

Amsco, A Division of Nichols-Homeshield, Inc. and International Association of Machinists and Aerospace Workers, AFL-CIO. Case 18 CA-5915

July 17, 1979

DECISION AND ORDER

BY MEMBERS JENKINS, MURPHY, AND TRUESDALE

On March 27, 1979, Administrative Law Judge Harold A. Kennedy issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief¹ and has decided to affirm the rulings, findings,² and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Amsco, A Division of Nichols-Homeshield, Inc., Rice Lake, Wisconsin, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

¹ Respondent has requested oral argument. This request is hereby denied as the record, exceptions, and brief adequately present the issues and positions of the parties.

² Respondent has excepted to the Administrative Law Judge's apparently inadvertent omission of the word "due" before the word "process" in the first quotation of statements made by Respondent's attorney at the hearing appearing in the second paragraph of the section entitled "Sufficiency of the Complaint" in the Administrative Law Judge's Decision. Although we find merit to this exception, this finding does not affect the results herein.

DECISION

HAROLD A. KENNEDY, Administrative Law Judge: Based on a charge filed by the International Association of Machinists and Aerospace Workers, AFL-CIO (Union),¹ the Regional Director for Region 18 of the National Labor Relations Board issued a complaint alleging that Respondent, Amsco, A Division of Nichols-Homeshield, Inc., interfered with, restrained, and coerced its employees in the exercise of rights guaranteed in Section 7 of the National Labor Relations Act, as amended, by issuing written warnings and

¹ The original charge was filed on July 27, 1978. Amended charges were filed on August 25 and September 25, 1978.

suspensions to Tamara Broten, Debra Postle, and Betty Olson "in reprisal for . . . participation on or about July 7, 1978, in a concerted temporary work stoppage at the Respondent's place of business to protest the results of a new job evaluation program."² The case was heard in Rice Lake, Wisconsin, on December 14, 1978.

The basic facts are not in dispute. Respondent's answer admits that it is engaged in the manufacture of fabricated aluminum window and door screens, that its principal place of business is located at Rice Lake, Wisconsin, and that it is an employer engaged in commerce within the meaning of the Act.³ Respondent admits that the following are supervisors within the meaning of the Act: William Cutter, division manager; Mary Menz, employee relations manager (erroneously designated personnel manager in the complaint); Robert Levan, quality control manager; Donald Lang, plant superintendent (erroneously designated plant supervisor in the complaint); Anita Berg, finals department supervisor; and Harriet Gleason, supervisor. Further, Respondent admits issuing the written warning and suspensions to Broten, Postle, and Olson as "legal and proper disciplinary actions" but not as "acts of reprisal." Thus, Respondent denies that there was any violation of Section 8(a)(1) of the Act as alleged. Respondent also raised a procedural issue at the hearing—repeated in its brief—that will be dealt with first.

Sufficiency of the Complaint

At the hearing Respondent moved for dismissal of the complaint on the basis that it fails to state a cause of action. Respondent has renewed its motion in its brief. Respondent contends that the complaint is deficient because it omits the word "protected." According to Respondent, the complaint challenges concerted activity but not *protected* concerted activity. Respondent's motion is without merit. Both paragraph 4 and 5 of the complaint allege that Respondent's conduct has interfered with "the exercise of rights guaranteed in Section 7 of the Act"—obviously putting in issue protected concerted rights of Respondent's employees.

When I declined to dismiss the case at the hearing counsel for Respondent claimed that Respondent was not on notice of what might be considered protected activity under the complaint, even though paragraph 4 specifically alleges that Tamara Broten, Debra Postle, and Betty Olson were, on or about July 11 or 12, issued warnings and suspended in reprisal for participating in a concerted temporary work stoppage to protest the results of a job evaluation program. The names of the supervisors that allegedly issued such warnings and suspensions were set forth in the complaint. Counsel for Respondent indicated that they would leave the

² The warnings and suspensions of Broten and Postle were allegedly issued on or about July 11, 1978, by Quality Control Manager Robert Levan and Supervisor Harriet Gleason, admitted supervisors of Respondent. Olson's warning and suspension were allegedly issued on or about July 12, 1978, by Donald Lang, an admitted supervisor of Respondent. Respondent's answer states that Lang is plant superintendent, not plant supervisor as the complaint alleges.

³ Respondent does not dispute the allegations of the complaint that aver that in 1977 Respondent shipped products out of State valued in excess of \$50,000, and that in 1977 it received materials from outside the State valued in excess of \$50,000.

hearing and not participate further in the hearing on the basis that to remain "would not aid in the guarantee to our client his right to process." The General Counsel's attorney summarized the evidence he intended to offer, and I then indicated to Respondent's counsel that if they remained at the hearing I would consider at the close of the General Counsel's case-in-chief a motion from Respondent to defer the presentation of defense evidence at a later time "in the event . . . anything comes up . . . to indicate that [they] were not sufficiently apprised of." Counsel for Respondent, nevertheless, chose to leave the hearing before hearing the General Counsel's evidence.⁴ The General Counsel's attorney called one of Respondent's attorneys, Gordon Gill, to the stand to identify an affidavit which he had signed on August 17, 1978. The General Counsel's attorney explained the reason for offering the affidavit as follows:

The only reason I am presenting it, to show that the company had sufficient notice of the incidents involved in this case. I think the complaint alone is sufficient, but I am going to show further that they had sufficient notice, and I am introducing it for that purpose alone.

Examination of the affidavit (G.C. Exh. 2) discloses that Respondent's attorney, Gordon Gill, was aware "of the employee protest over the job evaluation program sometime that Friday, July 7." According to the affidavit he visited the plant on July 10 and was briefed by Menz and Cutter who reported that Tammy Broten and Debbie Postle were responsible for the protest. He spoke with Supervisor Anita Berg who reported that Betty Olson as well as Broten and Postle had encouraged employees to join in the work stoppage. According to the affidavit, Berg also reported to Gill on a meeting she had with those employees on the day of the protest. Gordon Gill also reported interviewing Quality Control Manager Bob Levan, Plant Production Manager Lang, Supervisor "Angel" Gleason, and some employee witnesses. Gill's affidavit recites that he reviewed certain personnel records and recommended personnel action to be taken with respect to Broten, Postle, and Olson.

Having considered the pleadings filed, Gordon Gill's affidavit, and the entire record, including the testimony of the witnesses, I find Respondent's motion to dismiss to be without merit. Counsel for Respondent was fully apprised of the charges well before the date of the hearing. Accordingly, Respondent's motion to dismiss is denied.

Respondent requests, in the alternative, that the case be reopened so it can "defend against matters raised at this hearing which were a surprise to Respondent." Respondent has provided no basis for reopening, and this request is also denied.⁵ Respondent was clearly on notice of the charges well before the hearing, and there is no showing that Respondent was misled in any way.

⁴ When counsel for Respondent left the hearing room, I said "good bye," but the transcript incorrectly reads "good boy." The transcript is herewith corrected in this respect.

It should be noted that at one point Respondent's counsel indicated a willingness to appear again within 2 months or possibly 6 weeks if the entire case would be postponed.

⁵ As Respondent's counsel states in its brief, I indicated that I would give consideration to reopening of the proceeding even after they had an opportunity to read the transcript of the General Counsel's witnesses, but the brief provides no adequate basis for doing so.

Findings on the Charges

In *Polytech, Incorporated*, 195 NLRB 695 (1972), five employees were given 2-day suspensions for refusing, for the first time, to perform overtime work requested of them by their employer. The Board said [at 696]:

In determining whether or not the above-described work stoppage was a protected concerted activity, we are guided, in the main, by the decision of the Supreme Court in *N.L.R.B. v. Washington Aluminum Co.*, 370 U.S. 9. That decision held that when a group of unrepresented employees spontaneously ceased work after reporting to their jobs because of unsatisfactory condition in the plant, their concerted action was entitled to the Act's protection—and this even though the stoppage occurred without any advance notice to the employer and there had been no prior demand for a change in the prevailing working conditions.

In a case arising [citing *First National Bank of Omaha*, 171 NLRB No. 152, enfd. 413 F.2d 921 (C.A. 8)] subsequently, the Board held, with court approval, that a previously unannounced concerted refusal by a group of unrepresented employees to work overtime—one prompted by dissatisfaction with the employer's overtime policies—was a presumptively protected concerted activity. The Board and the court [*First National Bank of Omaha, supra*] made it clear that the stoppage did not lose its protected status because it was limited in duration to the overtime hours or was unaccompanied by any affirmative indication as to what the employees intended to do in the future if the employer continued to maintain the existing overtime policies.

* * * * *

This analysis of the *Washington Aluminum* and *Omaha* cases demonstrated the existence of a presumption that a single concerted refusal to work overtime is a protected strike activity; and that such presumption should be deemed rebutted when and only when the evidence demonstrates that the stoppage is part of a plan or pattern of intermittent action which is inconsistent with a genuine strike or genuine performance by employees of the work normally expected of them by the employer. We find insufficient such evidence in this case and therefore find that the presumption has not been effectively rebutted. We thus conclude that Respondent's disciplinary suspension of the employees was conduct violative of Section 8(a)(1) of the Act.

Polytech was followed by the Board's decision in *Union Electric Company*, 219 NLRB 1081 (1975), involving the suspension of two linemen for engaging in a work stoppage to protect the suspension of two other linemen who had refused temporary upgrading. The Board stated in *Union Electric* [at 1082]:

In this situation, we find the Board's decision in *Polytech, Incorporated* to be controlling. There, the Board held that separate concerted refusals to work are presumed to constitute protected strike activity and that this presumption may be rebutted only when the

evidence demonstrates "that the stoppage is part of a plan or pattern of intermittent action which is inconsistent with a genuine strike or genuine performance by employees of the work normally expected of them by the employer." We find no evidence in this case sufficient to rebut this presumption of protected strike activity. In these circumstances, we conclude that Welshans and Henry engaged in protected activity when they refused to work, in sympathy over the temporary suspension of fellow employees who refused the disputed upgrade assignments. Accordingly, we conclude that the Respondent's disciplinary suspension of Welshans and Henry, for engaging in such activity, violated Section 8(a)(1) of the Act. *A fortiori*, the Respondent violated Section 8(a)(1) of the Act by warning employees against engaging in similar protected concerted activity.

The evidence shows that on Friday, July 7, 1978, there was a brief, one-time work stoppage to protest the new job evaluations announced by Respondent.⁶ Under the controlling cases cited above, the work stoppage was presumed to be protected activity. Respondent had an adequate opportunity to show that the work stoppage was part of the plan of "intermittent action" inconsistent with a genuine strike or performance by employees of work normally expected of them, but it elected not to do so.

The testimonies of Tamara Broten, Debra Postle, Betty Olson, and Judith Parker went un rebutted. Broten testified that she went to the cafeteria before starting work on the morning of July 7, 1978. "Everybody was talking about the posting that was on the bulletin board," she said. She checked the bulletin board and observed that as a result of the "MIMA Job Evaluation Study" (G.C. Exh. 3) her job as a quality control inspector had been downgraded from labor grade 4 to labor grade 3.⁷ She said that employees reported to work at 7 a.m. as usual, but "there was definitely a difference in the output." "[E]verybody was just discussing these changes."

Broten noticed that several male employees from the "door line" department, who had gone on break around 9 a.m., had gathered near her department around 9:15 a.m. when her group was due for a break. There was a report that Division Manager Cutter had talked with members of the night shift, and "everybody" then proceeded down the hall to Cutter's office. Broten was "toward the front" and asked Cutter's secretary if the group could see him. Cutter agreed and met with the employees in a conference room. Broten testified that she asked Cutter a question during the meeting concerning the effect of the downgrading on wages, but she said that he responded by telling her that she "wasn't listening." Broten said that Cutter passed around a book which had reportedly been used by "MIMA" in making the job evaluation for Respondent. Broten stated that she left the conference room and returned to work after about 1 hour. She thought at the time that there were only

about 15 employees left in the conference room and 20 or 30 outside the room.

Broten testified that shortly after returning to her work station Anita Berg, her supervisor, called a number of employees together and told them that she was ashamed of them for putting "Mr. Cutter on the spot like this." Broten stated that Berg complained that employees failed to go through "the right channels" and, turning to Broten, "said if I was ever spokesman for anybody in her department again she would personally see that I am out of there."⁸ Broten stated that she did not respond at the time but later during the lunch period pointed out to Berg that the men from the door line had come over to her department before employees went to see Cutter—a fact that she said Berg acknowledged observing.

On Tuesday, July 11, Broten said that she and Debbie Postle were called in and given suspensions by Harriet Gleason and Bob Levan for their participation in the July 7 protest. She said she signed, as requested, a "warning" notice which referred to her "conduct on July 7" as well as to prior warnings.⁹ The notice read in part:

... On July 7, 1978 you engaged in conduct in complete disregard of established procedures and policy by leaving your work area and job when you were supposed to be in production work and by encouraging, aiding and urging an unauthorized work stoppage.

As a result of past warnings and your conduct on July 7, 1978, you are hereby suspended from work without pay until August 7, 1978.

On August 7, 1978, you are to report to work at your scheduled shift at 7 AM. Failure to report as scheduled will be construed as your resignation.

We hope the severity of this disciplinary action will teach you to adhere to all rules and regulations and follow established procedures and policies the same as all others are required to do.

Broten testified that she had never participated in a work stoppage before July 7.

Debbie Postle, a "cartoner" at the time of the hearing, testified to the same events of July 7 as did Broten. Like Broten, Postle was a quality control inspector on that day working under Harriet Gleason. Postle said that she observed employees from several departments at the meeting with Cutter. She thought that there were 30 or 35 in the conference room and 15 outside it when the meeting began. "Everybody talked," she said. She said that she asked if a Mr. Anderson, one of Respondent's customers located in Minnesota, knew of "the poor management" of Nichols-Homeshield and inquired if there was "any proof" concerning the new evaluation program (which prompted circula-

⁸ The end of the first page of the notice entitled "Job Re-Evaluation Program," which had been posted on the bulletin board, read:

Should you have any questions regarding this, please see your supervisor, Personnel, or myself.

/s/ Bill

Bill Cutter

⁶ Respondent's employees were not represented by a union at that time.

⁷ Broten testified that "close to half" of the jobs were downgraded. Debra Postle thought that about 70 percent of the plant had been downgraded. Broten last worked for Respondent as a "sill base operator." She left Respondent's employment on December 13, 1978, the day before the hearing.

⁹ The warning notice (G.C. Exh. 4), referred to warnings "for careless work" and "for failure to punch your time card" in 1977 and "for tardiness" and "for failure to punch your time card" in 1978.

tion of the book that the MIMA evaluation group had utilized). Postle said that she returned to work after about 1 hour when Cutter asked the employees to do so. She said that no strike or "work slowdown" was threatened, and Cutter did not threaten to discipline anyone. Postle said that she was not aware that a work stoppage at Nichols-Homeshield had ever occurred before.

Postle also testified about the brief meeting of employees later that morning called by Supervisor Berg at which she said that Berg singled out Judy Parker, Dave Houk, and Tamara Broten for criticism. At the July 11 meeting, to which Levan and Gleason had called her and Broten, she said that she told Levan that she had never heard of such a long suspension before. She refused to sign for the written warning given her on that day. The warning (G.C. Exh. 5), which also refers to tardiness and absenteeism on earlier dates, read in part:

... On July 7, 1978 you left your work area and encouraged, aided and urged others to engage in an unauthorized work stoppage contrary to established procedures and policies.

As a result of your conduct, you are hereby suspended from work without pay until July 31, 1978. You are expected to report for work on July 31, 1978 in accordance with your regular shift schedule which starts at 7 AM. Failure to report for work as scheduled on July 31st will be construed as your resignation.

We hope this disciplinary action will make you realize that you must comply with all rules and regulations the same as all other employees and to follow company procedures and policies.

Betty Olson, a saw operator for Respondent at the time of the hearing, gave testimony concerning the events of July 7 similar to that given by Broten and Postle. Olson's job, which had included inspection work at that time, had been downgraded two grades—from grade 3 to grade 1. Olson testified that "we were all disgusted" over the posting of the new labor grades that morning, and that a leadman encouraged employees to go in, as "some from the night group has," and talk with Cutter. Olson testified that when she saw employees lined up to see Cutter she grabbed her purse and joined them.¹⁰ She said that she returned to work shortly after 10 a.m. and thereafter met briefly with Supervisor Berg who said that she was "ashamed" of Olson and certain others who had attended the meeting.¹¹ On July 12 Olson met with Supervisor Lang, who handed her a notice (G.C. Exh. 6), which read:

On July 7, 1978 you left your work area and encouraged, aided and urged others to engage in an unauthorized work stoppage contrary to established procedures and policies.

As a result of your conduct, you are hereby suspended from work without pay until July 24, 1978.

¹⁰ Olson thought that there were about 50 employees in the conference room when she spoke up and inquired of Cutter "how a cartoner and inspector" could be classified the same as a person who sat at a table doing "latching" work. She said that Cutter's response was: "It's all in the book."

¹¹ Olson said that there were two persons in her department who did not go to the meeting.

You are expected to report for work on July 24, 1978 in accordance with your regular shift schedule which starts at 7 AM. Failure to report for work as scheduled on July 24th will be construed as your resignation.

We hope this disciplinary action will make you realize that you must comply with all rules and regulations the same as all other employees and to follow company procedures and policies.

Olson said that she told Lang that she would not sign for the notice because, "I don't feel it is right." Olson stated that this was the only disciplinary warning she had ever received from Respondent, and that it was the only work stoppage she had ever observed at Respondent's plant.

Judith Parker testified that she stayed at her station as a "final operator" but was able to observe that "the guys from the door line" took the initiative in holding the meeting with Cutter.

CONCLUSIONS OF LAW

Based on the foregoing and the whole record, I make the following conclusions of law:

1. Amsco, A Division of Nichols-Homeshield, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. By warning and suspending Tamara Broten, Debra Postle, and Betty Olson because they engaged in protected concerted activities, Respondent has interfered with, restrained, and coerced employees in the exercise of rights guaranteed in Section 7 of the Act and thereby engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

REMEDY

Having found that Respondent engaged in unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. As I have found that Respondent unlawfully suspended Tamara Broten, Debra Postle, and Betty Olson, I shall recommend that Respondent make these employees whole for any loss of earnings they may have suffered as a result of the unlawful action against them by payment to them of a sum of money equal to what each of them would normally have earned as wages from the dates of suspension to the dates of reemployment, less net earnings during such period with backpay and interest thereon to be computed in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950); *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962); and *Florida Steel Corporation*, 231 NLRB 651 (1977).¹²

Upon the foregoing findings of fact, conclusions of law, the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

¹² It is to be noted that Broten was suspended for approximately 3-1/2 weeks, Postle for approximately 2-1/2 weeks, and Olson for approximately 1-1/2 weeks. The General Counsel has urged that 9-percent interest be paid on the backpay, but the Board has not approved such rate. Accordingly, such request is denied.

ORDER¹³

The Respondent, AmSCO, A Division of Nichols-Homesfield, Inc., Rice Lake, Wisconsin, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Interfering with, restraining, or coercing employees by warning, suspending, or in any other manner discriminating against employees for striking or engaging otherwise in concerted protected activity.

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

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

(a) Make whole Tamara Broten, Debra Postle, and Betty Olson for any loss of earnings each of them may have suffered by reason of the unlawful action against them in the manner set forth in the remedy section in this Decision.

(b) Expunge from its records all references to the warnings and suspensions issued to Tamara Broten, Debra Postle, and Betty Olson for their "conduct" on July 7, 1978, and notify each of them that the warnings and suspensions issued to them have been revoked and that all such warnings and suspensions in the personnel files and other records of Respondent have been expunged.¹⁴

(c) Preserve and, upon 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 its premises at Rice Lake, Wisconsin, copies of the attached notice marked "Appendix."¹⁵ Copies of said

¹³ In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

¹⁴ Warnings and suspensions were issued to Broten and Postle on July 11, 1978. The warning and suspension of Olson occurred on July 12, 1978.

¹⁵ In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of

notice, on forms provided by the Regional Director for Region 18, after being duly signed by Respondent's representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 18, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

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

WE WILL NOT interfere with, restrain, or coerce employees by warning, suspending or discriminating against them in any other manner for striking or for engaging in otherwise concerted, protected activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of rights guaranteed them by Section 7 of the National Labor Relations Act, as amended.

WE WILL make Tamara Broten, Debra Postle, and Betty Olson whole for any loss of earnings they have suffered.

WE WILL expunge from our records all reference to the written warnings and suspensions issued to Tamara Broten, Debra Postle, and Betty Olson in connection with the meaning with Division Manager William Cutter on July 7, 1978, and WE WILL notify each of them, in writing, of the expunging of our records.

AMSCO, A DIVISION OF NICHOLS-HOMESHIELD,
INC.