relations Board is to force us to go back to one of our more typical techniques. This is the use of a combined notice and opportunity to bargain and/or waiver. In the first situation, we send the union notice that we intend to raise wages to a particular level and ask them if they wish to bargain about it or whether they wish to allow us to go ahead. Normally speaking, an intelligent union has no real choice, regardless of how far into the contract they are, but to allow the employer to implement such a wage adjustment. If they refuse it, the employees can be informed and the effect on the union will be felt. Alternatively, the employer can send on to the union a "waiver" whereby the union agrees to waive any and all rights it has to file a charge in the event the employer introduces a wage increase. On several occasions, we

have had unions sign such waivers which should protect the employer against unfair labor practice charges. However, if the union is sticky about it, we treat it the same way we do the notice and opportunity to bargain.

There are several other techniques that may be used for preventing a strike which could and should be of interest to consultants. We have often noticed that factors other than the implementation of a wage increase have a dramatic effect on whether a union can encourage employees to strike. For instance, it is much easier to get employees to strike during the summer than the winter. It is also much easier to get employees to strike during hunting season, presuming they are male, than during the Christmas season. Accordingly, the termination date of a contract is very important in determining whether or not employees are likely to strike. An employer who is wise, and a consultant who gives good counsel, will always suggest the placement of contract termination dates at some period when it is less likely that the employees in that individual locale will strike. Further, if there is something that the employer can do prior to the strike to encourage the employees to

stay in, that usually should be done. For instance, during hunting season consider renting a hunting lodge for the use of employees who are not on strike. During the summer, consider the possibility of a vacation park for the employees and their families. The alternatives are endless. It is up to the consultant to tailor the individual facts to the potential benefit necessary to keep the employees from engaging in a needless strike.

The employer also has at his option certain, somewhat coercive, techniques. One of the most commonly used is temporary or permanent replacements. While WCIRA has never established a set policy on how to use these, we might suggest that the consultant consider the following scenario. If a strike date is set for October 1, on September 15, the consultant gets in touch with all of the employees of the employer, presumably in a group meeting. He indicates that negotiations are not going particularly well and that there is reason to believe that the union may be interested in calling a strike vote. He indicates that the company is doing its best to increase its benefits and intends to do everything it can to conform to legitimate

employee requests. However, certain of the union's demands appear to the employer to be irresponsible and accordingly the employees may become involved in a hazardous undertaking - namely a strike. The consultant explains that in order that there be no confusion, the employees should know exactly what will happen prior to their undertaking such an enterprise. The consultant explains that it is the intent of the company to continue to operate. In order to do so, replacements have been arranged. The employees will be given a 5-day grace period after the time of the commencement of the strike to reconsider their decision to strike. Nothing will happen during that 5 days. At the conclusion of the 5-day period, the employees who are out on strike will receive a letter in the mail which will tell them that they have been temporarily replaced and, wherever possible, the name of the replacement will be given. It is often a nice touch for the employee to know who is replacing him. Next, another 5-day grace period will be enacted during which the striking employee will only be temporarily replaced. However, at the conclusion of the second 5-day period, or 10 days after the strike is

commenced, the employees will receive a note in the mail telling them that they have been permanently replaced by a particular employee. Again, names are often helpful. The consultant will explain to the employees that the purpose of all this is to give the employees accurate, up-front knowledge of what will occur and also to provide them for an opportunity to consider whether they wish to be employees who are employed or "employees" who have been permanently replaced. Remember, strikers, even if replaced, are still employees within the meaning of the NLRA.

Another variation on this same theme is the use of a poll of the employees. Under very limited circumstances, a consultant may conduct a poll of employees prior to the commencement of a strike to determine whether or not the employees wish to strike. The sole purpose that an employer can have for such a poll is to determine how a strike will adversely affect production. This will allow the employer to arrange for temporary or permanent replacements. While we have used this on several occasions very effectively, it is a sensitive procedure and consultation with one of the WCIRA attor-

neys is required before you undertake such an action.

Another technique, also a variation on the theme, is the so-called "shadow work force" routine. This involves simply bringing in employees in certain categories who perform no work but are called in to train on certain jobs. The individual who is to be a part of the shadow work force is introduced to the employees on the line. The employees on the line are told that the individual in the shadow work force is being trained for the handling of the equipment and the skills that are necessary to perform the employee's job. Nothing is ever mentioned about the possibility that the individuals in the shadow work force are work replacements. They are not necessarily kept on the payroll. But they will tend to send a rather distinct message to the employees prior to the time that the union tries to get a strike vote.

In conclusion, I should point out two factors. Strikes are merely elections by another name. If you are an effective campaigner in an election, you should be an effective campaigner in a strike situation. This is particularly true when you consider that you have many

advantages in a strike that you do not in a typical campaign. You usually have quite a bit of time to prepare. You usually have considerable flexibility about implementation of wage increases. And, of course, you have the ability to replace. On the other hand, in every strike situation, the stakes are higher than they are in an election. If a consultant is found to have committed a serious violation of the Act while preparing for a strike, the Board may well regard the strike as a "unfair labor practice" strike as against an economic strike. The result of that will be that any employees who have been either permanently or temporarily replaced must be immediately reinstated at the conclusion of the strike. In other words, a great deal of the effect may be lost.