

National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

DATE: October 3, 1995

TO: Michael Dunn, Regional Director, Region 16

FROM: Barry J. Kearney, Associate General Counsel, Division of Advice

SUBJECT: Lasko Metal Products, Inc. Cases 16-CA-17026; 17056

506-2017-1700, 506-4033-1000, 512-5012-0133-1100, 512-5012-1701, 512-5012-1701-5000, 512-5012-1725-1172, 512-5036-6777

These Section 8(a)(1) and (3) cases were submitted for advice as to whether the Employer unlawfully suspended 12 employees for gathering near and refusing to move away from a manager's office where a fellow employee had been called for disciplinary reasons. ⁽¹⁾

FACTS

The Employer operates a fan manufacturing facility in Fort Worth, Texas. The Amalgamated Clothing and Textile Workers Union represents the employees in the facility, and was negotiating with the Employer for an initial contract when the events involved in these cases occurred.

On October 19, 1994, ⁽²⁾ after the end of the day shift, Union bargaining committee member Teresa Lopez and another employee were called into the office of production manager Alfredo Alonso for disciplinary reasons. Also present at this meeting was supervisor Julie Gonzalez. Having seen or heard that Lopez was in Alonso's office and after punching out for the day, a group of about ten employees gathered in front of that office, which was located next to the time clocks off of the production area. ⁽³⁾

The employees testified that they were "concerned for" Lopez and decided to wait until she came out from Alonso's office. ⁽⁴⁾

Some of the employees were pacing back and forth and looking into the office window. At this point there was no shift operating in the production area near the group, and most other employees had left the building. ⁽⁵⁾

Shortly after the employees gathered, plant process engineer Rudicile approached them. Rudicile asked a member of the group what they were doing, and apparently was told that they were waiting for Lopez. ⁽⁶⁾ He told them in English to go home or to wait in the lobby, cafeteria or outside. ⁽⁷⁾ When Spanish-speaking supervisors Bowen and Sanchez approached the group, Bowen repeated Rudicile's instructions in Spanish. Bowen also told employee Noriega to go home because she had already punched out.

Rudicile left to inform plant manager Yarbrough of what was happening. Yarbrough, who was in the office next to Alonso's, could not hear the group at this time. He instructed Rudicile to tell the group to wait in the cafeteria or lobby, which Rudicile did. When they refused to move, Yarbrough went out and told them himself. Supervisor Sanchez translated Yarbrough's orders into Spanish. Yarbrough approached employee Rosa Camacho and ordered her to go home. Camacho replied that they were waiting for their co-worker and would not leave until she came out of the office. Rudicile, Yarbrough and Sanchez all testified that at this point, the group was not particularly loud and was making no more, and possibly less, noise than that made by employees waiting to punch out at the end of the day.

Yarbrough then telephoned corporate human resources manager Eisman for advice. Eisman instructed Yarbrough to give the

group a "direct order" (in both Spanish and English) to move from the production area to the cafeteria or lobby, and to suspend them if they did not leave. Yarbrough returned to the group and issued that order several times, threatening them with suspension if they refused. Sanchez repeated the orders in Spanish. When the group repeatedly refused to move, Yarbrough told them they were all suspended. Yarbrough instructed Bowen to make a list of their names. While Bowen was taking down names, several employees walked over and joined the group. Bowen told them that they also would be suspended if they did not leave, and eventually added their names to the list. Yarbrough made another call to Eisman, who instructed him to call the police if the group did not leave. Yarbrough then told the security officer to call the police.

The noise-level increased significantly when the employees were told that they were suspended, and the group began to chant "justice" in both English and Spanish. Alonso had been conducting the meeting inside his office for approximately 10 minutes when he began to hear chants, clapping and yelling. At this point he also noticed people looking into the office window.⁽⁸⁾ Within five minutes of the time Alonso started to hear noises, he decided to end the meeting and continue it in the morning because of the disruption. The employees were outside the office for approximately 15 to 20 minutes, and left when Alonso terminated the meeting. The police were arriving just as the employees followed Lopez out of the building.

Yarbrough testified that the group was suspended for three days for failing to follow his direct orders to move from in front of the office and for trespassing. There is no evidence that the Employer had a rule which prohibited employees from remaining in the production area after work hours. Employees gather in this area every day to punch their time cards at the end of their shifts. Employees wait for rides in the cafeteria, lobby or outside, but often return to the work area to use the bathrooms, drink water or retrieve forgotten items. In addition, employees who need to see Alonso for work-related matters do so after hours or during breaks. Alonso testified that if he was busy when an employee came to his office, the employee would wait outside his office for a short time until he was available. He also recalls more than one employee waiting outside his office at the same time to see him.

ACTION

We conclude that the Employer violated Section 8(a)(1) and (3) by suspending employees for engaging in the protected concerted activity of gathering near and refusing to move away from an office where a fellow employee had been summoned by management.⁽⁹⁾

In determining whether concerted activity is protected under Section 7, the Board considers both the object of the activity and the means used to obtain that object.⁽¹⁰⁾ The protest of the discipline or discharge of co-employees is a protected object under Section 7, even if the discipline is lawful under the Act.⁽¹¹⁾ Concerted employee activity inside an employer's building may be a protected means of protest, if the employees' immediate interests outweigh the immediate interest of the employer in securing its property.⁽¹²⁾

Applying this standard, the Board has found that spontaneous, peaceful, relatively short in-plant work stoppages to address immediate problems or situations are protected activity.⁽¹³⁾ Conduct is also protected where there is evidence that the activity did not disturb plant business or operations,⁽¹⁴⁾

was the only available avenue for reaching the employees' intended audience,⁽¹⁵⁾ and/or did not attempt to bar management access to the facility.⁽¹⁶⁾ The protection of Section 7 extends to refusals by protesting employees to leave an employer's facility after the end of their shift.⁽¹⁷⁾

On the other hand, conduct has been found unprotected where the interest of employees in maintaining a protest on an employer's property is outweighed by the employer's property interests. For example, activity may be unprotected if it does not address an immediate problem, or interferes with the employer's control over or access to its property.⁽¹⁸⁾

In addition, activity originally deemed protected under the Act will lose that protection if continued for more than a reasonable time, as where a protest is continued after all immediate employee interests have been achieved.⁽¹⁹⁾

In this case, both the object and the means of the employees' concerted activity were protected. The employees were concerned about Lopez and were demonstrating, to her and management, their support for her by their presence right outside the office. One employee testified that she had been struck by Alonso and was therefore concerned about Lopez's safety. Such objectives clearly constitute "mutual aid and protection" within the meaning of Section 7. ⁽²⁰⁾

Additionally, the means used by the employees to achieve these objectives, when balanced against the Employer's property rights, are entitled to the protection of the Act. The group gathered spontaneously to address an immediate concern involving their fellow Union member. There is no evidence of interference with production or business operations of the Employer. Several Employer witnesses testified that the group was not being loud when it initially gathered, but rather was quieter than employees normally are when they gather in that area after work to punch out. Although the group eventually became loud enough to disturb the disciplinary meeting, this loudness and disruption did not occur until after the employees had been told they were suspended. There was no violence, threat of violence, or attempt to bar management personnel from using or controlling the facility, and the entire incident lasted no more than twenty minutes. The employees made clear that they were merely waiting for Lopez, and in fact left immediately when she came out of the office. There is thus no evidence indicating any attempt by the group to take over the facility.

While the Employer contends that employees are not allowed to loiter in plant areas after work hours, it has given no legitimate reason, e.g., safety or security, why the area outside of management offices must be kept clear. Moreover, management has generally permitted employees to be in the production area after work, at least to use the bathrooms, get water and retrieve forgotten items. Finally, although the Employer offered the employees alternative locations within the facility in which to gather, i.e., the cafeteria or lobby, we conclude that this "accommodation" was not reasonable under all the circumstances. In this regard, the employees could not have achieved their protected objectives of supporting Lopez from any of the alternative locations, since they are around a corner, 20 to 30 feet away from, and out of sight of, Alonso's office.

In sum, we conclude that the employees' concerted activity in gathering outside the manager's office was protected and did not lose its protection because they remained after being order to move. Accordingly, complaint should issue, absent settlement, alleging the Employer's suspensions of the employees for engaging in that activity were violative of Section 8(a)(1) and (3).

B.J.K.

¹ In both cases, the Union alleges the Employer committed additional violations of Section 8(a)(1) and (3). The Region has made a determination to dismiss those allegations, and seeks advice only on the October 19 suspensions.

² All dates hereinafter are 1994.

³ The group included key Union members, and some in the group wore distinctive Union T-shirts.

⁴ Employee Marta Rangel claims that she had been frightened by Alonso several weeks earlier when he struck her on the hand four times and "hurt" her. Rangel testified that the group was waiting for Teresa because they were afraid "something would happen to her." Several other employees testified that they saw Teresa on the way to the office looking very angry and wanted to wait and see what was happening to her. One employee said she was concerned because she had never seen an employee disciplined and kept in the manager's office after working hours.

⁵ Approximately five to seven employees were still working some distance away from the group.

⁶ Several employees testified that Rudicile was told the group was waiting for Lopez. However, Rudicile and supervisor Bowen testified that Rudicile was told that they were waiting to see Alonso.

⁷ The lobby is located around the corner and about 20 to 30 feet from Alonso's office. The cafeteria is a separate room off the lobby where employees traditionally wait for rides.

⁸ Supervisor Gonzales testified that she noticed people outside the office about 5 or 6 minutes into the meeting, and that she locked the office door after she saw people peering into the window. She later heard people outside saying that they "had Teresa in the office." Gonzales testified that Lopez became "loud and aggressive" after hearing the noise. Gonzales also claims that she remained inside the office after the meeting because she was afraid after seeing the Union T-shirts.

⁹ Although the present case involves access to the Employer's property, the Supreme Court's decision in *Lechmere, Inc. v NLRB*, 502 U.S. 527, 139 LRRM 2225 (1992), is inapplicable because this case involves the presence of employees, rather than non-employees, in the Employer's facility. See *Ohio Masonic Home*, 290 NLRB 1011 (1988), *enfd.* 892 F.2d 1290, 133 LRRM

2179 (6th Cir. 1989), applying *Tri-County Medical Center*, 222 NLRB 1089 (1976).

¹⁰ See, e.g., *Washington Adventist Hosp.*, 291 NLRB 95, 102-103 (1988). See also *Benjamin Electrical Engineering*, 264 NLRB 1061 (1982).

¹¹ *Pepsi-Cola Bottling Co.*, 186 NLRB 477, 478 (1970), *enfd.* 449 F.2d 824 (5th Cir. 1971); *Cone Mills Corp.*, 169 NLRB 449, 450 (1968), *enf. denied in rel. part* 413 F.2d 445 (4th Cir. 1969).

¹² *Peck, Inc.*, 226 NLRB 1174, n.1 (1976).

¹³ *Pepsi-Cola Bottling Co.*, 186 NLRB at 478 (work stoppage lasted only a few hours and didn't extend beyond normal working hours); *City Dodge Center*, 289 NLRB 194, 196-197 (1988), *enfd.* 882 F.2d 1355, 132 LRRM 2161 (8th Cir. 1989).

¹⁴ See e.g., *Farah Manufacturing Co.*, 202 NLRB 666 (1973) (lunchtime speech in hallway); *Chrysler Corporation*, 228 NLRB 486, 490 (1977) (silently walking through plant during break carrying signs: "We Want Heat").

¹⁵ See *AMC Air Conditioning Co.*, 232 NLRB 283, 283-284 n.3 (1977) (no evidence employer had provided, or that there existed, any other location where the employee could reach intended audience).

¹⁶ See, e.g., *Advanced Industries Division*, 220 NLRB 431 (1975), *enf. denied* 540 F.2d 878 (7th Cir. 1976); *Pepsi-Cola Bottling Co.*, 186 NLRB at 478.

¹⁷ See *Advanced Industries Division*, 220 NLRB at 431.

¹⁸ See *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240 (1939) (employees who seized and retained possession of employer's plant for several days engaged in illegal trespass); *Peck, Inc.*, *supra* (after-hours sit-in unprotected where staged as punishment against supervisor for imposing valid conditions, and employees' refusal to leave employer's premises was not predicated on any necessary immediacy of action); *Waco, Inc.*, 273 NLRB 746 (1984) (3 1/2 hour work stoppage unprotected where employees had no plan to give up occupation of lunchroom); *Calliope Designs*, 303 NLRB 65, n.2, 72 (1991) (employees' refusal to leave supervisor's office and return to work exceeded the protections of the Act by interfering with the employer's immediate interest in investigating an accident and attempting to obtain medical attention for an injured employee).

¹⁹ See *Cambro Mfg. Co.*, 312 NLRB 634, 635-36 (1993) (employees were entitled to conduct for a reasonable time in-plant work stoppage which was peaceful, focused on several specific job-related complaints and caused little disruption of production by those who continued to work; employees lost protection upon failure to return to work or leave the plant after the second directive to do so, because no further interest was served by continuing the protest after management assured that their complaints would be considered in a few hours pursuant to past practice).

²⁰ See, e.g., *Boese Hilburn Electric Service Co.*, 313 NLRB 372, 373-374 (1993), and cases cited (employee talking and agreeing with second employee that latter was being unfairly denied maternity leave by Employer, protected).