

Bird Engineering and Keith Main, Case 17-CA-10713

26 June 1984

DECISION AND ORDER

**BY CHAIRMAN DOTSON AND MEMBERS
ZIMMERMAN AND HUNTER**

On 21 December 1982 Administrative Law Judge James S. Jenson issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The judge found that the Respondent violated Section 8(a)(1) of the Act by terminating six employees who had clocked out of the Respondent's facility during their lunchbreak in protest against a new policy prohibiting employees from leaving the premises during their work shifts. The Respondent contends that the employees' actions constituted a deliberate violation of a known work rule falling outside the protection of the Act. We find merit in the Respondent's position.

As fully set forth in the judge's decision the Respondent imposed a "closed campus" rule on its night-shift whereby employees would no longer be permitted to leave its premises on lunchbreaks. This was done in an effort to curb problems of theft of both company and employee property, drinking during lunch hours, and tardy returns after lunch.¹

When the rule was announced to four welding department employees—Belak, Main, Burge, and Greser—they all protested it as unfair. Prior to this time they had followed a practice of punching their timecards when leaving and returning from lunch outside the facility. In response to the employees' complaints the Respondent repeated that the new rule was effective immediately, that there would be no permission granted to leave the facility for lunch as of that day, and that termination from employment would result from disobeying the rule. Two other employees, Christiansen and Lockhart, were informed about the rule later during the same shift. Christiansen complained to the Respondent that the rule was unfair because he did

not have his lunch with him inside the plant. Lockhart prepared to leave the building to go to the parking lot for lunch. His leadman, Anderson, warned him that he would be fired if he left the facility. When Lockhart asked the night supervisor if he could go to the parking lot to retrieve medication from his van he received a negative reply. Lockhart insisted that he needed at least to get his medicine if not his lunch and that he should be given a termination slip if the Respondent would not permit him that. The night supervisor issued Lockhart a termination slip. Termination slips were also issued to Burge, Greser, and Belak who had decided after the meeting with management regarding the new rule to follow their usual practice and clock out at lunchtime in protest over the implementation of the rule.

A few days later, after researching a state statute on the subject, Main and Christiansen decided that it was their legal right to leave the plant for lunch. Both punched their timecards as they prepared to leave the building at lunchtime. As they were about to leave, leadman Anderson called out to them that they were fired. When they returned from lunch they discovered that their timecards were missing. Anderson told them that they were dismissed.

While there is no question that the issue of lunchbreak policy is a condition of employment of common concern to all employees and that there is a concerted element present in at least five of the six discharges which occurred here,² we find that the actions of these employees were unprotected under the Act. These employees did not engage in a strike, withholding of work, or other permissible form of protest to demonstrate their disagreement with the Respondent's rule. Instead they simply chose to ignore the rule in direct defiance of the direction and warnings of management. By treating the rule as a nullity and following their pre-rule lunchtime practice they did not participate in a legitimate protected exercise but rather engaged in insubordination. These employees were attempting both to remain on the job and to determine for themselves which terms and conditions of employment they would observe.³ Their actions in delib-

² Lockhart's action was taken alone and without apparent consultation with his fellow shift employees. However, in view of our ultimate disposition of this case we find it unnecessary to address the concertedness aspect of his decision to leave the facility.

³ For this reason the cases relied on by the judge are inapposite to the facts of this case. If the employees had chosen to demonstrate their opposition to the lunchbreak rule by participating in a work stoppage or similar form of conduct then the protections of the Act might have applied. However, here, they simply attempted to have it both ways—avoiding the involvement in a labor dispute and deciding for themselves which rules to follow and which to ignore. The Act does not protect this form of conduct.

¹ There is no union at the Respondent's facility and there is no issue as to the legitimacy of the Respondent's implementing the rule.

erate defiance of the Respondent's authority left the Respondent with little choice but to take the disciplinary action it had announced would be imposed for flouting the rule. Accordingly, we reverse the judge's finding of violations of Section 8(a)(1) and dismiss the complaint in its entirety.

ORDER

The complaint is dismissed.

DECISION

STATEMENT OF THE CASE

JAMES S. JENSON, Administrative Law Judge. This case was heard in Omaha, Nebraska, on September 14, 1982. The complaint issued on December 21, 1981,¹ pursuant to a charge and amended charge filed on November 12 and December 16, respectively. The complaint alleges that on October 15 and 20 the Respondent discharged certain employees who had concertedly clocked out during their lunch period in protest of the Respondent's premises during their work shift. The Respondent contends the alleged discriminatees terminated themselves by voluntarily violating a work rule knowing the consequences of such a violation was immediate termination. All parties were afforded full opportunity to appear, to introduce evidence, and to examine and cross-examine witnesses. Briefs were filed by the General Counsel and the Respondent and have been carefully considered.

On the entire record in the case, including the demeanor of the witnesses, and having considered the posthearing briefs, I make the following

FINDINGS OF FACT

I. JURISDICTION

It is admitted and found that the Respondent is engaged in the manufacture of gocarts and minibikes in Fremont, Nebraska; that it annually purchases goods and services valued in excess of \$50,000 directly from sources located outside Nebraska, and annually sells goods and services in excess of \$50,000 directly to customers located outside Nebraska; and that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. ISSUE

Whether six employees were terminated or engaging in a protected concerted activity.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Setting*

The Respondent is engaged in manufacturing gocarts and minibikes in Fremont, Nebraska. Ruth Minchow is the Respondent's general manager and chief operating officer; Bob Leftewitch is the plant manager; Stan Hart

is the production coordinator for the welding and fabrication departments; Sam Austin is the night supervisor; Keith McCoy was the leadman in the welding department until October 5 when he was replaced by George Anderson. The Respondent admits that Hart, Austin, and Anderson are its agents. The Respondent's operations are cyclical, with production normally building to a peak in November of each year. It has been the Respondent's practice that as orders increase the latter part of the year to hire additional employees on a temporary basis. When no longer needed, the temporary employees are terminated. As production requirements increase in the latter part of the year, the Respondent increases the number of work shifts. In August 1981, the fabrication department went to three 8-hour shifts; in September the paint and welding departments commenced operating on two 10-hour shifts and the tire department also went to a multiple-shift basis; in October the seat department commenced working two 12-hour shifts. About September 14, approximately a week prior to the welding department going to a two-shift operation, the Respondent instituted a "closed campus" rule with respect to employees working the night-shifts. The rule prohibited employees from leaving the Respondent's plant during the night-shift lunch period. According to the Respondent, the "closed campus" rule was instituted because of thefts of employee and company property, the unauthorized use of company property, suspicion of drinking during lunchbreaks, and employees returning tardy from lunchbreaks. Prior to the institution of the new policy, employees could leave the plant during authorized breaks by punching out on their timecards and later punching back in on returning. While the new rule was disseminated to employees then on the night-shift, the welding department night-shift had not yet come into existence. Consequently, it is undisputed that the night-shift welding department employees were unaware of the "closed campus" rule. In fact, as the testimony disclosed, Robert Christiansen, an alleged discriminatee who started working for the Respondent around the end of September, had left the plant during lunchbreak with Keith McCoy, his leadman.² McCoy was replaced as the night-shift leadman on October 5 by George Anderson whom the Respondent admits is an agent, and who was also unaware that the "closed campus" rule prohibited employees from leaving the plant during lunchbreaks. About October 14 or 15, Minchow learned from Phyllis Sheth, the assembly department coordinator, that some of the other employees were complaining that the "closed campus" rule was not being enforced in the welding department. Accordingly, at a regularly scheduled management meeting, the responsibility for seeing that the rule was enforced was placed on Hart, who contacted Anderson and learned that the night-shift welding department employees were indeed not following the "closed campus" policy. Anderson had believed the applicable rule involved employees clocking out and in when they left the plant for lunch. Anderson informed Hart that four employees, Tony Belak, Keith Main, Art Burge,

¹ All dates hereafter are in 1981 unless otherwise stated.

² The Respondent considered the leadmen to be its agents.

and Mark Greser, had been leaving the plant during their lunch hour. Consequently, Hart and Anderson called those four individuals to the foreman's desk in the welding area, where Hart informed them of the "closed campus" policy, explaining that they would be terminated if they left the plant building during their lunchbreaks.³ The four employees protested, arguing the new policy was unfair and illegal and demanded that upper-level management talk to them and that the policy be reduced to writing. Hart responded that he was management and that anyone violating the policy would be terminated immediately. An employee request that they be granted permission to leave the building that night since they customarily left for lunch, and as a consequence no one had brought his lunch, was denied. Hart left instructions with Anderson and Austin to terminate anyone who left the premises during lunchbreak.

B. The October 15 Terminations

After the meeting, the welding department employees discussed among themselves and with Anderson the unfairness of the "closed campus" policy and their disagreement with it. Consequently, several of the men decided to follow their customary lunchtime procedure and leave the building during their 10:30 to 11 p.m. lunchbreak.

As noted, Christiansen and Lockhart had been working in fabrication and had not learned of the newly instituted rule along with their coworkers. About 10 p.m. that night, Anderson approached Christiansen in the fabrication department and told him that Hart was serious about the new rule. Christiansen asked what the rule was and Anderson explained that if employees left the building for lunch they were to be terminated. Christiansen responded that he thought the rule was unfair, that his "normal procedure was to go out for lunch," and that, since he had not been forewarned, he did not have any lunch with him. Anderson's reply was to the effect he could not do anything about it. Lockhart normally ate lunch in his van located in the employee parking lot. When hired in mid-September, he had been informed that employees were permitted to leave the building to go to their vehicles, but that they should clock out if they left the premises. About 10:30 p.m. on October 15, as Lockhart was preparing to leave to go to his van for lunch, Anderson told him that he would be "fired" if he stepped outside. Anderson then called Austin over who explained the "closed campus" rule. Lockhart, who had missed the three previous days of work because of illness, asked Austin if he could go outside to his van and get his lunch bucket and medication. Austin responded in the negative.⁴ Lockhart then asked why employees had not been given prior notice of the new policy, and Austin stated he did not know. Feeling that he could go without lunch but not without his medication, Lockhart

³ Welding department employees Robert Christiansen and Richard Lockhart were both working in the fabrication department and did not learn about the "closed campus" policy until later that night. Despite the fact they were working in fabrication, they took their lunchbreak with the rest of the welding department employees.

⁴ Lockhart had earlier shown Anderson a doctor's slip saying he had been out with the flu.

said, "Well, if there's no other alternative, then write me out a termination slip." Austin made out a termination slip which reads:⁵

10-15-81

Richard Lockhart
Reason for termination
Left building during
lunch when told not too [sic]

Sam Austin

Similarly worded slips were issued to Burge, Greser, and Belak who had decided to leave, as was their custom, in protest over the "closed campus" rule.

C. The October 20 Terminations

There is no dispute but that employees other than welding department employees had also complained to management about the new policy. On Friday, October 16, following a management meeting, those terminated welders who had shown up were informed that the terminations stood. At 6 or 6:30 p.m. that Christiansen told Hart "I thought it [closed campus policy] was a chicken shit policy, and I didn't think it was fair, and it wasn't probably even legal." Hart responded he had to enforce it.

On Monday, October 19, Main and Christiansen decided to go to the library and try to find out if the "closed campus" policy was legal. On the following day, October 20, they went to the library and made copies of the following Nebraska statute:

48.212 Lunch hour; requirements; exceptions. Any person, firm, or corporation owning or operating an assembling plant, workshop, or mechanical establishment employing one or more persons, shall allow all of their employees not less than thirty consecutive minutes between the hours of 12:00 noon and 1:00 p.m., in each day for lunch, or thirty consecutive minutes during any other suitable hour for lunch, and during such time it shall be unlawful for any such employer to require such employee or employees to remain in buildings or on the premises where their labor is performed. *Provided*, that the provisions of this section shall not apply to any person, firm, or corporation owning or operating an assembling plant, workshop, or mechanical establishment where such assembling plant, workshop, or mechanical establishment operates in three shifts of eight hours each twenty-four hours.

Upon reporting for work that evening, Main and Christiansen discussed the foregoing statute with other employees. The two men stated they were going to leave the premises for lunch that evening because they felt it was within their legal right to do so, and invited other employees to join them. As they were leaving they heard Anderson holler at them. On their reentry to the plant approximately a half hour later, Anderson stated they

⁵ G.C. Exh. 6.

were terminated. At that point they showed Anderson a copy of the above statute, maintaining it was against the law for him to terminate them. Shortly thereafter, Hart, whom Anderson had called, arrived at the plant. He ordered the two men to leave since they were no longer welcome.

The following morning Hart informed Minchow of the previous night's events and gave her a copy of the statute which Main and Christiansen had given him. Minchow called her attorney and was informed that, because of the proviso in the statute, the Company had not violated the law in terminating the men.

The record shows that while the Respondent maintains a lunchroom and a breakroom for employees, there are no cafeteria or other food services offered with the exception of vending machines containing chips, cookies, peanuts, sometimes rolls, soup, hot chocolate, and coffee. The Respondent's employees are not represented by a labor organization, nor were the alleged discriminatees aware of any grievance procedure. Minchow described a "very informal" "gripe committee" chosen by the employees in the different areas. Apparently Plant Manager Leftewitch "would be meeting with one area a month" to hear complaints. The Respondent "Employee Handbook"⁶ makes no mention of the "gripe committee," nor have any notices been posted regarding its existence.

Positions of the Parties

The Respondent argues that it did not terminate the alleged discriminatees because they were protesting the establishment of the "closed campus" rule, but rather that "as soon as the employees violated this work rule they lost the protections of the law and therefore were legally terminated." It is claimed that "simply because the working conditions create an inconvenience, even of a physical nature, this is an employee problem and not one that the employer is forced by the law to deal with." It is argued further that "all of this testimony with regard to the employees' feelings concerning the closed campus policy and the fact that they did not have lunches with them on the evening of October 15, is completely irrelevant to a determination of the question presented in this trial." The General Counsel argues that "Respondent's lunch policy is a working condition and protest of and objection to such a policy by employees are concerted activities for the purpose of mutual aid and protection within the meaning of Section 7 of the Act." Thus, the action taken by the four employees on October 15 and the two on October 20 was in protest over a condition of employment and protected by Section 7 of the Act, and the discharges therefore violated Section 8(a)(1).

Conclusions

Section 7 of the Act guarantees the right to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection." That section insures not only the right to engage in union-concerted activity but also the "fundamental right" to join together to seek better terms, tenure, or conditions of employ-

⁶ G.C. Exh. 2.

ment. *Hugh H. Wilson Corp. v. NLRB*, 414 F.2d 1345, 1347 (3d Cir. 1969), cert. denied 397 U.S. 935 (1970). Accord: *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 14 (1962). Section 8(a)(1) implements that guarantee by making it an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of rights guaranteed by Section 7. Thus, as the Supreme Court emphasized in *NLRB v. Washington Aluminum Co.*, supra, 370 U.S. at 14, the Act affords a broad protection to unorganized employees who have "to speak for themselves as best they [can]." The Court therefore held that these employees do not "necessarily lose their right to engage in concerted activities under § 7 merely because they do not present a specific demand upon their employer to remedy a condition they find objectionable," that "[t]he language of 7 is broad enough to protect concerted activities whether they take place before, after, or at the same time such a demand is made" and that "the reasonableness of workers' decisions to engage in concerted activity is irrelevant to a determination of whether a labor dispute exists or not" *Id.* at 14-17.

Of course, Section 7 does not protect all group activities engaged in during the course of employment, without regard to the objective sought or the means employed. Employee protests which are not reasonably related to terms and conditions of employment are not protected. Moreover, concerted protests have been held unprotected where the means utilized contravened the provisions or basic policies of the Act⁷ or were otherwise unlawful,⁸ violent,⁹ or indefensible.¹⁰ Unless concerted activity is unprotected for one of these reasons, however, it is entitled to full statutory protection and an employer cannot discipline his employees for engaging in such activity. See *NLRB v. Washington Aluminum Co.*, 370 U.S. at 17; *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 223 (1963); *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333, 334 (1938). "It is therefore clear," as the Board stated in *Plastilite Corp.*, 153 NLRB 180, 184 (1965), *enfd.* in pertinent part 375 F.2d 343 (8th Cir. 1967):

. . . that the determination of whether a "labor dispute" exists does not depend on the manner in which the employees choose to press the dispute, but rather on the matter they are protesting. Where a "labor dispute" exists, the employees may engage in a peaceful primary strike or any other lawful manner of protest and still retain the protection of the Act.

Consistent with these principles, the Board has long held, with court approval, that concerted activity is pro-

⁷ See, e.g., *NLRB v. Sands Mfg. Co.*, 306 U.S. 332 (1939) (strike in breach of a collective-bargaining agreement).

⁸ *Southern Steamship Co. v. NLRB*, 316 U.S. 31 (1942) (strike which constituted mutiny under the Criminal Code).

⁹ *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240 (1939) (forcible seizure of employer's property).

¹⁰ *NLRB v. Electrical Workers IBEW Local 1229*, 346 U.S. 464 (1953) (unjustifiable published attack on employer's product); *Auto Workers v. Wisconsin Board*, 336 U.S. 245, 255-256 (1949) (series of intermittent economic pressures).

ted by the Act where the facts show that the protest is directly related to employees' conditions of employment and is undertaken for their own mutual aid or protection. As stated by the Board in *First National Bank & Trust Co.*, 209 NLRB 95 (1974): "Respondent's lunch policy clearly is a condition of employment, and the employees' objections to that policy . . . are concerted activity for the purpose of mutual aid or protection within the meaning of Section 7 of the Act." "It is well settled that employees who attempt to persuade their employer to modify or reverse management decision are engaged in conduct which is protected by Section 7 of the Act." *Alumina Ceramics, Inc.*, 257 NLRB 784 (1981). Even individual protests are protected as concerted activity if the matter at issue is of moment to the group of employees.

The undisputed testimony of the employees in the instant case establishes that they discussed among themselves, and with other employees, both on October 15 and 20, the common problem of no longer being able to leave the Respondent's premises during their lunchbreaks because of the "closed campus" policy. It is clear from the evidence that no employee was alone either in his action or his interest. As in *Oklahoma Allied Telephone Co.*, 210 NLRB 916, 920 (1974), the grievance of each was enmeshed with the complaint of the others and all would have benefited from the adjustment of the matter. It is concluded, therefore, that the discharges on both October 15 and 20 acted concertedly when they clocked out during their lunchbreaks on those days, and that the Respondent knew of the concerted nature of the discharges' conduct on both dates when it took action against them.

In *Washington Aluminum*, supra, the Supreme Court held that when a group of unrepresented employees spontaneously ceased work after reporting to their jobs because of their dissatisfaction with a condition in the plant, even though in contravention of an express company requirement of permission to leave the job, their concerted action was entitled to the Act's protection although the stoppage had occurred without any advance notice to the employer and there had been no prior demand for a change in the prevailing working condition. As in *Washington Aluminum*, the Respondent's employees are unrepresented and do not have the benefit of established procedures to protest undesirable working conditions. With respect to the informal gripe committee established by the Respondent, it is clear the alleged discriminatees were not even aware of its existence. In that connection, in *Advance Industries*, 220 NLRB 431, 432 (1975), the Board stated "the existence of a grievance procedure unilaterally established by Respondent does not provide a sufficient basis for denying the protection of the Act to the . . . employees" there distinguishing between that type of grievance procedure and one reached mutually through the collective-bargaining process.¹¹

¹¹ *Bechtel, Inc.*, 248 NLRB 1222 (1980), cited by the Respondent, is clearly distinguishable on this and other grounds.

Employees who together seek amelioration concerning terms or conditions of employment are exercising a right guaranteed to them under the Act, for which they may not be discharged without violating the Act. Upon the cited authorities, the facts as found, and the record presented, I find and conclude that the activities of the alleged discriminatees on both October 15 and 20 constituted concerted activities protected by Section 7 of Act, and that the discharge therefore was in violation of Section 8(a)(1) of the Act.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. By terminating Arthur Burge III, Anthony Belak, Mark Greser, and Richard Lockhart on October 14, 1981, and by terminating Keith Main and Robert Christiansen on October 20, 1981, as found herein, the Respondent in each instance violated Section 8(a)(1) of the Act.

3. The above unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. I shall recommend that the Respondent be required to offer Arthur Burge III, Anthony Belak, Mark Greser, Richard Lockhart, Keith Main, and Robert Christiansen immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority and other rights and privileges, and to make them whole for any loss of earnings that they may have suffered by reason of Respondent's discrimination against them, by payment of a sum of money equal to that which they normally would have earned as wages from the dates of their respective discharges to the date of the offer of reinstatement, less their respective net earnings during such period, with backpay computed on a quarterly basis in the manner established by the Board in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest thereon as set forth in *Florida Steel Corp.*, 231 NLRB 651 (1977). See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962). It is further recommended that Respondent expunge from its records any references to the unlawful discharges of said discriminatees as found herein, and notify each of the discriminatees in writing that this has been done and that evidence of the unlawful discharges will not be used as a basis for future personnel actions against any of them. *Sterling Sugars*, 261 NLRB (1982).

It is also recommended that Respondent make available to the Board, upon request, all payroll and other records to facilitate checking the amount of backpay due.

[Recommended Order omitted from publication.]