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MEMORANDUM

TO:	Steven G. Petterson
FROM:	Thomas R. Trachsel
DATE:	April 25, 2002
RE:	Minnesota Mechanical Contractors Association File No. 01780.000

STRIKE CONTINGENCY PLANNING

I. INTRODUCTION

Although it is obviously the desire of contractors to resolve contract negotiations without a work stoppage, strikes can and do occur. Therefore, it is advantageous to be familiar with legal issues that arise in the context of a potential or actual work stoppage.

II. THE RIGHT OF EMPLOYEES TO WORK DURING A STRIKE

A. Polling employees about their intent to work during the strike

A contractor has the legal right to ask employees whether they intend to join an ongoing or anticipated strike, so that it can make adequate plans to man its projects. The effectiveness of such polling is debatable, since many employees are ambivalent in their response, and some will simply decline to answer. However, if it is concluded that a poll is to be utilized, it is extremely important that the question asked be uniformly applied to all employees and that there be no further discussion other than asking the question. The following script should be used:

QUESTION: Under the law, we can inquire of employees as to their intentions of coming to work at the beginning of, and throughout, the strike. Our

purpose in asking you is to make it possible for us to schedule and have employees available to work during the strike. We want to assure you that you are free to make your own decision. In addition, participation in this poll is entirely voluntary. No reprisals will be taken against you whatever your decision may be. In the event of a strike, we may be picketed. Would you be willing to work under these circumstances?

If the employee declines to answer the question or indicates uncertainty as to intention, the matter should be dropped, and no further inquiries should be made. The polling process must be closely monitored, as deviations from the script may amount to an unfair labor practice.

B. Advising employees of their right to resign from union membership

The National Labor Relations Act provides that employees have an absolute right to continue to work during a strike. However, a union can discipline and impose court collectible fines upon its members who cross a picket line. NLRB v. Allis Chalmers Mfg., Co., 388 U.S. 175 (1967). The local and international union's bylaws state whether members who cross the picket line are subject to fines, reprimand, censure, suspension, or expulsion. It is important to note that the right to fine and discipline employees for crossing the picket line is limited to those who are union members. Thus, an employee can avoid penalties by resigning his membership prior to crossing the picket line. A contractor has the right to inform employees of their rights in this regard. However, the contractor cannot encourage employees to resign their union membership, or tell employees that they must resign their union membership before they will be permitted to return to work.

The union may attempt to fine or discipline supervisor-members who perform work for the struck employer during the strike. Whether or not the union can lawfully fine or discipline a supervisor-member who works during the strike depends upon the work that he is performing. A union may lawfully fine or discipline a supervisor-member for crossing a picket line to perform rank-and-file struck work (*i.e.*, the work normally performed by the employees out on strike).

Florida Power & Light v. International Brotherhood of Electrical Workers, 417 U.S. 790 (1974).

On the other hand, if the supervisor-member is crossing the picket line to perform only regular supervisory duties — including collective bargaining, grievance adjustment and interpretation and application of the contract — then the union cannot lawfully discipline him. American Broadcasting Cos. v. Writers Guild West, Inc., 437 U.S. 411 (1978). What if the supervisor-member performs, in addition to his regular supervisory duties, some struck work? If he is performing only a “minimal amount” of struck work, then the union cannot fine or discipline him for crossing the picket line. Columbia Typographical Union 101 (Washington Post), 242 NLRB 1079 (1979).

III. PERFORMANCE OF WORK DURING THE STRIKE

An employer is free to perform bargaining unit work during a strike by utilizing supervisors, managers, and such non-unit employees as are desired by management. However, non-unit employees cannot be forced under the threat of discipline or discharge to perform struck work. This is because a statutory employee’s refusal to perform struck work amounts to concerted, protected sympathy action. Supermarkets General Corp., 296 NLRB 1138 (1989); American Transportation Service, Inc., 310 NLRB 294 (1993), *enforced* 145 LRRM 2512 (11th Cir. 1994).

IV. HIRING REPLACEMENT EMPLOYEES

A contractor has the right to hire employees to work during the strike. If the contractor is signatory to a Section 9(a) agreement, it generally must pay such employees the wages and fringe benefits under the previous contract, or the wages and fringe benefits in its impasse offer.

If the contractor is signatory to an 8(f) (not a Section 9(a)) agreement, then it does not need to pay replacement employees the wage rates under the expired contract. The contractor can pay the replacements what it deems to be an appropriate rate.

The 8(f) contractor does not need to make fringe contributions on behalf of replacement employees who work during the strike, unless (1) the trust agreement for the particular fund requires contributions, notwithstanding the expiration of the contract, or (2) the contractor signed a participation agreement requiring that contributions be made post-expiration. Obviously, it is necessary to review the trust agreement and participation agreement to make this determination.

V. SUBCONTRACTING

Generally, collective bargaining agreements in the construction industry limit the subcontracting of job site work to union (or in some cases signatory) contractors. They also generally require that fabrication be performed by companies that pay their employees the prevailing rate. If the contractor is signatory to an 8(f) (not a Section 9(a)) collective bargaining agreement, then these restrictions would not apply during a strike.

There may be additional hurdles, however. If the subcontractor's contract with the general or construction manager restricts subcontracting as in the case of a project labor agreement, for example, then it may be necessary to seek the consent of the parties prior to subcontracting any work in a manner that is inconsistent with the restriction.

Subcontracting work to a non-signatory contractor during a strike may create an issue with respect to fringe fund contributions. If the applicable trust agreement or participation agreement requires that contributions be made even after the contract's expiration, and if that trust agreement or participation agreement makes the contractor liable for any contributions that are not made by a subcontractor, then the contractor may be liable to the fund in the event that contributions are not made.

When the strike is resolved, the language restricting the subcontracting of work will most likely be in the new agreement. This factor must be considered by the contractor if the project may run beyond the strike, as the contractor may be in violation of the new collective bargaining agreement, or the agreement with its subcontractor.

VI. INTERIM AGREEMENTS

Before the collective bargaining agreement expires, the union may ask a number of contractors to sign interim agreements. An interim agreement operates to bind the contractor to whatever agreement is reached between the union and the Association. In exchange, the union agrees to not strike that contractor. At first blush, signing an interim agreement seems harmless, since the contractor will, in the end, be covered by the multi-employer agreement. In actuality, interim agreements negatively impact the multi-employer bargaining process, since they operate to enhance the union's bargaining leverage. The union's strategy is based upon the notion that struck contractors (those that were not offered or would not sign an interim agreement) will quickly sign an agreement that is more favorable to the union, rather than remain struck while their competitors are working.

As part of its strategy to secure interim agreements, the union may send a letter to the targeted contractors, stating that the fringe fund will not accept contributions on behalf of employees who work during the strike, unless the contractor has signed an interim agreement. A fund's failure to accept contributions could have untoward effects (*e.g.*, employees ending up with no health insurance).¹ The National Labor Relations Board has concluded that this tactic does not amount to an unfair labor practice. And while it is possible to argue that the trustees' refusal to accept contributions would constitute a breach of their fiduciary duties, such a claim would take time to resolve.

¹ It should be noted that, under Federal COBRA provisions, a strike is considered a "qualifying event" that invokes the contribution of coverage provisions for health insurance benefits.

VII. SYMPATHY STRIKE

A sympathy strike occurs where one union honors the picket line of another union, or when unrepresented employees honor the picket line of a union.

A. Employees represented by another union

Whether an employer's represented employees can engage in a sympathy strike depends upon the no-strike language in their collective bargaining agreement. The Board has ruled that a general no-strike clause encompasses sympathy strikes, unless the contract as a whole or extrinsic evidence (including past practice and negotiation history) demonstrates that the parties intended otherwise. Indianapolis Power Co., 291 NLRB 1039 (1988).

B. Non-union employees

A non-union employee has the legal right to honor the union's picket line, if the employee chooses. That means that an employee cannot be disciplined or discharged for honoring the picket line. However, a non-union employee supporting a union strike is subject to permanent replacement. Non-union employees must not be advised that they will be disciplined or discharged if they refuse to report for work.

VIII. UNEMPLOYMENT COMPENSATION

The general rule in Minnesota is that striking employees are not entitled to collect unemployment compensation benefits. The employer may wish to notify the Minnesota Department of Economic Security that employees are on strike, and advise the agency that it is the employer's position that these employees are ineligible to receive unemployment compensation benefits.

IX. DELIVERIES

Employees of delivery companies have a legal right to honor picket lines at a struck employer. However, the employer should use its leverage as a customer to insist that deliveries be made. One of the following alternatives may be acceptable:

1. Request that the deliveries be made to an alternative site, like a neighboring business;
2. Request that the delivery vehicles be operated by a non-union supervisor or employee;
3. Utilize non-contract employees to pick up deliveries at the carrier's place of business.

X. RESERVED GATE

The owner or manager of a construction project has the ability to establish "reserved gates." Under a reserved gate system, the owner or manager designates separate entrances to the site for use by parties who are not involved in the labor dispute. The union cannot picket at the entrances reserved for "neutral" parties — *i.e.*, neutral construction contractors and their employees and suppliers. The reserved gate system would insulate the neutral contractors from the strike and allow the work on the project to continue. In order to establish reserved gates, the owner or manager of the project will post signs designating the entrances and attempt to ensure that the employees, suppliers, and subcontractors of the struck employer do not use the neutral gate.

XI. VEHICLES CROSSING PICKET LINES

Minnesota law requires any person operating a motor vehicle to stop completely, and proceed cautiously, before entering or leaving any entrance to or exit from a picketed facility. This requirement exists even if that specific entrance or exit to the facility is not being picketed.

Employees should be advised of this statute by letter or memorandum. Non-employees, such as delivery drivers, should be advised of this requirement by posting a large, highly visible sign at each entrance. It should read:

NOTICE TO ALL PERSONS
Minnesota law requires all persons to stop, and proceed cautiously,
before entering or leaving any facility that is being picketed.

XII. PICKET LINE MISCONDUCT

Striking employees have the right to engage in peaceful picketing activities. However, they do not have the right to make threats, engage in acts of physical violence, or block ingress to and egress from the site. All incidents of picket line misconduct should be reported to single, designated individuals at the contractors. Serious incidents should be immediately reported to the police, and they should be immediately documented.

A. Injunctions

If there are acts or threats of violence or other misconduct, an injunction may be obtained against the union in a state court action, which would restrain such acts. An injunction is not automatic in a strike setting. To obtain an injunction, clear proof of continued illegal conduct by striking employees must be shown. Often it is also necessary to prove, or at least present evidence that, the police department or other law enforcement agency has been unable or unwilling to stop the illegal conduct.

In general, to obtain an injunction against picket line misconduct, the employer must establish that the union has been engaged in some form of the following activities:

1. The blocking or obstruction of entrances or exits to the facility by mass picketing or other acts.
2. Acts of property destruction.
3. Threatening or assaulting persons.

4. Interfering with the operation of motor vehicles in the vicinity of the strike.

B. Photographing strikers

It is a violation of the National Labor Relations Act to photograph purely peaceful picketing activities. However, it is entirely appropriate to photograph mass picketing which blocks entrances, or conduct involving threats, property destruction, and violence. Under Minnesota law, persons photographing strike incidents may be regarded as “security personnel.” Under that law, security personnel are only permitted to photograph strike incidents where either the person being photographed or the security personnel are “on the premises being protected.” That generally means that either the photographer or the person being photographed should be on the contractor’s property.

XIII. ADS FOR EMPLOYEES

Minnesota law requires that if the employer runs an advertisement for replacement employees or other vacancies at the struck facility, that advertisement must disclose that a strike is in progress. Minn. Stat. § 181.64. This same disclosure must also be made in verbal solicitations for applicants and during interviews.