Trompler, Inc. *and* Jeff Franjevic. Case 30–CA–14342

August 27, 2001

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND TRUESDALE

On November 4, 1998, Administrative Law Judge William N. Cates issued the attached bench decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed limited exceptions, a brief in support of the judge's decision, and a request to expedite the Board's decision.

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,[1] and conclusions and to adopt the recommended Order.[2]

We adopt the judge's finding that certain second-shift employees[3] in the computerized numeric control department were engaged in protected concerted activity when they walked off the job on July 9, 1998, to protest the conduct of their shift leadman, Larry Marchand (a supervisor). We further agree with the judge that the Respondent violated Section 8(a)(1) when it terminated the employees for engaging in that protected concerted activity.[4]

Background

On July 9, 1998,[5] second-shift employees Jeff Franjevic, Nicole Franjevic, Ron Rank, Sandra Rank, Tracy Kovac, and Brian Deehr walked off the job. Those employees, who worked in the computerized numeric control machine department, were dissatisfied with the performance of their shift leadman, Larry Marchand, as it related to them.

On June 30, 9 days prior to the walkout, employee Ronald Rank attempted to give Manufacturing Manager Dieter Grammel a note expressing the second-shift employees' concerns about Marchand. Rank told Grammel that the second-shift employees wanted to "impeach" Marchand as their shift leadman and have Jeff Franjevic take his place.

The employees had three specific concerns about Marchand's conduct. First, they were concerned about Marchand's failure to stop the perceived harassment of Sandra Rank by another second-shift employee, David Liesenfelder. Occasionally Rank was assigned to work on or near a machine that Liesenfelder operated. When this occurred, Liesenfelder would verbally harass Rank and accuse her of taking work away from him. Liesenfelder's behavior upset Rank, often causing her to cry. The employees complained to Marchand, who asked, but did not require, Liesenfelder to apologize to Rank. However, 2 days prior to the walkout, on July 7, Liesenfelder again allegedly harassed Rank when she was assigned to operate a machine in "his" area.

Next, the employees disapproved of Marchand's handling of Tracy Kovac's drug dependency problem. Kovac was undergoing treatment for drug addiction. Marchand was highly suspicious of her activities and on July 2, when a friend dropped Kovac's lunch off to her, Marchand asked Kovac if he could look through the lunch bag before giving it to her.[6] She gave him permission. Finding, no evidence of drugs, Marchand tried to give Kovac's lunch to her. She told him she no longer wanted it. Kovac became extremely upset over this incident, as did the other second-shift employees.

Finally, the employees believed that Marchand was not qualified for the position of second-shift leadman. According to the employees, Marchand was not adequately trained to operate the computerized numeric control machines. Consequently, when an employee had a problem operating his or her machine, Marchand would have to call on another employee to assist, thereby causing that employee not to be able to do his or her work.

On the morning of July 9, while driving together to work, Jeff Franjevic, Nicole Franjevic, and Sandra Rank discussed management's failure to address concerns they had raised about their supervisor, Marchand. What prompted their discussion was a comment third-shift leadman, Ronald Brooks, had made the night before. Brooks told them that during a management meeting on July 8, Marchand criticized the second-shift employees.[7] According to the employees, when they heard that Mar-

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We shall modify the judge's recommended Order in accordance with our recent decision in *Ferguson Electric Co.*, 335 NLRB 142 (2001).

[3] The employees are Jeff Franjevic, Nicole Franjevic, Ron Rank, Sandra Rank, Tracy Kovac, and Brian Deehr.

[4] We do not agree with the Respondent's contention that the employees quit when they walked off the job in protest of Marchand's conduct.

[5] All dates herein are 1998, unless otherwise indicated.

[6] Marchand was himself recovering from a drug dependency problem. Marchand testified that he believed he was particularly qualified to handle Kovac's problem.

[7] In a letter the employees gave to management on July 10, highlighting their concerns, employees indicated that "everything was fine up until July 8" and "when we came to work on July 9 we were feeling very frustrated by things we had heard the night before."

chand had been criticizing them, it was the "icing on the cake." (Tr. at 144:14–145:7.) After arriving at work, the employees decided to walk out. They went to an employee's house and, approximately 20 minutes later, called Grammel, requesting a meeting with management. Grammel told them he would not meet with them that day; however, a meeting was scheduled for the next day.[8]

On July 10, the employees met with management.[9] Representing management was Respondent's president, Christine Trompler, and Grammel. The employees presented management with a letter explaining why they had walked out.[10] The letter did not cite any specific concerns, but according to the employees' credited testimony, they verbally communicated their specific concerns about Marchand to Trompler and Grammel during the meeting. Trompler told them that it did not matter what they had to say and that, when they walked off their jobs, they no longer worked there.

Analysis

There is no dispute by the parties that the employees' protest of Marchand's conduct was concerted activity. As such, the only issue before us is whether such activity was protected. We find that it was.

It is well-settled Board law that concerted employee protests of supervisory conduct are protected under Section 7 of the Act where such protested conduct affects the employees' working conditions.[11] Further, where employees seek to protest the selection or termination of a supervisor, an analysis of whether the protest is protected depends on whether "the identity and capability of the supervisor involved has a direct impact on the employees' own job interests and on their performance of the work they are hired to do."[12] Thus, in order for the activity of employees protesting supervisor selection, termination, or conduct to be protected, there must be a sufficient nexus between the conduct of the supervisor and the employees' conditions of employment.[13] As long as the concerted action is motivated by legitimate employee concerns regarding their supervisor, the fact that it takes the form of a strike rather than some lesser form of protest renders it no less protected than any other activity which employees may undertake in pursuit of their mutual interest.[14] Indeed, this principle has been embraced both by the Board and courts.

In *Arrow Electric Co. v. NLRB,* 155 F.3d 762 (6th Cir. 1998), the employees' walkout was protected where it was found that the supervisor's "rude, belligerent and overbearing behavior . . . directly impacted the employees' jobs and their ability to perform them."[15] Consequently, the employees' group action in bringing their concerns to management and seeking the supervisor's removal was protected.[16] According to the court, the connection between the supervisor's behavior and the terms and conditions of the employees' employment was made before, during and after the walkout.[17]

In *NLRB v. Guernsey-Muskingum Electric Co-Op*, 285 F.2d 8 (6th Cir. 1960), when employees complained that the newly appointed foreman did not understand the work, was incompetent and created hardships for the men on the crew, the court stated that their grievance was a proper subject for concerted action toward management.[18] In *NLRB v. Leslie Metal Arts Co.*, 509 F.2d 811 (6th Cir. 1975), the court found the employees' protest protected because the facts indicated that the supervisor threatened the safety of the employees and failed to maintain discipline.[19] Under those circumstances, the court held, the employees "could legitimately protest by concerted activity the failure of the employer to take appropriate action to correct or alleviate the situation."[20]

Applying this Board and judicial precedent, we agree with the judge that the employees' concerted activity of walking out to protest Marchand's conduct was protected. The second-shift employees' had three major concerns about Marchand: (1) his alleged failure to adequately address the harassment of one employee by another; (2) his alleged inappropriate handling of an employee's drug problem; and (3) his alleged deficiencies as a supervisor. All three of these concerns directly affected the employees' conditions of work.[21] Marchand's alleged failure to deal properly with jobsite harassment and his workplace treatment of an employee's drug prob-

[8] Respondent's president, Christine Trompler, had been out of the country for 2 weeks. She was returning to the office on July 10.

[9] Employee Brian Deehr did not attend this meeting and there is no explanation in the record as to why he was absent.

[10] See Jt. Exh. 3.

[11] See, e.g., *Millcraft Furniture Co.*, 282 NLRB 593, 595 (1987), citing *Fair Mercantile Co.*, 271 NLRB 1159 (1984), enfd. in unpublished decision 767 F.2d 930 (8th Cir. 1985).

[12] *Senior Citizens Coordinating Council*, 330 NLRB 1110, 1111 (2000), enfd. by unpublished decision, No. 00-4126 (2d Cir. April 27, 2001) (quoting *Dobbs Houses, Inc.*, 135 NLRB 885, 888 (1962), enf. denied 325 F.2d 531 (5th Cir. 1963)).

[13] *Puerto Rico Food Products Corp. v. NLRB*, 619 F.2d 153, 157 (1st Cir. 1980) (Finding no sufficient nexus between employee protest and their working conditions, the court found the employees' activity not protected).

[14] *See Dobbs Houses, Inc.*, supra at 135 NLRB at 888–889.

[15] 155 F.3d at 766.

[16] Id.

[17] Id.

[18] 285 F.2d at 8.

[19] 509 F.2d at 814.

[20] Id. at 813.

[21] We are not concluding that Marchand's conduct was in fact inadequate, inappropriate or deficient. We are simply concluding that employees reasonably perceived it as such.

lem had an impact not only on the individual employees directly involved, but also on their coworkers who suffered from the turmoil that resulted. Further, Marchand's alleged inability to operate the second-shift employees' computerized numeric control machines directly impacted their employment because it required employees to interrupt their work to assist coworkers with the equipment since Marchand was incapable of doing so. One of the employees testified that he was concerned that this time away from his job would prevent him from meeting his prescribed machine assignments and affect his performance evaluation.

We recognize that the Seventh Circuit, among others,[22] has added a step to its analysis of cases involving concerted employee conduct to protest a supervisor's conduct, selection, or discharge. Embracing the Fifth Circuit's analysis in *Dobbs Houses, Inc. v. NLRB*,[23] the Seventh Circuit considers not only whether the supervisor's conduct has an impact on employees' work conditions, but also whether the means of the employee protest was "an appropriate means of protest, the legitimacy of the employees' grievance notwithstanding."[24] Where the court has found that an "unduly disruptive walkout bore no reasonable relation" to the employees' grievance, it has held that it "necessarily lost them the protection of the Act."[25] Where employees' protest regarding a supervisor causes a disruption that would be detrimental to business, the Seventh Circuit has found that the activity will not be protected.

We respectfully adhere to Board precedent in determining whether employee protests concerning supervisors constitute protected activity. In our view, if employees are protesting working conditions, whether caused by a supervisor or by higher management action, 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.[26]

However, even under the *Dobbs* "reasonable means" test, we find that the employees' conduct in this case remained protected. The judicial decisions finding employee conduct unreasonable involved conduct far more severe, and having significantly more impact, than the actions of employees in this case. For example in *Bob Evans Farms*,[27] waitresses, protesting the discharge of their supervisor, left at the height of the dinner rush, thus having the "immediate effect of crippling the restaurant's ability to function at what was characteristically busy time."[28] According to the court, "that the walkout had a far-reaching effect on the operation of the restaurant is undisputed."[29] The court continued, "the best Bob Evans could hope for was to limit the damage: service was poor, customers got angry, bills were not paid and business was lost."[30] In *Dobbs Houses*,[31] waitresses who mistakenly believed their supervisor had been terminated, similarly walked out *en masse* during the dinner rush. In assessing whether this concerted activity was protected, the court held that the concerted activity (the walkout) in protest of a change in supervisory personnel must reasonably relate to the ends sought to be achieved.[32] The court held a mass departure by the waitresses during the dinner hour was not so reasonably related.

Here, conversely, there is no evidence, or allegation that the second shift employees' walkout had a similarly significant impact. The Respondent's business is not one that directly serves the consuming public, nor was there a finding that the walkout had the immediate effect of causing the Respondent to lose business, income, or customers. Likewise, this was not a situation in which the walkout created a threat to the safety and health of others.[33]

Further, in this case, the walkout of the second-shift employees followed their unsuccessful efforts to have management redress their concerns about Marchand. The employees had attempted to communicate their concerns about Marchand to management 9 days before the walkout.[34] When management failed to address their

[22] *See Abilities & Goodwill, Inc.*, 612 F.2d 6 (1st Cir. 1979); *Yesterday's Children, Inc. v. NLRB*, 115 F.3d 36 (1st Cir. 1997); *Oakes Machine Corp. v. NLRB*, 897 F.2d 84 (2d Cir. 1990); *Dobbs Houses, Inc. v. NLRB*, 325 F.2d 531 (5th Cir. 1963).

[23] 325 F.2d 531 (5th Cir. 1963).

[24] *Bob Evans Farms, Inc. v. NLRB*, 163 F.3d 1012, 1022 (7th Cir. 1998). See *Henning & Cheadle, Inc. v. NLRB*, 522 F.2d 1050 (7th Cir. 1975).

[25] *Bob Evans Farms*, supra at 1024.

[26] See *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 16 (1962) (the "reasonableness of workers' decisions to engage in concerted activity is irrelevant to the determination of whether a labor dispute exists or not").

[27] Supra at fn. 23.

[28] *Bob Evans Farms*, 163 F.3d at 1024.

[29] Id. at 1016.

[30] Id.

[31] 325 F.2d 531 (5th Cir, 1963).

[32] Id. at 538–539.

[33] Accordingly, Member Truesdale finds this case distinguishable from *NLRB v. Federal Security, Inc.*, 154 F.3d 751 (7th Cir. 1998), denying enf. to 318 NLRB 413 (1995), in which the court agreed with his dissent and found a walkout by security guards at a public housing project unprotected.

[34] On June 30, second-shift employee Ronald Rank attempted to give Manufacturing Manager Deiter Grammel a note expressing the second-shift employees' concerns about Marchand. Rank told Grammel the employees wanted to impeach Marchand. There are conflicting versions of Grammel's response thereto. The judge did not deal with this

concerns, and, indeed additional incidents arose, the employees reasonably believed that they had no better recourse than to walk out on July 9. This is distinguishable from both *Bob Evans Farms, Inc. v. NLRB* and *Dobbs Houses v. NLRB*, where the employees made no other attempts to communicate their concerns to management prior to their work stoppages. They simply left the premises at a time and under circumstances that had a severe impact on business operations.

In sum, it is clear from the record that the walkout was protected and was the motivating factor for Respondent's adverse action against the employees.[35] Accordingly, we agree with the judge that the Respondent violated Section 8(a)(1) when it terminated the six employees.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Trompler, Inc., Waukesha, Wisconsin, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

Substitute the following for paragraph 2(c).

"(c) 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."

Percy J. Courseault, Esq. and *Nichole Hoover Cook, Esq.,* for the General Counsel.

Marna M. Tess-Mattner, Esq. and *Albert H. Petajan, Esq*., for the Company.

BENCH DECISION

STATEMENT OF THE CASE

WILLIAM N. CATES, Administrative Law Judge. This is a wrongful discharge case. At the close of a 2-day trial in Milwaukee, Wisconsin, on October 6, 1998, I rendered a Bench Decision in favor of the General Counsel (Government) thereby finding a violation of 29 U.S.C. §158(a)(1). This certification of that Bench Decision, along with the Order which appears below, triggers the time period for filing an appeal (Exceptions) to the National Labor Relations Board. I rendered the Bench Decision pursuant to Section 102.35(a)(10) of the National Labor Relations Board's (Board) Rules and Regulations.

For the reasons stated by me on the record at the close of the trial, and by virtue of the prima facie case established by the Government, a case not credibly rebutted by Trompler, Inc. (Company), I found the Company violated Section 8(a)(1) of the National Labor Relations Act, as amended (the Act) when on July 9, 1998, it discharged its employees Jeff Franjevic, Nicole Franjevic, Sandra Rank, Brian Deehr, Tracy Kovac, and Ronald Rank because of their concerted protected activity of walking off the job to protest certain terms and conditions of their employment. See *Meyers Industries*, 281 NLRB 882 (1986) *(Meyers II),* enfd. 835 F.2d 1481 (D.C. Cir 1987), cert. denied 487 U.S. 1205 (1988). In *Meyers II*, the Board reaffirmed its definition of concerted activity contained in *Meyers Industries*, 268 NLRB 493 (1984) *(Meyers I),* revd. sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir 1985), cert. denied 474 U.S. 971 (1985). I rejected the Company's contention its actions were justified because the employees' walk out was not protected activity and/or the employees quit their employment by walking off the job. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983).

I certify the accuracy of the portion of the transcript, as corrected,[1] pages 378 to 395, containing my Bench Decision, and I attach a copy of that portion of the transcript, as corrected, as "Appendix A."

CONCLUSION OF LAW

Based on the record, I find the Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act; that it violated the Act in the particulars and for the reasons stated at trial and summarized above and that its violations have affected and, unless permanently enjoined, will continue to affect commerce within the meaning of Section 2(2) and (6) of the Act.

REMEDY

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

Having found the Company discriminatorily discharged its employees Jeff Franjevic, Nicole Franjevic, Sandra Rank, Brian Deehr, Tracy Kovac, and Ronald Rank, I shall recommend they, within 14 days from the date of this Order, be offered full reinstatement to their former jobs, or if their jobs no longer exist to substantially equivalent positions, without prejudice to their seniority, or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings or other benefits suffered as a result of the discrimination against them

incident and therefore did not resolve the credibility conflict. We find it unnecessary to resolve the credibility issue concerning Grammel's response. We rely solely on the undisputed fact that Rank sought to present the note which expressed employee concerns. That fact is relevant to show that the controversy about Marchand was a matter of employee concern.

[35] *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981) cert. denied 455 U.S. 989 (1982).

[1] I have corrected the transcript by making physical inserts, crossouts, and other obvious devices to conform to my intended words, without regard to what I may have actually said in the passages in question.

with interest. Backpay shall be computed in the manner prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), plus interest, as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). I also recommend that the Company, within 14 days from the date of this Order, be ordered to remove from its files any reference to Jeff Franjevic's, Nicole Franjevic's, Sandra Rank's, Brian Deehr's, Tracy Kovac's, and Ronald Rank's, unlawful discharge and, within 3 days thereafter, notify Jeff Franjevic, Nicole Franjevic, Sandra Rank, Brian Deehr, Tracy Kovac, and Ronald Rank, in writing that this has been done and that their discharge will not be used against them in anyway. Finally, I recommend the Company be ordered, within 14 days after service by the Region, to post an appropriate notice to employees, copies of which are attached hereto as "Appendix B"[2] for a period of 60 consecutive days in order that employees may be apprised of their rights under the Act and the Company's obligation to remedy its unfair labor practices.

On these conclusions of law, and on the entire record, I issue the following recommended[3]

ORDER

The Company, Trompler, Inc., Waukesha, Wisconsin, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging employees because they engage in protected concerted activities.

(b) In any like or related manner interfering with, 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 Jeff Franjevic, Nicole Franjevic, Sandra Rank, Brian Deehr, Tracy Kovac, and Ronald Rank, full reinstatement to their former jobs, or if their jobs no longer exist to substantial equivalent jobs without prejudice to their seniority or any other rights or privileges previously enjoyed. Make Jeff Franjenic, Nicole Franjenic, Sandra Rank, Brian Deehr, Tracy Kovac, and Ronald Rank whole for any loss of earnings they may have suffered as a result of the discrimination against them in the manner described in the remedy section of this bench decision.

(b) Within 14 days from the date of this Order remove from its files any reference to their unlawful discharge and within 3 days thereafter notify Jeff Franjevic, Nicole Franjevic, Sandra Rank, Brian Deehr, Tracy Kovac, and Ronald Rank, in writing that this has been done and their discharge will not be used against them in any way.

(c) Preserve and, within 14 days of a request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Regional Director for Region 30 of the National Labor Relations Board, post at its Waukesha, Wisconsin facility copies of the attached notice marked "Appendix B." Copies of the notice, on forms provided by the Regional Director for Region 30 after being signed by the Company's authorized representative shall be posted by the Company and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that the notices are not altered, defaced, or covered by any other material. In the event that during the pendency of these proceedings the Company has gone out of business or closed the facility involved in these proceedings, the Company shall duplicate and mail, at its own expense, a copy of the notice to all employees in the Waukesha, Wisconsin, area employed by the Company on or at any time since July 9, 1998.

(e) Within 21 days after service by the Region, file with the Regional Director for Region 30 of the National Labor Relations Board sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Company has taken to comply.

APPENDIX A

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to work with. She had no issue to resolve with them and, Your Honor, I submit that not only was their activity unprotected but the Employer's response was lawful given the information that she had at the time and her understanding of what their issues were, and I therefore ask that the complaint be dismissed.

JUDGE CATES: Thank you.

I thank both of you. I don't think I have any questions. I shall go out and organize my thoughts and I will be back hopefully at 12:30. If not no later than 12:40. That will give me time to go out and pace up and down the street and organize my thoughts. So if you would be kind enough to be back at 12:30 I will be back at about that time or shortly thereafter.

Off the record.

(Brief recess taken.)

JUDGE CATES: On the record.

DECISION

This is my decision in the matter of Trompler, Inc., Case 30–CA–14342. The caption of the company appears in my decision as corrected at trial herein.

First let me state that it has been a pleasure to be in Milwaukee, Wisconsin and the people here have been most hospitable. I have enjoyed my visit here. Let me also add that counsel for both sides have done an outstanding job. If you will reflect back over the trial I may have asked two questions.

[2] 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."

[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended 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.

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I restated a question for someone in order to expedite the proceeding and I asked Mr. Grammel a question. Other than that I don't think I asked any questions in the entire trial.

The counsel for the parties are a credit to the party they represent and you were well prepared. You filed very helpful pretrial briefs and you presented the case in a very logical and orderly manner and you are to be complimented for your performance. Whether you win or lose it may not be placed at the feet of counsel for either side. It always makes my job very easy when the parties come in as the parties here did and present their case.

The company, Trompler, Inc., is a corporation with an office and place of business located at Waukesha, Wisconsin where it is engaged in the business of machining tools. During the past calendar year ending December 31, 1997 the company in the course and conduct of its business operations purchased and received gross revenue in excess of $50,000.00 directly from points outside the State of Wisconsin. The complaint alleges, the parties admit and I find that the company is an employer engaged in commerce within the meaning of Section 2(2)(6) and (7) of the Act.

I am going to next note that certain officials of the company —and let me state up front that if I mispronounce anyone's name please attribute that to my hillbilly background and not to any intent to offend anyone with a mispronunciation of

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their names. The following individuals are admitted to be supervisors of the company within the meaning of Section 2(11) of the Act. Christina Trompler is the president. Dieter Grammel is the manufacturing manager. Larry Marchand and Ronald Brooks were supervisors at relevant times herein.

The key event that sets the case in motion is that on July 9, 1998 certain employees on the second shift engaged in a walkout at the company. That is not disputed. Those individuals were Jeffrey Franjevic, Nicole Franjevic, Ronald Rank, Sandra Rank, Tracy Kovac and Brian Deehr. The six employees were terminated on July 10, 1998 for walking out. The company president, Christina Trompler, so stated. The six employees involved herein were all computerized numeric control machine operators on the second shift. The company, it appears, operates 24 hours a day with three shifts of employees five days a week. It appears the company employs approximately 30 to 33 employees including its management personnel.

Before I outline the facts and apply certain legal principles to those facts let me briefly outline some of the legal principles that I believe to be applicable herein. The parties for example are in agreement that a key or central issue herein is whether the walkout by the second shift employees on July 9, 1998 was protected concerted activity. The Board in *Meyers Industries*, 268 NLRB 493 (1984), a decision which I shall refer to as *Meyers I*, noted that the concept of concerted action

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has its basis in Section 7 of the Act.

The Board pointed out in *Meyers I* that although the legislative history of Section 7 of the Act does not specifically define concerted activity it does reveal that Congress considered the concept in terms of individuals united in pursuit of a common goal. The statute requires that the activities under consideration be "concerted" before they can be "protected". As the Board observed in *Meyers I* "Indeed Section 7 does not use the term protected concerted activities but only concerted activities." It goes without saying that the Act does not protect all concerted activity.

With the above, as well as other considerations, the Board in *Meyers I* set forth the following definition of concerted activity. The Board's definition is "In general to find an employee's activity to be concerted we shall require that it be engaged in with or on the authority of other employees and not solely by and on behalf of the employee him or herself. Once the activity is found to be concerted an 8(a)(1) violation will be found if in addition the employer knew of the concerted nature of the employee's activity, the concerted activity was protected by the Act and the adverse employment action at issue," for example in this case the discharge, "was motivated by the employee's protected concerted activity."

It is well settled, I'm persuaded, that employees have the right to engage in concerted activities including the right to

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leave their work concertedly where such activities have a reasonable relationship to the employees' interest in their working conditions. The 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.

The company in this case argues the employees were not engaged in protected activity. The two criteria for determining whether employee action over supervisory matters can, for example, be protected are, first the employee protest must be a protest over the actual conditions of employment and, second, the means of protest must be a reasonable one. Let me highlight again the matters that must be established by the Government in order to have a prima facie case.

There must be concerted activity. The company must have known of the concerted nature of the employees' activity. The concerned activity was protected by the Act and the adverse employment action was motivated by the employees' protected concerted activity. The key question that I perceive the parties are attempting to frame herein is: was the employee action over the supervisory performance or functions, of Mr. Marchand, if it took place, conduct that is protected by the Act?

In order to determine that I must examine what caused the walkout on July 9. What reasons did the employees have. What

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reasons, if any, were communicated to management and what action, if any, did company management take. In order to do that I need to examine the events that took place on July 9, 1998. The facts that I will set forth in my decision are the facts that I have credited. If there are facts that are contrary to what I outlined in the decision I discredited those facts or not accepted those facts.

The testimony is, for example from Sandra Rank, that on the way to work on July 9, 1998 she and Jeff Franjevic and Nicole Franjevic discussed the fact management would not listen to their problems and that something needed to be done. Jeff Franjevic, in essential parts, corroborated Sandra Rank's testimony regarding the July 9, 1998 ride to work and the concerns discussed as they rode to work. I credit their testimony that they discussed their concerns on the way to work.

After arriving at work the second shift employees and specifically Sandra Rank, Ron Rank, Jeff Franjevic, Nicole Franjevic, Tracy Kovac and Brian Deehr, discussed in the lunchroom prior to going to work, certain concerns they shared. Sandra Rank testified they discussed the fact the company would not listed to their concerns or problems. Sandra Rank credibly testified they discussed the perceived harassment that she, Sandra Rank, had received at the plant. They discussed supervisor Marchand's actual and/or perceived treatment of Tracy Kovac's drug dependency problem.

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They discussed what they perceived, rightly or wrongly so, to be the inability of supervisor Marchand to do his job such as helping the employees to operate the computerized numeric control machines. Tracy Kovac credibly testified it was discussed that the employees needed solidarity to get management's attention. Ron Rank credibly testified they discussed the fact management was pushing them aside and not listening to their problems. Ron Rank credibly testified they discussed the fact they would be better off to form a group and walk off the job in order to get management's attention.

The employees did just that on July the 9th. After reporting to work, but without performing any work, they left the facility, walked off the job and proceeded, at least five of them, to one of the employee's homes. Why did the employees walk off the job? According to their credited testimony such as that from Sandra Rank that the harassment of her by a co-worker was one of the reasons. Another was the treatment of Tracy Kovac by supervisor Larry Marchand as it pertained to the situation involving Kovac's drug dependency problem and/or situation, and supervisor Marchand's lack of ability to perform his supervisory job duties.

Jeff Franjevic agreed with the reasons advanced by Sandra Rank for their walking out and added management was not taking the second shift employees' concerns seriously. Nicole Franjevic testified supervisor Ronald Brooks had

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told the employees that supervisor Larry Marchand had been putting the employees down at a management meeting on July the 8th, 1998 and that they, the employees, perceived and felt they were unable to defend themselves.

What was communicated to management and in what form related to the walkout by the employees in question? Approximately twenty minutes after the employees had walked off the job on July the 9th a call was placed to the company by one of the employees that walked out and the employee spoke with manufacturing manager Dieter Grammel asking for a meeting with management in order to discuss their concerns regarding their jobs. A meeting did not take place, however, on July the 9th but a meeting was had with management on July the 10th at approximately somewhere between 10:30 and 11 a.m.

Representing management was president Christina Trompler and manufacturing manager Dieter Grammel. The employees that had walked off were in attendance at this meeting except for Brian Deehr who did not attend nor was his absence adequately explained on the record. Did the employees apprise management of the nature of their concerns at this July 10, 1998 meeting? First, the employees presented company management with a written paper regarding their concerns. That paper was received in evidence as Joint Exhibit 3.

The reasons were outlined in six typewritten paragraphs and one handwritten paragraph. The document was given to president

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Christina Trompler and after she had read it she passed the document to Dieter Grammel, the manufacturing manager, and both read the document. The employees testified the document was only talking points that they hoped to explain to some degree their problems, concerns or matters they wanted discussed with the company and resolved thereby. Employees testified with respect to more precisely what was said at the meeting.

Sandra Rank testified that Jeff Franjevic and Ron Rank spoke for the employees at this meeting and indicated their problems concerned the real or perceived harassment of Tracy Kovac by supervisor Marchand regarding Kovac's drug dependency situation. Sandra Rank testified Christina Trompler stated they could sit there all day, that when they walked out they had quit their job that it did not matter what they had to say. They didn't work there any more.

Jeff Franjevic testified with respect to what was said at the July 10 meeting that Christina Trompler was shaking her head and saying it doesn't matter what they had to present, that when they walked out and tried to shut down the second shift did they realize how stupid they were. Mr. Jeff Franjevic testified he told Christina Trompler and manufacturing manager Grammel they were not speaking poorly of supervisor Marchand on a personal basis but that it dealt with his ability to perform his job.

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According to the testimony of Jeff Franjevic, Christina Trompler responded supervisor Marchand was a most decent individual and they would have to accept that. Ron Rank testified that at the meeting he mentioned to president Christina Trompler that the reasons they had walked out were that nothing had been done about the harassment to Sandra Rank from a fellow employee, namely David Liesenfelder, and also supervisor Marchand's treatment of employee Tracy Kovac.

President Christina Trompler presents a somewhat different version of the meeting on July 10. Christina Trompler testified that none of the employees advanced any reason for the walkout other than that third shift supervisor Ron Brooks was a real problem for the employees and he was a cancer in the facility. Christina Trompler testified she went around the room asking those that were present specifically what their reasons were for

walking out and specifically she testified she asked Sandra Rank if it involved the treatment she had received from fellow employee David Liesenfelder and that Sandra Rank responded no, that was behind them.

She also testified she asked Tracy Kovac if the treatment that had been afforded her was the reason for the walkout and again the answer was "no" according to the testimony of Christina Trompler. President Trompler states they were never provided a reason for going out, that is for the employees walking off the job.

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I am persuaded the employees' version of the events are more nearly accurate and I credit them based not only on demeanor but on the probability of what took place. If employees are concerned enough about what they perceive problems to be, whether they are real or otherwise, and they walk off the job and they specifically request a meeting and they prepare talking notes or an outline of an agenda to be presented, I find it is much more credible and much more probable they then expressed what it was they walkedout for. So, I credit the employees' testimony that I have outlined as having been expressed at the meeting.

At the conclusion of the meeting it is undisputed that company president Christina Trompler told the employees they no longer worked there, that their employment was terminated and that if they wished to they could apply to be re-employed. I think it is appropriate before I apply these facts to the principles that I have outlined that I look at what these concerns of the employees were and we'll start with the situation involving Sandra Rank and her fellow worker David Liesenfelder.

It appears that Ms. Rank, from time to time, was assigned to work in the area of or on a machine that Mr. Liesenfelder had worked on or perceived it was his machine to work on and he —based on the credited and undisputed testimony of Sandra Rank and others Mr. Liesenfelder told Ms.

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Rank that he didn't like her taking his fucking work and he did not know why she needed to be over there, And he did this on more than one occasion and this upset—according to the testimony of Sandra Rank and her son, Ronald Rank, and other members of her family, her greatly.

Specifically one of these encounters took place on or about July 7, 1998—July the 9th is obviously when the employees walked away from the job. The company presented a great deal of evidence to show that they perceived the problem had been rectified or eliminated and even if that was or is the case that does not prevent the employees from legitimately perceiving the problem still existed and to attempt to have it addressed specifically by management.

The second area of concern expressed by the employees amongst themselves and to management was the situation involving employee Tracy Kovac. All of the parties including Tracy Kovac testified to the fact that she had a drug dependency problem, that she was aware of it, that her fellow workers were aware of it and that management was aware of it. Tracy Kovac on a time near in point to the walkout had lunch brought to her at the plant by a boyfriend, sometimes boyfriend, friend or at least one of the witnesses alluded to perhaps a supplier, brought her this lunch and supervisor Larry Marchand told the individual named "Kenny" bringing the lunch that he could not see Tracy Kovac and he took the lunch, took it to Kovac and asked if he could

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look into the lunch.

He did. There was nothing in it but two egg rolls. He asked Kovac if she wanted it. She said no. He said he didn't so they trashed the lunch and based on Ms. Kovac's testimony this upset her considerably and caused her problems and the other employees knew of her being upset about supervisor Marchand checking her lunch and as Ms. Kovac expressed it she felt she was still being watched or monitored to see if she was reverting back to the use of controlled substance drugs.

The company defends by saying it has a legitimate interest in keeping its workplace drug free, that it had a specific interest regarding Tracy Kovac because the Company had paid, if not in whole at least in part, for the rehabilitation treatment Tracy Kovac had received. The company had offered through supervisor Larry Marchand to be a sponsor or someone that Tracy Kovac could speak with and talk about the drug related problems she had.

Supervisor Marchand testified he felt he was especially qualified to speak with her on that because he himself had a drug dependency problem and he had been through treatment and rehabilitation. The company also points out that it did not receive any official complaints from Tracy Kovac that she was being harassed, that she perceived she was being harassed or that she felt she was being harassed. None of those matters would preclude the employees from perceiving, believing or being

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concerned that management was not, in their opinion, properly treating a worker, that they were in fact harassing the worker and wish and seek to have the matter addressed by management.

The third item the employees said they were concerned about, discussed among themselves, and expressed to management was the ability, or lack thereof, of supervisor Larry Marchand to perform his job as a second shift supervisor. A number of the employees testified with respect thereto that supervisor Marchand actually had or the employees perceived that he had a lack of knowledge or ability to operate the computerized numeric controlled machines or that he would always have to have someone else help them with the operation of the computerized numeric controlled machines.

Also the employees perceived that he was not performing certain jobs that he was supposed to perform. The company suggests and defends that whatever they wish for their supervisor to perform as his or her job is simply that, that it is their prerogative to decide what duties their supervision will perform, and that in essence the argument goes forward that if they wish to train their supervisor on the job they may do so without input from the rank and file employees.

Again this does not preclude the employees from perceiving that their supervisor's inability to help them set up and/or properly operate their machines impacts on their job performance. In fact one of the employees speaks to the matter

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of his having to go and help other employees either at the other employee's request or at supervisor Marchand's direction. He said that took him away from the job he would normally be performing in order to assist or help the employees that had requested his help or that supervisor Marchand had directed that he help.

The company counters that we pay you by the hour, not by the piece rate, and therefore if we want to utilize your hourly rate to have you assist another employee so be it. But, one of the employees spoke to the issue that when he was away from his job he might not be able to advance his job or produce the parts or fill the orders that had been directed for him and although it did not impact the hourly wage rate he would be paid it had the potential of impacting any evaluation he may be given, that he was not meeting his prescribed machine assignments.

So I am persuaded each of the three concerns were valid concerns the employees had and expressed to management. Now applying those concerns and the facts as I have outlined to the principles of law that I advanced there are at least four or perhaps as many as seven questions that need to be asked and answered and the first is was the activity the employees engaged in concerted? Absolutely. The employees testified that perhaps what they needed to do was to form a group and walk out. Employees testified that perhaps what they needed was solidarity

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in their efforts and walked out.

So there is no question that the conduct engaged in by the employees was concerted. Did the company know of the concerted nature of the employees' activities? Again the answer is yes because the employees walked out in a group. The employees left the facility together at the same time. The employees through one of their spokespersons called management and said we have walked out and we are requesting a meeting to discuss our walkout and our concerns.

Was the concerted activity that the company knew about protected by the Act? The answer is yes. The activity was protected by the Act because the issues that they wished to have resolved, discussed among themselves and with management, involved working conditions of employees. That is the treatment they perceived they were receiving at the hands of management vis-à-vis their fellow employees, their prior drug dependency problems and the fact that they perceived or were not receiving the necessary guidance they needed to perform their jobs in the manner that they were required to perform.

Was the adverse employment action that was taken motivated by the employees' protected concerted activity? The answer is yes. Company president Christina Trompler told the employees they had walked off and they were no longer employed there but they could reapply.

I find as alleged in the complaint that when the employees

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were discharged—when the Employer discharged its employees Jeff Franjevic, Nicole Franjevic, Sandra Rank, Brian Deehr, Tracy Kovac and Ronald Rank on July 10, 1998 their actions violated Section 8(a)(1) of the Act. Now in due time after I have received the transcript of this proceeding I will certify those pages of the transcript that constitute my decision to the Board. It is my understanding that that is the time from which any appeal to this decision runs.

I invite your attention, however, to the Board's Rules and Regulations as to when these time frames begin rather than relying on my understanding. In certifying the pages of the transcript that constitute my decision I will, as appropriate, make corrections on the transcript itself by lining through and ink writing in above what should have been there so that you can see what was there in the transcript and how I corrected it. I have found it has been necessary to correct transcripts in certain matters, and I shall do so in this.

I will also, in the certification that I provide, order a remedy which will include the reinstatement of the employees herein, that they be made whole for any lost wages, that their unlawful discharge be expunged from their records, that they be returned without any prejudice to their seniority, other rights or privileges, that for example if they were in the middle of taking blueprint reading training

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that they be reinstated to the blueprint reading training, that they be reinstated to all benefits they were previously entitled to including as previously discussed herein health care coverages.

I shall order also that the company post a notice which I shall draft that will cover the allegations of the complaint. I would urge the parties to still resolve this matter so that it need not go further through the system. If you do reach a settlement before I certify the decision you would need to direct that to my attention. After I have certified the decision, the Board will issue a notice showing that it has been transferred to and continued before the Board and I no longer have any jurisdiction at that point.

Again let me state that it has been a pleasure to be in Milwaukee, Wisconsin and this trial is closed.

(Hearing concluded at 1:20 p.m.)

APPENDIX B

NOTICE TO EMPLOYEES
Posted by the Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid and protection
To choose not to engage in any of these concerted activities.

WE WILL NOT discharge our employees for engaging in concerted protected activities.

WE WILL NOT in any like or related manner interfere with, restrain or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, offer Jeff Franjevic, Nicole Franjevic, Sandra Rank, Brian Deehr, Tracy Kovac, and Ronald Rank, full reinstatement to their former jobs, or, if their jobs no longer exist to substantially equivalent jobs without prejudice to their seniority or other rights or privileges previously enjoyed; and WE WILL make them 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 this Order remove from our files any reference to their unlawful discharge, and within 3 days thereafter, notify Jeff Franjevic, Nicole Franjevic, Sandra Rank, Brian Deehr, Tracy Kovac, and Ronald Rank, in writing, that this has been done and their discharge will not be used against them in any way.

TROMPLER, INC.