

Molon Motor and Coil Corp. and Local 1031, International Brotherhood of Electrical Workers, AFL-CIO. Case 13-CA-28456

March 21, 1991

DECISION AND ORDER

BY MEMBERS CRACRAFT, DEVANEY, AND OVIATT

On March 15, 1990, Administrative Law Judge Stephen J. Gross issued the attached decision. Both the General Counsel and the Charging Party filed exceptions and supporting briefs, and the Respondent filed an answering 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 briefs 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 did not violate Section 8(a)(1) by discharging employees who, in support of a demand for higher wages, remained in the Respondent's breakroom while refusing to work. The General Counsel and the Charging Party except, contending that the discharges were unlawful since the employees were engaged in protected concerted activity which did not lose the protection of the Act and, in any event, the employees were terminated for refusing to work and not for remaining in the breakroom. We agree with the General Counsel and the Charging Party that the discharges were unlawful as the Respondent's actions were motivated by the employees' refusal to work.¹

The Respondent manufactures electric motors at its Palatine, Illinois plant. Thirty-two production employees work on the first shift which begins at 6 a.m. and ends at 2:30 p.m. On Monday, February 13, 1989,² after clocking in, 10 to 20 of the production employees went to the employees' break area and refused to work. The employees informed the plant manager, Don Stratton, that they would not return to work unless they got a pay increase. Stratton told the employees he would communicate their complaint to Respondent's senior management and the employees returned to work. During the remainder of the day, management met with the employees individually and in groups to determine whether the employees had concerns other than their wages. Management informed the employees that they would provide the employees with more information regarding the salary rate at the end of the

week. The employees were paid for a full day on February 13.³

On the evening of February 13, a group of employees met with a representative of the Union. Some of the employees, whose native language is Spanish, left the meeting with the impression that if they left the Respondent's premises for any reason during a conflict with the Respondent, they would be deemed to have abandoned their jobs and would be "laid off without any right to go to unemployment." On February 17, the Respondent met with the employees and read a letter in both Spanish and English describing the Respondent's financial difficulties, and its inability to grant the employees a wage increase.

On Monday, February 20, after clocking in at 6 a.m., 22 of the production employees went to the breakroom, refusing to work unless they got a pay increase. During the next 5 hours Respondent's management officials tried to convince the employees to return to work. Management made statements like, "please return to work," and "we can't promise you increases because the Company is in a crisis." The Respondent's comptroller also spoke to the employees, giving them a detailed account of the Respondent's financial situation and the reasons for Respondent's inability to grant the employees a wage increase at that time. After listening to the Respondent's explanation, the employees continued to refuse to return to work.

According to Donald Bodziak, the Respondent's director of manufacturing, at approximately 11:10 a.m. he told the employees, *inter alia*, "[E]ither you go to work or you will be terminated." Bodziak further testified that at 11:20 a.m. or 11:30 a.m. in his final request to the employees he stated, "This is my final request. If you do not go back to work, you will be terminated for refusing to work. If you don't go back to work or don't leave, I will call the police."⁴ Even after Bodziak's final request, the employees refused to leave. At 11:30 a.m. Bodziak called the police who arrived a few minutes later. The employees left the building at 11:45 a.m., after the policemen informed them that they could be arrested for trespassing and would have to post bail. Bodziak did not file criminal trespassing charges against the employees.

A few days later, a number of the employees who had participated in the work stoppage inquired whether they could return to work. The Respondent responded that they could not return to work because they had been terminated. In a memo to the "Personnel File" from Bodziak stating the subject as "Terminations-Re-

³No employees were disciplined for their activities on February 13.

⁴The judge found that he could not determine whether management informed the employees either "go back to work or you'll be terminated" or "if you don't return to work or leave the premises we'll consider you trespassers and we'll terminate you." Although there may also have been statements by management officials to the effect that employees should either return to work or leave the premises, we find, in light of Bodziak's admissions, that the employees were threatened with being discharged for refusing to work.

¹Accordingly, we need not pass on whether the Respondent could have lawfully discharged the employees for staying in the breakroom.

²Unless otherwise stated all dates are 1989.

fusal to Work'' and listing the 22 employees, the following statement is included:

At approximately 11:30 a.m. on Monday, February 20, 1989, these individuals were asked either to go to their regularly assigned work stations and start to work, or leave the premises since they were *being terminated for refusing to work*. They would not return to work, and refused to leave the premises. At this time the above listed individuals were advised that they were terminated and were trespassing. [Emphasis added.]

Bodziak testified at the hearing that the employees were terminated for refusing to work.⁵

The judge recommended the dismissal of the complaint, finding that the Respondent did not violate the Act when it terminated the employees. The judge found the discharges justified because, even though the work stoppage at its inception was protected concerted activity, the conduct lost its protection as a result of the length of time that the employees remained in the breakroom.⁶

In so doing the judge assumed that the discharges were for trespassing. He did not discuss the possibility that the Respondent actually discharged the employees for refusing to work. However, the overwhelming evidence establishes that the employees' refusal to work was the actual reason for the discharges, not the fact that they stayed too long in the cafeteria. Bodziak acknowledged that in his last plea to the employees to return to work he stated, "This is my final request. If you don't go back to work, you will be terminated for refusing to work. If you don't go back to work or don't leave, I will call the police."⁷ This statement clearly informed the employees that their only option, if they did not want to lose their jobs, was to return to work. It did not leave the employees the option of leaving the premises and avoiding discharge. In addition, the document in the Respondent's personnel records confirms that the 22 employees were discharged on February 20, for refusing to work.⁸ Further, Bodziak at the hearing admitted that the employees

⁵Thus, at the hearing counsel for the General Counsel asked Bodziak, "So what was the cause they were terminated for? Is the cause they were terminated for clearly stated in the memo you wrote for the personnel files?" Bodziak responded, "Basically refusing to work."

⁶The judge found that the employees during their stay in the breakroom were peaceful, that they did not keep other employees from using the breakroom, and that the employees entered the Respondent's premises when the shift began and left before their shift ended. However, the judge also found that the gathering in the break room had "undoubtedly . . . adversely affected the work of those employees who did not join in the refusal to work" since the breakroom is next to the production area.

⁷This version of the events was reinforced by the Respondent's attorney's opening statement at hearing, in which he described that the employees were told that if they did not go back to work they would be terminated.

⁸In concluding that the Respondent violated Sec. 8(a)(1), Member Oviatt relies just on this document, which he finds clearly conveyed the Respondent's decision to terminate the employees "for refusing to work," a protected concerted activity.

had been discharged for refusing to work on February 20. Thus, the Respondent consistently maintained in the statements to its employees, in the documents in its personnel file, and in the testimony presented at the hearing that the discharges were for the employees' refusal to work.

The refusal to work that motivated Respondent's decision to terminate the employees was, as the judge found, protected concerted activity. Therefore, we find that the General Counsel has established a prima facie case that the Respondent unlawfully discharged the employees for engaging in protected concerted activity. The Respondent, therefore, has the burden of establishing that the discharges would have taken place even in the absence of the protected concerted activity.⁹ The Respondent has not offered any explanation for the discharges other than that the employees were trespassers. Because we have concluded that the employees were discharged for refusing to work and not for being trespassers, we find that the Respondent has failed to meet its burden. Thus, we conclude that the Respondent violated Section 8(a)(1) by discharging employees for engaging in the protected concerted activity of refusing to work and by thereafter refusing to reinstate them.

CONCLUSION OF LAW

By discharging and refusing to reinstate 22 of its employees because they engaged in the protected concerted activity of refusing to work, the Respondent has violated Section 8(a)(1) of the National Labor Relations Act.

REMEDY

Having found that the Respondent has engaged in unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Having found that the Respondent unlawfully discharged and refused to reinstate the 22 employees at issue here, we shall order the Respondent to offer them immediate and full reinstatement, without prejudice to their seniority and other rights and privileges, and to make them whole for any loss of earnings they may have suffered as a result of the Respondent's unfair labor practices, with interest, in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

ORDER

The National Labor Relations Board orders that the Respondent, Molon Motor and Coil Corp., Palatine, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

⁹*Wright Line*, 251 NLRB 1083 (1980), enf'd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

(a) Discharging and refusing to reinstate employees because they engaged in a protected, concerted refusal to work.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Demetrio A. Alvarez, Gonzalo Martinez, Joaquin Damian, Juana Hernandez, Josefina Vasquez, Maria A. Morales, Maria Rebolledo, Graciela Jaimes, Virginia Oviedo, Maria Agnes Skowronski, Arthur Robert Skowronski, Juanita Pinto, Romeo Carbajal, Adan Salgado-Montes, Tiburcio Carbajal, Eugenio Delgado, Guillermo Vasquez, Saul F. Viveros, Maria T. Bustos, Ofelia Solis, Maria Balderas, and Rosa Santoyo immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(b) Remove from their files any reference to the unlawful discharges and notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

(c) Preserve and, on request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at the Respondent's Palatine, Illinois facility copies of the attached notice marked "Appendix."¹⁰ Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

¹⁰If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge or refuse to reinstate you because you engage in a protected, concerted refusal to work.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Demetrio A. Alvarez, Gonzalo Martinez, Joaquin Damian, Juana Hernandez, Josefina Vasquez, Maria A. Morales, Maria Rebolledo, Graciela Jaimes, Virginia Oviedo, Maria Agnes Skowronski, Arthur Robert Skowronski, Juanita Pinto, Romeo Carbajal, Adan Salgado-Montes, Tiburcio Carbajal, Eugenio Delgado, Guillermo Vasquez, Saul F. Viveros, Maria T. Bustos, Ofelia Solis, Maria Balderas, and Rosa Santoyo immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and WE WILL make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, plus interest.

WE WILL notify each of them that we have removed from our files any reference to their discharges and that the discharges will not be used against them in any way.

MOLON MOTOR AND COIL CORP.

Sandra Tyra and Emily Fall, Esqs., for the General Counsel.
Steven L. Gillman and Michael Paull, Esqs. (Fox & Grove),
of Chicago, Illinois, for the Respondent.
Stephen Rubin, Esq., of Chicago, Illinois, and *Mr. Roy L. Cortes*, of Park Ridge, Illinois, for the Charging Party.

DECISION

STEPHEN J. GROSS, Administrative Law Judge. On February 20, 1989, a group of employees of the Respondent,

Molon Motor and Coil Corp. (Molon or the Company), clocked in but refused to work, saying that they would not work unless management promised to increase their wage. Molon refused to make that promise. The employees responded by refusing to either go to work or leave the plant. After about 5 hours of that stalemate, Molon's management told the employees that their employment at Molon was terminated. The Company called the police, and two police officers escorted the employees off the premises.

Several of the employees involved subsequently told Molon that they wanted to return to work. Molon said no.

The General Counsel contends that Molon, by firing the employees and by refusing to reinstate them, violated Section 8(a)(1) of the National Labor Relations Act (the Act). Molon admits that the Board has jurisdiction in the matter but denies that the Company has violated the Act in any respect. I heard the case in Chicago on October 17 and 18, 1989. The General Counsel and Molon have filed briefs.¹

A. The Events Leading to the Employees' Refusal to Work on February 20

1. The Employees' refusal to work on February 13, 1989

Molon manufactures electric motors in three plants, all in the Chicago area. The only facility we are concerned with here is the Company's plant in Palatine, Illinois. Thirty-two production employees work there on the first shift, which begin at 6 a.m. and ends at 2:30 p.m.

On Monday, February 13, the employee clocked in as usual. But then somewhere between 10 and 20 of the production employees went to the employees' break area and refused to go to work. The plant manager, Don Stratton, asked what was going on. The employees responded that they weren't going to work unless they got a pay increase. Stratton told the employee that he didn't have the authority to grant any pay increase but that he would talk to Molon's senior management about it and give the employees an answer by noon. Stratton asked the employees to return to work in the meantime. They did, about 7 a.m.

During much of the rest of the day Stratton and his boss, director of manufacturing Donald Bodziak, met with the plant's employees, sometimes with individual employees, sometimes with small groups. The first language of many of the plant's employees is Spanish, and many of those employees speak and understand English poorly. So Stratton and Bodziak kept a bilingual employee by their side to translate.

Management's purpose in holding the meetings with the employees was to determine whether the employees had concerns other than their wage scale. It turned out that low pay was their only complaint. Management also used the meetings to tell the employees that within the week the Company would provide more information about wages.

Molon paid all the employees their full days' pay for February 13, notwithstanding the refusal of some of the employees to work for about an hour. Molon's work rules state that "any form of work stoppage" by an employee is cause for disciplinary action. But Molon did not discipline the employees in any way for the work stoppage.

¹The case began on March 2, 1989, with the filing of an unfair labor practice charge by Local 1031. The complaint is dated April 10, 1989. The General Counsel has filed an unopposed motion to correct transcript which I grant.

2. The union meeting on February 13

That evening about 15 of the Palatine plant employees met with a representative of IBEW Local 1031 (the Charging Party). Somehow at least some of the employees came away from the meeting with a misunderstanding about their labor law rights. If they left the plant for any reason during the course of a controversy with management, they thought, they would thereby be deemed to have "abandoned" their jobs and, in the words of one employee witness, would be "laid off without any right to go to unemployment" (that is, to receive unemployment compensation).

3. Molon's February 17 rejection of any pay increase

On Friday, February 17, management met with those Palatine plant employees who had demanded pay increases. Management read aloud (in both English and Spanish versions) a letter signed by the Company's executive vice president. The letter contended that the Company was facing increased competition and higher costs and concluded that because of these factors, Molon could not afford to pay the employees more than they were already getting. Management handed copies of the letter to the employees.

B. The Events of February 20, 1989

The Palatine employees clocked in as usual on Monday, February 20, about 6 a.m. But then 22 of the production employees went to the employee breakroom, and stayed there, instead of working. At least some of those employees had participated in the February 13 refusal to work. The employees made it clear that they would not work unless they got a pay increase.

Over the course of the next 5 hours various members of Molon's management repeatedly tried to convince the employees to go to work. (The supervisors spoke in English. The Company had a clerical employee translate management's communications into Spanish.) Management used language on the order of "please return to work," and "we can't promise you a pay increase because the Company is in a crisis." The Company's controller came to the plant to present to the employees a detailed analysis of Molon's financial difficulties. The employees remained adamant, stating their position as "no increase, no work."

About 11:10 a.m. Bodziak (Molon's director of manufacturing) told the employees to either go to work or leave the building. The employees refused. Bodziak then said that if they did not either go to work or leave the building he would call the police. The employees said that they were going to remain in the plant's breakroom. Management, in its final communications to the employees in the breakroom then said (in English) either: (1) "go back to work or you'll be terminated; or (2) "if you don't return to work or leave the premises we'll consider you trespassers and we'll terminate you."² The employees, who were under the impression that if they left the building they would thereby be "abandoning" their jobs (perhaps because of the way management's statements were being translated, perhaps because of the employees' own preconceptions), continued to refuse to leave the breakroom.

²The record does not permit me to determine which alternative was uttered. Perhaps both were.

At 11:30 a.m. Bodziak called the police. Two police officers arrived a few minutes later. They asked Bodziak if he wanted to file criminal charges. Bodziak said that he did not. The officers spoke to the employees, discussing the possibility of jail and the need for bail. At 11:45 the employees left the building.

Throughout the 5 hours and 45 minutes that the employees remained in the Palatine plant and refused to work, they remained in the employee breakroom. That room adjoins the production area, and undoubtedly the gathering in the breakroom adversely affected the work of those employees who did not join in the refusal to work. On the other hand the employees in the breakroom were peaceful and some work did get done on the production floor by nonparticipating employees.

February 21 and Thereafter

In the days following the employees' refusal to work about a half-dozen of the employees who participated in that refusal called the Molon to ask if they could return to work. Molon said that they could not, that they had been terminated as employees of the Company.

C. Did the Company Violate the Act?

1. Did the employees engage in an intermittent strike?

"Hit-and-run" intermittent strikes are not protected by the Act. See *Pacific Telephone Co.*, 107 NLRB 1547 (1954). And here a number of the Palatine production employees refused to work for an hour or so on February 13, worked the rest of that week, then refused to work on February 20. Nonetheless it is clear that the employees' activity did not constitute an intermittent strike. For one thing, on February 13 Stratton, on behalf of Molon, essentially asked the employees to return to work on an interim basis while Molon determined how to respond to the employees' demand for higher wage. Secondly, there is no evidence even suggesting that before the employees ceased work on February 13, or during that work cessation, they agreed among themselves that in order to increase Molon's difficulties they would return to work for a few days and then cease work again. Rather, the record indicates that the employees' action on February 20 was a spontaneous response to Molon's statement on February 17 that no pay increase would be forthcoming.

2. Was the employees' February 20 activity protected?

There are some subsidiary issues that seem to me to be exceedingly complicated. For example, what counts—what management said, in English, or what the employees were told in the language that most understood (Spanish, by the translator)? And if the translation was faulty, is that management's problem (for purposes of determining whether the Company violated the Act), or the employees'?

But perhaps questions of that ilk don't have to be answered. The employees' refusal to work was concerted activity over wages. And it is reasonably clear that management had the right to call upon the police to force the employees out of the plant.³

³In many circumstances an employer violates the Act if it calls upon police to force employees to cease their protected activity. E.g., *Medina Super Dupre*,

Thus the central issue seems to be this: When the employees refused to either work or leave the plant for more than 5 hours (and gave no indication that their position was going to change any time soon), did Molon have the right to fire the employees as trespassers? Or does the Act require an employer in those circumstances to consider the employees to be strikers—so that while management could force the employees to leave the building, management could not lawfully fire them.

There appear to be no Board cases that answer that precise question.

The answer would be easy if the employees had begun their stay in the breakroom after their shift ended, instead of when the shift began. Then it would be clear that their activity was unprotected: *Peck, Inc.*, 226 NLRB 1174 (1976).

Similarly it would be clear that management's discharge of the employees would have been a violation of Section 8(a)(1) if: (1) Molon had waited only a half-hour or so after 6 a.m. before taking that action; or (2) the employees' purpose was, for example, to force the Company to cease an unlawful refusal to meet with the employees' bargaining representative. See *NLRB v. American Mfg. Co.*, 106 F.2d 61 (2d Cir. 1939), modified on other grounds 309 U.S. 629 (1940); *Golay & Co.*, 156 NLRB 1252, 1262, enf. 371 F.2d 259 (7th Cir. 1966); *Cone Mills Corp.*, 169 NLRB 449 (1968), enf. denied 413 F.2d 445, 454 (4th Cir. 1969).

Here the circumstances cut both ways.

Several considerations point in Molon's direction. First, no one claims that the employees' action stemmed from any unfair labor practice by Molon. Second, no one claims that the Company refused to listen to the employees' complaints. Third, the object of the employees' action was higher wages—the classic basis for an outside-the-plant strike. Fourth, for more than 5 hours the employees refused to either go to work or leave the plant. And, finally, for much of that time management's only communications with the employees were to urge them to return to work and to explain why the Company was unwilling to agree to higher wages.

But there are points in the employees' favor too. The employees were entirely peaceful. They remained in an appropriate part of the plant—the breakroom—where they interfered least with the Company's production. They did not "occupy" even the breakroom in the sense that they did not try to keep others from using it. And unlike cases like *Peck*, they entered the plant only when their shift was supposed to begin and left it before their shift was supposed to end.

I am going to recommend that the complaint be dismissed.

My reason for that recommendation is this. In the kinds of work places in which the Act applies, it has always been generally understood, by both management and labor, that where employees opt to apply economic pressure on an employer by withholding their services, the employees belong outside the employer's facility, not in it. See *American Mfg. Concern*, 7 NLRB 753 (1938). But were the Board to con-

286 NLRB 728, 729 (1987). But it appears that even if an in-plant refusal to work is protected in the sense that the employer may not lawfully fire the employees for that activity, the employer may lawfully ask the police to remove the employees from the premises. See *Pepsi-Cola Bottling Co.*, 186 NLRB 477 (1970). (The General Counsel here does not claim that management's demand that the employees leave the premises, or management's call to the police, violated the Act.)

clude that Molon violated the Act, that historical arrangement might shift.

That's because there were no special factors in the Molon situation that impelled the employees to stay in the plant rather than engage in the traditional form of strike—picketing outside the plant. Thus a ruling that Molon violated the Act would mean that, in most circumstances, the employees of any employer that was subject to the Board's jurisdiction would have every reason to begin strikes by clocking in to work and then going to the facility's break area, cafeteria, or the like and refusing to either work or leave the premises until forced out. For one thing, that approach might increase the employees' leverage since it might often be more disruptive of the employer's efforts to maintain production than if the employees stayed outside the employer's premises. Secondly it would often be more comfortable for the employees.

(In this case, for example, the dispute occurred in Chicago in February.) Thirdly, that approach would probably result in more mistakes by employers regarding what the Act permitted them to do and say, with consequent findings by the Board that the employer violated the Act which, in turn, might mean backpay awards or, in the very least, findings that the strikes were unfair labor practice strikes.

Because I think that the Board should be exceedingly cautious about encouraging a change in the historically agreed-upon place for employees to station themselves when collectively withholding their services, I conclude that Molon did not violate Section 8(a)(1) of the Act when it fired the 22 employees who clocked in and, for more than 5 hours, refused either to work or to leave Molon's premises.

[Recommended Order for dismissal omitted from publication.]