American Motors Corporation *and* Jonathan Melroy, Willie E. Williams, Louina Allen, and Phillip D. Haney. Cases 30–CA–3819, 30–CA–3838–1, 30–CA–3838–2, and 30–CA–3838–3

July 17, 1978

DECISION AND ORDER

BY CHAIRMAN FANNING AND MEMBERS JENKINS AND PENELLO

On March 1, 1978, Administrative Law Judge Sidney J. Barban 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 Labor 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 brief and has decided to affirm the rulings, findings, 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, American Motors Corporation, Milwaukee, Wisconsin, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

DECISION

STATEMENT OF THE CASE

SIDNEY J. BARBAN, Administrative Law Judge: This matter was heard at Milwaukee, Wisconsin, on August 17, 1977, upon a complaint issued on March 29, 1977, based on charges filed on October 4 and 13, 1976, by the above-named Charging Parties. The complaint alleges that the above-named Respondent violated Section 8(a)(1) of the National Labor Relations Act, as amended, by threatening employees with disciplinary action unless they ceased engaging in union and/or concerted activities protected by the Act, and violated Section 8(a)(1) and (3) of the Act by issuing disciplinary layoffs each of the above-named Charging Parties. The answer to the complaint denies the unfair labor practices alleged, but admits allegations of the complaint sufficient to justify assertion of jurisdiction under current standards of the Board (Respondent, engaged in the manufacture of automobiles at several locations throughout the United States, in a recent annual period caused goods and materials valued in excess of $50,000 to be shipped in interstate commerce among the several States), and to support a finding that Local No. 75, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (herein the Union), is a labor organization within the meaning of the Act.

Upon the entire record in this case, from observaiton of the witnesses, and after due consideration of the briefs filed by the General Counsel and the Respondent, I make the following:

FINDINGS AND CONCLUSIONS

I. THE ISSUE

On July 22, 1976 (all dates hereinafter are in 1976, unless otherwise noted), a group of employees, including the Charging Parties, picketed for a short time outside Respondent's employment office. Respondent told the employees that, if they did not cease their activity, which Respondent termed illegal, they would be subject to discipline. Within a few minutes the employees left. Thereafter, Respondent imposed a 2-week suspension from work on the Charging Parties for engaging in this picketing activity, but also suspended the penalty, with the only result that notice of the disciplinary action remains in the files of these employees. Respondent contends that the picketing activity violated clauses in bargaining agreements it has with the Union and the International union with which it is affiliated (herein the UAW). General Counsel contends that the employees' actions did not violate the contracts.

II. THE FACTS

A. *The Transfer of Work to Kenosha*

During the times material to this matter, Respondent operated production facilities at Milwaukee and at Kenosha, Wisconsin. The Union represented employees (including the Charging Parties) in an appropriate unit at Milwaukee, and another local affiliated with UAW represented employees at Kenosha. Among other activities, Respondent, prior to July 2, assembled bodies for its Gremlin model automobile at the Milwaukee plant.

On July 2, Respondent employed about 2,500 employees in the unit at Milwaukee. On that date the production operations at the Milwaukee plant were closed down for the annual "change-over" period, and all of the employees, with the exception of 261 maintenance and service employees, were placed on layoff or vacation status. These employees were not scheduled to return before August 2.

On July 2, Respondent also notified the Union of its intention to transfer the assembly of the Gremlin model cars from Milwaukee to Kenosha. The Union communicated with Respondent and the UAW asking for meetings to discuss this problem. For reasons which are not set forth in the record, the employees in the unit at Milwaukee were not informed by Respondent or by the Union of the Re-

spondent's communication to the Union or the Union's actions on their behalf.

B. *The Employees' Protest*

About July 3, the employees learned of the projected transfer and the asserted loss of 1,000 jobs at the Milwaukee plant from the newspaper. At the time, contract negotiations between Respondent and the UAW and its locals were scheduled to begin in Detroit, and the Milwaukee employees, upset over the possible loss of their jobs, and desiring union action in their behalf, were not able to communicate with officers of the Union or the UAW.

Some of these employees, including the Charging Parties, met at the home of one of them, Louina Allen, and formed an amorphous group which they came to call "Fighting Times—United Workers Org." They decided to publicize their situation by picketing Respondent's employment office on July 22. Prior to that date they composed a leaflet announcing the intention to picket the AMC employment office. This document, headed up "Stop the runaway of 1000 jobs at AMC," attacks Respondent for "wiping out the livelihood of the workers," and union officials for conceding that the jobs were gone, and merely seeking to negotiate the transfer of Milwaukee employees to Kenosha, where, it is asserted, Respondent would pit the Kenosha workers against those from Milwaukee, each attempting to secure the work. The leaflet demands jobs from Respondent, exhorts Kenosha and Milwaukee workers to stand together, calls for the "working class" to "fight this runaway," and asserts that "We must organize to fight for these jobs—passing resolutions of support in unions, mass petitions, jamming the common council to stand against the runaway, and confronting AMC in direct action."

C. *The Picketing*

Respondent's employment office is located on the west side of Richards Street in an area surrounded by a fence. There is a gate near the office. In this area are a tool and fixture department, a machine shop, and a material storage area. There is no evidence that any unit employees were working in this area during the changeover shutdown. There is some indication that the production employees who worked in the main plant were not aware of any operations in this area other than the employment office. The main production plant is located about a block to a block and a half north of the employment office and on the opposite side of Richards Street.

About 10 a.m., as stated in the leaflet, about 40 persons, including the Charging Parties, began picketing in a circular fashion in front to the gate leading into the area occupied by the employment office. They were observed by Respondent's management officials in the office. After about 20 to 25 minutes, James Madden, labor relations supervisor for Respondent, came to the picket line and approached Jonathan Melrod, one of the Charging Parties, and advised him that he was engaged in an illegal picket line, that he was subject to disciplinary action, and that he should cease picketing. Melrod demurred, asserting that the pickets were engaged in informational picketing.

The picket signs, so far as can be ascertained from the photographs in the record and slight references in the testimony, carried the following legends: "Stop the Runaway of 1000 AMC Jobs"; "Kenosha Milwaukee Workers Unite!! Fight for every Job!!!"; "Youth in Action"; "Fighting Times United Workers Org.—Workers United to Fight—Milwaukee/Kenosha AMC"; "Jobs Now"; "Jobs or Income"; "We Demand Emergency Union Meeting"; and "Emergency Union Meeting." [1]

About 5 minutes after Madden had demanded that the pickets disperse from the area in front of the employment office gate, the pickets left and finally went to the union hall, where they unsuccessfully sought to have the secretary in the office contact the union officials.

During the period that the picketing was conducted at the employment office gate, a truckdriver employed by Respondent came down Richards Street driving one of Respondent's trucks intending to turn into the gateway that was being picketed in order to unload some surplus material in the storage area. He stopped very briefly in the street (the driver, James Awe, first testified that he stopped for 5 minutes, but on cross-examination, he amended this to say, "Like I said, a couple minutes. Three, four, five minutes.") Awe states that he had his turn signal on. He did not speak to the pickets and they did not speak to him. The Charging Parties testified that they did not see him that morning. Awe made no further attempt to enter the gate, but drove his truck to another location where he parked it. He then walked back to the main plant where he presumably went back to work. The next day he took the truck and delivered the material to the storage space in the employment office area.

D. *The Discipline*

Labor Relations Supervisor Madden testified that he recognized only the four Charging Parties among the picketers. On August 6, in a meeting attended by certain stewards and officers of the Union, Respondent advised the Charging Parties that they would be suspended from work for 2 weeks, but that Respondent would in fact suspend the penalty. The personnel files of these employees contain records of the discipline imposed.

E. *The Contract Clauses*

Respondent contends that the picketing activity of the Charging Parties was in violation of an agreement between Respondent and the Union, referred to as the local Working Agreement, and an agreement between Respondent and the UAW, and its locals, referred to as the National Economic Agreement. Insofar as relevant, the clauses relied on are as follows:

First, the local Working Agreement provides:

ARTICLE VI

LIMITATIONS OF STRIKES, WORK STOPPAGES, SLOWDOWNS AND LOCKOUTS

[1] One of the asserted objects of the picketing was to get the Union to hold a special meeting to discuss the jobs situation.

Section 1.

(A) The Union and its members, individually and collectively, agree that during the term of this Agreement . . . there shall be no slowdown or sitdown strikes.

It is further agreed that the Union will not take any strike action, in respect to any controversy, dispute or grievance—

(1) arising under [the management rights provisions of the agreement with certain exceptions].[2]

(2) . . . .

(B) It is agreed that the Union will not authorize any strike, not otherwise prohibited or picket the Company's plants or premises in respect to any controversy, dispute or grievance until the grievance procedure provided herein has been completely exhausted and not then unless sanctioned by the International Union and until fifteen (15) days after filing of the grievance.

Section 2. . . . the union, its officers, agents, or members shall [not] be liable for damages for unauthorized stoppages, strikes, intentional slowdowns or suspension of work if the Union complies with all the provisions of Section 3 of this Article.

Section 3. The Union agrees that . . . it will take immediate steps to end any unauthorized stoppages, strikes, intentional slowdowns or suspension of work . . . .

Section 4. In the event of a strike in violation of this Agreement, the Company shall have the right to discipline . . . any member of the Union who participates therein, furthers or agitates such strike action. . . .

Secondly, the National Economic Agreement provides, as part of article I(a), MANAGEMENT RIGHTS CLAUSE, the following paragraph 15:

> Insistence by the Company upon full compliance with this agreement and with the management right clauses in the said several Working Agreements shall not be an objective of or reason or cause for any strike, slowdown, work stoppage, walkout, picketing, or other exercise of force or threat thereof by the Union or any of its members. . . .

F. *Union-Management Discussions on the Transfer of Jobs to Kenosha*

As has been noted, the Union, UAW, and Respondent discussed Respondent's decision to transfer the Gremlin assembly work from Milwaukee to Kenosha. These discussions occurred just prior to the negotiations for a new collective-bargaining contract, during the negotiations, and just after those negotiations. As a result, on July 30, the Union and Respondent came to an agreement with respect to the right of Milwaukee workers to transfer to Kenosha with the work.

The record indicates that, at least until the matter was finally decided by Respondent and the Union and UAW, the employees in the unit were not informed of the negotiations by the Union or Respondent, and thus were given no opportunity to advise their representatives of their position, and were deprived of the advice and assistance of their bargaining representative in the matter of the elimination of their jobs. It appears that there was publicity in the newspapers concerning the possibility of transfer to Kenosha, which Respondent's vice president for industrial relations, Richard T. MacCracken, acknowledges aroused "[s]peculation and uncertainty and so forth. . . ."[3]

Respondent asserts that the Union and the UAW at no time challenged Respondent's right to transfer the work to Kenosha, and negotiated only about the impact of the decision on the Milwaukee employees. These negotiations were carried on apparently in conformance with paragraph numbered "(14)" on page 3 of the National Economic Agreement, providing for bargaining on the impact on employees of decisions made by Respondent under the management rights reserved to Respondent under the agreement. It is not claimed and it does not appear that the issue was processed under the grievance procedure of the local Working Agreement.

II. ANALYSIS AND CONCLUSIONS

Though the factual outlines of this matter are relatively simple, the problem presented is difficult, presenting once again the necessity of balancing the guarantee of certain fundamental rights of concerted action to the employees with the essential purpose of the Act to stabilize labor relations.

As a general rule, employees have a protected right under Section 7 of the Act to engage in peaceful concerted activities protesting their working conditions. Such protected right may be lost, however, where the activities engaged in are unlawful, violent, in breach of a contract forbidding such concerted action,[4] or where they constitute "indefensible" disloyalty to the employer "unnecessary to carry on the workers' legitimate concerted activities" (such as by disparaging the employer's products or services to the public without advising the public that there was a labor dispute between the union and the employer). See *N.L.R.B.* v. *Washington Aluminum Company, Inc.*, 370 U.S. 9, 17 (1962), or where the employees seek to bargain directly with the

[2] Among the management rights reserved is "the location of plants," which may be argued to support Respondent's right to transfer the work. It is noted that one exception to this strike prohibition is that the Respondent may not use this management rights authority "for the purpose of discriminating against any employee."

[3] It is noted that, in the leaflet issued by the "Fighting Times" group, it was complained that the Union had taken the position that "the jobs are already gone from Milwaukee so we'll negotiate your right to transfer to Kenosha."

[4] It has been held that, in appropriate circumstances, the employees' right to engage in concerted activities "for mutual aid or protection" may be waived by provisions in a lawful collective-bargaining contract, but that such waiver, since statutory rights are involved, must be "clear and unmistakable." See, e.g., *Gary Hobart Water Corporation* v. *N.L.R.B.*, 511 F.2d 284 (1975). However, even contract clauses seemingly clear on their face have been held ineffective to deprive employees of their statutory rights where, under the circumstances of the particular case, it would be incompatible with fundamental purposes of the Act to do so. See *Mastro Plastics Corp., and French-American Reeds Mfg. Co., Inc.* v. *N.L.R.B.*, 350 U.S. 270 (1956); *N.L.R.B.* v. *Magnavox Company of Tennessee*, 415 U.S. 322 (1974).

employer in derogation of the exclusive bargaining status of the employees' bargaining representative. See *Emporium Capwell Co.* v. *Western Addition Community Organization, et al.*, 420 U.S. 50 (1975).

A. *The No-Strike Clauses*

In the present case, Respondent contends that the Charging Parties' picketing activities violated clauses in its local Working Agreement and its National Economic Agreement with the Union and the UAW, and thus were not protected by the Act. The provisions in these contracts with which we are concerned are not models of clarity and the arguments of Respondent and the General Counsel concerning these clauses tend to become complex.

Taking the local Working Agreement first: article VI, section 1(B), of that agreement provides that "[i]t is agreed that the Union will not authorize any strike . . . or picket the Company's plants or premises. . . ." In answer to the General Counsel's argument that this clause provides only a limitation of *union* action, and does not clearly and unmistakably waive employee rights to picket in the present case, Respondent refers to sections 2 and 3 of article VI providing for union action to end "unauthorized stoppages, strikes, intentional slowdowns or suspension of work," and to section 4 of article VI setting forth the right of Respondent, "[i]n the event of a strike in violation of this agreement," to discipline any union member "who participates therein, furthers or agitates such strike action." Respondent argues from this that "the prohibition of strikes and picketing does not just bind the Union, it binds the individual employees as well."

Indeed, the language of all the sections of article VI taken as a whole does show an intention to prohibit *strike action* during the term of the contract whether authorized by the Union or not. Section 4 makes that clear. However, article VI is also clear that *picketing* is prohibited only where engaged in *by the Union*, or by a union member who participates in a strike in violation of the contract, or "furthers or agitates such strike action." Article VI does not prohibit picketing by employees *not* engaged in a strike, or who do *not* "further or agitate such strike action."

With respect to the National Economic Agreement: Paragraph 15 of that agreement provides in pertinent part that the exercise by Respondent of management rights reserved in the local Working Agreement (here presumably the asserted right to transfer work from Milwaukee to Kenosha) "shall not be . . . reason or cause for any strike, slowdown, work stoppage, walkout, picketing, or other exercise of force or threat thereof by the Union or any of its members. . . ."

Upon consideration of all the language in the two contracts, and in particular the fact that the parties clearly intended that both the National Economic Agreement and the local Working Agreement should be applied to the employees at Milwaukee simultaneously and in a coordinated fashion, I find that the parties intended by the language in the National Economic Agreement to prohibit the same conduct and accomplish the same ends as set forth in the local Working Agreement: i.e., to prohibit strikes and to forbid picketing which furthers or agitates such strikes. No reason has been advanced, nor do I know of any, that would lead to the conclusion that the parties intended two different no-strike prohibitions in the two coordinated contracts. That being so, I accept the specific provisions of the local Working Agreement (which is essentially a working shop agreement) over the general, nonspecific provisions of the National Agreement.

B. *The Concerted Activity*

At the outset, it is clear that the Charging Parties were not engaged in a strike (which is defined in Sec. 501 of the Labor-Management Relations Act, 1947, as "including any strike or other concerted stoppage of work by employees . . . and by concerted slowdown or other concerted interruption of operations by any employees"—with an exception set forth in Sec. 502 not pertinent here). At the time of the picketing involved here, the Charging Parties, and all the other pickets so far as this record shows, were on vacation or layoff during a period when Respondent's production lines were shut down, and only 261 maintenance and service employees out of 2,500 unit employees were at work.

It is also obvious that the Charging Parties had no intention of interfering with Respondent's operations, but did intend only to publicize their grievance over the apparent loss of their jobs and lack of communication from the Union on so vital an issue. Thus they picketed for about 30 minutes (dispersing when directed by Respondent), at a time when production operations were shut down, and at a place—the Respondent's employment office which is physically separate from the main production plant—where working employees were not likely to be confronted by the pickets. Neither the leaflet distributed by the group of which the Charging Parties were a part, nor the wording on the picket signs, suggested that a work stoppage was the picket's purpose.

By happenstance, one truckdriver employed by Respondent desired to enter the gate which was being picketed to deliver some obsolete material for storage in that area and, seeing the pickets, drove away without communication with the pickets. The indication is that he continued working that day at the main plant and on the following day delivered the material to storage. It is not shown that any other employee was working in the area which was picketed or knew of the pickets at the time, or that Respondent's operations were in any way disrupted by the picketing, other than by the failure of the one truckdriver to deliver material to storage. Thus the Charging Parties' picketing did not cause, further, or agitate a strike within the meaning of article VI of the local Working Agreement or paragraph 15 of the National Economic Agreement between Respondent and the Union and the UAW.

In *National Can Corporation*, 200 NLRB 1116 (1972), the Board passed on a similar situation, in which the company there involved defended its discharge of an employee (Borrero) for picketing its plant premises (with another employee, Bowers, who had been discriminatorily discharged) in protest of Bowers' discharge, on the ground that the picketing violated its bargaining contract, notwithstanding that the picketers made it clear that they did not intend to cause

a work stoppage and did not do so. The Board there accepted the Administrative Law Judge's findings and conclusions as follows (200 NLRB at 1123–24):

> Respondent also contends that Borrero's picketing and distribution of leaflets on August 30 was in violation of the labor agreement. As discussed hitherto, I regard Borrero's conduct on August 20 as an expression of free speech protected by the Act. His conduct did not constitute a strike or picketing for the purpose of calling a strike. Borrero in the leaflets and in his conversations at the plant premises was engaging in concerted activities with Bowers to publicize their grievances and difficulties with Respondent. Such conduct is protected by the Act and a discharge for this reason is violative of . . . the Act.

Further, it appears that the picketing by the Charging Parties was not intended to subvert the status of the Union as the bargaining agent of the unit employees, but was intended to cause the Union to meet and discuss with the unit employees the matters which the employees wished to be negotiated with Respondent; thus, the picket signs demanding an emergency meeting of the Union. Essential to the fair representation of the employees, which the Act encourages, at the very minimum, is communication between the representative and the employees being represented concerning the jobs of the latter. Although Respondent argues that the Union did not challenge its right to transfer the work from Milwaukee, this does not mean that the employees did not have the right to insist that its representative try to persuade Respondent through negotiations not to transfer the work.

The action of the pickets, further, was legitimately related to their dispute with Respondent, which was clearly publicized, and the language used was not inappropriate to the issues involved. I do not pass on whether their actions were wise or could have been more reasonable since these factors have been held not to be relevant to a decision as to the protected nature of employee concerted activity. See *N.L.R.B.* v. *Washington Aluminum Co., supra* at 16.

On the basis of the above, and the record as a whole, I find that Respondent, by threatening to discipline and by disciplining the Charging Parties for engaging in picketing on July 22, which was a concerted activity protected by the Act, violated Section 8(a)(1) of the Act. The General Counsel also contends that Respondent violated Section 8(a)(3) by imposing such discipline on the Charging Parties. Inasmuch as this would not affect the remedy recommended hereinafter, I find it unnecessary to pass on this contention.

Conclusions of Law

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union and UAW are each labor organizations within the meaning of Section 2(5) of the Act.
3. By threatening to discipline and by disciplining employees for engaging in concerted activities protected by the Act, Respondent engaged in unfair labor practices in violation of Section 8(a)(1) of the Act, which unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

It having been found that the Respondent has engaged in and is engaging in unfair labor practices in violation of Section 8(a)(1) of the Act, it will be recommended that Respondent cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

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

ORDER [5]

American Motors Corporation, the Respondent herein, Milwaukee, Wisconsin, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Threatening or warning its employees that they will be disciplined or suffer other reprisal if they engage in concerted activities protected by the National Labor Relations Act.

(b) Disciplining or imposing other reprisal upon its employees because they engage in concerted activities protected by the Act.

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

2. Take the following affirmative action which will effectuate the policies of the Act:

(a) Withdraw the discipline imposed on Jonathan Melrod, Willie E. Williams, Louina Allen, and Phillip D. Haney, and each of them, for engaging in picketing activities on July 22, 1976, and expunge from its records any written references to the discipline of these employees, and each of them, for such activities.

(b) Post at its operations at Milwaukee, Wisconsin, and mail to Jonathan Melrod, Willie E. Williams, Louina Allens, and Phillip D. Haney, copies of the attached notice marked "Appendix." [6] Copies of said notice, on forms provided by the Regional Director for Region 30, after being duly signed by Respondent's authorized representative, shall be posted by it, and mailed by it as aforesaid, immediately upon receipt thereof, and such posting shall 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

[5] 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.

[6] 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 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."

altered, defaced, or covered by any material.

(c) Notify the Regional Director for Region 30, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

APPENDIX

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

WE WILL NOT threaten or warn employees that they will be disciplined or suffer other reprisal if they engage in concerted activities protected by the National Labor Relations Act.

WE WILL NOT discipline or impose other reprisal on employees because they engage in concerted activities protected by the Act.

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

WE WILL withdraw the discipline imposed on Jonathan Melrod, Willie E. Williams, Louina Allen, and Phillip D. Haney because of their picketing activities on July 22, 1976, and WE WILL expunge from our records references to the discipline of these employees for such activities.

AMERICAN MOTORS CORPORATION