

**McGaw Laboratories, a Division of American Hospital Supply Corporation and Wayne D. Sturm. Case 31-CA-3497**

October 25, 1973

**DECISION AND ORDER**

BY CHAIRMAN MILLER AND MEMBERS FANNING  
AND JENKINS

On June 5, 1973, Administrative Law Judge Maurice Alexandre issued the attached Decision in this proceeding. Thereafter, the Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief to the Respondent's exceptions.

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 briefs and has decided to affirm the rulings, findings,<sup>1</sup> 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 McGaw Laboratories, a Division of American Hospital Supply Corporation, Glendale, California, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

<sup>1</sup> The Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an Administrative Law Judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544, enf. 188 F.2d 362 (C.A. 3). We have carefully examined the record and find no basis for reversing his findings.

**DECISION**

MAURICE ALEXANDRE, Administrative Law Judge: This case was tried before me in Los Angeles, California, on March 29, 1973, upon a complaint issued February 20, 1973,<sup>1</sup> alleging that Respondent had violated Section 8(a)(1) of the National Labor Relations Act, as amended, by dis-

<sup>1</sup> Based upon an original and an amended charge filed on December 19, 1972, and February 6, 1973, respectively

charging Wayne D. Sturm. Respondent has admitted the discharge, but contends that it was lawful.

Upon the entire record, my observation of the witnesses, and the briefs filed by the parties, I make the following:

**Findings and Conclusions<sup>2</sup>**

**The Contentions of the Parties**

Respondent is an Illinois corporation engaged in the business of manufacturing hospital supplies at various locations, including one in Glendale, California. On December 18, 1972,<sup>3</sup> Warehouse Manager Wyatt discharged employee Sturm, the Charging Party. The record establishes, and the General Counsel does not deny, that Sturm was guilty of considerable misconduct. However, Respondent admits that the discharge was motivated not only by Sturm's misconduct, but also by the fact that on December 14 he suggested to several employees that they stop work and leave with him at 4 p.m., the usual quitting time, rather than work overtime as requested by Respondent.

It is well settled that the Act forbids a discharge which is motivated in part by an illegal reason. See, for example, *Betts Baking Co. v. N.L.R.B.*, 380 F.2d 199, 203 (C.A. 10, 1967); *N.L.R.B. v. Great Eastern Color Lithographic Corp.*, 309 F.2d 352, 355 (C.A. 2, 1962), cert. denied 373 U.S. 950 (1963). The General Counsel contends that Sturm's suggestion constituted protected concerted activity and, therefore, that it was an unlawful reason for discharge. Respondent argues that the suggestion involved neither concerted nor protected activity, and hence that the discharge was lawful.

**The Evidence**

The evidence relating to Sturm's suggestion is as follows. Respondent's employees include warehousemen and truck-drivers. At the time of his discharge, Sturm was employed as a so-called emergency truckdriver, i.e., it was his responsibility to deliver emergency orders and to work in the warehouse when there were no such orders. It is undisputed that Respondent requested the warehousemen to volunteer for overtime work on certain days, that they complied with such requests, but that a number of them disliked overtime work, that they frequently complained about it to each other, and that on a number of occasions they requested Respondent to increase the staff. The record establishes that Sturm was one of those who worked overtime and who complained about the shortage of employees.<sup>4</sup> The record also shows that Sturm disliked working in the warehouse and preferred to deliver orders.

About 2:30 p.m. on December 14, a number of warehouse employees, including Sturm, met informally with Personnel Director Trauthen and complained about a shortage of help in the warehouse. A few minutes later, Vice President

<sup>2</sup> No issue of commerce is presented. The complaint alleges and the answer admits facts which, I find, establish that Respondent is an employer engaged in commerce and in operations affecting commerce within the meaning of the Act

<sup>3</sup> All dates referred to hereafter relate to 1972 unless otherwise stated.

<sup>4</sup> Warehouse Manager Wyatt testified that Sturm liked and requested overtime

Hamm approached the group and requested that the meeting be postponed because a number of late orders had just come in and needed attention. The employees disbanded and returned to work. Sturm testified that about 3:45 p.m. employees Lawrence and Leroy Baron, both of whom worked in the warehouse, came to him and suggested that they leave at 4 p.m. At another point, Sturm testified that he made the suggestion to Baron. Baron denied that he asked Sturm to leave, and testified that it was Sturm who made the suggestion to him. According to Baron, Sturm stated that everyone was going to leave at 4 p.m. and asked whether Baron wished to join them, and that Baron replied that he would go if all went. In view of Sturm's inconsistent testimony relating to Baron, I credit the latter. However, I credit Sturm's testimony that Lawrence made the suggestion to him, since Lawrence did not testify and the said testimony by Sturm is not contradicted. Sturm testified that his understanding of the reason why the suggestion was made to him was the excessive amount of overtime in the warehouse due to a lack of manpower, and the dislike for overtime on the part of many employees.

Sturm further testified that he made the same suggestion to Warehousemen Scott, Larkin, and Bushman. Scott testified that Sturm told him that the rest of the employees planned to leave at 4 p.m. and asked him whether he would leave if they did. Larkin testified that at the time Sturm made the suggestion to him, the latter stated that the workload was "pretty heavy," that the orders had come in late, and that "he didn't think they should be that late in coming out and keeping us on overtime." Bushman did not testify. Sturm testified that he gave the employees no reason for his suggestion. He further testified that Scott and Bushman replied that they would leave if everybody else did, that Larkin rejected the suggestion, and that all of the employees, including Sturm, remained and worked beyond 4 p.m.

On December 18, Warehouse Manager Wyatt returned from a short vacation, and was informed by Acting Supervisor Kennedy that Sturm had tried to get Employees Larkin, Bushman, Scott, and Baron to walk out at 4 p.m. After talking to the said employees and reviewing Sturm's file, Wyatt discussed Sturm's shortcomings with Vice President Hamm and recommended that Sturm be discharged. Hamm reported the situation to Personnel Director Trauthen who, after reviewing Sturm's file, agreed to the discharge. Hamm then informed Wyatt that Sturm should be discharged, and Wyatt proceeded to discharge him. Wyatt testified that when he asked Sturm why he had requested employees to leave at 4 p.m., Sturm replied that "he was upset with management," that "he thought he could get back at them by getting everybody to walk out of the warehouse," that this "would hurt the customers and this would upset management." According to Wyatt, Sturm did not disclose why he was upset with management. Sturm denied making such statements. I credit Sturm, whose testimony was more convincing.

Subsequent to this discharge, Sturm went to see Trauthen. The latter testified that when he asked Sturm why he had requested employees to leave at 4 p.m., Sturm replied that he was irritated because he was employed as a truckdriver, but was required to work in the warehouse. Sturm testified that he told Trauthen that he was trying to show that

the warehouse was undermanned.

### Analysis

In *Polytech, Incorporated*, 195 NLRB 695, the Board held that a single concerted refusal to work overtime is presumptively a protected strike activity, and that the presumption is 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. This rationale necessarily applies to an attempt to induce a strike. Applying such rationale to the instant case, I find that Sturm's single attempt to induce other employees to strike was presumptively protected, and that there is nothing to show that it was part of a plan or pattern of intermittent action inconsistent with a genuine strike. And since Sturm's attempt was admittedly one of the reasons for his discharge, I find that the discharge violated Section 8(a)(1) of the Act.

Respondent contends that Sturm's suggestion to leave did not constitute concerted activity because, unlike the situation in the *Polytech* case, none of the employees walked out. According to Respondent, Sturm's suggestion involved the act of a single employee and not the concerted activity of employees within the meaning of the Act. This argument is without merit. In requesting employees to leave at 4 p.m. on December 14, Sturm was attempting to induce group action.<sup>5</sup> Accordingly, I find his suggestion involved concerted activity. *Signal Oil Co. v. N.L.R.B.*, 390 F.2d 338 (C.A. 9, 1968); *Ross Valley Savings & Loan Assn.*, 194 NLRB 270.

Respondent further argues that Sturm's suggestion to leave did not constitute concerted activity because he was concerned about a personal problem unrelated to the complaints of other employees about overtime work, i.e., Sturm's dislike for warehouse work. It is not at all clear from the record that Sturm did not share the other employees' concern about overtime work in the warehouse.<sup>6</sup> But even assuming, *arguendo*, that Sturm's purpose in seeking group action was not identical with that of other employees, this would not remove his suggestion from the category of concerted activity. Employees who act in concert do not necessarily do so for the same reason. Some may be seeking higher wages. Others may want shorter hours or greater fringe benefits. Still others may make common cause "in the hope of reciprocal support at a later time." *Signal Oil and Gas Co.*, 160 NLRB 644, 649, *enfd.* 390 F.2d 338 (C.A. 9, 1968). Where, as here, the activity is aimed at improving conditions of employment of the group involved, it consti-

<sup>5</sup> Although Sturm gave the employees no reason for his request to leave at 4 p.m., and although there is nothing to show that Lawrence stated any reason to Sturm, I have little doubt, and find, that Sturm and the other employees understood that the purpose behind the suggestion to leave was to bring home to Respondent the employees' strong feelings concerning the need for additional help at the warehouse. Employees had complained on a number of occasions to each other and to Respondent about the need for more help. Very shortly before the suggestion to leave was made, employees had complained to Trauthen about the need for more help, and Hamm had requested them to return to work because late orders had arrived. Baron apparently needed no explanation for the suggestion to leave, since he agreed to go if all the other employees left.

<sup>6</sup> If, in testifying that Sturm liked and requested overtime, Wyatt meant overtime in the warehouse, I do not credit his testimony in view of the undisputed fact that Sturm disliked warehouse work.

tutes concerted activity.<sup>7</sup>

Respondent also contends that Sturm's suggestion was not protected by the Act because he was not attempting to bargain or work for the mutual aid of the group, but rather was seeking to hurt Respondent and its customers. If Respondent means by this contention that Sturm was merely seeking revenge because he was required to work in the warehouse, it is not supported by the record. On the other hand, if Respondent is contending that the Act prohibits employees from attempting to bring pressure upon their employer to change the terms and conditions of employment, the contention is without merit. A strike to obtain such a change is an economic weapon designed to cause an employer to meet the strikers' demands. See *N.L.R.B. v. Insurance Agents' Union*, 361 U.S. 477 (1960). The Act protects employees in the right to strike and to attempt to induce fellow employees to engage in a strike for such a purpose.

#### CONCLUSIONS OF LAW

(1) By unlawfully discharging Sturm, as found herein, Respondent engaged in an unfair labor practice within the meaning of Section 8(a)(1) of the Act.

(2) The aforesaid unfair labor practice affects commerce within the meaning of Section 2(6) and (7) of the Act.

#### THE REMEDY

In order to effectuate the policies of the Act, I find that it is necessary, and recommend, that Respondent be ordered to cease and desist from the unfair labor practice found, and from in any other manner interfering with, restraining, or coercing its employees.

Affirmatively, I recommend that Respondent offer to Sturm immediate and full reinstatement to the position which he held at the time of his discharge, without prejudice to his seniority and other rights and privileges. I further recommend that Respondent make Sturm whole for any loss of earnings suffered because of the discharge, by paying to him a sum of money equal to that which he would have been paid by Respondent from the date of his discharge to the date on which Respondent offers reinstatement as aforesaid, less his net earnings, if any, during the said period. The loss of earnings under the Order recommended shall be computed in the manner set forth in *F. W. Woolworth Company*, 90 NLRB 289, and *Isis Plumbing & Heating Co.*, 138 NLRB 716.

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

#### ORDER<sup>8</sup>

Respondent, McGaw Laboratories, a Division of American Hospital Supply Corporation, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Unlawfully discharging employees or otherwise discriminating in regard to their hire, tenure of employment, or any term or condition of employment.

(b) In any other manner interfering with, restraining or coercing employees in the exercise of any right guaranteed by the Act.

2. Take the following affirmative action:

(a) Offer to Wayne D. Sturm, immediate and full reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position, and make him whole for any loss of earnings he may have suffered by reason of Respondent's discrimination against him, in the manner set forth in the section herein entitled "The Remedy."

(b) Preserve and make available to the Board or its agents on request, for examination and copying, all payroll records and reports, and all other records necessary to analyze the amount of backpay due and the right of reinstatement under the terms of this recommended Order.

(c) Post at his place of business in Glendale, California, copies of the attached notice marked "Appendix."<sup>9</sup> Copies of said notice, on forms provided by the Regional Director for Region 31, after being signed by a representative of the Respondent, shall be posted immediately upon receipt thereof, and be maintained for 60 consecutive days thereafter in conspicuous places. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 31, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

<sup>7</sup> In view of the above finding, it is unnecessary to resolve the conflict between Sturm's testimony and that given by Trauthen.

<sup>8</sup> In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 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.

<sup>9</sup> In the event that the Board's 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 be changed to 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 Act gives all employees these rights;

To engage in self-organization  
To form, join or help unions  
To bargain collectively through a representative of their own choosing  
To act together for collective bargaining or other aid or protection  
To refrain from any or all of these things.

WE WILL NOT do anything that interferes with these rights.

WE WILL NOT unlawfully discharge employees, or otherwise discriminate against them.

WE WILL offer to restore Wayne D. Sturm to his job and pay him for all the wages, if any, which he lost because of the discrimination against him.

McGAW LABORATORIES, A DIVISION OF AMERICAN HOSPITAL SUPPLY CORPORATION  
(Employer)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Federal Building, Room 12100, 11000 Wilshire Boulevard, Los Angeles, California 90024, Telephone 213-824-7357.

Dated

By

(Representative)

(Title)