

Anco Insulations, Inc. and Larry J. Ourso, Sr.
Dow Chemical Company, Louisiana Division and
Larry J. Ourso, Sr.
The McCarty Corporation and Larry J. Ourso, Sr.
 Cases 15-CA-6910, 15-CA-6911, and 15-CA-6912

January 28, 1980

DECISION AND ORDER

BY CHAIRMAN FANNING AND MEMBERS
PENELLO AND TRUESDALE

On August 13, 1979, Administrative Law Judge J. Pargen Robertson issued the attached Decision in this proceeding. Thereafter, Respondent Dow Chemical Company, Louisiana Division, filed exceptions and a supporting brief; the General Counsel filed limited exceptions and a supporting brief; Respondent Anco Insulations, Inc., filed limited cross-exceptions and a brief in support thereof and in answer to the General Counsel; Respondent McCarty Corporation filed limited cross-exceptions and a brief in support thereof and in answer to the General Counsel; the Respondent Dow Chemical Company, Louisiana Division, filed a brief in answer to the General Counsel.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,¹ and conclusions of the Administrative Law Judge only to the extent consistent herewith.

The facts are more fully set forth by the Administrative Law Judge in the attached Decision. Briefly, Anco Insulations and McCarty Corporation were contractors on Dow Chemical Company's construction project. Charging Party Larry J. Ourso, Sr., worked for Anco as insulation installer until his discharge on April 28, 1978. After a number of unsuccessful oral complaints, Ourso, on March 28, 1978, filed a written complaint that scaffolding on which he was working was unsafe. The next day, a foreman called the union steward into his office and said that he had the complaint from Ourso, and that he had to get Ourso off the job. He said that Dow's project engineer wanted Ourso off the job. Ourso heard about this and complained to Dow's safety

engineer that he was going to be discharged because of his safety complaint. The safety engineer contacted Dow's project engineer, who reported back that Ourso was not going to be terminated.

In late April 1978, Ourso and another employee noticed that insulation was apparently being installed in nearby furnaces by another contractor. Ourso mentioned the matter to the union steward because it possibly involved a jurisdictional dispute. Because he would not be at work the next day, the steward told Ourso to call the union office. Ourso did so and was told to check on the matter. On April 27, Ourso went into the furnace, questioned employees working there, and checked on the type of work being done. He phoned his findings to the union office and the next day told his steward about the matter. About 1 p.m. on April 28, Ourso was fired by Anco's foreman, who said that Ourso had been seen inside the furnace, and Dow's project engineer wanted him off the job.

The following Monday, May 1, Ourso picketed an entrance gate at Dow from about 5:50 to 9:15 a.m. with a sign stating, "Anco Industrial Insulators Unfair." As a result, fellow workers using that gate stayed off the job. Anco secured an injunction that morning prohibiting Ourso from picketing, and Ourso did not picket further. Ourso testified that he picketed to let his fellow workers know what would happen if they were involved in a safety incident. However, Ourso made no attempt to communicate his reason to fellow employees.

On May 9, Ourso was referred by the Union to work for McCarty at the Dow facility. Ourso reported for work on May 10, but was prohibited from entering the gate by Dow security because of his May 1 picketing. Because Dow stopped him at the gate, Ourso was unable to go to work for McCarty.

We agree with the Administrative Law Judge that Anco's foreman told the union steward, an employee of Anco, that he had to get Ourso off the job because of Ourso's safety complaint, and that Anco thereby violated Section 8(a)(1) of the Act by threatening to discharge an employee for engaging in protected concerted activity. Accordingly, we shall adopt the Administrative Law Judge's recommended Order with respect to Anco.² We further agree with the Administrative Law Judge that Ourso was discharged not because he filed a safety complaint, but because he was in another work area on working time without authorization. We also agree that the evidence shows that other employees had been discharged because they left their work areas, and that there was no need

¹ Respondent Dow Chemical Company, Louisiana Division, has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard*

Dry Wall Products, Inc., 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

² We shall, however, change the broad cease-and-desist order to a narrow one. See *Hickmott Foods, Inc.*, 242 NLRB 1357 (1979).

for using other than normal procedures for inquiring into work jurisdictional questions. Thus, the fact that Ourso was at the time engaged in union business played no part in his discharge. In fact, Anco was not aware that Ourso was checking on a possible jurisdictional problem when it decided to discharge him for leaving his work area. Accordingly, we agree with the Administrative Law Judge, for the reasons set forth in his Decision, that Anco lawfully discharged Ourso.

We do not, however, agree with the Administrative Law Judge that Dow violated the Act by refusing to permit Ourso to work for McCarty. Dow had ample reason to keep Ourso off the site. Ourso's picketing kept several hundred people off the job and effectively shut down a substantial part of the project for the day. The issue is, thus, whether Ourso's picketing was concerted protected activity. Contrary to the Administrative Law Judge, we find for the following reasons that Ourso's picketing was individual, as opposed to concerted, activity, and that Dow lawfully prohibited Ourso's further employment on the site.

Ourso began picketing on his own without prior support by fellow workers, without approval of the Union, without seeking to use the contractual grievance procedure, and without regard to the no-strike provision of the bargaining agreement.¹ Although in certain circumstances ostensibly individual activity may in fact be concerted activity if it directly involves the furtherance of rights which inure to the benefit of fellow employees, those circumstances are not present here. Cf. *Alleluia Cushion Co., Inc.*, 221 NLRB 999 (1975). Ourso picketed to protest his discharge, not to protest safety matters or other working conditions. At most, the picketing was indirectly related to safety matters because Ourso believed that his safety complaint played a part in his discharge. Even so, Ourso made no attempt, either on his picket sign or orally, to communicate this belief to others. Instead, he appeared on the next day following his discharge with a picket sign stating that Anco was unfair. Thus, Ourso sought something for himself only, and his picketing did not directly relate to matters of mutual concern to other employees. Any indirect relationship to the working conditions of other employees is too remote to convert Ourso's personal protest into a concerted protest. See *Tabernacle Community Hospital & Health Center*, 233 NLRB 1425 (1977). Accordingly, we find that Ourso's picketing was not concerted activity, was therefore not protected by the Act, and was legal

¹ The Administrative Law Judge's analysis of the effect of the no-strike provision was made in the context of the relationship between Dow and Anco and in consideration of whether that provision removed the picketing from the Act's protection. Although the contractor-subcontractor relationship adds complexity to the case, it does so primarily by obscuring the fundamental issue of whether Ourso's activity was individual rather than concerted. In this connection, we find that Ourso's picketing in contravention of the established

ground to bar his further employment at the construction site.

In sum, we find that Ourso was lawfully discharged, and that he picketed in personal protest of his discharge. To find, in these circumstances, that Ourso was engaged in concerted activity would subject an employer and its general contractor to undue harassment, with no recourse, by any ex-employee who thought he had a colorable claim of unfair treatment, and who decided to disrupt the business of the employer and general contractor, no matter what the grounds for that employee's discharge. Such a result is unreasonable and is clearly not mandated by the Act. Accordingly, we shall dismiss all allegations of the complaint against all Respondents except that portion of the complaint respecting Anco's threat to discharge employees for filing safety complaints.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Anco Insulations, Inc., Baton Rouge, Louisiana, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Threatening its employees with discharge for engaging in concerted activities for the purpose of collective bargaining or other mutual aid or protection.

(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 which is deemed necessary to effectuate the policies of the Act:

(a) Post at its place of business at the Dow facility in Plaquemine, Louisiana, copies of the attached notice marked "Appendix."⁴ Copies of said notice, on forms provided by the Regional Director for Region 15, after being duly signed by Respondent's authorized representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director for Region 15, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

bargaining relationship and procedures is one of several factors showing that Ourso was acting individually.

⁴ In the event that 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."

IT IS FURTHER ORDERED that the complaint allegations that Dow Chemical Company, Louisiana Division, and McCarty Corporation violated the Act are hereby dismissed.

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

WE WILL NOT threaten to discharge employees for engaging in concerted activities for the purpose of collective bargaining or other mutual aid or protection

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 National Labor Relations Act, as amended.

ANCO INSULATIONS, INC.

DECISION

STATEMENT OF THE CASE

J. PARGEN ROBERTSON, Administrative Law Judge: This case was heard on March 26-28, 1979, in Baton Rouge, Louisiana. The consolidated complaint issued on November 30, 1978, pursuant to charges filed in the captioned matters on May 25, 1978, by Larry J. Ourso, Sr., an individual. The complaint alleges that Respondent Dow Chemical caused Respondent Anco to terminate Larry J. Ourso, Sr., on April 28, 1979, and that Dow caused Respondent McCarty to refuse to employ Ourso on May 9, 1978, in violation of Section 8(a)(1) and (3) of the National Labor Relations Act (Act). It is also alleged that Anco threatened to discharge Ourso in violation of Section 8(a)(1).

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. Briefs, which have been carefully considered, were filed on behalf of General Counsel, Dow, Anco, and McCarty. Upon the entire record¹ and from my observation of the witnesses and their demeanor, I make the following:

¹ Including McCarty's motion to amend its answer, which was granted at the hearing, and General Counsel's motion to correct record, made at the filing of his brief, which is hereby granted.

² According to testimony at the hearing, permit holders, like Ourso, are referred to jobs after the Union has exhausted its list of members available for work.

³ Anco was admittedly a member of Master Insulators Association of New Orleans and Baton Rouge, Inc., and McCarty was admittedly a member of Southeastern Louisiana Insulation Contractors Association, multiemployer associations which are signatory to a collective-bargaining agreement with the Union.

⁴ The collective-bargaining agreement effecting Anco, McCarty, and the Union provides, at art. V (in part):

FINDINGS OF FACT

I. COMMERCE

Anco admitted and I find that it is an employer engaged in commerce within the meaning of the Act.

Dow admitted and I find that it is an employer engaged in commerce within the meaning of the Act.

McCarty admitted and I find that it is an employer engaged in commerce within the meaning of the Act.

II. LABOR ORGANIZATION

Respondents admitted and I find that International Association of Heat and Frost Insulators and Asbestos Workers' Local No. 53 (Union) is a labor organization as defined in the Act.

III. THE EVIDENCE

During all times material herein Anco and McCarty were engaged in construction work at Dow's Plaquemine, Louisiana, facility. Ourso was, until April 28, 1978, employed as an insulator by Anco. Ourso was not a member of the Union. He was referred to Anco, and later to McCarty, by the Union as a "permit" employee.²

Both Anco and McCarty were, at times material, parties³ to a collective-bargaining agreement with the Union. That agreement contained a "non-strike" clause and a clause providing for the processing of grievances through arbitration.⁴ Dow was not signatory to a collective-bargaining agreement with the Union.

During March 1978, Ourso's work duties for Anco involved the installation of insulation material in the E-9 exchanger area of block 68 at Dow. Ourso and his work partner, Floyd Hidalgo, worked from scaffolds which had been installed by another contractor. Ourso and Hidalgo found the scaffolds unsafe and complained to the Union Steward, Marvin Truett. Subsequently, when no repairs were made to the scaffold, Ourso complained to his foreman, Jerry Guillot, that the scaffold floor boards were not fastened and that some of the handrails were missing. However, when the scaffolding was not repaired, Ourso lodged an additional complaint, around March 22, with B. B. Oubre, a civil engineer. Ourso made this complaint to Oubre at the conclusion of a safety meeting conducted by Oubre on the jobsite. Oubre personally inspected the scaffold in the presence of Dow Project Supervisor Lester Porrier and Anco Foreman Guillot. Following Oubre's inspection some repairs were made to the scaffold. Nevertheless, the scaffold was not completely repaired and, when several days

Trade disputes or grievances shall be settled without cessation of work, and in cases where the parties to this Agreement fail to agree the matter in dispute shall be referred to the Joint Trade Board.

There shall be no lockouts by the employers, nor any strikes or work stoppages by the Union. In the event the Trade Board shall be unable to resolve a dispute by majority vote, the dispute shall be submitted to arbitration in the following manner:

* * * * *

All decisions of the arbitrator shall be final and binding on both parties.

passed with no further work on the scaffold, Ourso complained that the scaffold remained unsafe. On March 28, Ourso filed a written "Report of Unsafe Practice, Procedure, Condition." Complete repairs were then made to the scaffold.

On March 29, Jerry Guillot called Union Steward Marvin Truett into his office. Guillot told Truett that he had gotten a written complaint about the scaffold that Ourso had made and that he had to get Ourso off the job. Guillot said that Lester Porrier wanted Ourso off the job, that he did not want any troublemakers on the job.⁵ The Union advised against discharging Ourso.

Upon hearing that he might be discharged Ourso contacted Dow's safety engineer, Robert Vaughn, and complained that he was going to be terminated because of his safety complaint. Vaughn checked with Lester Porrier to see if Ourso's safety complaint was a valid one and if it had been corrected. Vaughn testified that he instructed Porrier to check and insure that Ourso was not let go because of his safety complaint. Porrier reported back to Vaughn that Ourso was not going to be terminated.

In late April Ourso and Hidalgo started using a stairway located near furnaces, identified as KTI furnaces, when ascending and descending to their work area on scaffolding on vertical vessels. A few days before Ourso's discharge he and Hidalgo noticed that insulation was apparently being installed by another contractor inside the KTI furnaces. Ourso mentioned this matter to steward Truett since it involved a possible jurisdictional dispute.⁶ Truett said that he was going to miss work the following day and he asked Ourso to call the Union about the furnace. Ourso contacted the union office and was told by Edward Jacob to check out the furnace work.⁷

On April 27, Ourso went into the KTI furnace and questioned some of the employees working in the furnace. Ourso asked if they had insulators working with them. He checked the type of material they were using and the type of scaffolding that had been erected in the furnace.⁸ After a few minutes in the furnace Ourso returned to his regular work station and resumed work. Later, during his lunch break, Ourso phoned his findings to Edward Jacob. The following day Ourso told Union Steward Truett what he had found in the furnace.

At approximately 1 p.m. on April 28, Ourso was called down by Guillot and terminated. Ourso testified that Guillot told him that he had been seen inside the furnace and that Lester Porrier wanted him off the job.

On the Monday following his discharge Ourso picketed gate 6 at Dow from approximately 5:50 to 9:15 a.m. Gate 6 was the entrance to the construction site where Ourso had worked until April 28. Ourso's picket sign stated "Anco Industrial Insulators Unfair." Ourso testified that he picketed to let his fellow workers know what would happen to

them if they were involved in a "safety incident." Anco secured an injunction prohibiting Ourso from picketing, and he did not picket after 9:15 Monday, May 1.

On May 9, Ourso was referred back to the Dow facility to work for McCarty. Pursuant to that referral from the Union, Ourso reported to Dow's gate 3 at 7:30 a.m. on May 10. Ourso was prevented from entering the gate by Dow security. The evidence is uncontested that Dow prevented his entrance because of his May 1 picketing. Ourso was not employed by McCarty pursuant to the union referral after Dow stopped him at the gate.

IV. ANALYSIS AND CONCLUSIONS

A. The April 28 Discharge

The General Counsel contends that Ourso was discharged by Anco at the insistence of Dow because of Ourso's complaint concerning unsafe scaffolding. Alternately, General Counsel argues that Ourso's activity in questioning a possible work jurisdiction conflict was protected concerted activity and that his discharge for that reason would be a violation. In support of his primary argument, the General Counsel cited several decisions including *Key City Mechanical Contractors, Inc.*, 227 NLRB 1884 (1977); *Interboro Contractors, Inc.*, 157 NLRB 1295 (1966); *Alleluia Cushion Co., Inc.*, 221 NLRB 999 (1975); and *Carbet Corporation*, 191 NLRB 892 (1971), to demonstrate that the Board recognizes that a complaint, such as Ourso's, about unsafe working conditions constitutes protected concerted activity. I agree. Ourso's activity in complaining about the scaffolding was designed to improve the safety of the work area for all the employees and was concerted.

The General Counsel points to statements by Anco Foreman Guillot to Steward Truett and union representative Edward Jacob as supporting his position that Ourso was fired because of his unsafe complaints. As mentioned above I credit the testimony of Truett and Jacob that Guillot told each of them that Lester Porrier wanted Ourso off the job because of Ourso's unsafe scaffolding complaints. Both Truett and Jacob impressed me as candid, straightforward witnesses. Guillot's testimony demonstrated that his recollection was vague regarding the alleged threats. Guillot refused to specifically deny the threats but indicated simply that he did not recall those conversations.

I also agree with the General Counsel's contention that Ourso was acting pursuant to instructions from the Union when he entered the KTI furnace on April 27. I am convinced that Ourso was instructed by the Union to check out the work in the furnace to determine if it was properly the Union's work. Ourso's comments to the employees in the furnace demonstrate that his motive for being there was to check the work. The testimony of Jacob, Ourso, and Truett

⁵ I credit Truett's testimony in this regard. Guillot did not specifically deny Truett's account and the testimony of the Union's International representative, Edward Jacob, demonstrated that Guillot made a similar statement to him.

⁶ The presence of insulation material caused Ourso to believe that another union's members might be engaging in work that should have been performed by members of the Asbestos Workers (the Union).

⁷ Respondents contend that the evidence does not support Ourso's contention that he was acting pursuant to Jacob's directive when he checked

into the nature of the insulation work in the KTI furnaces. However, I am convinced that Ourso was acting pursuant to Jacob's instructions. There was no affirmative evidence offered to dispute Ourso's contention. Both Ourso and Jacob testified that Ourso was told to check out the work, and Ourso's comments to the employees in the furnace on April 27 demonstrates that he was there to check into whether they were doing Asbestos Workers work.

⁸ Apparently one indicium used to determine if the work is customarily Asbestos Workers is the question of whether the scaffolding is erected on a level by level basis.

demonstrates that Ourso was concerned about the work on April 26 and that he was told to follow up on the matter since Truett would be absent on the 27th. However, the evidence reveals that Anco had no knowledge of Ourso's assignment from the Union until at least after its initial decision to discharge Ourso for entering the furnace.⁹

The incidents of April 27 present difficult problems for the General Counsel. Ourso did not deny that he entered the KTI furnace on April 27 without notifying anyone beforehand. These furnaces, which were being bricked inside to a high level, were dangerous areas. Ourso entered the furnace during his worktime and he caused a disruption in the work of the contractor in the furnace. Although there is a dispute as to how close to the furnace Ourso's work area extended, it is undisputed that the inside of the furnace was outside Ourso's work area.

In order to prevail in its discharge allegations the General Counsel must show that Ourso's concerted or union activities were a cause of the discharge. An employee is not immune from discipline because of his protected activities.¹⁰ It is axiomatic that some activities by any employee, even one engaged in union business, may properly subject the employee to disciplinary measures. With this in mind I have examined the record to determine if Ourso was treated in a disparate manner in relation to other employees and, if he was not, whether he would, as the result of his mission on behalf of the Union, be entitled to special consideration.¹¹

The record indicates that other employees working for various contractors on the Dow job have been discharged because they left their work area. One of the General Counsel's witnesses, Robert Boudreaux, admitted that he had been discharged when he walked through another contractor's¹² work area and stopped to talk with that contractor's foreman. Even Ourso admitted that he had heard of several instances of people being discharged for being out of their work area. Robert Boudreaux also testified that other employees had walked through areas of other contractors along with him and those employees had not been discharged. However, there was no showing that any of those employees stopped to talk with employees of other contractors or that they otherwise disrupted work or placed themselves or others in danger. Therefore, I conclude that by discharging Ourso for being out of his work area on April 27, Anco was not treating him disparately.

In determining whether Ourso was entitled to special considerations due to his directive to check out the work, I have examined the record for evidence of the customary procedure for handling possible jurisdictional problems. I have also considered whether the evidence demonstrated the existence of a need, in this particular instance, to avoid the

standard procedure. Tommy Hussey, project superintendent for La-Mo Refractory Company at the Dow site, testified without rebuttal that the common practice in the area which includes the Dow site was for stewards to work through their superintendent and the superintendent and steward of the other contractors with whom they have a possible jurisdictional dispute, away from the job. By that means the matter may be resolved without disrupting work, since that procedure would not involve unnecessarily alerting employees to the jurisdictional question. The record does not reveal why Ourso failed to follow this procedure. Therefore, I have concluded that the circumstances did not justify Anco treating Ourso differently from any employee. The evidence failed to show a need existed for avoiding the normal procedure. On that basis I find that Anco's April 28 discharge of Ourso was not illegal.¹³

B. Barring Ourso From Dow's Premises

The evidence is uncontested that Ourso was barred from entering Dow's premises on May 10, because of his May 1 picketing. The evidence showed that Dow alone was involved in preventing Ourso from entering the premises where he was scheduled to start work for McCarty. The complaint alleges that both Dow's action in barring Ourso from entering the premises and McCarty's action in not employing Ourso violated Section 8(a)(3). In addressing that issue I shall consider first whether Ourso's picketing on May 1 was concerted activity and secondly whether, if concerted, it was protected under the Act.

1. Ourso's picketing; concerted activity or not

Ourso picketed Dow's gate 6 alone for approximately 3-½ hours on May 1. It is undisputed that his picketing was effective. The evidence revealed that the construction work at Dow was seriously affected on that day because employees refused to cross Ourso's picket line. Ourso's picket sign stated "Anco Industrial Insulators Unfair." Ourso testified that he picketed because he "just wanted to let my coworkers know what—what would—what would happen to them if they got involved in a—safety incident."

At the time of his picketing Ourso was aware of Guillot's March 29 threat to the Union Steward and to Union Representative Jacob that Dow wanted Ourso off the job because of his complaint about the unsafe scaffolding.¹⁴ Ourso was also aware that Lester Porrier of Dow was directly involved in his April 28 discharge.¹⁵ Following his picketing on May 1, Ourso had a conversation regarding the picketing with Anco Vice President Harold Johnson. Ourso

⁹ Compare with *Key City Mechanical Contractors, supra*.

¹⁰ E.g., *M. R. & R. Trucking Company*, 218 NLRB 1109 (1975).

¹¹ This case must be distinguished from *Key City Mechanical Contractors, supra*. In *Key City* the employer was aware of employees inquiring into the jurisdictional question. Here the evidence fails to show that Anco or Dow was aware of Ourso's purpose in entering the furnace prior to the initial decision to terminate Ourso.

¹² Ironically the other contractor involved in Boudreaux's discharge was Anco.

¹³ *Bechtel Power Corporation*, 239 NLRB 1139 (1979). In view of my finding regarding Ourso's discharge I find it unnecessary, and I do not reach, Anco's contention that it would have legally discharged Ourso in any event later during the afternoon of April 28.

¹⁴ As indicated above, I credit Union Steward Truett's and Jacob's testimony regarding Guillot's threat. I also credit Ourso's testimony that Truett told him about Guillot's threat.

¹⁵ According to the uncontested testimony of Anco supervisors Bourgeois and Guillot, after Guillot talked with Jacob (of the Union) on April 28 they decided against discharging Ourso immediately. Allegedly, Bourgeois had decided to discharge Ourso on other grounds a week before April 28 and it was planned, according to Bourgeois, to let Ourso go at the end of the April 28 shift. Therefore, when Jacob resisted their decision to fire Ourso immediately for entering the furnace, Bourgeois and Guillot decided to wait until the end of the day and let Ourso go pursuant to their earlier plan. However, when Lester Porrier learned of the delay in Ourso's discharge, he

told Johnson that he thought "he had been fired at Dow because Dow did not want him in the plant because of safety complaints." Johnson asked Ourso what it would take to stop his picketing. Ourso replied that he wanted to be reinstated.

Therefore, I find the evidence fully supports, and I credit, Ourso's assertion that he was picketing to let his fellow workers know that in his opinion he had been fired because he filed an unsafe condition report.¹⁵ In view of the credited evidence which connected Dow (through Lester Porrier) with Guillot's threat to discharge Ourso and with Ourso's ultimate discharge, I find that the basis for his picketing was not frivolous.¹⁷

I have no doubt, and find as a fact, that Ourso by filing the unsafe condition report was engaged in protected concerted activity. The very nature of the complaint evidences a desire to make the scaffolding safe for all the employees.¹⁸ Moreover, the evidence demonstrates that Ourso was acting in concert with his work partner Floyd Hidalgo in lodging the unsafe complaint.

In *Pink Moody, supra*, the Board found that a driver's refusal to drive a truck he felt was unsafe constituted concerted activity. *Pink Moody* fell squarely in the line of cases including *Alleluia Cushion Co., supra*; *Air Surrey Corporation*, 229 NLRB 1064 (1977); and *Dawson Cabinet Company, Inc.*, 228 NLRB 290 (1977), holding employee protests, including refusals to work, were concerted if the employee's action fell within "the premise that an individual's actions may be considered to be concerted in nature if they relate to conditions of employment that are matters of mutual concern to all the affected employees." (*Air Surrey Corporation, supra*, at 1064).¹⁹ If protests regarding unsafe conditions are concerted, then obviously protest of a discharge which the protesting employee reasonably believed²⁰ stemmed from his unsafe condition complaints,²¹ would also be concerted. Therefore, I find Ourso's picketing constituted concerted activity.

2. Ourso's picketing; protected or not

In view of my finding above that Ourso's picketing was concerted, I shall find it protected unless there is some basis on which Ourso lost his protected status. Respondents contend there are several reasons why the picketing was not protected:

complained to Bourgeois' supervisor, who directed the immediate discharge of Ourso. I credit Ourso's testimony that Guillot told him during his discharge interview, "Lester Porrier said for us to get you off the job."

"In crediting Ourso's testimony in this regard, I do so pursuant to my inquiry into his motive for picketing. I agree with the argument advanced by McCarty that the language on the picket sign did not indicate Ourso was protesting that he had been discharged because of his safety complaints. However, I do not consider his success, or lack of success, in articulating the basis of his protest to other employees to be a necessary element in determining whether the picketing was protected concerted activity. Of course, Ourso's motive for picketing is a material inquiry and I make my finding despite the picket sign's language.

"Despite my finding that Ourso's belief was not frivolous, I do not understand such a finding to be necessary under Board precedent to a determination that Ourso's picketing was protected concerted activity. Cf. *Blount Brothers Corp.*, 230 NLRB 586, 595 (1977).

"*Pink Moody, Inc.*, 237 NLRB 39 (1978); *B & P Motor Express, Inc.*, 230 NLRB 653 (1977); *Roadway Express, Inc.*, 217 NLRB 278 (1975); *Alleluia Cushion Co., Inc.*, 221 NLRB 999 (1975).

3. The "no-strike" provision

As indicated above, both Anco and McCarty were at all material times party to a collective-bargaining agreement which included both a no-strike provision and an arbitration provision.²² Nevertheless, I find that the unique circumstances of this case produced a situation where there existed no effective no-strike agreement.

In order for a no-strike provision to be legally binding, the contract must contain a binding arbitration clause which provides the employees a forum for resolution of grievances short of striking. The Supreme Court in *Textile Workers Union of America v. Lincoln Mills of Alabama*,²³ stated, "Plainly the agreement to arbitrate grievance disputes is the *quid pro quo* for an agreement not to strike."

The arbitration provisions of Anco's and McCarty's contracts were not binding on Dow. Even if Ourso had been successful in a grievance against Anco, it would have had no binding effect on Dow. In view of Dow's material involvement in Ourso's discharge and the power of Dow's sanctions as evidenced by Dow's preventing McCarty from hiring Ourso by barring him from the premises, it is clear that only through an arbitration provision which would bind Dow as well as Anco could Ourso have effectively remedied a grievance over his termination. In view of the absence of such a binding provision, I find there existed no "*quid pro quo*" and, therefore, the existing no-strike provision has no binding effect on Ourso in the instant situation.

4. The picketing; a "wildcat" strike, "stranger" picketing, and reasonable

Respondents contend that since Ourso's picketing was not authorized by the Union, it was an effort to circumvent the Union's efforts to bargain as his exclusive representative, and was unprotected.²⁴ I reject this contention on substantially the same basis as I rejected the "no-strike" agreement argument. In order for Ourso's picketing to circumvent his elected representative's efforts to engage in bargaining, there must of necessity be a bargaining relationship between the employer and that representative. In the instant case there was no such relationship involving Dow. As I indicated above, Dow was intimately connected with both Ourso's discharge and Anco's Section 8(a)(1) threat to discharge him over his safety complaints.

¹⁵ See also *M Restaurants, Incorporated, d/b/a The Moudarin*, 228 NLRB 930 (1977).

¹⁶ See *Roadway Express, Inc., supra*, at 279, where the Board found a violation where a truckdriver was discharged for his "refusal to drive what he believed to be an unsafe tractor." (Emphasis supplied.)

¹⁷ I specifically reject the General Counsel's contention that Ourso was engaged in unfair labor practice picketing. I find that his picketing was precipitated by his discharge, which was not an unfair labor practice. However, on the basis of factors including Guillot's March 29 threat to discharge Ourso because of Lester Porrier's unhappiness over Ourso's unsafe condition complaint, which I find hereafter to be a violation of Sec. 8(a)(1), and Guillot's April 28 assertion that Lester Porrier was insisting on Ourso's discharge, I find that Ourso had a reasonable basis for concluding that his discharge was connected to Dow's concern over his unsafe condition complaint.

¹⁸ See fn. 2 and 3, *supra*.

¹⁹ 353 U.S. 448, 455 (1957).

²⁰ *Emporium Capwell Co. v. Western Addition Community Organization*, 420 U.S. 50 (1975); *T-K City Disposal, Inc.*, 190 NLRB 462 (1971).

In support of the contention that Ourso engaged in "stranger" picketing, counsel cited *Raleigh Water Heater Mfg. Co., Inc.*, 136 NLRB 76, 80 (1962). The situation in *Raleigh* is to be distinguished from the question before me. In *Raleigh* the Board was considering whether employees who engaged in picketing following their legal discharge were entitled to reinstatement rights as economic strikers. The Board held they were not because of their discharge. In the instant query I am not concerned with Ourso's rights to reinstatement at Anco. I am concerned with his rights to future employment without interference in violation of the Act. Therefore, I find *Raleigh* to be inapplicable.

I also find Ourso's picketing was not unreasonable. It did not result in a "quickie" or "intermittent" strike, slowdown, partial strike, or sit-down strike, so as to lose its protection under the Act. The case cited by counsel, *Dobbs Houses, Inc. v. N.L.R.B.*, 325 F.2d 531 (5th Cir. 1963), which involved a walkout of restaurant waitresses during the rush hour is clearly distinguishable from the instant situation. I find Ourso's picketing was not unreasonable or indefensible under applicable authority.²³

In view of the above and the record as a whole, I find Ourso's picketing was protected concerted activity. Dow's action in barring Ourso's admission to their facility for the purpose of employment by McCarty on May 10 was, therefore, violative of Section 8(a)(1) of the Act and I so find.

C. McCarty's Liability

The evidence failed to demonstrate any basis for McCarty's refusal to employ Ourso other than his unavailability. The record demonstrated that all the comments by McCarty's supervision were to the effect that they could not employ Ourso because Dow would not permit him in the plant. The evidence failed to demonstrate that McCarty was in any sense acting in collusion with Dow in preventing Ourso from working. Therefore, I find that the evidence does not show that McCarty's failure to hire Ourso on May 10 was precipitated by motives which would constitute a violation of the Act.

D. The Alleged 8(a)(1) Violation

As indicated above, I credit the testimony of Union Steward Truett that on March 29 Anco Foreman Guillot told him that he had a copy of the written complaint Ourso had made about unsafe scaffolding. Guillot said that Lester Porrier wanted Ourso off the job, that he did not want any troublemakers on the job. At the time Truett was an employee working under Guillot's supervision. I find Guillot's remarks included a threat to discharge an employee because the employee engaged in protected concerted activity in violation of Section 8(a)(1) of the Act.

²³ See, for example, *M Restaurants, Incorporated*, 228 NLRB 930, 932 (1977).

Upon the foregoing findings of fact and upon the entire record, I hereby make the following:

CONCLUSIONS OF LAW

1. Each of the respective Respondents, Anco Insulations, Inc., Dow Chemical Company, Louisiana Division, and The McCarty Corporation, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. International Association of Heat and Frost Insulators and Asbestos Workers' Local 53 is a labor organization within the meaning of Section 2(5) of the Act.
3. By threatening to discharge its employee because he engaged in protected concerted activity, Anco has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.
4. By barring employee Larry J. Ourso, Sr., from its Plaquemine, Louisiana, facility and thereby preventing him from being employed by McCarty because he engaged in protected concerted activities, Dow has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.
5. Respondents Anco and Dow did not engage in unfair labor practices by discharging Ourso on April 28, 1978.
6. Respondent McCarty did not engage in unfair labor practices by refusing to employ Ourso on May 10, 1978.
7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondents Anco and Dow have engaged in unfair labor practices, I shall recommend that they be ordered to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent Dow unlawfully prevented the employment of Larry J. Ourso, Sr., I recommend that Dow be ordered to immediately remove all impediments to his employment at or outside its Plaquemine, Louisiana, facility and to immediately notify all employers at its Plaquemine facility of that action, and make Ourso whole for any loss of earnings and employee benefits he may have suffered from May 10, 1978, to the date he is offered employment which is substantially equivalent to the employment to which he was referred at The McCarty Corporation on May 10, 1978, by an employer at the Dow Plaquemine, Louisiana, facility. The amount of backpay shall be computed in the manner set forth in *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest thereon to be computed in the manner prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977).²⁴

[Recommended Order omitted from publication.]

²⁴ See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).