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Region 5

November 7, 1990

Harold J. Datz, Associate General Counsel
4300
Division of Advice

524-8351-

Norfolk Shipbuilding and Drydock Corporation
Cases 5-CA-21113; 5-CA-21227; 5-CA-21138

and

International Brotherhood of Boilermakers, Iron
Ship Builders, Blacksmiths, Forgers and Helpers,
Local 684, AFL-CIO

(Norfolk Shipbuilding and Drydock Corporation)
Cases 5-CB-6542; 5-CB-6544

These cases were submitted for advice and the warrant for Section 10(j) injunctive proceedings on the following issues: whether work stoppages on April 5, 6, 12, 13, 14, 21, 23, 24, and 27, 1990 constituted intermittent strike activity so as to give the Employer the right to impose disciplinary action, including discharge, against those who participated; and whether the Union violated Section 8(b)(3) and 8(b)(1)(A) by engaging in the work stoppages.¹

FACTS

Background of Charges

The International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local 684 (the Union) represents a unit of approximately 1800 production and maintenance employees at Norfolk Shipbuilding and Drydock Corporation's (the Employer or NORSHIPCO) Berkley and Brambleton Yards in Norfolk, Virginia. The most recent collective-bargaining agreement expired October 31, 1988. In November 1989, the parties reached impasse in negotiations. In December 1989, the Employer implemented part of its final offer. It also

¹ By memorandum dated July 5, 1990, we concluded that Section 10(j) relief was not warranted.

implemented a grievance procedure identical in form to the one set forth in the expired contract, except it did not include a provision for binding arbitration. No proposals were advanced by either party during negotiations that would have made substantive changes to the grievance procedure, including arbitration, as it existed in the last contract.

In November 1989, the Union held a series of lunch time rallies outside the Employer's property and, on one occasion, held a lunch time rally within the Berkley Yard at a time when production was shut down.² From November 1989 to April 1990 the Union held several lunch time rallies off the company's property aimed at building solidarity for the Union's position in the ongoing negotiations. From April 5, to April 24, 1990,³ Union leaders led a series of gatherings outside and/or inside the gates of the facilities. With two exceptions these gatherings began during nonwork time. Several of the gatherings which began during nonworktime continued after work was scheduled to begin. On a few occasions when management representatives ordered employees to vacate the premises or return to work, the employees followed advice from Union leaders to go home for the balance of the shift.

The purposes and/or objectives of these gatherings were to protest: the Employer's alleged unilateral changes in the handling of grievances and its refusal to meet with the a Union grievance committee; the Employer's discipline and discharge of employees for participating in the work stoppages; alleged safety violations; supervisors' using tools to do bargaining unit work; the Employer's refusal to disburse checks early when overtime is worked; and the docking of pay for employees engaged in concerted activity.

Whistles are blown at 7:05 a.m. to signify that the shift will begin in 10 minutes, again at 7:10 a.m. to warn employees they should be moving toward their work stations, and at 7:15 a.m. to announce that employees are to be at their work stations and working. Similarly, whistles are blown to mark the end of the 12:00 noon to 12:45 p.m. lunch break, at 12:35 p.m., 12:40 p.m. and 12:45 p.m. Production is shut down during the lunch break.

² On April 24, 1990, after initial settlement efforts were unsuccessful, the Region issued a complaint in Case 5-CA-20817 alleging that the Union's rallies were protected concerted activity.

³ All dates hereinafter are in 1990 unless otherwise indicated.

a. Dispute Over Who May File Grievances

In March, an employee from the Crane Department wished to file a grievance on the last or next to last day that it could be filed. Union secretary-treasurer Garnett Stevens, who is a steward in another department in the same group as the Crane Department, wanted to file the grievance for the Crane Department employee but was forbidden from doing so by the Employer. The Union maintains that the Crane Department steward was not available and therefore Stevens should have been allowed to file. Union president Daniel admits, however, he has no idea what system, if any, has been used by the Employer to select an alternative steward. The grievance was ultimately dismissed as untimely.

The Region has concluded that the Employer did not unilaterally change the grievance procedure by refusing to allow Stevens to file the grievance.

b. March 27, 1990 at Grievance Committee Meeting

On March 27, a grievance meeting was held to hear several grievances including one filed by the electrical shop steward James McCleary concerning the discharge of three employees. The Employer did not invite McCleary to attend and refused the Union's request to summon him. The Region has concluded that the Employer violated Section 8(a)(1) and (5) by unilaterally changing the grievance procedure by not allowing McCleary to attend the grievance hearing.

c. April 5, 1990 at Brambleton Yard

In response to the above alleged unilateral changes in the grievance procedure, the Union held simultaneous lunchtime rallies at the Employer's two yards (Brambleton and Berkley). The rallies had been planned the day before by Union President Daniel and his steering committee. Daniel hoped to inform those who gathered of the unilateral changes and ask them if they wanted to be part of a new grievance committee that would enter the yard and be presented to the Employer.⁴

⁴ Implicit in this plan was Daniel's assumption that a unilateral change constitutes an abrogation of the grievance procedure which gives the Union the right to form whatever committee and use whatever procedure it wishes to press its grievance.

Daniel led the rally at the Brambleton yard which started at about 12:20 p.m. on the west side of the carpenter's shop. About 70-80 people congregated. Daniel spoke about working safely and working to rule and asked employees to call management's attention to safety violations. He then told those gathered about the alleged unilateral changes and told them they were the new grievance committee and he was its chair. He said that at 12:45 p.m., they would approach management and attempt to hold a meeting.

At 12:45 p.m., the group moved to the east side of the office building. Three representatives, Mike Patterson, Neil Coleman and Tim Gilbert, went into the building. They met Assistant Vice President for Production Frank Creasy who refused their request to meet with the group, saying the old contract set forth the grievance procedure. They went back to the group and Daniel sent them back into the building where he instructed them to tell Creasy that the Union's position was that there was no contract and no grievance procedure.

Sometime between 1:00 and 1:08 p.m., Creasy and several supervisors came outside. Creasy said he had a statement to read. Daniel stated that the Employer was obligated to meet and confer with the Union at reasonable times and in reasonable places. Creasy replied: "We have a grievance procedure and we will address your grievances with this procedure." Daniel stated that the Employer had unilaterally changed the grievance procedure on March 27. Creasy then read a statement saying "Return to work or leave the premises or you will be subject to disciplinary action." Daniel told the employees to return to work. Daniel turned to Creasy and told him he had refused to meet and confer with the Union and they would be back the next morning at 7:15 a.m. Creasy replied that he did not get in until 8:00 a.m. Daniel said, "We'll see you at 8:00 a.m." and left.

d. April 5, 1990 at the Berkley Yard

About 500 employees gathered on a state highway department easement outside the gate during their lunch hour. The group was addressed by Steward McCleary, Secretary-Treasurer Garnett Stevens and Grievance Committee Member James Layton. The crowd was asked by the speakers

if they wanted to be a grievance committee for the purpose of addressing the Employer's unilateral changes to the grievance procedure. At about 12:35 p.m., the crowd entered the gates, chanting. They went to the rear of the office building. Stevens and Layton entered the building at about 12:40 p.m., while Steward James Montegue and McCleary addressed the group. They stated the Union had gone to get a company representative to hear the grievances and that everyone would stay until a company representative agreed to hear the grievances.

Layton and Stevens were rebuffed by Chief Guard Sam Baker when they asked to see Owen Roper. They left the building but re-entered at 12:45 p.m. and spoke to Director of Industrial Relations James Wermeister; they demanded the Employer meet and confer with their grievance committee. Wermeister told them there was an established grievance procedure. Layton insisted that procedure had been improperly administered. Wermeister ordered them to leave the premises. They left the building.

Stevens told the crowd that Wermeister had ordered them to vacate the premises or go back to work. He suggested that they go back to work. Layton grabbed the megaphone and told them that they should stay right there since they were doing nothing illegal. They stayed and Montegue and Layton led them in chants.

At about 1:05 Wermeister came out and told the employees to vacate the premises or return to work. At 1:10 p.m., Layton told the crowd the Union did not want anyone to face disciplinary action and advised employees to go back to work.

e. April 6, 1980 at Brambleton Yard

In response to the Employer's refusal to meet the previous day, Daniel and 60-75 employees gathered at the main office building at 8:00 a.m. Daniel is off work Friday mornings for Union business, and the employees, who begin work at 7:15 p.m., left their work areas to join him. Supervisors came from all directions and went into the building where they were seen watching the crowd through windows.

By 8:10 a.m., Creasy came out of the building, approached Daniel and asked him if he was off on Union

business. Daniel said he was. Creasy told him to leave the property or be escorted off. Daniel said he was there to chair the Union grievance committee meeting. Creasy said the group was to leave the premises, return to work or face disciplinary action. Daniel turned to the crowd and asked that they leave the premises because the Employer had again refused to meet and because they had been given a choice.

f. April 6, 1990 at Berkley Yard

No rally had been planned for the Berkley Yard on March 6, but when Daniel got to the union hall after leaving the Brambleton Yard, he learned that Montegue and Layton had been fired for their activity at Berkley the day before. In response to these discharges, Daniel spoke by phone with his steering committee and called a rally for noon outside the gate to ask those attending if "they wanted to form a committee to address that grievance."

A crowd of 400-500 employees gathered at 12:15 p.m., outside the gate. At roughly 12:25 p.m., they entered the gate and walked to the main office building, chanting. McCleary and Daniel entered the building and told the receptionist they were there to exercise their Section 7 rights and asked her to tell Owen Roper they were there. The receptionist handed the phone to Daniel who then told the party on the other end to have a management representative meet them outside. They went outside and, after ten minutes, Daniel led the crowd around to the other side of the building. Daniel and McCleary again attempted to enter. This time they were met by a guard who stopped them from entering. Rebuffed only for a minute, Daniel again attempted to enter. This time he was met by Wermeister who told him the Employer had an established grievance procedure and said he would not meet with the crowd. Daniel told Wermeister that "this is our grievance committee" and that he would meet him outside. Daniel exited and told the crowd that the company "appeared once more to be violating the law and we would wait there until the company met and conferred with us."

After the 12:45 p.m. whistle blew, Wermeister came out and told the group that the Employer had a grievance procedure through which grievances would be addressed. He ordered employees to return to work or vacate the premises. Daniel advised employees to return to work, which they did

at about 1:04 p.m. The Employer docked at least 33 employees for 15-30 minutes.

g. April 10, 1990 - Union Publication

The April edition of the local Union newsletter contained information about the termination of Layton and Montague for their participation in the April 5 rally. It also contained a reprint of a Jan./Feb. 1990 article from "The Boilermakers Reporter." This article described successful in-plant strategies at three plants throughout the country and its impact on a fourth plant. The reported strategy was characterized by International President Jones as "aggressive, coordinated solidarity action" which is "is better than a strike."

Reported actions by the locals included a walkout to protest the Employer's bargaining position, a march to protest unilateral implementation of terms and conditions of employment, and a three-day protest of an "unfair" discharge of an employee. Reference was also made to the fact that productivity was off by an estimated 65 percent at one plant as a result of the workers' response to unilaterally implemented terms and conditions of employment. The article contained no comment by local union officials.

h. April 12, 1990 at the Green Mountain State

Since the beginning of the year, safety has apparently become increasingly lax upon certain commercial ships, especially where subcontractors are employed. In the past, employees had been able to get safety hazards corrected by making complaints to supervisors. Lately, however, supervisors have apparently become progressively unresponsive.

On the morning of April 13, in response to safety problems, steward McCleary spoke to a couple of his coworkers about safety problems that he and others had noticed aboard their ship, a commercial vessel called the Green Mountain State. There had been three small fires on the ship on April 9 and 10. Although McCleary had complained to his supervisor about safety violations (overloaded welding lines, lines lying on deck, a subcontractor's welding in the electrical box), nothing had been done to correct the problems. McCleary suggested to

several coworkers that they join him around lunch time when he made a complaint to the leadman or to whomever would listen. About 12:40 p.m., about 60 employees gathered on the pier. At 12:45 p.m., welding shop Supervisor Wesley Taylor approached the group. McCleary told him they were there to grieve the safety violations on board the ship. He listed the violations and cited specific safety rules from the Employer's safety book, including those pertaining to electrical and welding cables, oxygen lines, manifolds and fire hoses lying in the walkways. Taylor said he could not do anything but told McCleary to wait there while he got someone to talk to them.

At 12:58 p.m., Superintendent Wesley Copeland arrived. McCleary told him they were there to grieve safety violations, listed them and pointed out the pertinent sections in the safety book. Copeland asked if the violations had been reported to supervisors or to the safety department and McCleary said they had, listing the supervisors' names. Copeland asked for documentation of the problems, which McCleary did not have. According to McCleary, Copeland then told the group that while he had always been an easy person to deal with, from then on he did not want to catch anyone without safety glasses or hard hats. He told McCleary that he would see to it that the violations were corrected and then told the employees to go back to work. Copeland gave McCleary his beeper number and told him to call him if there were any more problems. The employees returned to work shortly after 1:00 p.m. A crew of workers from another area was brought on board to repair the violations.

At about 3:15 p.m., McCleary was summoned to Foreman Bernie Foreman's office. There, in the presence of Foreman, Leadman Sam Teller and Henry Mann, Foreman told McCleary "this time you've gone to far. You're fired." After checking out, he returned to Foreman's office with a shop steward where he told Foreman that he felt his discharge was illegal as he "was acting in total compliance with company rules." He explained that all participation had been voluntary and no one had been discouraged from returning to work. He said that their activity was protected by Section 7. Foreman responded that he had no business telling any other employee about safety violations. Foreman also said that safety department personnel had been on the ship that morning and had not found any violations.

In additions, to firing McCleary, the Employer docked several employees for the time spent at the gathering.

i. April 13, 1990 at Berkley Yard

In response to McCleary's April 12 discharge, a rally was called for noon outside the gates. Daniel and McCleary addressed the crowd of about 500. Daniel asked those gathered if they wanted to be a grievance committee to address the discharge, and at 12:25 p.m. they entered the yard, chanting. They went to the west side of the main office building where Daniel attempted to enter the building. He was met by Wermeister. He told Wermeister of his purpose and named the crowd as his grievance committee. Wermeister said there was a grievance procedure in effect and the grievance would be dealt with through it. Wermeister instructed him to return to work, leave the premises, or face disciplinary action. Daniel went outside, repeated the order, and advised the group to leave the premises.

The Employer videotaped the incident.

j. April 14, 1990 Tank Watch Safety Complaint

Fuel tanks are required to be certified as gas-free before workers are allowed to enter them. The certificate states under what conditions, if any, work may be performed in a tank.

On April 14, 12 year veteran welder Frank Deerfield was assigned to weld a crack in a tank on a gas barge. He had been assigned a task in the same tank the day before and knew that a fire watch was required before "hot" work could be done in it. That day, he worked with a burner and a shipfitter, satisfying the watch requirement. The shipfitter had been instructed to take extraordinary precautions in preparing the crack so that Deerfield's work would be safe.

On April 14, Deerfield was to work in the tank alone, while the other welders were given other assignments. Deerfield asked his supervisor, Raymond Jones, if the welders were going to have tank watches. Jones replied that he and others would be working topside and would keep an eye on them. Deerfield then went to Acting Foremen Wayne

Gray. As he entered Gray's office he said "This is not a concerted activity" but stated that he thought it was unsafe to work. He left, got another welder, Richard Singleton, to act as a witness, and return to Gray's office. He again told Gray he "thought it was not safe and I was afraid it would endanger my life to work in the tank alone without visual contact or communication while someone checked on me and two other welders topside." Deerfield also mentioned his concern as to the safety of the other two welders, but he had not been asked by them to do so. He did not invoke the contract or safety rule book. Deerfield said he wanted to talk to the safety director. Gray asked him if he was refusing to work and Deerfield responded that he would work as long as he had someone in the tank watching for him. Gray told him to punch out and go home.

The Employer asserts that Deerfield was given two hours report-in pay for the afternoon and was not issued any discipline. The Union alleges that Deerfield was given a half-day suspension.

k. April 21, 1990 at the Electrical Shop

Before work, 15 workers represented by newly-appointed shop steward Robert Hynes approached Foreman Bernie Foreman to grieve the fact they had been docked for participating in "incidents which began as rallies and ended as grievances which went over the lunch period." At lunch time, seven workers went to Foreman to find out if he had an answer to their grievance; he said he had not been able to secure a meeting with anyone. The second whistle had just blown and Foreman said that they were supposed to be at work when the third whistle blew and that they were not going to make it unless they left immediately. Foreman said that if they did not go back to work they would have to vacate the premises. Hynes told everyone to vacate. (The employees had earlier taken a vote and decided that if Wermeister did not meet with them they would leave for the day in protest).

The following day, five employees were told that their work had been rescheduled and told to leave. On Monday, April 23, seven employees were called into the office by Wermeister and told to sign a form. Six refused to sign and were ordered to leave for the day. The form they were asked to sign states:

I am returning to work on an unconditional basis. I recognize my obligation to work the hours and jobs assigned to me. I will no longer leave my job other than to engage in a legally protected complete work stoppage. I understand that my failure to continue to work on an unconditional basis and my resorting to intermittent work refusals to perform assigned work and hours of work may result to my discharge.

The six employees went to the Union hall where Daniel called Attorney Michael Manley who advised the men to sign the form and work. They decided not to return to work until the following day.

1. April 23, 1990 at the Chelsea

The Chelsea was moved into Pier 11 the evening of April 22. Upon arriving to work on April 23, Welder Philip Reed noticed that there were four broken posts on the gangway to the ship, the only way aboard. The gangway railing was held down only by a piece of rope.

At about 8:00 a.m., Reed spoke to Welding Supervisor Johnny Thomas who said he would speak to the superintendent about it. Thomas asked him if he had any other complaints and Reed responded that he thought the whole ship was a safety problem, but they had already gone over that.⁵ Reed then went to his assigned area where he found a spill of hydraulic oil which meant that welding would be unsafe. He went back to Thomas and told him about it. Thomas agreed to get him a new assignment. As he was waiting, Superintendent Harris came on deck, and Thomas told him about the gangway problem. Harris said he knew about it. Leadman Brooks approached, and Thomas and Harris told him about the gangway. Harris arranged for Brooks to get a shipfitter, when one was available, to work with one of Thomas' welders to fix the gangway. Reed returned to work.

The problem had not been fixed by 12:45 p.m. after lunch. At that time, Reed was on the gangway platform discussing the problem with rigger leadman Herb Jenkins who

⁵ Reed was referring to a conversation they had earlier in the week in which Reed had complained about paint spills and Leadman Tatum had dismissed his complaint as not serious. Thomas had warned him that if he continued to knit-pick the job with the safety book he would use the same safety book on him "and I can pick you to death with it."

said the problem was the dock department's responsibility. At 12:50 p.m., Jenkins called from the platform to Brooks who was on the pier and asked him if he would fix the gangway. Brooks said he would get to it when he could. Reed, who was accompanied by welders Askew and Tatum responded "That's the same thing you said at 8:00." Not satisfied by the lack of progress, Reed, Tatum and Askew decided to go aboard and call the Safety Department. As they were going to a phone, they overheard Brooks on the phone saying there were three welders refusing to cross the gangway. They went to work about 1:00 p.m.

At about 2:00 p.m., the Thomas approached Reed and asked him why he had refused to cross the gangway. Reed said he did not refuse and would not be standing there if he had. At about 3:50 p.m., Thomas gave Reed a warning slip. Reed was also docked 15 minutes.⁶ Reed submitted a grievance on it.

m. April 23, 1990 at the Paint Shop

Shipyard employees are paid weekly on Fridays. Generally, employees pick up their checks after noon. If an employee is scheduled off on Friday or if the company knows in advance that a group of employees will work late on Friday, it sometimes makes their checks available on Thursday. Some shops do this more regularly than others. Paint shop employees have been working a great deal of overtime since about the first of the year. On April 16, paint shop steward B.C. Smith asked foreman Larry Ambrose if employees could get their paychecks early the following Thursday since many had experienced trouble cashing their checks when they worked overtime. Ambrose was sympathetic and said he would make sure they could.⁷

Checks were not disbursed early. Over the next several days, Smith spoke to several coworkers about the problem. On Monday, April 23, he told his coworkers he planned to speak to paint shop supervisor A.B. Walker about it at lunch. At about 12:35, 18 workers assembled outside the paint shop. Smith went inside and got Walker. Outside, Smith asked Walker why employees could not get their checks early on Thursday. Smith explained the

⁶ Tatum was also given a warning, but he is not named in the charge. The Employer could not identify the third welder, Askew, and so did not give him a warning.

⁷ Ambrose denies that this conversation occurred.

problem that this posed for employees and said that some employees seemed to be treated better than others. Smith added that Ambrose had told him that employees would get their checks on Thursday. Walker agreed to speak to Ambrose about it, and said that he would get back to them with an answer later that day. The employees returned to work at about 12:47 p.m.

On Tuesday, April 24, 15 employees were issued warnings, two were fired (Majett and Garrett) and one was suspended (Bryant). Of those who received discipline other than warnings, Majett and Bryant had disciplinary records with other offenses and Garrett had just returned from medical leave that day. None had been outspoken at the gathering.

n. April 24, 1990 at the Brambleton Yard

According to Daniel, supervisors' using tools to do bargaining unit work has been a problem at the Brambleton yard for a long time. As a steward, Daniel personally filed about 40 grievances on the subject between 1982-85. On April 18, 19, 20 and 23, supervisors were observed by unit members using tools to do bargaining unit work all day long. In response to these allegations, Daniel planned a rally for April 24 before work. A total of 60 or 70 employees attended. Daniel addressed several subjects including safety and the use of tools by supervisors. He asked those assembled if they wanted to form a grievance committee to address the tool issue with management. Daniel said they would attempt to meet during their own time, but if they could not, then at least two members of the committee would meet with management at another time if one could be arranged. Starting at 7:05 a.m., the group asked to meet with a foreman Jack Daves, a supervisor named Wally who had used tools to do bargaining unit work, and Superintendent Gwynn. Each refused. When the 7:15 a.m. whistle blew, Gwynn pulled down his pants and "mooned" the group. He then walked to the side lines and took out some paper and a pencil and began writing. Other supervisors also began writing. A video camera filmed the group.

Within 15 minutes (it was now past the 7:15 a.m. starting time), Creasy, Wermeister and Supervisor Hankins came out of the office building. Creasy identified himself as management's representative and before Daniel could explain why they were assembled, ordered the group to

return to work or vacate the premises. Daniel asked him to confirm that he was refusing to meet with them and he repeated his order. He added that if they returned to work they should see their shop head to sign a form. Daniel instructed the group to leave the premises.

On April 25, returning workers were asked to sign the same statement required of Electrical Shop workers earlier in the month. Nine employees, including Forrest and Marshall had signed the form before leaving the previous morning. When they returned on April 25, Forrest and Marshall were called into the office and fired by foreman C.L. Seyler (the remaining 7 received an oral warning).

o. April 27, 1990 at Discharge Grievance Meeting

At the meeting, the Union was represented by Daniel, International Representative Dave Bunch, and fired employee James Layton. Wermeister refused to meet with Bunch and Layton present and said that he would meet in accordance with the provisions of the grievance procedure as set forth in the expired contract. Daniel refused to meet unless the Employer was willing to recognize the Union's chosen representatives. Wermeister told Layton that he was trespassing and commented that he thought that he was being set up for an occupational injury case.

p. April 27, 1990 at Berkley Yard Paint Shop

On Friday, April 27, 1990, after not getting paid early the day before, the 12 employees who had been warned gathered at Smith's invitation outside the paint shop at lunch. At 12:35 p.m. employees Hoffman and Rogers went into the shop and told Ambrose that they had a grievance that they wanted to discuss with him and asked him to come outside. They gave him 16 grievances. Ambrose went outside and asked Smith what the problem was. Smith said they wanted to know why they had been given the warnings. Ambrose responded that this was not the proper time to discuss the matter. Smith asked him to name a time. Ambrose said he had nothing to talk about and left.⁸

At about 12:44 p.m., Wermeister and Assistant Director of Industrial Relations Gloria Dana went into the shop.

⁸ According to Smith, Employees Catherine Vaughn and Charles Newkirk who did not participate in Monday's grievance, were given their checks early. The Employer denies this.

They sorted through the grievances and found that one had been improperly filed. Wermeister told Ambrose to go tell the group to return to work. Smith said he was not refusing to work but wanted to have the grievances addressed. Ambrose refused. He asked Smith several times if he was refusing to work. At one point according to Ambrose, Smith looked at the group and they nodded their heads. Smith then said "yes" and Ambrose ordered them to vacate the premises. According to Smith, he never said he was refusing to work, but Ambrose ordered them to vacate the premises, which they did between 12:57 and 1:05 p.m.. According to Ambrose, as Smith was punching out, he turned to Walker and said, "See you tomorrow, maybe." Smith, and all five Union witnesses, deny Smith made the remark.

When employees reported to work the following day, they were informed that management did not know what they were going to do, so had gotten replacements for them. They were not given call-in pay. When four of the participants reported to work the following Monday, they were fired (Goodman, Buck, Darden and McMullen).⁹ None had been outspoken at the gatherings. All were among those warned on April 23, 1990. All had poor attendance records.

The Union asserts that no Union officials, other than stewards, sanctioned or planned the activity.

The Region has concluded that the Union did not interfere, restrain or coerce employees who did not wish to participate in its activities, or engage in any other unlawful conduct.

ACTION

We conclude that the work stoppages on April 5, 6, 12, 13, 21, 23, 24 and 27, 1990 do not constitute unprotected intermittent strike activity, and that the Union did not violate Section 8(b)(3) or 8(b)(1)(A) of the Act by engaging in the work stoppages.

1. The Work Stoppages.

"[E]mployees may not be discharged or otherwise discriminated against for engaging in concerted work

⁹ These four terminations occurred after the Union filed its charges. No amendment of the charges has been filed.

stoppages to protest working conditions."¹⁰ However, a refusal to work will be considered unprotected intermittent strike activity "when the evidence demonstrates that the stoppage is part of a plan or pattern of intermittent action which is inconsistent with a genuine strike or genuine performance by employees of the work normally expected of them by the employer."¹¹

The Board and courts have found to be protected concerted activity work stoppages which are spontaneous attempts designed to pursue work-related complaints or grievances,¹² and/or which are precipitated by, and in protest against, separate unlawful acts of the employer.¹³ Although numerous work stoppages may suggest a recurring pattern, "... there is no magic number as to how many work stoppages must be reached before we can say that they constitute [unprotected intermittent strike activity]"¹⁴ In Blades Mfg. Co., supra, for example, the Board held that the union's three walkouts were protected concerted activity. The Board reasoned that "each walkout was precipitated by, and was in protest against, a separate unlawful act of the [employer]...[t]he fact that the employees struck each time the [employer] refused to deal with the Union in the handling of a new grievance does not make their conduct 'intermittent' in the sense in which the Board and courts have used that term to describe a form of unprotected concerted activity. If the employees struck repeatedly, it was because the [employer] repeatedly denied them their statutory rights." 144 NLRB at 566.

¹⁰ Embossing Printers, 268 NLRB 710, 722 (1984); NLRB v. Washington Aluminum Co., 370 U.S. 9 (1962); McEver Engineering Inc., 275 NLRB 921 (1985), enfd. 784 F.2d 634 (5th Cir. 1986); Johnnie Johnson Tire Co., 271 NLRB 293, 294 (1984), enfd. 767 F.2d 916 (5th Cir. 1985).

¹¹ Polytech, Inc., 195 NLRB 695, 696 (1972). See, e.g. John S. Swift Company, Inc., 124 NLRB 394, 396-397 (1959), enfd. 277 F.2d 641 (7th Cir. 1960); Embossing Printers Inc., 268 NLRB 710, 723 (1984).

¹² Meilman Food Industries, 234 NLRB 698, 712 (1978); Polytech Inc., 195 NLRB at 696; Advance Industries Division-Overboard Door Corporation, 220 NLRB 431 (1975), enf. den. 540 F.2d 878 (7th Cir. 1978); Robertson Industries, 216 NLRB 361, 362 (1975), enfd. 560 F.2d 396 (9th Cir. 1976); Washington Aluminum Inc., 370 U.S. 9; First National Bank of Omaha, 171 NLRB 1145, 1151 (1968), enfd. 413 F.2d 921 (8th Cir. 1969).

¹³ Blades Mfg. Co., 144 NLRB 561, 566 (1963), enf. denied 344 F. 2d 988 (8th Cir. 1965).

¹⁴ Robertson Industries, 216 NLRB at 362.

There exists a presumption that "a single concerted refusal to work...is protected strike activity"¹⁵ Further, while a work stoppage of brief duration may suggest an unwillingness on the part of employees to accept the risks of a genuine strike, "a work stoppage does not lose its presumptive protection merely because of its limited duration."¹⁶

Work stoppages are more likely to be deemed protected where there is no lawfully implemented grievance procedure,¹⁷ where the employer refuses or fails to process grievances,¹⁸ and/or where union representation is unavailable for resolution of grievances.¹⁹ Further, "[t]he degree of merit of the grievance, and even the lack of merit, does not affect the protection of the employee's right under Section 7 of the Act to assert it as a matter of concerted activity."²⁰

Based on the above law, we conclude that the Union's work stoppages were not unprotected intermittent strike activity. Therefore, the work stoppages on April 5, 6, 12, 13, 21, 23, 24 and 27, 1990 are protected, concerted activity. In this regard, we note first that each of the work stoppages were spontaneous protests concerning work related complaints or grievances and/or were precipitated by, and in protest against, separate unlawful acts of the Employer. Thus, on April 5, at the Brambleton and Berkley yards, 80 and 500 workers, respectively, engaged in a 25 to 35 minute work stoppage to protest the Employer's unilateral change of the grievance procedure when it excluded a Union steward from the March 27 grievance committee meeting. On April 6, 75 workers demonstrated at Brambleton and left work for the day to protest the Employer's failure to meet with Union representatives, and 500 workers engaged in a 20 to 30 minute work stoppage at Berkley to protest the discharge of two Union officials.

¹⁵ Polytech, Inc., 195 NLRB at 696; See e.g. Johnnie Johnson Tire Co., 271 NLRB at 295.

¹⁶ Polytech, Inc., 195 NLRB at 696; First National Bank of Omaha, 171 NLRB at 1151.

¹⁷ Advance Industries Division - Overboard Door Corporation, 220 NLRB at 432; Polytech, Inc., 195 NLRB at 696.

¹⁸ Meilman Food Industries, Inc., 234 NLRB at 700.

¹⁹ Polytech, Inc., 195 NLRB at 696; Washington Aluminum Co., 370 U.S. 9, 14; First National Bank of Omaha, 171 NLRB at 1152; Johnnie Johnson Tire Co., 271 NLRB at 294.

²⁰ Johnnie Johnson Tire Co., 271 NLRB at 294.

On April 12, 60 workers engaged in a 15 minute work stoppage to protest safety violations on the Green Mountain State. On April 13, 500 workers engaged in a half-day (approximately) work stoppage to protest the discharge of a Union steward who apparently organized the April 12 work stoppage. On April 21, 15 workers engaged in half-day work stoppage after the Employer refused to meet with them concerning their grievances on being docked for participating in prior rallies. On April 23, three workers on board the Chelsea engaged in a 15 minute work stoppage to protest the unsafe gangway, and 18 paint shop workers engaged in a 5 to 10 minute work stoppage to protest their failure to receive paychecks early on days when workers were required to work overtime. On April 24, 70 workers at Brambleton engaged in a one day work stoppage to protest both safety violations and the use of tools by supervisors to do bargaining unit work. And on April 27, 12 paint shop workers engaged in a half-day (approximately) work stoppage after the Employer refused to discuss grievances concerning the Employer's issuance of warning notices to the paint shop workers who had engaged in the April 23 work stoppage. Thus, each work stoppage was a separate and distinct protest of separate and distinct actions by the Employer.

Second, there is insufficient evidence that the work stoppages were part of a plan or pattern of intermittent action that would be neither strike nor work. Concededly Daniel stated in his affidavit that the Union had "implemented a strategy aimed at accomplishing its goals with regard to contract negotiations and correcting safety violations" and had established an "in plant solidarity program" which included rallies, safety complaints and concerted activities over unilateral changes. However, this is not to say that the Union intended to use intermittent actions irrespective of Employer conduct. Rather, the Union was simply taking the position that, if there were Employer conduct, such conduct would not be ignored. As discussed above, each one of the work stoppages was precipitated by a work related complaint or grievance and/or by separate unlawful act of the Employer.²¹

²¹ Compare Embossing Printers, supra (the Board found that three work stoppages were unprotected since employees left work "not to find a way to resolve some immediate, adverse and undesirable working condition" but "to discuss ways in which to resolve their bargaining dispute with the [Employer]." There, the union called meetings during working time to discuss "the current contract negotiations". 268 NLRB at 723) with Blades Mfg. Co., supra (the Board found that each of three walkouts

And finally, not only did the Employer unilaterally change the grievance procedure, but it also unilaterally implemented a procedure that did not end in final and binding arbitration. Thus, there was no mutually agreed upon grievance procedure for the resolution of grievances.²²

In these circumstances, the evidence falls short of establishing that the work stoppages were part of a pattern or plan of intermittent and recurring strikes.

2. Sections 8(b)(1)(A) and 8(b)(3).

As a preliminary matter, we note that the Region has concluded that there is no evidence that the Union attempted to interfere, restrain or coerce employees who did not wish to participate in its activities, or that the Union engaged in any other unlawful conduct. Thus, the Union did not restrain or coerce employees within the meaning of Section 8(b)(1)(A).

As to the Section 8(b)(3) charge, it is well settled that the Board may not premise a Section 8(b)(3) violation upon a union's choice of economic weapons during a labor dispute. In Insurance Agents International Union,²³ the Supreme Court stated that Congress did not empower the Board to "define through its process what economic sanctions might be permitted negotiating parties in an 'ideal' or 'balanced' state of collective bargaining."²⁴ Thus, even repeated intermittent strikes would not violate Section 8(b)(3). Here, however, we have concluded that the Union's work stoppage was protected concerted activity. A fortiori, the Union did not violate Section 8(b)(3) when it engaged in the work stoppages.

3. Conclusion.

"was precipitated by, and was in protest against, a separate unlawful act of the Respondent... [each] strike was therefore a separate, protected concerted activity." 144 NLRB at 566.)

²² We do not necessarily conclude that the Employer's failure to institute an arbitration procedure was unlawful. See p. 25 *infra*. Rather, we merely note that the absence of an arbitration procedure is a factor militating in a favor of protecting the employee protests.

²³ 361 U.S. 447(1960).

²⁴ *Id.* at 499-500.

The Union's work stoppages on April 5, 6, 12, 13, 21, 23 and 27, 1990 were protected concerted activity.²⁵ Thus, any discipline or discharge resulting from these work stoppages was unlawful. Further, the Section 8(b)(1)(A) and 8(b)(3) charges should be dismissed, absent withdrawal.²⁶

H.J.D.

□

²⁵ We conclude that the April 14 incident should not be alleged as a violation. On that date, when welder Deerfield refused to work without another employee standing watch, the Employer sent him home for the day. Deerfield stated that his protest was not concerted activity, although he did express concern for the safety of two other welders. And, it appears that the Region has concluded that Deerfield has not been disciplined or discharged. [FOIA Exemptions 2 and 5

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²⁶ We note that the Employer implemented, after impasse, the grievance procedure contained in its expired contract, except it did not include the provision for arbitration. In Indiana & Michigan Electric Co., 284 NLRB 53 (1984), "the Board held there was no statutory duty to adhere to an arbitration procedure absent a contractual commitment to do so. The Board also held, however, that an employer violates Section 8(a)(5) when it engages in conduct tantamount to a wholesale repudiation of the limited postcontract duty to arbitrate." American Gypsum Co., 285 NLRB 100 (1987). Here, the Employer, after impasse, implemented a grievance procedure identical in form to the one codified in the expired contract, except it did not include a provision for binding arbitration. And, it appears that the Employer has taken the position that it will not arbitrate any grievance, even those which arguably might arise under the expired contract and thus are arbitrable under Nolde Brothers. v. Bakery Workers Local 358, 430 U.S. 243 (1977). [FOIA Exemptions 2 and 5

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