

**Accel, Inc. and United Food and Commercial Workers Union, Local 1059.** Case 8–CA–33013

August 21, 2003

DECISION AND ORDER

BY MEMBERS LIEBMAN, SCHAUWER, AND ACOSTA

On October 10, 2002, Administrative Law Judge Paul Bogas issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel 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 and to adopt the recommended Order.

The judge, correctly applying Board law, found that eight employees who walked off their assembly line to protest the Respondent's decision to deny them a scheduled work break engaged in protected activity, and, thus, that the Respondent violated Section 8(a)(1) by discharging them for their work stoppage. *P.B. & S. Chemical Co.*, 224 NLRB 1 (1976) (employee walkout to protest denial of break is protected activity).

The Respondent argues that the work stoppage was unprotected because it was a disproportionately disruptive response to a trivial grievance. It relies on several circuit court decisions holding that employees' means of protesting a managerial decision that involves the conduct, selection, or discharge of a supervisor must be "reasonable" in order to be protected.<sup>1</sup> We find no merit in that contention. As the Respondent concedes, the Board has not imposed a "reasonable means" requirement on employees' concerted activity. See, e.g., *Trompler, Inc.*, 335 NLRB at 480 fn. 26 (citing *NLRB v.*

*Washington Aluminum Co.*, 370 U.S. 9, 16 (1962), for the proposition that "the reasonableness of workers' decisions to engage in concerted activity is irrelevant to the determination of whether a labor dispute exists or not").<sup>2</sup> We reject the Respondent's invitation to do so now.

Even were we to apply a "proportionality" requirement to the circumstances here, we would find that the employees' work stoppage was a reasonable response to the denial of their break period. First, we agree with the judge that the denial of a scheduled work break is not a trivial matter. Second, the employees' actions did not disproportionately disrupt the Respondent's operations. The Respondent's business is not one that directly serves the public, and there is no indication that the walkout had the immediate consequence of a loss of business, customers, or income. Cf. *Bob Evans Farms*, 163 F.3d at 1016 (waitresses' walkout during a restaurant's busy dinner hour found unreasonable means of protest because of highly disruptive effect on the employer's business); *Dobbs Houses, Inc. v. NLRB*, 325 F.2d 531, 538–539 (5th Cir. 1963) (same). In fact, as the judge found, there is no credible evidence that the employees took any action, other than walking off the job, that could have disrupted the work of those employees who remained at the facility. Thus, the employees left the Respondent's facility upon being ordered to do so immediately after they stopped work, and the Respondent was able to reorganize the line on which they had been working so that it could perform a different project requiring fewer workers. There is no indication that the walkout interfered in any way with the four other assembly lines that were operating at the time.

The Respondent nevertheless argues that it lost several hours of valuable production time as a result of having to rearrange the protesting employees' line. But that loss resulted from the Respondent's own order that the employees leave the premises if they would not return to work immediately, turning what began as a temporary work stoppage into a full-blown walkout. It is clear that the employees who participated in the work stoppage intended to return to work promptly. Thus, even after being ordered off the premises, they immediately attempted—without success—to contact the Respondent's

<sup>1</sup> The Respondent relies in particular on Seventh and First Circuit precedents. *Bob Evans Farms, Inc. v. NLRB*, 163 F.3d 1012, 1022 (7th Cir. 1998); *Abilities & Goodwill, Inc. v. NLRB*, 612 F.2d 6, 9 (1st Cir. 1979). However, the Board in *Benesight, Inc.*, 337 NLRB 282, 283 (2001), found those cases distinguishable because they all involved management decisions regarding conduct, selection, or discharge of supervisory personnel, and the Seventh Circuit, in its recent decision in *Trompler, Inc. v. NLRB*, 172 LRRM 3201 (7th Cir. 2003), enfg. 335 NLRB 478 (2001), limited its holding in *Bob Evans Farms*, supra, based on that distinction.

The Sixth Circuit has also indicated that it takes "reasonableness" into account in *Squier Distributing Co. v. Teamsters Local 7*, 801 F.2d 238 (6th Cir. 1986) (employees' statements to sheriff regarding suspected embezzlement by their employer's general manager was protected because it was a reasonable means to protest a perceived risk of job loss arising from the general manager's conduct). Unlike our case and like the Seventh and First Circuit cases, however, that case was largely concerned with whether the cause of the employees' protest was sufficiently related to their terms and conditions of employment to come within the protection of Sec. 7.

<sup>2</sup> In enforcing the Board's decision in *Trompler*, supra, the Seventh Circuit recognized that, under Board and Supreme Court law, "the only unprotected concerted activities (provided they relate to the terms and conditions of employment . . .) are those that are unlawful, violent, in breach of contract, or otherwise 'indefensible' but that the mere fact that they are not 'reasonable' does not forfeit the protection of the Act." *Trompler v. NLRB*, supra (internal quotations in original). Here, the Respondent has not argued—nor could it—that the employees' work stoppage was unlawful, violent, or otherwise indefensible, and it was plainly related to their terms and conditions of employment.

human resources manager from the parking lot, and they expressed their desire to resume work when he met with them the following morning. Whatever losses the Respondent sustained, then, were caused by its own response to the work stoppage, not by the work stoppage itself.<sup>3</sup>

For these reasons, we find that the employees' November 26 work stoppage was protected activity, and that the Respondent violated Section 8(a)(1) by discharging the employees for engaging in that activity.

#### ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Accel, Inc., Lewis Center, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

*Steven Wilson, Esq.* for the General Counsel.  
*Ronald L. Mason, Esq.*, of Dublin, Ohio, for the Respondent.

#### DECISION

##### STATEMENT OF THE CASE

PAUL BOGAS, Administrative Law Judge. This case was tried in Delaware, Ohio, on August 21 and 22, 2002. The United Food and Commercial Workers Union, Local 1059 (the Union) filed the charge on December 26, 2001, and the Regional Director for Region 8 of the National Labor Relations Board (the Board) issued the complaint on March 28, 2002. The complaint alleges that Accel, Inc. (the Respondent) violated Section 8(a)(1) of the National Labor Relations Act (the Act) by discharging eight employees because they concertedly complained to the Respondent about being denied a work break. The Respondent filed a timely answer in which it denied the substantive allegations of the complaint.

<sup>3</sup> We find it unnecessary to address the Respondent's argument that the work stoppage was unprotected because the employees did not articulate a grievance to which management could respond. As the Respondent acknowledges, Board law imposes no such requirement. See, e.g., *Eaton Warehousing Co.*, 297 NLRB 958 fn. 3 (1990), enf. mem. 919 F.2d 141 (6th Cir. 1990); see also *NLRB v. Washington Aluminum Co.*, 370 U.S. at 14 ("We cannot agree that employees necessarily lose their right to engage in concerted activities under § 7 merely because they do not present a specific demand upon their employer to remedy a condition they find objectionable. The language of § 7 is broad enough to protect concerted activities whether they take place before, after, or at the same time such a demand is made.")

In any event, even were the Board to adopt the Respondent's view, the result here would be unchanged. The judge found that an employee who remained on the job explained to a manager the reason for the other employees' walkout as it was occurring. Immediately after walking out, the employees involved attempted to communicate with a manager and explain their position. In addition, the written statements prepared by supervisors immediately after the incident show that the Respondent was aware of the employees' complaint about the denial of their scheduled break. In the circumstances, we find that the participating employees, who were not represented by any labor organization, sufficiently articulated their grievance to management.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

#### FINDINGS OF FACT

##### I. JURISDICTION

The Respondent, a corporation, provides fulfillment, assembly, and packaging services at its facility in Lewis Center, Ohio, where it annually ships and sells products, goods, and materials valued in excess of \$50,000 directly to points outside the State of Ohio. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

##### II. ALLEGED UNFAIR LABOR PRACTICES

###### A. Background

The Respondent's business is contract packaging. In November 2001, when the violations are alleged to have occurred, the Respondent employed approximately 200–300 individuals. Its employees have never been represented by a Union. The alleged discriminatees are eight individuals who immigrated to this country from Somalia, in most or all cases within the last several years.

The incident that triggered this litigation occurred at the Respondent's facility on November 26, 2001, during the night shift,<sup>1</sup> which begins at 9:30 p.m. and ends at 6 a.m. The Respondent had five assembly lines operating at the time, including "line 4" where the alleged discriminatees and approximately 20 other employees were packaging assortments of bath products in gift baskets. Approximately 1 hour after that shift started, Janet Fedors, the line leader/coordinator for line 4, noticed that baskets were accumulating on the floor. Baskets placed on the floor are "rejects" that have not been properly assembled. By 11:15 p.m. there were about 50 rejected baskets on the floor—an unusually high number. Fedors discussed the problem with Jonathan Hendershott, the production manager for the shift, who was working approximately 50 to 100 feet away.

Hendershott approached line 4 to assess the problem at approximately 11:20 p.m. On the night shift there was a pre-scheduled 15-minute break starting at 11:30 p.m., a 30-minute "lunch" break starting at 1 a.m., and a 15-minute break starting at 4 a.m. Transcript at page (Tr.) 20. After observing the number of baskets on the floor, Hendershott told Fedors that the employees on line 4 would not be permitted to take the break scheduled to begin at 11:30 p.m., but rather would be required to stay and correctly assemble the rejected baskets. Hendershott stated that if the employees finished this task before the break period ended at 11:45 p.m., they would be permitted to take the remainder of their first break. Hendershott returned to the area where he had previously been working, and Fedors told the employees that they would not be permitted to take their break until after the rejected baskets were addressed.

<sup>1</sup> This shift is also referred to in the record as the "third" shift.

At 11:30 p.m. the employees at line 4 did not go on break, but rather stayed to work on the rejected baskets. By the time the employees had finished fixing the rejected baskets, it was 11:45 p.m. or later, and the scheduled break period had ended. One of the alleged discriminatees asked Fedors whether she would permit the employees to take their break at that time, or would extend the next break. Fedors answered, “[N]o.” Employees working on line 4 began talking loudly about being denied the break, and then a group walked away from the work area. This group was comprised, in whole or in part, of the eight alleged discriminatees named in the complaint—Zakaria Ahmed, Shukri Dahar, Ryaan Farah, Mohamud Hersi, Najma Mohamed, Safia Mohamed, Liban Mohammad, and Asha Omar. When Fedors saw the group leaving she asked an employee what was happening, and the employee reported that the people who were leaving had said they “didn’t agree” with the decision to deny them a break and that “if they weren’t going to get a break, they simply will not work anymore.” Respondent’s Exhibit (R. Exh.) 7. Fedors told Hendershott that the group had left their workstations, and then Hendershott observed them walking towards the area where employees clocked out. Hendershott contacted Peter Nyame, the Respondent’s human resources manager, by phone and told him that employees were walking off the job. Nyame told Hendershott that if the employees clocked out without permission they were voluntarily resigning from their positions and should be directed to surrender their timecards and talk to Nyame before attempting to return to work. Nyame also stated that he would conduct an investigation and told Hendershott to document what had happened. In the account he prepared, Hendershott indicated that he was aware that these employees left because they did not agree with the decision to deny them the break. (R. Exh. 8.)

After the employees walked away from line 4, but before they left the facility, Hendershott had at least one exchange with them. Not long after 11:45 p.m., Hendershott, accompanied by employee James Skaggs, approached the alleged discriminatees. A number of the employees were talking, but they did not direct their comments to Hendershott and, at any rate, Hendershott did not understand what they were saying.<sup>2</sup> Hendershott told the alleged discriminatees that they had to either “go to work or clock out” and that “otherwise” he would “call the police.” (Tr. 225–226.) The alleged discriminatees did not return to work. Subsequently, Hendershott, believing that the alleged discriminatees were about to clock out, or already had done so, said, “[Y]ou’re voluntarily clocking out and you need to turn in your time cards to . . . [the] security guard . . . and . . . are not to return.” (Tr. 41.) Skaggs also told the alleged discriminatees that they had to leave. The alleged discriminatees clocked out, but did not surrender their timecards and at no time stated to any official of the Company that they wished to resign. As a result of the walkout, there were not enough employees to continue the project on line 4. Hendershott and Fedors had to reorganize line 4 to produce a different product—a time-consuming endeavor.

<sup>2</sup> A number of the alleged discriminatees are not fluent in English. At trial, five of these individuals testified and four of them needed substantial assistance from a Somali-English interpreter.

After leaving the building, the alleged discriminatees stopped in the facility’s parking lot where one of them, Farah, left a voicemail message about the incident for Nyame, after trying unsuccessfully to reach him by phone. Then all of the alleged discriminatees went to the house of S. Mohammed, where Farah again tried unsuccessfully to reach Nyame by phone and left another voicemail message. At 7 a.m. on the morning of November 27, Nyame arrived at work and discovered the two messages from Farah. Very shortly thereafter Nyame and Farah spoke by phone. Nyame directed Farah to prepare a written account of what had happened, and to bring it to the office. The alleged discriminatees worked together that morning to draft the written account requested by Nyame. At the end of the document the alleged discriminatees listed seven of their names and noted that there was also “one person that we are unable to get his name”—apparently alleged discriminatee Mohammad Hersi, who was sleeping.

On November 27, the alleged discriminatees returned to the facility. Farah and L. Mohammad, along with a third employee who was not involved in the incident, met with Nyame. The employees presented Nyame with the written account of the alleged discriminatees. After Nyame read it, he asked why the employees had clocked out. L. Mohammad responded that the employees believed management had treated them unfairly and had not respected their religion. One or more of the employees told Nyame that, as practicing Muslims, they needed the 15-minute rest period in order to pray and break the Ramadan fast. Nyame told the employees that he would read the statements prepared by Hendershott and Fedors and meet with others about the matter. The employees told Nyame that they wanted to return to work, but Nyame informed them that they were not to return until the investigation was concluded. Nyame opined that clocking out was the wrong thing to do.

Subsequently, Nyame reviewed the statements of Hendershott and Fedors and also obtained and reviewed statements from a number of other witnesses to the November 26 incident. Nyame and Lianne Vannan, senior human resources manager, met with Hendershott and Fedors to discuss their written statements. Nyame and Vannan then met with the Respondent’s president, vice president, and chief financial officer. On November 28, 2002, the Respondent’s vice president informed Nyame that a decision had been made that the employees who took part in the walkout had voluntarily resigned their positions and violated company policy by refusing to perform assigned duties, and that none of them would be permitted to return to work.<sup>3</sup> Nyame communicated the decision directly to four of the alleged discriminatees, and the information was passed on to others in the group. Nyame prepared separation paperwork stating that each of the alleged discriminatees had been discharged for disciplinary reasons after walking off the job. On December 26, 2001, the Union filed an unfair labor practices charge alleging that the eight individuals had been discharged

<sup>3</sup> The Respondent’s employee handbook provides that a “refusal to perform assigned job duties,” is grounds for “written warning and possible termination.” R. Exh. 9. The Respondent terminated a number of employees for “walking off” the job before the events of November 26, 2001. R. Exh. 15.

because they engaged in protected activity by concertedly protesting the denial of their break. In addition, seven of the alleged discriminatees filed charges with the Ohio Civil Rights Commission and the U.S. Equal Employment Opportunity Commission alleging that the Respondent had discriminated against them on the basis of religion and national origin.

### B. Credibility

The testimony of the witnesses for the General Counsel and the witnesses for the Respondent is largely consistent regarding the events of November 26 for the period prior to 11:45 p.m. However, the versions of the two groups of witnesses diverge rather dramatically from that point on. I do not believe that either group of witnesses was being completely truthful and on disputed matters I have sometimes credited the testimony of witnesses for the general counsel and sometimes testimony of witnesses for the Respondent, based on considerations of demeanor, plausibility and consistency with the record as a whole.<sup>4</sup> I was not impressed with the demeanor of key witnesses for either side. Hendershott and Fedors, although they testified calmly, were very guarded and did not appear forthcoming. The alleged discriminatees who testified, on the other hand, sometimes responded evasively, or with undue defensiveness or petulance to cross-examination questions.

Moreover, both groups of witnesses gave testimony that was, in significant respects, at odds with the written accounts they themselves prepared in the hours after the incident. For example, Fedors, in support of the Respondent's contention that the reason for the alleged discriminatees' protest was not communicated to the Respondent, testified that when she asked why the employees were walking off the job, employee Edmar Santos said, "I don't know, they're just going home." (Tr. 327, 334.) She denied that Santos informed her that the alleged discriminatees were leaving because they disagreed with the decision regarding the break. *Id.* However, in the written account that Fedors prepared shortly after the incident, she stated that Santos had said: "[T]he eight people didn't agree with my reply [denying them a break]. They said that if they weren't going to get a break, they simply will not work anymore." (R. Exh. 7.) Similarly, Hendershott testified that Fedors had not told him why the alleged discriminatees walked off the job, that he did not try to find out why the alleged discriminatees did that, and that all he heard about the incident during the shift was a rumor that the alleged discriminatees had tried to get another employee to leave. (Tr. 29, 31–33.) However, in the written account that Hendershott prepared shortly after the incident, he stated that Fedors told the employees that there would be no break, "and so those people who did not agree, clocked out." (R. Exh. 8.)

Similarly, the testimony of the alleged discriminatees was contrary to the written account they prepared the morning of

the incident. A number of the alleged discriminatees claimed that before they clocked out on November 26 they repeatedly explained to Hendershott that, as Muslims, they needed the break in order to pray and eat. (Tr. 100, 103–104, 159, 225.) Hendershott denied that he was told this, and stated that the alleged discriminatees said nothing to him. (Tr. 29–30, 349.) The alleged discriminatees' written account is more consistent with Hendershott's version, stating that during the incident "there was no communication between [Hendershott] and us whatsoever," and indicating that the alleged discriminatees had not had an opportunity to tell Hendershott "why that 15 minutes was so critical to us." General Counsel's Exhibit (GC Exh.) 2; General Counsel's Exhibit 3.<sup>5</sup>

I also conclude, based on the record, that the alleged discriminatees falsely testified that the first break was critical to them for religious reasons. The alleged discriminatees who testified stated that they were all practicing Muslims and needed 5 minutes or less to say the night prayer during their first break. According to them, all eight of the alleged discriminatees always said the night prayer in the Respondent's locker room during the first break. However, the Respondent called multiple nonmanagement witnesses who frequented the locker room during the first break of the night shift and who testified that they had not seen a single one of the alleged discriminatees praying in the locker room even once. These witnesses included another Somali employee who was a practicing Muslim, and an employee who was posted in the locker room as a security guard during the night shift 1 day a week. The record is devoid of testimony from any disinterested witness to corroborate the testimony of the alleged discriminatees that they prayed in the locker room during the first break. The locker room was a relatively small and very public place. The prayers that the alleged discriminatees described involved kneeling on the floor, and would, I believe, have been obvious to others. Under these circumstances, I find it wholly implausible that such activity would have gone completely unnoticed by other employees, especially if the alleged discriminatees engaged in it with anything like the regularity they claim. Moreover, the accounts of the alleged discriminatees about the conduct of the prayers were contradictory. For example, Farah stated that the alleged discriminatees did not all pray at one time, but rather went to pray "one at a time" (Tr. 96), whereas Ahmed stated that the men prayed together in a group and the women prayed together in another group. (Tr. 231–232.)

In addition, the alleged discriminatees' own description of their prayer practices contradict the assertion that it was critical that they say the night prayer during the first break. Farah and Ahmed testified that the night prayer could be said *at any time* after sundown (about 6 p.m.) and prior to the morning prayer at sunrise the next day. (Tr. 136–138, 234.) Under those constraints, the alleged discriminatees had over 3 hours to say the night prayer prior to the start of their shift. Even if they had planned to say the night prayer during the first break, and were not permitted to do so, they would still have been able to say the prayer during their 30-minute break at 1 a.m. or their 15-minute break at 4 a.m. Based on the record, I find that the tes-

<sup>4</sup> See *American Pine Lodge Nursing*, 325 NLRB 98 fn. 1 (1997) ("A trier of fact is not required to accept the entirety of a witness' testimony, but may believe some and not all of what a witness says."), *enf. granted in part, denied in part* 164 F.3d 867 (4th Cir. 1999); *Excel Containers, Inc.*, 325 NLRB 17 fn. 1 (1997) (nothing is more common in all kinds of judicial decisions than to believe some and not all, of a witness' testimony).

<sup>5</sup> GC Exh. 3 is a typed version of GC Exh. 2.

timony of the alleged discriminatees that they always prayed during the first break, and that it was essential that they do so, was false.

The alleged discriminatees also stated that, for religious reasons, it was critical that they have an opportunity to eat during the first break on the day in question. They noted that November 26, 2001, fell during the Muslim holy month of Ramadan, when their religion prohibits eating and drinking from sunrise to sunset. However, according to the testimony of the alleged discriminatees themselves, they could break the fast starting at approximately 6 p.m. Therefore, they had a period of several hours during which to find time to eat and drink prior to beginning work at 9:30 p.m. Moreover, when they walked away from the workstation after 11:45 p.m., it was only a little over an hour before their 1 a.m. “lunch” break. They could have eaten during that break, as well as during the break scheduled for 4 a.m. Under these circumstances, I do not credit the testimony of the alleged discriminatees that the denial of the break significantly impacted on their religious practices regarding the Ramadan fast.

### C. The Complaint Allegations

The complaint alleges that the Respondent violated Section 8(a)(1) of the Act by terminating Zakaria Ahmed, Shukri Dahar, Ryaan Farah, Mohamud Hersi, Najma Mohamed, Safia Mohamed, Liban Mohammad, and Asha Omar because they concertedly complained to the Respondent regarding the wages, hours, and working conditions of the Respondent’s employees by protesting to supervisors about being denied a work break.<sup>6</sup>

### III. ANALYSIS AND DISCUSSION

In order to establish a violation of Section 8(a)(1) of the Act, the General Counsel must show: that the employees engaged in concerted activity; that the employer knew the concerted nature of the activity; that the concerted activity was protected by the Act; and that the employer’s decision to take the challenged adverse action was motivated by the employees’ protected concerted activity. *Meyers Industries*, 268 NLRB 493, 497 (1984), remanded sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert denied 474 U.S. 971 (1985), decision on remand 281 NLRB 882 (1986), affd. 835 F.2d 1481 (D.C. Cir. 1987), cert denied 487 U.S. 1205 (1988); see also *Kathleen’s Bake-shop, LLC*, 337 NLRB 1081, 1089 (2002).

The General Counsel easily establishes the elements of a violation. The eight alleged discriminatees walked off the job together in protest over a term and condition of employment—the denial of a regularly scheduled break—that affected all employees on line 4. *Hickman Garment Co.*, 172 NLRB 1168, 1173 (1968) (elimination of a rest period is a condition of employment), enf. 408 F.2d 379 (6th Cir. 1969), cert. denied 396 U.S. 838 (1969). The walkout followed a discussion between employees, who then walked out with and in reliance on one

<sup>6</sup> At the start of the trial, I granted the General Counsel’s unopposed motion to amend the complaint in three minor respects. The reference to Janet Fedors in par. 5 was deleted, the spelling of one of the alleged discriminatees names was corrected, and the employees’ termination date in par. 6(b) was changed from “on or about November 27, 2001,” to “on or about November 28, 2001.”

another. It is plain that this joint walkout was “concerted,” see, e.g., *Federal Security, Inc.*, 318 NLRB 413, 418 (1995), enf. denied on other grounds 154 F.3d 751 (7th Cir. 1998); *Trident Recycling Corp.*, 282 NLRB 1255, 1261 (1987), and, indeed, the Respondent has made no argument to the contrary. It is equally plain that the Respondent was aware of the concerted nature of the walkout. Fedors and Hendershott both saw the employees walk off as a group and both were aware that the employees took this action because they disagreed with the decision to deny them a scheduled break. When Hendershott spoke to the alleged discriminatees after they left line 4, he addressed his comments to them as a group, implicitly recognizing that they were undertaking the action jointly. Regarding the requirement that the concerted activity be “protected,” it is well settled that an employee walkout to protect the denial of a break is protected activity. *P.B. & S. Chemical Co.*, 224 NLRB 1 (1976); *Hickman Garment Co.*, 172 NLRB at 1173; see also *SDC Investment*, 299 NLRB 779, 785 (1990) (employees engaged in protected concerted activity when they left the workplace to protest a change in the timing of their lunchbreak). Lastly, the record leaves no doubt that the Respondent’s decision to terminate the employees was motivated by the protected concerted activity. Nyame, the Respondent’s human resource manager, testified that the walkout was the reason that the alleged discriminatees were terminated (Tr.63), and his testimony is corroborated by the Respondent’s personnel records (GC Exh. 4).<sup>7</sup> Thus, the General Counsel has established that the Respondent violated Section 8(a)(1) by terminating the eight alleged discriminatees.

The Respondent contends that the walkout should be found to be unprotected for essentially two reasons: the discriminatees did not “voice their concerns to the employer prior to leaving their jobs” (R. Br. at 15); and the walkout was a disproportionately disruptive response to a “trivial grievance” “over working conditions,” *Id.* at 16–17. The Respondent cites no Board precedent to support these arguments for finding the walkout to be unprotected.<sup>8</sup> Indeed, the Board’s decisions are

<sup>7</sup> I conclude that the employees did not voluntarily resign by “clocking out” prior to the end of their shift. The employees clocked out only after Hendershott threatened to call the police if they did not either abandon their concerted activity by returning to work, or clock out. Shortly after exiting the building they attempted to talk to Nyame about returning to work. That morning the employees came to the facility and spokespersons for the group told Nyame that they wanted to keep working for the Respondent. There is no claim that any of the alleged discriminatees ever stated that they wished to resign, and their actions belie any suggestion that they voluntarily did so.

<sup>8</sup> The Respondent acknowledges that “Board law on the issue is unfavorable to the Company’s position,” and states that that even if the administrative law judge accepts the Respondent’s version of the facts, he might still “follow Board precedent and find that the [alleged discriminatees’] actions were a walk-out over their loss of a paid break and such activity constituted protected, concerted activity.” R. Br. at 14. The Respondent argues, however, that the Board’s concept of “what is considered to be Section 7(a) conduct should be modified” based on decisions of “Federal Courts across the nation.” *Id.* That argument is for the Board to consider, not me. I am bound to apply established Board precedent that neither the Board nor the United States Supreme Court has reversed. *Herbert Industrial Insulation*

contrary. Regarding the Respondent's first contention, it is clear that "the act of going on strike is protected concerted activity, regardless of whether the employer had been given notice of the strike, or presented with a prior demand for a change in working conditions." *Americorp*, 337 NLRB 657, 659 (2002); see also *Benesight, Inc.*, 337 NLRB 282 (2001) ("It is well settled that '[t]he Act protects the right of employees to engage in concerted activities, including the right to strike without prior notice.'"), quoting *Bethany Medical Center*, 328 NLRB 1094 (1999); see also *Vic Tanny International, Inc.*, 232 NLRB 353 (1977) ("[T]he spontaneous banding together of employees in the form of a work stoppage as a manifestation of their disagreement with their employer's conduct is clearly protected activity."), *enfd.* 662 F.2d 237 (6th Cir. 1980). At any rate, the written statements that Fedors and Hendershott prepared immediately after the incident show that both were well aware that the employees walked out as a form of complaint about the denial of the scheduled break. Indeed, given the course of events here I have no trouble concluding that this was obvious to all concerned when the employees started away from line 4, and certainly it was clear to Hendershott when he approached the employees inside the facility and told them to clock out.

The Respondent's other argument—that the walkout was not protected because it was a "disproportionate" response to a "trivial grievance"—is also contrary to Board precedent and I reject it. In *Trompler, Inc.*, 335 NLRB 478, 480 (2001), the Board stated:

[I]f employees are protesting work conditions, . . . those employees can protest by any legitimate means, including striking. The fact that some lesser means of protest could have been used is immaterial. We would not second-guess the employees' choice of means of protest.

See also *Plastilite Corp.*, 153 NLRB 180, 183–184 (1965) ("[W]e must respectfully disagree with any rule which would base the determination of whether a strike is protected upon its reasonableness in relation to the subject matter of the 'labor dispute.'"), *enfd.* 375 F.2d 343 (8th Cir. 1967). In *Trompler*, the Board explicitly discussed the modification to Board law advocated by the Respondent here, and concluded unanimously that it would "respectfully adhere to Board precedent." That precedent includes multiple cases in which the Board has held that employees who walk off the job to protest the denial or rescheduling of a work break are engaged in concerted protected activity, despite the disruptive nature of their protest. *SDC Investment*, *supra*; *P.B. & S. Chemical Co.*, *supra*; *Hickman Garment Co.*, *supra*. I found no credible evidence that the discriminatees took any action, other than walking off the job, to disrupt the work of those employees who remained at the facility. Thus, I must reject the Respondent's contention that the discriminatees' walkout was unprotected because it was too disruptive a response to a trivial grievance.

*Corp.*, 312 NLRB 602, 608 (1993); *Lumber & Mill Employers Assn.*, 265 NLRB 199 (1982), *enfd.* 736 F.2d 507 (9th Cir. 1984), cert. denied 469 U.S. 934 (1984); *Los Angeles New Hospital*, 244 NLRB 960, 962 fn. 4 (1979), *enfd.* 640 F.2d 1017 (9th Cir. 1981).

Moreover, even under the Respondent's "trivial grievance" standard, the Respondent would not prevail. Scheduled break periods are not trivial matters. They are important, especially to those who work on assembly lines and may have little or no other opportunity to attend to personal needs during their shifts. The Respondent's contention that the denial of a 15-minute break is trivial is based on the wage rate of the affected employees (\$10 to \$10.25) and the observation that 15 minutes worth of wages for the entire group of eight discriminatees amounts to only \$20.06. (R. Br. at 17). What the Respondent fails to recognize is that a period of rest was at issue here, not wages.<sup>9</sup> The magnitude of an employee's need for such a rest period is not determined by the size of his or her paycheck.

For the reasons discussed above I conclude that the Respondent violated Section 8(a)(1) of the Act when it terminated Zakaria Ahmed, Shukri Dahar, Ryaan Farah, Mohamud Hersi, Najma Mohamed, Safia Mohamed, Liban Mohammad, and Asha Omar because they concertedly protested the Respondent's decision to deny them a work break.

#### CONCLUSIONS OF LAW

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

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act, by terminating Zakaria Ahmed, Shukri Dahar, Ryaan Farah, Mohamud Hersi, Najma Mohamed, Safia Mohamed, Liban Mohammad, and Asha Omar because they concertedly protested the Respondent's decision to deny them a work break.

3. The Respondent has violated Section 8(a)(1) of the Act by terminating Zakaria Ahmed, Shukri Dahar, Ryaan Farah, Mohamud Hersi, Najma Mohamed, Safia Mohamed, Liban Mohammad, and Asha Omar because they concertedly protested the Respondent's decision to deny them a work break.

#### REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily discharged employees, it must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>10</sup>

<sup>9</sup> The Respondent has not claimed that it offered to allow the employees to take their break if they would forgo 15 minutes worth of wages.

<sup>10</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recom-

## ORDER

The Respondent, Accel, Inc., Lewis Center, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from  
 (a) Discharging or otherwise discriminating against any employee for engaging in protected activity by concertedly protesting their working conditions.

(b) In any like or related manner 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) Within 14 days from the date of this Order, offer Zakaria Ahmed, Shukri Dahar, Ryaan Farah, Mohamud Hersi, Najma Mohamed, Safia Mohamed, Liban Mohammad, and Asha Omar 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.

(b) Make Zakaria Ahmed, Shukri Dahar, Ryaan Farah, Mohamud Hersi, Najma Mohamed, Safia Mohamed, Liban Mohammad, and Asha Omar 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.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges, and within 3 days thereafter notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Lewis Center, Ohio, copies of the attached notice marked "Appendix."<sup>11</sup> Copies of the notice, on forms provided by the Regional Director for Region 8, 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. In

mended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

<sup>11</sup> If 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."

the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since November 26, 2001.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

## 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 Federal labor law and has ordered us to post and obey this notice.

## FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist any union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT discharge or otherwise discriminate against any of you for engaging in concerted protected activity by protesting your working conditions.

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, within 14 days from the date of the Board's Order, offer Zakaria Ahmed, Shukri Dahar, Ryaan Farah, Mohamud Hersi, Najma Mohamed, Safia Mohamed, Liban Mohammad, and Asha Omar 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.

WE WILL make Zakaria Ahmed, Shukri Dahar, Ryaan Farah, Mohamud Hersi, Najma Mohamed, Safia Mohamed, Liban Mohammad, and Asha Omar whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of Zakaria Ahmed, Shukri Dahar, Ryaan Farah, Mohamud Hersi, Najma Mohamed, Safia Mohamed, Liban Mohammad, and Asha Omar, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges will not be used against them in any way.

ACCEL, INC.