

Lockout due to Union Strikes

Bongsoo Jung, Korean labor attorney at KangNam Labor Law Firm

An employer may declare lockout to counteract an industrial act taken by the labor union (Article 46 of the *Trade Union and Labor Relations Adjustment Act*, hereinafter the “TULRAA”). According to Article 46, lockout refers to "an employer's act of refusing to accept work provided by its employees." It is a type of industrial action that an employer is allowed to take in order to guarantee an equal playing field in labor relations. A lockout may not be done in a preemptive or aggressive way. It may be declared only once the union has taken industrial action. This means that a lockout declared before any industrial action by the union is unlawful. If a lockout is not withdrawn even after the union has genuinely declared a halt to the industrial action, the lockout shall be considered an aggressive one and so shall be deemed unjustifiable. The following explains the conditions and methods required to justify a lockout, and the effects of such an action.

1. Concept

Lockout is a situation in which the employer refuses to receive employees' labor as a counteraction to their industrial action and to prevent their entry onto the work premises. The lockout sustains the balance of power between labor and management. Case law states that a lockout must be conducted in a confrontational and defensive manner in response to a labor union strike.

If a lockout is deemed a reasonable defensive measure against an industrial action by the union, it can be recognized as a legitimate industrial action by the employer, which would then mean the employer has no obligation to pay wages to the affected workers during the period of the lockout.¹ However, even if initiation of the lockout itself is justified given the specific circumstances of the workers' industrial action, if at some point the workers cease their industrial action and express a genuine intention to return to work, yet the employer continues the lockout, the lockout then moves from being a defensive measure to an aggressive one, thereby losing its legitimacy from that point onwards. In such

¹ Supreme Court ruling on May 26, 2000, Case No. 98da34331.

cases, the employer is not free from the obligation to pay wages, from that point on.²

2. Requirement (defensive lockout)

The employer usually implements a defensive lockout after inception of an industrial action.³ Therefore, the employer may only implement a lockout after the labor union takes a justifying industrial action. In principle, the law prohibits preemptive lockouts or any measures that exceed the scope and method of an industrial action to a considerable degree.⁴

As a related case, even before the labor union of a bus company held a “strike rally,” the company closed its main gate and initiated a lockout. Despite the clear expression of willingness to work by only three union members, the company refused to assign them to buses and, the following day, filed a report of partial lockout limited only to a few vehicles operated by union members in a certain city. The company continued its operations by assigning vehicles only to non-union members. This indicates that the lockout went beyond a defensive action against a labor union's industrial actions and became a preemptive, aggressive lockout aimed at actively weakening the organizational strength of the labor union. Such a lockout has no legitimacy.⁵

3. Method

(1) Practical measures

A lockout is not legitimate if the labor union is notified only once it has begun. Other actions must be taken before refusing employees' work. Employers must announce their intention to initiate a lockout by posting notices detailing the timing and the subjects of the lockout before it is implemented, ensuring that workers are aware of the possibility. The notice must be posted in a place accessible to workers prior to the start date of the lockout. If there is a practice of communication between labor and management occurring online, announcing

² Court ruling on May 24, 2016, Case No. 2012da85335.

³ Ministry of Employment and Labor (MOEL) Guidelines, June 24, 1998, Labor-Management No. 32281-1703.

⁴ Daejeon District Court ruling on Feb. 9, 1995, Case No. 93gahap566.

⁵ Supreme Court ruling on June 13, 2003, Case No. 2003du1097.

through the company intranet or website, or sending individual emails to the workers subject to the lockout is also possible.

(2) Applicable to any industrial action

A lockout can be implemented in response to all forms of industrial action. This includes slow-downs and work-to-rule actions, where workers are technically performing their duties.⁶ If a labor union aims to maximize the effect of a strike or strategically conducts industrial actions for certain hours each day, the employer can counter this by implementing a defensive lockout. As long as the lockout is deemed a reasonable action against the labor union's repeated industrial actions, there is no need to repeatedly start and end the lockout in response to each action. Therefore, unless the labor union expresses an intention to withdraw its industrial actions, the employer can maintain the lockout throughout the period of industrial action, including times when no industrial actions are taking place.⁷

(3) Partial and total lockouts

An industrial action refers to acts such as strikes, work slowdowns, and lockouts, which are undertaken by parties in labor relations to assert their demands, and the actions taken in response to them. Similarly to how a labor union can conduct either a general or partial strike as part of its industrial action toolkit, employers can also counteract with either a total or partial lockout.⁸ A partial lockout means closing down certain operations (departments) or locking out certain personnel while continuing operations elsewhere, whereas a total lockout means halting operations across the entire workplace, similar in appearance to a suspension of business.

In principle, a partial strike should be met with a partial lockout. However, if a partial strike leads to the stoppage or closure of the entire workplace's operations, then a total lockout may be implemented.

The subjects of a lockout, in principle, can include both union and non-union members, depending on the form of the industrial action. That is, the targets can be limited to strike participants, all union members, or all workers, depending on whether some union members fully refuse to provide labor, or all union members

⁶ MOEL Guidelines, Oct. 26, 1995, Cooperation 68107-333.

⁷ MOEL Guidelines, Nov. 7, 2008, Labor Law Division-1019.

⁸ MOEL Guidelines, Aug. 31, 1998, Cooperation 68140-327.

are providing incomplete labor, such as in work slowdowns or intermittent strikes.

In a partial lockout, employers have the freedom to continue operations by accepting labor from workers not participating in the industrial action, so assigning non-striking non-union members to operate vehicles previously operated by striking union members does not constitute a violation of the prohibition against replacement labor during a strike.⁹

Generally, a partial strike achieves a similar effect as a total strike while minimizing the risk of wage loss. Even if employers accept labor from these workers, practically combining this labor force is challenging, leading to the dual burdens of operation stoppages and wage payments. In such cases, employers can implement a total lockout against the union, even if the union has only conducted a partial strike.¹⁰

As a related case, even if the labor union of a bus company declared a partial strike and conducted industrial actions for 1-2 days, such as operating only once as per the predetermined number of trips or refusing to drive, the substantial impact of such erratic operations and the unpredictability of their duration mean that the mere refusal of employers to assign work to the participating union members does not constitute an unfair labor practice.¹¹

4. Effect

(1) Employer exempt from obligation to receive labor services and pay wages

An employer has the right to refuse to receive labor services from employees during a lockout. In addition, the employer is not obligated to pay wages to employees who do not provide labor services due to a lockout, since wages are remuneration for work. This applies not only to union members subject to lockout, but also to all other non-union employees. However, if an employee who is not subject to the lockout provides regular work for the company, contractual wages shall be paid for the services provided.¹²

(2) Holidays and leave

⁹ MOEL Guidelines, Sept. 14, 1999, Cooperation 68140-14.

¹⁰ Supreme Court ruling on Mar. 9, 2001, Case No. 2000da63813.

¹¹ Supreme Court ruling on Sept. 29, 2003, Case No. 2003du5792.

¹² MOEL Guidelines, Nov. 21, 1994, Nosa 68107-338.

As an employer can legitimately refuse to receive labor services from the employees subject to the lockout, there is no longer any obligation for the employer to honor the statutory holiday and leave stipulations outlined in the *Labor Standards Act*.¹³

(3) Premises off-limits to employees

A lockout allows the employer to prevent employees from entering the workplace, by closing the company entrance gates or withdrawing employees from production facilities and precluding their provision of labor service. Accordingly, employee refusal to leave the workplace during a legitimate lockout may be subjected to criminal charges such as failure to comply with a deportation order. Provided that, a lockout shall be limited to production facilities or office facilities as “lockout” refers to prohibiting employees from production and service. Nevertheless, the employer may allow union members entry to certain facilities necessary for union activities or welfare under a reasonable scope, such as the union office, dormitory, canteen, and other facilities not related to production or work.¹⁴

Despite the employees' legitimate occupancy of a workplace before a lockout is declared, once a lockout has been declared, the employer has full control of the workplace and may order all employees to leave the work facilities during that lockout. Sustained occupancy at this time is illegal and persons engaging in such actions will be subject to punishment under the law for failure to comply with a deportation order.¹⁵

(4) The possibility of partial operations

Even during a lockout, it is not mandatory to completely halt operations. It is merely necessary to restrict the entry of striking workers; non-striking workers may be allowed to continue operations.¹⁶ The freedom to operate is guaranteed independently of industrial actions, meaning that employers can continue operations during a lockout using non-union workers or those not targeted by the lockout.

¹³ MOEL Guidelines, Nov. 10, 1994, Kungi 68040-1769.

¹⁴ MOEL Guidelines, Oct. 30, 1998, Cooperation 68140-409.

¹⁵ Supreme Court ruling on Jan. 27, 2004, Case No. 2003do6026; Supreme Court ruling June 9, 2005, Case No. 2004do7218.

¹⁶ MOEL Guidelines, Sept. 9, 1997, Cooperation 68140-368.

Case #1: In a partial lockout, employers have the freedom to continue operations by accepting labor from workers not participating in the industrial action. It cannot be considered a violation of the replacement prohibition rules for an employer to have non-union members who did not participate in the strike perform the duties of striking union members who were drivers.¹⁷

Case #2: The prohibition of replacement labor during industrial actions is a rule that restricts hiring or replacing workers unrelated to the business for the performance of work halted by the union's actions. Therefore, using non-union workers from within the same business, including headquarters and technical departments, for replacement labor in operations halted due to industrial actions is permitted.¹⁸

(5) Effects of an unlawful lockout

If an employer's lockout is unjustifiable, workers entering the workplace where they are usually allowed does not constitute trespassing, unless there are special circumstances otherwise. Additionally, while an employer is not obligated to pay wages if the workplace is legally closed in response to union industrial actions (such as strikes or work slowdowns), if a preemptive or aggressive lockout is taken to suspend work, the employer must pay wages (suspension allowance).¹⁹

Case #1: A lockout initiated abruptly after three days of legal action is not a passive or defensive measure taken out of necessity. Therefore, the company's lockout lacks justification, and the employer is not exempt from the obligation to pay wages during the lockout period.²⁰

Case #2: If an employer's lockout is not recognized as a legitimate industrial action, workers who refuse to vacate the parts of the workplace they have occupied as part of a lawful industrial action, even if the employer has initiated a lockout, are not committing any crime in refusing to vacate those premises.²¹

Case #3: Even when an employer's lockout is considered a legitimate industrial action, access to facilities necessary for normal union activities within the workplace, such as union offices, and basic living facilities like dormitories, shall

¹⁷ MOEL Guidelines, Sept. 14, 1999, Cooperation 68140-14.

¹⁸ MOEL Guidelines, May 13, 2010, LaborDept-383.

¹⁹ MOEL Guidelines, Oct. 30, 1969 Kijoon 1455.9-11349.

²⁰ Supreme Court ruling on May 26, 2000, Case No. 98da34331.

²¹ Supreme Court ruling on Dec. 28, 2007, Case No. 2007du5204; Supreme Court ruling on Mar. 29, 2007, Case No. 2006du9307.

be allowed. However, considering the nature of the dispute, lockout, and subsequent developments, if the union uses the union office itself as a location for dispute, or if the office and production facilities are inseparably located or structured such that the union's access and potential occupation of production facilities are reasonably foreseeable, and the employer provides an alternative location for the union office that is recognized as a reasonable alternative for normal union activities as the original location, it is permissible to restrict access to the union office within reasonable limits.²²

5. Reporting

When conducting a lockout, employers must report in advance to the administrative authorities and the Labor Commission. However, the reporting of a lockout is not a requirement for its validity but a procedural requirement, demanded by administrative necessity. Therefore, failure to report does not invalidate the lockout.

Employers are required to report the lockout to both the competent administrative authorities and the Labor Commission. The competent administrative authority is the administrative agency that handles union establishment reports, i.e., it is the same as the entity that has jurisdiction over the main office of the labor union. The Labor Commission refers to the branch of the Labor Commission with jurisdiction over the area where the lockout occurs. If the report of a lockout is filed with the competent administrative authority, a local government entity, this local government must send a copy of the lockout report to the local employment and labor office that oversees the jurisdiction of the main office of the labor union involved in the lockout. Administrative authorities, upon a lockout being conducted without prior reporting, must immediately order corrective actions and may impose a fine for non-compliance.²³

6. Lifting the Lockout

When a labor union withdraws its strike, the employer must lift the lockout. If the labor union stops its ongoing industrial actions and clearly expresses its intention to return to work, the employer must withdraw the lockout. If workers

²² Supreme Court ruling on June 10, 2010, Case No. 2009do12180.

²³ Enforcement Decree to the TULRAA, Article 12-3; TULRAA Article 96 (Penalty fine).

genuinely express their intention to return to work but the employer continues the lockout, the lockout loses its justification. In this case, the employer will not be exempt from the obligation to pay wages for period after the related strike is lifted.²⁴

Since the labor union's industrial action is both a condition for initiating and maintaining a lockout, if the union's intention to return to work is genuine and there is objectively no urgency to continue the lockout, the employer must stop the lockout. However, if there is a high likelihood of the labor union resuming industrial actions and the intention to return to work isn't considered genuine, maintaining the lockout is not deemed unlawful.²⁵

Case #1: After a temporary strike ended, the labor union immediately expressed its intention to return to normal duties. Despite reaching an agreement on the dispute's issues right after the lockout, the employer continued the lockout and sent individual withdrawal forms to union members. In this case, the lockout lacked urgency, necessity, and reasonableness, and seemed more aggressive than defensive against the labor union's industrial actions.²⁶

Case #2: If workers cease their industrial actions and genuinely express their intention to return to work, but the employer continues the lockout, the lockout transitions from being a defensive measure to an aggressive one aimed at weakening the labor union's organizational strength. In such cases, the lockout loses justification, and the employer is obligated to pay wages for the period beginning immediately upon the lockout losing its justification.²⁷

Case #3: The labor union notified the company of its intentions to change its strike from a general strike to a partial strike, with all members except the deputy head of the union branch returning to work. However, the labor union did not comply with the company's request to sign a strike termination confirmation document to verify the withdrawal of the strike, requested given the high likelihood of the union returning to a general strike based on its past strike behavior and the employer's (a financial institution) necessity for continuity and strict security. Therefore, requesting a strike termination confirmation document to verify union members' genuine intentions wasn't seen as an unreasonable

²⁴ Supreme Court ruling on May 24, 2016, Case No. 2012da85335.

²⁵ MOEL Guidelines, Oct. 30, 1998, Cooperation 68140-409.

²⁶ Daejeon High Court ruling on Dec. 19, 1995, Case No. 95na1697.

²⁷ Supreme Court ruling on May 24, 2016, Case No. 2012da85335.

demand or interference with the union's organization and operation. Continuation of the lockout upon not receiving the requested verification of the workers' genuine intention to return to work was therefore deemed lawful.²⁸

Case #4: Considering the workers merely expressed their intention to return to work without indicating they would stop the legal action that resulted in the lockout, maintaining the lockout as a defensive measure against the workers' industrial action is justified.²⁹

²⁸ Supreme Court ruling on June 9, 2005, Case No. 2004do7218.

²⁹ Changwon District Court ruling on Oct. 18, 2002, Case No. 2000gahap297.